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Editorial

Dear Readers,

BiLD Law Journal is deeply grateful for the constructive and supportive feedback from its readers since the publication of its first issue of the first volume, mostly that the Journal provided an excellent doorway to the laws of Bangladesh with its rich contents.

I am pleased to present ten articles in this issue that in their own ways contribute to a better understanding of a range of issues traversing environmental law, land law, competition law, personal laws, intellectual property rights, rule of law, medical negligence and others. I hope that the articles published in the second issue of the third volume will reflect the journal's new focus.

I am also pleased to present the journal, an established venture of Bangladesh Institute of Legal Development (BiLD), to the legal-research enthusiasts. This journal is created to further the study of multi-disciplinary issues of laws and legal jurisprudence with the eventual craves for fostering the legal development of Bangladesh.

The articles are designed to have the widest appeal to those interested in the law—whether as scholars, jurists, law practitioners, law students, teachers, judges or administrators - and to provide an opportunity for them to keep abreast of new ideas and the progress of legal reform.

I would like to express heartfelt gratitude from BiLD family to the members of the Editorial Review Board for their kind support and valuable advising. BiLD family is deeply indebted to them for the time and effort that they put into the journal. Words are inadequate to express our gratitude to them because it would not be possible to publish the issue of the journal without their constant support and immense sustenance.

I would also like to welcome and congratulate the authors of research papers in this second issue of the third volume of BiLD Law Journal.

I wish to put on record my sincere appreciation and thankfulness to every single people involved and contributed by all means especially Sorowar Nizami to make this journal published in a right manner.

By addressing the dynamism and breadth of communications, I hope not only to make the Journal more useful and interesting to current readers, but also to attract a wide variety of new readers and authors.

Finally, I certainly hope you all will enjoy this second issue of the third volume and consider submitting your own work for future publication in our journal, whether it is an original research, law analysis or any other piece of scholarly articles about any aspect of domestic or international law.

Md. Abul Kalam Azad
Editor-in-chief

C O N T E N T S

Medical Negligence and Deceptive Medical Practices in Bangladesh Health Segment: an Appraisal

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Md. Hasnath Kabir Fahim[2]

Abstract

Recently, medical negligence and deceptive medical practices in Bangladesh health sector has become a common episode that received a supreme level of attention from all sectors since the issue poses as the biggest threat endangering right to life of an individual or patient in the society. Though almost every day we come across the news of such medical malpractice and negligence in the public and private hospital and clinic of the country through media, but the factual scenario is more intense than what is manifestly seen. To this context, this paper, however, tries to trace out the diverse nature of medical negligence and deceptive treatment repeatedly committed by the physician, health professionals such as nurse, ward boy and other health assistants against the patients and their attendants in hospitals of the country. This paper further seeks to analyse the existing legal frameworks in connection with the laws and regulations involving medical negligence in Bangladesh. Finally this study also suggests to develop the medical professional conducts and to formulate effective and unique legislation to regulate medical negligence deceptive medical practices in Bangladesh. It is believed that this study will contribute to facilitate advancement of the legal regime of the Medical Negligence and to upgrade the proper enforcement of laws to ensure the right to life by putting an end to medical negligence in very near future.

Keywords: Medical negligence, Medical law, Enforcement, Public and private hospitals, Right to life.

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1. Introduction

The right to life is said to be one of the basic human rights as well as it is mentioned as a fundamental right of every citizen as per the constitution of Bangladesh. But such right is now under the black cloud of medical negligence. Medical professionals with such a noble service hold the place of ultimate saviour of life. It is not only a common expectation of the patients but also the medical jurisprudence that physicians are imperatively under an obligation to perform their duties and responsibilities towards the patients with 'standard of care'. A slight delusion in professional service can endanger the valuable life of a patient.[3] While defining 'standard of care' McNair J. very rightly said "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not to possess the highest expert skill at the risk of being found negligent. It is a well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act". According to the World Medical Association (WMA) Declaration of Geneva 1948, a medical professional shall solemnly plight stating that health of the patient will be a physician's first deliberation.[4] It is very prudent that all medical professionals must have a marginal level of knowledge, experience and skill in medical science as this profession deals with a basic right of human life. But unfortunately it has become a common phenomenon of medical professionals to make money by treating the patients as consumers. Though, interestingly, patients are considered one of the vital classes of consumers but now they belong to the worst and neglected groups. Best physicians are only available at their private clinics though there is a huge crowd of ill-fated patients in public hospitals. Many of the physicians demand high rate of fees and frequently prescribe a long list of pathological tests from which they usually get commissions. Very often proper care is seen from other medical assistants. Such malpractice in medical sector causes uncountable intimidation towards health rights every year.

It is a lamentable matter that in Bangladesh there is no precise, unique and ample legal framework to deal with medical negligence, deceptive Medical practices and the misconduct of health professionals. As a result, by using this haziness the wrongdoers are very often beyond the grip of law. Every health service provider must be accountable for his misconduct to the patient or to his family but actual system of accountability of medical professional is absent and such lack of accountability explicitly gives them a black license to commit deceptive medical practices and negligence. Accordingly such inhuman practice is taking the form of disaster day by day. Due to lack of

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3 Reddy, Dr. K.S. Narayan, (2012), *The Essentials of Forensic Medicine and Toxicology*, A.P.509002, 13th ed., pp.37-41.

4 World Medical Association (WMA) Declaration of Geneva (1948), Adopted by the General Assembly of the *World Medical Association at Geneva in 1948*, Available at: http://en.wikipedia.org/wiki/Declaration_of_Geneva#cite_note-1

effective legal framework, the health service providers have almost forgot their professional etiquette. Many of the worst cases of medical negligence are mostly seen in public hospitals.[5] Physicians, nurse or other health assistants show grievous negligence to patients in government hospitals of Bangladesh. Because of such negligence and misbehave of medical professionals the patients lose their mental strength and confidence to recover from disease. Some patients even under such circumstances do not feel free to explain about their health complications.

In Bangladesh, there are few scattered laws which generally deal the cases of medical negligence although not in appreciable manner. As a result, the medical wrongdoers are availing full privilege and indemnity of their profession by considering themselves free from the jurisdiction of law. Surprisingly such kind domestic legal lacuna increases the suffering of the victim patients while taking legal action against any medical professional for his/her professional negligence. In last decade though a good number of allegations regarding medical negligence are brought into legal action but very insignificant numbers of allegations are legally disposed. Neither specialized legislation nor separate court is established to handle the cases of medical negligence in our country.

To this end, the imperative intention behind this text is, however, to explore the diverse nature of medical negligence and deceptive medical treatment frequently perpetrated by the physician, health professionals and other health assistants against the patients and their attendants in public and private hospitals of the country. This paper also aims to analyses the existing legal regime in connection with the laws and regulations involving medical negligence in Bangladesh. Another objective of this study is to realize appropriate way out to upgrade the domestic legal regime on medical negligence for the promotion of public health.

Taking the present perspective into consideration along with the existing facts of medical negligence and deceptive medical practices over the country this paper, primarily, tries to focus on the concept and modes of medical negligence and the current scenario of medical negligence in Bangladesh with special reference to some incidents happened in health sector. Then the article examines the existing domestic legal regime and attempts to points out the drawbacks of the present legal system involving medical negligence in Bangladesh. Finally this study suggests to develop policy and to formulate effective and unique legislation to regulate medical negligence and deceptive medical practices in Bangladesh.

In this article analytical method has been used following qualitative and descriptive study which is based on secondary sources of information like text

[5] Islam, Md. Rabiul. (2015). Negligence in Government Hospitals of Bangladesh: A Dangerous trend, *International Research Journal of Social Sciences*, Vol.4 (5), pp.12-18.

books, national and international journals, research reports and news reports. Relevant literature also collected from different websites. An examination of substantial background was considered for finding out the true application of laws of Bangladesh for the victims of medical negligence.

2. Meaning of Medical Negligence

According to the law of torts "negligence" means more than mere inadvertency. It refers to lack of proper care, careless conduct or remissness. The term "Negligence" indicates to the inadvertence or deviation to provide care which a sensible man would not do in that circumstance.[6] Medical Negligence is the shortcoming of any kind of medical professionals such as physician, nurse or other health service providers to achieve their standard of care and conduct. According to Austin- "In cases of negligence, the party performs not an act to which he is obliged; he breaks a positive duty". It becomes a medical negligence if the mode of service and conduct fails to satisfy the due standard of a medical service provider. L.B. Curzon in dictionary of Law defined the term 'negligence' as an infringement of legal duty to take care, resulting in harm to the climate which was not desired by the defendant.[7] Negligence is generally a kind of careless conduct which bears huge risk of causing harm to another.[8] Medical negligence is the professional malpractice by act or omission of a health care provider in which the mode of care and treatment does not meet the reasonable standard of practice in medical community and injures the patients.[9] Professionals providing psychological care can be equally liable for medical negligence in respective field. From very ancient time punishment for medical malpractice and wrong treatment was a common phenomenon in Indian sub-continent.[10]

The judiciary of our neighbouring country India has established significant and progressive constitutional components of medical negligence by means of judicial precedents. As per the judgments of apex court, deficiency in diagnostic or treatment procedures,[11] shortage of preparation for an operation,[12] or incompetency to sterilize properly[13] are treated as instances of medical negligence.

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6 Ratanlal & Dhirajlal, (2002), *Law of Torts*, 24th edition, edited by Justice G.P. Singh; pp. 441-442.

7 Islam, Md. Zahidul. (2013), Medical Negligence in Malaysia and Bangladesh: A Comparative Study, *IOSR Journal of Humanities and Social Science* (IOSR_JHSS), 14(03), pp.82-87.

8 Kumar, Dr. Lavlesh. (2011), Medical negligence-Meaning and Scope in India, *Journal Nepal Medical Association*, pp. 49-52.

9 Karim, S. M. Towhid. (2013), Medical Negligence laws and Patient Safety in Bangladesh: An analysis, *Journal of Alternative Perspectives in the Social Science*, Volume 5 No 2, pp. 424-442.

10 Modi, Jaising. (2006), *Modi's Medical Jurisprudence and Toxicology*, LexisNexis, New Delhi, 23th ed., p.154.

11 *Dr. Kunal Saha* v. *Dr. Sukumar Mukherjee & Ors*, III (2006) CPJ 142 (NC).

12 *Dr. Ravishankar* v. *Jery K. Thomas and Anr*, II (2006) CPJ 138 (NC).

13 *Pravat Kumar Mukherjee* v. *Ruby General Hospital & Ors*, II (2005) CPJ 35 (NC).

3. Modes of Medical Negligence in Bangladesh

Being a fundamental right, the right to life and good health is a very sensitive issue and in this context proper treatment and due care is must by the health care providers. Both the physicians and other medical care providers must have expertise and skill in respective health service. But it is a matter of panic that tragic errors are often made in both public and private hospitals of Bangladesh. Very few of such incidents are reported in media but many remain untraced. A very silly delusion by a physician, dentist, health assistant, nurse and even by an executive of the concerned hospital may cause irreparable damage to the health of a patient.

3.1 Misbehave by Medical Service Providers

It is often an allegation of the patients that they face misbehave from the physicians and other health professionals. Many physicians refer the patients to their private chamber and ask for high rate of fees. It is also found that some physicians do not make a free conversation by keeping necessary information secret and frequently prescribes unnecessary clinical test as well as surgery from which they gain financial interest. One of the common problems occurs when a physician's handwriting in his prescription becomes very cumbersome to understand for the patient and even for another physician. If a prudent man fails to read out the names of medicines in prescription then this is a gross negligence by the concerned medical professional. It is a foremost duty of a physician to disclose the effects and side effects of the medicines to the health of the patient along with the quantities and proper timing of taking medicines.[14] Unfortunately the physicians get disturbed when detailed queries are made to them about the prescribed medicines. The health care providers often forget that they have a momentous duty towards the patients. A medical practitioner goes under an obligation to serve a patient as long as it requires attention if he consents to serve the patient.[15]

3.2 Oversight in Surgery and Processing of Anesthesia

Though surgery and anaesthesia are the two common treatments in health service but they are required expert knowledge and ability to perform. Some surgeries like heart, skull, spine or eyes must be performed with high care. Little error in such surgeries may cause lifetime damage to the vital organs of a patient or even death. Major parts of the surgeries must be carried out only by the expert physicians but sometimes these are left in the hand of medical assistants having no adequate knowledge in relevant field. It is often found that big mistakes were made in minor surgeries like leaving some sort of

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[14] Akter, K. Khinur. (2013), A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practice, *The Northern University Journal of Law*, Volume IV, p. 69.

[15] *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbark Babu Godbole and Anr*., AIR 1969 SC 128.

surgical instruments inside the patient's body and sometimes incautious stitch after the surgery. It is really pathetic that many of the surgical errors are never realized by patients. Preparation and use of anaesthesia are sometimes done by health assistant instead of anaesthesiologist without considering the past and present condition of the patient's health.[16]

3.3 Fruitless Medical Tests and Misdiagnosis

Unnecessary pathological test and diagnosis have added a new dimension in medical negligence and deceptive medical practices. Such test and diagnosis are not always done in due time and proper manner; consequently patient suffers fatal diseases like diabetes, heart attack, trauma injury or cancer and prevention becomes ponderous. Dereliction to diagnose Cancer, to identify DVT and Pulmonary Embolism, to recognize Meningitis, to diagnose Appendicitis are some common forms of misdiagnosis

3.4 Negligence during Child Birth

Medical negligence is often alleged to occur in case of childbirth and caesarean section. Intensive care and conduct is always a requirement in caesarean section to save the life of both mother and baby. Several complications may arise during a child birth. A caesarean section must be handled by expert medical professional, gynaecologist and staffs. In case of forced extraction of a baby, using of forceps and suction bears big risk. In both cases of caesarean section and forced extraction the doctor usually gets few crucial minutes to determine the next approach. During the delivery of a baby while inducing labour to avoid caesarean section, errors due to negligence can take which is highly hazardous.

3.5 Rashness by Unnecessary and Long Term Treatment

Many times, medical negligence may take place due to long term treatment of a patient. If a physician makes fault to monitor the overall progress of the patient and to mitigate the side effects of the medicines, another chronic disease may nestle inside the patient's body. It is largely seen that in case of many fatal diseases medical professionals suggest to continue the treatment just to make money rather than interest of the patient. They keep those patients under their treatment for a certain period and make some financial gain. Sometimes the health care providers do not prescribe the proper medicine to linger the disease. Redundant use of medication in time of emergency case, poor equipment maintenance, not property following up on a patient's blood pressure and diabetes have become some common medical negligence in everyday scenario of both public as well as private hospitals.

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[16] Karim, S. M. Towhid. (2013), Medical Negligence laws and Patient Safety in Bangladesh: An analysis, *Journal of Alternative Perspectives in the Social Science*, Volume 5, No. 2, pp. 424-442.

4. Incidents and Cases of Medical Negligence in Bangladesh

Misbehave by health care providers, error in diagnosis, wrong medical reports, unnecessary and delayed surgery or prescribing wrong medicines are some shabby instances of medical negligence in Bangladesh. For example, on August 15, 2011 Dr. Mridul kanti Chakrobrty who was a teacher of University of Dhaka died in Labaid Cardiac hospital. By this incident serious allegation of negligence was brought against Labaid Cardiac Hospital and in 2012, some physicians were summoned in the High Court Division of Bangladesh for allegation of negligence. Dr. Mridul unfortunately received treatment after an hour of being admitted in Labaid hospital and this gross negligence by hospital caused his death. Labaid Cardiac Hospital had compensated 50 lakh taka directed by the order of High Court Division. Almost similar incident happened by the death of another professor from University of Rajshahi named as Professor Abu Nasser M Saleh. Mr. Saleh was wrongly diagnosed at emergency department of Rajshahi medical College. He was supposed to refer at cardiology department instead of respiratory unit. On February 17, 2008 one of the famous cinema celebrities Manna died due to heart attack in United Hospital. It was claimed by his wife that though he rushed to hospital with chest pain but there was no specialist doctor in the hospital.[17] These factors of medical negligence drew the attention of national media.

Very recently on July 29 of 2018, Rafida Khan Raifa, a 28 months old girl died in Max Hospital of Chittagong. An antibiotic dose was given to Rafida at Max Hospital which triggered convulsions in her body and later on injection was administered which led to her death. The Director of Directorate General of Health Service (DGHS) directed a three members committee to investigate the case and served a notice on the Max Hospital authority regarding irregularities and medical negligence in the hospital. Rafida's parents alleged that their daughter died due to wrong treatment in the hospital and subsequently a case was filed by her father.[18] In another case a Homoeopathic physician having no idea of effect prescribed 24 drops of stramonium along with a leaf of dhatura to a patient who was suffering from a guinea worm. Subsequently the patient died and the Homoeopathic practitioner was held guilty of causing death by negligence under the Penal Code, 1860.[19] In another case of preparing medicine where a compounder without reading the label of the medicine bottle added poisonous strychnine hydrochloride and caused death of seven patients. The compounder like Homoeopathic physician was also held guilty under section 304A of Penal Code, 1860.[20] Similarly few criminal cases of medical negligence were filed in several regions of Bangladesh. One of the leading human rights NGOs in Bangladesh namely

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17 See wife-blames-manna-s-death-on-hospital at http://bdnews24.com/bangladesh/2008/03/05

18 See allegation-of-medical-negligence-in-Chittagong at http://www.dhakatribune.com/2018/05/07

19 Karim, Md. Ershadul. (2005), 'Examining Liabilities Arising from Doctor's Negligence', 16 *Dhaka University Law Journal*, p.166.

20 De Souza (1920), 42 All 272.

Ain O Salish Kendra (ASK) revealed in a report[21] that 504 cases of medical negligence took place in between June 1995 to September 2008 and many of these cases unfolded the frightening standard of our medical sector. Unfortunately many gross cases of medical negligence are not covered.

In *Parmanand* v. *India*[22] the Supreme Court of India held "No law or state action can intervene to avoid/deny the discharge of the paramount obligation cast upon members of medical profession. The obligation being total, absolute and paramount, law of procedure whether in statutes or otherwise which would interfere with the discharge of the obligation cannot be sustained."

In fact, no specific and authoritative judgment of Bangladesh Supreme Court is found regarding medical negligence and medical malpractice. In *Saleemullah* v. *Bangladesh*[23] and *RAJUK* v. *Mohsinul Islam*[24] the Supreme Court stated that state is under an obligation to secure the health and longevity of the citizens. But these observations by the Supreme Court of Bangladesh do not make any strong implication in the field of medical negligence.

5. National Legal Framework to Restrain Medical Negligence

There is no comprehensive, balanced, precise and/or unique legislation to prevent medical negligence except few scattered provisions of Constitutional law, civil and criminal statutory law. Although medical negligence comes under the umbrella of Tort but liability under the Law of Tort is rarely followed in our courts. The Bangladesh Medical and Dental Council (BMDC) is the body corporate under the Bangladesh Medical and Dental Council Act, 2010 to deal with the standard and quality of medical practice, registration of medical professionals and investigation of complaints against physicians. A plaintiff has to establish four vital elements of negligence for an effectual medical malpractice claim which are (i) the physician owned a duty of care, (ii) the physician failed to provide the reasonable standard of care, (iii) a compensable injury was suffered by the person; and (iv) the patient is entitled to damages.[25]

5.1 Constitutional Measures

There is no any direct provisions covering right of a patient in the Constitution of Bangladesh. Right of a patient is indirectly incorporated in Article 32 which represents 'right to life'. This Article however, symbolizes something really

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21 Islma, Md. Rabiul. (2015). Negligence in Government Hospitals of Bangladesh: A Dangerous trend, *International Research Journal of Social Sciences*, Vol.4 (5), p.12.

22 AIR 1989 SC 2039.

23 (2003) 55 DLR 1.

24 (2001) 53 DLR (AD) 79.

25 Islam, Md. Rabiul, (2005), 'Negligence in Government Hospitals of Bangladesh: A Dangerous Trend', *International Research Journal of Social Science*, Vol. 4(5), p. 13.

more than animal existence.[26] It comprises the right to live consistently with human dignity and decency,[27] right to the bare necessities of life such as proper nutrition, clothing and shelter[28] and the facilities for reading, writing and expressing oneself in various forms, to move freely and mixing with other human beings[29] and everything that has meaning and relevant to man's life[30] including his culture, tradition and lifestyle.[31] In fact, the norm of right to life of a person also conveys health and medical care, security of life, proper sanitation, safe food and drinking water. The Constitution in its Fundamental Principles binds the government to ensure all basic necessities of life such as food, shelter, clothing, medical care, education and to raise the level of alimentation as well as the betterment of public health. Articles 15, 18 read with Articles 31, 32, 44 and 102 are considered as protectors for citizen's health rights if there is any risk regarding health. As the right to health falls within the arena of fundamental rights of the Constitution, any person deprived of such health rights can go to High Court Division of the Supreme Court to ensure his or her right.

5.2 Provisions of the Medical and Dental Council Act, 1980

According to the Medical and Dental Council Act, 1980 any physician taking good amount of fees but not providing reasonable treatment may be removed by the council. The Act further describes that the council may reject to provide registration or remove the name from registrar to any medical professional if he/she is found guilty of gross negligence, malpractice or misconduct towards the patient. Private practice is prohibited during office hours and all private clinics are bound to give high and reasonable standard of treatment as the patients become consumers by paying money for service. In addition, this law empowered the Director General of health to supervise and to inspect any private clinics, private chambers, private hospitals or pathological laboratories.

5.3 Remedy under the Consumer Rights Protection Act, 2009

The Consumer Rights Protection Act, 2009 is another weapon for the patients to defend medical negligence and get remedies.[32] Section-2(22) of this Act says "Service means any service of transport, telecommunication, water supply, sanitation, fuel, gas, electricity, construction, residential hotel and restaurants, and health, which are made available to the consumers in

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26 *Munn* v. *People of Illinois*, (1877) 94 US 113.

27 *Vikram* v. *Bihar*, AIR 1988 SC 1782.

28 *UP Avas Evam Vikash Parishad* v. *Friends Co-op Housing*, AIR 1996 SC 114.

29 *Francis coralie* v. *Union Territory*, AIR 1981 SC 746.

30 *HP* v. *Umed Ram*, AIR 1986 SC 847.

31 *Ramsharan* v. *India*, AIR 1989 SC 549.

32 Joy, Dr. Belal Hossain, (2013). *Health care laws in Bangladesh* at http://www.scribd.com/doc/6789243/Healthcare-in-bangladesh-Final

exchange of price but this will not include free of service". Accordingly patients are the ultimate consumers as they deserve medical service from medical practitioners. Under this Act a medical professional or hospital will be punished with imprisonment for a term not exceeding one year or with fine not exceeding 50,000 taka or both if promised medical care is not provided in exchange of money or fees. Besides, for endangering life or security and for causing damage to money and health of a consumer the offender will be penalized with confinement for a term not more than three years or with fine not surpassing 2,00,000 taka or both. However, this legislation does not directly encompass medical negligence in the transaction of physician and patient.

5.4 Criminal Liability under the Penal Code, 1860

In Bangladesh, victims can invoke the jurisdiction of criminal court under Section-284, 304A, 323, 325, 326, 336, 337 or 338 of the Bangladesh Penal Code, 1860 against physicians for causing medical injuries like death by negligence, wilfully causing hurt and grievous hurt by hazardous weapons, death by act with intention of causing miscarriage, resulting in loss of life or injury by rashness on the part of medical professional.[33] As per the Penal Code, 1860 whoever causes the death of any person by doing any negligent act, not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to five years or with fine or with both.[34]

5.5 Liability under the Civil Laws

The kinship between a physician and a patient may also be discussed under the Contract Act, 1872. Under the Act, if there is any contravention of contract the party who suffers any loss by such contravention is entitled to receive damages. In this context an aggrieved patient may also file civil suit against the medical service provider for compensation. This is how a medical professional has civil liability as well as criminal liability under the laws of Bangladesh namely the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, the National Health Policy and Code of Medical Ethics under Bangladesh Medical and Dental Council for any malpractice in the health sector.

5.6 Other relevant laws regarding healthcare service in Bangladesh

In the texture of Healthcare laws, there are also The Bangladesh Nursing Council Ordinance, 1983, The Bangladesh Homoeopathic Practitioners Ordinance, 1983, The Bangladesh Unani and Ayurvedic Practitioners

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[33] Karim, Md. Ershad, (2005), 'Examining Liabilities Arising from Doctor's Negligence', 16 *Dhaka University Law Journal*, p. 166

[34] *Ibid* at p. 166.

Ordinance, 1983, The Drug Act, 1940, The Pharmacy Ordinance, 1976, The Bangladesh Drug Control Ordinance, 1982 and many more. It is pertinent to note that the government is formulating a new law named as the Medical Services Act which describes medical negligence as a cognizable offence and bears the provision of confinement of maximum three years along with fine up to five lakh taka.

6. Loopholes and drawbacks of existing laws to deal with medical negligence

It is very confusing for both the aggrieved patients and lawyers to choose an appropriate law to file a case against medical wrongdoers. Filing a criminal case under the Penal Code, 1860 against any medical practitioner may not often ensure proper justice. Apart from that under the civil laws of Bangladesh any victim of medical negligence will only get certain amount of money as compensation. Actually no balanced legal framework is there mentioning the specific rights of a victim patient due to medical negligence.

It is seen that due to lack of proper legislation to regulate medical negligence a victim usually has to file several litigations. Generally for filing and running these cases of medical negligence, a victim has to provide several types of fees to court and bear many other expenses. Beside, a court fee of our country is sometimes too high that keeps the victim away from asking remedy from court. Moreover, police are not always very friendly with every type of victims. Aggrieved patients of medical negligence feel discouraged to take legal action due to long and complex legal proceedings and investigation carried by police.

Many complex issues of health and medicine become very difficult to prove in the eye of law.[35] Some physicians are there not even willing to provide any data against another physician. Technical problems arise as most of the lawyers and judges of our country are not very much attached and trained with cases of medical negligence as there is no particular law.

The Bangladesh Medical and Dental Council (BMDC) has the authority to take action only against those physicians who are practicing privately.[36] Even the Law Commission avowed the issue that the BMDC's power is very limited to address the negligence issue.[37] Another unfortunate matter is that public awareness regarding health rights in our country is in awfully zero

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35 Damayanti, S. (2011). *What is medical negligence? What are the standards of care principles*? Available at: http://pharmacyzoneustc.blogspot.com/2011/07/part-vi-implementation-of-existing-laws.html

36 World Health Organization (WHO) (1991), 'Health ethics in six SEAR countries, health Ethics in South-East Asia', at http://www.hf.uib.no/i/filosofisk/seahen/vol11rev3.PDF

37 Billah, S.M. Masum (2003), Law Commission's proposal of making negligence law, *The Daily Star*, April 20, 2013.

level. No remarkable step has yet taken to develop the relationship of patients and medical professionals from the side of the government. The procedures to get remedy for medical negligence under the Consumer Protection Act, 2009 are very complex as the victim patient as a consumer can not directly lodge a complaint to the magistrate.

7. Way forwards

There is no alternative except to formulate a comprehensive, precise and effective law and policy to regulate the issues arising from medical negligence and deceptive medical practices in Bangladesh health sector. Being of the World Health Organization (WHO) Bangladesh has an international obligation to work for the betterment of standard of health and life of the citizens. The Constitution of Bangladesh which is the supreme law of land also imputes an assignment over the government to promulgate necessary laws for raising the life and health security of the people.

7.1 Promulgation of Comprehensive Law

The government should enact the new, comprehensive law and effective laws to resolve the issues of medical negligence without further delay. The law must ascertain and includes the procedure of practice, punishment of malpractice, duties and liabilities of every medical care providers appropriately. The rights and remedies of the aggrieved patients must also be clearly and separately noted in the legislation.[38] The practicing mechanisms and rules of private practice shall also be explained in the law for those who want to practice in private clinics. The Government under the law shall time to time fix the rate of fees of the medical professionals. Under the new Act, the Government after consulting with the Ministry of health shall publish the rates of all kind of medical tests by gazette notification.

7.2 Setting up Special Court system

After enacting special Acts on medical negligence there must also be the establishment of special health tribunal or court system which will dispose the cases of medical negligence. The courts will be equipped with judges specially trained with medical science. To provide speedy and effective remedy there may also be a Medical Negligence Board to provide expert knowledge for assisting the courts. Under the new Act there shall be a separate investigation department having certified knowledge on health issues, for investigation of cases of medical malpractice.

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[38] UN Office of the high Commissioner for Human Rights (OHCHR), (20008), *Fact Sheet no.31 on the Right to Health, Office of United Nations*, at: http:www.ohchr.org/Documents/Publications/Factsheet31.pdf.

7.3 Ensuring Study of Medical Laws before registration

There must be a mandatory provision that before taking registration as a medical professional he/she must study medical laws during all types of medical studies. Along with the topics of medical science there shall be necessary relevant laws to be studied compulsorily. Some sort of ethical programs or seminars must be arranged before providing registration to any health professional.

7.4 Improving the Standard of Public Hospitals

Instead of giving license to many private hospitals and clinics the government shall concentrate on the development of standard of the public and private hospitals. Increasing the numbers of private clinics without improving the service of public hospitals is not appreciable. Each and every hospital or clinic must have a visible chart of fees of all available medical tests.

8. Concluding remarks

From the jurisprudential view, it is obviously true that where there is a right, there is a remedy. Patients are the ultimate victims of medical negligence and such negligence may result in losing their valuable lives. In order to mitigate the sufferings of aggrieved patients, the government must take immediate and necessary initiatives to make a comprehensive and unique law to safeguard the right to life of the patients as to the constitutional mandate. It is pertinent to note that only enacting new law is not the solution but there shall be proper and true enforcement of the laws. If the law becomes difficult to execute, it will be nothing but a wild goose chase**.** Impartial investigation and speedy remedy have to be ensured in cases of medical negligence to encourage the victims to seek remedy. Creation of a specialized and expertise board has been also recommended to assist both the court and litigants in case of complex issues of medical science. Complaint mechanism against a physician must be patient friendly.[39] Formal court proceedings and high fees of court shall be avoided as well as accountability of every medical professional must be ensured. It is also recommended that the role of Bangladesh Medical and Dental Council (BMDC) must be visible and effective. Furthermore, creating public awareness is must to literate about the medical ethics and norms. Being a holiest profession of the world, a medical professional is sharply under an obligation not to treat a patient as a business hub rather they should always be aware of their holy duties and must abide by the existing rules and regulations of the country. The aim of the proposed law should not to be punished the medical practitioners but to create an amicable environment between patients and physicians. Eventually, it is expected that the newly proposed legal

[39] Nazir, Taha (2011), 'Review of the basic components of clinical pharmaceutical care in Pakistan', *School of Pharmacy*, The University of Lahore. p.04

frameworks and recommendations regarding medical negligence can put a full stop to medical negligence in Bangladesh.

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The Role of the Judiciary in Upholding the Rule of Law in Bangladesh

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Abstract

The paper assesses the role of the judiciary in upholding the rule of law in Bangladesh. The study contends that the judiciary is minimally a necessary indicator that plays a vital role for upholding the rule of law in a country. Although this layer is not exhaustive in the measurement of degree of the rule of law but this is minimally a necessary yardstick for judging the rule of law prevalent in Bangladesh. The study argues that without progress of this area the rule of law to the large extent would remain meaningless and dysfunctional.

Keywords: Rule of Law, Citizens' Rights, Judiciary, Judicial Independence, Bangladesh.

Introduction

The rule of law means from the highest in the country to the lowest, all must submit to law and law alone. The rule of law enjoins every citizen to be treated subject to law. It forms the basis for the functioning of all state organs to ensure greater welfare of the people. Among the state organs, the judiciary performs the delicate task of ensuring 'rule of law' interpreting laws, settling disputes, enforcing rights of the citizens and imposing penalty to the offenders. Under this general duty, "…..a pervasive element in the judiciary's role at every level is the protection of each person's constitutional, human, civil and legal rights. The judiciary also has an essential role in protecting us from the wrong-doing of others, protecting the weak from the strong, the powerless from the powerful as well as protecting individuals from unwarranted or unlawful exercise of power by the state. Moreover, the judiciary plays a crucial role in securing domestic tranquillity by providing a

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structured institutionalized forum for the resolution of discord and dispute and the vindication of civil and criminal wrong-doing" (John, 2000). Besides it was mentioned in *Punjab* v. *Khan Chand* (1974)[3] that the rule of law requires that any abuse of power by public functionaries should be subject to the control of courts. In order to achieve this goal judiciary as a co-equal organ with the other two organs of the state should be made functional, meaningful, and further strengthened in real sense by removing all sorts of challenges to provide cheap and immediate justice to the public. The main aims of the article are: to assess how far rule of law is being maintained by the judiciary and to reveal the obstacles for which the judiciary as one of the most important state organs lags behind in upholding the rule of law in Bangladesh. This paper will be descriptive in nature based on primary and secondary data collected from concerned law books, journals, daily newspapers, annual reports and other materials. It will be envisaged the role of the judiciary as minimally procedural indicator that can be considered as one of the main aspects for ensuring the rule of law. The study will give attention to some vital issues related to the judiciary for which it lags behind to ensure rule of law. For this very reason, the rule of law will be measured on the scale of minimal normative standard using a procedural indicator- 'judicial approach to the rule of law' in Bangladesh.

Rule of Law

Aristotle said about two thousands year before regarding rule of law- '*it is more proper that law should govern than any one of the citizens.*' It then passed on to many other languages. Professor Albert Venn Dicey includes three things of rule of law: equality before law, absence of arbitrary power and guarantees of citizen's rights (Diecy, 2015). The modern concept of rule of law which has developed by the International Commission of Jurists in New Delhi known as the Declaration of Delhi, 1959 which was later on confirmed at Lagos Conference in 1961 saying that- *"The rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realize his legitimate aspirations in all countries, whether dependent or independent"* (cited in Islam, 2012). Advancing the concept, the World Justice Project (2014)[4] defined the rule of law as a system in which the following principles are upheld:

- The government, its officials and agents are accountable under the law.
- The laws are clear and just and protect fundamental rights.

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[3] AIR, SC 543.

[4] World Justice Project, Rule of Law Index, 2014 available at http://data.worldjusticeproject.org/#/index/BGD

- ❖ The process by which the laws are enforced and enacted is accessible, fair and efficient.
- ❖ Justice is delivered timely by competent and independent representatives……

Independence of the Judiciary

The UN basic principles on the independence of the judiciary are[5]:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

The apex court of Bangladesh referred to the essential conditions of independence of judiciary listed by the Canadian Supreme Court in *Walter Valenty* v. *Queen* (1985)[6] are: Security of tenure, (2) Security of salary and other remunerations, (3) Institutional independence i.e., it must be free from

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5 https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

6 2 SCR 673.

all kinds of governmental or non-governmental interference to decide on its own matters of administration and (4) The administrative or financial independence i.e., if the funds allocated to the Supreme Court in the annual budget are allowed to be disbursed within the limits of sanctioned budget by the Chief Justice without any interference by the executive [*Secretary, Ministry of Finance* v. *Masdar Hossain* (2000)].[7]

Rule of Law in the Constitution of Bangladesh

Although there is no express mention about rule of law in Bangladesh constitution, the Preamble of the Constitution provides-*"it shall be a fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizen*."[8] In accordance with this pledge article 27 forbids discrimination in law or in state actions, while article 31 and 32 import the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law or state action. Moreover, in the constitution 18 fundamental rights have been guaranteed and constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102.

In accordance with Articles 7, 26 and 102(2) of the Constitution the Supreme Court exercises the power of judicial review whereby it can examine the extent and legality of the actions of both the executive and legislative and can declare any of their actions void if they do anything beyond their constitutional limits. Thus, the rule of law is a basic feature of the Constitution of Bangladesh.

Positive Aspects of the Role of the Judiciary in Upholding the Rule of Law in Bangladesh

The constitution is a supreme law of the land and the Supreme Court of Bangladesh is the guardian of the constitution. The constitution incorporates all the important rights from the UDHR, 1948 in Part II (Fundamental Principles of State Policies, article 8-25) and Part III (Fundamental Rights, article 26-47) which are judicially enforceable by the Supreme Court. The constitution provides that the right to move the High Court Division in accordance with article 102, for the enforcement of Fundamental Rights that has been guaranteed in article 44 of the Bangladesh Constitution. The Constitution has conferred on the HCD writ jurisdiction under article 102 whereby it can enforce fundamental rights as guaranteed in part III of the

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7 BLD (AD) 104.

8 Constitution of the People's Republic of Bangladesh.

constitution allowing a writ petition from an aggrieved person. For example, on an average every year about 10,000 Writ cases are instituted under Article 102 of the Constitution for protection or enforcement of fundamental rights or judicial review of administrative or legislative actions (Sinha, 2015). Article 26 of the Constitution makes all laws inconsistent with fundamental rights void to the extent of such inconsistency and further enjoins upon the state not to make any law inconsistent with fundamental rights. The constitution has provided appellate jurisdiction to the Supreme Court under article 103. Moreover under Article 104 of the Constitution, the Appellate Division has jurisdiction to make any order or direction for doing complete justice in any case or matter before it. Article 109 of the constitution says that the HCD shall have superintendence and control over all courts and tribunals subordinate to it. The Supreme Court has statutory supervisory power under 115 of the C.P.C. and section 439 of the Cr. P.C. The Supreme Court advocates for social justice for the poor by way of Public Interest Litigation (PIL) that means litigation in the interest of public and not in the interest of the litigant himself. The notion of *suo muto* bears evidence of action by the Supreme Court. *Suo muto* is helpful in bringing remedies to the door of the victim. The Supreme Court is *pro-active* where human rights issues are of great serious nature and has wide concern. In that case involvement of the Supreme Court is more active that includes flexible interpretation of laws, such as extension of the concept of *locus standi* (right to sue). This approach is helpful in understanding the wide capacity of the Supreme Court to deal with human rights. Thus the SC can act in order to protect human rights and to uphold the rule of law accordingly.

Table: 1. Procedural Indicators and Proxy Measures of the Role of the Judiciary in Upholding the Rule of Law into the Reality Mirror:

Indicator	**Procedure Measured**	**Proxy Measurements**
1. Separation of judiciary and Judicial Independence.	Court system, the process of recruitment of the judges and the process of adjudicating.	(a) How far is the judiciary independent from the executive? (b) Is there any interference on the judiciary? (c) Is judiciary corrupted? (d) Access to justice system. (e) Whether the power of the courts has been curtailed. (f) How credible and transparent the recruitment process is? (g) Are judges recruited for political biasness? (h) Do the judges maintain professional independence in adjudication?

2. Prosecution System and complaint mechanism	The role of the lawyers, prosecutors and attorneys, due process in complaint system.	(a) Do lawyers facilitate corruption or the process of delaying trials? (b) How the process of prosecutorial and state attorney service? (c) Do they deal with cases with professional independence? (d) Are they recruited due to political allegiance? (e) Access to complaint mechanism. (f) Do the complainants have to pay bribes to file complaints?
3.Investigation system and security mechanism	The recruitment process of the police personnel, due process in investigation of cases, witness and victim protections.	(a) Is the system of investigation credible? (b) Do investigators extort undue benefit while investigating cases? (c) Do they use torture to extract confession? (d) Does the process accommodate intervention of political and financial elites? (e) How the police recruited or promoted? (f) Are victims and witnesses harassed or tortured (g) Are there any security mechanism?

Independence of the Higher Judiciary

Appointment Procedure: One researcher (Biswas, 2012) revealed that, "in the absence of a legislation prescribing detailed qualification in appointment of judges in the Supreme Court of Bangladesh 'the at least ten years' experience as a lawyer or judicial officer appears as a board criterion, leaving room for political maneuvering in selection and appointment of judges to the Supreme Court". As per Article 95, the present provision for appointments is that the Chief Justice and other judges shall be appointed by the President.[9] But being titular one the President in Bangladesh compulsorily appoints the judges on advice of the Prime Minister. In practice, the absolute power of the executive and parliament in the hands of Prime Minister. "Thus the appointment depends on the sole wish of the executive which may create personal favoritism and political bias in the appointments" (Halim, 1998). As per the statement of Asian Human Rights Commission the Chief Justice also happens to be appointed on political considerations in Bangladesh (Ashrafuzzaman, 2014).

Crisis of Seniority in the Supreme Court Elevations: The principle of seniority in the appointment of the Chief Justice as reflected in Article 96 and 97 of the Constitution as well as in *Bangladesh* v. *Md. Idrisur Rahman*[10] has

[9] Constitution of the People's Republic of Bangladesh.

[10] 15 BLC (AD) 49.

been repeatedly violated. For example: during the BNP-led four-party alliance government, Justice KM Hassan and Justice Syed J.R. Modasser Hossain were appointed Chief Justice, respectively, following Ruhul Amin and Justice Mohammad Fazlul Karim violating seniority. In the caretaker government regime, Justice MM Ruhul Amin was appointed as the Chief Justice. Justice Tafazzal Islam was appointed Chief Justice after the Awami League-led Government overturning Justice Mohammad Fazlul Karim. The appointment of the former Chief Justice A. B. M. Khairul Haque in September 2010 was alleged to have involved the supersession of two more senior judges Justice MA Matin and Justice Shah Abu Nayeem Mominur Rahman. During the appointment of Mozammel Hossain again Justice Shah Abu Nayeem Mominur Rahman was took away. As a result, Justice Shah Abu Naeem Mominur Rahman resigned before the expiry of the validity period. The last of the cases of seniority violation of Justice Abdul Wahhab Mian was occurred on 02.02.2018 and he was resigned.[11]

Provision of Consultation with the Chief Justice: Although there is a convention of consultation with the Chief Justice in judicial appointments but the practice is violated now and then by government. For example, in the first instance in February, 1994 the then BNP government arranged appointment of 9 judges as additional judges without consulting the Chief Justice. In February, 2001 the AL government appointed 9 HC judges under Article 98 of the constitution. The BNP government did not confirm the services of 7 additional judges out of 9. In the second instance in July, 2001 AL government appointed 9 additional judges for HCD. The BNP government did not confirm the services of 4 of these 9 additional judges. In view of these incidents it is widely contented that this bad practice by the government in confirming the services of the judges ignoring the advice of the Chief Justice has already politicized the judiciary (Halim, 2014).

Appointment in Profitable Post after Retirement: Under Article 99 of the Constitution a retired or removed judge may be appointed by the President in judicial or quasi-judicial offices. For example, the former Chief Justice A. B. M. Khairul Haque has been appointed as the Chairman of the Law Commission after his retirement. But according to the International Law Commission's Report- "*Where there is any chance for the judges to be appointed in honorable post after their retirement or removal, impartial judgment may not be expected from them especially where the government itself is a party to a suit."*

Security of Tenure: The Canadian Supreme Court in *British Colombia* v. *Imperial Tobacco Canada Ltd.* (2005)[12] referred that, security of tenure, financial security and administrative independence are the three 'essential conditions' of judicial independence. Moreover, the International Congress of

[11] Bangladesh Pratidin, February 03, 2018.

[12] 2 SCR 473.

Jurists held in New Delhi in 1959 suggested that 'the grounds for removal of judges should be before a body of judicial character assuring at least the same safeguards to the judges as would be accorded to an accused person in a criminal trial (Halim, 1998). But on 30 July, 2009 the President by a notification had forced retirement of two judges- Mr. Abdul Gafur, the District & Sessions Judge of Dhaka and Mr. Md. Shahjahan Shaju, Judge of Women and Children Repression Prevention Tribunal of Gazipur. The apex court termed the decision illegal on the grounds that competent and fair trial to inflict punishment did not happen in this case and the decision without consulting the Supreme Court is a violation as per Article 116 of the Constitution.

Arbitrariness in Judicial Action: Biswas (2012) in his study pointed out that during almost the entire government regime the practice of feeling 'embarrassment' to hear some matters especially bail petitions of the member of the opposition in some cases is a common scenario in the Higher Judiciary of Bangladesh. Sometimes the manner of refusal of bail to political leaders raises concerns about the court's functions freely. Withdrawal of cases on allegedly political considerations is also a controversial matter in the country. Sometimes the politically motivated cases in which the members of the ruling party are involved are withdrawn on political consideration but it cannot be seen in the cases in which the members of opposition are involved.

Independence of Lower Judiciary: Since the lower judiciary is the foundation of the judiciary, they must be independent and impartial for the establishment of rule of law. As per article- 116 of the Constitution of Bangladesh, the provisions dealing with constitutional safeguards of the lower courts are - the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court. Moreover, Article-116A provides, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions. But the reality is little different. Firstly, there is no separate secretariat for the judiciary. Secondly, in many cases all acts of posting, promotion, grant of leaves etc. are done by the Ministry of Law, Justice, and Parliamentary Affairs and sometimes they do it without any approval of the Supreme Court. Although the Ministry obtains the approval as a mandatory one but in some cases some particular judges are harassed whom the Ministry has intention to harass. Such type of harassment is a great hindrance to the way of the judge to discharge impartial justice (Halim, 2014). Besides premature transfers, arbitrary postings, promotions and removals of the judges of the lower judiciary are happened on political biasness. Ashrafuzzaman (2014) observed that, the Ministry deals with the process of appointment, promotion, and dismissal in a whimsical fashion, prompted by the wishes of the incumbent political regime.

Appointment of the Public Prosecutor: This is a common practice in judiciary of Bangladesh that, the public prosecutors or the other persons of the office of the Attorney General are appointed from ruling party-affiliated lawyers. Every ruling party coming into power replaces almost the entire group of public prosecutors with the members or genuine supporters of the governing party. In Bangladesh, every regime appoints a group of lawyers of their choice to act as prosecutors or state attorneys. These lawyers get this opportunity because of their political loyalty–not professional skills–and often by corrupt means (*ibid*).

Political Pressures and Interference on Courts: In the history of the judicial system of Bangladesh political interference is a major impediment in dispensing and neutral justice. According to the statement of Asian Legal Resource Centre (2014/789) in Bangladesh the judiciary at all its levels entertains the instructions of the executive (cited by Ashrafuzzaman, 2014). Similarly, the World Justice Project, 2014 reported that the administrative agencies and courts in Bangladesh affected by corruption and political interference. But according to Durga Das Basu, (Basu, 1972) *"Independence of judges does not merely mean security of their tenure or a decent wages to keep themselves off from the worry for their daily bread, but a condition under which judges may keep their oath to uphold the constitution and the laws without fear and favor….* (Cited in Islam, 2012).

Problem and Challenges in Bangladesh Judicial System

(1) The powers of the courts have been curtailed: In a country where the rule of law exists, all the laws should be administered in the courts of law. But in Bangladesh, the powers of the Courts have been curtailed in certain laws. For example:

(a) By the Speedy Trial Tribunal Act, 2002 the government is authorized to select and for holding quicker trials for murder, rape, and the possession of illegal firearms, explosives, or narcotics. The law has thereby allowed executive authorities to arbitrarily pick and choose cases for trial under this law.

(b) The Mobile Court Act, 2009 by its Section 5 authorizes the government to assign an 'Executive Magistrate' or 'District Magistrate' to conduct trial of offences under this law. Sections 6 and 11 empower the 'Executive Magistrates' and 'District Magistrates' to punish with a maximum imprisonment of two years (Sec. 8) and monetary penalties. This law has mostly been used to punish opposition activists.

(c) Under the constitution of Bangladesh the Administrative Tribunal has been kept outside the writ and supervisory jurisdiction of the High Court Division. Neither in Pakistan constitution (Art. 212) nor in Indian

constitution (Art. 323A) administrative tribunal is exempted from the power of judicial review by the Supreme Court.

(d) Magistrates perform dual functions of both executive and judiciary. The Deputy Commissioner who is the Chief Executive in the district can arrest and prosecute a person. He also acts as a judge and tries some criminal cases. But conferring of judicial power of the executive magistrates, though in a small degree, is against the principle set out in Article 22 of the constitution (Islam, 2012)

(e) Parliament can impeach the President and can adjudicate certain disputes. It has power to enforce its own privileges and to punish those who offend against them (*ibid*).

(2) Declaration of Military Laws: Since 1972 Martial Law had been declared many times, one in 1975-1979, another in 1982-1986 and lastly in January 11, 2007 ostensibly to save the country from political violence. But during the continuance of the Martial Law the Supreme Court could not call in question the proclamation of Martial Law and the Judiciary was made the subordinate organ of the executive (Patwary, 2004).

(3) Confrontational Politics: Bangladesh is in front of challenges in the path of the rule of law owing to the confrontational politics practiced by the two main political parties over the decades, reflecting longstanding personal enmity between Awami League (AL) and Bangladesh Nationalist Party (BNP) which are creating difficulties to separate the Judiciary from the Executive and Legislature.

Lack of Check and Balance of Power: In order to avoid autocratic exercise of powers of the state it is thought that the three powers (Executive, Legislative and Judiciary) should be entrusted to three different organs. But, the Appellate Division says that-

> "*In the scheme of our constitution the division of power is not absolute. The executive can legislate under certain circumstances. Reference may be made of Articles 62(2), 93 and 115. Parliament cannot make law relating to the appointment of judicial officers and magistrates exercising the judicial functions which has to be provided for by the President under Article 115 of the Constitution. On the other hand parliament can cause a fall of executive Government and impeach the president. The parliament through its standing committees can review the execution of laws and investigate and enquire into the activities or administration of Ministries. Reference may be made of Article 76. Judiciary on the other hand under Articles 107 and 113 makes rules. The parliament at the same time can adjudicate certain disputes and hold the power to enforce its own privileges and to punish those who offend against them.*[13]

[13] *Bangladesh* v. *Md. Aftabuddin*, (2010), BLD (AD) 1.

Delay and Backlog of Cases: The rule of law requires that justice will be delivered in timely manner. But the judiciary of Bangladesh is now overburdened in many ways and fails to do it for those very reasons. In a seminar titled- "Access to Justice: Judicial Remedy" held in CIRDAP auditorium, Dhaka on 25.04.2015 the Chief Justice S K Sinha said, 3,000,000 cases are pending in the courts of our country.[14] Similarly, as per the estimates provided in a Supreme Court Study released on June, 2015, every day 1,051 cases are added to the existing backlog. The study showed that (as of March 31, 2015) 3,098,569 cases were pending with all the courts across the country. Of them, 15,383 were with the Appellate Division, 369,813 with the High Court and 2,713,373 with the lower courts. Biswas (2008) in his study observed that in total our judiciary can resolve 150 cases daily and currently in total daily 250 cases submitted to the court. On the other hand, where a civil suit should take 1 to 2 years for the disposal but it continues for 10 to 15 years or sometimes more than that. It is found that the shortage of judges in the subordinate courts is the principal cause of delay in disposal of litigations. The former Chief Justice Khairul Haque said, "There is one judge for every 10,000 people in the USA and for 67,000 in India. But in Bangladesh, we have only one judge for more than 1 lakh people." According to S K Sinha there are 1600 judges for 160,000,000 people and of them only 1100 judges take sit regularly in the courts.[15]

Access to Justice: The rule of law is meaningless unless there is access to justice for the common people. But most of the people think that law is for rich people and privileged, not for poor people. According to Mahmudul Islam having regard to the economic situation of the common people, the cost of litigation in Bangladesh is high and most people cannot afford to seek remedies in courts (Islam, 2012). Moreover, no arrangement has been made to deal with urgent civil matters in vacation. Although in *Manjil Morshed* v. *Bangladesh* (2009)[16] the High Court Division gave direction to the Government for holding vacation courts to deal with urgent civil matters but the civil courts go on in recess for 1 month in December every year.

Corruption in Justice System: Corruption is inseparable from every stage of a criminal case (Islam, 2010). As regards criminal cases, it is observed that there is extensive corruption and abuse of court process concerning bail. A survey in 2007 had found 47.7% corruption in the judiciary. Available statistics shows that more than three-fifths (63%) of the households involved in court cases to bribe the court officials. Cash for bribe is paid to the court employees by 71.3% of households (Rahman, 2005). The 'Rule of Law Index 2014' published by the World Justice Project (WJP) shows that, the worst score was in corruption and in civil and criminal justice, out of the eight indicators in implementing the rule of law. According to the index,

[14] Bangladesh Protidin, April 26, 2015.

[15] Bangladesh Protidin, May 01, 2015.

[16] 61 DLR 94.

Bangladesh stands at 92nd position in civil justice, 94th in criminal justice, 95th in absence of corruption.[17]

Prosecution and Investigation System: Investigation in the criminal justice system is very much essential to collect pure evidence which helps the judiciary to administer of justice as well as to detect the actual offender. But an observation of the High Court Division in 4 MLR 87 can be mentioned here to get a clear idea of faulty investigation system in Bangladesh:

> *"We have come across many cases in which due to faulty investigation accused get benefit of reasonable doubt in spite of consistent and uniform evidence of prosecution witnesses about the occurrence. As a result, people of our country have been losing faith in the present system of administration of justice mainly due to the failure of the police to properly investigate the case and collect the evidence. It is high time that the system of the investigation of the criminal cases by the police alone should either be abandoned or completely reformed."*

Lack of Security Mechanism: Victim and witness play a vital role in justice system. But in Bangladesh, lack of victim and witness protection provisions they are harassed, intimidated threatened in different stages during the criminal procedure. Faruque and Rahman (2013) in their study observed that crime victims are often victims of the criminal process. Such claim has also been justified by Shazia Sultana (Sultana, 2014) that, at the time of reporting or after reporting the case the witness is afraid to come to the police station to give their statement. The witnesses are threatened at any stage of the investigation. Sometimes victim or witness is prevented from coming before the court to give statement. Furthermore, researcher Ashrafuzzaman (2014) in his study iterated that, those who dare contest cases against the law-enforcement personnel, influential persons associated with the ruling parties, and economically powerful persons, face dire threat to their lives, liberty, and property.

Conclusion

The above mentioned discussion proved that, the foremost role of the judiciary as third branch of government is to uphold and assure the rule of law in a country. In order to achieve this goal the judiciary of a state should be effective and meaningful in a real sense. Although the rule of law is one of the basic principles of the Constitution of Bangladesh but the condition worsens by the day. Under the circumstances, a balance must be maintained to live in a society and that very balance is maintained by the judiciary administering justice. The study contended that the judiciary is minimally a necessary indicator that plays a vital role for upholding the rule of law and this is minimally a necessary yardstick for judging the rule of law prevalent in

[17] World Justice Project, Rule of Law Index, 2014 available at http://data.worldjusticeproject.org/#/index/BGD.

Bangladesh. The study argued that without progress of this area the rule of law to the large extent would remain meaningless and dysfunctional. From this point of view, in the study it has emphasized to draw up the role of the judiciary in protecting rule of law in Bangladesh. It is the judiciary whose duty is to look after and supervise that everything is going on in accordance with the constitution of the Republic. Another reason is that the judiciary as one of the most important state pillars provides cheap and immediate justice to the public at their doorsteps. To attain this fundamental aim of the state it has shown that, as a co-ordinate and co-equal organ with the other two organs of the state, judiciary should be made functional to perform the delicate task of ensuring rule of law overcoming all kinds of loopholes. That is why, throughout the study it has been demonstrated some weaknesses of the judiciary that should be immediately removed as the supreme responsibility belongs to it.

Recommendations

(1) The Judiciary should be made full-fledged independent by removing all sorts of challenges that still remained on the path of its full independence. The executive authority of Bangladesh should not infringe on the independence of the judiciary. People should be more conscious about and judges as the guardian of the constitution should utter their voice against any external interference on the judiciary.

(2) It should be stopped appointment of judges on political consideration and biasness. The appointment and the removal of Judges need to be fair, transparent and impartial. Seniority must be maintained in the appointment. Methods to transfer of judges should be strict. Judicial Reforms Commission to review appointments and related matters should be established.

(3) Shortage of judges should be fulfilled and at the same time sufficient court buildings should be set up soon. The government should invest in this sector on top prior basis. The judges and the lawyers who are engaged in adjudication shall have the earnest co-operation, legal obligation and social responsibility to establish the rights of justice seeker.

(4) Corruption should be minimized at the tolerable within the judiciary. Accountability of the entire judiciary including judges, lawyers and related sector should be ensured also.

(5) Access to justice should be ensured for all. It should be stopped unnecessary adjournment of hearing of cases to get rid of delays and backlog of cases. Retired judges should be engaged in adjudication on contractual basis to reduce backlog which is a great hindrance on the path of access to justice.

(6) Separate investigating agency should be set up and the system of the investigation of the criminal cases by the police completely reformed. The police should cooperate sincerely with the judiciary in investigation and related matters such as producing witness, making report etc.

(7) Civil Society of Bangladesh should increase debates constantly within the country and pressure the government by exposing the defects and loopholes of the judicial process that remain as obstacles to the independence of the judiciary and the implementation of rule of law. Political parties of the country should be more sincere for establishment of the independence of judiciary and the rule of law accordingly.

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Sustainable Development and Environmental Protection in Bangladesh: Challenges and Opportunities

Sazzad Alam[1]

Abstract

In 1992, more than 170 countries came together at the Rio Earth Summit and agreed to pursue sustainable development, protect biological diversity, prevent dangerous interference with climate systems, and conserve forests. It is mandatory for a country to keep balance between development process and environmental pollution level. This idea is known as sustainable development. Bangladesh is already in the process of becoming a developing Country it is expected that she will go through a massive development phase in the next twenty to thirty years. Several researches showed that rapid development process affects the ecosystem and environment. To minimize that pollution level all over the world, countries have implemented sustainable development idea and made it mandatory to follow sustainable development plans by introducing and implementing laws. Bangladesh is no difference and there are several Laws, Plans related to environmental protection and sustainable developments like The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013, The Wildlife (Preservation and Safety) Act, 2012, Bangladesh Water Act, 2013. The idea behind enacting these laws was to minimize environmental pollution without slowing the development process. But it is a matter of great concern that pollution level in Bangladesh is increasing day by day especially the water and air pollution. In this paper I will try to find out why hasn't Bangladesh become much more environmentally sustainable despite decades of international agreements and national policies and are the opportunities and challenges of sustainable development under Bangladeshi laws and policy framework.

Keywords: Sustainable Development, Global Warming, Pollution, Bangladesh, SDG.

Introduction

Humanity's ecological footprint has exceeded the earth's capacity and has risen to the point where 1.6 planets would be needed to provide resources

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sustainably.[2] From the 1970 biodiversity index has fallen around 50% and environment pollution level is also increasing day by day. Even after the Introduction of sustainable development plans greenhouse gas emission have almost doubled and around 48% of the world's sub-tropical forests has been lost in recent times. If we try to find out what is going wrong with sustainability initiatives, researchers found that three types of failure kept recurring: economic, political and communication.[3] While this is the situation of sustainable development in the rest of the world, it is high time to look at the effectiveness of sustainable development plans, Acts in Bangladesh.

Bangladesh is a country with 160 million people and economic worth is around $686.5 billion, now in six year graduation process to become a developing nation. Bangladesh was amongst the Least Development Bloc (LDC) countries from 1975.[4] As per the decision of UN Committee for Development Policy (CDP), currently there are 47 countries in the LDC bloc. Bangladesh had attained tremendous progress in the private sectors like garments, pharmaceuticals and ceramic.[5] It is expected that Bangladesh will go through a massive development process in the next 20 or 30 years. As it is a known fact that development process effects on the ecosystem.[6] For a steady economic growth a country needs to develop industries, facilities for the people. Development process requires more power consumption. Usage of fossil fuel pollutes the environment, emits greenhouse gas. The idea was to achieve development goals in such way that the process will not harm the environment as a result future generation will have enough resources to meet their own needs. Bangladesh government had introduced policies after the Rio Declaration. Bangladesh government also enacted several laws related to environment and biodiversity protection in the past 20 years. In 2015 Bangladesh gave commitment to implement the SDGs (Sustainable Development Goals). There are 16 SDS to achieve for Bangladesh set by an agreement of the United Nations Conference on sustainable development.

This paper will be mostly a Doctrinal type of research. I will try to show what types of initiatives have been taken by Bangladesh government to attain sustainable development and the effectiveness of those initiatives. I will also discuss the challenges of sustainable development initiatives and at the end of

2 Michael Howes, 'HOWES: Why Sustainable Development Plans Have Failed' (*Business Daily*, 2017) <https://www.businessdailyafrica.com/analysis/Why-sustainable-development-plans-have-failed/539548-3876264-2x0u20/index.html> accessed 5 October 2018.

3 *Ibid*.

4 ''Pitfalls' Ahead Of Bangladesh Getting Out Of LDC Bloc' (*Atimes.com*, 2018) <http://www.atimes.com/article/pitfalls-ahead-bangladesh-getting-ldc-bloc/>.> accessed 25 June 2018.

5 Samia Naz, 'Bangladesh: A Country Marching Ahead towards Development' (*Vietnamnews.vn, 2019*) <http://vietnamnews.vn/life-style/424999/bangladesh-a-country-marching-ahead-towards-development.html#IGd17HaPe1Sf8W7K.97> accessed 10 May 2018.

6 Yong-Kuk Jeong and others, 'Development of the Methodology for Environmental Impact of Composite Boats Manufacturing Process' (2015) 29 Procedia CIRP.

the paper I will make some recommendations for the authority based on my research.

Current Environmental Issues and Concerns in Bangladesh

The environmental condition of Bangladesh is not at all equilibrium. We can categorize that pollution into three major parts a) Water pollution, b) Air pollution, and c) Sound pollution. Pollution is a threat to the human health, ecosystem and economic growth of Bangladesh. In the book name 'Environmental Law: Bangladesh Perspective'[7] author Iqbal Hossain identified some reasons of environment pollution in Bangladesh and those are:

- Deforestation in the name of development projects.
- Water quality is deteriorated due to poor sanitation.
- Water pollution due to pesticide use.
- Natural disasters, declining surface water availability.
- Excess usage of chemical fertilizers.
- Unplanned Urbanization.
- Loss of biodiversity and wetlands due to human activates.
- Direct disposal of hazardous waste and substance in the environment.
- Conflict of development with environmental illiteracy.[8]

The reasons of environmental pollution are mostly human made. Industrialization, Urbanization, improper use of agricultural chemicals and pesticides, faulty policy priorities and approaches and above all poorly designed development activates.[9] To save the environment from various kinds of pollution it is mandatory to create a balance between development and environment protection. And from this necessity government enacted many environmental protection related laws and policy.

Positive steps towards sustainable development in Bangladesh

The term sustainable development connects environment and development together. Principal 4 of the Rio Declaration states that the environmental protection will be a part of development process.[10] Sustainable development

7 Iqbal Hossain, *International Environmental Law Bangladesh Perspective* (5th edn, Md Saiful Islam 2014).

8 *Ibid*.

9 *Ibid*.

10 UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) p 4.

became necessary as the global population is on the rise, as per United Nations projections there will be more than 10 billion people at the end of year 2100.[11] It is important to ensure enough resources for this huge number of future population so that they can fulfil their demand. Currently the entire world depends mostly on fossil fuels. Using those fossil fuels emits carbon dioxide gas which is mostly responsible for greenhouse effect. World's current resources stock of fossil fuel (Gas, oil, coal) will last another 50-55 years.[12] So it is important to think about alternative energy sources and to protect the environment. Bangladesh is also following the path to sustainable development model.

Sustainable development became a necessary in the late 80's then it was known as eco-development. But environmental protection related law was subject to the law maker all around the world though sustainable development method wasn't introduced then. If I looked at the development of environmental protection laws and programs by Bangladesh government I found that in 1973 right after the liberation war Bangladesh government enacted Water Protection Ordinance followed by a project under this ordinance. The main goal of this project and ordinance was to control water pollution. Later in 1977 Environment Pollution Control Ordinance was introduced. In 1989 Department of Environment (DoE) was structured by Bangladesh government and the activities of the department are overseen by a Director General. There are some laws which came before 1985 but amended recently which are related to environmental protection like *The Pesticide Ordinance*,[13] *The Pesticide Rules*,[14] *The Wild Life (Preservation Order)*,[15] *The Forrest Act*,[16] *The Wetland Protection Act*, etc. In the late of 80's Bangladesh went through major development phase. Industries were setting up, foreign investments in garments sector started to come in, natural gas, coal field were discovered. On that time Ministry for Environment and Forest (MoEF) was established, Non-governmental organizations started to work on environmental issues in Bangladesh as well.[17] On that time several NGO's were very concern about the rising of pollution level in Bangladesh. Ministry of Environment formulated National Environmental Management Action Plan (NEMAP) with the help of some NGO's.

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11 Jared Skye, 'Why Is Sustainable Development Important? | Lovetoknow' (*LoveToKnow*, 2017) <https://greenliving.lovetoknow.com/Why_Is_Sustainable_Development_Important> accessed 10 July 2018.

12 Siddharth Singh, 'How Long Will Fossil Fuels Last?' (*Business-standard.com*, 2015) <http://www.business-standard.com/article/punditry/how-long-will-fossil-fuels-last-115092201397_1.html> accessed 7 July 2018.

13 The Pesticide Ordinance, 1971 (Amended 2009).

14 The Pesticide Rules, 1985.

15 The Wild Life (Preservation Order), 1973 (Amended 1995).

16 The Forrest Act, 1927 (Amended 2002).

17. Nurul Islam, 'The Broader Significance Of The Environment Movement In Bangladesh' [2002] *Bangladesh Poribesh Andolan.*

Bangladesh adopted the National Environment Policy 1992 and Environment Action Plan 1992, by those adoption concepts of environmental protection through national effort was recognized for the first time in Bangladesh. In the Agenda 21 chapter 8 says about the importance of formulation of national policies and laws for environmental protection and sustainable development.[18] Bangladesh government formulated a good number polices after National Environmental Policy 1992 such as, National Forrest Policy, 1994, Fisheries Policy, 1998, National Water Policy, 1999, National Agricultural Policy, 1999, Industrial Policy, 2005, National Land Use Policy, 2001, National Land Transport Policy, 2004.

The most important Act passed by Bangladesh government was Environment Court Act, 2000. This act was enacted for the purpose of tying cases related to the violation of environmental laws. In recent time back in 2010 this act replaced by the new Environment Court Act, 2010.[19] Currently there are more than 200 laws in Bangladesh which are dealing with environmental issues.[20] Those laws mostly deal with Air, Water and Land pollution. Amongst all those some are specific to the environments which are:

- The Bangladesh Environmental Conservation Act, 1995 and Rules 1997.
- The Environmental Court Act, 2010.
- The Wildlife (Preservation and Safety) Act, 2012.
- The Brick Making and Burning (Control) Act, 2013.
- The Conservation of Play Ground, Open Place, Park and Natural wetland in Metropolitan City, Divisional Town and Municipal Area of District Town Including All Municipal Area Act, 2000.
- Bangladesh Water Act, 2013.

Opportunities of Sustainable Development under the Constitutional Framework of Bangladesh

India and Pakistan adopted constitutional rights to protect the environment as human rights. India adopted environmental protection right back in 1976 with amendment Act.[21] Article 27(4) of the Constitution of Sri Lanka states that its states duty to protect the environment for the benefit of the community. The constitution of Bangladesh originally did not incorporate with any provisions related to environment protection. Constitution of Bangladesh more

18 Yong-Kuk Jeong and others, 'Development of the Methodology for Environmental Impact of Composite Boats Manufacturing Process' (2015) 29 Procedia CIRP.

19 The Environment Court Act, 2010.

20 *Ibid*, 17.

21 The Constitution (Forty Second Amendment) Act, 1976.

emphasized on human rights and equal protection before the law. Back in 1994, in the case of *Dr M. Farooque* v. *Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 others*[22] it was a case of Public Interest Litigation and that dealt with air pollution and noise pollution. The Supreme Court accepted the argument that 'Right to Life' includes right to have safe and healthy environment to live. Later in 2011 by the 15th Amendment Act Bangladesh made environmental protection and preservation of natural resource fundamental duty of the state.[23] Article 18A of the Constitution of Bangladesh states that:

> "The state shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wildlife for the present and future generations."[24]

This Article of the Constitution talks about protecting the environment for future generation and this idea is known as Sustainable development. So, with the 15th amendment of the constitution Bangladesh has guided to take sustainable development measures in order to protect the environment so that our future generation can have a safe and healthy environment with enough resources to continue the development process.

Sustainable development under Policy framework in Bangladesh

Bangladesh has The National Environment Policy, 1992 and National Environment Action Plan, 1992. These two focus solely on the environmental protection issues in Bangladesh. There are policies specifically address different aspects and application of sustainable development, those are:

- National Forestry policy, 1994.[25]
- National Agriculture Policy, 1999.[26]
- National Land Use Policy 2001.[27]

In Bangladesh adoption of policies is very important. There are over 160 million people living in a small area of land around 55598 square miles, it has limited resources. By adopting environmental policies gives the Ministry of Environment goals to achieve, shows ways to achieve the goals. After adoption of polices Ministry of Environment also gets idea about legal development if the implementation of polices requires new laws. Policies are not judicially enforceable in Bangladesh according to Article 152 of The

22 *Dr M. Farooque* v. *Bangladesh,* [1997] 49 DLR 1.

23 The Constitution (Fifteen Amendment) Act, 2011.

24 The Constitution of Bangladesh 1972, Art 18(A).

25 The National Forestry policy, 1994.

26 The National Agriculture Policy, 1999.

27 The National Land Use Policy, 2001.

Constitution of Bangladesh.[28] But those policies made huge impact in the area of environmental protection laws and sustainable development in Bangladesh.

Sustainable development under The National Environmental Policy, 1992

Bangladesh government introduced most of the policies related to sustainable development and environmental protection after the Rio Declaration. In this National Environmental Policy 1992 Bangladesh government identified problems related to environment and established Ministry of Environment and Forest (MoEF). In that policy it was mentioned that Bangladesh has a serious issue of over population, illiteracy, inadequate health care and lack of public awareness it also speaks about improving the environment in an integrated manner. Some of the objectives of the policy related to Sustainable Development are:

- Maintaining ecological balance and improvement of the environment.[29]
- Identifying and regulating activities that pollute and degrade environment.[30]
- Ensuring environmentally sound development in every sectors.[31]
- Ensuring sustainable, long term and environmental friendly use of government resources.[32]
- Actively cooperating with all international environmental initiatives to the highest possible extent.[33]

In this policy Section 3.2 talks about undertaking Environmental Impact Assessment (EIA) for new private and public industries[34] and imposing ban on industries which are harmful to the environment.[35] Environmentally sound and friendly production system is encouraged as well as efficient use of raw materials. Sustainable use of raw materials in the industry production is encouraged.

As a result of this policy Bangladesh government enacted Environmental Impact Assessment (EIA) legislation in 1995 and EIA rules in 1997. All the tanneries from Hazaribag Dhaka are ordered to relocate in Savar Tannery State. Those tanneries were responsible for major water pollution as well air

28 The Constitution of Bangladesh 1972, Art. 152.

29 The National Environment Policy 1992, s. 2(1).

30 *Ibid*, s2(3).

31 *Ibid*, s2(4).

32 *Ibid*, s. 2(5).

33 *Ibid*, s. 2(6).

34 *Ibid*, s. 3(2)(2).

35 *Ibid*, 3(2)(3).

pollution in Hazaribag area. Till June 2017 out of 154 tanneries 55 relocated in Savar and started producing.[36] In the later part of this paper I will discuss about the implementation of EIA in real life situation in Bangladesh.

In the Section 3.4 of the Policy usage of environmental friendly fuel is encouraged. Back in 2002 two stroke three wheelers were banned from Dhaka city. Those three wheelers used to emit excess amount of carbon dioxide in the environment so more environment friendly Natural Gas driven auto rickshaw were introduced. Usage of renewable energy was encouraged. As a result it was made mandatory by the government to have solar panel in every building which is 5 storied or more. Reducing the use of coal and wood for burning was emphasized and later government passed Law in 2013 restraining brick kilns from using wood as burning materials. Introduction of tree plantation project was also mentioned in this policy.[37] Now Bangladesh government has a tree plantation week programme. Because of the policy which was introduced in 1992, Bangladesh government introduced laws which are essential to ensure sustainable development. To attain the objective of this policy in 1995 Bangladesh government adopted NEMAP (National Environment Management Action Plan). And this action plan emphasized on sustainable development and improvement of environment. The National Environmental Policy, 1992 was a statement of Bangladesh government which showed her (Bangladesh) commitments to reduce environment pollution and promoted sustainable development.

Positive Initiatives taken by Ministry of Environment and Forests (MoEF) to attain Sustainable Development

Ban on Plastic Shopping Bag

The most effective initiative taken by the MoEF is imposing ban on plastic shopping bang back in 2002. Plastic bags were responsible for major sewerage blockage all over the country especially in Dhaka city. The plastic bags were also responsible for polluting the river and canals. Plastic bags don't degrade and they were responsible hampering soil quality. As Bangladesh did not managed to establish plastic recycling plant it was the only solution to protect the rivers, canals and fertile land from plastic bags.

Air Pollution Control

Air quality in Dhaka city is unhealthy. According to the report of WHO Dhaka is the 23rd most air polluted city in the word.[38] The Department of

36 Tribune Desk, '35% of Hazaribagh tanneries relocated to Savar' *Dhaka Tribune* (Dhaka, 11 June 2017) <https://www.dhakatribune.com/business/commerce/2017/06/11/35-hazaribagh-tanneries-relocated-savar/>accessed on 14 May 2018.

37 The National Environment Policy 1992,s, 3(7)(2).

38 Tribune Desk, 'Air Quality in Dhaka city,' *Dhaka Tribune* (Dhaka,30 January 2018).

Environment (DoE) said that the air quality in Dhaka is harmful to human health and the level of air pollution is rising continuously.[39] The air quality in the village and rural areas are safe for human health. But it's just a matter of time that those villages air will also get polluted like the cities. So it is high time for the government to take necessary measures to reduce air pollution all over Bangladesh. In 2002 the Ministry of Transportation banned two stroke three wheelers from Dhaka city as per the recommendation from the Department of Environment (DoE). Those three wheelers were known as "baby taxi" locally were responsible for polluting the air with the emission of excessive amount of carbon dioxide. Auto Rickshaw run by CNG was introduced thus the pollution level was reduced for some years until a new problem showed up which is Brick Kilns. In later part of this paper I will briefly talk about brick kilns and their effects on the environment. DoE has banned vehicles (Bus, Truck, and Minibus) which are older than 20 years. Five Continuous Air Quality Monitoring Stations (AQMP) is established by the DoE to monitor air quality in Bangladesh the World Bank funded this project. Recently The Environment Conservation Rules, 1997 has been amended and in the amended rules use of Catalectic Converter and Diesel Particulate filter for Petrol and diesel vehicles had been made mandatory so that they emits less carbon dioxide in the environment.

Industrial Pollution Control

To control the industrial pollution the government had taken various steps over the past years. In Bangladesh it is common that the industries set up their plant without proper disposal and recycling plant. Bangladesh government made it mandatory to collect Environmental Impact Assessment report before setting up new industries. In every district now government had established Bangladesh Export Processing Zone where all the industries of that particular area set up their plant and that area is well planned as a result less pollution occurs. Government recently relocated tannery factories from populated area to Savar. In the tannery city Savar they had modern technology reclining and chemical waste purifying plants as a result water and air pollution in the Dhaka city area will decrease in recent future. Now a days for industries which are highly polluted , Environment Clearance is given after the industries set up effluent treatment Plant (ETP), these types of steps are common in developed countries but in Bangladesh these types of protective measures is new and essential for environmental protection.

Conservation of forest, wild life and biodiversity

Bangladesh is a contracting party to the *Convention of Biological Diversity, 1992* as a result Bangladesh is determined to achieve the goals and objectives

<https://www.dhakatribune.com/bangladesh/environment/2018/01/30/us-aqi-dhaka-worst-air/>accessed 14 May 2018.

39 *Ibid*.

of the convention. Bangladesh established National Biodiversity Action Plan (NBSAP).[40] In the Bangladesh Wildlife (Preservation) Order, 1973 amended in 1994 government identified three types of areas National Park, Wild Life and Game reserve and government has declared 19 protected areas in the different part of Bangladesh. There are 9 areas in Bangladesh government declared as Ecologically Critical Area. Bangladesh government has taken necessary steps to protect biodiversity of wet lands like Tanguar Haor as per the instructions of the *Ramsar Convention, 1971*. There wetland are important for fisher men, but government imposed restriction on fishing on those wetland so that fishes can repopulate properly. These types of protective measures are part of a sustainable development model.

Sustainable Development Goals and Bangladesh

Recently back in 2015 Sustainable development Goals (SDG) was introduced in the United Nations Sustainable Development Summit. Based on this Sustainable development Goals universal development agenda to 2030 was formed. Key objective of Sustainable development goals can be categorized into three sections such as, a) economic and social development. b) Environmental Protection. C) Physical and Personal Protection.[41]

According to the government Bangladesh has done tremendously well achieving Millennium Development Goals.[42] According to a world development indicators published by the World Bank showed that Bangladesh is now a lower middle income country and annual income of per person is between 1046 to 4125 USD.[43] The aim of the government is to transform Bangladesh to a middle income country by 2021. In the year of 2015-2016 the GDP growth of Bangladesh was 6.7%.[44] In order to achieve sustainable development goals government need huge amount of funding as development is needed almost in every sector. Asian Development Bank has estimated that to finance Sustainable Development Goal in the Asia Pacific region it would need 1 trillion dollar per year.[45] To achieve sustainable development goals Bangladesh need collective and concentrated effort from the government. In all development policies in Bangladesh SDG is prioritized. Environmental protection is a key part of sustainable development.

40 'National Biodiversity Strategies and Action Plans' (*Convention on Biological Diversity*, 2018) <https://www.cbd.int/nbsap/>.Accessed 19 June 2018.

41 Ruth Kuttumari, 'Sustainable Development: The Goals And The Challenges Ahead' < https://www.theigc.org/blog/sustainable-development-the-goals-and-the-challenges-ahead/>. ed-savar/> accessed 20 May 2018.

42 Sujit Kumar, 'Sustainable Development Goals and Bangladesh: The Role of Parliament' (2016) 6 International Journal of Development Research (IJDR).

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

Role of the Bangladesh Parliament in Sustainable Development

Without strong commitment from the parliament Sustainable development goals are not achievable. There are three key pillar of sustainable development they are

(a) Economic Development.
(b) Social Development.
(c) Environmental Protection.

Different research article shows that without the proper governance sustainable development cannot be achieved. It's the duty of Bangladesh parliament to make sure that government is taking necessary measures to protect the environment which does not decrease the pace of development process. It's the parliament's duty to monitor the balance between environmental protection and development process. Parliament is the representative of the people of Bangladesh and their duty is to ensure primary needs of life which is the sole element of development. According to *The Constitution of Bangladesh* its stated duty to protect the environment, and the parliament should make sure that they protect the environment by enacting and formulating environmental protection laws in the country.[46] No country is legally bound to achieve sustainable development goals but it's important for the future generation and the parliament should make sure their policies and legal frame work protect the environment for future generation while fulfilling the development goals.

The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013

In recent years Brick making factories in Bangladesh cause serious air pollution. A report from the Department of the Environment stated that 58% of the polluting particles in Dhaka city air come from Brick Kilns.[47] Unplanned and old Brick Kilns are not only responsible for air pollution but also responsible for destroying productivity of soil as well as deforestation partially all over Bangladesh.[48] In Bangladesh housing sectors is a profitable business and lots of new instructress, industries are building all over the country and in present time around 25 billion pieces of bricks needed per year.[49] There are more than ten thousand brick kilns in Bangladesh according

46 The Constitution of Bangladesh, Art 18(A).

47 Mostafa Karim and Jenny Gustafsson, 'In Pictures: The Brick Fields of Bangladesh' (*Aljazeera.com*, 2014) <https://www.aljazeera.com/indepth/inpictures/2014/05/pictures-brick-fields-banglade-2014517134431553324.html> accessed 19 July 2018.

48 *Ibid*.

49 Mobassher Hossain, 'To Cut Brick Kiln Pollution, Bangladesh Constructs New Building...' (*U.S.*, 2017) <https://www.reuters.com/article/us-bangladesh-construction-climatechange/to-cut-brick-

to different NGO's report but the Government claims that there are around 6700 registered brick kilns.[50] According to the head of the Housing and Building research institute Mohammad Abu Siddique a combined of 10 million tons of woods and coals are burned in the brick kilns per year which produce 5 million ton of Carbon dioxide. Brick is needed to build new info structures and roads, if the government had to find a way to lower environment pollution without decreasing the production of Bricks.

In the year of 2013, Bangladesh government enacted *"The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013"*. Aim of this act was to control unplanned old Brick Kilns and to encourage brick kilns owner to embrace modern brick kilns technology which will eventually downsize environment pollution in Dhaka as well as all over Bangladesh. This act talks about controlling brick kilns and reduction of the use of soil, government banned use of soil collected from agricultural land, dead pond, swampland etc. as raw materials for brick making. In Bangladesh brick kilns are situated in rural areas where soil is fertile as fertile soil is best raw material for wood and coal burned bricks. Section 5 of *The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013* talks about controlling brick kilns and reduction of the use of soil, by this section government banned use of soil collected from agricultural land, dead pond, swampland etc. and also prohibited the use of rural road made by LGED while heavy vehicles are the method of transportation of bricks or raw materials.[51] But in real life scenario due to lack of proper implementation Brick Kilns owners are not abiding by the laws, they are collecting soil from fertile land as those soil are best raw materials for high quality bricks. There are specific instructions about the fuel and raw materials which should be used in brick kilns. All the necessary instructions and prohibition to minimize pollution caused by brick kilns are included in this Act.

After coming into force it is mandatory to stop the use of wood in making fire for the burning bricks. Bangladesh Government is encouraging the old brick kilns owner to convert their kilns into modern HHK. Low interest loans are provided by the government to convert old Kilns to modern HHK kilns. The HHK technology was originally developed in Germany then imported to Bangladesh after improvement by the Chinese engineers. Now the HHK kilns has been redesigned to suit local soil conditions, humidity levels and climate in Bangladesh. This modern technology brick kilns use only half the amount of coal compared to fixed chimney kilns and trap coal particles inside the brick to prevent them from becoming air-borne fly ash. So enactment of *The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013* was a

kiln-pollution-bangladesh-constructs-new-building-materials-idUSKBN1D81IA> accessed 14 April 2018.

50 *Ibid*.

51 The Brick Kilns (control) Act 2013, s. 5.

major step by Bangladesh government towards sustainable development approach.

Opportunities of Sustainable Forest Resource Management in Bangladesh

In the year of 2004 Bangladesh introduced Social Forestry Rules and Forest Transit rules came later in 2011 under The Forest Act, 1927 (Amended in 2004). But there is a huge gap between demand and supply in forest goods service. In recent years Bangladesh has forest area around 2.5 million hectors that comes around 11% of its total area.[52] Around 1.6 million hectors of forest is under the Forest Department. Government introduced various participatory forestry projects to encourage afforestation, there are more than 600 thousands Bangladeshi people are now participating on those afforestation projects.[53] But it is alarming that after all that effort of government deforestation rate is not decreasing. Still deforestation is a major issue for the forest department. Because the forest department does not have enough monitoring over the forest areas. Most of the time the forest officer illegally sells trees to the locals. The government has to make proper monitoring system so that illegal deforestation can be controlled. If the government can manage Natural Regeneration Plots (NRPs) around all the natural forest areas it will help to increase forest areas. In Bangladesh 60% people use wood for cooking. Alternative cooking materials such as energy efficient cooker, stove should be introduced to the local people. Different NGO's are working in the rural areas on introducing alternative cooking system to the people. Again proper implementation of the Forest policy and Forest Act, 1927 is mandatory to protect the forest land in Bangladesh.

Challenges of Sustainable Development in Bangladesh

It's been almost 26 years since in Rio Earth Summit was held to protect biodiversity but the situation is getting worst day by day specially in developing country like Bangladesh. Water, air pollution is increasing though government enacted many laws related to environment pollution some of them are mentioned in this paper. Sustainable initiatives are failing in Bangladesh because of economic, political and communication failure. In Bangladesh environmentally polluting activities are finically awarding in as an example Brick Kilns, Leather tanneries are mostly responsible for air and water pollution but good source of making money. Deforestation is also awarding as trees worth more money when they are chopped down and it is a particular problem for a country like Bangladesh which is transitioning to a market-based economy. Political failure is also a reason, government has enacted laws

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52 Abu Syed, 'Sustainable forest resource management', *The Daily Star* (Dhaka, 27 February 2017).

53 *Ibid*.

and polices related to sustainable development but unable to implement those. This is happening in Bangladesh because large extractive industries, like mining, brick kilns, and garments are dominant players in an economy and see themselves as having the most to lose.

Conclusion

In recent time Bangladesh government became agreeing party of several international convention related to environmental protection such as Rio Convention, United Nation Framework convention on Climate Change, 1992, Kyoto Protocol, 1997. Bangladesh govern is committed to formulate and implement a sustainable development strategy addressing environmental issues. But till now we have seen the formulation of sustainable development policies and acts but proper implementation of those policies and acts yet to be ensured by Bangladesh government. Most of the time political influence stops the Environment Ministry from taking action against pollutant industries. The Department of Environment must be allowed to work without political influence. Thus proper implementation of laws and policy related to environment will be ensured. At last, I would like to make the following recommendations:

- Bangladesh Government can give financial support eco-friendly initiatives and politicians should take extra step to go well beyond current standard.
- Bangladesh government should give transition pathways for industries that are polluting the most to become eco-friendly. New tax structure, grants can be allowed so that the businesses remain profitable when changing their business model.
- Both politicians, businessmen must agree on the environment pollution issues. They should work together to ensure that sustainable development policies, laws are implemented properly.

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Treatment of Juvenile Delinquency under the Criminal Justice System in Bangladesh: An Overview

Shibly Noman[1]

Abstract

Several changes have been brought by the state in the criminal justice system to provide a better treatment for the juvenile delinquents in Bangladesh since 1973. The objective of this paper is to analyse and obtain an overview of the treatment system of juvenile delinquents under the criminal justice system in Bangladesh, framed on the standards of the International Laws provided by the Beijing Rules, the Riyadh Guidelines, and the UNCRC. Moreover, its objective is also to investigate the existing informal mechanisms for the treatment of juvenile delinquencies outside the formal criminal justice system. After conducting the study on several case references, books and journals it has been found that the reformation of the juvenile justice system was the high demand of the constituent courts, the law jurists, and law professionals. The study also found that the maximum aspects of the juvenile justice system have been reformed by the Children Act 2013. Although, there are several criminal laws to deal with the juveniles but this Act of 2013 is the comprehensive legislation that provides special, alternative and diversionary treatment system to deal with the juvenile delinquents. However, the juvenile justice system is still in its infancy to protect the legal interests of the juvenile delinquents because of the lack of coordination and motivation between the legislation and enforcing agents, minimal implementation of the legislation through poor justice administration system. Moreover, the absence of the modern children policy, governing rules, and a separate procedural law regarding the implementation of the Children Act has made the system slow and weak. This paper recommends providing necessary rules, a separate procedural law to implement the national laws according to the international standard of the juvenile justice system to build a strong juvenile justice system in Bangladesh.

Keywords: Treatment, Juvenile Delinquency, Juvenile Justice System, Alternative Judicial treatment.

Introduction

The child[2] of today is the future of tomorrow. They are the backbone of the nation. Once they are lost, all the future is lost. So, it is very important that

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priority and importance should be given to the juvenile justice system and juvenile delinquency one of the major social crisis in Bangladesh.[3] The social structure and demand for social life in Bangladesh have failed the children to get a natural opportunity for their quality growth and natural development in life. As a result, near about 35,000- 45,000 children were reported to be involved with activities like caring deadly weapon, engaged in gangs in arms and drugs dealing in Bangladesh.[4] Later, it was reported that there were 40 million children in the Bangladesh between the age of 5-17 years, where around 44% of the street children were involved in drug dealing, 35% in picketing, 12% in mugging, 11% in human trafficking and 21% in other criminal activities and about 550,000 children are addicted to drugs.[5] Moreover juveniles are found involved with stealing, teasing, group violence, sex offences, homicide.[6] So, it has become very alarming to address the social crisis and ensure the safe and secure future of our future generation by providing the extra care and guidance from the adults so that the social darkness cannot grab them. It is imperative that priority and due importance should be given to meet the problems of juvenile delinquency and juvenile justice system because prevention is better than cure.[7] So it is important for the criminal justice system to protect human rights, demoralize the degrading punishment and make a way to the rehabilitation and reintegration to restore the juvenile delinquents to the normal life and develop them as the law-abiding citizen. The institutional authorities like law enforcing agency, court, and correctional institutions etc have the major role in dealing with juvenile delinquency in changing the society. The delinquents undergo four stages once they are caught by the police e.g. police arrest, prosecution, court hearing and correction.[8] However, article 28 of the constitution also encourages the state to make special provision in favor of the women or child or other backward section of citizens to provide a better treatment under the justice system. A series of recommendation made in the case of *The State* v. *The secretary, Ministry of Law, Justice and Parliamentary Affairs and others*;[9] case of *Raushan Mondal*[10] and in the case of *The State* v. *The secretary,*

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2 According to the section 4 of the Children Act 2013, any person under the age of 18 shall be considered as child as well as juvenile.

3 Abdur Rahman Chowdhury, "Crime and Human Rights," *Democracy Rule of Law and Human Rights* (2nd edn, Dhaka University Prokashona Shangstha 2016) 61.

4 Haradhan Kumar Mohajan, "Child Rights in Bangladesh" (March 2014) 2(1) Journal of Social Welfare and Human Rights 207 < http://jswhr.com/journals/jswhr/Vol_2_No_1_March_2014/12.pdf > accessed November 20, 2017.

5 M. Jamil Khan and Md. Sanaul Islam Tipu, "Children's Involvement in Crime on the Rise" *Dhaka Tribune* (October 1, 2016) <https://www.dhakatribune.com/bangladesh/2016/10/01/childrens-involvement-crime-rise/> accessed January 20, 2018.

6 Sakib Hasan, "Horrifying Trend of Juvenile Delinquency" The Independent (October 7, 2017) <http://www.theindependentbd.com/arcprint/details/117490/2017-10-07> accessed January 1, 2018.

7 Abdur Rahman Chowdhury, *ibid* 62.

8 Nahid Ferdousi, "Best Practice in the Institutional Treatment of Juvenile Delinquents in Bangladesh: An Appraisal" (2014) 19 The Chittagong University Journal of Law 75.

9 15 MLR 59-83.

10 [2007] 59 DLR 72(HCD).

Ministry of Law, Justice and Parliamentary Affairs and others[11], where the Government was directed to make necessary reformation in the Children Act following the required standard provided by the UN Convention on the Rights of the children (CRC) 1989.[12] It was also directed to take adequate measures for imparting training to all concerned including the judges to ensure the implementation process of all the provisions of the CRC, which were beneficial to children and also to minimize the anomalous situations which arise when dealing with children. Accepting the recommendation of the law jurists and following the directions of the constituent courts, the Children Act in 2013 has been introduced in Bangladesh to cover all the aspects and ensure the protection of the children and provided a comprehensive legislation for the better treatment under the criminal justice system dealing with juvenile delinquency in Bangladesh. Besides, others laws regarding juvenile delinquency formed a treatment system under the criminal justice system to deal with the juvenile delinquents beyond the traditional legal procedures applied to the adults. It is recommended that the treatment of the juvenile delinquency and development of the criminal justice system must be considered as one of the target to be achieved for the better treatment system under the criminal; justice system in Bangladesh.

Objectives of the study

The general objective of this paper is to analyse and obtain an overview of the treatment system of juvenile delinquents under the criminal justice system in Bangladesh. Besides, the specific objectives of this study are to investigate the existing informal mechanisms for the treatment of juvenile delinquencies outside the formal criminal justice system, explore the knowledge about the International Laws providing the international standard for the ideal juvenile justice system for all member states, explore the knowledge about the National Laws operating the juvenile justice system, and obtain an overview on the provisions regarding the current judicial treatment provided for the juvenile delinquency in Bangladesh.

Methodology

This study is depended on information that is obtained from primary and secondary sources of data. Primary data has been collected from the National Legislation i.e. the Children Act of 2013, the Code of Criminal Procedure 1898, the Penal Code 1860 etc and relevant judgments of the constituent courts of Bangladesh.

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11 29 BLD 656 (HCD).

12 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 Sept. 1990) 1577 UNTS 3 (CRC).

Besides, secondary data has been collected from the websites, books, commentary, newspaper journals, etc. relating to the juvenile delinquency in Bangladesh perspective. This paper is mainly based on the qualitative study for exploring relevant knowledge and to fulfil the objectives of this study.

Limitation of the Study

In case of collecting data from secondary sources like books, websites, and journal, there are always some queries and confusion regarding the authentication of sources as the same data sometimes held by different references in different times and places. During this study same type of problem had been faced at the time of collecting data from different books, journals and web links etc. This was a basic and common limitation of this study.

The findings of the current study might not be used in case of representing the existing scenario regarding the implementation of the provisions of the new Children Act in reality as it was not conducted in any reliable scientific method on any specific area and time. It was a highlighted limitation for this study.

Significance of the Study

This paper provides the information about the different significant aspects of the juvenile justice system operated by the National Legislation according to the standard of International Laws regarding the treatment of juvenile delinquency under the criminal justice system in Bangladesh. mechanism of ascertaining age, establishing separate juvenile courts, provide separate charge and trial system, specific provisions relating probation officer, child friendly police officer, alternative care, diversion methods, restriction on punishment and detention of child delinquents and other matter relating to the protection of the rights of the children in contact or conflict with the law are discussed in this article in the light of law provisions with famous case analysis which will be really helpful for the future study on juvenile justice system in Bangladesh.

Conceptual Framework

Concept of Juvenile and delinquency in Bangladesh

In Bangladesh, it is assumed that the Juvenile is in the matured stages of the child who will be attended the maturity age soon. There are differences among

child, adolescent, and juvenile where a child is only the first stage of childhood and does not understand anything happening besides it.[13]

Ahmed also referred that nine years in case of female and twelve years in case of the male are called adolescent.[14] Thus, the juvenile who already attained the age of thirteen but yet to attain the age of eighteen is called the juvenile.

The Children Act of 2013 declares the age of a child is below 18 years[15] where about half of the population of this country are under the age of 18 who are considered as children.

Age of Criminal Responsibility of juvenile delinquents in Bangladesh

The age of criminal responsibility of juvenile delinquents was not fixed before 2013. A juvenile is a child or young who under the respective legal systems should be dealt with for an offence in a manner which is different from that of an adult. Juvenile delinquency known as juvenile offending, or youth crime, is the subject of the participation in illegal behavior by juveniles.[16] Again, the age of the criminal liabilities of the children is not distinctively determined by different laws. The Penal Code of 1860 declares that nothing is an offence done by a child below the age of 9 years of age.[17] Furthermore, the code declares that nothing is done by a child of above 9 years and below 12 years, is an offence if he has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct of that occasion.[18] In the case of *State* v. *Secretary, Ministry of Home Affairs*,[19] the court declared that any police should not arrest a child below the age of nine years since that child would be immune from prosecution. For these solid reasons it can be said that the juvenile delinquent in Bangladesh is an offender of 12-16 year boy or girl in every case and where the child can understand the nature and consequences his/her act.

The Second United Nations Congress on the Prevention of Crime and Treatment of Offenders (1960)[20] states, "Juvenile delinquency should be

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13 Rizvi Ahmad, "Juvenile Delinquency and Justice System," *Theory and practice of criminology Bangladesh perspective* (2nd edn, Titu Publication 2017)162, 163.

14 Md. Tajul Islam, "Juvenile Delinquency in Bangladesh: Identifying the Causes with Reference to Some Case Studies" (2015) 2 Law Journal Bangladesh <http://www.lawjournalbd.com/2015/02/juvenile-delinquency-in-bangladesh-identifying-the-causes-with-reference-to-some-case-studies/> accessed December 29, 2017.

15 The Children Act, 2013(CA, 2013), s. 4.

16 Ahmad (n 13) 163.

17 The Penal Code of 1860(PC, 1860), s. 82.

18 PC 1860,s 83.

19 16 MLR (HCD) 254.

20 The United Nations Congress on Crime Prevention and Criminal Justice is a United Nations congress on crime and criminal justice, held every five years which is organized by the United Nations Office on Drugs and Crime (UNODC) with the aim of strengthening international cooperation against expanding crime.

understood by the commission of an act which, if committed by an adult, would be considered a crime."

History of the juvenile justice system in Bangladesh

The Juvenile Justice System was first introduced in Bangladesh by the British rulers. The concept of a separate trial for children and adults were first introduced in the Bengal Code and Prisons Act 1864. The Reformatory Schools Act 1897 provided a guideline for the reformation of juvenile delinquents. Later the Bengal Children Act 1922 provided the provisions that the trial of the juvenile must be dealt with by the juvenile court. Afterward, in independent Bangladesh, some Articles of the Constitution of the People's Republic of Bangladesh 1972 including some laws were made to deal with the issues about the juvenile delinquency.[21]

Treatment of juvenile delinquency under the criminal justice system in Bangladesh

According to the Cambridge Dictionary, "Treatment" means the way to deal with or behave towards someone or the way something is considered and examined. In medical language, "Treatment" is the using any means or exercise to cure a person of an illness or injury. Again, treatment is a process of putting a special substance on something or putting it through a special process in order to change its condition. Here, treatment of juvenile delinquency under the criminal justice system means the institutional and non-institutional arrangements provided to the juvenile delinquents as an alternative system other than the formal criminal justice system of the adults with the opportunities of rehabilitation and reintegration in the society for purpose of changing his internal and external behaviours.

The criminal justice system is like the social institutions always concerned with prevention, investigation, prosecution and punishment of offenders and offences where the principal objective is to control crime, punish the offender, prevent crimes, protect innocents and maintain social unity and stability.[22] The concerned institutions and stakeholders have the duty to utilize all the remedial, educational, moral, religious and other forces and forms of assistances which are appropriate and available, and should seek to apply them according to the individual treatments needs to the juvenile delinquents other than the treatment provided by the traditional criminal justice system provided for the adult delinquency in Bangladesh.

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21 Ahmad (n. 13) 186.

22 H M Fazlul Bari, "An Appraisal of Sentences in Bangladesh: Between Conviction and Punishment" (2014) 14 Bangladesh Journal of Law 92.

Findings and Discussion

This study has found that the juvenile delinquents are the subject of special treatment different from the adult delinquents under the criminal justice system in Bangladesh. The juvenile justice system of Bangladesh, framed on the standards of the International Laws provided by the Beijing Rules, the Riyadh Guidelines, and the UNCRC, formed the existing informal mechanisms for the treatment of juvenile delinquencies outside the formal criminal justice system. As a member of the international community, Bangladesh has adopted maximum provisions of the international laws relating juvenile delinquency. There are several criminal laws to deal with the juveniles but the Children Act 2013 is the comprehensive legislation that framed on the ideal standards of the Beijing Rules, the Riyadh Guidelines, and UNCRC to provide special, alternative and diversionary treatment system to deal with the juvenile delinquents. However, the juvenile justice system is still in its infancy to protect the legal interests of the juvenile delinquents because of the minimal use and implementation of the act through poor justice administration system. Moreover, the absence of the modern children policy, governing rules, and a separate procedural law regarding the implementation of the Children Act has made the system slow and weak.

Treatment under International legal framework applicable for the juvenile delinquents in Bangladesh

Considering the frequent juvenile delinquency, a lot of international Rules, Convention and Guidelines designed for establishing an ideal model of the juvenile justice system for ensuring the legal rights of the children coming into contact or in conflict with the law. The United Nation has taken a number of initiatives for setting the standards for treatment of children who come into conflict with the law. They also set an idea of administration of juvenile justice. Such as:

The Beijing Rules 1985[23] clearly provide for a separate and specialized system of juvenile justice which does not encourage capital and corporal punishment for the children but guarantees the children right to participate in the legal proceedings and ensures their education and care during detention. These rules give directions to the courts to exercise its discretion in the best interest of the children.

Riyadh Guidelines 1990- The UN Guidelines give more emphasis on the integrated and comprehensive plan and effectiveness of institutional crime

[23] The Beijing Rules is a resolution of the United Nations General Assembly regarding the treatment of juvenile prisoners and offenders in its member nations. It is also called the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

control agencies so that the juveniles will be prevented from committing the crime.

The Convention on the Rights of the Child (UNCRC) 1989[24] is a comprehensive international document, which set a standard for the state parties when the children come into conflict with the law. As per the Convention state parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment.[25]

The Convention requires the authorities, public or private social welfare institutions, Court of law, administrative authorities or legislative bodies taking actions against the children must ensure the best possible welfare of the children.[26]

Article 37 and 40 of the CRC make clear about the treatment of children in conflict with the law set elaborate procedures to be followed to deal with a juvenile. According to the article 37 of the CRC, state parties shall ensure that child under 18:

i. Shall not be subject of torture or other cruel, inhuman, degrading treatment or neither capital nor life imprisonment punishment;

ii. Shall not be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment shall be in conformity with the law and humanity;

iii. Shall be treated without humanity and the inherent dignity;

iv. Shall not be jointly tried in any trial with adult and shall have the right to maintain contact with his/her family through correspondence and visits;

v. Shall have the right to challenge the legality of the deprivation of his/her liberty before the Court or other components.

According to the article 40 of the UNCRC (1989), state parties shall ensure that no child shall be accused of having infringed the penal law by reason of acts or omissions. It also ensures that every such child has at least the following guarantees:

i. To be presumed innocent until proven guilty according to the law;

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[24] This United Nations Convention on Rights of the Child (UNCRC) is a legally-binding international agreement setting out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities. This obliges the member states to ensure a separate judicial treatment system for the juvenile delinquents with the options of the reformation and reintegration with the society.

[25] The UNCRC 1989(CRC 1989), Art-2.

[26] CRC 1989, Art -3.

ii. To be informed promptly and directly through his/her parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his defence;

iii. To have the matter determined without delay by fair hearing according to the law, in the presence of legal or other appropriate assistance for the best interest of the child;

iv. Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses;

v. If considered to have infringed the penal law, to have this decision reviewed by a higher impartial authority or judicial body according to law;

vi. To have the free assistance of an interpreter if the child cannot understand or speak the language used;

vii. To have his/her privacy fully respected at all stage of the proceedings.

In accordance with the said article, the state parties shall:

- promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children alleged as having infringed the penal law;
- fix a standard of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- ensure the availability of a variety of dispositions such as care, guidance, supervision orders, counselling, probation, foster care, education, vocational training programs and other alternatives to institutional care necessary to the children.

The condition of the treatment of juvenile delinquents under the criminal justice system is complex in its practical application. Because, the situation of Bangladesh concerning domestic application of international law is characterized by lack of case laws, vagueness of constitutional and statutory provisions and unwillingness of the stockholders of the constituent institutes to refer the global instruments.[27] However, the above mentioned standard minimum Rules, the Convention, the UN Guidelines provide the rights of the children, best possible welfare of the children, who come in conflict with the law and the administration of juvenile justice. They also persuade that the aim of the juvenile justice system should be to protect the rights of the children who come into conflict with the law and their reintegration into their societies. The international instruments require that the deprivation of liberty should be utilized as a last resort and there ought also to be sufficient alternative measures for the rehabilitation of the juveniles. In Bangladesh, maximum of

[27] Amran Ahmed and Arif Hossain, "Human Rights Law: Implementation Mechanisms," *Governance and International Human Rights Law* (2016) 147.

these standard provided by the international legislations are adopted by Bangladesh to establish a child-friendly judicial system for the juvenile in Bangladesh. Following the Beijing Rules 1985, the UNCRC 1989 and the directions of the constituent courts Bangladesh has reserved the option of a separate and special system for the juveniles in the principal legislation i.e. the Penal Code 1860 and the Code of Criminal Procedure 1898 and reformed the Children Laws by introducing the Children Act 2013. Those standards also reflected in the National Children Policy 2011. However, the remaining part of the standards should be added to the laws for the better administrative treatments of juvenile under the justice system in Bangladesh.

Treatment under the National legal framework regarding the juvenile delinquents

There are more than 32 children related laws in Bangladesh among which 8 laws are directly related to the children issues, juvenile delinquency, diversion measures, and the juvenile justice system. These law are – (1) The Penal Code, 1860; (2) The Child Marriage Restraint Act, 1929; (3) The Children (Pleading of Labour) act, 1933; (4) The Suppression of Immoral Traffic Act, 1933; (5) The Vagrancy Act, 1943; (6) The Compulsory Primary Education Act, 2013; (7) The Children Act, 2013 (8) The Constitution of the People's Republic of Bangladesh.[28] Besides these, there are more laws to cover the juvenile matters. The Court of Wards (Amendment) Act 2006; protect the property rights of the orphaned child until it attained the age of 18. The Anti-women and Children Oppression (Amendment) Act, 2003 provides the protection to the children less than 16 years of ages against all sorts of oppression. But, among all of these laws, the Children Act 2013 is the comprehensive legislation, which deals with child rights, delinquent and uncontrollable children, their correction, diversion and most importantly the friendly juvenile justice system different from the justice system regarding adults in Bangladesh.

1. Treatment of Juvenile Delinquency under the Bangladesh Constitution: the supreme law of the land

The Constitution of the People's Republic of Bangladesh 1972 is the supreme law to govern the fundamental rights of the citizen of Bangladesh. The State has been directed to make special provisions in favor of women and children or other backward section of the citizens.[29] Besides, Article 31, 32 and 35 (3) of the Constitution has given the guarantees regarding the fundamental rights to life, personal liberty, equal protection of the law, protection against

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[28] Sheikh Hafizur Rahman Karzon, "Juvenile delinquency and justice system," Criminology, *criminal justice victimology and restorative justice* (Hira publication 2016) 391.

[29] The Constitution of the People's Republic of Bangladesh 1972, Art 28 (4).

arbitrary arrest and to speedy and fair trial always applicable on all citizens including the juvenile.

2. Treatment of Juvenile Delinquency under the Code of Criminal Procedure: a separate trial system for juvenile

A. Separate Trial System for the Juvenile Delinquents:

The criminal Procedure code 1898 provides the provisions of a separate trial system for the juvenile. According to this section, the trial of the children must be dealt with by the juvenile courts separately from the adults. Moreover, if any offences other that one punishable with death or transportation for life committed by any person who at the date when appears or is brought before the court is under 15 years of age, may be tried by i) Chief Judicial Magistrate, ii) Chief Metropolitan Magistrate or iii) by any Magistrate specially empowered by the Government to exercise the powers conferred by any law providing for the custody, trial or punishment of juvenile or youthful offenders.[30]

It should be noted that the objective of section 29B was not to seize the jurisdiction of the Magistrate conferred by the section 28 and eighth column of the second schedule of Code of Criminal Procedure 1898. Its objective was to extend the jurisdiction of trying certain cases relating juvenile delinquency from the court of sessions to the Court of Magistrates.[31]

B. Lesser inflicting punishment than the adult delinquents

Section 392 provides the treatment regarding the mode of inflicting punishment by whipping to the juvenile delinquent under the age of sixteen. Under subsection 2 provides that such punishment shall not exceed 30 strips, but the punishment for the juvenile offender, less than 16 years of age under this section; shall not be the subject of the criminal justice system.[32]

C. Confinement of juvenile offender in reformation system

Section 399 deals with the confinement of juvenile offender in reformation system. This section provides that if any person under fifteen years of age is sentenced by any criminal court to imprisonment for any offence the court may direct that such person, instead of being imprisoned

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30 The Criminal Procedure Code 1898(CrPC, 1898), s.29B.

31 AIR 1936 AII 675.

32 CrPC 1898, s. 392.

in a criminal jail, shall be confined in any reformatory established by the Government as a fit place for confinement.[33]

D. Releasing Juvenile Delinquents on Bail

Section 497(1) provides the provisions when bail may be taken in case of non-bailable offence. It is provided in the section that the Court may direct that any person, if arrested or detained without warrant by an officer in charge of a police station, or appears or brought before a Court for being an accused of a non-bailable offence is under the age of sixteen years be released on bail unless the charge brought against him is punishable with death or life imprisonment.[34]

In the case of *Abdul Motaleb,*[35] it was observed that no person shall be released on bail unless fulfilling the condition of section 497 of the Code of Criminal Procedure 1989.

The High Court Division also directed in the case of *K.M Obaidur Rahman,*[36] that an accused might not be released on bail if the court had reasonable grounds to believe that the allegation of such offence which was punishable with the death penalty or imprisonment for life.

3. Treatment of Juvenile Delinquency under the Penal Code 1860: regarding juvenile criminal responsibility

The Penal Code 1860 has fixed the age of criminal responsibility above 9 years of age to ensure protection to the children below 9 years of age from any judicial proceedings so that they may be exempted from criminal liability for any crime done by them. According to the Code of 1860, a child below the age of 9 years is protected from any action against his offence either committed or not.[37] Again, if a child between 9 years and 12 years of age is to be convicted of an offence, it must be proved that he has sufficient maturity of understanding to judge the nature and consequences of the act done.[38] This old provision was reflected in the judgment of the case of *Kalu alias Abdul Majid,*[39] where the court observed that nothing would be the offence if had done by a child above 7 and below 12 years. Later, the age of child fixed as above 9 years below 12 years.[40]

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33 CrPC 1898, s. 399.

34 CrPC 1898, S 497(1).

35 27 DLR 665.

36 10 BLD 9 (HCD) 137.

37 The Penal Code 1860(PC 1860), s 82.

38 PC 1860, s 83.

39 31 DLR(1979) 101.

40 Substituted in penal code 1860 by the Amendment Act No. 24 of 2004.

In the case of *Md. Roushan Mondal*,[41] the Court directed that if a child above 9 years and below 14 years of age who was not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct would be exempted from criminal liability under the shade of section 83 of the Penal Code 1860.

4. Treatment of Juvenile Delinquency under the Bengal Jail Code and Prison Act 1894: provided a separate jail system

The Bengal Jail Code and Prison Act 1894 provided a separate jail system for the juvenile. This Act provided the provisions of the separation of children or juvenile offender from adults in jails. According to this Act, the prisoners who have not arrived at the age of puberty shall be separated from the adult prisoners in jail.[42]

5. Treatment of Juvenile Delinquent under the vagrancy Act: providing a provision of vagrant child

The Vagrancy Act 1943 provided provisions regarding the vagrant child who is found in public asking for alms or involved with anything defined under this act as vagrancy. The arrest of such children and the threat of its use to extort bribes from those children appear to be arbitrary under this act.

6. Treatment of Juvenile Delinquents under the Children Act, 2013: principle legislation to deal with the children comes in contact or conflict with the law

Bangladesh has enacted new legislation in 2013 for the benefit of the juvenile involved with delinquency, repealing the Children Act of 1974, for the purpose of implementing the United Nations Convention on the Rights of the Child. The new provisions essentially reflect some of the provisions of the Convention on the Rights of the Child (CRC). In addition, it seems, some provisions have been incorporated in response to directions of the Supreme Court as well as the requirements of other international instruments such as the Beijing Rules.[43] The legislation, procedures provisions, institutions and bodies focusing on the juvenile or children who come into conflict with the law. In Bangladesh, the children act of 2013 is the principal law on children and its deals with both children in conflict with law and children in need of protection, often with a lack of differentiation between these two groups. Bangladesh has tried to establish a comprehensive juvenile justice system that

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41 [2007] 59 DLR (HCD) 72.

42 The Bengal Jail Code and Prison Act 1894, s. 27(2)

43 The Beijing Rules is a resolution of the United Nations General Assembly regarding the treatment of juvenile prisoners and offenders in its member nations. It is also called the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

ensures children are separated and treated differently from adults at all stages of criminal proceedings.

6.1 Separate Court for the Juvenile Delinquents

In the case of *Bangladesh Aid and service Trust*,[44] the learned court observed that children entitled to the trial before the Juvenile Court should not be tried jointly with the adults. Later, it was observed in the case of *Minnat All*[45] that no court should be tried any case where any children were involved and only the competent Juvenile Court established under the Children Act 2013 will be tried the case of juvenile delinquents. According to the children act 2013 and also the code of criminal procedure, 1898 children can only be tried in the juvenile courts and no joint trial can be held with the adult.

Section 16 of the Act empowers the Government to establish juvenile courts and in absence of juvenile court, the following court shall be empowered to work as juvenile court:

i. High Court Division.
ii. Sessions Court.
iii. Additional Sessions Court.

Again, the Juvenile court shall have the following powers:[46]

i. It shall have the power to try any case in which a child is charged with the commission of an offence.

ii. It shall deal with or dispose of any other proceedings under this act.

So, a separate court system for the juvenile delinquents has been formed under the criminal justice system in Bangladesh. There are some basic differences between the ordinary criminal court and the juvenile court[47] as follows:

i. There are two parties in the trial of Criminal Court; on the other hand, there is one party in the hearing of the Juvenile Court;

ii. Purpose of the trial of Criminal Court is to determine whether the accused committed the crime. On the other hand, the purpose of hearing of Juvenile Court to determine whether the youth is delinquent and the general condition and the character of the youth;

iii. Limited procedure are maintained in Criminal Court for securing information regarding the character of the accused, on the other hand in

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44 57 DLR [2005] 11.

45 22 BIT [2014] HCD 314.

46 CA 2013, s. 17.

47 Ahmad (n 13) 200.

Juvenile Court an elaborate procedure are maintained for securing information regarding the character of the accused juvenile;

iv. in ordinary criminal court the correctional methods in a specific case determined not by the needs of the particular individual by the possibilities of using such methods within the same works of specific deterrence and deference, on the other hand such information is the basis on which the decision is made by the Juvenile Court.

6.2 Providing a mechanism to ascertain the age of the juvenile delinquents

In the previous law, there was no specific mechanism for determining the age of juvenile delinquents. Now the Children act 2013 provides the definition[48] in compliance to the UNCRC, 1989 to fulfil the demands of time for the benefit of the children conflict in the law.

In the case of *Roushan Mondal*,[49] it was decided that the date of committing the offence would be considered as the relevant date of cause of action as well as for the determination of the age of the accused which has been subsequently adopted in section 20 of the Children Act 2013. Later, some necessary directions found in the case of *Mehedy Hasan.*[50] In this case the court directed that the ascertaining the age of a child is a mandatory and the age of the offender to be determined at the earlier date by the court if the person brought before it is a child and no doctor, medical expert and radiological or bone ossification report would be required to do so.

Section 44 has provided the minimum standard of determining the age. According to this section, if any child is arrested, the arresting police officer shall determine the age by checking birth certificate, school certificate, document submitted for the admission in school or other documents relating date of birth for the purpose of the case and immediately inform the Child Affairs Police Officer about the detail reasons of such arrest.

6.3 Liberal procedures relating Arrest, Detention, Bail, and Discharge of Juvenile delinquents

Appellate Division of the Supreme Court of Bangladesh declared any arrest of a child less than 9 years of age under any circumstances, or even to detain under any law for preventive detention as illegal.[51]

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48 According to the section 4 of the Children Act 2013 and the Article 1 of the UNCRC define a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.

49 [2007] 59 DLR (HCD) 72.

50 [2014] 66 DLR AD 111.

51 [2016] 8 SCOB AD 83.

The Act 2013 has specifically prohibited the arrest below the age of 9 years under any circumstances.[52] Again, section 44(2) provides that no child shall be arrested or detained under any law relating to preventive detention. If it is established by the police that an offender is a child who is nine years or above or is between nine and twelve years and has the capacity to understand the nature and consequences its actions, the police, if it has reasonable doubt that the child has committed or is involved in the offence, may arrest the child. The Children Act sets out the appropriate procedures that need to be followed after the arrest of the child. The Act does not contain all relevant pre-arrest procedural safeguards. Thus, the Children Act is silent on a number of issues which are recognized internationally to be guaranteed for all persons and for which the CRC makes special provision.

In the case of *Metropolitan Police Commissioner, Khulna*,[53] the concern court observed that, if a child is arrested, he should be released on bail and may be detained only as a last resort, the parents must be informed about the arrest without delay about such arrest and a probation officer must be appointed immediately to ensure that the child is released to a favorable environment. If the child is detained, the police and the court must ensure that the child will be held in a remand centre or other place of safety.

According to the Code of Criminal Procedure (1898), the child offenders could be granted bail by the Court.[54] The section 52 of the Children Act, 2013 has incorporated this provision and provides that notwithstanding anything contained in any other law or the Code of Criminal Procedure, if the case of any child is not dealt with by way of diversion, the court may release the child on bail with or without surety. Bail may be granted on the bond of the child troubled or of the child's parents, the other guardian or family members, or probation Officer or any institute or association whom the court thinks fit, with or without surety. In cases where the child is not released on bail, the Children's Court must give its reasons for refusing bail.

6.4 Separate Charge Sheet and Trial Procedure for Juvenile Delinquents with different court

It was observed in the case of *State* v. *Md. Akabbar Hossain*,[55] that, no child shall be charged with, or tried for any offence together with the adult. The same demand had found in the observation by the court in the case *Bangladesh Aid and service Trust* v. *Bangladesh and others*.[56] In this case environment, it was directed that if children are entailed to the trial before the

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52 CA 2013, s 43.

53 [2008] 60 DLR 660.

54 CrPC 1898, s 497.

55 [2014] 19 BLC 762 HCD.

56 [2005] 57 DLR 11.

juvenile courts according to the section of 53 of the Children Act of 1974[57] then they must not be tried jointly with the adults. Subsequently, it was observed by the High Court Division in the case of *Md. Akabbar Hossain*,[58] that no child should be charged with, or tried for any offence together with an adult. The Appellate Division of the Supreme Court of Bangladesh also nourished about the separate trial procedure in the case of *Bangladesh & others* v. *Blast & others*,[59] regarding the Article 10 and 14(4) of the International Covenant on Civil and Political Rights of 1966, General Assembly resolution 2200A (XXI) of 1966. The Convention paying attention in the Article 10 that the accused juvenile should be separated from the adult and brought as speedily as possible for adjudication and be accorded treatment appropriate to their age and legal status. It also provided in the Article 14 (4) of the Convention that the age and rehabilitation should be considered in the case of juvenile or child below 18 years. The procedure and mode of a trial are laid down in 17-30 to set the juvenile justice system totally different from the usual criminal justice system. Section 17(2) of the Act forbids the joint trial of a juvenile and an adult where any criminal court found any juvenile charged for any offence with the adult person. Again, though under the section 239 of the Code of Criminal Procedure the joint charge of the persons accused in the same transaction is allowed, section 15 of the Children Act 2013 provides the exception in this regards. If any court fails to comply with this section and tries any juvenile along with adult person, it shall be the violation of Children Act and also beyond his jurisdiction.

6.5 Bar on the punishment of Juvenile Delinquents under the Children Act, 2013

In the case of *Mehedy Hasan @ Modern (Md)* v. *State*,[60] it is recommended that if a child offender or juvenile delinquents must be dealt with in accordance with the provision of the Act, no matter how serious or heinous the offence might be. Section 33(1) and 34 provides in the Act that no child shall be sentenced to death, transportation, or imprisonment unless the court is of the opinion that the crime committed is of so serious in nature or the child is so unruly or depraved that he cannot be committed to the certified instituted, the child can be sentenced to imprisonment that may extend from 3 years to 10 years. Again, a youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners.[61]

The following factors those have to be taken into consideration by the court while passing any order under the Children Act:[62]

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57 Repealed by the Children Act 2013.

58 [2005] 57 DLR 11.

59 [2016] 8 SCOB 83 AD.

60 [2014] 66 DLR AD 111.

61 The Children Act 2013(CA 2013), s 33(2).

62 CA 2013, s. 30.

i. The character and age of the child.
ii. The circumstances in which the child is living.
iii. The report made by the probation officer.
iv. Such other matters required to be taken into consideration in the interest of the child.

Section 43 provides that when a child is found to have committed any offence terms 'conviction' or 'sentence' cannot be used. The fact is that if a child has been found guilty shall not operate as a disqualification for any office, employment or election under any law. Besides, the convicted juvenile has the right to file appeal or revision within 60 working days from the date of conviction.[63] Again, that the court may discharge any young offender after due admission, release on probation of good conduct or commit a child to the care of a fit person executing a bond with or without sureties.[64] For the protection of the beautiful future, the criminal justice system is liberal in awarding punishment to the juvenile delinquents who is on or below the tender-age. Here, justice will be met if the court considers the mitigating factors before awarding punishment and sentences the accused person of tender age with liberal or lesser punishment i.e. life imprisonment and fine in place of the death sentence.[65]

6.6 Probation, Diversion, and Rehabilitation for the juvenile delinquents: Special alternative treatment under the justice system

The state providing a special alternative treatment system under the criminal justice system where the Government or even the Juvenile Court may appoint probation officer from among suitable person in the district, if there no probation officer in that area and may appoint a probation officer for a particular juvenile.[66] The duties of a probation officer shall be supervised by the juvenile court and where no court exists, the court of Sessions. The duties of a probation officer include:[67]

i. Visiting or receive a visit from the child at reasonable intervals;
ii. See that the conditions of bond are fulfilled;
iii. Report to the court as to the behavior of the child;
iv. Advice, assist and befriend the child and where necessary endeavor to find him suitable employment;
v. Perform any other duty which may be prescribed by the law.

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63 CA 2013, s. 41.
64 CA 2013, ss. 34 and 35.
65 [2015] 4 SCOB 171 [HCD].
66 CA 2013, s. 5.
67 CA 2013, s. 6.

The case of *State* v. *Metropolitan Police Commissioner, Khulna, and Others (660)*[68] gave directions about the diversionary measures. As per the direction the state had to make provision for the diversion of child offenders to be placed in the environment where the child might have been guided in more favorable touch with a family either with relatives or foster family etc. beyond the formal placement in jail custody or government certified correctional institution (safe home). This present act provided with a diversionary measure for the child in conflict with the law to give a better justice regarding the juvenile offenders which is provided instead of any legal proceeding against a child under the complex formal justice system[69] (Ali, 2013, p.21).

The Children Act provides for a number of alternative measures instead of confining juvenile in the remand home; place of safety or in development centre. At the first instance, the officer of the police station can release a juvenile on bail. The Act also gives responsibility on the Court and it has exercised its jurisdiction judiciously. A Court may, if it thinks fit, instead of directing any youthful offender to be detained in a certified institute, order him to be (i) discharge after due admonition; (ii) released on probation of good conduct and committed to the care of his parent, guardian or other adult relative or any other fit person on such parent, guardian, relative or a person executing a bond with or without sureties, as the Court may require to be responsible for the good behavior of the youthful offender for any period not exceeding three years and the Court may also order that the youthful offender be placed under the supervision of a probation officer. If it appears to the Court on receiving a report from the probation officer or otherwise that the youthful offender has not been of good behavior during the period of probation, it may, after making such inquiry as it deems fit, order the youthful offender to be detained in a certified institute for the unexpired period of probation.[70]

6.7 Child Affairs Desk and Child Affairs Police Officer (CAPO): Child-Friendly Police officer in every police station

In the case of the *State* v. *Secretary, Ministry of Law, Justice and Parliamentary affairs*,[71] the High Court Division recommended to establish special police cell and appoint Child Affairs Police Officer in every police station. Section 13 of this act of 2013 provides a provision of Child Affairs Desk for every police station to deal the matters regarding the child who is accused, arrested or taken into the station for suspecting of infringing any provision of law. This desk shall be headed by the Child Affairs Police Officer (CAPO), not below the rank of Sub-inspector (SI), has the duties to maintain

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68 [2008] 60 DLR 660.

69 Imman Ali, "The Children Act 2013: A Commentary by Justice Imman Ali," (2013) BLAST and PRI 21.

70 The Children Act 2013, ss. 48 and 84.

71 29 BLD 656 (HCD).

separate files and registers for the cases involving children, inform the Probation Officer, parents or guardian of the concerned child to meet the basic needs, determine age, maintain birth certificate and school records of that child, take diversionary measure and assess the option relating to bail and submit separate Charge Sheet to the concern court.

6.8 Child Welfare Boards for integration and rehabilitation of the Juvenile Delinquents

The Children Act 2013 provides that there will be Child Welfare Boards in District and Upazila including at national level to formulate policy, strategy and implementation plan for integration and rehabilitation of the Juvenile Delinquents. Section 7 of the act entrusted the responsibility on the Board to monitor, coordinate, review and evaluate the activities of the Child Development Centers (CDC) and of certified institutions, provide guidelines regarding rehabilitation and reintegration into family and social life of disadvantaged children and those children in contact or in conflict with law, advice regarding the development and implementation of plans regarding those children.

6.9 Settlements of Disputes between the juvenile and the victim

Section 37 of the new Act provides that if any child has committed an offence of lesser gravity the probation officer will take necessary steps as per the direction of the court to settle the a dispute between the victim and the child who has committed the offence and the court passes orders thereto.[72]

6.10 Steps taken for strengthening the treatment system of juvenile delinquents under the non-judicial procedure in Bangladesh

The Government of Bangladesh has passed a number of laws and undertakes initiatives for meaning effective operation which has been intensified and taking with all seriousness concerning the children. The National Children Policy (NCP), 2011 is the second national policy concerning the children in Bangladesh. Section 2 of the NCP 2011defines the child as the person under the age of 18. Besides, legislation has also defined the child less than 18 years of age, e.g. Domestic Violence act 2011, Prevention of Trafficking Act 2011, and Vagrancy Act, 2011. Through the policy 2011, the State ensures that all necessary steps will be taken to protect children from all forms of violence, begging or physical, mental or sexual torture. This NCP 2011 has given priority to all types of children including child laborer and ensured their rights of getting suitable working environment, financial progress, educational and recreation facilities with incentive caring.[73]

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72 Ali, 2013, p.19.

73 Najrana Imaan, "Justice for Children in Bangladesh: An Analysis of Recent Cases" (December 2012) Save the Children Bangladesh 5.

According to the children Act 2013 the Government declares its followings mandate to do:

- Establishing of Juvenile development centres and certified institution for the accommodation, reformation and development purposes.[74]
- Permit any person, institution or organization to fulfil the above purposes.[75]
- All government and private establishments shall supply information to the Department of Social Welfare within 15th day of every month.[76]
- The government or a representative empowered by it and the Director General of the Department or any other person or organization authorized by him in this behalf may inspect any certified institute for the purpose of collecting information for any official or special purpose, and may on the basis of such information advise the government.[77]
- When a child is sent to a certified institute or handed over to any person, that institute or person shall act as the child's parent and shall be responsible to ensure his safety, care and development, and shall keep the child in his custody for the period specified by the Children's Court or by the Board or any other court even though the child's parents or any other person may claim his custody.[78]
- Government shall monitor the certified institutes those are mandated to protect the best interest of every child staying there and to ensure their proper behaviour and appropriate education including vocational training.[79]

The Beijing Rules 1985 clearly provide for a separate and specialized system of juvenile justice which guarantees the children right to get their education and care during detention. Riyadh Guidelines 1990 give more emphasis on the integrated and comprehensive plan and effectiveness of institutional crime control agencies so that the juveniles will be prevented from committing the crime. Again, the Convention on the Rights of the Child (UNCRC) 1989 set a standard for the state parties so that the states ensure the availability of a variety of dispositions such as care, guidance, supervision orders, counselling, probation, foster care, education, vocational training programs and other alternatives to institutional care necessary to the juvenile[80] for the best possible welfare of them.

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74 Children Act 2013(CA 2013), s 59(1) (2).

75 CA 2013, s: 60.

76 CA 2013, s: 62.

77 CA 2013, s: 64.

78 CA 2013, s: 68.

79 CA 2013, s: 63.

80 CRC 1898, art 40.

So, the government has established three correctional institutes according to the provisions of the International Conventions and the Children Act 2013, each of which is consisted of a juvenile Court, remand home and training institute namely:[81]

a) National Correctional Institute for boys at Tongi, Gazipur.
b) National Correctional Institute for girls at Konabari, Gazipur.
c) Correctional Institute for boys at Jessore.

Another correctional institute having similar program component is going to be established at kashimpur, Gazipur. Necessary facilities of the existing two unite located at Tongi and Jessore will also be increased for the accommodation of additional 350 inmates.

These institutes deal with the following programs:

Vocational Training Program for the juveniles: The purpose of the vocational training program of correctional institutes is to make them skilled so that after their release they can employ them in professional aspects. The institutes have the following program:[82]

Name of the Correctional Institutions	**National Correctional Institutes for boys, Tongi, Gazipur**	**Correctional Institutes for boys, Jessore**	**National Correctional Institutes for girls, Konabare, Gazipur**
Training Works	• Tailoring and Industrial Sewing • Automobile and welding • Electrical wiring • Wood works	• Automobile and welding • Electrical wiring • Electronics	• Tailoring and Industrial Sewing • Embroidery Electronics and poultry

Educational Program for the moral and inner quality development of juvenile delinquents:

Primary Education is compulsory, facilities for further education inside the centre are also provided to the concerned children. Religious education for the moral development of children is also provided there.[83]

Counselling for Correction and Rehabilitation of juvenile delinquents: Counselling and motivation for behavioral correction, psycho-social, human

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81 Monjur Kader and M. Muajjem Hussain, "Juvenile Delinquency," *Criminology* (4th edn, Books 4 U 2017) 177.

82 *Ibid* 178.

83 *Ibid* 178.

development, socialization and re-integration of the inmates are done by social caseworkers and probation officers through the following methods;[84]

i. Individual casework
ii. Group works and focus group discussions
iii. Motivation
iv. Parental guidance
v. Follow up

Recreational Activities for mental and physical development of juvenile delinquents:

Games (indoor and outdoor), Sports and physical exercise are daily events. The recreational activities are also provided regularly.

7. Limitation of the existing juvenile justice System in providing better treatment to the juvenile delinquents in Bangladesh

During conducting the study several legislations, case references, books, journals, newspapers, websites regarding juvenile delinquency have been reviewed with personal observation on the matter of juvenile delinquency and found the following aspects which may be identified as limitations of the juvenile justice system in Bangladesh:

i. No specific mechanism is found in any legislation regarding determination of the age of children of a disadvantaged group like street children, poor children and orphan children who do not go to school or have no birth certificate.[85] So, it is tough to determine the age of the juvenile offender who is from those disadvantaged group.

ii. The government has not taken any pre-preventive project-based strategy to reduce the trends of juvenile delinquency.[86]

iii. Lack of adequate training of the public officers, poor reporting system, separate lockup arrangement for the child, mechanism of monitoring and supervising the police conduct and child help desk in the police station are the causes that depriving the juvenile from getting special care and treatment from law enforcing agencies.

iv. An insufficient number of children courts, limited jurisdiction, conducting the procedure without camera trial, treated like adults by the courts, absence of child-friendly environment, unwillingness or negligence in the implementation of the law[87] etc made the justice system more complex

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84 *Ibid*, 179.

85 See section 20 and 21 of the children Act 2013.

86 There is no such program taken by the government to prevent or reduce the trends of juvenile delinquency in Bangladesh.

87 Nahid Ferdousi, "Best Practice in the Institutional Treatment of Juvenile Delinquents in Bangladesh: An Appraisal" (2014) 19 The Chittagong University Journal of Law 80.

and ineffective for providing a better judicial treatment to the juvenile delinquents.

v. Inadequate Child Development Center (CDC), shortage of human resource, budget,[88] and other support of CDCs are the limitations in rendering better treatment system for the quality development and rehabilitation of the juvenile delinquents and their reintegration into family and social life.

vi. There are lacks of facilities like lack of sufficient vocational training, lack of skilled trainer, officials made the correctional method system weaker.

vii. There is no specific rule and up-to-date policy that providing the appropriate mechanisms for the implementation of the legislation in Bangladesh. Many concepts like the diversion, family conference, alternative care and ADR etc cannot be implemented in reality in absent of the rules.

viii. There is no course as a part of study for the school level or any special course in any university or training institutions regarding the juveniles and juvenile delinquency. This is creating a huge knowledge gap between the ordinary people and the concerned entities of the justice system practicing in Bangladesh.

ix. There is no separate Code of Criminal Procedure and Penal law made only for the juvenile justice system.[89]

x. There is no Child Rights Commission has been established for lack of motivation and coordination between the laws and the involved institutes have made the whole implementation system slow and weak.

xi. Detained juvenile are often found below the age of criminal responsibility or found as a victim of circumstance caused by unfairness.

xii. It is reported that juvenile are found kept with adult prisoners from whom they may suffer abuse and be exposed to negative learning.

xiii. There is also limited knowledge of international standards for dealing with children at all phases of the system, which seriously affects the treatment of the juvenile delinquents.

xiv. There is no Child Rights Commission has been established in Bangladesh to monitor and protect the juvenile rights.

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88 Ferdousi, *ibid* 81.

89 Bangladesh government has not yet passed any special and separate Code of Criminal Procedure and Penal Law for establishing a separate and special justice system for the juvenile delinquents.

Recommendation and Conclusion

Bangladesh has tried to establish a comprehensive Juvenile Justice system to providing the best treatment to the juvenile delinquents under the shade of juvenile justice system. The Government has made efforts to put juvenile justice on agenda but much more initiatives need to be done. One of the major problems is the lack of knowledge about child rights by those in charge of or involved with the justice system, such as the police, judiciary, social welfare officers and probation officers. This results in many unpleasant violations of basic child rights. In many cases, the most fundamental principles of due process are violated. Arrest, detention and even sentencing are often arbitrary and sometimes even illegal. Physical abuse, force, and torture are applied during arrest and interrogation. Female's children are frequently sexually abused. Detained children are often found below the age of criminal responsibility and kept with adult prisoners from whom they may suffer abuse and be exposed to negative learning. There is also limited knowledge of international standards for dealing with children at all phases of the system, which seriously affects the treatment of the children in conflict with the law. However, theoretically, the treatment of the juvenile justice system of Bangladesh should be formed with a non-traditional criminal justice system which is the combination of the non-formal attributes with formal regulations and procedures to deal with the juvenile delinquents or child in conflict with the law. Hence, for the better and effective treatment for the juvenile delinquents the followings might be recommended for the future actions in Bangladesh:

i. There should be a pre-preventive government strategy program to keep the juveniles outside of the social evils like corruption and crimes.

ii. The mechanism of ascertaining the age of a juvenile should be more specific unless any juvenile may be punished as the adult in absence of the required mechanism.

iii. Sufficient number of Juvenile Courts with specific and complete jurisdiction, conducting the procedure with camera trial, separate judicial treatment different from the procedures applicable for the adults, and accountability in the implementation of the law etc must be ensured to make the justice system more reliable and effective for providing a better judicial treatment to the juvenile delinquents.

iv. Government and non- government institutions must jointly coordinate with the procedural and non-procedural aspects of the juvenile justice system to ensure effective implementation of the legal provisions.

v. Appointment of the CAPO in all the police station must be ensured to fulfil the objectives of the concerned Act.

vi. Adequate training of the public officers, poor reporting system, separate lockup arrangement for the child, mechanism of monitoring and

supervising the police conduct and child help desk in the police station should be ensured to provide the juvenile delinquents special care and treatment by law enforcing agencies.

vii. Required numbers of Safe Home and certified institution must be established for the placement of most of the juvenile delinquents. With the establishment of adequate number of Child Development Center (CDC), removing the shortage of human resource, budget, and other support of CDCs better treatment system may be ensured under the criminal justice system for the rehabilitation of the juvenile delinquents and their reintegration into family and social life

viii. Proper treatment and mechanism provided by this state must be ensured for the benefit of those children.

ix. The government should ensure the better arrangement to provide regular training and practical knowledge to increase the competency of the concerned professionals involved in the children justice system.

x. All the matters relating Juvenile delinquency should be introduced into any special course or included in the course curriculum of the educational institutes to increase the sincerity of the students, teachers and guardians on this matter.

xi. More study and more research should be encouraged to detect the problems of the treatment of juvenile delinquents under the criminal justice system which might be helpful for the legislature for the future amendment.

xii. Necessary rules and policy are urgently needed to be introduced for the implementation of the national and the international legislation regarding juvenile delinquency. Many concepts like a diversion, family conference, alternative care and ADR etc cannot be implemented in reality unless the necessary rules and policy regarding these matters have been passed.

xiii. The government should ensure the necessary arrangements to keep any juvenile offender separated from the adult prisoners from whom they may suffer abuse and be exposed to negative learning.

xiv. An independent and active Child Rights Commission should be established to ensure, protect the rights and interests of the juvenile coming into contact or in conflict with law

xv. The knowledge of the national laws and the international standards should be implemented for the better treatment to the juvenile delinquents at all phases of the system, which seriously affects the treatment of the juvenile delinquents.

However, considering the limitations, the criminal justice system has provided a comprehensive and unique treatment system for the juvenile delinquents in Bangladesh. The juvenile justice system has been reformed by adapting

alternative diversionary measures instead of the traditional complex justice system to protect the best interest of the children coming into contact or in conflict with the law. Here the system is a part of a traditional criminal justice system which consists of regulations and procedures to deal with a child in conflict with the law. The truth should be remembered that children, who becomes or comes into conflict with the law, do not do so of their own volition. A little circumspection would be revealing that they come into contact with the law due to actions or failure of adults around them[90]. Hence, the parents, society and the state need to be more concerned to take care of them with due responsibilities. In *Fahima Nasri* v. *Bangladesh*,[91] case, the court observed that the children (juveniles) are to be treated for their behavior rather than punished it and if their behavior of a juvenile delinquents has improved sufficiently to be released for the integration with the society. Mere enactment of laws is not sufficient; rather their enforcement and implementation by the government organs is also important[92] for creating a better juvenile justice system and for the better treatment of juvenile delinquents. Many significant provisions and mechanisms is provided which impossible to implement fruitfully in Bangladesh unless it is practiced effectively by the Government, concerned family members, the community and all other stakeholders indeed.

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Title Test Methods of Land in Bangladesh: An Overview

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Abstract

Land is closely related to our livelihood, economic functions and social norms. In various aspects it is also another cause of disputes in different areas of Bangladesh. Due to not following the proper methods of title test, the right of ownership is not being perfect. Under this situation it is essential that to know the mechanism of searching various documents relating to title and methods of verification of title of that document initially. Without proper verification of the title it can't be possible to buy any unencumbered land. In addition, this paper seeks to explore about historical development of ownership, various modes of acquiring absolute ownership, steps to be taken by the interested buyer or mortgagee for title test i.e. documentary and in person. It also focuses that many more relevant laws and practical ways to identify the title of property held by a person. Lastly, this paper assesses the categories of core causes of disputes and recommendations.

Keywords: Land, Title test, Ownership, Disputes.

Introduction

In Bangladesh there are no visible methods of title test in purchasing land but it is common cause of dispute which is increasing day by day. Many people have been illegally occupying massive land and they sell the same land to different persons. Any land can be transferred by several ways. For example, if someone buys a land property, he/she becomes the owner of that land by the virtue of sale deed and he/she can transfer it to other person by the ways of sale, gift, exchange, inheritance etc. The children and relatives of the deceased person have the right on the remaining property by the way of inheritance. This is the continuous process of transfer of property. In such a long journey of transferability, the documents relating to a landed property often seems or found to be forged. Such landed property is a major sector for the companies, banking institution, financial institution etc. Someone uses the property as a security against the loan disbursed or someone takes the property as a focal point to invest by way of developing the land. The companies like developer

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or the Banking institutions which take the land as a security verily suffers injury when it transpires and in fact no legitimate connection to the person who claims it as his/her own property. Without profound awareness of relevant land laws and methods of title test it might not be possible to purchase unencumbered land. It might also face assorted problems which can only be removed by in person visiting and verification of documents of title at the very beginning. In this regard, to check the title of a property, a purchaser or developer or mortgagee ought to maintain structured process, searching and collecting all relevant information related to the title as well.

The objectives of this article are to find out the proper methods of title test (i.e. documentary and in person) in Bangladesh. Moreover this article covers to determine various modes of acquiring absolute ownership. In addition to that this article will help to identify the practical ways of cause of disputes and recommendation.

On the other hand, this article is based on the primary and secondary sources. Secondary data has been collected from books, journal articles and reports etc. In completing this study, mainly qualitative approach has been adopted to make an analytical reasoning in identifying the relevant laws as to title test in land of Bangladesh. Practical experience as a legal officer and associates of Law Chambers has been included in this article and methods of authentication are also reflected.

Historical development of ownership of land

Land, sometimes referred to as dry land, is the solid surface of earth that is not permanently covered by water.[2] It also includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. In section 2(16) of SAT Act, 1950[3] has clearly mentioned:

> *'land' means land which is cultivated, uncultivated or covered with water at any time of the year, and includes benefits to arise of land, houses or buildings and also things attached to the earth, or permanently fastened to anything attached to the earth.*

In ancient period, the king was the whole proprietor and real owner of the land from 5th century to 13th century. Because of the partition of the country in 1947, the Bengal State Acquisition and Tenancy Bill was introduced in the Provincial Legislature of undivided Bengal, but was not passed.[4] The East Bengal State Acquisition and Tenancy Act, 1950, passed by the provincial

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2 Michael Allaby, Chris Park, A Dictionary of Environment and Conservation (2013), p. 239.

3 The State Acquisition and Tenancy Act, 1950. (East Begnal Act XXVIII of 1951), s 2 (16).

4 Arif Jamil, Verification of documents of land: Legal issues and complications, June (2006), Journal of the faculty of law, vol. 17, Number 1.

legislative assembly[5] on the basis of the recommendations of the Floud Commission, was a landmark in the history of tenurial legislation. The State Acquisition and Tenancy Act, 1950 *(East Bengal Act XXVIII of 1951)* abolished the *'zamindari'* system by acquisition of all types of intermediary rent receiving interests that existed between the government at the top and the tenants cultivating the land at the bottom.[6] Section 3 of SAT Act, 1950 gives to the provincial Government the power or discretion to acquire simultaneously, or from time to time, as was considered to expedient the interest which have been decided upon to be terminated.[7] The abolition of *'zamindari'* made the way for introduction of *'raiyatwari'* system in this region. The State Acquisition of Tenancy Act, 1950 derives that state is the owner of the land and all people having possession as *'raiyat'* or *'tenant'*. Raiyat have regained their ancient rights to hold land directly under the Provincial Government as they were under the Hindu and Muslim Government.[8] A '*raiyat*' is now the proprietor of his holding which is heritable and transferable.[9] In the modern period, the '*raiyat*' is not treated as the real owner of the land of Bangladesh within the spirit of the SAT Act, 1950 since he/she cannot leave his/her land at will and is thus getting deprived of his right of leaving the land at will in the fear that his/her right to land will extinguish[10]. If he/she doesn't pay rent to the Land, his right to land will distinguish as well. According to Section 81[11] of the State Acquisition and Tenancy Act, 1950 with effect from the date from which Part V comes into force in any area all holders of agricultural land under the Government be known as '*malik'*.[12]

Various modes of acquiring absolute ownership

Ownership denotes the legal rights to hold and use of the land. The methods of ownership are fairly complex: one can gain, transfer, and lose ownership of property in a number of ways. In our constitution Article 13[13] derives that principle of ownership. Article 42[14] of the Constitution of Bangladesh derives that each and every citizen can exercise his right to property but this right is not unfettered as he got to conform to certain guidelines framed by the state

5 T. Husain, Land Rights in Bangladesh, University Press Limited, Dhaka, 1995, at pp. 18 & 19.

6 The State Acquisition and Tenancy Act, 1950, s 3.

7 *Jivendrakishore* v. *Province of East Pakistan* (1957), 9 DLR (SC), 21.

8 Dr. Lutful Kabir, Land Laws in East Pakistan, Vol. III, Dhaka, at p.6.

9 *Ibid*.

10 Mohammad Towhidul Islam, Text, Cases & Materials, Second Edition, Centre for Human Rights & Legal Research 2018.

11 The State Acquisition and Tenancy Act, 1950, s 81.

12 *S M Basiruddin* v. *Zahirul Islam Chowdhury*, 35 DLR (AD) 230.

13 The Constitution of the People's Republic of Bangladesh, A 13.

14 The Constitution of the People's Republic of Bangladesh, A 42.

from time to time. At Article 143[15] derived that the list of the property of the Republic which he doesn't own or enjoy, it belongs to the state. In Article 144[16] also derives that Executive authority can interfere in relation to property, trade etc. of the citizen. In this part, various modes of transfer of ownership are discussed which can be a proof of good title.

(a) Sale

Section 54[17] of the Transfer of Property Act, 1882 says that, sale is completed by (a) execution of deed and registration (b) transfer of the property by the seller, and (c) payment of consideration by the buyer. In this regard, the buyer gets '*right in rem'* over the property. The seller gets the price for the transfer of property and the price must be a certain amount.[18] It is necessary that the deed of sale must be registered. For creating legal obligation between the seller and buyer, Section 54A[19] was inserted by the Transfer of Property (Amendment) Act, 2005. Because of this amendment, registration of the Contract for sale (*bainanama*) is made compulsory.[20] Section 17 (1) (g) of the Registration Act, 1908 says that, instrument of sale in pursuance of an order of the Court under Section 96 of the State Acquisition and Tenancy Act, 1950 shall also be registered.[21]

(b) Gift

Transferring interest of property (movable or immovable) from one living person to another without any consideration is called '*Gift*'. It is a gratuitous and '*inter vivos'* in nature. Under Section 122, of the Transfer of Property Act, 1882,[22] *'Gift'* is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Section 17(1)(a)[23] of the Registration Act, 1908 derives that the registration of instruments of gift of immovable property is compulsory. '*Declaration of heba'* under Musim Personal Law (*Shariat*) must be made through a registered deed according to Section 17(1)(a)(a)[24] of the Registration Act, 1908. It can be made to grandparents, parents, children, grandchildren, siblings and wives. There is another term of registration of

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15 The Constitution of the People's Republic of Bangladesh, A 143.

16 The Constitution of the People's Republic of Bangladesh, A 144.

17 The Transfer of Property Act, 1882, s 54.

18 *Messer's Chittagong Engineering Electric Supply Company Ltd.* v *Income Tax Officer*, 22 DLR (SC) 443.

19 The Transfer of Property Act, 1882, s 54A.

20 The Transfer of Property Act, 1882, s 17A-17B.

21 The State Acquisition and Tenancy Act, 1950 deals with the right of pre-emption, s 96.

22 The Transfer of Property Act, 1882, s 122.

23 The Registration Act, 1908, s 17(1).

24 The Registration Act, 1908, s 17(1)(a)(a).

heba to prescribe new few relatives; one has to submit a fixed registration fee.[25] Mulim Law called '*Heba-bil-ewaz'* also shall be registered. Section 17 (1)(aaa)[26] of the Registration Act, 1908 also derives that the registration of instruments of gift under the Hindu, Christian and Buddhist Personal Law is also compulsory.

(c) Exchange

In generally exchange is the mutual transfer of ownership of two persons in two different properties and both or either of these things may be movable or immovable. Under Sections 118 to 121 of the Transfer of Property Act, 1882 deal with the provisions of exchange. According to Section 118[27] of the Transfer of Property Act, 1882, when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange". It will not be exchange if money is given for the transfer of thing. It also can be similar kinds of properties or dissimilar types of properties. Therefore, if money is given to equalize the price of property exchanged, then the exchange will be valid. According to Section 17(1)[28] of the Registration Act, 1908, registration of instruments of exchange of immovable property is compulsory.

(d) Will

The Arabic synonym of will is '*Wasiyat'*. A will is an instrument by which a person makes the disposition of his property to take effect after his death. A document embodying the will is called '*Wasiyatnama'*. According to Section 2(h) of the Succession Act, 1925,[29] '*Will*' means the legal declaration of the intention of a testator with respect to his property which he/she desires to be carried into effect after his/her death. Section 40(1)[30] says that, the testator, or after his/her death any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration. Section 41 (1)[31] also says that, a will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document. Therefore, will is not provided by Section 17[32] of the Registration Act, 1908 and anyone can possess any land by virtue of deed of will which may be or not be a registered one.[33] In Muslim Law probate is not essential

25 The Registration Act, 1908, s 78A.

26 The Registration Act, 1908, s 17(1)(aaa).

27 The Transfer of Property Act, 1882, s 118.

28 The Registration Act, 1908, s 17(1).

29 The Succession Act, 1925, s 2(h).

30 The Registration Act, 1908, s 40(1).

31 The Registration Act, 1908, s 41(1).

32 The Registration Act, 1908, s 17.

33 The Registration Act, 1908, s 18.

but in other case for execution of Will prior permission of Civil Court is also necessary and Court shall serve a notice to the heirs.

(e) Waqf and Trust property

The concept of '*Waqf*' derived from the Islamic tradition. According to Section 2 (1) of the Mussalman Wakf Validating Act, 1913[34] 'Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable'. On the other hand, a '*Trust*'[35]is an obligation imposed on one or more persons (trustees) with regard to the 'trust property' that has been transferred to the trustees by the creator of the trust. It must be a clear and certain 'purpose' or 'purposes' of creating the trust. It does not affect the rule of Muslim law relating to the *'waqf'* or mutual relations of members of an undivided family.[36] As per the provisions of the Registration Act, the trust deed has to be registered, if the trust property is an immovable one (e.g. land).[37] If, on the other hand, the property in issue is not fixed but movable, like, money or otherwise, then there is no legal compulsion to register the trust instrument.[38]

Steps to be taken by the interested Buyer or Mortgagee for title test (documentary)

The interested buyer or purchaser should verify the land documents which are directly related to title with skilled person i.e. lawyer or surveyor etc. He/she will also try to find out and analysis these documents relating to title on the proposed property.

(a) Record-of-rights (*Khatiyan/porcha/shatvalipi*)

Bengali word *'Khatiyan'* is called Record-of-rights and it also called as traditional term '*Shatvalipi'* or '*Porcha'*. Basically, it is one kind of form showing all the details of rights of '*raiyat*' or '*malik*' relating to ownership. It is prepared under direct control and guidance of the Department of Land Records and Surveys and maintains its own '*Settlement press'* with collected in the Register No. 1 locally called '*Jamabandi'* Register. Firstly, the Bengal Tenancy Act, 1885[39] had recognized rights over land held by various interests, such as, landholders, tenure holders and raiyats. Thereafter, it is gradually prepared by operation of the Sylhet Tenancy Act, 1936[40] and the State

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34 The Mussalman Wakf Validating Act, 1913, s 2(1).

35 The Trust Act, 1882, s 3.

36 http://en.banglapedia.org/index.php?title=Trust_Act,_1882›, accessed 6th August, 2018.

37 The Registration Act, 1908, ss. 17 & 28.

38 The Trust Act, 1882, s 5.

39 The Bengal Tenancy Act, 1885.

40 The Sylhet Tenancy Act, 1936.

Acquisition Tenancy Act, 1950, consecutively. Every entry of *'khatiyan'* is shown its own khatiyan no. (taken from *Register No. 1*), plot number, bata plot number, area, mouza, touzi, *J.L.* number, names and shares of the possessors and description to their rights and superior interest etc. It has been prepared during several surveys such as *C.S., S.A., R.S., and B.S./City Jorip* etc. It also shows the plot (chak) holder's name and his father's name, nature of right, nature of the tenancy, area of the plot and amount of rent. A map was prepared for every Mouza and contained all the plots marked with individual numbers. All the khatiyans of a Mouza are kept according to serial number in a bound volume that is preserved in the '*Collectorate Record Room'* and '*Judge Record Room'* and also in the '*tahsil/rent collectorate office*' for reference. The holder of each plot has a right to get a certified copy of the khatiyan.[41] Latter record-of-rights will prevail and get preference over the earlier one. S.A. Khatiyan itself is not the document of title but it can create presumption of possession[42] but C.S. Khatiyan can create both i.e. possession and title. Every record-of-rights should be presumed to be correct until it is proved to be incorrect by evidence or revised under Section 114 A of the SAT Act, 1950.[43] But until the record-of-rights is finally published, no presumption of correctness arises. Record-of-rights creates neither title nor destroys it. Presumption of khatian does not prevail over the recital of kabala.[44] Presumption of correctness of record-of-rights ceases when a decision by a civil court is given under section 42[45] of the Specific Relief Act, 1877.

(b) Mutation *(Nam-jari/jama-khariz/jama-bhag)* and Land Development Tax payment receipt *(Khajna)*

Mutation is the change of title ownership from one person to another when the property is sold or transferred by way of kabala, will and gift. This khatiyan prepared under Section 144 of SAT Act, 1950 and duties of Tahsildar and Revenue officer for mutation regulated by rules (22 to 24) of the Tenancy Rules, 1955.[46] By mutating a property, the new owner gets the property recorded in his/her name in the land revenue department or the government is able to charge property tax on the rightful owner or creates a separate '*holding'* or '*jote'*. That means it is a process of updating of Record of Rights *(ROR).* It does not confer any title on any person.[47] It is proof of present possession.[48] After completion of the process of mutation the owner of land will get the following documents: *a.* D.C.R (*Duplicate Carbon Receipt, Form*

41 http://en.banglapedia.org/index.php? title=Khatiyan›, accessed 5th July, 2018.

42 *Chan Mahmood* v. *Hossain Ali*, 3 BLC, 364.

43 Vested and Non-Resident Properties (L & B) & others DLR 186 at para 8 (at per Gour Gopal Saha).

44 *Goru Charan Mondal & others* v. *Sree Bhaba Sindhu Sarkar & others*, 13 MLR (AD), 6.

45 The Specific Relief Act, 1877, s 42.

46 The Tenancy Rules, 1955, r (22 to 24).

47 *Mohammad Azim* v. *Nur Islam*, 4 BLC, 195.

48 *Shahera Khatun* v. *State*, 53 DLR, 19.

no. 222) *b.* Namjari proposal application (*which is proforma form that is used to create and record the grounds for mutation of property*) and *c.* Mutation khatiyan (*which is mostly hand written or printed and also valuable as other khatiyan*). Office of the Assistant Commissioner of Land *(AC land)* issues this khatiyan. Thereafter, the land owners will pay his/her Land Tax *(khajna)* in his/her name and will collect receipt of payment.[49]

(c) Guardianship certificate

Guardianship means legal authority and corresponding duty of a person to care for another person (a child, a disabled, an aged old etc.) relating to his body or property. During the British regime the law of guardianship was developed and that the father is the natural guardian of the children and after his death, mother is the natural guardian of minor children. The provisions of the Guardians and Wards Act, 1890[50] is applicable in Bangladesh. According to Majority Act, 1875,[51] minor means a person who has not completed the age of 18 (Eighteen) years and this Act is also applicable to all citizens in Bangladesh. According to that Act, every minor or whose person or property a guardian has been appointed by any court and superintendence has been assumed by a Court of Wards, is deemed to have attained his majority at the completion of the 21 (Twenty one) years; and in all other cases, at the completion of the 18 (eighteen) years. Guardians may be a. Natural or dejure guardians b. Guardians appointed by father by a will (testamentary guardians) and c. Guardians appointed or declared by the Court. Consequently, provisions of Family Court Ordinance, 1985[52] is applicable to all citizen of Bangladesh irrespective of religion.[53] In appointing a guardian, the Family Court must follow the provisions of the Family Court Ordinance, 1985 and if any conflict arises between the provisions of these two, the Family Court Ordinance, 1985 shall prevail. In case of minor property the certificate of guardianship is compulsory.

(d) Rajuk/Dit documents

Most residential property especially in cities is leased from the Government such as Rajdhani Unnayan Kartripakkha (RAJUK), Department of Public Work, and Chittagong Development Authority (CDA) etc. In all cases permission of these agencies are required for any kind of activities in those leased land. The Rajdhani Unnayan Kartripakkha *(RAJUK)* had been emerged through the ongoing crisis of planned and controlled development of Dhaka City. RAJUK established in April 30, 1987 by replacing Dhaka Improvement Trust (DIT). The prime intension of the organization was to develop, improve,

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49 Land Development Tax Ordinance, 1976, (Ordinance No. XLII of 1976).

50 Guardians and Wards Act, 1890, (Act No. VIII of 1890.)

51 Majority Act, 1875, (Act No. IX of 1875.)

52 Family Court Ordinance, 1985. (Ordinance No. XVIII of 1985.)

53 *Pochon Rikssi Dasi* v. *Khuku Rani Dasi and others*, 50 DLR 47.

extend and manage the city and the peripheral areas through a process of proper development planning and development control. In the light of 'DHAKA' Metropolitan Development plan (DMDP), RAJUK has prepared Detailed Area plan (DAP) within its jurisdiction. In case of apartment or land the proposed buyer should verify the membership of developer from Real Estate & Housing Association of Bangladesh (REHAB), deed of agreement, power of attorney, approval plan; all permission letters etc. to make sure that the building is constructed according to the plan or agreement.

Steps to be taken by the interested buyer or mortgagee for title test (*in person)*

The interested buyer or purchaser should also visit the property in person with skilled person i.e. lawyer or surveyor etc. He/she will also try to find out any difficulty.

(a) Easement Rights

The term 'easement' in its wide and literal sense means a definite right acquired for the ease, conveniences or accommodation of the person entitled to exercise the same.[54] Every person has got certain rights over his own land. He also may acquire certain other rights over his neighbour's land for the beneficial enjoyment of his land by virtue of the ownership of his own land. These rights may be termed as easement.[55]According to Section 2 (5) of the Limitation Act, 1908,

> *"easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another.*

Section 4 of this Act, says that, an *'easement'* is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. As there are various modes of acquiring easement such as express or implied or local custom or estoppels and at last by long continued enjoyment for this statutory period of 20 (Twenty) years or 60 (Sixty) years in the case of Government property.[56]

(b) Pre-emption or co-sharer

The term 'pre-emption' is derived from the Latin terms '*prac*' which means '*before*' and '*empto*' meaning '*purchase*' the equivalent of Arabic term

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54 Mozaharuddin Ahmed, Land Laws of East Bengal (Published by the author, Dhaka, 1963) 69-79.

55 Hamid Ashraf, Land Laws of East Pakistan (published by Salman Usmani, Dhaka) 75-120.

56 The Easement Act, 1882, s 15.

'*shufaa*'. It has not been defined in any of the statues in Bangladesh. According to *Osborn's Concise Law Dictionary*, pre-emption as 'the right of purchasing property before or in preference to other persons'.[57] It is a right of opportunity of purchasing land in priority to other people, which is ensured in some provisions in various acts of our country. It may be allowed only in the case of transfer of the land to a co-sharer tenant.[58] Section 96[59] of The State Acquisition and Tenancy Act, 1950 and Section 24[60] of The Non-Agricultural Tenancy Act, 1949 have described the provisions for pre-emption of land falling within the municipal area.[61] Section 4[62]of the Partition Act, 1893 derives that right of pre-emption to the members of a joint family having a dwelling house against a stranger who has purchased interest in the joint family. This section has bearing on Section 44[63] of the Transfer of Property Act, 1882. By Section 13 (1)[64] of the Land Reform Ordinance, 1984 says that where the owner intends to sell the '*barga*' land, he shall ask the '*bargadar*' in writing whether he is willing to purchase the land but this provision shall not apply where the owner sells the land to a co-sharer or to his parent, wife, son, daughter or son's son or to any other member of his family. Under Section 27[65] of the Restoration of Vested Properties Act, 2001 also provides the right of pre-emption. If government attempts to sell or lease any unclaimed vested property, the co-sharer (by inheritance) of the holding will be given preference to other prospective purchasers or lessees.

(c) Abandoned or Enemy property or Hat bazar

During the liberation war many of the owners of properties left the country or abandoned their properties without making any arrangement. Thereafter, under *Ministry of Land* abandoned properties are being managed in accordance with the provisions of Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 (PO No. 16 of 1972)[66] and the Bangladesh Abandoned Property (Land, Building and any other property) Rules 1972.[67] In Bangladesh all abandoned properties shall vest in the Government. The proposed buyer should check the abandoned property list from AC land office and hat bazaar according to hat bazar policy. DCs were

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57 Roger Bird, Osborn's Concise Law Dictionary (Sweet and Maxwell, London, 7th Edition, 1996), 260.

58 *S.M.Basiruddin* v. *Zahurul Islam Chowdhury*, (1983) 35 DLR (AD) 230.

59 The State Acquisition and Tenancy Act, 1950, s 96.

60 The Non-Agricultural Tenancy Act, (East Bengal Act) 1949, s 24.

61 *Md. AbdurRouf and others* v. *Ahmuda Khatun and others*, 1 BLD (AD) 269.

62 The Partition Act, 1893, s. 4.

63 The Transfer of Property Act, 1882, s. 44.

64 The Land Reform Ordinance, 1984, s. 13(1).

65 Restoration of Vested Properties Act, 2001, s. 27.

66 Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 (Po No. 16 of 1972.)

67 Bangladesh Abandoned Property (Land, Building and any other property) Rules 1972.

given the supremacy on over all administrative and management of hat bazar.[68]

(d) Khas land

The term '*Khas*' derive from Arabic meaning exclusive, special, definite or personal etc.[69] It means that the land owned by the Government which is under the ownership and guardianship of the Ministry of Land. According to Section 2 (15) of the State Acquisition and Tenancy Act, 1950:[70]

> *"khas land" or "land in khas possession," relating to any person, includes any land let out together with any building standing thereon and necessary adjuncts thereto, otherwise than in perpetuity.*

Khas land recorded in the *'Khatiyan No. 1'* in the name of the Collector in the Register No. VIII. This register is preserved in the Bangladesh Form No. 1072 in four parts.[71] There has been a significant amount of khas land in Bangladesh with direct or indirect ownership of the Government. Many khas plots were grabbed by local elites and powerful quarters that have strong political nexus. The East Bengal State Acquisition and Tenancy Act, 1950 was the main frame legal document which was promulgated to abolish the '*Zamindari*' System (Permanent Settlement of 1793). This law was the basis for all subsequent laws on '*khas*' land. There are two khas land management policies: *a.* Agricultural Khas land Management Policy[72] and *b.* Non-agricultural Khas land management and settlement Policy 1995.[73] The basic doctrines of these policies are to provide institutional structure and procedures for locating khas and distributing it particularly to landless. The non-agricultural khas land management policy was framed in order to address the issue of land grab by powerful elites and lease procedure of non-agricultural khas land. Considering the serious consequences of grabbing non-agricultural khas land, the related policies are not adequate in terms of their coverage and plan of action. The policy does not provide any guidelines on how to recover grabbed land from powerful elites as well as how to distribute non-agricultural khas land to urban poor or landless. The proposed buyer ought to go to the AC land office to check the Khas land.

(e) Pending suit or certificate cases on land

As a result of legal restriction no transfer of land is possible during the pendency of suit. Section 52[74] of the Transfer of Property Act, 1882 says that,

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68 The Hat And Bazars (Establishment and Acquisition) Ordinance, 1959.

69 Kabedul Islam, Glossary of Land and Land Revenue Affair, Mowla Brothers, Dhaka, 2003, P. 43 (In Bengali).

70 The State Acquisition and Tenancy Act, 1950, s 2 (15).

71 The Government Estate Manual 1958.

72 Agriculture Khas Land Management and Settlement Policy, 1997.

73 Non-agricultural Khas land management and settlement Policy 1995.

74 The Transfer of Property Act, 1882, s 52.

during the pendency in any Court in Bangladesh of any suit of or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on which terms as it may impose. The explanation says that the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. Under this circumstance any disputed land which is pending in Court (Judge Court or Supreme Court) should not be bought until it is settled. The interested buyer also is required to conscious about certificate cases which is regulated by the Public Demand Recovery Act, 1913.

(f) Searching in Deputy Commissioner's- DC office: *District level*, Assistant Commissioner's- AC Land: *Upazilla level* and Tahsil office: *Union level*

Deputy Commissioner or District Collector is the head of the authority as to land and revenue in the District and maintains a record room for the preservation of the records. ADC (revenue) also works very close to the DC in the Revenue Administration. Upazilla Land Office conducts all the functions with the cooperation of Kanungo, Surveyor, Accountant, Nazir, Mutation Clerk, and Assistant Certificate Clerk, Credit Checking cum Sairat Assistant, Process Server etc. He generally keeps land records up-to- date, determines land development tax to be demanded each landowner and dispatches tahsildars to collect land development tax and also administers khas land and vested or abandoned properties etc. Union Land Office is a local revenue collector i.e., tashildar and one or more assistant tahsildars and process servers. They works under the authority of AC (Land) conducts preliminary enquiries regarding petitions to update land records, maintain list of khas lands, inspects incident of alluvium and diluvium making related map corrections and rent adjustments etc. under the Land Administration Manual, 1990[75] along with related acts and circulars.[76] This office of the government under the Ministry of Establishment keeps control over a certain area consisting of a collection of Mouzas. This office deals with Mutations, and other Quasi-judicial matters. Land Tax must be paid in the Tahsil Office designated for a given area. Tahshildar is burdened with the daily duty to collect current and arrear taxes from the land owners, maintains records of the

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[75] Land Administration Manual, 1990.

[76] Howes Mick, Land Policy and Administration in Bangladesh: A Literature Review, CARE SDU Reports and Studies, Care Bangladesh Rural Livelihoods Programme, 2003.

collected taxes and deposits them with the District treasury. He also enlists defaulters to instituting certificate cases and other suits as per the Public Demand Recovery Act, 1913[77] and the AC Land disposes of certificates cases as well. However, land records are maintained by the Ministry of Land. There are 5 register books in tahsil office which are used for collection of land revenue. *Register 1* having the record of rights, *Register 2* contains the classification of land, rate of land taxes etc. *Register 3* the officer keeps the daily account of the taxes of this register, *Register 4* is also called cash book and through the *Register 5* taxes are collected and deposited in the brunches of the public bank. This is the government office under the Ministry of Land which keeps record of Land Tax for particular pieces of landed property.

(g) Searching in Sub-Registrar office

Registration is the process of documentation which is to be recorded in the Government held by registry office. As per Section 89[78] of the Transfer of Property Act, 1882, every transfer shall be registered instrument. Section 17 of the Registration Act, 1908 derives that a guideline as to documents for which registration is compulsory[79] but if not registered, it does not have any legal effect and any legal value in the eye of law and it would have been difficult to prove the contents. Section 49[80] also derives the effect of non-registration. It says that,

> *No document required to be registered under this Act or under any earlier law providing for or relating to registration of documents shall- (a) operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to or in immoveable property, or (b) confer any power to adopt, unless it has been registered.*

To prevent difficulties, any transfer of ownership needs to be documented in due process of execution and attestation. It prevents fraud or any kind of fraudulent changes in the transfer and also ensures evidence as to transfer of title. All registered deed has a record of the original deed in the Sub-Registry Office. This Act directs Register officers to give certified of all documents.[81] It is possible to obtain a certified copy of the deed by paying government fees to the Sub-Registrar. In case of sale deed reference of the deed will be found on the back of the last page of deed. The Book no., deed no., date and year of the registration are the basis of searching a deed in the Register office. Via-deeds are lies in maintaining the chain of the land. A brief description of the previous ownership of 25 (Twenty five) years has to be shown for the purpose

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77 The Public Demands Recovery Act, (Bengal Act) 1913.

78 The Transfer of Property Act, 1882, s. 89.

79 The Registration Act, 1908, s. 17.

80 The Registration Act, 1908, s. 49.

81 The Registration Act, 1908, s. 57.

of registration.[82] There can be several Via-deeds in a chain of title and show who are the persons in possession and had title. In a chain of a land, there may be no sale deed, if the land is inherited one and is not transferred by the successive heirs. In case of ownership by inheritance partition deed or Bontonnama deed or any other deeds or succession certificate can prove title and also be supposed to be checked. Thereafter, it is also necessary to check whether the property is transferred or mortgaged or gifted or willed or exchanged or executed by Power of Attorney etc. and the genuineness of title deed and the record of previous year by a search in the relevant Sub-Registry Office through taking *Non Encumbrance Certificate (NEC)* which is signed by authorized person. And According to *Land Holding Limitation Order, 1972* and the *Land Reform Ordinance, 1984* if the total land of person exceeds 100 (One hundred) bighas of which 60 (Sixty) bighas is the ceiling for the agricultural land, the person can voluntarily abandon the excessive land to the government.[83]

Categories of disputes and recommendations

Under the above circumstances, I have tried to identify the relevant points and recommendations for the interested buyer or mortgagee which are as follows:

Firstly, sometimes Government surveyor or deed writer can erroneously record or insert any name of the owner or dag of land in the Record-of-rights or title deeds or other deeds but in reality the land owner's actual possession is in another place. It may create dispute between any purchaser and seller. In this regard, it needs to be cautious to choose undisputed land and also have to justify by the surveyor (locally called *'Amin')* whose actual name is present in the *'Record-of-rights'* as an owner and where is his/her actual possession.

Secondly, when any person possesses any land for long time he/she can claim that property as of right. According to Article 144 of the Limitation Act, 1908[84] any undisputed and uninterrupted possession for 12 (Twelve) years gives rise to a good claim of title. In addition, title by prescription can be acquired against the Government only by the adverse possession for 60 (Sixty) years.[85] In the context of this situation, it may be the cause of dispute to determine the ownership of title and also need to talk about the aforesaid matter with local people.

Thirdly, when any successor does not divide his/her property by partition among them it may raise several disputes. Any particular land of the deceased

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82 The Registration Act, 1908, s. 52AA.

83 Article 3 of the Bangladesh Land Holding Limitation Order 1972 and Section 4 of the Land Reform Ordinance 1984.

84 The Limitation Act, 1908. (Act IX of 1908), A 144.

85 The Limitation Act, 1908 (Act IX of 1908), A 149, First Schedule.

can be claimed by these heirs since it has not settled among them, which of the land each of them will possess. In this situation, the registered partition deed or a succession certificate can be the only solution for diminishing these disputes.

Fourthly, any erroneous information of *deed of sale or heba deed or via deed or khatians or mouza map* etc. carries mistake in schedule of the land, wrong boundary, wrong dag no., wrong plot no., quantity of land and any printing mistake are grave mistake. In this regard, every purchaser or mortgagee should be cautious about the aforesaid mistakes which are neither safe nor good title.

Fifthly, various documents constitute a chain of ownership which includes various title deeds, via deeds, Khatians (*C.S./S.A./R.S./B.S./City Jorip etc.*), Mouza Map, Mutation (D.C.R and namjari proposal application), rent receipt etc. and shall have brief description for last 25 (Twenty five) years. In this regard, every purchaser or mortgagee ought to maintain and verify the documents carefully which are recorded manually, otherwise this defect may result in invalidity of the title or may be a questionable one.

Sixthly, the whole process of title test is very complicated because of non-linkage of every department like DC office, AC Land and Tahshil office. So, it can be easier by brining all these documents and department under the purview of Ministry of Land and maintenance of proper information of the authority.

Seventhly, the idea of verification is troublesome because register books (locally called *'balam book'*) of Sub-Register Office and Land offices are almost destroyed and our Government may introduce computerize and digitalize documents to make identification of title easier which will also minimize civil suit, time and money in dealing with these disputes.

Eighthly, the corruptions of different offices are gradually increasing due to lack of proper or inadequate monitoring or visit of the Land Reform Commissioners, ADC Revenue. In this situation, monitoring of corruptions in the concerned departments must be increased by proper take care of the concerned authority of the Government.

Ninthly, Assistant Commissioner's-AC Land plays major role in land management and administration of upazilla level but in most cases they do not have ample knowledge of land laws and policies. Therefore, they rely on *kanungo* and *surveyor* to deal with land issues and under this situation proper professional training must be increased to the AC land.

Tenthly, various types of disputes have been arisen due to lack of appropriate information but according to the Rights to Information Act, 2010,[86] every Government offices are supposed to assign information officer which will reduce package deal of service recipients.

Conclusion

Learning about title test methods is very essential part for the proposed buyer or mortgagee before purchasing or settlement of mortgage of any land. In Bangladesh it is dire necessity for the buyer to acquire knowledge about the title test methods as it does not have any visible methods in virtually. Many countries have their formal procedures to make purchase of land. But in Bangladesh there are numbers of structural and institutional restrictions in existing land administration and management. Organizational gap is one of them which are mostly noticeable in policy formulation and execution. Through the study it has been found that in Bangladesh there have no specific rules and procedure regarding the justification of title before purchasing any land. Considering the matter it is urgent for the government to take proper initiative and adopt strong policy through enacting relevant laws with consulting Ministry of Land and other stakeholders for removing existing irregularities and introduce a strong accountable mechanism.

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Development of Competition Law: National and International Perspective

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Abstract

Competition is one of the best ways to ensure proper growth and development of a country's economy. It can ensure the customer welfare and benefit more and can protect their rights. Proper distribution of the resources can be done by competition and competitive market. Monopolistic or oligopolistic practice in business firms may be arisen in the absence of proper competition law and policy. Absence of competition in the market, monopolists do not think about product quality, innovation and diversity. It may also negatively affect society. So the imposition of restriction on monopoly could be better off for the society and the market as a whole. In doing so, it's the duty of state to introduce or formulate pro-active competition law as well as competition policy. The competition regime in Bangladesh has traditionally been fairly weak. Before formulation of the Competition Act 2012, there were hardly any specific policies or laws for governing the market practices and actions of market participants. This study is descriptive in nature and tries to find out a historical background of competition law and its implementation mechanism in nationally and globally in light of which several recommendations have been preferred to make competition law effective in Bangladesh.

Keywords: Competition, Business, Competition law and Competition policy.

1. Introduction

A competitive business market with fair and perfect practice is very much desirable in a welfare state. At the modern age of globalization states are not directly supposed to be involved in production and the distribution. But states are to ensure fair and perfect competition for the welfare of the common citizen. It seems that the implication of economic liberalization has declined

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the role of the state. But the state has a pivotal role to control its market and ensure competition for the betterment of its people. It is also the responsibility of the state to regulate monopoly and other anti-competitive conducts. For making the market competitive and people oriented, it needs to formulate pro-active competition law as well as competition policy. The aim of competition law is to promote economic development of the country by creating a better environment for the private and public sectors in terms of efficiency in production and pricing decisions and benefit both consumers and producers. The competition is needed to improve productivity, innovation and new entrepreneurship. Initiatives have already been taken both in national and international levels. In Bangladesh, a competition law has been enacted in 2012 to ensure fair market practices, prevent unstable random price –hike and to prevent other unfair practices which are hampering perfect competition in the market. Before enacting the Competition Act in 2012, Bangladesh had the only law namely, the Monopolies and Restrictive Trade Practice (Control and Prevention) Ordinance which was promulgated in 1970 dealing with unfair competition and illegal trade practices. The main objective of this study is to explore in detail the historical background of competition law and their implementation mechanism in nationally and globally. There are some specific objectives of this study to review the existing competition law and policy in Bangladesh and finally to prefer pathways to make competition law effective. This paper is qualitative in nature; it is based on information largely taken from secondary sources like websites including books, journal articles and research papers.

2. Definition of Competition

In 1600s the term 'competition' was used as the terms 'action of competing' which had been derived from the Latin word *competitionem* (nominative competition) means 'agreement', 'rivalry', noun of action from past participle stem of *competere*. It was meant 'a contest for something' from 1610s. Sense of 'rivalry in the marketplace' attested from 1793; that of 'entity or entities with which one competes' is from 1961, especially in business.[3] Merriam Webster dictionary defines competition as the act or process of competing or rivalry as-

(i) the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.

(ii) active demand by two or more organisms or kinds of organisms for some environmental resource in short supply.[4]

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[3] Competition (n.d) *Online Etymology Dictionary. Retrieved July 23, 2016 from dictionary.com* website*:* www.dictionary.com/browse/competition.

[4] http://www.merriam-webster.com/dictionary/competition (accessed on July 23, 2016).

Various legal experts defined competition in various aspects. Some of them termed competition as rivalry which are given below-

Competition, in a large sense, means a struggle of conflicting interest.[5]

To most of us layman, competition means struggle, contest, rivalry, matching of wits or strength. … To the non-economist, competition in business is but one manifest of this spirit of conflict and rivalry of ideas.[6] Competition entered economics from common discourse, and for long it connoted only the independent rivalry of two or more persons.[7] Some scholars have tried to define competition in the absence of barriers entry and exit which are given below-

Competition … is then not merely the presence of several sellers in the market. One might define it as the possibility of the free movement of labor and capital. Competition, latent at least, is present as long as the appearance of a new seller in a branch of industry is not precluded.[8]

The essential characteristic of an industry which is in open competition … is nothing more than that such an industry is formally open to the entry of new competition. … it will follow from my later argument that an industry with only one firm in it might well have to be analysed as though it were competitive.[9]

It seems preferable, therefore, to adapt the concept of competition to changing conditions by another method: to insist only upon the absence of barriers to entry and exit from an industry in the long-run normal period; that is, in the period long enough to allow substantial changes in the quantities of even the most durable and specialized resources.[10]

On the other hand some legal expert tried to define the term competition as selection mechanism which are given below-

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5 R. T. Ely, 'Competition: its nature, its permanency, and its beneficence', Publications of the American Economic Association, 3rd series, 2, February, (1901) S. 55-70.

6 D. E. Lilienthal, 'Big Business: A New Era', Harper & Brothers Publishers New York, (1952), S. 54.

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Competition is the chief selective process in modern economic society, and through it we have the survival of the fit.[11]

Competition, in the sense in which the word is still used in many economic works, is merely a special case of the struggle for survival. … Competition, in the Darwinian sense, is characteristic, not only of modern industrial states, but of all living organisms.[12]

Some jurists also tried to define competition as price taking behavior which are given below-

Monopoly ordinarily means control over the supply, and therefore over the price. A sole prerequisite to pure competition is indicated – that no one have any degree of such control.[13] It is also defined as the absence of monopoly power in a market.[14]

From these definitions, it could be summarized that the concept of competition is wide and would be rivalry through various mechanism where one competes to defeat other in conflicting matters for gaining interest.

In the market, competition means a method or a process whereby firms compete with one another in order to attract customers for their products. Competition occurs when two or more organizations act independently to supply their products to the same group of consumers. In the field of marketing, competition is the rivalry between companies selling similar products and services with the goal of achieving revenue, profit, and market-share growth. Market competition motivates companies to increase sales volume by utilizing the four components of the marketing mix, also referred to as the four P's. These P's stand for product, place, promotion, and price.[15] In economic perspective competition is a rivalry in which every seller tries to get what other sellers are seeking at the same time: sales, profit, and market share by offering the best practicable combination of price, quality, and service. Where the market information flows freely, competition plays a regulatory function in balancing demand and supply.[16]

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11 R. T. Ely, 'Competition: its nature, its permanency, and its beneficence', Publications of the American Economic Association, 3rd series, 2, February, (1901) S. 55-70.

12 A. J Eddy, 'The New Competition, Chicago, A. C. McClurg & Co.' Encyclopedia Britannica (1913), S. 19.

13 E. H. Chamberlin, 'The Theory of Monopolistic Competition,' Cambridge, MA, Harvard University Press. (1933), S. 7.

14 G. J. Stigler, 'Perfect competition, historically contemplated', Journal of Political Economy 65, (1957, S. 262) and G. J. Stigler, 'Essays in the History of Economics', The University of Chicago Press, Chicago and London: (1965): S. 234-267.

15 http://study.com/academy/lesson/what-is-competition-in-marketing-definition-types-quiz.html (accessed on July 23, 2016).

16 http://www.businessdictionary.com/definition/competition.html (accessed on July 22, 2016).

3. Competition Law and Policy

Competition law is the law which promotes or maintains market competition by regulating anti-competitive conduct by companies.[17] Competition law, or antitrust law, has three main elements:

(a) Prohibiting agreements or practices that restrict free trading and competition between businesses. This includes in particular the repression of free trade caused by cartels.

(b) Banning abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal, and many others.

(c) Supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.[18]

Competition policy refers to those governmental measures that directly affect the behavior of firms and the structure of the industry. A competition policy should include both:

i) Economic policies adopted by Government, that enhance competition in local and national markets and

ii) Competition law designed to stop anti-competitive business practices.

The 'OECD Policy Framework for Investment' (PFI) highlights the following key elements of a competition policy:

- ❖ Promotion of consumer welfare;
- ❖ Preventing excessive concentration levels and resulting structural rigidities;
- ❖ Addressing anti-competitive practices of enterprises;
- ❖ Reinforcing the benefits of privatization and regulatory reforms;
- ❖ Establishing the institutional focal point for the advocacy of pro-competitive policy reforms and a culture of competition; and

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[17] http//www.en.wikipedia.org/wiki/Competition_law#cite_note-Taylor_2006_1-1 (accessed on 24/05/2013).

[18] http//www.en-wikipedia.org/wiki/competition_law.

- ❖ Increasing an economy's ability to attract and maximize the benefits of investment.[19]

4. History of Competition Law

4.1. International Development

The history of competition law traces back to the Roman Empire. Laws governing competition law are found in over two millennia of history. Roman Emperors and mediaeval monarchs alike used tariffs to stabilize prices or support local production. The *Lex Julia de Annona* was enacted during the Roman Republic around 50 BC.[20] To protect the grain trade, heavy fines were imposed on anyone directly, deliberately, and insidiously stopping supply ships.[21] Under Diocletian in 301 AD, an edict imposed the death penalty for anyone violating a tariff system, for example by buying up, concealing, or contriving the scarcity of everyday goods.[22] More legislation came under the constitution of Zeno of 483 AD, which can be traced into Florentine Municipal laws of 1322 and 1325.[23] This provided for confiscation of property and banishment for any trade combination or joint action of monopolies private *or* granted by the Emperor. Zeno rescinded all previously granted exclusive rights.[24] Justinian I subsequently introduced legislation to pay officials to manage state monopolies.[25]

The formal study of competition began earnest during the 18th century. Different terms were used to describe this area of law including 'restrictive practices', 'law of monopolies', 'combination act', and 'restrained of trade'. Since the 20th century, competition law has become global. The United States antitrust law and European Union competition are the two largest and most influential systems of competition in the world. Modern competition law has historically evolved on a country level to promote and maintain competition in markets principally within the territorial boundaries of nation-states. National competition law usually does not cover activity beyond territorial borders unless it has significant effects at nation-state level.[26] The protection of international competition is governed by international competition

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19 Speaking Notes of Prodeep S Mehta, Fourth South Asia Economic Summit, Dhaka, 23 October 2011, p. 3.

20 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-6 (accessed on 24/05/2016).

21 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-wilberforce_1996_p.20-7 (accessed on 24/05/2016).

22 *Ibid*.

23 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-8 (accessed on 24/05/2016).

24 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-wilberforce_1996_p.21-9 (accessed on 24/05/2016).

25 *Ibid*.

26 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-Taylor_2006_1-1 (accessed on 24/05/2016).

agreements. In 1945, during the negotiations preceding the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947, limited international competition obligations were proposed within the *Charter for an International Trade Organisation*. These obligations were not included in GATT, but in 1994, with the conclusion of the Uruguay Round of GATT Multilateral Negotiations, the World Trade Organization (WTO) was created. The *Agreement Establishing the WTO* included a range of limited provisions on various cross-border competition issues on a sector specific basis.[27]

UNCTAD's role in the field of competition law and policy dates back to the early seventies, when developing countries in particular, called for work on restrictive business practices (RBPs).[28] This was followed, in 1979-1980, by negotiations on a multilateral code of conduct on RBPs, and the adoption in 1980 by the UN General Assembly (resolution 35/63 of 5 December 1980) of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in the form of a recommendation to States. To date, the UN RBP Set is still the only full multilateral instrument on competition law and policy. Main Features of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices are as follows:

(i) The Set of Principles and Rules applies to restrictive business practices including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behavior.[29]

(ii) Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.[30]

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27 http//www.en.wikipedia.org/wiki/Competition_law#cite_note-3 (accessed on 24/05/2016)

28 Section B (i) of **Set of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices "Restrictive business practices" means acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.

29 Section B (ii) of **Set of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices.

30 Section C (i) of **Set of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices.

(iii) Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information, in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries, to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provisions should be in accordance with safeguards normally applicable in this field.[31]

(iv) States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.[32]

(v) Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programs on restrictive business practices, particularly for developing countries: Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures; Seminars, training programs or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connection, advantage should be taken *inter alia*, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices; A handbook on restrictive business practices legislation should be compiled; Relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries; Exchange of personnel between restrictive business practices authorities should be arranged and facilitated; International conferences on restrictive business practices legislation and policy should be arranged; Seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.[33]

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31 Section D of Set **of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices.

32 Section E of **Set of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices.

33 Section F of **Set of Multilaterally Agreed Equitable Principles and Rules for** the Control of Restrictive Business Practices.

Implementation Mechanism

Its implementation is being monitored and reviewed by the following institutional bodies:

(i) The Intergovernmental Group of Experts on Competition Law and Policy (formerly IGE on RBPs, established in 1981), which provides an annual forum for multilateral consultations, discussions and exchange of views between States on matters related to the Set and undertakes and disseminates periodically studies and research on competition policy issues.

(ii) The UN Review Conferences, which meet at five-year intervals.

4.1.2. UK Development

Early Development

In early age, legislations were existed in England to control monopolies and restrictive practices in businesses which were in force before 'Norman Conquest'.[34] During the reign of King Edward the Confessor (ruled from 1042 to 1066), the unacceptable method 'foresteel'[35] was forfeited throughout England depicted in 'Domesday book'.[36] In 1266, Henry III imposed several penalties 'amercements'[37], 'pillory'[38] and 'tumbrel'[39] for breaching law to stabilize corn prices. Under King Edward III the Statute of Labourers of 1349 was passed to fix wages for artificers and workmen and also ordered that foodstuffs should be sold at reasonable prices. The statute also stated along with existing penalties that overcharging merchants must pay the injured party double the sum he received. In the year of 1553 King Henry VIII reintroduced tariffs on foodstuffs to stabilize price for facing of price fluctuations. In the meantime some business organizations had been developing in England and enjoyed many opportunities from the existing laws against monopolies until

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[34] The Norman conquest of England was the 11th-century invasion and occupation of England by an army of Normans, Breton, and French soldiers led by Duke William II of Normandy, later styled as William the conqueror.

[35] The buying or contracting for any merchandise or victual coming in the way of the market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practices make the market dearer to the fair trader.

[36] Domesday Book is a manuscript record of the "Great Survey" of much of England and parts of Wales completed in 1086 by order of King William the Conqueror.

[37] An amercement is a financial penalty in English law, common during the Middle Ages, imposed either by the court or by peers.

[38] The pillory was a device made of a wooden or metal framework erected on a post, with holes for securing the head and hands, formerly used for punishment by public humiliation and often further physical abuse.

[39] A tumbrel is a two-wheeled cart or wagon notably used for taking prisoners to the guillotine during the French Revolution.

the enactment of the Municipal Act 1835.[40] If we consider the history of competition law in England, we found that various court verdicts which played an important role to protest monopoly practices in business. One of the landmark decisions came from the case of Darcy[41] in 1602 when Queen Elizabeth I granted to Darcy, her groom, the monopoly of the import of playing cards. That grant was subsequently struck down by the judges of the Kings' Bench Division, as contrary to the common law against monopoly, in language that would be familiar to any consumer or lawyer today: such a monopoly, said the seventeenth century judges, harms consumers, leads to poor quality, and hinders competition.[42] Later in the year of 1623 the parliament of England passed a statute of monopolies where most part depicted the exclusion of exclusive patent rights. During the reign of King Charles I and King Charles II monopoly business continued especially for raising revenue though the civil war was going on. Then in 1684, another remarkable monopolies case was *East India Company* v. *Sandys*,[43] it was decided that exclusive rights to trade only outside the realm were legitimate, on the grounds that only large and powerful concerns could trade in the conditions prevailing overseas. In 1710 to deal with high coal prices caused by a Newcastle Coal Monopoly the new law was passed to control monopoly.[44] Father of Economics Adam Smith wrote the Wealth of Nations in 1776,[45] he was somewhat cynical of the possibility for change.

> "To expect indeed that freedom of trade should ever be entirely restored in Great Britain is as absurd as to expect that Oceana or Utopia should ever be established in it. Not only is the prejudices of the public, but what more unconquerable, the private interests of many individuals irresistibly oppose it. The Member of Parliament who supports any proposal for strengthening this Monopoly is seen to acquire not only the reputation for understanding trade, but great popularity and influence with an order of men whose members and wealth render them of great importance."

In the contemporary time, the British thought that restraint of monopoly practice in business somehow caused a great hindrance for exercising the individual freedom but at that time restraint of monopoly practice would be granted or not by the court if any new cases raised considering upon the business circumstances. Adam Smith rejected any monopoly power on this basis.

> "A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping

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40 https://en.wikipedia.org/wiki/United Kingdom competition law (accessed on 12/07/2016).

41 *Darcy* v. *Allein*, (Case of Monopolies), 77 Eng. Rep. 1260, 1261-63 (K.B.1602).

42 See id. at 1262-63.

43 *East India Company* v. *Sandys*, (1685) 10 St. Tr. 371.

44 See for details (https://en.wikipedia.org/wiki/United Kingdom competition law) (accessed on 12/07/2016).

45 Adam Smith, An Enquiry into the Wealth of Nations (1776).

> the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate."[46]

In The Wealth of Nations (1776), Adam Smith also pointed out the cartel problem, but did not advocate legal measures to combat them.

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."[47]

The concept named restraint of trade is simply some kind of agreed provision that is designed to restrain another's trade, which may be called as the precursor of modern competition law was developed in England and discussed through various court verdict. *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co Ltd*,[48] is a 19th-century English case decided by the House of Lords. The dispute was about restraint of trade, and the judgment declares when such a restraint (which is *prima facie* void) may become valid. The fact of the case was Thorsten Nordenfelt, a manufacturer specializing in armaments, had sold his business to Hiram Stevens Maxim. They had agreed that Nordenfelt 'would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way for a period of 25 years. The House of Lords decided that "The provision prohibiting Nordenfelt from making guns or ammunition was reasonable, as he had been paid a very substantial sum". This case established the principle that if any valuable consideration is provided in an agreement that would not be void under the concept of restraint of trade.[49] This principle to consider whether or not there is a restraint of trade in any agreement was firstly pointed out in the Dyer's case.[50] This is an old English contract law case concerning restraint of trade and doctrine of consideration. The fact of the case was Mr. John Dyer had given a promise to not exercise his trade in the same town as the plaintiff for six months but the plaintiff had promised nothing in return. On hearing the plaintiff's attempt to enforce this restraint, Hull J exclaimed, "In my opinion, you might have demurred upon him that the obligation is void, in as much as

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46 Adam Smith, An Enquiry into the Wealth of Nations (1776), Book I, Chapter 7, para 26.

47 *Ibid* ,Chapter 10, para 82.

48 *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co Ltd*, (1894)AC 535.

49 See for details (https://en.wikipedia.org/wiki/Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd) (accessed on 13/07/2016).

50 Dyer's case (1414) 2 Hen. V, fol. 5, pl. 26.

the condition is against the common law and by God ,if the plaintiff were here, he should go to prison until he had paid a fine to the King".[51]

Modern Development

The modern era of the development of competition law has started in the middle of the 20th century. Basically United Kingdom has adopted laws after the 2nd World War to control or regulate the buildup of monopolies and concentrations of business, anti-competitive agreements and cartels and the unfair trading practices of powerful companies.[52] Competition law has occupied a place in the English law for many centuries but elsewhere provided a foundation for the emergence of antitrust policy though the doctrine of restraint of trade existed which only a residual limitation on the commercial operators. Modern statutory competition policy first emerged in the aftermath of the Second World War. Indeed, it was only in 2000 with the coming into force of the Competition Act 1998, and 2002 with the passage of the Enterprise Act that the United Kingdom saw the completion of a rounded scheme of law.[53] Until the mid –Twentieth Century, there was no sufficient and remarkable statutory enactment regarding the competition law in United Kingdom. In 1948, the first statutory intervention came with the passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act. The primary aim of this Act was to flesh out the institutions those were exercising the monopoly business in England and enthusiasm for the new law which marked a decisive moment in the development of British competition policy which also was politically bipartisan but the legislation provided only limited coercive machinery. The new regime could count either as a glass half-full or half-empty depending on perspective. Wilks explains further that:

> "the British vocabulary talked of 'monopolies' and 'restrictive practices' but it did not regard them as unlawful and was not 'anti' anything. Indeed, although nowadays these terms have become pejorative, the normative coloration was more muted… when both monopoly and restrictive practices had proved their worth."[54]

Later, the Monopolies and Restrictive Practices Commission Act, 1953 was enacted to control anti-competitive practices that may be damaging to the public interest and a commission was formed named Monopolies and Restrictive Practices Commission (MRPC) under this Act, Under, Monopolies

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51 See for details (https://en.wikipedia.org/wiki/History of competition law) (accessed on 14/07/2016).

52 Livingston Drothy, Pouncy Craig and Latham Charles, 'Competition Law Sources', (London, FT Law & Tax 1995), p.3.

53 Scott Andrew, 'The Evolution of Competition Law and Policy in the United Kingdom' LSE working paper series (09-2009), pp-1-2(see for details www.lse.ac.uk/collections/law/wps/wps.htm).

54 Wilks, In the Public Interest: Competition Policy and the Monopolies and Mergers Commission (Manchester: Manchester University Press, 1999).

and Restrictive Practices (Inquiry and Control) Act, 1948, the Secretary of State was empowered to instigate investigations by the newly established Monopolies and Restrictive Practices Commission (MRPC) into goods industries where anti-competitive practice exercised. In the few years following the creation of the Commission, it investigated concerns in a range of markets, including the supply of dental goods, cast- iron rainwater goods, electric lamps, insulated electric wires and cables, insulin and imported timber.[55] While noting that the legislative scheme was "timid" and the Commission's investigations largely educative only, Gerber emphasizes that this role "should not… be underestimated, because it helped to change attitudes to competition".[56] Another author agrees forcibly that the Act caused a "psychological convulsion" across British industry on account of it censorious decrial of what had for many become standard practice.[57]It had been observed that the Monopolies and Restrictive Practices Commission (MRPC) had only the investigating power rather than judicial power to protect anti-competitive practices in business. So, this lacuna leads to increase significant disquiet regarding the perceived room for arbitrariness and political machination. Wilks lists the complaints:

> "the inquisitorial nature of the [Commission] investigations; the alleged lack of clarity of the case 'against' the company; the vagueness of the public interest test; the lack of a right to see third-party allegations or to reply to conclusions; the amount of money and senior management time required, and the unpredictability of the [government] response."[58]

So there was a demand for a more juridical regime that it was supposed would at least offer business a greater degree of legal certainty. Then Parliament turned to revise the competition regime further and enacted the Restrictive Trade Practices Act 1956 that emerged a bipartite system. RTPA was introduced primarily to discourage cartel practices in British industry, many of which had been fostered during difficult conditions of the year of 1940s when war time consideration required allocation of business on an agreed basis and pricing controls.[59] This enactment promised stronger treatment of restrictive practices, while leaving the coverage of monopoly as it had been under the 1948 legislation.[60] Companies were obliged to register agreements that included designated forms of cooperation with the Registrar of Restrictive

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55 See details for http://www.competition-commission.gov.uk/rep_pub/reports/ index.htm (accessed July, 2016).

56 Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus (Oxford: Oxford University Press, 2001), p. 216.

57 Allen, The Structure of Industry in Britain (London: Longman, 2nd ed,1966), p. 70.

58 Wilks, In the Public Interest: Competition Policy and the Monopolies and Mergers Commission (Manchester University Press, 1999), 36.

59 Livingston Drothy, Pouncy Craig and Latham Charles, 'Competition Law Sources', (London, FT Law & Tax 1995), p. 4.

60 Wilks, In the Public Interest: Competition Policy and the Monopolies and Mergers Commission (Manchester University Press, 1999), p. 38.

Trading Agreements. The working presumption was that registered agreements were contrary to the public interest and hence should be unlawful and non-enforceable. The Registrar was to seek confirmation of this before the judges of the Restrictive Practices Court (a High Court). Many agreements were dissolved or amended in advance of this step taking place. However, section 21 of the Act offered a series of heads – or 'gateways' – under which it was to be possible for firms to contend that their particular agreement in fact did not operate contrary to the public interest. Where such an argument could be made, it was for the Court to assess the balance between the harms and benefits.[61] With the advent of this new law MRPC was renamed the Monopolies Commission (MC). While in 1965 the MC took on the additional role of merger review and became the Monopolies and Mergers Commission (MMC). In 1973, the Fair Trading Act imposed on the DGFT an obligation to monitor markets and to recommend reference to the Commission where it perceived monopoly problems .Thus, while the 1973 Act radically revised the institutional structure of competition law, creating the DGFT and thereby providing a dedicated agency and spokesperson for competition policy, in the monopoly context power was left in the hands of political decision-makers. It was the Secretary of State who would decide on the recommendation of the DGFT whether to make a reference. The system was used sparingly, it was long-winded, 35 and the advice offered by the Commission – while invariably thorough and impartial - was generally too fact-specific to be of precedent value for firms seeking legal certainty.[62] The relevant law was consolidated in the Restrictive Trade Practices Act 1976. It was only after the United Kingdom had been a member of the European Community for some time that the end for more general process to control unilateral anticompetitive behavior by large business was recognized in the Competition Act 1980. This shows the influence of European law in its language and economic approach. It provides for two stage investigative processes, the first by the DGFT and the second by the MMC. If voluntary undertakings are not given, unilateral conduct which is against the public interest can be prohibited or controlled by Order of the Secretary of State, as in case of monopolies and mergers.[63] This mechanism was remained effective until the competition regime that took place in the late 1990s.

Competition law in the UK until the year 2000 was accurately described by Sharpe, a leading competition QC:

> "Competition law in the United Kingdom ---seldom serves to regulate behavior: what takes place is more the selective adhoc application of public powers, exercised in a non-doctrinaire, pragmatic spirit, allowing little

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61 Stevens and Yamey, The Restrictive Practices Court: A Study of the Judicial Process and Economic Policy (London: Weidenfeld & Nicolson, 1965), 19.

62 Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus (Oxford: Oxford University Press, 2001), pp. 220-222.

63 Livingston Drothy, Pouncy Craig and Latham Charles, 'Competition Law Sources', (London, FT Law & Tax 1995), p. 4.

> opportunity for compensation in favor of those affected by the anti-competitive action of others."[64]

So, in the year of 1998, a new Competition Act was passed by Parliament though for the most part its provisions will not come into force until early in 2000. The Act goes a long way towards bringing UK competition law into line with European Community competition law. The central objective of the Competition Act 1998 was to align national competition law as closely as possible with EC law (Articles 81 and 82 EC), and thereby to reduce the regulatory burden on companies. This was achieved through the introduction of the 'Chapter I' and 'Chapter II' prohibitions on anticompetitive agreements and abuse of a dominant position respectively. In the normal case, the new prohibitions are enforced by the Office of Fair Trading (OFT).The Office of Fair Trading (OFT) is the central institution for the enforcement of Competition law in the United Kingdom and it states that its mission is to 'make markets work well for consumers'. It is responsible for taking action against anti-competitive agreements and abuse of dominant position under either the Competition Act 1998 as well as deciding on whether or not to refer mergers to the Competition Commission for a full investigation. It has powers to conduct market studies of particular sectors of the economy and, if necessary, refer a market to the Competition Commission for investigation. Finally, it is responsible for the investigation and prosecution of criminal cartels under the Enterprise Act 2002.[65] Along with the Office of Fair Trading (OFT), there are three institutional mechanisms for the enforcement of Competition Law in the United Kingdom. One of them is Competition commission. The Competition (CC) has two main roles.[66]

1. It makes decisions on whether mergers, either contemplated or completed, might lead to a substantial lessening of competition and, if it finds that they do, whether or not the merger should be prohibited or allowed to proceed subject to certain conditions, and
2. Conducts investigations into particular markets in order to determine whether or not there are any features of the market which may distort or restrict competition. Again, if there are problems in markets, the CC is entitled to decide upon the appropriate remedies.

Another institutional mechanism is the Competition Appeal Tribunal. The Competition Appeal Tribunal (CAT) was set up under the Enterprise Act 2002, although it had existed in a slightly different form as part of the Competition Commission, rather oddly, under the competition Act 1998.The Enterprise Act creates the CAT as a truly independent judicial body, which is

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64 T. Sharpe, 'British Competition Policy in Perspective '(1985) 1 Oxford Review of Economic Policy, pp. (80 – 81).

65 Cosmo Graham 'EU and UK Competition Law' Longsman, London, 2nd edition, 2013, Page 41.

66 *Ibid*, p. 42.

critical as its main role is to hear appeals and review decisions of both the OFT and the CC.[67]

And finally, The High Court of England is involved for the enforcement of Competition Law which acts as an ordinary court.

4.4.3. USA Development

Indeed, today's modern American antitrust law was basically developed with the passing of Sherman Act 1890. It is the original, principal, and foremost antitrust statute in the United States. The Sherman Act codifies the principal antitrust offenses — conspiracies to restrain trade, monopolization, attempted monopolization, and conspiracies to monopolize. During the nineteenth century, American economy was heavily changed with the growth of large corporations which were then known as 'trust'.[68] The activities of these large corporations were to deal monopoly business and for this reason, their activities were highly controversial. A classical example was Standard Oil Company which was initially organized as a trust and controlled 90% of oil production in USA. As a result, their activities were heavily criticized and also politically controversial. So, the pressure was raised on the politicians to introduce a new law to control the 'trust' activities.[69] As a politician, Senator John Sherman pointed out rightly-

> "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[70]

As a result, the Sherman Act was passed against this background in 1890 to try restraint of trade or to form a monopoly. The main provisions of this act are-

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States or with foreign nations, is hereby declared to be illegal. [Violators]….shall be deemed guilty of a felony…….
2. Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.[71]

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67 *Ibid*, p. 43.

68 The word was commonly used to denote big business especially a large corporation which began to have an important influence on significant parts of the American economy.

69 Cosmo Graham 'EU and UK Competition Law' Longsman, London, 2nd edition, 2013, Page. 5.

70 https://en.wikipedia.org/wiki/History_of_United_States_antitrust_law (accessed on 15/07/2016).

71 See details (Sec.1 and 2 of the Sherman Act 1890).

If we consider the legislative history of the Sherman Act, then the aim of Congress was to protect consumer welfare.[72] On the other hand, it has been argued that one of the objectives of the Sherman Act was to control the large corporations to attaining sole private power and in doing so to preserve democratic government.[73] Later a century of case law has helped to provide clarity and meaning to this statute, establishing how it is supposed to be applied in order to forbid and sanction illegal trade restraints and monopolization. However public officials were also played an important role to enforce the statute and for doing so President Theodore Roosevelt sued 45 companies under the Sherman Act, while William Howard Taft sued 75. In 1902, Roosevelt stopped the formation of the Northern Securities Company, which threatened to monopolize transportation in the Northwest.[74] The Sherman Act was applied in some leading cases such as Northern *Securities Co.* v. *United States*, 193 U.S.197 (1904) and *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

One problem some perceived with the Sherman Act that it was not entirely clear what practices were prohibited which leading to businessmen not knowing what they were permitted to do and government antitrust authorities not sure what business practices they could challenge. Later in 1914, another antitrust law named Clayton Act was passed by following the Sherman Act in USA that imposes restrictions on proposed mergers and acquisitions. It also supplements the Sherman Act, prohibiting certain kinds of commercial practices. This Act enhanced the government's capacity to intervene and break up big business. The Act removed the application of antitrust laws to trade unions, and introduced controls on the merger of corporations that excessively stifle competition on the merits. It sets forth various civil remedies. Indeed, it was the Clayton Act that established a private right of redress for civil relief under the Sherman Act, awarding treble damages and attorney's fees to a private plaintiff who prevails on a claim made under the antitrust laws of the United States. In addition, the Clayton Act usefully allows the courts to enjoin anti-competitive conduct before it actually causes harm.

The Clayton Act made both substantive and procedural modifications to federal antitrust law. Substantively, the act seeks to capture anti-competitive practices in their incipiency by prohibiting particular types of conduct, not deemed in the best interest of a competitive market. There are 4 sections of the bill that proposed substantive changes in the antitrust laws by way of supplementing the Sherman Antitrust Act of 1890. In those sections, the Act thoroughly discusses the following four principles of economic trade and business:

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72 R. Bork, The Antitrust Paradox,(2nd edn, Free Press, New York,1993),ch.2,p.51 and R. Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 Journal of Law and Economics 7.

73 See, D. Millon, 'The Sharman Act and the Balance Power' (1998) 61 Southern California Law Review 1219.

74 See details, https://en.wikipedia.org/wiki/History_of_United_States_antitrust_law (accessed on 15/07/2016).

1. Price discrimination between different purchasers if such a discrimination substantially lessens competition or tends to create a monopoly in any line of commerce[75]

2. sales on the condition that (A) the buyer or lessee not deal with the competitors of the seller or lessor ("exclusive dealings") or (B) the buyer also purchase another different product ("tying") but only when these acts substantially lessen competition[76]

3. mergers and acquisition where the effect may substantially lessen competition or where the voting securities and assets threshold is met[77]

4. any person from being a director of two or more competing corporations, if those corporations would violate the anti-trust criteria by merging.[78]

An important difference between the Clayton Act and its predecessor, the Sherman Act, is that the Clayton Act contained safe harbors for union activities. Section 6 of the Act exempts labor unions and agricultural organizations, saying "that the labor of a human being is not a commodity or article of commerce, and permit labor organizations to carry out their legitimate objective".[79] Therefore, boycotts, peaceful strikes, peaceful picketing, and collective bargaining are not regulated by this statute. Injunctions could be used to settle labor disputes only when property damage was threatened.

In the year of 1936 a new competition law named Robinson–Patman Act was passed to protect small retail shops against competition from chain stores by fixing a minimum price for retail products. The new law emerged in the circumstances of practices in which chain stores were allowed to purchase goods at lower prices than other retailers. This statute forbids sellers to make sales of the same or similar products at the same time to commercial customers at different prices, if the practices causes harm to competitive processes in the seller's market, the buyers' markets or in further downstream markets. The Robinson Patman Act (RPA) was enacted as an amendment to Section 2 of the Clayton Act. Six subsections make up the RPA:

1. Section 2(a) prohibits certain forms of price discrimination by a seller;

2. Section 2(b) provides an affirmative defense to discrimination intended to meet competition;

3. Section 2(c) prohibits certain brokerage fees and commissions;

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75 See details, sec. 2 of the Clayton Act, 1914 (codified as 15 U.S.C. & 13).

76 See details, sec. 3 of the Clayton Act, 1914 (codified as 15 U.S.C. & 14).

77 See details, sec. 7 & 7a of the Clayton Act,1914 (codified as 15 U.S.C. & 18,18a)

78 See details, sec. 8 of the Clayton Act, 1914 (codified as 15 U.S.C. & 19).

79 See details, sec. 6 of the Clayton Act, 1914 (codified as 15 U.S.C. & 17).

4. Sections 2(d) and (e) prohibit sellers from discrimination in providing allowances or services to competing customers for promoting the resale of the seller's products; and
5. Section 2(f) prohibits buyers from inducing a seller to violate the RPA.[80]

Another important amendment of the Clayton Act was known as the Cellar-Kefauver Act begot in the year of 1950. The main purpose of this Act was to close a loophole regarding asset acquisitions and acquisitions involving firms that were not direct competitors. While the Clayton Act prohibited stock purchase mergers that resulted in reduced competition, shrewd businessmen were able to find ways around the Clayton Act by simply buying up a competitor's assets. The Cellar–Kefauver Act prohibited this practice if competition would be reduced as a result of the asset acquisition. Hovenkamp, a distinguished American anti-trust scholar has argued that if you look at the context of the competition laws and their legislative history in USA, these statutes are aimed at protecting small businesses.[81]

The Hart-Scott-Rodino Act, 1976 also an amendment of Clayton Act imposes disclosure requirements for certain kinds of mergers, acquisitions, and other combinations of two or more business operations. The duty to make a disclosure depends on the size of the transaction and the size of the participating companies. If a firm wishes to conduct a transaction that is covered by this Act, it must first make prescribed disclosures to the FTC and Department of Justice-Antitrust Division, either of which can thereafter require additional disclosures, object to the transaction, grant conditional approval (e.g., require a divestiture as a condition of approval of the proposed transaction), or decline to object and allow the proposed transaction to be consummated without further inquiry. It is sometimes possible to obtain expedited approval and a waiver of the obligatory waiting period. If the FTC or DOJ-Antitrust objects, the proponents of the merger can challenge the objection, abandon the transaction, or modify their proposal and re-submit it.

So, the Sherman Act 1890 and two additional antitrust laws the Federal Trade Commission Act, which created the FTC, and the Clayton Act with some revisions are still effective today.

4.5. Development of Competition Law in Bangladesh

Market competition in Bangladesh operates under some isolated institutional framework, with uneven rules for market participants. The Monopolies and Restrictive Trade Practice (Control and Prevention) Ordinance, 1970, enacted before Bangladesh separated from Pakistan, which provides for taking action

[80] See Section.2 of The Robinson-Patman Act 1936

[81] H. Hovenkamp, 'The Antitrust Enterprise' (Harvard University Press, 2005), p.42.

against any unfair competition or concentration of economic power, or illegal trade practices. But neither the government nor the private sector has ever invoked the law. At present, Bangladesh does not have any competition policy. This weak competition regime not only impedes efficiency gains but also overlooks the interest of the consumers. So, the formation of monopolies is regulated in an inconsistent manner due to the absence of a policy in this regard. The first initiative to adopt a competition law was taken in 1996, but it was soon abandoned. To enact a law in the present era of global free market economy for ensuring fair competition in trade and commerce and stopping monopoly and syndication was felt mandatory. A section of corrupt and unscrupulous traders, taking the advantage of the open market economy, had been serving their narrow personal interest and destroying atmosphere of fair competition in trade which were largely affecting the country's overall economic activities. As a result, the market syndicates were hampering consumers' interest and also posing a threat to the overall economic activities of the country. At last, a draft Competition Act 2008 has been prepared by the ministry of commerce. After a long period of time the national parliament passed the Competition Bill on June 17, 2012, the law was published on June 21, 2012 in the Official Gazette as Competition Act 2012. It came into force with immediate effect. It contains seven chapters and a preamble. The preamble of this Act describes the purpose of the Act to prevent, control and eradicate collusion, monopoly and oligopoly, abuse of dominant position in the market, anti-competitive practices and to encourage and ensure competitive business environment to promote economic development of Bangladesh. Notably, this Act provides a provision to have a strong Competition Commission. The functions and responsibilities of the Commission will be to eradicate any practice which puts an adverse effect on the competition in the market and to encourage and maintain the healthy competition in the market.[82]

5. Conclusion

Although, at present Bangladesh have a Competition Law namely the Competition Act, 2012, it does not have any clearly defined competition policy at the macro level or any sector specific policy that addresses competition issues. Moreover, at present Bangladesh does not have any institutional mechanism to review and administer the existing law that affect competition or regulate business activities that are anti-competitive because of the said law has not been made practically effective yet. Till now, no Competition Commission has been established which is responsible to look after the competition issue. So, a sound, independent and accountable Commission is needed to establish, as implementation of the competition law is only possible under this Commission. Even, our neighboring countries like India and Pakistan have adopted competition policy and established

[82] See for detail, section 8 of the Competition Act, 2012.

Competition Commission also. So, for meeting the aims and objectives of the said legislation the government should establish the Commission and set sector wise policy. It also needs to create awareness among the people and accelerate an active consumer movement.

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Acknowledgement of Paternity under Muslim Law: Indian Perspective

Rubaiyat Noureen[1]

Abstract

Paternity should have to be insured to make free a child from the stigma of illegitimate. The child who is illegitimate in the eye of law, the society is also considering the same. Until the paternity has been established the child does not get legal father as well as legal identity. The biological father should have the right to acknowledge his own child. Acknowledgement means accepting the truth; in some cases paternity also need to be acknowledged. In the context of Mohammedan law some situations demands for acknowledgement regarding paternity. If the parents are not married then paternity needs to be legally recognized in order to identify the father and secure the father's rights. We need to change our view, we need to consider situations, and we need to understand the practical scenario than we can implement a decent law for the society.

Keywords: Illegitimate, Wedlock, *Zina, Firash, Legitimare.*

Introduction

The word paternity derived from a Latin word *'paternitas'* which used in the 'canon law to signify a kind of spiritual relationship,' it also means fatherhood. According to Black's Law Dictionary, paternity defines the identity of the father of a child both legally and biologically.

A child gets born with lots of blessings and happiness for the parents. Generally, if the Mother was married at the time the baby is born or ten-month period before the baby is born then the husband become the legal father of the child. However, if the parents are not married then paternity needs to be legally recognized in order to identify the father and secure the father's rights. Until the paternity has been established the child does not get legal father as well as legal identity. Moreover, till the father's identity has not been recognized the child is not become legitimate child. On the other hand, when the mother gets pregnant by one person but marries another person and she delivers the baby after marriage then the husband did not becomes father of

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the child automatically. That husband needs to acknowledge that child legally and after that he can become legal father. Additionally, who is the biological father of that child has no right to acknowledge that child under law. If the mother of the acknowledged child have not been the lawful wife of the acknowledger then that acknowledgement should be void. Then the child would be declared as *Walad Zina* (i.e. bastard), where paternity of a child is uncertain.

Acknowledgement means legally accepting someone, which creates some legal rights. When a man legally recognize any baby who did not biologically belong to that man, then it is called 'Acknowledgement of Paternity' under Mohammedan Law, this concept is also known as 'Adoption' under Hindu Law. This doctrine of 'Acknowledgement of Paternity' under Mohammedan Law applies only when there is uncertainty and paternity of the child has been proved from any other person, the child is not a result of any *Zina* (i.e. adultery, fornication, incest, or illicit relation) and the circumstance of his birth are such that he could be a legitimate child of his father.

The word legitimacy has been derived from the Latin term *'legitimare'* which means to make lawful.' Legitimacy refers to the status of a child who is born to parents who are legally married to each other. Under the Indian Evidence Act 1872, there is presumption in favour of legitimacy of a child born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried. According to Mohammedan Law, to establish paternity three proofs are needed, such as marriage, acknowledgement and evidence, otherwise the child becomes illegitimate. Consequently, being an illegitimate child without any culpability; leads him to be a burden of the society. Thus, it should not happen to any child as it goes against the idea of natural justice.

This paper deals with the rights of the parents to acknowledgement of a child and various aspects relating to acknowledgement of paternity under the Muslim law. Over the time steps have been taken to improve the status of women and children but still there exist a significant difference. In this paper, there is focus on this issue especially under Muslim law with the help of cases.

Specifically, when a child have no identity of a father that child recognize as an illegitimate child. This paper will help to change the view of readers regarding this matter. The motive of this paper is to make people understand that, a child cannot be called as illegitimate child, maybe the way in which the child came into existence that can be illegitimate but the child did not illegitimate. In additionally, the biological father should have the right to acknowledge his child as his legitimate child.

This study has discussed in detail the concept of Legitimacy and Acknowledgement of paternity under Mohammedan Law. It has evaluated the

effect of paternity, necessity of paternity; ways to establish paternity and rights creates through paternity. The study signifies that, once a father acknowledges the paternity of a child, that child becomes legitimate irrespective of the fact that the child was born out of lawful wedlock. But the problem becomes more complicated where the father refuses to acknowledge the paternity of the child in his lifetime. Such a child will remain for all intent and purposes an illegitimate child. The concept of illegitimacy regarding a child should be eliminated from the law as well as from the society, to establishing a natural justice.

Provisions regarding legitimacy of a child under Mohammedan Law

According to Lord Dunedin, he points out in '*Habibur Rahman* v. *Altaf Ali'* case "Legitimation is a proceeding which creates a status which did not exist before. In proper sense there is no legitimation under Mohammedan Law."

Under the Mohammedan Law a child to be legitimate must be the offspring of a man and his wife. 'Legitimacy is proved by showing that the child's parents had been lawfully married to each other at the time of the birth of the child.'

Sometimes there may be no direct proof of the marriage, in such case under Mohammedan Law proof of an acknowledgement of paternity is taken as presumptive proof of the marriage. Once a marriage is presumed to be valid, children born of such marriage are also legitimate. Thus, it is the establishment of a valid marriage that gives rise to proper legitimacy or paternity of children in Islamic Law.

There is a saying in Islamic Law 'that *Firash*, i.e. matrimonial authority belongs to the husband. All the jurists agreed that commission of illicit relations by a wife or a husband does not affect the validity of marriage.' The Prophet (PBUH) and all the Jurists condemn it "If as a result of illicit relation the wife becomes pregnant and if the husband is aware and keep mute for sometimes with her after his awareness and then the paternity established through Li'an, it shall not be allowed and the child shall be affiliated to him."

The jurists further held, 'the commission of adultery by the wife does not affect the marriage contract but it is recommended that the husband should divorce her.'

Muslim Law provides that, 'an illegitimate child is a *filius nullius* owing no *nasab* to parent. According to Shias, a child born outside the lawful wedlock is related neither to the father nor to the mother. On the other hand, Hanafis do not take such rigid stand, according to them, an illegitimate child for certain purpose such as wearing and nourishment is related to the mother. Under no School of Muslim Law, an illegitimate child has any right of inheritance in the

property of his putative father. Muslim Law also does not provide for the guardianship of illegitimate child, but in modern India by judicial system, it has established that guardianship of an illegitimate child vests in its mother.'

Establishment of paternity

The acknowledgement of paternity under Muslim Law is in 'the nature of a declaration by the father that a child is his legitimate offspring but it is not a process of legitimating of an illegitimate child.' A valid marriage is essential element, for acknowledgement of paternity under Mohammedan Law some proofs are also needed. A man can acknowledge another either expressly or impliedly as his lawful child. Under Islamic Law, Paternity may be established through: -

- Marriage
- Acknowledgement, and
- Evidence.

Paternity through Marriage

As earlier discussed, marriage is the right channel through which paternity may be established. The marriage in question must be valid and all essentials of marriage contract must be complied with. These are consent of the two parties, consent of the parents especially the father or his representative, payment of dower and the ceremony to take place between at least two witnesses. It is important to stress that after a couple might have complied with all the essentials of a valid marriage under Islamic Law, there must be continuation of such marriage. After that legitimacy can be fully established. 'A child's paternity or affinity is not considered through physical resemblance but by consideration of the period within which the child is born after continuation of the marriage of his parents.'

Paternity through acknowledgement

Paternity of the child shall be established if the following conditions are fulfilled, those are: The paternity of the child is not established in any one else; The ages of the man and the child are such that family relationship is possible between them; Where the child is of discreet age, the child has agreed in the acknowledgment; The man and the mother of the child could have been lawfully joined in marriage at the time of conception; The acknowledgment is not merely that he or she is his son, but that the child is his legitimate son; The man is competent to make a contract; The acknowledgment is with the distinct intention of conferring the status of legitimacy; The acknowledgement is definite and the child is acknowledged to be the child of his body.

Presumption from acknowledgment rebuttable

The presumption of paternity arising from acknowledgment may only be disproved by— denial on the part of the person acknowledged; proof of such proximity of age, or seniority of the acknowledge, as would render the alleged relationship physically impossible; proof that the acknowledge is in fact the child of some other person; or proof that the mother of the acknowledged child could not possibly have been the lawful wife of the acknowledger at the time when the acknowledge could have been conceived.

In the case of, '*Hai Ghazali* v. *Asma'* 'Parties were married in Nov 1974 and were divorced on August 1975. The wife claimed maintenance for a child born on 11 August 1975 but the Husband denied that the child was his. The Kadi (Judge) who heard the case gave judgment for the wife. He held that the child was legitimate and ordered the Husband to pay maintenance for the child. Because, the child was born during the marriage and was born more than 6 months after the marriage.'

Paternity through Evidence

It may happen that a husband may be away for a short period and when he comes back his wife tells him that she gave birth to this particular child. If the husband doubts it, then the wife may bring evidence to prove her allegation. In such cases evidence of two females is sufficient.

'In Hanafi School the evidence of one woman is sufficient and Hanbali school share the same view while in Shafi'i School, the minimum number for such evidence is four females.'

Conditions for Valid Acknowledgement

'The paternity of the child should be doubtful that means it should neither be proved nor disproved that the child is illegitimate. It was held in a case that, "if the child is known to be illegitimate, it cannot be acknowledged to be legitimate." The doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgement has its effect, but that effect always depend upon the assumption of a lawful union between the parents and acknowledge child.

"The acknowledger should acknowledge the child as his legitimate child, not just as his child." Generally, when one person calls another as his child, 'he means to call him as his legitimate child.' 'The intention to confer the status of legitimacy must be clear.' So whenever any acknowledge any child he must have to declare that child as his legitimate child and have to express that clearly.

The age of the acknowledger and acknowledged person should be such that they appear to be father and child. The acknowledger should be at least twelve and a half years senior to the person acknowledged.

The person acknowledged must not be the offspring of adultery or a result of any kind of *zina*. If the child is an outcome of *zina* then the child cannot be acknowledged as a legitimate child. That child is not able to get any acknowledgement of paternity. That child has no right under law and the society will not also accept the child.

The paternity of the person acknowledged must not be established by anyone else. If the paternity is certain and established by any other person then that acknowledgement is not legal and as well as the husband of the mother of that will not be able to acknowledge paternity of that child.

The acknowledgement must not be repudiated by the acknowledged person. Under Muslim law, a person who has the ability to understand the transaction has the right to repudiate the acknowledgement. For the validity of acknowledgement of paternity, no confirmation by the person acknowledgement is necessary. Once an acknowledgement of paternity is made, it cannot be revoked.'

Rights create by getting acknowledgement of paternity

When a valid acknowledgement of paternity is made, the following rights and consequence flow from it:

- It raises a presumption of valid marriage between the acknowledger and the mother of the person acknowledged.
- The acknowledger and the acknowledged person have mutual rights of inheritance.
- The mutual rights of inheritance also arise between the acknowledger and the mother of the acknowledged person.

It also has some benefits to establishing paternity for the mother, the father, and the child.

For the child

- Legal record of the identity of both parents.
- Father's name on the birth certificate.
- Information on family medical history if needed for the purpose of the child's medical treatment.

- Emotional benefits of knowing both parents.
- Financial support from both parents, including child support, Social Security benefits, veterans benefits, military allowances, and inheritance.
- Health or life insurance from either parent, if available.

For the mother

- Help in sharing parental responsibilities.
- Information about medical history if needed for the purpose of the child's medical treatment.
- Improved financial security for the child.
- Access to health insurance, if available.

For the father

- Legal establishment of parental rights.
- Father's name on the birth certificate.
- Right to seek court ordered custody or visitation.
- Right to be informed and to have a say in adoption proceedings, if any.

Critical Analysis

A child is only able to get the identity of a father and have a right to get acknowledged by a person who is the legal husband of the mother of the child. That person maybe a biological father of that child or not but the child may not be the outcome of any *zina*, this is the law. My question is, what about the biological father? If he wants to acknowledge that child he cannot do so, because the law did not permit that. There is no provision in the law regarding the paternity right of a biological father. Dr Mohamad Sujimon, a Scholar of Islam said that "If the biological mother is acknowledged, why not the biological father? There is gender discrimination operating here." But, yes our laws in some expects is gender biased and gender discriminative. From my point of view, law should permit the biological father to acknowledge paternity to the child.

The child is sinless and innocent. Law should look at the best interest of the child and try to find a solution. If a child is a result of *zina* then you cannot punish the child by recognizing him/her as a *waladzina*. *Zina* was committed by the parents not by the child, so why should the child have suffer from a mental pain as being a *waladzina* and live without any parental identity.

Always people point out that child as a symbol of stigma and burden for the society. The Supreme Court gave a judicial message in the case of '*Gaurav Jain* v. *Union of India'* that 'children are innocent and abandoning of the child by one of the parents, excluding a good foundation of life for them, is a crime against humanity.' This is also goes against the principles of natural justice.

The National Fatwa Council has ruled that a Muslim child born less than six months after the parents' marriage is illegitimate and cannot bear his father's name. This is not appropriate rule for an innocent child, if any kind of *zina* took place between two people and after that they decided to marry and at the same the girl is become pregnant out of that *zina* before marriage. Then the father of the child cannot acknowledged the child because the child came in to mother's womb before marriage and the child born less than six months after the parents' marriage, then the law will declare he child illegitimate. What type of inhumanity rule is this, it should not be practice any more. I am not in support of *zina*, I am in support of that innocent child. If the parents get married, that is an additional supporting factor; why the child should will addressed as an illegitimate child. The Quran clearly says that "no soul has to carry the burden of another soul" (Surah Al-Baqarah, 2:286). Therefore, undressing a child of its dignity and a healthy state of mind is, to him, against Islamic principles.

On the other hand, if the child declared as an illegitimate child then the child cannot bear his father's name. So the child loses the right of maintenance, the right of inheritance, custody and protection of the father. This is a significant blow not only materially but also emotionally, which could psychologically scar the child for life especially in a society where illegitimacy is scorned.

Now a day if a child get acknowledgement then additionally also get right to maintenance and inheritance, lots of issue and cases arising regarding this two matters. I want to cite some case decision regarding these two issues.

In '*Pavitri* v. *Katheesumm'* a question arose on the maintenance of an illegitimate daughter, born of a mohammedan male and a hindu woman, against his putative father and his assets. The court held that the mohammedan law imposes no burden of maintenance of an illegitimate child on the putative father. An illegitimate child is not entitled to be maintained by either parent under the shia law and only from mother under the hanafi law.

However in the case of '*Nafees Ara* v. *Asif Sadat Al' Khan* Petition was filed under Section 488 of the Criminal Procedure Code of 1898 claiming right of maintenance for an illegitimate child. In this case the court held that the Muslim law does not make any specific provision provide for granting or prohibiting the grant of maintenance to an illegitimate child against the father, does not mean that the civil or criminal court have no jurisdiction to grant maintenance.

Islamic Countries provisions regarding acknowledgement

'Islamic countries have restraint in child adoption. There are countries like Afghanistan which does not recognise adoption altogether. It is interesting to see that Iraq does not deem inter-country adoption at all. Distinctive features of these countries are given under, as follows:

- Bangladesh: Does not permit adoptions under Muslim law. Under Hindu law, Hindus may adopt Hindu children.
- Afghanistan: Islamic law does not recognize adoption (Art. 228 of civil Code of 1980);
- Iraq: Iraq does not permit the adoption of its nationals by foreigners.
- Kuwait: Kuwaiti law has no provisions for adoption and legitimation under Muslim law.'

Muslim law does not recognize assumed father for any purpose. It sticks to the concept of *"filius nullius"*. There is no process recognised under the Muslim law which confers legitimacy on an illegitimate child. However Mohammedan laws have adopted measures which is "acknowledgement of paternity" which are preventive measures to save the children from being bastard. Mohammedan Adoption or any equivalent of the same is not recognized under Mohammedan law.

Recommendation

Personal Laws are discriminatory, it injected into the society and emerged bias, prejudices, and inequity, unfairness and women were cast aside. The personal laws began rendering groups of people powerless and this suppressed group then came to be referred to as the weaker section of the society. Women from different religious and ethnic backgrounds were treated differently. The inequality covered in the framework of personal laws leading people differently, this shows the need for a Uniform Civil Code. Article 44 of the Indian Constitution mandates the establishment of such a code by providing that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." Although this constitutional mandate has existed for over half a century and women's rights supporters have long demanded its realization, opposition from patriarchal minority leaders has yet prevented the implementation of a uniform code.

We need to change our view, we need to consider situation, and we need to understand the practical scenario than we can implemented a decent law for the society. Whatever law we have now all are codified in the early society but now the society has been changed, so we should have a uniform law which is perfect for this society.

Conclusion

The practical scenario of the society is far different from the guideline of the law prescribed in the statutes. The child who is illegitimate in the eye of law, the society is also considering the same. However, no one does not consider his innocence although the child himself does not bring him in this world. He is the result of *zina* but he does not commit that *zina.* Moreover, the whole world goes against him. Thus, the word "illegitimate" should not be added with the child. Meanwhile, the biological father should have the right to acknowledge his own child.

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Copyright Infringement in Bangladeshi Cinema

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Abstract

Cinema is a subject matter of copyright. Copyright is one kind of intellectual property. If cinema contains any copyright issues then Copyright Act 2000 is available. There are some objectives of the study, such as; to discuss the relationship between cinema and copyright, highlight the various laws on cinema and copyright protection, and analyse the current situation of copyright infringement of cinema in Bangladesh. Only secondary sources have been used during the time of the study. It's revealed from the study that in Bangladesh there is various sorts of challenges regarding copyright protection of cinema, such as; cinema making process, present cinema related laws, rules, policy, censorship system, film censor board etc. At last stage of the study some suggestions have been provided accordance with the findings.

Keywords: Cinema, Cinematograph Act 1918, the Censorship of Films Act 1963, Copyright Act 2000.

Introduction

Cinema is an artistic expression of ideas, stories and often opinions, sometimes inspired by reality occasionally set to music, designed to enthral, enchant or simply to entertain. However cinema is a subject matter of copyright. Copyright is one kind of intellectual property. It is a right given by

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the law to the creators of literary (including computer programs), dramatic, musical and artistic works and producers of cinematograph films and sound recordings. Cinema has been a classic means of expression. Therefore, it has been looked at from the same lens of freedom of speech and expression. Ability to make and release films is parallel to an expression of creativity, guaranteed by Article 39 of the Constitution of Bangladesh. Cinematograph Act, 1918 and The Censorship of Films Act, 1963 are the main laws regarding cinema in Bangladesh. If cinema contains any copyright issues then Copyright Act 2000 is also available.

Cinema is considered to be an important art form, a source of popular entertainment, and a powerful medium for educating—or indoctrinating—citizens. The visual basis of film gives it a universal power of communication. Some films have become popular worldwide attractions by using dubbing or subtitles to translate the dialog into the language of the viewer. Some have criticized the cinema industry's glorification of violence and its sexist treatment of women. The cinema of Bangladesh, often generally referred to as Dhallywood, has had a significant effect on Asia. Bangladesh has had a significant film industry since the 80's. Film production reached an all-time high in 1990, a period referred to as the golden age of Bangladeshi cinema. During the 90's, the Bangladeshi film industry produced some of the biggest films in the history of Bangladeshi Cinema. According to film experts, the Bangladeshi film industry is growing at a very fast pace in recent years. The Bangladeshi film industry has its beginnings with the 1931 production of Last Kiss; the earliest feature film ever made in what would become Bangladesh. However, the first ever screening of films in Bangladesh started on April 24, 1898 by Bradford Bioscope Company at the Crowntheater near Dhaka harbour.[3] It's a matter of great sorrow that copyright infringement is a very common affair in Bangladesh. Copyright infringement is a stigma in our film industry as well as a threat for the protection of intellectual property rights.

Copyright infringement commits when anyone constructs a film which is similar to previously released film without the license or consent of the owner or author of that film. Bangladesh film industry or "Dhallywood" has been waking up to copyright infringement cases because of the recent trend of remaking films based on Tollywood (Bengali cinema based on Kolkata) or south Indian films and taking inspiration from Bollywood films has shifted the focus to the cause of protection of intellectual property rights in entertainment industry.

There are some objectives of the study, such as; to discuss the relationship between cinema and copyright, highlight the various laws on cinema and copyright protection and analyse the current situation of copyright infringement of cinema in Bangladesh. This study is written primarily by

3 Hyder, Md. Nayem Alimul. Strengthening the Film Industry: the Role of Censorship (2015), The Financial Express, March 11, 2015.

taking help of the secondary source such as books, news, feature, reports published is different national and local daily newspapers, internet etc. Additionally, available published research reports and articles are taken into consideration while developing arguments and analysis of different dimension of cinema and copyright issues. After the analysis, the data has been interpreted according to the analysis. At last some recommendations have been provided.

Meaning of Cinema

Cinema is an artistic expression of ideas, stories and often opinions, sometimes inspired by reality occasionally set to music, designed to enthrall, enchant or simply to entertain. There are hardly any other mediums of expression that can actually claim foe levels of insidious influence and presence in our daily lives. It has been one of the most potent tools of expression since its inception years back. A Cinematograph film can be defined as any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph' shall be constructed as including any work produced by any process analogous to cinematograph including video films. According to Cinematograph Act, 1918 "cinematograph" means a composite equipment including a video-cassette recorder used for production, projection and exhibition of motion picture film.

Freedom of Expression and Cinema

Cinema has been a classic means of expression. Therefore, it has been looked at from the same lens of freedom of speech and expression. Ability to make and release films is parallel to an expression of creativity, guaranteed by Article 39 of the Constitution of Bangladesh. However, the very nature of cinema as a mass media, with tremendous outreach, has led to increased responsibility and increased restrictions on the ability to express. Article 39 of the Constitution of People's Republic of Bangladesh contains the right of freedom of speech and expression in the title of "Freedom of thought and conscience, and of speech". It is stated in the said article that, 1. Freedom of thought and conscience is guaranteed. 2. Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence– (a) The right of every citizen to freedom of speech and expression; and (b) Freedom of the press, are guaranteed.[4] From article 39 it becomes clear that the right of freedom of speech and expression has been guaranteed by the constitution of

4 Article 39 of the Constitution of Bangladesh.

Bangladesh but it has been made subject to reasonable restrictions. If any cinema contains any issue which is against the constitutional provisions then government can impose some restrictions or censorship against that cinema.

Cinema and Legal Framework in Bangladesh

Constitution is the supreme law of the land. Article 39 of the constitution deals with freedom of speech and expression as cinema is a mode of expression. So Article 39 can be treated as safeguards for cinema related issues. Cinematograph Act, 1918 and The Censorship of Films Act, 1963 are the main laws regarding cinema in Bangladesh. If cinema contains any copyright issues then Copyright Act 2000 is available. There are also some laws which may apply for cinema and cinema related legal issues, such as;

1. Penal Code 1860
2. Code of Criminal Procedure 1898
3. The Dramatic Performance Act 1876
4. The Foreign Relations Act, 1932
5. The Children Act, 1974
6. Right to Information Act, 2009
7. Official Secret Act, 1923
8. Contempt of Courts Act, 1926
9. ICT Act, 2006 etc.

Idea of Copyright

Copyright is one kind of intellectual property. It is a right given by the law to the creators of literary (including computer programs), dramatic, musical and artistic works and producers of cinematograph films and sound recordings. Copyright Act 2000 is the key legal instrument regarding protection of Copyright materials. Under the Copyright Act 2000, copyright means any right, to do or authorize the doing of any of the concerned acts in respect of a work thereof, namely;[5]

i. **Literary, dramatic, or musical work except a computer program:** Reproducing the work in any material form, issuing copies of the work to the public, performing the work in the public, producing, reproducing, performing or publishing any translation of the work, broadcasting of the work or making any adaptation of the work;

ii. **Computer program:** Doing any of the acts mentioned in the preceding paragraph and selling or giving on hire, or offering for sale or hiring any copy of the computer program;

5 Section 14, the Copyright Act, 2000.

iii. **Artistic work:** reproducing the work in any material form, publicizing the work to the public, issuing copies of the work to the public, including the work in any cinematograph film, broadcasting of the work or making any adaptation of the work etc;

iv. **Cinematograph film:** Making a copy of the work, including a photograph of any image forming part thereof in vcp, vcr, dvd or any other form, or selling or giving on hire, or offering for sale or hiring any copy of the film in vcp, vcr, dvd or any other form and publicizing and displaying among general public any auditory or visual copy of the film in vcp, vcr, dvd or any other form; and

v. **Sound recording:** Making any other sound recording embodying it, or selling or giving on hire, or offering for sale or hiring any copy of the sound recording, or communicating the sound recording to the public etc. Copyright protection covers expressions of ideas rather than the ideas themselves.[6] Under section 15 of the 2000 Act, copyright protection is conferred on original literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. It extends to the computer program also. Copyright refers to a bundle of exclusive rights vested in the owner of copyright. These rights can be exercised only by the owner of copyright or by any other person who is duly licensed in this regard by the owner of copyright. These rights include the right of adaptation,[7] right of reproduction, right of publication, right to make translations, communication to public etc.

The Copyright Act 2000 governs the subject of copyright laws in Bangladesh. Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation and translation of the work. There exist a number of international conventions governing the area of copyright law, including the Berne Convention of 1886 (as modified at Paris in 1971), the Universal Copyright Convention of 1951, the Rome Convention of 1961 and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The duration of the copyright protection for literary, dramatic, musical and artistic work is till the lifetime of the author until 60 years from the beginning of the calendar years next following the year in which the work is first published.[8] In case of cinematograph film, sound recording, photograph, computer program or posthumous publications, the duration of protection is same; it is sixty years from the beginning of the calendar year next following the year in which such

6 Article 9.2, the TRIPS Agreement, 1994

7 Adaptation is generally understood as the modification of a work to create another work, for example, adapting a novel to make a film.

8 Section 24 of the Copyright Act, 2000.

works are published.[9] The Copyright Act 2000 lays down the manner of assignment of copyright in Bangladesh. Assignment can only be in writing and must specify the work, the period of assignment and the territory for which assignment is made, if the period of assignment is not specified in the agreement, it shall be deemed to be 5 years and if the territorial extent of assignment is not specified, it shall be presumed to be limited to the territories of India.[10]

Copyright infringement is the use of works protected by copyright law without permission, infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works. The copyright holder is typically the work's creator, or a publisher or other business to whom copyright has been assigned. Copyright holders routinely invoke legal and technological measures to prevent and penalize copyright infringement.

Unauthorized copy, reproduction or use of copyright raises the question of infringement. In order to ensure exclusive right to the owner of a work, there must have certain provisions as regards infringement. Which acts create infringement if it is well defined by law; it will be easy on part of the owner to take action against the wrongdoer and thus protects the rights and interests of the owner. The present law of copyright also ensures protection by inserting the provisions of infringement. Copyright in a work is deemed to be infringed:[11]

When any person, without a license from the owner of the copyright, or the Registrar of the copyright, or in contravention of the conditions of a license granted or any conditions imposed by a competent authority under Act:

(i) does anything, the exclusive right to do which is conferred upon the owner of the copyright; or

(ii) permits for profit any place to be used for communicating the work to the public where such communication constitute an infringement of the copyright in the work, unless he *was* not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright.

Copyright infringement may also arise if any person does any of the following acts:

- ❖ makes for sale or hire, or sells or lets hire or by way of trade displays or offers for sale or hire any infringing copies of the work or

9 Sections 25-28A, the Copyright Act, 2000.

10 Section 19 of the Copyright Act 2000.

11 Section 71, of the Copyright Act 2000.

- distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, any infringing copies of the work, or
- exhibits to public by way of trade any infringing copies of the work, or
- imports into Bangladesh any infringing copies of the work.

The present copyright law at the same time provides certain cases where no infringement can arise.[12] Several exceptions are as follows:

(a) Fair use of a literary, dramatic, musical or artistic work for the purpose of private study or private use including research; or criticism or review.

(b) Fair use of a literary, dramatic, musical or artistic work for the purpose of reporting current events in a newspaper, magazine, or similar periodical or in a cinematograph film or by means of photograph.

(c) Reproduction for use in judicial proceedings and for use of members of the legislature etc.

Copyright Protection

Copyright law protects only the form of expression of ideas, not the ideas themselves. It protects the owner of property rights against those who copy or otherwise take and use the form in which the original work was expressed by the author. The law may state that the author of an original work has the right to prevent other persons from copying or otherwise using his work. So a created work is considered protected as soon as it exists, and a public register of copyright protected works is not necessary. In Bangladesh in order to get copyright protection the owner of the work should register it under Copyright Register. It is pertinent that under the 2000 Act, registration is optional; not compulsory to get copyright protection. At the same time it is also true that copyright protection is legally ensured to the copyright owner by registration; certificate of registration of literary, dramatic or artistic work is considered as a prima facie evidence when any dispute arises.[13] Any other person than a registered owner, can get copyright protection by grant of license either by voluntary or compulsory license or means of assignment. Here the provisions of infringement and remedies of copyright infringement also play an important role in providing copyright protection to the copyright owners.

12 Section 72 of the Copyright Act, 2000.

13 Section 60 of the Copyright Act, 2000.

Conditions for Getting Copyright Protection

Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. However, facilities exist for having the work registered in the Register of Copyrights maintained in the Copyright Office under the Ministry of Culture Affairs. The certificate issued by the Registrar of Copyright constitutes *prima-facie* evidence of ownership of copyright. The Copyright Office has been set up to provide registration facilities to all types of works[14] and is headed by a Registrar of Copyright and is located at National Library Building (2nd Floor), 32, Justice S. M. Morshed Sarani, Agargaon, Sher-e-Bangla Nagar, Dhaka.

In order to get copyright the owner has to show that the work is original; it is immaterial whether the work is wise or foolish, accurate or inaccurate or whether it has or has not any literary merit.[15] In order to qualify for copyrights the works apart from being original, should satisfy the following conditions:

(a) In the case of published work, it has to be published first in Bangladesh but if it is first published[16] in foreign country, the author must be a citizen of Bangladesh or domicile in Bangladesh at the date of publication, or where the author is dead at the time of publication and the work is published after his death, the author must be a citizen of Bangladesh or domicile in Bangladesh at the time of his death.[17] It is important to note that if any work is published in Bangladesh and any other country simultaneously, the work should be considered to be first published in Bangladesh. The work shall be considered to be simultaneously published if the difference of days between the publication in Bangladesh and publication in any other country more than 30 days or the time fixed by the Government.[18]

(b) In case of unpublished work, the author is on the date of making of the work a citizen of Bangladesh or domicile in Bangladesh. This does not apply to works of architecture.[19]

(c) In the case of cinematographic work, the office or residence of the produce must be in Bangladesh at the time of making the work, the office or residence of the producer must be in Bangladesh at the time of making the whole or substantial part of the work.

14 Work means a literary, dramatic, musical, artistic work or cinematograph film or sound recording or broadcasting as per section 2(11), the 2000 Act.

15 Azam Mohammad Monirul (2008), Intellectual Property, WTO and Bangladesh, Dhaka: New Warsi Book Corporation, 1st edn, p. 193.

16 Publication means making a work available to the public by issue of copies or by communicating the work to the public as per section 3 of the Act, 2000.

17 Section 15(2)(a), the Copyright Act, 2000.

18 Section 5, *ibid*.

19 Section 15(2)(b), *ibid*.

(d) In the case of any architectural artistic work, the work must be located in Bangladesh.[20]

Cinema and Copyright in Bangladesh

For a long time, film makers in Bollywood and Tollywood were largely unaware of their films being copied in Bangladesh. The unlicensed copying of movies, changing a few sequences in the film and conveniently passing them off as "inspirations" to avoid giving credit to the original filmmakers is an all too familiar practice here. It is observed that some movies made in Bangladesh are copies of Bollywood movie scripts and songs. Bangladesh actors even adopt the family name Khan as their screen name, copying a trend set by Bollywood up-and-coming actors who do so to emulate megastars like Salman Khan and Shah Rukh Khan. An actor or actress can copy his or her favorite one's gesture, posture or body languages. Nothing is wrong with it. But when a director or script writer steals a story or script from others and makes a movie out of it without his or her permission that is indeed a crime.

Anyone can make movie taking ideas from other film and story but in Bangladesh viewers and audiences witnessed that films were 'copied' from original one without permission of writer or authority concerned. It is revealed that some of the Bangladeshi movie has copied another film without any permission or consent from the creator or author which is a clear copyright infringement. Some of them are;

1. Pita MatarShontan (early 90s) copied from hindi movie "Avtaar (1983)"
2. Ohongkar (2017) copied from Kannadi film "Auto Shankar (2005)"
3. Raja Babu (2015) copied from Telugu Movie "Dhammu (2012)"
4. Ashiquei (2015) copied from Telugu Movie "Ishq (2012)"
5. Full and Final (2014) copied from Korean Movie "Daisy (2006)"
6. Brihannala (2014) story copied from the short story titled 'Gaachh-ta Balechhilo' (The tree had told) and many more.

A case is going on film Onno Jibon (1995) for the copyright violation. However, Hindi movies like Kiyamat Se Kiyamat Tak, Sajan, Dil were remade in Bangladesh after taking copyrights. On the other hand, there were so many Bangla movies like Sotto Mithya, Mayer Doa were remade in Kolkata after taking permission.

Piracy is another integral part of copyright infringement in Bangladesh. Piracy is the unauthorized duplication of an original recording for commercial gain without the consent of the rights owner which is an illegal and criminal activity. Piracy is considered to be the illegitimate use of materials held by

20 Section 15(2)(c), *ibid*.

copyright.[21] The unauthorized copying or reproduction of copyright materials for commercial purposes and the unauthorized commercial dealing in copied materials is treated as copyright piracy. It affects all of the elements involved in the creation; production and distribution of intellectual works together constitute copyright system.[22] Piracy primarily targets software, film and music. However, the illegal copying of books and other text works remains common, especially for educational reasons. The Pirated copies usually sold at reduced prices, thereby undermining the original author's and investor's possibility of obtaining a just moral and economic reward for their work and investment and thus the authors and investors lose their interest in creation new literary, dramatic or artistic work. Copyright piracy is a great problem in Bangladesh. Here its rate is the highest amongst the world.[23] Most of the people do not realize that the copyright of a work (literary, artistic or dramatic) belongs to the creators; not to them; if they copy it without authorization, it constitutes an infringement or an offense.

The piracy levels are extremely high in Bangladesh. Bangladeshi audio and film industry are suffering from increasing trend of piracy of both audio and video products. The problem of piracy has arisen with the rapid advance of technology. These piracies are causing huge loss to film and music industry of the country but there is little or no enforcement of Copyright Act, 2000 (last amended in 2005). Video piracy is causing a total loss of 150 million taka annually to local film makers. Local film producers invest more than 560 million taka annually to make 70-80 movies every year on an average. But for different reasons, including piracy, the producers cannot get back 50 percent of their investment from 80 percent of the films. The Copyright Act of Bangladesh went into effect in July 2000 and was last amended by the Copyright (Amendment) Act 2005 on May 18, 2005. Bangladesh should take the opportunity to update the Copyright Act in order to combat piracy and pave the way for intellectual property industries to develop, invest and create jobs. In addition to the rights granted in the Copyright Act, Bangladesh should accede to the WIPO (World Intellectual Property Organization) performances and Phonograms Treaty (WPPT) as well as to the WIPO Copyright Treaty (WCT) and should update the Copyright Act to comply with the treaties. The Copyright Act should be amended in real sense to provide adequate protection for all right holders against the circumvention of technological protection measures (TPMs), including access and copy controls, used by right holders to protect their works against unauthorized uses, as well as adequate protection against the manufacture and trafficking of devices and offering of services/information that enable the circumvention of such technological measures. The Bangladesh government should also add provisions prohibiting

21 Owen, Lynette (2001) Piracy Association of Learned and Professional Society Publishers 14(1) p. 67.

22 WIPO (1988), Background Reading Material on Intellectual Property, WIPO Publication No. 659(E) p. 288.

23 International Intellectual Property Alliance (IIPA) 2009 Special Report on Copyright Protection and Enforcement.

the illegal removal and altering of rights management information and the trafficking of copies that contain tampered with information. Bangladesh could achieve this objective by offering injured right holders the opportunity to select pre-established (i.e., statutory) damages, and by substantially increasing the minimum and maximum fines and sentences for criminal offenses. Although there is a Copyright Act, 2000 as well as an order of the High Court against piracy in Bangladesh but it is true that there is not enough enforcement of that law or of that Act.[24]

Cinema is a subject matter of media. The media of Bangladesh got their freedom from the Supreme law of the land, namely, the Constitution of Bangladesh. Article 39 of the said Constitution deals with freedom of thought, conscience and of speech. Various media laws and regulations regulate the cinema of Bangladesh, such as; The Cinematograph Act, 1918 (Act No. II of 1918), The Censorship of Films Act, 1963 (Act no. XVIII of 1963), The Indecent Advertisements Prohibition Act, 1963 (Act no XII of 1963) etc.

Section 2(b) of the Cinematograph Act, 1918 said that cinematograph" means a composite equipment including a video-cassette recorder used for production, projection and exhibition of motion picture film.

Section 3 of the Censorship of Films Act, 1963 said that the Government may, by notification in the official Gazette, Constitute a Board to be called Bangladesh Films Censor Board, which shall consist of a Chairman and such number of members, not exceeding fourteen, appointed by the Government for the purpose of examining and certifying films for public exhibition in Bangladesh.

The Board members are from different walks of the society like Social Worker, Government officers, Educationist, Journalists, Film maker, Film producer, Actor-Actress, Poet etc. Bangladesh Film Censor Board examines the locally produced films of all categories, all imported films for commercial purposes and non-commercial use. It also censors the films imported by the Foreign Missions through diplomatic channel. The Board acts as the registration authority of film clubs and societies and to regulate activities including granting permission for screening of films. Bangladesh Film Censor Board checks violations of Acts and Rules regarding film Censors and Film Club Acts. It performs other works as assigned by the Government from time to time. These include examination and preview of films for foreign films festivals held in Bangladesh. The Board gives secretarial assistance and manages screening of films submitted for National Film Award. It is also responsible for screening of films examined by the Appellate Committee.[25]

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24 Babu, Dr. Kudrat-E-Khuda, Who will stop piracy? (2017), The Independent, 4th January, 2017.

25 Islam, Kazi Shariful, A Critical Analysis of Censorship Law and Bangladeshi Film, (2015), Journal of Law, Policy and Globalization, Vol. 36, 2015, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online).

Regarding Censorship and public exhibition, there is a notification of Ministry of information dated 16th November 1985, which is as follows:

The Government is pleased to issue the following instructions for the purpose of examining and certifying films for public exhibition, namely:

Application of general principles.- In the light of the broad principles, a film shall be regarded as unsuitable for public exhibition if it has the feature given below :-

I. Security or Law and Order:

(a) Brings into contempt Bangladesh or its people, its tradition, culture, custom and dress.

(b) Tends to undermine the integrity or solidarity of Bangladesh as an independent state.

(c) Violates any instruction issued by the Government from time to time in the interest of preservation of Law and order and, of the security aspects of the country.

(d) Portrays sedition, anarchy or violence with political motive.

(e) Reveals military or other official secrets likely to affect security of the state.

(f) Leads to breach of law and order or creates sympathy for violation of laws.

(g) Ridicules or brings into contempt the Defense Forces, Police Force or any other Force responsible for maintenance of law and order in the country. Portrayal of any character falling in this category in a manner that might help to correct any corrupt element therein will be permissible.

(h) Portrays the Defense Forces or Police Force in derogatory uniforms.

(i) Gives a general impression of predominance of violence and lawlessness in the country and shows forces of law absent or inactive.

(j) Has an inadequate story intended to cover-up sequences predominantly consisting of lawlessness, violence, crimes or spying likely to affect adversely the average audience.

N.B.- While invoking sub-clause (a), place and context should be taken into full consideration.

II. International Relations:

(a) Contains propaganda in favor of a foreign state having a bearing on any point of dispute between it and Bangladesh or against a friendly foreign

state which is likely to impair good relations between it and Bangladesh.

(b) Violates the third country principle, that is which adversely affects friendly relations with the other country or countries or wounds the susceptibilities of foreign nations.

(c) Portrays maliciously incidents or sequences which are prejudicial to the prestige or history of any people, race or nation.

(d) Distorts historical facts particularly maligning Bangladesh and its ideals and heroes.

III. Religious Susceptibilities:

(a) Ridicules, disparages or attacks any religion.
(b) Causes hatred or strife among religious sects, castes or creeds.
(c) Exploits religion to denounce or uphold controversial social issues.
(d) Ridicules religious persuasions so as to offend its believers.

IV. Immorality or Obscenity:

(a) Condones or extenuates acts of immorality.
(b) Over emphasizes, glamorizes or glorifies immoral life.
(c) Enlists sympathy or admiration for vicious or immoral character.
(d) Justifies achievement of a noble end through vile means.
(e) Tends to lower the sanctity of institution of marriage.
(f) Depicts actual act of sex, rape or passionate love scenes of immoral nature.
(g) Contains dialogue, songs or speeches of indecent interpretation.
(h) Exhibits the human form, actually or in shadow graphs –
  (i) in a state of nudity;
  (ii) indecorously or suggestively clothed;
  (iii) indecorous or sensuous posture.
(i) Indecently portrays national institutions, traditions, custom or culture. (This covers kissing, hugging and embracing which should not be allowed in films of sub-continental origin. This violates accepted canons of culture of these countries. Kissing may, however, be allowed in case of foreign films only. Hugging and embracing may be allowed in sub-continental films subject to the requirements of the story, provided that the same do not appear to be suggestive or of suggestive nature.)

N.B.- (i) Deception of attempts or indication to rape may be permissible on when it is intended to condemn it.
(ii) Bikini or bathing costume scene may be permissible in case of foreign films.

(iii) Modern dress and suitable bathing costume in local production may be allowed in export quality films, provided these are of modest presentation.

(iv) In case a picture creates such an impression on the audience as to encourage vice or immorality, the film should not be certified even it shows that the vicious to the immoral has been punished for his/her wrong.

V. Bestiality:

(a) Exhibits wanton cruelty to animals.
(b) Shows exaggerated horror, torture or cruelty or suffering which creates severe adverse reaction among the spectators.
(c) Depicts third degree methods unless otherwise it is for the betterment of the society.

VI. Crime:

(a) Condones criminal acts.
(b) Portrays the *modus operandi* of criminals which may help to introduce new methods of crime.
(c) Makes heroes of criminals or elicits sympathy of audience on their behalf.
(d) Maliciously ridicules or belittles public officers engaged in the prevention or detection of crime or punishment of criminals or entrusted with the dispensation of justice.
(e) Suggests wrong-doings or criminal activities as profitable or as normal incidents of ordinary life.
(f) Overemphasizes criminal activities in such a way as to arouse sympathy.
(g) Familiarizes the adolescents and young people with crime and acts of violence as normal incidents of ordinary life and not to be reprobated.
(h) Shows science as a means of acquiring devilish powers by master criminals and highly equipped and most modern laboratory as his headquarter.
(i) Upholds trafficking women, children, liquor, drugs, and smuggling of any kind.

VII. Plagiarism:

Plagiarism in any form from any old or under production foreign or Bangladeshi film.

N.B.- (i) A plagiarized film is that which comes to near the original as to suggest the original in the mind of every person seeing it.

(ii) Plagiarism shall not, however, be deemed to prohibit exceptions being made in suitable cases in the local production of well-known

classics of folk-tales or where a producer of an old film produces a better version of his film or he is legally authorized to remake or reproduce the original.

Findings

Following are the findings of the study regarding copyright infringement in Bangladeshi cinema;

1. Cinema is a medium of expression which protected under the article 39 of the constitution of Bangladesh.
2. In Bangladesh there are exist some laws regarding cinema including Copyright Act, 2000.
3. Commercial cinema is a famous way of recreation for general public in Bangladesh.
4. There is a great influence of Indian cinema on Bangladeshi cinemas.
5. Bangladeshi cinema makers (not everyone) generally follow the materials of foreign films and apply them into their own creation with slight modifications.
6. Copyright violation, piracy and plagiarism are familiar issue in Bangladesh film industry.
7. Film makers and related persons don't have adequate knowledge as well as respect on existing laws regarding cinema.
8. Bangladesh Film Censor Board is not well equipped and this board is playing a nominal role regarding protection of copyright of cinema.
9. Laws like Cinematograph Act, 1918and Censorship of Films Act, 1963 are not up to date to tackle the violation of copyright activities in cinema.
10. There are no specific provisions for copyright violation in cinema under the existing laws.
11. Film censor board is the key organization to prevent the copyright violation activities before the release of any cinema. Lack of experienced and expert cinema related person as well as legal expert in the censor board and censor appeal board is another loophole.
12. Existing punishment under the laws relating to cinema which includes Copyright Act are not sufficient.
13. Law enforcing agencies do not have adequate knowledge and experiences on copyright protection.
14. Inadequate awareness of the general people on copyright protection is another hindrance.

It can be said that in Bangladesh there is various sorts of challenges regarding copyright protection of cinema, such as; film making process, present film related laws, rules, policy, censorship system, film censor board etc.[26] It's a matter of great sorrow that there is absence of comprehensive action by the legislative, executive and judicial organs to protect the cinema from copyright violation.

Suggestions

1. Specific provisions regarding copyright piracy need to introduce in the Copyright Act.
2. Copyright and Censorship law should be modified. Especially the issues of plagiarism of cinema should need to be added.
3. Digital projection should be introduced in every cinema hall in Bangladesh. By making digital cinema aproducer can save huge amount of money.
4. The member of the censor board should be more film related and law related person. Without expert opinion they couldn't take the perfect decision about a film. Every member should have proper information and knowledge on cinema plagiarism issues and copyright laws.
5. Existing degree of punishment on copyright violation should be increased.
6. Law enforcing agencies should be properly trained to combat with copyright violation.
7. Bangladeshi film makers should have reasonable idea and knowledge on copyright laws so that they will refrain from any activities against copyright violation.To give adequate awareness on copyright issues for both film related persons and general people seminars, workshops etc. on copyright violation matters should need to be executed regularly.
8. Proper take care of Intellectual property rights by the concerned authority is essential. So government officials should need to take hard steps towards any kind of IP rights violations.
9. A comprehensive afforts by the legislative, executive and judiciary of the state are needed to introduce regarding protection of all sorts of IP rights including copyright.

26 Mohiuddin, Md, Administration and the Rules, Regulations of Censorship: a Study on Bangladesh Film Censor Board (2015), IOSR Journal of Business and Management (IOSR-JBM), e-ISSN: 2278-487X, p-ISSN: 2319-7668, Volume 17, Issue 6, Ver. I (June. 2015), PP 38-48.

Conclusion

Cinema has been a classic means of expression. Therefore, it has been looked at from the same lens of freedom of speech and expression. Cinema is an artistic expression of ideas, stories and often opinions, sometimes inspired by reality occasionally set to music, designed to enthrall, enchant or simply to entertain. There are hardly any other mediums of expression that can actually claim foe levels of insidious influence and presence in our daily lives. It's a matter of great sorrow that copyright infringement is a very common affair in Bangladesh. Copyright infringement is a stigma in our film industry as well as a threat for the protection of intellectual property rights. A comprehensive initiatives are to be taken by the film makers, film related entity, government and general people to prevent this wrong.

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Assessing the Importance of Enacting Laws for Introducing Paternity Leave in Bangladesh

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Abstract

Children being an important asset, proper effort and care should be made to them from the early days of their birth. This proper caring of children must be ensured by the parents for the betterment of their future. Active participation of both mother and father is needed for perfect growing of children. Most developed or industrialized nations have made paternity leave available to fathers in conjunction with childbirth. It increases father's involvement with their children. But father's participation in childcare is severely limited in developing countries. There is a significant connection between father's taking leave around the birth and involvement in the care of their babies and young children later. Bangladesh has no laws relating to paternity leave. This paper addresses the necessity of paternity leave in Bangladesh by making a comparative study of laws of different countries regarding the paternity leave as well as recommends enacting laws regarding paternity leave in Bangladesh.

Keywords: Paternity leave, Male employees, Job sectors, Baby care, Importance of enacting laws.

Introduction

Child is the most precious and divine gift for parents. A new born child is the future, greatest resource and hope for a better tomorrow. A proper parenting is thus essential for the better grown up of a child. Considering the betterment of a new born child, every developed country in the world has acknowledged the paid leave for mothers and many also provide paid leave for fathers. Approximately 70 countries out of 178 countries offer paid leave for fathers in

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the form of paternity leave or shared parental leave (ILO, 2014). But unfortunately Bangladesh has no legislation for paternity leave yet.

There are numerous reasons for the extension of taking paternity leave in the present days. More intense engagement in parenting for men has positive long term effects for both father and child (Brown, Mangelsdorf, and Neff, 2012). This failure of men to be active co-parents in the first few months of the children's lives sets a pattern in motion that is complex to change. The mother develops a close bond with her child as well as the confidence and competence to become the primary caregiver. The father is immediately cast in the role of a supporting actor. So, one can easily realize the importance paternity leave laws for Bangladesh perspective after going through this paper. This paper assess the importance of enacting laws for paternity leave for Bangladesh by drawing examples of the leave rules for male employees of different countries along with addressing the needs of this enactments for us.

Paternity Leave

In the modern world of globalization the concept of taking care of the new born child has changed than the ancient time. Child needs the active participation of both mother and father for its proper growth. Generally paternity leave means the leave which is taken by the father after the birth of his adorable child.

Paternity leave is a period of time that a father is legally allowed to be away from his employment so that he can spend quality time with his new-born baby.

The International Labour Organization (ILO) defines the leave as, "A leave period - paid or unpaid - reserved for fathers in relation to childbirth or leave that can be used exclusively by fathers as paternity leave. It does not include parental leave provisions that can be used by the father or mother or parts of maternity leave entitlements that the mother can transfer to the father. It includes 'special leave' provisions in addition to annual leave that may be used by fathers at the time of birth, but which are not strictly 'paternity leave'."

However paternity leave is a short period of leave exclusively for the father, immediately following childbirth, the main purpose of which is to allow him to spend some time with the new child and his partner (ILO, 2014).

Importance of Paternity Leave in General

Incontrovertibly, children need care from the very moment of its birth. The care includes feeding, healthcare, early motivation, love and everything else

that is part of full development of that child. For this reason both the father and mother play important role for the better future of the child. The benefits of paternity leave are obvious and something very important. Every modern father should be encouraged to take advantage of not only for his child, but also for his own sense of fulfilment and to maintain a healthy relationship with his partner. The benefit of paternity leave has a long-lasting effect on the family life of that person.

The Convention on the Rights of the Child (CRC) establishes in article 18, subsections 1- 3 that "the state must guarantee the recognition of the both parents have common responsibilities for the upbringing and development of the child". It affirms that "states shall render assistance to parents and legal guardians in the performance of their child rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children". Furthermore "they shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible".

Article 10 of the International Convention on Economic, Social and Cultural Rights (ICESCR) establishes that states must provide protection and assistance to families for the care and education of their children.

Paternity leave has a long term influence on the child. If fathers get parental leave, they can be there to help not only with the children, but also help the spouse while she is recovering from whatever difficulties she might have had after birth. The importance of paternity leave is described in below:

Equal spousal partnership

Women are participating in the workforce in growing numbers, both by choice and by economic necessity. The ability to keep working while raising children, and the consequent need for the spouses to share in parenting duties, should not be weaken by policies based on a model of one male breadwinner per family. Paternity leave sets up patterns to boost father's share of childcare duties and household responsibilities.

Children's long time benefit

Generally fathering habit of a person formed during a baby's first year of life and it held on throughout the child's upbringing. As children grew dads duties in infant care were linked to more education involvement later.

Levels the economic playing field

Generally paternity leave can be given to the father either paid or non-paid. Greater access to paid paternity leave has a positive effect on the family. It demonstrates benefits to the children.

Ensures the active role of father

Fathers who take paternity leave are more likely to take an active role in child care tasks. Generally fathers who take paternity leave are more likely to feed, dress, bathe and play with their child as long as the period of leave ended.

Creates early interaction of fathers with their child

Paternity leave creates an early interaction between the father and the new-born child. This early interaction has long term benefits for a child's learning ability.

Paternity leave creates bonding

Paternity leave creates bonding with child as it is the best time to continue the conversation of the father with the child. In most cases baby will recognize that voice and will be comforted that dad is still here. This is a very fundamental time for the father to build up a relationship with his baby. During this period the father needs to dedicate his time to his baby and his wife.

Helping hand for the women

As a dad any person's role is as important to the mother as it to the child. Paternity leave allows both husband and wife to ease into their new life and changing roles. It is as important for dads as it for mum to understand what their contribution will be in this new world order.

Sharing Parenting Responsibility

Today people realize that parenting is a shared responsibility of both, father and the mother. The presence of father at the time of childbirth makes him sensitive towards the special needs of the child. The experience will bring more caring, affectionate and better fathers.

Family Friendly Policies

Paternity leave needs to be taken within a specific time period. This will also lead many men to take some day off and welcome their bundle of joy with a free mind. This makes the father take part in the family and he starts taking larger share of responsibility at home. A strong father- child attachment and equal division of responsibility at home will make fathers more responsible.

Initiatives taken in Bangladesh concerning Paternity Leave

In Bangladesh several proposals were taken to give paternity leave to the employees and workers but later it was failed because the authority did not notice on the necessity of paternity leave. For example, in 2010, 15 days paternity leave was proposed for fathers to take care for new-born. The request was made by the Ministry of Public Administration and is available to government employees and private companies. The proposal was put forward on 18th May, 2010 by the Ministry of Public Administration in Bangladesh, urging the government and Ministry for Women and Children to consider the "paternity leave" as a statutory right for men. Another attempt to provide paternity leave in our country was taken in 2014. But this attempt was also turned into vain due to negligence of concerned authority. Deputy Commissioner of Tangail District Md. Mahbub Hosen proposed at the DC (Deputy Commissioner) conference on 8th July 2014 to 10th July 2014 about this issue. He claimed that service holder mothers are obtaining continuous 6 month maternity leave. But service holder fathers have no such type of opportunity of acquiring paternity leave. So he suggested that 15 days paternity leave should be fixed in Bangladesh (undated-1).

The Scenario of Paternity Leave Laws Worldwide to Justify the Need of it in Bangladesh Context

The worldwide scenario of paternity leave laws has been discussed in this part to justify the necessity of enacting laws for paternity leave in Bangladesh. A comparative study of worldwide paternity leave laws will help to assess the importance of enacting paternity leave laws in Bangladesh.

Paternity leave in Asia

Many countries of Asia have introduced paternity leave policy for their male employees. This policy was introduced in India a decade ago by some technology companies. Now it is also prevalent in government sector. There is no provision on paternity leave in Indian Labour law for private sector workers. In 1997, the Central Civil Services Leave Rules brought in paternity leave for men in government service. Rule 43-A & 43-AA of Central Civil Services (Leave) Rules, 1972 has allowed a male civil servant 15 days of fully-paid paternity leave (Habib, A.Z.M. Arman, 2015).

In Pakistan, the paternity leave of maximum seven days is provided under Revised Leave Rules, 1981 only in the Punjab province. (Awan, Purniya, 2015). In Malaysia, the civil servants are entitled to paternity leave generally form seven to fourteen days (undated-2).

China does not have unified legislation for paternity leave. Paternity leave policies are implemented on a municipal or provincial level by local

population and family planning regulations, and can vary from anywhere between zero to 30 days (undated-3). Recently Hong Kong has changed their laws relating to paternity leave. Pursuant to the Employment (Amendment) Ordinance 2014, male employees with child born on or after 27 February 2015 are entitled to 3 day's paternity. (Norton, Hannah, 2015).

In Singapore, eligible working fathers, including self-employed are entitled to 1 week of Government-paid Paternity Leave (GPPL) (undated-4). Japan has 52 weeks off retaining 60% of the salary on average for the male employee after the birth of a child (Narula, Svati, 2016).

Paternity leave in Europe

In Europe, Finland provides paternity leave for its male employers allowing the father to take longer paid paternal leave after 2015 (undated-5). Sweden was the first country in the world to introduce a parental leave giving both parents the same possibilities of staying at home with their child (undated-6).

In Norway, the parental leave scheme offers full (or 80%) wage compensation to parents (undated-7). In Netherlands, the father is entitled to paternity leave of two working days with full pay, to be taken within 4 weeks of the birth of the child (undated-8). In the UK the father is eligible to 1 or 2 weeks paid paternity leave when the baby is born (undated-9). Iceland introduced paid three months paternity leave in 2000 (undated-10).

Paternity leave in North America

In the United States some employers, however, voluntarily offer their employees paid family leave, including leave for parenting and pregnancy related medical conditions. Under the Family and Medical Leave Act of 1993, companies must give qualifying employees 12 weeks of unpaid leave each year for certain family related or medical reasons (undated-11).

Canada now also offer some form of paternity leave. Quebec gives fathers five weeks of paid leave for them (Anderssen, Erin, 2016).

Paternity leave in Australia

Australian mothers and fathers now have access to government funded paid parental leave, and have had since January 2011(undated-12). In New Zealand, the Parental Leave and Employment Protection Act 1987 provides for parental leave when a baby is born (undated-13).

Prospects of Introducing Laws Concerning Paternity Leave in Bangladesh

Bangladesh is being developed day by day. Many developed countries of the world have incorporated rules allowing paternity leave in their legal system which has been described in above. Paternity leave helps to generate a fruitful parenting to child and it is well acknowledged that today's child holds the leadership of a country in future. Thus, Bangladesh should enact laws allowing paternity leave without delay to fasten her development continuity.

The benefits to children of having involved fathers over the course of their childhoods are significant. The notion that only women care for children is outdated now-a-days. Men are also the baby's primary caregiver at present concepts. The father who is actively involved in raising his children can make a positive and lasting difference in their lives. So, he has also responsibility of childcare parallel to mother. If a woman employee becomes pregnant while in employment, she is entitled to take maternity leave. In our country, rule 197(1) of the Bangladesh Service Rules (as amended 9 January 2011) provides for female Government servants six months and section 46 of the Labour Act, 2006 provides for a female workers 16 weeks maternity leave. So, paternity leave is a new concept for Bangladesh (undated-14). The government needs to introduce parental leave for both men and women, instead of only granting maternity leave to ensure equality. According to a survey, women spend an average of more than seven hours on unpaid care work while men spend approximately an hour and a half on it. The paternity leave would allow men to take the greater share of the household work and to look after the children. Thereby women would get more opportunities to get involved in paid work too (undated-15).

However, if the state starts treating parents as having equal rights and responsibilities for childcare, it would be going with the grain of the choices being made by mothers and fathers. Bangladesh is now in a possible situation to introduce laws on paternity leave assessing its importance. The following developments urge the prospects of enacting laws regarding paternity leave in Bangladesh-

- Educational development
- Industrial development
- Infrastructural development
- Institutional development
- Technological development
- Communication development

These developments creates a large number of job opportunities daily and we are receiving a good amount of graduates every year from different educational institutions are availing those posts. So, job sectors are being broadened day by day. It is high time for Bangladesh to become better at

providing facilities to employees from different sectors including enacting laws on paternity leave.

Challenges

In traditional patriarchal society in Bangladesh many criticisms may arise regarding paternity leave. Owner of the factories or industries may oppose against this legislation since this law may cause harm for them to get financial benefit. Another challenge in this perspective is that most men don't take paternity leave as they fear it will restrict their career. Many people may think that Bangladesh is developing day by day for its manpower. If a large number of workers go on vacation then its productivity may be slowed down. If the proposed law is implemented then huge officials or skilled persons keep away from the work. The leave of the employees may also impose huge workloads to their colleagues.

Suggestions

Paternity leave is not a new concept but Bangladesh has no paternity leave opportunity for its male employees. Like other countries of the world Bangladesh should welcome the paternity leave law for the wellbeing of child as well as mother. Many challenges may come before the law makers while they are thinking to implement paternity leave in Bangladesh. Reviewing different countries having paternity leave system, this paper emphasizes on enacting paternity leave law for the male employees in Bangladesh. Paternity leave should be paid. But it can be unpaid depending on the circumstances, terms and conditions of the job. The Government can enact laws for paternity leave in Bangladesh reviewing the existing laws regarding paternity leave in different countries of the world as to ensure optimum opportunity for the fathers so that he can take proper care to his wife and the newborn baby. This paper also suggests the Government to take proper steps to create awareness among people of every sector about the necessity of paternity leave and introduce proper guideline for paternity system. Government should also make provisions of paternity leave available for non-government service holder so that the employees get the same opportunity as like as the public service holder and it would be better for child as well as for the state.

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The Status of Daughter in Muslim Law of Succession: Bangladesh Perspective

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Abstract

Islam has given daughter a strong status in inheritance. Daughter is one of the primary heirs of the *propositus*. There are six primary heirs who are never excluded from succession by any other relatives of the *propositus* and Daughter is one of them. Daughter takes property as a sharer in inheritance in the absence of son and as a residuary in the presence of son. The aim of this paper is to improve the status of daughter in Bangladesh is case of muslim law of succession. This paper is qualitative in nature. Books, journals, articles, case law and statutory laws have been reviewed to formulate the work. This paper tries to improve the status of Muslim daughters in the light of amendments made in some Middle Eastern countries in the area of traditional Muslim Law of Succession. This paper further tries to focus on the change that has been made in Bangladesh by Section 4 of the Muslim Family Laws Ordinance 1961 with the provision of increasing the share of daughter/s by prohibiting any part of the property going to the collaterals. Finding of this paper is that the Muslim daughters are deprived of their entitled share of inheritance by their male members of family in many aspects. Finally this paper makes some recommendations to improve the status of daughters in Bangladesh as regards to their entitlement in Muslim of succession.

Keywords: Daughter, Inheritance, *Propositus*, Collaterals, Eclecticism.

Introduction

In Pre-islamic Arabia, Daughters were deprived from their parents' property after her parents' death. They had no share in the property of their parents. But Islam has given daughter respectable status in all cases from her status in the society to her status in the property. After revolution of Islam, status of

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daughter has been totally changed. Daughter holds a strong status in the muslim law of succession. Daughter is one of the six primary heirs of the *propositus* who are never excluded from succession by any other relatives of the *propositus*. Other 5 primary heirs are the husband, wife, father, mother and son. So it is clear that Islam has given daughter a strong status in the succession and daughter cannot be excluded by any other relatives and daughter cannot also exclude any other relatives except uterine brothers and sisters. Daughter takes property as a sharer in inheritance in the absence of son and as a residuary in the prsence of son. When daughter takes as a sharer one daughter gets 1/2 and two or more daughters get 2/3 of the property of the *propositus*. When daughter takes as a residuary heir in the presence of son ta'sib rule is applicable. When a son is present the children inherit as residuary heirs, sharing the estate or the residue thereof, in the proposition of two parts to a son and one part to a daughter. This is known as principle of tasib. Daughter can not exclude any other relatives except uterine brothers and sisters though daughter is a primary heir and so close in relation to the *propositus* and the tasib rule applicable in case of daughter is the burning question now. Some Muslim countries like Tunisia, Iraq, Turkey etc. amended the traditional Muslim Law of Succession to improve the status of daughter.

The techniques of data collection followed in this research are both primary and secondary in nature. As primary source women from different classes were taken interview. The research also used materials from secondary sources like Review of related literature and examination of important principle document, law Book, law reports, PLD etc. However, the modern technology like internet for collecting data has also been used for conducting this research.

The objectives of the study are to present the status of daughter in the traditional Muslim Law of Succession; to sort out the lacking or problems of traditional sharia law in case of daughter's share in inheritance in the contemporary world; to summarize the amendment which has been made in Muslim countries in traditional sharia law to improve the status of daughter in present context; to determine the status of daughter in Bangladesh in case of Muslim Law of Succession; to compare the status of daughter between Bangladesh and Muslim countries in case of inheritance; to determine whether it is necessary to amend the status of daughter in Bangladesh in case of Succession.

Status of Daughter in Traditional Muslim Law

Daughter in the Muslim Law of Succession (Both Sunni and Shia Law)

For the purpose of inheritance under Shariah law only legitimate children are entitled to inherit. Adopted children and fostered children are not entitled to inherit under Shariah. An illegitimate child cannot be legitimised. In Islamic

law conception must take place after marriage for a child to be legitimate. This is contrary to English Law where conception may occur before marriage and the child is still considered legitimate providing it is born after marriage. The minimum gestation period is Six lunar months.A child born within six months of a marriage is illegitimate unless acknowledged by the father. The maximum gestation period allowable is two lunar years according to the Hanafi Fiqh and four lunar years according to the Shafi and Hanbali Fiqh. The Maliki Fiqh recognises gestation period of five to seven years.[3]

Status of Daughter in Sunni Law

In Sunni Law of succession, daughter has some specific features. These are given below –

(a) Daughter is a primary heir

In Sunni law daughter is a primary heir. For the purposes of priority in succession, members of the inner family may be marshalled into three groups i.e. primary heirs, substitute heirs and secondary heirs. Primary heirs are those heirs who are never excluded from succession by any other relatives of the *propositus*. There are six primary heirs in number in Sunni law and they are Husband, Wife, Son, Daughter, Father and Mother.

(b) Daughter as a Qur'anic heir can't be a excluder

In Sunni law, Qur'anic heir does not exclude other relatives of the inner family. Daughter is a Qur'anic heir and like other Qur'anic heirs, a daughter can not also exclude either any ascendant or any agnatic collateral relatives, male or female of the *propositus*. The only exception to the rule is the exclusion of uterine brothers and sisters by the daughter or granddaughter. There is no exception at all to the rule that a Qur'anic heir including daughter can not exclude any male agnate in Sunni law but in Shia law daughter can exclude male agnate.

(c) Son's Daughter is a substitute heir of daughter

In Sunni law there are four substitute heirs who takes the place of four primary heirs in the absence of their respective primary heirs. The agnatic granddaughter, how low soever, is one of the four substitute heirs for the daughter. Rules relating to portion of son's daughter in muslim law of succession are given below:

I. The granddaughter through son acts like daughter in the absence of any daughter as heirs.

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[3] Dr. Abid Hussain, The Islamic Laws of Inheritance, 1st ed. (2005) p.178.

II. In spite of being substitute heirs of daughter, son's daughter is not totally excluded by daughter but actually son's daughter is totally excluded by son.

in the absence of any daughter, the agnatic granddaughter inherits in a similar manner to daughter –

a) SD may inherit as a sharer or as a residuary.
b) SD, when inherits as sharer, inherits on a per capita basis. This means that the total share allocated to the son's daughter is divided equally amongst them irrespective of the number of son through whom they are related to the deceased.
c) in the presence of Son's son, Son's Daughter converted into a residuary heir.

III. In the presence of only one daughter, SD does not become totally excluded, Daughter gets ½ and son's daughter gets 1/6 of the property.

IV. Rules of exclusion of son's daughter
a) SD is totally excluded by son.
b) SD is totally excluded by two or more daughters but where there is also son's son, SD is converted into a residuary heir.

V. Rules of entitlement of son's daughter
a) SD inherits as a sharer unless converted into a residuary heir by son's son
b) In the absence of any daughter _

one SD inherits a fixed share of ½

Two or more SD togather inherits a fixed share of2/3

c) The maximum collective share allotted to the daughters and son's daughter h.l.s. inheriting as a sharer is 2/3. SD (one or more) inherit a fixed 1/6 if there is only one daughter who inherits ½, this makes a total of 2/3. THis concept of daughters and son's daughters inheriting a collective share (similarly with full sisters and consanguine sisters) rather than individual separate shares may become important in situations where the right of pre-emption (Shuf'ah) is exercised by the co-heir.[4]

(d) Daughter with Agnatic Sisters

- In Sunni Law, in the presence of a daughter or agnatic granddaughter, and in the absence of brothers who would convert them into

[4] *Ibid*, p.234.

residuaries, Full Sisters (FS) or Consanguine Sisters(CS) inherit as 'Accompanying Residuaries'(AR) or *asaba maa ghayriha*.[5]

- Sunni Jurisprudance formally rests this doctrine upon the authority of a precedent of the prophet who, according to the report of Ibn Mas'ud, resolved a competition between a daughter, a granddaughter and a sister by giving the daughter one-half, the granddaughter one-sixth and the sister the residue of one-third.

(e) Daughter in competition with collaterals

- In Sunni Law, Daughter can't exclude collaterals and in the presence of Daughter collaterals get share in the property of the *propositus*. Daughter can totally exclude uterine brothers and sisters but they can't exclude agnatic collaterals. In the presence of daughter, where there are only agnatic sisters i. e. Full Sister(FS) or Consanguine Sister (CS), and no brothers, FS or CS becomes 'Accompanying Residuaries'(AR). In the presence of daughter, FS or CS becomes residuary in the presence respectively of Full Brother (FB) or Consanguine Brother (CB). So in Sunni Law Daughter can't exclude agnatic collaterals.[6]

Status of Daughter in Shia Law

In Shia Law of succession, daughter has some specific features. These are given below –

(a) Daughter in Class I

Perhaps the most striking and significant divergence between the Sunni and the Shia legal systems as a whole lies in their respective laws of inheritance. The principles of inheritance of Shia law are totally different from Sunni law.[7] The heirs are divided into three two groups:[8]

(a) Heirs by consanguinity (*nasab*) that is all blood relations and
(b) Heir is by marriage (*zowjeeat*) that is the husband or wife.

All blood relatives are divided into three classes as follows:-[9]

Class I: Parents and lineal descendants how low soever.

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5 N. J. COULSON, Succession in the Muslim Family (Cambridge, 1971) p. 71.

6 D.F. Mulla, Principles of Muslim Law.

7 B.R. verma, Mohammedan Law, 5th ed. 1978, p. 400.

8 *Ibid*, p. 401.

9 N. J. COULSON, Succession in the Muslim Family (Cambridge, 1971) p. 109.

Class II: Grandparents how high soever, brothers and sisters and their issue how low soever.
Class III: Uncles and aunts, paternal and maternal and their issue how low soever, followed by great Uncles and aunts and their issue how low soever.

In Shia Law, Daughter's status is in Class I.

(b) Daughter can be excluder

In Shia Law, any relative of Class I completely excludes from succession any relative of Class II who in turn excludes any relative of Class III. In Shia Law, Daughter's Status is in Class I and so Daughter can exclude any blood relative of Class I and Class III. A daughter, in Shia law just as a son, will de jure exclude any grandchild, male or female, agnatic or non-agnatic and any grandchild will in turn exclude any lower grandchild.[10]

For example:-

H- ¼	H- ¼
D- 1/2+1/4 (by radd)=3/4	M- 1/6 by radd 1/5 of ¾ =3/20
CB- excluded by D	2D- 2/3 by radd 4/5 of ¾=12/20
CS- excluded by D	FB- excluded by 2D
	FS- excluded by 2D

(c) No substitute heir of Daughter

In Sunni law, Son's Daughter is the substitute heir of Daughter. Where there is no son and daughter, SD is entitled to take the property in the same way as that of Daughter. But in Shia law, there is no idea of substitute heir. In the absence of any children of the *propositus*, the grandchildren whether of son or daughter get share in the property of the *propositus*. In the absence of son or daughter of the *propositus*, children of the daughter get the same portion of propertyas their mother get.[11]

(d) Special Rule of awl

In Shia law, in the event of the estate being over-subscribed the burden of necessary reduction should fall exclusively upon the portions of daughters or full sisters or consanguine sisters.[12]
For example –

Husband- ¼

[10] N. J. COULSON,Succession in the Muslim Family (Cambridge, 1971) p. 109.
[11] *Ibid*, p. 111.
[12] *Ibid*, p. 114.

Father- 1/6
Mother- 1/6
2Daughter- 2/3 by awl 5/12

(e) Daughter with father

In Shia law in the presence of daughter, Father does not become residuary. In Sunni law, in the presence of daughter, father at first take his Qur'anic share 1/6 and if there remains any residue after satisfaction of the Qur'anic heir, the father gets the residue as a residuary heir.
But in Shia law, in the presence of daughter, father does not become residuary, but the residue of the property will be distributed among the Qur'anic heirs by radd.[13]

For example –

Shia law	Sunni law
Father- 1/6 by radd 1/5	Father- 1/6 + 1/6(residuary)= 1/3
Mother- 1/6 by radd 1/5	Mother- 1/6
Daughter- ½ by radd 3/5	Daughter- ½

Amendment in Traditional Law in Case of Daughter's Succession

Most Islamic countries of the world follow traditional Sunni or Shia law. For example, Bahrain, Qatar, Syria, Oman, Iran etc. follows traditional law of inheritance. But some Muslim countries like Iraq, Turkey, Indonesia, and Tunisia have taken revolutionary step to improve the status of daughter in case of succession. The steps taken by these countries are given shortly below so that it becomes helpful for our country to take steps to improve the status of daughter in succession in our country.

Iraq

In Iraq after the amendment made by the Laws No. 11/1963 adding the Shia order of priorities of succession in Chapter 9, daughter status in succession has been totally changed. Under this law any lineal descendant can totally excludes all collaterals. Revolutionary though this step might appear from the general standpoint of Sunni Islam, it is not so in the particular context of Iraq, where approximately half of the population are Shias.

However, the Iraqi Law confines itself to laying down the bare order of priorities by class under the Shia system and then enacts that: "With due regard to the foregoing, the distribution to the heirs by relationship of their

[13] D.F. Mulla, Principles of Muslim Law.

entitlement and their shares shall be according to the rules of the Shari'ä which were followed before the enactment of the Law of Personal Status." Apparently the courts have interpreted this provision to mean that the detailed rules of Shia law apply only to cases of succession concerning Shias, and that as far as Hanafi cases are concerned the traditional Hanafi princples of distribution still apply, subject only to the statutory order of priorities.[14]

It is apparent that this interpretation of the Law will result in considerable divergence as regards the class of of lineal descendants. Since the Shia system applies the strict rule of priority by degree within this class, a daughter will totally exclude any grandson or granddaughter oin a Shia case. But in a Hanafi case an agnatic granddaughter will take a basic Qur'anic portion of one one-sixth along with a daughter, and an agnatic grandson will take the residue of the estate after the daughter has taken her Qur'anic portion of one-half. Again in a shia case of a competition between a father, mother and daughter, the distribution will be: father one-fifth, mother one-fifth, daughter three-fifth (all taking Qur'anic portions increased by radd). But the same case in a Hanafi court will result in the father being allotted one- third (one-sixth as a Qur'anic portion and one-sixth as the agnatic residuary), the mother one-sixth and the daughter one-half. Finally in a Shia case, a daughter child will take one-third when in competition with a son's child who will take two-thirds (according to theShia principles of representational entitlement), but in a Hanafi case the son's child will totally exclude the daughter's child.[15]

Turky

Book III of the *Turkish Civil Code* deals with the law of inheritance. It introduces an entirely novel scheme of intestate succession adopted *in toto* from the *Civil Code* of Switzerland. The *Hanafi* law of succession followed in Turkey till 1926 stands replaced by this new scheme.

One of the most prominent features of the newly introduced law, which makes it wholly detached from the corresponding provisions of Islamic law, is the principle of equality of males and females with regard to the right to inheritance, The *Qur'an* provides that degrees of proximity to the *propositus* being equal a male shall take a share double that of a female.[16] There has been a consensus of Juristic opinion in the world of Islam on the fundamental place of this *Qur'anic* rule in the scheme of inheritance; there being no differences in the matter between the various schools of law.

Book III of the *Turkish Civil Code* now provides in general terms that children of the deceased shall inherit equally.[17] The very foundations of the Islamic and

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14 N. J. COULSON, Succession in the Muslim Family (Cambridge, 1971) p. 141.

15 *Ibid*.

16 Al-Qur'an, Surah An-Nisa: 11.

17 Article 439 of *Turkish Civil Code.*

the existing Turkish laws of succession being diametrically opposed to each other, no fruitful comparison between the two systems can be made.[18]

Indonesia

The Indonesian Supreme Court in H. Nur Said bin Amaq Mu'minah, (reg. No. 86 K/AG/1994) has adopted the liberal interpretation of verse 176 of "Surah al-Nisa" of Ai-Quran. In this verse it has been held that child will exclude the collaterals from succession but nowhere has it been clearly stated that here child means only male child. So the Indonesian Supreme Court has adopted the interpretation that here child means either a male or female child. The traditional concept of Sunni law was different in this case. There the Arabic word "Al-Khalala" was interpreted to mean only the male child. Consequently the male child would exclude his uncle from his father's property whereas the female child would not. However, the Supreme Court of Indonesia asserted that "so long as the deceased is survived by children, either male or female, the rights of inheritance of the deceased's blood relations, except for parents and spouse, are foreclosed."[19]

Tunisia

In Tunisia before 1959, the law which was generally applicable was the Maliki Law, which does not recognize radd. Though Maliki law does not recognize Radd, it was not altogether unknown in Tunisia because since Ottoman times Hanafi law had been applied through the official courts to a fraction of the urban population which professed allegiance to this school. In Tunisia, reform in case of daughter's succession was formally effected under the doctrine of Radd through the Law of 1959. The relevant provision reads: "As for the daughter, whether one or many, or the son's daughter, how low so ever, she shall take the residue of the estate by radd even in the presence of a male agnate, like a brother or an uncle or the Public Treasury." The proper interpretation of this provision appears to be that it is the daughter or agnatic granddaughter alone who is entitled to take the surplus of the estate by radd when she is in competition with other Qur'anic heirs. Consequently, therefore, the daughter or granddaughter virtually becomes a residuary heir in her own right, not only excluding all collaterals from inheritance but also restricting the mother or grandmother to their basic Qur'anic portions of one-sixth. It seems reasonably certain, however, that the reform was not intended to prejudice the residual rights of succession of male agnate ascendants as distinct from collaterals. Since the father, or agnatic grandfather, in competition with a daughter is entitled to take both a Qur'anic portion of one-sixth and any surplus after the satisfaction of other Qur'anic portions as residuary heir, there is no occasion for radd and the daughter will accordingly

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[18] Tahir Mahmmod, Family Law Reform in the Muslim World p. 25.

[19] H. Nur Said bin Amaq Mu'minah, (reg. No. 86 K/AG/1994).

be restricted to her basic Qur'anic entitlement of one-half. From the way in which the reform was effected it is certain that the Tunisian Law is not the result of any conscious preference for Shia principle. Nor was any express attempt made to justify the daughter's priority, as indeed it might well have been, by reference to the Qur'anic verse which states that a brother or sister is an heir only "if the deceased dies without a child".[20]

Status of daughter in Bangladesh

Though Bangladesh is a secular kind of state, persons of this area are governed mainly by their own personal laws as regards to their family matters i.e. inheritance, divorce, marriage, dower etc. It is matter of great concern that in case of inheritance right, women face discrimination by the male heirs of *propositus* and get unequal and smaller portion of shares than the male. Most of the people living here are Muslims and governed by hanafi law of Sunni school. No amendment has yet been made in traditional Sunni law till now to improve the status of daughter in Bangladesh.

Practical Scenerio of Daughter's Right of Inheritance in Bangladesh

It is necessary to meet daughters to understand the practical scenerio of daughter's right of succession in Bangladesh. We have taken interview of 22 daughters to know about practical status of daughter's right in Bangladesh. A table on the interview is given below-

Table of the interview

Description of the interview	Form of Distribution (written or oral)	Time of Distribution	Amount of Property Entitled	Other Information
Interview No. 1	No Distribution has been made	Property has been cheated by local *adhians*	Nothing	The daughter has knowledge about succession but has not been able to recover her property from local *adhians.*
Interview No. 2	Oral Distribution	After 6 months of the death of the *propositus*	1.5 *bigha dhani* land and 2 *katha vita* land	The daughter has knowledge about daughter's right but has no idea how the distribution has been made.

[20] N. J. COULSON, Succession in the Muslim Family (Cambridge, 1971) p. 142.

Interview No. 3	Oral Distribution	After 6 months of the death of the *propositus*	1.5 *bigha dhani* land and 2 *katha vita* land	The daughter has knowledge about daughter's right but has no idea how the distribution has been made.
Interview No. 4	Written Distribution	Before the death of the *propositus*	1.5 *katha vita* land	The *propositus* had himself made the distribution in his lifetime and the daughter has knowledge about distribution.
Interview No. 5	Written Distribution	Before the death of the *propositus*	1.5 *katha vita* land	The *propositus* had himself made the distribution in his lifetime and the daughter has knowledge about distribution.
Interview No. 6	Written Distribution	Before the death of the *propositus*	1.5 *katha vita* land	The *propositus* had himself made the distribution in his lifetime and the daughter has knowledge about distribution.
Interview No. 7	Written Distribution	After 1 year of the death of the *propositus*	1 *bigha dhani* land and 1 *katha vita* land	The daughter has knowledge about distribution and tasib rule has been applied in the distribution under Sunni law.
Interview No. 8	Written Distribution	After 10 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and she has attained her right after a long time.
Interview No. 9	Oral Distribution	After 6 months of the death of the *propositus*	1.5 *bigha dhani* land and 2 *katha vita* land	The daughter has knowledge about daughter's right but has no idea how the distribution has been made.

Interview No. 10	Written Distribution	After 6 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and her brothers has made the distribution after the death of the *propositus*.
Interview No. 11	Oral Distribution	After 1 year of the death of the *propositus*	1 *bigha dhani* land	The daughter with her two other sisters are the only children of the *propositus* and the collaterals of the *propositus* has got share in the property and the daughters has not been able to exclude the collaterals.
Interview No. 12	Oral Distribution	After 4 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about distribution and tasib rule has been applied in the distribution under Sunni law.
Interview No. 13	Written Distribution	After 1 year of the death of the *propositus*	1 *bigha dhani* land and 1 *katha vita* land	The daughter has knowledge about distribution and tasib rule has been applied in the distribution under Sunni law.
Interview No. 14	Oral Distribution	After 1 year of the death of the *propositus*	1 *bigha dhani* land	The daughter with her two other sisters are the only children of the *propositus* and the collaterals of the *propositus* has got share in the property and the daughters has not been able to exclude the collaterals.
Interview	Written	After 1 year	1 *bigha*	The daughter has

No. 15	Distribution	of the death of the *propositus*	*dhani* land and 1 *katha vita* land	knowledge about distribution and tasib rule has been applied in the distribution under Sunni law
Interview No. 16	Oral Distribution	After 1 year of the death of the *propositus*	1 *bigha dhani* land	The daughter with her two other sisters are the only children of the *propositus* and the collaterals of the *propositus* has got share in the property and the daughters has not been able to exclude the collaterals.
Interview No. 17	Written Distribution	After 1 month of the death of the *propositus*	Nothing (Brothers have deprived her)	The daughter has knowledge about succession but has not been able to recover her property.
Interview No. 18	Written Distribution	After 10 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and she has attained her right after a long time.
Interview No. 19	Written Distribution	After 6 years of the death of the *propositus*	2 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and her brothers has made the distribution after the death of the *propositus*.
Interview No. 20	Written Distribution	After 10 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and she has attained her right after a long time.
Interview No. 21	Written Distribution	After 6 years of the death	2 *bigha dhani* land	The daughter has knowledge about

		of the *propositus*		daughter's right of succession and her brothers has made the distribution after the death of the *propositus*.
Interview No. 22	Written Distribution	After 10 years of the death of the *propositus*	1 *bigha dhani* land	The daughter has knowledge about daughter's right of succession and she has attained her right after a long time.

From the above table we see that most of the daughters of Bangladesh get property from their father after the death of the *propositus*. In only some cases the *propositus* distribute his/her property in his lifetime orally or in written. In maximum cases distribution takes place between 1 to 6 years after the death of the propositus. The daughters are aware of their right in the property of their father and mother but in most cases they have no knowledge to what extent they are entitled to inherit. In maximum cases, male members of the family like son or brothers of the *propositus* take the responsibility to distribute the property of the *propositus* among the heirs and the female members like daughter have no opinion in the distribution. So the male members who take the responsibility of distribution, distribute the property according to their own whim. So daughters accept the portion which has been given to them after distribution by the male members without any excuse even in some cases they do not know what portion of share has been given to them. In some cases daughters relinquished their portion willingly in favour of their brothers.

Rationales for increasing Daughter's Share in the absence of Son

1. An important amendment has been made in the traditional Sunni Law of the then Pakistan by Section 4 of the Muslim Family Law Ordinance, 1961. By this amendment the status of the orphaned children has been totally changed in the property of their grandparents. Before this amendment under the traditional Sunni Law the Orphaned child could not inherit in the property of their grandparents in the presence of son and daughter. But after this amendment now the children as the representatives of the pre-deceased shall inherit his or her share from the grandfather on the basis of the principle of representation.

   Now the very important point to be noted here that if the daughter of the predeceased father can inherit the full share of her father from her grandfather, why she will not fully inherit her father's property after latter's death.

2. Islam is the comprehensive code of life and we get the solutions of all problems from Quran and Sunnah. In the lifetime of our great Prophet, if any problems arise our great Prophet gave the solutions of the problems. After the death of the prophet (sm) two more sources of Muslim law i.e. Ijma and Qiyas emerged to deal with the issues not clearly covered by Qur'an and Sunnah. There are many examples of changes in the Muslim law on the basis of Ijma and Qiyas to adopt the law in our present life. So we can get the solutions of our new arising problems from Ijma and Qiyas.

3. Increase in daughter's share on the basis of Ijtihad: The word 'Ijtihad' is an Arabic term which originates from 'Zahad' which literally means 'striving', 'exerting', 'trying utmost' in any activity which involves a measure of hardship. Juridically, Ijtihad mainly consists not of physical, but of intellectual exertion on the part of the jurists or lawyers. So Ijtihad means the all-out efforts made by a jurist in order to infer with a degree of probability, the rules of Shariah from their detailed evidence in the sources. In other words, Ijtihad is the capacity for making deductions in matters of law in cases to which no express text or a rule already determined by Ijma.

   The improvement in the law of inheritance can be possible under this device. One of the basic principles of Muslim law of inheritance is "a nearer in kinship excludes the remoter from inheritance". This basic principle can be interpreted liberally to justify the increase of share of daughter.

4. Verse 176 of Surah Al-Nisa may be interpreted widely to increase the daughter's share in the Muslim Law of Succession. In this verse it has been held that child will exclude the collaterals. The traditional Sunni law interprets this child to mean only male child. Consequently the male child would exclude collaterals from property of the *propositus* whereas the female child would not exclude the collaterals. The liberal meaning of the Arabic word "Al-Khalala" (meaning child) can be used to justify the increase of share of daughter. An example from the Indonesian Apex Court can be taken in this respect. Indonesian Supreme Court interprets that child means either male or female child.

5. Increase in daughter's share on the basis of Eclecticism: Eclecticism which is known as takhayyur is the method of searching for precedents, not only in the four orthodox schools but even in the opinions of individual jurists to meet the need of modern life. [21] Through this eclecticism Islamic jurists are allowed to follow one school in one particular issue and to follow other schools in other issues if the situation requires such application. Many Muslim countries have adopted the

[21] http://www.lc.gov.bd/reports/113.doc

principle of takhayyur in various matters. For example, Saudi Arabia has legalized the grounds of dissolution of Muslim marriage stated by Maliki law though they follow Hanbali Doctrine. In our country on the basis of takhayyur The Dissolution of Muslim Marriage Act, 1939, has given the right to divorce to the women on the grounds of husband's torture and desertion for a period of four or more years.

Though both the Sunni and Shia school adopted the same principles of succession laid down in Qur'an but the both school has interpreted it differently. Under Shia law all heirs of the same relationship to the deceased, whether male or female, agnatic or non-agnatic, have the same ability to exclude other heirs and to transmit their entitlement to their own heirs.[22] There is no reason to undermine the Shia version. Richard Kimber after a thorough research observes that Shia law is much closer than Sunni law in respect of rules laid down in Qur'an regarding inheritance.[23] Therefore there is no harm if the interpretation of Shia law is taken in increasing daughter's share in absence of son.[24]

Judicial precedence

In Federation of *Pakistan* v. *Mst. Farishta*, the children of pre-deceased daughter, who herself died in 1942, were given inheritance from the legacy of their grandfather. Although, in this case, there is a reference of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, but the children of predeceased daughters have been held entitled to the inheritance of their grandparents on the principle of section 4 of the Muslim Family Laws Ordinance, 1961.[25]

Recommendation to Increase of Daughter's Share in the Succession of Parents' Property

So the status of orphaned child has already been improved by reforming traditional law to meet up the necessities of modern times. It is high time we should take some steps to improve the status of daughter in inheritance by reforming the traditional law to cope up with the modern times.

- ❖ It is suggested that a new Act should be enacted with a provision following The Iraqi law of 1963, The Tunisian legislation of 1959 to enable a daughter or a son's daughter to exclude collateral male agnates form inheritance in the absence of son of *propositus*.

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22 NJ Coulson, *Succession in the Muslim family*, Cambridge 1971, pp. 108, 133.

23 Richard Kimber, The Qur'anic law of inheritance, *Islamic Law and Society*, Vol.5, No.3.

24 http://www.lc.gov.bd/reports/113.doc

25 PLD 1981 Supreme Court 120.

- ❖ It is further suggested that a new Act can be enacted given male and female child equal status by providing that the children of the deceased shall inherit equally as it is made by the Turkish Civil Code.

- ❖ We can take examples of different Muslim countries and take such proper steps which will be fruitful in our country to improve the status of daughter in succession.

Conclusion

From the above discussion, we can understand that it is very important for our present situation to take steps to improve the status of daughter in succession as early as possible. So the Parliament can add a new Section in the Muslim Family Law Ordinance, 1961 effecting the recommendation of the Law Commission by restricting the right of collaterals to inherit in the property of the *propositus* in the presence of daughter by improving the status of daughter in Muslim law of succession.

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