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The Institute was established on 24th April of 2016. The mission of the Institute is to achieve excellence in legal research, writing services and publication sector. It aspires to work on development of various legal issues and also to prepare and publish international standard books and journals with a high level of accomplishment and a commitment to the highest ideals of the legal profession.

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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 eight articles in this issue that in their own ways contribute to a better understanding of a range of issues traversing jurisprudence & human rights, intellectual property rights, laws governing international organizations, rights of prisoners and others. I hope that the articles published in the first issue of the third volume will reflect the journal's new focus.

I am also pleased to present the journal, a new 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 first 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 first 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

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Incompatibility of the Special Powers Act with Constitutional Jurisprudence and Human Rights Norms: A Comprehensive Analysis

Hossain Mohammad Younus Sirazi[1]
Md. Sadekur Rahman[2]

Abstract

In a free and democratic society based on the rule of law and other fundamental principles of justice and human dignity, the necessity for the criminal law in conformity with constitutional principles and mandates as well as international human rights discourse knows no bounds as the adoption of these norms and principles has ushered in a new dawn of criminal jurisprudence. So the state requires not to enact and to remain any oppressive, unjust and arbitrary law in force in order to ensure a just and fair criminal justice system. Nonetheless, such non-reasonable and disproportionate legislation is enacted in guise of removing the dichotomy between state security and protection of human rights. The Special Powers Act, 1974 is one of such obnoxious laws endangering liberty jurisprudence. There is no denying that this legislation violates many constitutional norms and is also ultra vires human rights instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and other international instruments that have been ratified by Bangladesh. In consequence, Bangladesh becomes obliged to respect, protect, fulfil, uphold and implement human rights. For this reason in peace time there remains no necessity of sustaining a black law like this due to its anti-human rights and fundamental rights characteristics. This paper aims to examine the incompatibility of the provisions of the Special Powers Act with constitutional and international human rights norms. At the same time it portraits the practical scenario of the indiscriminate use of the Act by the executive authority and the impacts of such misuse affecting an individual and his family as well as the state. At this paper the legal sustainability of this Act with the help of judicial activism will be assessed.

Keywords: Fundamental Human Rights, Incompatibility, Preventive Detention, Double Criminalization, Impact.

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1. Introduction

In the criminal justice system, the Constitution of a jurisdiction is contemplated as the primordial protector of the persons accused with criminal charges or of those kept in detention without trial. The enshrinement in the Constitution of certain rights and safeguards of the accused is universally recognized as a booming enterprise of preventing miscarriage of justice. The 1972 Constitution of the People's Republic of Bangladesh (hereinafter the Constitution)[3] proclaiming the national fundamental aim of realizing a society based on the rule of law, fundamental human rights and freedom, equality and justice, and mandating a just criminal system has been the yardstick to justify and measure the arbitrariness and unreasonableness of the criminal laws, and disproportionality of the punishment to the magnitude of the offences[4] and resultantly a law being unreasonable, arbitrary, unjust and disproportionate to the mischief sought to be remedied becomes unlawful and unconstitutional.[5] So every functionary of the state must justify its action with reference to law. Law does not mean anything which the legislature may pass. It must pass the test of reasonableness and non-arbitrariness within the ambit of Article 31 of the Constitution which imports due process imperative (though the term 'due process' has nowhere been mentioned) and thus prohibits arbitrary or unreasonable law or state action.[6] Nonetheless, the government of Bangladesh has legislated some draconian laws disobeying Constitutional and criminal jurisprudence acting in the belief of the notion that harsh laws will automatically lessen crimes by its deterrent effect as a result of which constitutional rights and safeguards are whetted down by imposition of pre-trial incarceration or detention without trial and severe punishment upon the accused.[7] So the adherence to basic constitutional norms bears much more significance owing to criminalization and imposition of invariable punishment telling upon a person's right to life and liberty. In the furtherance of administration of criminal justice, though the Constitution inserted certain most fundamental and universally accepted principles of criminal justice in mandatory nature and articulated 'due process model' as opposed to 'crime

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3 Adopted on 4 December, and entered into force on 16 December, 1972. To gather a useful knowledge on the history of Bangladesh's Constitution-making, see Abul Fazl Huq, *Constitution-making in Bangladesh* (46:1, Pacific Affairs 1973) 59-76.

4 Ridwanul Hoque, 'Criminal Law and the Constitution: the Relationship Revisited' [2007] Bangladesh Journal of Law 45.

5 Mahmudul Islam, *Constitutional Law of Bangladesh* (2nd edn, Mullick Brothers 2008) 255.

6 *Ibid* 61.

7 Sharmin Jahan Tania, 'Special Criminal Legislation for Violence against Women and Children- A Critical Examination' [2007] Bangladesh Journal of Law 199.

control model'[8], the impact of these constitutional norms on the country's criminal legislation whether general or special is alarmingly disappointing and beyond legitimate expectation. In addition to this, a considerable number of ratified international human rights instruments have also imposed obligations upon Bangladesh to ensure a fair, effective, accessible, and just criminal justice system through the well-protection of criminal procedural safeguards and rights of the accused with a criminal charge.[9]

Despite having the constitutional and international obligation upon Bangladesh to enforce the non-derogable rights of the individual, the government has taken the policy of thrusting a black, draconian and obnoxious law like the Special Powers Act 1974[10] (hereinafter SPA), at the very earlier stage since the coming into force of the original Constitution, emphasizing more on the protection of the state security rather than private individual's rights and interests. Under this Act, the executive authority exercises unfettered power overwhelmingly, arbitrarily and whimsically. So this Act is one of the most controversial legislations for the time being in force as the civil liberties to life and personal freedom are directly encroached upon by arrest, detention without trial and restrictions on movement[11] though the protection of the accused's right to a fair and just trial reliant on the preservation of his certain other human rights got an international recognition as the paramount impetus of a criminal justice system devised to achieve the rule of law.[12] It derives the legality and validity of moving its body and limbs in 1974 from the newly inserted provisions in Article 33 by amendment to the original Constitution through the Constitution (Second Amendment) Act 1973.[13] This Act is commonly known as preventive detention law leading to serious encroachment upon the civil liberties of an individual. Although there exists preventive

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8 The primary goal of 'due process model' is justice. This model emphasizes on the rights of the individuals in the process of criminal adjudication. It is enunciated as constituting such rights of the accused as the right to protection against unlawful, unreasonable and arbitrary arrest and detention; the right to counsel and legal defense and to be informed of grounds of arrest, detention and charge; the right to be presumed innocent until proved guilty, the right to be tried in an impartial and independent court or tribunal; the right of freedom from inhuman, cruel or degrading punishment or treatment; the right to enforce certain other human rights; and the right against self-criminalization. On the other hand, 'crime control model' explicates the regulation of the criminal behavior as the most important function of the judicial system by imposition of harsh punishment influenced by deterrent theory of punishment.

9 Hoque (n 4).

10 Act No XIV of 1974.

11 Sara Hossain, Shahdeen Malik and Bushra Musa (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies* (the University Press Limited 1997) 143.

12 Hoque (n 4).

13 Act No XXIV of 1973.

detention laws directly or indirectly in all the countries of the world,[14] any law like this Act begetting the scope of bewildered arbitrary exercise of the executive power is nowhere in the contemporary world. This Act was comprehensively enacted to achieve two purposes as enumerated in the preamble[15] to the Act which, among other things, authorizes taking special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences such as sabotage, hoarding, black-marketing, counterfeiting, smuggling, adulteration, restriction on freedom of press, restriction on association, ban on religion-based politics etc. But the most notable matter under the Act is the provision for preventive detention[16] of individuals by the executive authority on the suspicion of involvement with certain prejudicial acts against the state without charging them with a criminal offence. This Act gives room for sweeping powers to the executive to arbitrarily detain people for length of time along with creating fathomlessness and lawlessness of justifying and challenging its action before a court of law though liberty jurisprudence permitted by law is beyond the clutches of deviation from the people's constitutional rights and international human rights norms.

This paper will try to assess the incompatibility of the SPA with basic constitutional norms and international human rights instruments. This paper will critically examine the most important question of whether the SPA has complied with fundamental, mandatory and normative constitutional principles of justice, equality and fairness; constitutional rights, guarantees, safeguards and fundamental human rights, human dignity and worth of the accused; including judicial interpretations as well as the rule of law along with international obligation to adhere to criminal justice principles and the accused's rights jurisprudence reflected in international human rights laws. For the fulfilment of this paper, a

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[14] In Malaysia-The Internal Security Act 1960; The Emergency (Public Order and Prevention of Crime) Ordinance 1969. In Nigeria-The State Security (Detention of Persons) Decree 1966; Armed Forces and Police (Special Powers) Ordinance 1967; Public Security (Detention of Persons) Decree No 1 1979; The State Security (Detention of Persons) Decree 1984. In Singapore-Criminal Law (Temporary Provisions) Ordinance 1955; Federation of Malaya Internal Security Act 1960. In Sri Lanka- Public Security Ordinance 1947; The Prevention Terrorism (Temporary Provisions) Act 1979.

[15] An Act to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith.

[16] The term 'preventive detention' is used in contradistinction to the term 'punitive detention'. Preventive detention means detention of a person without trial and conviction by a court, but merely on suspicion in the minds of the executive authority where the executive is authorized to impose restraints upon the liberty of the individuals who are apprehended to commit acts which are prejudicial to public safety and state security. On the other hand, punitive detention means the detention of a person only after trial for committing a crime and after his guilt has been proved in a competent court of justice beyond reasonable doubt.

comprehensive analysis based on theoretical jurisprudence and practical impact of the use of the SPA is earnestly needed. This paper concludes by arguing the question of whether the viability of the SPA remains in existence.

2. Incompatibility of the SPA with Constitutional Jurisprudence and Human Rights Norms

The great Charter 'Magna Carta' signed in 1215 is the first instrument of human rights on the basis of which all of the international human rights instruments are framed.[17] In the history of human rights, the adoption of the Universal Declaration of Human Rights (hereinafter UDHR) in 1948 was the landmark step where universality of human rights is proclaimed for all peoples throughout the world as the first international instrument and some of the rights i.e. right to equality, right to life, liberty and security have partaken of the character of *'jus cogens'* – fundamental norms from which no derogation is allowed.[18] Like many other countries, Bangladesh ratifying eight out of nine core human rights treaties including the International Covenant on Civil and Political Rights of 1966 (hereinafter ICCPR) becomes obliged to respect, protect and fulfil human rights under international law.[19] In the contemporary world, human rights have become dominant ideology since these rights received almost universal recognition by people of all creeds and all societies. Human rights are now regarded as *sine qua non* for the holistic development of human personality.[20]

Human Rights are moral norms or principles which are generally meant as inalienable fundamental rights to which all human beings are inherently entitled since birth irrespective of their nation, location, language, ethnic origin or any other status simply for the very reason that they are human beings.[21] These rights are protected as legal rights in international and domestic law and are sometimes identified with fundamental rights as being guaranteed by the constitution of a country. Without ensuring these rights in efficacious manner, no state can surface its existences and

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17 Taru Faizunnessa, 'Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments' (2016) 46 Journal of Law, Policy and Globalization 40.

18 Abdullah Al Faruque, *International Human Rights Law: Protection Mechanism and Contemporary Issues* (New Warsi Book Corporation 2012) 18-19.

19 JAMAKON Report to the UN Human Rights Committee 4.

20 Faruque (n 18) 2.

21 Md Abdul Halim, *Constitution, Constitutional Law & Politics* (3rd edn, Human Development Foundation, 2006) 93.

intrinsic disciplinary action. If the state fails to ensure the best protection of such rights, it unleashes its acceptance from its citizens. The Government is the savior and knight in illuminating armor of such rights of its citizen. So, the Government being responsible should ensure the protection of the people's rights so that no question may arise as to the infringement of human rights by the law enforcing agencies.[22] Today throughout the world infringement of human rights is a major concern. Bangladesh is not an exception because human rights violations have become endemic and its remedies are mostly non-existent. The law enforcement agencies are often accused of abusing their powers and defying human rights. So there is always a must to have a balance in the social and national life between the rights of the individuals and safeguards provided as to secure the rights of the same as these rights should not be taken away except as a result of due process.

However, all international and regional documents of human rights recognize and make provisions for derogation of rights in case of emergency and of national crisis but when such rights are arbitrarily curtailed then the question of infringement arises.[23] The infringement of these rights is mostly caused by the arbitrary exercise of power by the law enforcing forces through different domestic laws. The SPA is such kind of law which is deemed by human rights activists and other members of civil society as a repressive and draconian law. The use and abuse of this Act in guise of protecting the security of the state has resulted in a steady pattern of the violations of constitutionally guaranteed rights and international human rights norms.[24]

A. Infringement of Right to Life, Imposition of Harsh Punishment and Double Criminalization

The right to life is the most fundamental of all human rights, without which all other rights are meaningless. Pursuant to the provisions of the Constitution and international human rights norms, Bangladesh is obliged to take pragmatic measures to ensure the right to life of individuals. A combined reading of Articles 31[25] and 32[26] of the Constitution enshrines

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22 Rabiul Islam, 'The Power of the Police and Human Rights Situation under Section 54 and 167 of the CrPC: A Critical Evaluation' (2016) 1 The Millennium University Journal 56.

23 Md Nazir Ahmed, 'Preventive Detention, Violation of Individual Human Rights: An Overview from Bangladesh Perspective' (2015) 5:1 Manarat International University Studies 84.

24 Suraya Momtaz, 'Human Rights Violations in Bangladesh: A Study of the Violations by the Law Enforcing Agencies' (2013) 4 Mediterranean Journal of Social Sciences 112.

25 Article 31 of the Bangladesh Constitution says, 'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every

that no deprivation of right to life is permissible except in accordance with law. But international human rights instruments such as ICCPR, UDHR and the Convention for protection of Human Rights and Fundamental Freedoms mandates the state to vividly ensure the protection of right to life with no exceptions.[27] The term 'in accordance with law' envisaging 'due process law' similar to the American Constitution concept prohibits the legislature from enacting an unreasonable or arbitrary law and attracts a person adversely affected by any state action detrimental to life to have constitutional remedy.[28] So the fundamental rights as postulated in Articles 31 and 32 of the Constitution which the state cannot deny by unreasonable or arbitrary action or inaction[29] can be interpreted as giving a person a right not to be interfered with the enjoyment of right to life by passing arbitrary or draconian legislation in the name of state security.

It's pertinent to mention here that protection of life means one's life cannot be endangered by any illegal action of any person or authority.[30] While interpreting right to life, the case of *Dr Mohiuddin Farooque* v. *Bangladesh*, the most glaring example, gives an extended and more liberalized interpretation observing that the term 'right to life' means a meaningful life- man can live with dream and dignity. It excludes anything which might affect the enjoyment and protection of life[31] and cannot be only confined to taking away of life but means something more than mere animal existence.[32] It includes the right to live orderly with human dignity and decency[33] and the inhibition against detrimental action extends to all those limbs and faculties by which life is enjoyed.[34] So no deprivation of right to life through sentencing policy of the state is permissible save in accordance with fair, just and reasonable procedure established by law.[35]

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citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'.

26 Article 32 of the Bangladesh Constitution says, 'No person shall be deprived of life or personal liberty save in accordance with law'.

27 According to Article 6 of the ICCPR 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. Article 3 of UDHR says, 'Everyone has the right to life, liberty and security of person'. Article 2 of the Convention for protection of Human Rights and Fundamental Freedoms depicts that everyone's right to life shall be protected by law.

28 Islam (n 5) 172-181.

29 *Maneka Gandhi* v. *India* [1978] AIR 620 (SC).

30 *Giasuddin* v.*Dhaka Municipal Corporation & others* [1997] 49 DLR 199.

31 [1996] 48 DLR 438 (HCD).

32 *Munn* v. *People of Illinois* 94 US 113.

33 *Vikram* v. *Bihar* [1988] AIR 1782 (SC).

34 *Saiakh Abdur Rahman & Others* v. *State* 15 BLT 326 (AD).

35 *Bachan Singh* v. *State of Punjab* [1980] AIR 898 (SC).

Moreover, the legislature can prescribe sentences within the constitutional limit i.e. bar to enact legislation in breach of fundamental rights[36], every person's right to be treated in accordance with law[37], no subjection 'to torture or to cruel, inhuman or degrading punishment or treatment'[38]. These constitutional bars can be considered as having conferred on the accused a right against unreasonable criminal laws.[39] Therefore, the upper judiciary in Bangladesh can strike down a punishment as unconstitutional because of having 'everyone's right to judicially enforce fundamental rights'[40], its 'authority to issue any appropriate direction or writs to enforce these rights'[41] as well as 'the principle of legality'[42] as interpreted as giving the accused to have effective and just constitutional remedies.[43] It is undeniable that the SPA known as preventive detention law is almost by definition arbitrary and unreasonable as the person detained virtually for an indefinite period has neither committed nor been convicted of any offence[44] but in anticipation of his involving certain vaguely defined prejudicial activities[45] and the enactment of such draconian law 'in accordance with law' does not make all these administrative detentions legal and proper as the grounds for detention being automatically satisfied[46], and is in violative of Article 31 of the Constitution being so demonstrably unreasonable or arbitrary.[47]

It is axiomatic that one of the basic principles of criminal jurisprudence is the quantum of punishment should be controlled by the doctrine of proportionality between the sanction and the gravity of the offence[48] as the imposition of a rational and proportionate sentencing to the magnitude of harm inflicted on society materializes a sound criminal justice system.[49]

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36 The Constitution of the People's Republic of Bangladesh, Art. 26(2).

37 (n 25).

38 The Constitution of the People's Republic of Bangladesh, Art. 35(5),

39 Hoque (n 4) 54.

40 The Constitution of the People's Republic of Bangladesh, Art. 44.

41 The Constitution of the People's Republic of Bangladesh, Art. 102(1).

42 The Constitution of the People's Republic of Bangladesh, Art. 102(2).

43 Hoque (n 4) 54.

44 Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' [2007] Bangladesh Journal of Law 264.

45 Hoque (n 4) 65.

46 Malik (n 44) 265.

47 *Sohan Ajmee* v. *Commissioner of Customs* WP 1882 of 2000 (unreported) (Whether law is reasonable is to be seen through the eyes of the legislators; if the legislators thought it to be so, it cannot be unreasonable.)

48 Andrew Ashworth, *Principles of Criminal Law* (Clarendon Press 1991) 58.

49 Abdullah Al Faruque, 'Goals and Purposes of Criminal Justice System in Bangladesh: An Evaluation' [2007] Bangladesh Journal of Law 10.

Nevertheless, in Bangladesh a contemporary legislative trend of enacting harsh penal laws envisaging severe and often disproportionate punishments to combat offences or to thwart the rate of crimes[50] and to regulate the law and order situation denying social dimension of the problem goes inexorable[51] owing to having dreadfully eroded the constitutional principle of justice and due process of law by these penal laws which, constitutionality of which is dubious, tend to create serious human rights implications for the accused.[52] Under many criminal laws of Bangladesh, the imposition of harsh punishments is provided for many trivial offences which are out of proportion to the gravity of the offence.[53] In modern age of human rights, when the sentencing policy is becoming more and more rational and reformative theory is becoming more and more popular with penologists, such widespread prescription of death penalty as a mode of punishment is incompatible with modern trend of correctional approach, constitutional & criminal jurisprudence and international human rights standard.[54] In democratic and welfare states, penal reforms have shifted punitive measures from death penalty becoming the exception and restricted to the 'rarest of rare cases' to life imprisonment becoming the rule.[55] But in Bangladesh, death penalty remains indispensable characteristic of almost every special criminal statute. Like many other statutes[56], the SPA also prescribe harsh punishments i.e. death sentence for ordinary and petty offences such as for hoarding[57], counterfeiting currency-notes and Government stamps[58], adulteration of, or sale of adulterated food, drink, drugs or cosmetics[59], and attempt of such offences[60] etc. The sentence may be in the reflection of the

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50 Hoque (n 4) 64.

51 Faruque (n 49) 10.

52 Hoque (n 4) 64.

53 Faruque (n 49) 12.

54 *Ibid* 12.

55 Mahendra P Singh, 'Capital Punishment: Perspective and the Indian Context' in R. S. Agarwal and Sarvesh Kumar (eds), *Crimes and Punishment in New Perspective* (Mittal Publication 1986) 28-40.

56 The Penal Code 1860 prescribes death sentence for eight kinds of offence. Apart from the Penal Code, death sentence has been prescribed for kidnapping or abducting a minor under the Criminal Law Amendment Act 1958; keeping arms under the Arms Act 1878, causing explosion under the Explosive Substance Act 1908. After emergence of Bangladesh, a large number of criminal statutes were enacted prescribing death sentences for various crimes. The statutes that prescribe death sentence include the Emergency Power Act 1975; the Terrorism Control Act 1992, the Suppression of Oppression of Women and Children Act 2000, the Acid Offences Act 2002 etc.

57 The Special Powers Act 1974, S. 25.

58 The Special Powers Act 1974, S. 25A.

59 The Special Powers Act 1974, S. 25C.

60 The Special Powers Act 1974, S. 25D.

degree of injury or loss caused by the convict.[61] Sentence should be proportionate to the gravity of offence.[62] It should not be too harsh or more lenient.[63] The High Court Division encapsulates that so much light sentence relating to gravity of offence makes the administration of criminal justice ludicrous.[64] So imposition of proper and appropriate sentence is combination of many factors i.e. nature of offence, mitigating and aggravating circumstances of which a balancing ambience should be drawn up before subjecting a person to sentence.[65] Therefore, it is indubitable that the SPA is in violative of Article 32 of the Constitution as being failed the test of reasonableness of, and disproportionate to, the punishment prescribed.[66]

It also needs to be mentioned that the presidential clemency under Article 49[67] of the Constitution is of fundamental relevance to the administration of criminal justice as its object is to ensure that the rights of the accused to his life and liberty are not breached by a harsh law or judicial pronouncement or owing to ineffaceable mistakes of the legal process.[68] However, such kind of clemency is a matter of grace not right for the convict.[69] Therefore, the President's power of pardoning sentence particularly death sentence is often abused and controversial as in the absence of proper rules and standard guidelines for exercising such power.[70]

It is also inextricably evident that many provisions on offences under the SPA are already covered by the Penal Code.[71] It refers to double criminalization[72] which has a plenty of negative impacts stating in the way

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61 E Green, *Judicial Attitudes in Sentencing* (Macmillan & Co. 1961).

62 *Md. Yahia and Others* v. *State* [1966] 1 MLR 59 (HC).

63 Tureen Afroz, 'Sentencing Practices in Bangladesh' [2007] Bangladesh Journal of Law 121.

64 *Nurun Nabi (Mohammad)* v. *Sahin Alam alias Shahin and others* [2003] 8 MLR 218 (HC).

65 *State* v. *Anjuara Khatun* [2005] 57 DLR 277.

66 Islam (n 5) 196.

67 Article 49 of the Bangladesh Constitution contemplates that the President of Bangladesh invokes a prerogative of mercy by which s/he has a power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

68 Hoque (n 4) 54.

69 A convict is also not entitled to oral hearing from the President, the matter being entirely within the discretion of the President. See Tureen Afroz, 'Sentencing Practices in Bangladesh' [2007] Bangladesh Journal of Law 121.

70 *Sarwar Kamal* v. *State* [2012] 31 CLC (HCD).

71 See section 4C of Schedule to the Special Powers Act 1974 (amended in 1991 by Act of XVIII) by which sections 376, 385 and 387 of the Penal Code 1860 have been punishable under the former.

72 Double criminalization denotes the situation where the same conduct is made punishable under two or more different laws. This arise the problem of whether it is allowed to prosecute an

that further criminalization of most of offences already defined and enshrined in general criminal law leads to duplication of efforts often at the cost of efficiency of relevant authorities;[73] most of newly defined crimes creates a scope of their misuse and extensive discretion in application;[74] and penalizing the same act under more than one legislation can create problem of procedural multiplicity and consequential confusion.[75] This apparently inescapable shift towards double criminalization does not mirror popular notions of justice and consequently is habitually flouted.[76] Resultantly, this law cannot dream of shielding protection rather than derogation of right to life. Therefore, it is said to be deviated from constitutional jurisprudence and international human rights norms.

B. Infringement of Right to Liberty, Protection from Arbitrary Arrest and Detention and Freedom of Movement

Freedom from arbitrary arrest and detention is constitutionally guaranteed as Art. 32 of the Constitution encapsulates this freedom saying that no person shall be deprived of life or personal liberty save in accordance with law. The genesis of the right to personal liberty and the implied protection against arbitrary arrest is traditionally traced to the French Declaration of Rights of Man and the Citizen 1789 as well as the first Ten Amendments of the American Constitution of the same span of time (1791), though the nucleus of this freedom can also be unearthed in earlier instruments such as the Bill of Rights 1689 (of England).[77] In modern age, international human rights instruments such as UDHR[78] and ICCPR[79] have unequivocally enshrined the right 1to personal liberty and freedom from

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accused under either of the two provisions or whether the subsequent law has the consequence of repealing the relevant provisions of earlier law. See Faruque (n 49) 5.

73 *Ibid* 5.

74 Shahdeen Malik, 'Laws of Bangladesh' in A.M. Chowdhury and Fakrul Alam (eds), *Bangladesh on the threshold of the Twenty-First Century* (Asiatic Society of Bangladesh 2002) 444.

75 Faruque (n 49) 5.

76 Malik (n 74) 445.

77 Malik (n 44) 262.

78 According to Article 3 of the UDHR 1948, 'Everyone has the right to life, liberty and security of person'.

79 According to Article 9 (1) of the ICCPR 1966, 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Please see also Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [hereinafter European Convention]; Article 6 of the African Charter on Human and People's Rights 1981 [hereinafter African Charter]; Article 7(1)-(3) of the American Convention on Human Rights 1969 [hereinafter American Convention]; and Article 55(1)(d) of the Statute of the International Criminal Court [hereinafter ICC Statute].

arbitrary arrest with no exceptions whereas the Bangladesh Constitution restricts this right on grounds of national security and public order to the effect that certain types of arrest and detention are legal even though in derogation of liberty jurisprudence.[80] These exceptions are legislated by preventive detentions laws which empower the executive to preventively detain citizens on the plea of deterring certain prejudicial acts and thereby such denial of liberty is exercised 'in accordance with law' meaning that deprivation of personal liberty must require the essence of 'in accordance with law' (American concept 'due process of law) not only when deprivation is legally authorized but also when the requirements implanted in the authorization have been painstakingly complied with[81]. So the deprivation of liberty permitted by law is not disproportionate, unjust or unpredictable as well as discriminatory;[82] and that's why derogation is permitted only by reasonable and non-arbitrary law; and liberty jurisprudence must be judged by such reasonableness[83]. For this reason, the curtailment of liberty right whimsically and arbitrarily would suffer from no legality and will be unreasonable or arbitrary and void in terms of Article 32. Hence, right to liberty is meant to have restricted the power of the state to arrest a citizen only on the belief of having reasons that a citizen has committed a crime; and continued denial of liberty right would be possible only upon conviction, through a fair and open trial, on a charge of having committed a punishable offence and, hence, the resultant denial of liberty upon conviction.[84] Nonetheless, the State has made the SPA so far the most infamous piece of legislation, derogating the liberty and human security of the people making provisions for the administrative detention of anyone virtually for indefinite period in anticipation of his involving in certain vaguely defined prejudicial activities[85] and such acts are incompatible with the ICCPR which bans retroactive punishment for

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80 Malik (n 44) 262.

81 *Ibid* 262.

82 Manfred Nowak, *UN Covenant on Civil and Political Rights* (CCPR Commentary, NP Engel 1993) 173.

83 A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgment of an ordinary prudent man the law is reasonable having regard to the compelling, not merely legitimate governmental interest. It must be shown that the security of the organized society necessitates the deprivation of life or personal liberty. See Islam (n 5) 193.

84 Malik (n 44) 262-264.

85 The Special Powers Act 1974, s. 2(f). It says- 'prejudicial act' means any act which is intended or likely- (i) to prejudice the sovereignty or defence of Bangladesh; (ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states; (iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order; (iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people; (v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order; (vi) to prejudice the maintenance of supplies and services essential to the community; (vii) to cause fear or alarm to the public or to any section of the public; (viii) to prejudice the economic or financial interests of the State.

actions that were not clearly defined before the commission of the act.[86] This Act empowered the District Magistrate to order the detention of such person for 30 days and the Government to order the detention for 120 days.[87] Mere satisfaction of the government or Magistrate has been made enough for the order of detention. In this way, though curtailment of liberty jurisprudence requires objective satisfaction, the detaining authority being satisfied subjectively can detain the person. Pertinently the court adjudged that the curtailment of the right to life and liberty being fundamental rights requires justification by reports and materials and not by mere satisfaction of the Government[88] as liberty right is sacrosanct and cannot be taken away by the state without due process of law[89] and denial of the rights of the detainee is contrary to Article 32.[90] Therefore, the judiciary can interfere with an order made in a careless manner depriving a man of personal liberty by declaring such order as with no legal authority.[91] In the case of *Habibullah Khan* v. *S. A. Ahmed*[92] the Appellate Division held that it is not only the government but also the court must be satisfied that the detention is necessary for the public interest.

More significantly, Article 33 of the Constitution grants an arrestee or detainee four constitutional safeguards which are (i) the right to be informed of the ground of arrest as soon as possible[93] , it is immaterial to inform him of the full details of the alleged offence[94] but sufficiency of information is justiciable and its insufficiency would render the arrest unlawful[95]; (ii) right to be produced before a magistrate within 24 hours excluding journey period from the place of arrest to the court of the magistrate[96], failure to comply with this requirement would render further detention illegal[97] (iii) right to consult and be defended by a legal practitioner of his choice[98], and to make an effective and meaningful representation, the grounds served must contain sufficient particulars;[99]

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86 See Article 15(1) of the ICCPR 1966.

87 The Special Powers Act 1974, S. 3.

88 *Anisul Islam Mahmood and others* v. *Government of Bangladesh* [1991] 20 CLC (HCD).

89 *Huidrom Konungjao Singh* v. *State of Manipur & Others* [2012] 7 SCC 181.

90 *Farzana Haq* v. *Government of Bangladesh* [1991] 11 BLD 553.

91 *Krishna Gopal* v. *Govt. of Bangladesh* [1979] 31 DLR 145 (AD).

92 [1983] 35 DLR 72 (AD).

93 The Constitution of the People's Republic of Bangladesh, Art. 33(1).

94 *Government of East Pakistan* v. *Mrs. Rowshan Bijaya Shaukat Ali Khan*, 18 DLR 214 (SC).

95 *Vimal* v. *UP* [1956] AIR 56; *Madhu Limaye* v. *Punjab* [1959] AIR 506.

96 The Constitution of the People's Republic of Bangladesh, Art. 33(2).

97 *UP* v. *Abdus Samad* [1962] AIR 1506 (SC).

98 The Constitution of the People's Republic of Bangladesh, Art. 33(1).

99 *Habiba Mahmud* v. *Bangladesh* [1993] 45 DLR 89 (AD).

and (iv) right not to be detained for a period longer than 24 hours plus journey time without the magistrate's authorization.[100] Though any law or action incompatible with these rights is void,[101] these constitutional protections become inapplicable to an enemy alien and an arrestee or detainee under preventive detention law[102] and accordingly the SPA. But Article 33 (4) & (5) confers three constitutional safeguards for a detainee under such law. Firstly, the detainee has the right not to be detained more than six months except under the authority of the Advisory Board[103] if the government wishes. He has the right to be produced before the Board. If the Board gives its opinion to the government before the conclusion of the said period that there exists sufficient cause for detention, only then government can detain him more than six months.[104] If such opinion is affirmatively not given by the Board, the detainee has to be released on expiry of six months.[105] However, the Board cannot opine as to how long the detention should continue.[106] It is for the detaining authority to decide on the detention period and the approval by the Board is only a defence against vagaries and arbitrariness of the detaining authority.[107] However, the Board being a quasi-judicial body with the responsibility of advising the executive cannot be said to be independent in giving its opinion without any intervention of the executive.[108] In the case of *Ranabir Das* v. *Ministry of Home Affairs*, the High Court Division observed that a detention order is made *malafide* when it is repugnant to the object and purpose of the act or when the detaining authority allows him to be influenced by conditions which he ought not to allow.[109] As to the procedure of the Board, Parliament can enact law which must pass the test of reasonableness under Art. 32.[110] Secondly, the detainee has to be communicated the detention grounds by the detaining authority as soon as possible.[111] Although by using the expression 'as soon as may be' the

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100 (n 96).

101 Islam (n 5) 198.

102 The Constitution of the People's Republic of Bangladesh, Art. 33(3).

103 The Advisory Board shall consist of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic.

104 The Constitution of the People's Republic of Bangladesh, Art. 33(4).

105 *Monowar Begum* v. *Secretary, Ministry of Home Affairs* [1989] 41 DLR 35.

106 *Dattatraya* v. *Bombay* [1952] AIR 181 (SC).

107 *Puranlal* v. *India* [1956] AIR 163 (SC).

108 Halim (n 21) 304.

109 [1976] 28 DLR 48 (HCD).

110 The Constitution of the People's Republic of Bangladesh, Art. 33(6).

111 The Constitution of the People's Republic of Bangladesh, Art. 33(5) (The word 'as soon as may be' is not defined in the Constitution. It means that the grounds must be communicated to the detainee within reasonable time.)

Constitution left the time indeterminate to allow the detaining authority reasonable time to formulate grounds, it cannot permit dilatoriness.[112] The expression refers to the time when the order is made.[113] But in its section 8, the SPA providing for not later than 15 days to inform the grounds of the detainee from the date of detention order[114] can be interpreted as deviation from constitutional jurisprudence and incompatible with Article 9(2) of the ICCPR.[115] So the Supreme Court of Bangladesh can examine the legality and manner of passing detention order and observed that service of the grounds of detention to the detainee under such law is mandatory.[116] Thirdly, the detainee has the right to make an effective representation against the detention order.[117] So the detaining authority has to inform this right of the detainee and failure to inform may make the continued order illegal.[118] In the case of *Md. Sekandar Ali* v. *Bangladesh*, the HCD declaring a detention order made under section 3 of the SPA illegal, adjudged that the government must serve the detainee specific grounds for detention so as to enable him to make an effective representation.[119] However, the authority can refuse to disclose the grounds which it considers against public interest to disclose.[120] Here lies the crux of the problem. Resultantly, second and third constitutional rights become quite meaningless as right to representation hinges on right to communication of grounds. If the latter is not ensured, the former also becomes ineffective.[121] So the detainee has only one right to enjoy-right to be personally produced before the Board and the question of that right sees the day light after the expiry of 6 months as section 10 of the SPA provides that the government shall place the detention grounds and the representation, if any, made by the detainee before the board within 120 days from the date of detention and the Board has to submit its report to

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112 Islam (n 5) 204-205.

113 *G.M. Loondhkhar* v. *State* [1957] PLD 497.

114 Section 8 (2) of the SPA says, ' In the case of a detention order, the authority making the order shall inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not later than fifteen days from the date of detention'.

115 Article 9 (2) of the ICCPR states, 'Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'. Please see also Article 5(2) of the European Convention; Article 7(4) of the American Convention; Principle 10 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988; Paragraph 2(B) of the 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights.

116 *Abdul Latif Mirza* v. *Government of Bangladesh* [1979] 31 DLR 41 (AD).

117 The Constitution of the People's Republic of Bangladesh, Art. 33(5).

118 *Jayendra Thakur* v. *India* [1999] AIR 3517 (SC).

119 42 DLR 346 (HCD).

120 The Constitution of the People's Republic of Bangladesh, Proviso to Art. 33(5).

121 Halim (n 21) 302-304.

the government within 170 days from the date of detention order.[122] In addition to, section 10 of the SPA saying that the government can detain a person without trial for as long as 120 days is also incompatible with Art. 9(3) of the ICCPR stating that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

Many can argue here that as the Act, being a preventive detention law, the detainee has no right to be informed of the detention grounds as soon as possible, and therefore not informing him of the grounds as such is no violation of the Constitution but it is a violation of international human rights instruments[123] as ICCPR has manifestly proclaimed that an arrestee shall be informed of the grounds of any charges against him and his arrest promptly and at the time of arrest respectively.[124] Apart from this, any law derogating freedom from movement will be void under Art. 32 being failed the test of reasonableness. In this sense, detention derogating personal liberty can also be interpreted as deviation from constitutionally guaranteed and universally recognized right to freedom from movement and resultantly the SPA can be said to be violative of the Constitution and human rights law.[125]

It is undeniable that liberty jurisprudence and protection from arbitrary arrest and detention is affected by the SPA. It is also well recognized that the formulation of the eight prejudicial acts as laid down in section 2(f) (i) of this Act is general in nature, enabling the government to include almost any conceivable act or suspicion within the ambit of one or the other of these formulations and resultantly a detainee initially arrested under Section 54[126] of the Code of Criminal Procedure, 1898 may be later

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122 Halim (n 21) 304.

123 Md. Shahjahan Mondol, 'Repealing the Special Powers Act, Law and our rights' *Daily Star* (Dhaka, 31 March 2007).

124 Article 9 (2) of ICCPR says, 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

125 Article 36 of the Bangladesh Constitution says, 'Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh'. According to Article 13 of UDHR, 'everyone has the rights to freedom of movement, residence within the borders of each state'. Similarly, Article 12 of the ICCPR, Article 15 of the American Convention on Human Rights, 1969 and Article 10 of the African Charter on Human & Peoples' Rights, 1981 talk about the right to freedom of movement.

126 Section 54 of Code of Criminal Procedure 1898 states- (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

Firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

detained and charged under the SPA.[127] In addition, such preventive detention law suffers from legal infirmity as the executive authority subject to its satisfaction often take the advantage of detaining a person under its colourful exercise and of using as a weapon to dominate, crash the opposition and to perpetuate rule.[128] Many times the detaining authority violates constitutional rights to satisfy the executive in many ways. Firstly, if any person who is actually criminal is arrested under the general law, then that person must be brought before the Magistrate within 24 hours[129] but there is no provision to bring a suspected person before the Magistrate arresting him under the SPA within such period. Resultantly, a person without bringing before the Magistrate can put in detention month after month. In India[130] and Pakistan[131], the initial period of detention without trial is three months but in Bangladesh, that period is six months. This is a bad process because nowhere in the world exists such a long period.[132] Secondly, Neither the Constitution nor the Special Powers Act did specify any maximum period of detention. So a person can be detained for indefinite period if the advisory board gives an affirmative opinion whereas the maximum period in India is 2 years and in Pakistan 8 months in a year[133] though detention without trial is contrary to the doctrine of

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secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a police-officer while in the execution his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

Ninthly, any person for whose arrest a requisition has been received from another police-officer.

127 JAMAKON (n 19) 15.

128 Halim (n 21) 293-298.

129 The Constitution of the People's Republic of Bangladesh, Art. 33.

130 The Indian Constitution, Art. 22(4).

131 The Pakistan Constitution, Art. 10(7).

132 Halim (n 21) 305.

133 Halim (n 21) 305.

presumption of innocence (Article 14(2) of ICCPR)[134] as the subject of criminal investigation must be gauged as innocent at all stages of criminal proceedings irrespective of the probable consequence of the trial.[135] Thirdly, in most democratic countries like USA, UK, and Singapore, such detention is a method resorted to be in emergencies like war but in Bangladesh it can be applied in both peace and emergency period. Because of having no such specification in our constitution, it can be used at any time as a weapon to dominate, crash the opposition and to perpetuate rule and a large number of political activists and leaders are detained without trial under the SPA[136] which causes massive violation of right to liberty, prohibition of arrest and detention, and freedom of movements.

C. Infringement of the Principle of Natural Justice and Due Process of Law

Like the concept of justice, the principles of natural justice seen as embodiment of requirements of procedural fairness are supposed to have universal significance. The principles of natural justice are not merely philosophical abstraction; rather they have fathomless pertinence in every conception of administration of justice to posit the executive authorities to act fairly.[137] According to IP Massey, 'natural justice represents higher procedural fairness developed by judges, which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual. It enjoys no express constitutional status.'[138] As Choudhury opines, "the principles of natural justice operate as checks on the freedom of administrative action. Where a statute confers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being in manner which can be said to be procedurally fair."[139] In fact, violation of natural justice results in arbitrariness and jurisdictional error.[140]

Natural justice reiterates that harsh law, if there be two parallel laws, should not be applied to an accused as his right to fair trial cannot be

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134 According to Article 14 (2) of ICCPR, 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

135 PJ Schwikkard, 'The Presumption of Innocence: What is it?' (1998) 11 South African Journal of Criminal Justice 403.

136 Halim (n 21) 298-305.

137 Abdullah-Al Faruque, *Natural Justice- From Principles to Practice* (Palal Prokaashoni 2013) 8.

138 IP Massey, *Administrative Law* (Eastern Book Company 1995) 144.

139 Tapas Gan Choudhury, *Penumbra of Natural Justice*, (Eastern Law House 1997) 4.

140 Islam (n 5) 482.

possible under such law.[141] That no person should be deprived of his right without hearing before an independent authority is the essential feature of the principle of natural justice.[142] More importantly, the High Court Division adjudged that prolonged mental suffering caused to the petitioner hanging him under suspension about 22 months without framing any charge is against the principle of natural justice.[143] Therefore, it is no denying the fact that the nexus between right to fair trial and natural justice is well established.

It's germane to postulate here that the principles of natural justice are applied to administrative process to ensure procedural fairness.[144] In applying these principles, balancing the competing interests of administrative justice and the exigencies of efficient administration is a crying need.[145] Procedural fairness meaning equality of treatment with people in the procedure[146] is always central to the administration of justice as the sense of fair treatment in dealing with people in accordance with the law is an important and indispensable element in any society purporting to be just.[147] Application of natural justice is also evident to be a requirement for due process which covers presumption of innocence and privilege against self-incrimination as discussed earlier. Due process is a right to a procedure, a right to have one's treatment determined as per some prescribed method; and the moral basis of such a legal or constitutional right would be grounded in the notion that citizens have a right to be treated justly by the state.[148]

It is well recognized that the principles of natural justice have found concrete expression in international human rights law. UDHR, ICCPR and the European Convention on Human Rights and Fundamental Freedoms, 1950 as well as the Bangladesh Constitution recognize right to fair and public hearing of any criminal charge against an accused by an independent and impartial tribunal established by law.[149] So an enquiry

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141 *State* v. *Anjila Debi* [2009] 61 DLR 743 (HCD).

142 *Samsuddoha* v. *Bangladesh* [2008] 13 MLR (HCD).

143 *Zulfikar Mahmud* v. *National University* [2008] 60 DLR 40 (HCD).

144 Islam (n 5) 482.

145 *Helaluddin* v. *Bangladesh* 45 DLR 1 (AD).

146 Michael D Bayles, *Procedural Justice Allocating to Individuals* (Kluwer Academic Publisher 1990) 3.

147 DJ Galligan, *Due Process and Fair Procedures* (Clarendon Press 1996) 5.

148 David Resnick, 'Due Process and Procedural Justice' in J R Pennock and W C Jhon (eds), *Due Process* (New York University Press 1971) 207.

149 Please see Article 10 of UDHR, Article 14 of ICCPR, Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, 1950, and Article 35 (3) of the Bangladesh Constitution.

cannot be held behind the back of the accused.[150] Likewise many countries, the principles of natural justice become constitutionally entrenched rules in Bangladesh. Although the Bangladesh Constitution didn't explicitly incorporate the expression 'due process', the expression 'in accordance with law as enshrined in some of its provisions as Article 31 contemplates that personal liberty of an individual cannot be curtailed whimsically and arbitrarily.[151] Wade remarked, 'the right to natural justice should be as firm as the right to personal liberty'.[152] It is an established rule that personal liberty cannot be curtailed until he has had a fair opportunity of hearing the charge against him. In *Anwar Hossain* v. *State and Others*,[153] the court held that a preventive detention is the deprivation of the liberty of a citizen, which should not be curbed in an arbitrary manner. Whenever any authority is legally empowered to make a detention order to the repugnancy of another person, such authority has the concomitant duty of acting judicially in making such an order based on decision of consideration of some materials by following the rule of natural justice. In the case of *Abdul Latif Mirza* v. *Government of Bangladesh*,[154] the Supreme Court of Bangladesh held that the detaining authority in exercise of the powers given under the SPA had no unfettered and arbitrary power in forming its opinion regarding the necessity of a person's detention and was under an obligation to have its satisfaction and opinion based on some materials which may be judicially scrutinized. So in arriving at the decision concerning the necessity of detention of a citizen, the authority must observe the rule of natural justice despite having any legal impediment[155] and executive exigency.

The principles of natural justice are also deeply embedded in the statutes and regulations but the Special Powers Act is an exception as mentioned earlier as section 11 of the Act does contemplate that the detenu shall have no right to defend himself through a legal practitioner[156] and the Bangladesh Constitution has also preached its sacred verses in support of

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150 *Abdur Rahman* v. *The Collector and Deputy Commissioner* [1964] 16 DLR (SC).

151 Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' [2007] Bangladesh Journal of Law 267.

152 HWR Wade and CF Forsyth, *Administrative Law* (8th edn, Oxford University Press 2000) 470.

153 [2003] 55 DLR 643 (HCD).

154 [1979] 31 DLR 1 (AD).

155 Although under preventive detention laws, disclosure of relevant information is prohibited when such disclosure would be contrary to the public interest, the principles of natural justice are totally excluded in matters of preventive detention.

156 Section 11(4) of the Special Powers Act 1974 says, 'Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential'.

this view as earlier discussed. But this provision of negating his defence and production of his statement by the detenu is ultra vires the principle of natural justice as one of the preconditions of natural justice is *audi alterum partem* meaning that none shall be condemned unheard. Opportunity to be heard is a universally recognized fundamental principle of both criminal and civil justice system. The right to be heard involves not only an opportunity to be heard and to present evidence and submissions in favor of one's own cause but it also implies the obligation of the court to consider the submissions of the defence.[157] In the case of *Abdul Hannan* v. *State*, right of an accused to be defended by a lawyer is an inalienable right guaranteed in the law of land.[158] So, legal representation through a lawyer is an indispensable part of the principle of natural justice and fair trial. In the case of *Bangladesh Steamer Agent's Association* v. *Bangladesh and Others*,[159] the court observed that no person should be deprived of his right without hearing before an independent authority is an essential feature of the principles of natural justice. Its object is to prevent miscarriage of justice. An unjust decision by an administrative authority affecting the right of a person can be judicially scrutinized. The principle of natural justice also applies in case of administrative proceedings where the authority is required to act on objective determination of facts.

Because of the exclusionary of the principle of natural justice in case of overriding consideration of national security through the instrument of preventive detention i.e. the Special Powers Act, application of natural justice is supposed to be nugatory resulting in arising incompatibility with constitutional jurisprudence and international human rights norms. Therefore it is established that even though the statute is silent on the principles of natural justice, it must be observed as a requirement of procedural fairness as being these principles recognized as norms rather than exception.[160]

D. Infringement of Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment

Freedom from torture and cruel, inhumane or degrading treatment is a constitutionally guaranteed right. It is also universally recognized right as enshrined in international human rights laws as well as a norm of

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157 Faruque (n 137) 86.

158 [2009] 61 DLR 713 (HCD).

159 [1979] 31 DLR 272 (AD).

160 Faruque (n 137) 147.

customary international law that belongs to the category of *jus cogens*.[161] Article 35(5) of the Constitution prohibits torture and cruel, inhuman or degrading punishment.[162] So any form of torture or illegal punishment infringing one's right to life and liberty as enshrined as non-derogable rights as in Articles 31 and 32 of the Constitution signifies a gross violation of fundamental human rights. Different international and regional documents have also outlawed any kind of such activities as contributing to torture. Article 5 of the UDHR and Article 7 of the ICCPR stipulate the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[163] This right is regarded as *jus cogens* all over the word from which no derogation is permissible.[164] Similarly, the ICCPR recognizes this right as absolute, demands non-interference on the part of state authorities[165] and rejects its violation on ground of emergency, national security or any other reasons by such authorities. So its duty of law enforcing agencies to treat all the detainees humanly as 10 Basic Human Rights Standards for Law Enforcement Officials reiterates that all detainees must be treated humanely.[166] Likewise, Article 10(1) of the ICCPR contemplates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[167] So it is easily understandable that the right of detainees to humane and dignified treatment works as the basis for positive obligations of state parties as enshrined in Articles 10(2) and 10(3) of the ICCPR, which are tailored to criminal justice context. This obligation tends to ensure the observance of minimum standards concerning the conditions of detention and exercise of their rights when deprived of

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161 Lawyers Committee for Human Rights, 'WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice' (2000) 8.

162 According to Article 35(5), 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment'.

163 Article 5 of the UDHR says, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 7 of the ICCPR also states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. See also Principle 6 of Body of Principles; Article 5 of the Code of Conduct for Law Enforcement Officials.

164 The provisions of the Universal Declaration of Human Rights 1948 are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Torture Convention), or any regional human rights instrument. The most directly relevant articles 5, 9, 10 and 11 of the UDHR will most probably be used as a supplementary source of a state's obligations to follow customary international law.

165 Nowak (n 82) 244.

166 Amnesty International, 'Basic Standard no. 8 out of 10 Basic Human Rights Standards for Law Enforcement Officials' 13. For details please visit. http://www.amensty.org

167 Article 5 of the American Convention on Human Rights 1969; Article 8 of the African Charter on Human and People's Rights 1981; Principle 1 of the Basic Principles for the Treatment of Prisoners and Article 3 of The European Convention on Human Rights and Fundamental freedoms echoed the same.

liberty[168] and inhumane treatment as depicted in Article 10 can be interpreted as a lower intensity of disrespecting for human dignity, to material conditions and treatment befitting that dignity than that within the meaning of Article 7.[169] Therefore, states are obliged to provide detainees and prisoners with services meeting their essential needs,[170] as for example, right to food,[171] to clothing,[172] to adequate medical attention[173] and to communicate with their families[174] as justification of humane treatment. But the SPA is silent on such rights of the detainee though Bangladesh is obliged to incorporate such rights in its domestic law.

Apart from ICCPR, Bangladesh also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (hereinafter CAT)[175] which legislate absolute prohibition of torture. The CAT defines torture as intentional infliction of severe pain or suffering whether physical or mental by a public official on a person who has committed or is suspected of having committed an act in order to obtain an information or confession from him[176] and stipulates that State Party shall ensure that all acts of torture including an attempt to commit torture and an act by any person constituting complicity or participation in torture are punishable offences under its criminal law providing appropriate penalties in proportion to the gravity of offences.[177] More importantly, no law enforcement official may inflict, instigate, or to tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of

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168 Lawyers Committee for Human Rights (n 161) 9.

169 Nowak (n 82) 186.

170 Human Rights Committee, General Comment No. 9/16, July 27 1982.

171 Rules 20 and 87 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977.

172 Rules 17, 18, and 88 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977; and Principles 15-16 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988.

173 Principle 24 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988; Rules 22-25, 91 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977 ; and Article 6 of the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17 1979. (Imposing a duty on officials to ensure the health of prisoners).

174 Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

175 Bangladesh became a signatory party to the Convention on 05 October 1998.

176 CAT 1984, Art. 1(1).

177 Kapaeeng Foundation, 'Article 4(1) of the CAT, 1984 and Indigenous Peoples Human Rights report: in Bangladesh 2007-2008' (2009) 109.

war, a threat to national security, internal political instability or any other public emergency a justification of torture or other cruel, inhuman or degrading treatment or punishment.[178] Therefore, states are obliged to take pragmatic legislative, administrative, judicial and other steps to prevent acts of torture in any domain under their jurisdiction.[179]

Despite the total constitutional ban on torture underpinned by Bangladesh's concerned international commitments, the law enforcing official often take resort to torture to extract confessions from the accused or for other purposes[180] and any law providing for definition and absolute prohibition of torture is yet to enact as before 2013.[181] In such situation, the government can use the law enforcing officials to arrest and detain any person under the SPA and infliction of torture whether physical or mental, or cruel treatment on the detainee to extract information from him has become a common practice amongst them as the court, being aware of the fact that torture has become deep-seated in the criminal process, issued in *BLAST* v. *Bangladesh*[182] a detailed guideline in the form of 15 directives on arrest without warrant, detention, remand and treatment of suspects and directed that in order to prevent torture, or cruel or inhuman punishment or treatment, a police officer shall not arrest any person under section 54 of the Code of Criminal Procedure, 1898 for the purpose of detaining him under the SPA and the magistrates shall not make any such order of detention. Also, the Court, focusing on principles of constitutional justice and relying on Article 33 of the Constitution, nudged in *Saifuzzaman* v. *State and Others*[183] the rationale of the BLAST's case further forward, and provided a 11-point guidelines to be followed in all cases of arrests so that harassment of citizens and the use of 'third method degrees' (torture) can be eradicated. Therefore, it is undeniable that the SPA is a weapon to inflict torture, cruel or degrading treatment deviating from the detainee's constitutional rights and international human rights norms.

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178 See Article 2(2) of the Torture Convention 1984; Principle 6 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988; Article 8 of the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17 1979 and Article 5 of The International Standards of Police Behavior, and Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/149).

179 CAT 1984, Art. 2(1).

180 Hoque (n 4) 59.

181 In 2013, Bangladesh has legislated the Torture and Custodial Death (Prevention) Act 2013 which is the first attempt to provide a legal definition of 'torture' and 'custodial death' and has also sought to introduce effective victim protection mechanisms. The Act also provides details about provisions for making a complaint, the investigation procedure, and sentencing provisions.

182 [2003] 55 DLR 363 (HCD).

183 [2004] 56 DLR 324 (HCD).

E. Infringement of Right to Fair Trial and Protection against Self-incrimination

The right to a fair trial is a constitutional right as well as a norm of international human rights law devised to protect individuals from arbitrary and unlawful curtailment of other fundamental rights and freedoms. It is guaranteed under Article 35(3) of the Constitution saying that 'Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law'. The similar tone is underpinned in Article 14 of the ICCPR.[184] The right of everyone against retrospective operation (*ex post facto*) of criminal laws and penalties,[185] the right against double jeopardy (repeated prosecution or conviction)[186], and the right to remain silent or the right against self-incrimination[187] are the core components of the right to a fair and just trial as guaranteed in the Constitution and human rights instruments. The rights of persons charged with criminal offence include: to be presumed innocent until proved guilty[188]; to be informed promptly of the nature and cause of the charge against him[189]; to have adequate time and facilities to prepare a defence[190]; to be tried without undue delay[191]; to

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184 Article 14 of the ICCPR provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. See also Article 6(1) of the European Convention; Article 8 of the American Convention.

185 Article 35(1) of the Constitution says, 'No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence'. Please see more Article 15(1) of the ICCPR; Article 7 of the European Convention; Article 9 of the American Convention; Article 7(2) of the African Charter; and Article 22 of the ICC Statute.

186 Article 35(2) of the Constitution says, 'No person shall be prosecuted and punished for the same offence more than once'. Please see more Article 14(7) of the ICCPR; Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute.

187 Article 35(4) of the Constitution says, 'No person accused of any offence shall be compelled to be a witness against himself'. The case of *BLAST v Bangladesh* [2005] 57 DLR 11 (HCD), is of very significance to mention pertinently that it was held that remand for the purpose of interrogation is not necessary except for extorting information from an accused by physical torture or other means, but such extortion of information is contrary to the mandate of article 35(4). Please see more Article 14(3)(g) of the ICCPR, 1966; Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, 1969; and Articles 55(1)(a) and 67(1)(g) of the Statute of the International Criminal Court (ICC Statute).

188 Article 14(2) of the ICCPR; see also Article 6 (2) of the European Convention; Article 8(2) of the American Convention; Article 7(1) (b) of the African Charter, supra note 8, Article 7(1) (b); and Article 66 (1) of the ICC Statute.

189 ICCPR 1966, Art. 14(3)(a).

190 ICCPR 1966, Art. 14(3)(b). See also the European Convention, Art. 6(3)(b); the American Convention, Art. 8(2)(c); the 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights (African Commission Resolution), Art. 2(E)(1) and ICC Statute, Art. 67(1)(b) and 67(2).

191 ICCPR 1966, Art. 14(3)(C). Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.

be present at the trial, and to defend oneself[192]; to have legal assistance from the state[193]; and to examine and cross-examine witnesses.[194] The right to fair trial applies to both the determination of an individual's right and any criminal charge against him or her in all court proceedings including administrative proceeding.[195] On any criminal case, this right commences on the formal lodging of a charge (from the moment of arrest depending on the circumstances of the case) including the date of state activities significantly affecting the conditions of individuals.[196] So fairness must be observed in both pre-trial and post-trial stages (from the moment of commencement of investigation against accusation until the completion of criminal proceeding including appeal).[197] Despite constitutional safeguards underpinned by international commitments, excessive delay in justice delivery system, political interference and widespread allegation against the law enforcement agencies for extracting confessional statements with the use of force and torture in violation of legal norms and absence of adequate legal aid to the poor litigants may vitiate fair trial principles.[198] Prolonged incarceration of the accused pending their trials raises concern respecting procedural fairness as well as their right to speedy trial[199] as the court emphasized on the human rights of these persons, entitled them to be released on bail, or to make their charges withdrawn.[200] Nevertheless, all offences including petty offences are made cognizable and non-bailable under the SPA[201] and the detaining authority can detain the accused for 120 days not producing him before any judicial body and later, for indefinite time.[202] Most of them have no means to go to the judicial body to seek remedy and only the rich can go to the High Court Division and get remedy through instituting the writ of Habeas Corpus.[203] It is also one of the attributes of the fair trial as guaranteed in the Constitution and human rights norms that the accused person is given adequate opportunity to defend himself but the proviso to Article 33(5) of the Constitution and also

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192 ICCPR 1966, Art. 14(3)(d).

193 I*bid.*

194 ICCPR 1966, Art. 14(3)(e); the European Convention, Art. 6(3)(d); the American Convention, Art. 8(2)(f); the African Commission Resolution, Paragraph 2(e)(3) and the ICC Statute, Art. 67(1)(e).

195 Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 415.

196 Nowak (n 82) 244.

197 Hoque (n 4) 58.

198 JAMAKON (n 19) 18.

199 Hoque (n 4) 58.

200 *BLAST v Bangladesh* [2005] 57 DLR 11 (HCD).

201 The Special Powers Act 1974, S. 32.

202 The Special Powers Act 1974, S. 3.

203 Nazir, (n 23).

Section 8(1) of the SPA, 1974 permits the detaining authority to refuse to disclose the facts which it considers against the public interest as a result of which the opportunity of defending himself becomes meaningless and due to having not defined the ambit of public interest, this proviso is often used as an exploitation tool and in denying right to fair trial. Again Section 11(4) of the SPA stipulates that the detainee against whom a detention order has been made cannot appear by any lawyer in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report except specified part of opinion by the Board in its report shall be confidential. And as the report of the Advisory Board is binding on the executive authority, it is always influenced by the authority.[204]

In particular, overriding application of the SPA over all laws makes the 30-day time frame of preferring appeal to the High Court Division imperative and the provision as to condonation of delay under section 5 of the Limitation Act, 1908 becomes inapplicable under the former[205] and similarly the court adjudged that application for delay in preferring appeal under the SPA is not amenable when such appeal is barred by limitation.[206] This rigid time frame may go against the convicted if he fails to prefer the same owing to circumstances beyond his control.[207] In addition, the overriding enforceability of the SPA excludes the applicability of the Code of Criminal Procedure, 1898 as the court reasoned that section 35A of the Code of Criminal Procedure of 1898 requiring deduction from the accused's sentence the period which he has already spent in custody is inapplicable to the offenders tried under the SPA.[208] Though the underlying philosophy of this provision is to compensate the accused delays in his trial pursuant to his constitutional rights to have a speedy trial irrespective of the law governing his offence, the legislation explicitly and specifically limit the applicability of section 35A only to general offenders, and resultantly such inapplicability to the offenders under the SPA seems to have deprived them of the right to equal protection of law.[209]

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204 Halim (n 21) 304.

205 Section 34B of the SPA says, 'The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Code or in any other law for the time being in force.' Section 30 (1) says, 'An appeal from any order, judgment or sentence of a Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery or passing thereof'.

206 *Shamsul Haque* v. *State* [1991] 43 DLR 247 (HCD); *Bashi* v. *State* [1991] 43 DLR 209 (HCD).

207 Faruque (n 49) 8.

208 *Hiru Miah* v. *The State* [2005] 10 MLR 388 (HCD).

209 Hoque (n 4) 58.

F. Threat to Freedom of Thought, Speech and Conscience

Though in 1991, sections 16, 17 and 18 of the Act were repealed by the Special Powers (Amendment) Act, the SPA is a threat to freedom of thought, speech and conscience and thereby targets political activists, the opposition and other critics of the government to prevent dissenting voices.[210] It infringes the people's constitutional right and international human rights norms as UDHR and ICCPR encapsulates that everyone has the right to freedom of thought, conscience… and right to freedom of opinion and expression including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[211] Likewise the Bangladesh Constitution guarantees freedom of thought and conscience[212] and ensures the right of every citizen to freedom of speech and expression; and freedom of the press subject to certain reasonable restrictions.[213] But the court observed that press is the mouth-piece of public opinion… It has to work as a link between the parliament which frames the legislation and the public which express their hope and aspirations through it.[214] Nonetheless, human rights defenders and professionals, political opponents and media members are routinely being monitored, detained and harassed by the law enforcing agencies.[215] For example, an instructor in the Law Department of the Northern University Bangladesh in Khulna was arrested and detained under the SPA in July 2014 for allegedly making comments criticizing the President, Prime Minister and former president of Bangladesh during his class but he was released from jail on bail a week after his arrest as the investigating police officer claimed to have no proof in support of the allegations. These types of cases are violations to freedom of thought, speech and conscience.[216] Not only that, journalists who write stories criticizing the government can also be arrested under the SPA.[217] In contrast, in a report submitted to the UN Human Rights Council, Bangladesh authorities talked to withdraw the use of the SPA to make the media free from any kind of control.[218] However, in the name of SPA, the executive authority arrests various persons, inflicts torture on

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210 https://www.justice.gov/sites/default/files/eoir/legacy/2015/01/08/BGD104943.E.pdf.

211 UDHR, Art. 18-19; ICCPR, Art. 18-19; the Convention for protection of Human Rights and Fundamental Freedom, Art. 9-10.

212 The Constitution of the People's Republic of Bangladesh, Art. 39(1).

213 The Constitution of the People's Republic of Bangladesh, Art. 39(2).

214 *Mujaffar Khan* v. *the State* [1959] PLD.

215 International Federation of Human Rights, 'Bangladesh: Criminal justice through the prism of capital punishment and the fight against terrorism'.

216 'NUB Teacher Accused of Defamation Gets Bail' *Dhaka Tribune* (10 July 2014).

217 http://freedomhouse.org/report/freedom -world/2013/Bangladesh

218 http://freedomhouse.org/report/freedompress/2013/Bangladesh

some of them and threatens everyone wishing to speak against the Government of order of preventive detention against them.[219] Therefore, it's unequivocally uttered that the SPA is contrary to the mandate of the constitutional spirit and human rights dictum.

G. Infringement of Freedom of Assembly and Association

The right to assemble peacefully as well as to form association of every citizen subject to reasonable restrictions is constitutionally guaranteed right in Bangladesh.[220] The freedom of association includes the right to organize and join in any association for the advancements of beliefs and ideas pertaining to religious, economic, civic, political, cultural or other matters.[221] The restrictions imposed by law not an administrative order will be violative of the freedom of association.[222] These fundamental rights have also been reflected in international human rights instruments as the UDHR reiterates that everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.[223] Similarly, the ICCPR have recognized the right of peaceful assembly and the right to freedom of association subject to restrictions, in conformity with the law, which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[224] But Section 20 of the SPA has made impediments to form political party based on religion not taking the circumstances into consideration as to the existence or non-existence of religious and communal harmony among individuals as its effect.[225] It is noticeable here that political parties are generally formed on ground of any particular spirit or for the furtherance of any particular aim and target. No human rights norms also did prohibit or restrict the formation of any party on ground of any particular ideal, spirit or aim. Similarly, the Constitution has abstained

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219 'Preventive Detention and Violation of Human Rights: Bangladesh Perspective' (A sample research monograph submitted for partial fulfillment of the requirements for the degree of Master of Laws) Bangladesh Journal of Legal Studies. <http://bdjls.org/research-monograph-preventive-detention-and-violation-of-human-rights-bangladesh-perspective/

220 The Constitution of the People's Republic of Bangladesh, Art. 37-38>

221 *National Association for the Advancement of Colored People* v. *Alabama* 357 US 449.

222 *Dacca National Institute* v. *East Pakistan* 10 DLR 343.

223 UDHR, Art. 20; American Convention on Human Rights, Art. 16; African Charter on Human & Peoples' Rights, Art. 11.

224 ICCPR, Art. 21-22; American Convention on Human Rights, Art. 16; African Charter on Human & Peoples' Rights, Art. 12..

225 The Special Powers Act 1974, S. 20(1) says, 'No person shall form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose'.

itself from imposing such restrictions except for the purposes of destroying the religious harmony and creating discrimination based on religion among the citizens.[226] The precondition imposed on the formation of an assembly or association is that it should be peaceful. But in guise of state security as well as in the name of the SPA, citizens are prevented from peaceful assembling and the right to form association is being denied.[227] The association formed with civil society is indirectly threatened by the Govt. The Government was increasingly hostile to civil society groups in 2012 and civil society as well as human rights defenders reported augmented governmental pressure and monitoring.[228] The SPA has also been used to detain trade union activists. A 2012 report about the violation of trade union rights in Bangladesh by the International Trade Union Confederation (ITUC) notes that if a strike is considered a "threat to national interest," the SPA can be used to detain trade union activists without charge.[229] Therefore section 20 of the SPA has infringed citizens' constitutional rights and international human rights norms.

H. Infringing Right to Compensation

Provision for compensation to victim is now viewed as a constitutive part of criminal justice system in many developed and developing countries since crime portraits a pattern of downfall of the political and administrative structure of society;[230] and also is regarded as an integral part of the concept of restorative justice implying that the state must be equally just and fair to victim by devising a compensatory and protection scheme for rendering justice to him.[231] Where Article 35(5) of our Constitution prohibits cruelty, inhuman or degrading punishment to an arrested or detained person, Article 46[232] permits the Parliament to enact law to provide impunity to the perpetrators rather than to pay

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226 The Constitution of the People's Republic of Bangladesh, proviso (a) (b) of Art. 38.

227 Mondol (n 123).

228 www.hrw.org

229 International Trade Union Confederation, 'Annual Survey of Violations of Trade Union Rights- Bangladesh' [2012]. http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4fd88965c

230 In UK- The Criminal Injuries Compensation Act 1995; the Criminal Injuries Compensation Act 1976, New South Wales (Australia); the Victims of Crime Act 1984; In India- The Code of Criminal Procedure 1973, S. 357.

231 KI Vibhute, 'Justice to Victims of Crime: Emerging Trends and Legislative Models in India' in KI Vibhute (ed), *Criminal Justice* (Eastern Book Company 2004) 370-395.

232 Article 46 of the Bangladesh Constitution may be utilized to acquit, or to extend impunity to, 'any person in the service of the Republic or any other person in respect of any act done by him in connection with…the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment, forfeiture ordered, or other act done in any such area'.

compensation for the victims of human rights violations by the state or the perpetrators. Not only that, Bangladesh is denying "international obligation to promote, protect and respect human rights including the right to compensation for the victims."[233] Because the ICCPR stipulates that every victim of unlawful arrest or detention shall have an enforceable right to get compensation.[234] Bangladesh has also an international obligation to run victim compensation scheme under its domestic law as the CAT reiterates, "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."[235] The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power[236] also solicited the state to treat victims with compassion and respect but also take appropriate measures to uphold their access to justice and fair treatment,[237] restitution,[238] compensation[239] and assistance[240]. Though unfortunately, it is bitter true that the government denies such compensation or rehabilitation as a result of which the concerns of victims under special legislation in Bangladesh are nowhere reflected in the criminal justice system as a whole and accordingly there is no provision for payment of compensation for illegal detention under the SPA.

The Higher Judiciary supposed to show strong judicial activism has played a pivotal role *suo moto* or of on its own motion by giving directives to the state to pay the victims compensation for human rights violations by the law enforcing agency.[241] In the case of *Smt Nilabati Behera @ Lalita Behera* v. *State of Orissa & Ors*,[242] the Indian Supreme Court, as the primordial protector of the accused's basic rights strangulated by the state

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233 Compensation scheme of victims discerns of three patterns: i) compensation by the state; ii) compensation by an offender either by asking him to pay it from the fine imposed or a specified amount; and iii) duty to repair the damage done by the offence. Vibhute (n 232) 382.

234 The International Covenant on Civil and Political Rights 1966, Art. 9(5).

235 The Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984, Art. 14(1).

236 General Assembly Resolution 40/34, 1985.

237 The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 4-7.

238 The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 8-11.

239 The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 12-13.

240 The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 14-17.

241 Momtaz (n 24) 117.

242 [1993] 2 SCC 746.

officials, adjudged that the State has obligation to pay compensation to the near and dear ones of a person deprived of life by their wrongful action. Again, the Indian Supreme court directed for compensation in *Rudul Sah* v. *State of Bihar* case.[243] In Bangladesh, in the case of *Muhammad Ali* v. *Bangladesh*[244] the Court fined 5000 taka as 'token compensation' against each of the two Police Officers. In *Bilkis Akhter Hossain* v. *the Government*,[245] the court ordered the government to pay one lakh to each detainee as compensation for illegal detention. Furthermore, the Indian Supreme Court in a landmark judgment in *D. K. Basu* v. *State of West Bengal*[246] awarded compensation to the unlawfully arrested detainee on the ground that India was a signatory to the ICCPR. Therefore, it is undoubtedly admissible that the SPA is against the constitutional spirit and human rights norms.

I. Incongruity with the Rule of Law

The concept of rule of law talks about the establishment of democracy and society free from exploitation in which fundamental human rights and freedoms, respect for the dignity and worth of the human person, equality before law and justice for all are guaranteed as a fundamental aim of the state which is the desired dimension and spirit of the constitution.[247] It is a basic feature of the Constitution of Bangladesh.[248] As a state organ, the function of the legislature in a democratic society under the rule of law is to undertake such activities as will uphold and respect for the supreme value and dignity of the individual.[249] Rule of law refers to the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and the exclusion of the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government; equal subordination of all classes to the ordinary law of the land; and guarantee of citizen's rights.[250] This concept demands that power

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243 [1983] AIR 1083 (SC).

244 [2003] 23 BLD 389 (HCD).

245 [1997] 2 MLR 113.

246 [1997] 1 SCC 416.

247 The Constitution of the People's Republic of Bangladesh, Preamble and Art. 11.

248 *Anwar Hossain Chowdhury* v. *Bangladesh* [1989] spl 1 BLD; *Farida Akter* v. *Bangladesh* [2007] 15 BLT 206 (AD); *Ekushey Television Ltd.* v. *Dr. Chowdhury Mahmood Hasan* [2003] 55 DLR 26 (AD).

249 This concept was developed by the International Commission of Jurists known as Delhi Declaration 1959 which was later on confirmed at Lagos in 1961. See for details, Journal of the International Commission of Jurist, Spring-Summer 1959 and the Rule of Law in Free Society published by the Commission in 1960.

250 AV Diecy, *Law of the Constitution* (1885) 193, 202-203.

is to be exercised in a just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination.[251] So the rule of law hinges upon the provisions of adequate safeguard against abuse of power by the executive, and an effective governance ascertaining conditions of life.[252] But in Bangladesh, every successive government has taken the SPA in its hand as a deadly instrument; and every year so many persons are detained without trial to purposively subjugate political opponents;[253] and constitutional and basic human rights as guaranteed in Articles 27, 31, 32, 33, 35, 36, 37, 38, 39 and 44 of the Constitution become non-protected for the detention orders under this Act arbitrarily and abusively; and resultantly almost all fundamental rights of a person become meaningless when unlawfully detained for once under this law. In Bangladesh, all governments always exercise such law in peace time as a lethal weapon unlike in the UK, the USA and Singapore during war and emergency time.[254] Therefore, the provisions permitting preventive detention in peace time is incompatible with the concept of rule of law. Moreover this law empowers the detaining authorities to exercise their arbitrary discretion to detain any person upon a mere subjective satisfaction on any vague grounds as discussed earlier. This arbitrary and wide discretionary power of the detaining authority has no room in the institution of rule of law. The dependence of excessively exercise of the executive on tyrannical laws like the SPA decreased the government's status as adopting 'rule by law' not 'rule of law'[255]. The abuse of 'rule by law' manifests itself in the passing of and reliance on unjust laws. So it keeps much more consistency to mention here in such way that the Special Powers Act is a draconian, unjust, black and obnoxious law which strangulates the rule of law and fundamental principles of human rights.

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251 *Delhi Transport Corporation* v. *DTC Mazdoor Congress* [1991] AIR 101 (SC); *Uttaranchal Jal Sansthan* v. *Laxmi Devi* [2009] 7 SCC 205.

252 'The Congress Committee IV Report' in Dr Ershadul Bari, *Rule of Law and Human Rights* (a booklet in Bengali) 14-15.

253 Shashi Kanto Das, Md Bashir Uddin Khan and Md Kamruzzaman, 'Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh' (2016) 1 American Journal of Business and Society 60-67. <http://www.aiscience.org/journal/ajbs.>

254 Halim (n 21) 302-304.

255 'Rule of law' is distinct from 'rule by law' which refers to abuse and excessive use of power by the government through the use of laws as instruments of government's policy.

J. Other Drawbacks

i. Exaggerated Act

Notwithstanding having the operation of section 54 of the Code of Criminal Procedure, 1898, the justification of remaining the SPA in force gets no ground.[256] The underlying philosophy of granting the powers of arrest without warrant under section 54 is that prevention is the most effective approach to control crime. Its object is to give widest powers to the police in cognizable cases subject to the mandatory use of powers reasonably and cautiously though discretionary as abusing the power is not at all intention of the legislators. Despite this, allegation always arises as to the misuse of these powers.[257] Therefore judicial intervention developed guidelines on prevention of arbitrarily arrest and detention in presence of which the SPA is exaggerated legislation.

ii. Insertion of Vague Definition

The definition of the crucial term 'prejudicial act' in the SPA is not precise; vague and open to interpretation widely by the government and its executives which creates scope for gross abuse of the law[258] as the Act makes provisions for putting the accused in detention in anticipation of his involving in certain vaguely defined prejudicial activities.[259] There are no set procedures for, and no clear pattern on, the use of the SPA.[260]

iii. Act of Secretive Nature

The statistics on the use of the SPA are not available in public due to reluctance of the government to divulge information about its use with human rights defender and complexity of monitoring the situation and collecting information about the executive actions of the detaining authority not because of its secretive nature[261] but the proceedings of

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256 http://www.calternatives.org/projects/cads/pps/special-power-act-people-or-regime-security.php

257 Das, (n 254) 60-67.

258 UN Development Programme, 'Human Security in Bangladesh: In Search of Justice and Dignity'(United Nations: 2002) http://www.un-bd.org /undp/info/hsr/index.html

259 Hoque (n 4) 65.

260 Asian Legal Resource Centre, Telephone interview with the Program Coordinator, Bangladesh Desk, N.d. "Background of ALRC." (August 22 2014). http://www.alrc.net/doc/mainfile.php/background/2/

261 In correspondence with the Research Directorate, a representative of the Dhaka-based NGO *Odhikar*, available at http://odhikar.org/about-us/about-odhikar/

the government-constituted advisory board to review preventive detention and examine evidence on which such detention is based are also very confidential. As contemplated in the Dhaka Law Reports commentary of the SPA, there exists no means of justifying the veracity of these materials whether these are verified as gathered from credible sources and not hearsays or rumours from any quarter tainted or otherwise.[262] Resultantly the transparency of record keeping or exercising the law also becomes non-existent.

iv. Creation of Impunity Culture

As long as the Special Powers Act remains operative, it is likely to be utilized as an apparatus for arbitrary detention because the perpetrators are protected by section 34 of the SPA which contemplates that any suit, prosecution or legal proceeding is not tenable against the government or any person for anything done or intended to be done in good faith. Such provision gets validity from the Constitution which empowers the Parliament to legislate to provide indemnity to any state official for any act done to maintain or restore order, and to lift any sanctions inflicted on this person.[263] These constitutional provisions and anachronistic legal frameworks are incompatible with a state's obligation under the ICCPR as amnesties prevent investigation, prosecution and punishment of perpetrators of human rights violations and impede the victims of such violations from being granted reparations.[264] The Human Rights Committee opines that such amnesty for acts of torture is inconsistent with Article 7 of the ICCPR.[265] Moreover, the Committee against Torture, being aware of

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262 Dhaka Law Reports, *The Special Powers Act and Anti-Corruption Commission Act with Some other Allied Laws* (8th edn, 2007) 81.

263 According to Article 46 of the Bangladesh Constitution, 'Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area'.

264 UN Human Rights Committee, General Comment No. 20, Prohibition of Torture and Cruel Treatment or Punishment (Forty-Forth session, 1992) para 15, http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?
See also UN Human Rights Committee, 'Consideration of Reports Submitted under Article 40 of the Covenant, Comments of the Human Rights Committee, Argentina' paras. 3 and 11 CCPR/C/79/Add.46, 1995, available at http://www1.umn.edu/humanrts/hrcommittee/ARGENTNA.htt;
"Consideration of Reports Submitted under Article 40 of the Covenant, Comments of the Human Rights Committee, Chile", at para. 5. CCPR/C/CHL/CO/5, May 18, 2007, available at http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.CHL.CO.5.pdf?Opendocument.

265 HRC General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) para. 15

the fact that prohibition of torture is absolute and non-derogable, makes assessment that amnesties infringes the principle of non-derogability under the CAT.[266] To meet the requirements of the ICCPR and CAT, such provisions need to be amended.

3. Practical Scenario of the Use of the SPA and its Impact

Successive governments have massively used the SPA to thwart political opponents and partakers in peaceful exhibitions, as well as against individuals involved in personal altercations with people in authoritative position. Sometimes detentions have been earthed on mere allegations. Over the years, hundreds and thousands people have been detained under the Act.[267]

Since the promulgation of the SPA on 9 February 1974 to the end of the Awami League regime in August 1975, some 35,000 people were detained under the SPA mostly for political grounds. During the Ziaur Rahman regime between 1975 and 1982, over 100000 people were detained whereas about 150000 people were detained during the Ershad regime between 1982 and 1990.[268] From 1991 to July, 1997, the number of detainees was 30,561.[269] From 1974 to July 1997, of 63,653 detained people, 15,034 people were released through writ of habeas corpus.[270] Under the emergency rules in force after January 2007, the potential future criminal acts for which a person could be preventively detained were substantially increased.[271] Therefore, as explicitly listed,[272] the SPA was also frequently used during such time. In addition, *Odhikar* representative opines that most SPA cases are unreported, and few cases involving local activists are publicized. [273]

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266 CAT General Comment No. 2, CAT/C/GC/2 para. 5.

267 Cathy McWilliam, 'Exercising the big stick' in States of Insecurity (Seminar, New Delhi, issue 512, 2002). http://www.india-seminar.com/2002/512/512%20cathy%20mcwilliam.htm

268 Amnesty International, Bangladesh: a summary of human rights concerns, April 1993, AI Index: ASA 13/01/93, file:///E:/Recent%20doc%20on%20SPA/A%20summary%20of%20human%20rights%20concerns.pdf

269 Md Abdul Halim, *Constitution, Constitutional Law and Politics* (edt, CCB Foundation 2009) 299.

270 *Ibid* 299.

271 The Emergency Power Rules 2007, s. 21.

272 The Emergency Power Rules 2007, s. 14.

273 https://www.justice.gov/sites/default/files/eoir/legacy/2015/01/08/BGD104943.E.pdf p.2

As per court records, from 1974 to March 1995, of the 10,372 habeas corpus writs filed with the High Court Division of the Supreme Court to challenge detentions, only in less than 9 percent did the court find the detention to be valid which reveals an indication of the extent to which the Act has historically been misused.[274] In the vast majority of such cases, the court has found the detention grounds to be vague, indefinite and lacking in particular materials.[275] However, the executive appears to have little or no discerning about the Supreme Court's repeated criticism of the law and its execution. It has even ignored release orders forcing the court to initiate contempt of court proceedings[276] and flagrantly violated such orders with a fresh detention order at the jail gate when about to walk to freedom.[277]

Such indiscriminate use of the SPA may affect not only detained individuals but also his family, children, community and state. It may have intergenerational effect as well. Lost human potential is one of the salient impacts of excessive arbitrary detention without trial or charge. Manfred Nowak, UN Special Rapporteur on torture opines, "Many people think that torture is primarily the fate of political and other 'high-ranking' prisoners. In reality, most of the victims of arbitrary detention, torture, and inhuman conditions are usually ordinary people who belong to the poorest and most disadvantaged sectors of society..." Therefore the poorest and marginalized echelons of society are least equipped to deal with criminal justice system and the experiences of detention. They with little family or social support are more likely to lack the ways to secure their legal right not to stay for indefinite time including bail challenging arbitrary detention.[278] The excessive and arbitrary use of such detention critically impairs socio-economic development and disproportionately affects individuals and families living in or at the edge of the poverty.[279] Because the detained persons cannot work or earn income during detention and frequently lose their jobs after only a short period away from their work, and are at risk of bankruptcy if self-employed. If the detention period is lengthy, detainees' future earning potential is also crippled. They are also at risk of long term unemployment or underemployment after release which hastens abject poverty commonly reduced to begging due to non-

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274 Human Rights Features, 'Dealing with Dissent: The 'Black Laws' of Bangladesh' 1999. <http://www.hrdc.net/sahrdc/hrfeatures/HRF08.htm>

275 S M Hasan Talukder, *Development of Administrative Law in Bangladesh: Outcomes and Prospects* (3rd edn, Bangladesh Law Research Center 2015) 114.

276 Islam (n 5) 206.

277 Talukder (n 276) 114.

278 Fernando Salla and Paula Rodriguez Ballesteros, *Democracy, Human Rights and Prison Conditions in South America* (Center for the Study of Violence, University of São Paulo, 2008).

279 Open Society Foundations, 'The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pretrial Justice' 22-23.

availability of any other options for earning income.[280] If the detainee is a parent, the education of children is often disrupted. According to an NGO report, such children may have to move to a new era, a new home or a new school because of imprisonment.[281] If the detained are mothers, the lives of their children are severely disrupted resulting in heightened rates of school failure and eventual criminal activity[282] and an increased likelihood of their becoming 'NEET' (Not in Education, Employment and Training).[283] Although an individual's detention may be only for a few weeks, the impact can be felt over the rest of his life and into the next generation eventually linking to negative outcomes including increased propensity for violence and other antisocial behaviours, increased likelihood of suffering anxiety and depression,[284] and increased likelihood of criminality when parents are detained.[285] The over-use of detention harms not only the detainee but the community as a whole and furthers the social exclusion of marginalized groups. Detention may also have impact on the state as every state spends money to meet the basic necessities of the detainee resulting in increased state's expenditure and reduced revenues.[286]

4. Conclusion

It may be logically drawn in fine that the SPA has taken the most formidable form striking down a balance between the needs of state security and protecting fundamental human rights and thereby contributing to a culture of arbitrary arrest, detention and torture; and creating the justification for the institutionalization of legal impunity of the human rights violators. The SPA is in flagrant violation of constitutional jurisprudence and international human rights norms as it has become the biggest threat for the safety of the public creating a dangerous ambience which affects public order and tranquillity and makes individual liberty fallen into the clemency of the government and thereby impedes the flourishing of proper and sound environment for democratic society

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280 *Ibid* 27-29.

281 Oliver Robertson, *The impact of parental imprisonment on children* (Geneva: Quaker United Nations Office, 2007) 7.

282 Barbara J Myers and others, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11.

283 New Economics Foundation, *Unlocking value: How we all benefit from investing in alternatives to prison for women offenders* (London: New Economics Foundation, 2008).

284 Jennifer Rosenberg, *Children Need Dads Too: Children with Fathers in Prison* (Geneva: Quaker United Nations Office, 2009) 14.

285 Herman-Stahl, Kan & McKay, *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families* (Washington DC: RTI International for the US Department of Health and Human Services, 2008) 1–3.

286 Open Society Foundations (n 280) 33-35.

governed by rule of law. It is aptly evident that till date since its enactment, the SPA has been rampantly misused in peace time by the successive governments, in the absence of determining its applicability in case of grave emergency and occurrence of situation of war, or external aggression or internal disturbance threatening the security of the state, as a deadly instrument to harass the opposition of the ruling party, suppress the anti-government movements, even democratic movements and perpetuate the political regime resulting in making the greatest instance of mutual distrust of the political parties. The SPA is indiscriminately used encroaching upon the basic human rights of the general people of the country even with no minimum care and thereby making them the worst sufferers of this draconian law owing to putting them into prolonged detention for no fault at all through the issuance of arbitrary detention order and restrictions on movement by the executive authority which derived their powers from the vague terms and provisions as contained in the Act itself of which the literal, lexicographic or pedantic construction or interpretation would render liberty jurisprudence nugatory. This Act undoubtedly suffers from the non-observance of criminal jurisprudence i.e. absence of proportionate sentence, double criminalization as well as failure of passing the test of reasonableness within the purview of constitutional jurisprudence. Given the priority over crime control model between two predominant models, this Act negates due process model suitable for a fair and just criminal justice system deviating from the principle of presumption of innocence, right to fair trial and protection against self-incrimination, right to freedom from torture and cruel, inhumane or degrading treatment, right to compensation as well as the cardinal principles of natural justice and due process of law. The judiciary has also remained the most zealous and steadfast protector of liberty jurisprudence and upheld compensatory justice for the victims. The overriding application of the Act over limitation laws weighs psychological distress of appealing within the rigid timeframe if failed beyond his control and misapplication and exclusionary clause of this Act to the SPA offenders to invoke the general benefit of the Criminal Procedure Code concerning post-trial concession of the time spent in custody or detention seems to have deprived of the principle of equal justice and right of equal protection of law. This Act is an exaggerated legislation as it is a common for the arrestee under section 54 of the Code of Criminal Procedure are later charged under the SPA. This Act negatively impacts not only on the individuals but also on their families, communities as well as the state. So there is no denying that such repressive law has deviated from constitutional jurisprudence and international human rights norms. From this perspective, such unreasonableness, arbitrariness, unjustness, incompatibility and draconian characteristics of the Act and the developing human rights jurisprudence demands that it has become a time befitting

concern of whether the sustainability of this black legislation should be rethinking or abrogated.

Towards a Regional Protection of Human Rights in the Perspective of Asia

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Abstract

This study outlined the regional protection of Human Rights in Asia that spans from the Middle East to Japan and covers up a very large space of Indian Sub-Continent, is geographically, politically and culturally too diverse for human rights to be managed effectively by a single protection. For a sustainable and effective protection, recognition of diverse political and social structures that range from democracy of Bangladesh, India, Japan, 'semi-authoritarianism' of Singapore and Malaysia, communism of China and Vietnam and Islamic reigns of Iran, Saudi Arabia and so on. And, importantly distinct cultural traditions, social practices and environments result particular needs for each Asian country. So, a 'margin of appreciation' should, as far as possible, be respected. If Human Rights mechanisms are to be successfully established in Asia, sub-regions are to be clearly defined within the larger Asian environment. Such sub-regional human rights systems can be more efficient for that the field of enforcing human rights then shall become narrower and easier to keep watchful eyes on discrimination and effective communication and fruitful establishment of human rights.

Keywords: Regional Protection, Asian Values, ASEAN, Human Rights, Diversity, Culture, Religion, Tradition.

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1. Introduction

Human rights lack in enforceability if it is fostering democracy is controversial or creates pseudo-enforceability by coining mere terms and plans without any political stability or willingness. So, the core thing of effective application of human rights touches the question of how power is distributed in a society and of state-individual relations, obligations, transparency and limitation to authoritarian state practice.

A few observations help to establish a context for talking about human rights in Asia. First, it could be argued that in Asia there is no history of 'human rights' as understood in its western context. As per the observation of Kenneth Christie and Denny Roy:

> "Human rights in their original sense (to which Asians have been obliged to react) not only apply to all groups of people in all societies, regardless of their socioeconomic status, but are also conceived of as fundamental entitlements that 'trump' all other considerations which may stem from an individual's relationship to social networks or to the state. In Asia and other Third World societies there is no tradition of such entitlements. People are believed to have basic duties, not basic rights, and these duties arise from a person's status or group affiliation. Thus, a ruler may have a duty to rule justly and the rich a duty to give to the poor, but this does not mean that the people have a right to be ruled justly or that the poor have a right to receive charity." (Christie & Roy, 2001)

The term "Asian values" is such a creation of some Asian leaders. The 1990s saw the rise of what came to be known as "Asian values" in the global human rights debate. In short, proponents of the "Asian values" case held that human rights, in particular civil and political rights, were culturally specific and could not be applied universally. Instead, they argued for culturally and developmentally specific interpretations of rights, in this case based on "Asian values." (Avonius & Kingsbury, 2008)

However, some scholars criticized the term 'Asian values'. The Question of distinctive value of the Asian people is viewed as:

> "Are there such things as Asian values, understood as a common social morality embraced by that half of humanity living in Asia today? Hardly, we contend, apart from the common humane values that are also shared by the other half of humanity. This anthology intends to show that there is no distinctively 'Asian' perspective, entirely different from Western or other perspectives and unanimously shared by all Asian societies.
>
> Accordingly, we are not concerned with identifying a specific Asianness in the approach to human rights, but with investigating the background for what

> has now established itself as the Asian values argument in international politics as well as with tracing similarities and dissimilarities in the current controversies over human rights and national cultures in Asian societies." (Jacobsen & Bruun, 2004)

But, we cannot in any way, deny to the fact that Asian values discourse has it's distinctive nature. So, we would like to introduce this discourse in our study and observe its technical opportunities and problems.

2. Asian Values and Human Rights in Asia

2.1. The Concept of Human Rights

The concept of a 'human rights culture' means different things to different people. To some, it means ensuring that everyone is treated with respect for their inherent dignity and human worth. To others, it means that judges, the police, and immigration officials are required to protect the interests of terrorists, criminals, and other undesirable elements at the expense of the security of the population. (Clapham, 2007)

Whatever the conception the word human rights mean, the common thing to be noticed is these are a bunch of rights that are interrelated with different human beings indifferent of their caste, race, religion, sex or any other barriers.

We first need to understand that human rights are considered a special, narrow category of rights. William Edmundson distinguishes human rights from other rights by suggesting that:

> 'Human rights recognize extraordinarily special, basic interests, and this sets them apart from rights, even moral rights, generally.'(Edmundson, 2012)

Richard Falk suggests that human rights are a 'new type of rights' achieving prominence as a result of the adoption of the Universal Declaration of Human Rights by the United Nations in 1948. (Clapham, 2007)

2.2. The Conflict between Asian Values and Western Ideas of Human Rights

The term "Asian values" was coined and advocated by some of the influential leaders of Asian countries such as Lee Kuan Yew, Suharto and Mahathir Mohammad. They had strong possession on this point and

rejected the "western ideas" saying that they have "Asian Values" which are totally integral in nature.

But, Lenk's observation says that their voices echoed the main trend of Western human rights studies, when some of them maintained "Human rights . . . raised from the tradition of the occident humanist and humanistic arts of thinking" (Lenk, 2008)

Some scholars of the supporter of the Western theory of human rights argue that:

> "The term 'human rights' was originally a western concept originating from the experience and political philosophy of Western Europe. One of the dominant themes of Western European history has been the struggle of citizens to limit the powers and intrusiveness of their rulers. Many western political thinkers have characterized government as a necessary evil, ideally given the task only of providing the protection and minimal supervision that allow the people to achieve prosperity and self-fulfillment. When the phrase 'human rights' came into popular usage after the Second World War, it referred to laws protecting citizens from being abused or suppressed by their governments – what are now more specifically called civil and political human rights. The need to distinguish this class of human rights, also known as 'first generation human rights', arose from the assertion of Third World commentators that social and economic rights ('second generation human rights'), which are guarantees that basic needs (food, shelter,employment, medical care, etc.) will be met, are desired by the majority of the world's population at least as deeply as civil liberties." (Christie & Roy, 2001)

But, why the term 'Asian values' was so much highlighted? Professor Mauzy points out the causes of the Asian values discourse:

First, the reassertion of 'Asian values' is in response to the determined promotion by the West, especially the US, of its own values following the demise of the Soviet Union, which left a 'crusading void.' (Vincent 1986: 2). The ASEAN states resent the West's belittling of 'Asian values', and they assert that they are resisting what they perceive to be Western bullying.[3]

Second, there has been a growing confidence in many Southeast Asian countries, buoyed by substantial economic successes (Carnegiecouncil.org, 2017) that appear to justify the policy of putting economic development first and giving priority to order and stability (the 'strong state') and what they call 'good government.'[4]

3 Jakarta Post, 22 June 1993.

4 Far Eastern Economic Review 12 October 1995: 45-124.

They believe that their own values and traditions have served them well, and, as expressed by the Malaysian deputy prime minister, Anwar Ibrahim, that they are experiencing an 'Asian Renaissance' in terms of a cultural rebirth and Asian empowerment.[5]

Furthermore, the democratic and human rights campaign from the West has revived and released a deeply felt bitterness about colonialization and colonialist assumptions on human rights that is not fully appreciated in the West.

A quote from Anwar Ibrahim captures the mood:

> "... to allow ourselves to be lectured and hectored on freedom and human rights after 100 years of struggle to regain our liberty and human dignity, by those who participated in our subjugation, is to willingly suffer impudence."[6]

Third, there is also a widespread suspicion that the West has a hidden agenda to maintain hegemony by slowing down Asian prosperity and crippling its competitiveness by 'changing the rules' to invoke a new kind of protectionism with human rights and democracy as the standard bearers, succeeding the old banners of colonialism and Christianity.

Likewise, the Western media are sometimes portrayed as accomplices in serving dominant Western power interests. (Laiq, 1996). The suspicion that the West's real goal is domination is shared by some Asian NGOs and was the central theme of a bitingly critical NGO-sponsored international conference on 'Rethinking Human Rights' held in December 1994 in Kuala Lumpur, Malaysia.

Finally, there is a feeling that the Western model being promoted, meaning predominantly the US model, is flawed and therefore undesirable for Asia. This feeling is accompanied by widespread dismay at the social decay in the West.[7] Asians naturally want to avoid the problems of rampant crime, welfare-induced sloth, and a breakdown of society.[8]

The human rights and 'Asian values' debate in Southeast Asia 213 prominence of rights and freedoms in the West since the Second World War is at least partly responsible for the current social decay.[9]

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5 Far Eastern Economic Review 7 December 1995: 23.

6 Far Eastern Economic Review 2 June 1994: 20.

7 Time Magazine 14 June 1993: 16-19; Mahbubani 1992: 3-12.

8 Economist 28 May 1994: 9-10.

9 Far Eastern Economic Review 17 June 1993: 5.

2.3. A Critical Observation on Asian Values

So many scholars have oversimplified and sometimes made even pointless commentaries on 'Asian values.' They often underestimated the diversity of its cultures, religions, traditions and histories. Some dismiss the notion saying that it was manufactured as a convenient defense for authoritarian government.(Little, 1996).

There are other scholars of Western liberal and social democratic values as conservatism. (Rodan and Hewison, 1996)

But, it is a matter of fact that there is no pan-Asian view or set of values that can be uniformly termed as 'Asian values'. Clearly, not all Asians share all the Asian values. However, it seems the term is applied to Southeast Asia where there is a shared portion of values and commonalities exist. (Stubbs, 1995).

However, the ASEAN states emphasize a balance between rights and duties, although in reality the balance remains tilted towards duties in most of these states (Anwar Ibrahim, 1994).

Yet another widely shared Asian value, not just in Confucian East Asia and Singapore, but also in Islamic Indonesia and Malaysia, and Buddhist Thailand (and once valued to a degree in the West), emphasizes communitarianism - the concept that responsibilities to the family and the community have priority over the rights of the individual (Muzaffar, 1995: 5; Fukuyama, 1995).

'None of the major Asian philosophies,' writes Muzaffar, 'regards the individual as the ultimate measure of all things' (Muzaffar, 1996).

2.4. Hindrances of Considering Asia as a Unit

Considering Asia as a unit is not an easy exercise for various reasons. The size of Asia is itself a problem. Then comes the population. Asia is a country where 60 percent of the total world population lives. So, what we can consider to be values of our society or geographical area, is not the value of the other parts of Asia. There are quintessential values that differentiate Asians as a group from people in the rest of the world.

The advocates of "Asian values" have tended to look primarily at East Asia as the region of particular applicability. However, in fact, East Asia itself has much diversity. There are far variation between Japan and China and Korea. Various cultures influences from within and outside this region

have affected human lives over the history of this rather large territory. (Sen, 1997)

3. Towards Freedom, Democracy, Tolerance and Basic Human Rights

3.1. A Brief Statement of Human Rights in Asia

India: If we pay our attention to the world's biggest democratic republic, that is, India, we can see that the basic human rights are humiliated in so many ways. A few case studies can help to get a better understanding of the situation.

i. **Custodial Death of Md Jaleel, Andhra Pradesh:** On 26 August 2004, the NHRC received information from the Collector & District Magistrate, Warangal in Andhra Pradesh about the custodial death of Md. Jaleel (son of Bandeli, resident of Malkapur village, Ghanpur, Warangal district) in police custody. The post mortem report found that he died due to acute Pancreatitis, a natural death. The Magisterial Enquiry did not find foul play or medical negligence.

   According to the police, 25-year-old Jaleel was taken into police custody on 25 August 2004 in connection with case No. 271/2004. He died on 26 August 2004 in MGM Hospital, Warangal. During the enquiry the family of the victim claimed that Jaleel was, in fact, arrested by the police on the evening of 24 August 2004. The police provided records showing his arrest on 25 August 2004 at 0245 hours.

   On 9 December 2006, the NHRC asked the Director General of Police (DGP), Andhra Pradesh to initiate a Criminal Investigation Department (CID) inquiry and take appropriate action on the outcome of such enquiry. The Commission further directed the DGP, Andhra Pradesh to send the report of the CID enquiry along with Action Taken Report within six weeks.[10]

ii. **Custodial death of Parmeshwar Dayal, Delhi:** On 15 March 2005, 28-year-old businessman Parmeshwar Dayal died in police custody in the Shanti Nagar area of North-west district of Delhi. He had been rescued by the Delhi police from Pune, Maharashtra after being allegedly abducted from Delhi. The police brought him back to Delhi on the night of 14 March 2005 but did not hand him over to the family.

10 NHRC Case Number: 424/1/2004-2005-CD.

> The victim's family alleged that he was tortured in custody by the police in connivance with a business rival. The police claimed he committed suicide by touching live wires after breaking a bulb holder inside the toilet.
>
> According to his relative Rajender Kumar, the police did not allow him to meet Parmeshwar after he was brought back from Pune. The family was only told of the victim's death on the morning of 15 March 2005.
>
> The NHRC has directed the Commissioner of Police, Delhi to submit the inquest report, postmortem report along with the status of Magisterial Inquiry and the status of investigation in the FIR registered in relation to the incident.[11]

From 1 April 2001 to 31 March 2009, the deaths of 1,184 persons in police custody were reported to the NHRC. An overwhelming number of these deaths had taken place as a result of torture. Most of these deaths took place within 48 hours of the victims being taken into custody by the police. In recognition of the scale of the problem of use of torture, on 14 December 1993, the National Human Rights Commission (NHRC) issued guidelines directing all District Magistrates and Superintendents of Police in every district to report to the Secretary General of the NHRC about custodial deaths/rapes within 24 hours.

The NHRC warned that: "Failure to report promptly would give rise to presumption that there was an attempt to suppress the incident". A landmark judgment in 1996 in the case of *D. K. Basu* v. *State of West Bengal*, the Supreme Court laid down specific guidelines required to be followed while making arrests with the aim to eliminate violations of human rights in police custody. (Asian Centre for Human Rights, 2009)

Bangladesh: Same kind of direction was given by the Supreme Court of Bangladesh in a landmark case of *BLAST and others* v. *Bangladesh*.

> **Fact of BLAST Case:** The petitioners argued that law enforcing agencies routinely abuse the powers granted under Sections 54 and 167 of the CrPC, and further that these provisions suffer from vagueness and allow for arbitrary exercise of power. The petitioners argued that the Court should enunciate safeguards to prevent or curtail police abuse of powers and arbitrary actions by Magistrates, which constitute violations of citizens' fundamental rights to life and liberty,

11 NHRC Case Number 5061/30/2004-2005-CD.

to equal protection of law, to be treated in accordance with law and to be free from cruel, inhuman and degrading treatment and punishment as guaranteed under articles 32, 27, 31, 33 and 35 of the Constitution.

The Supreme Court of Bangladesh laid down a set of fifteen guidelines with regard to exercise of powers of arrest and remand. It includes the manner and procedures the police must follow during the exercising the powers.

Let's take a look at the Human Rights Watch's report of 2016 about the overall conditions of Human Rights in Bangladesh:

The Detective Branch of the police, the Bangladesh Border Guards (BGB), and the Rapid Action Battalion (RAB) have been responsible for serious abuses, including arbitrary arrests, torture, enforced disappearances, and killings.

The government increased its attacks on civil society organizations and critics in 2015, and drafted a new law restricting foreign funding to Bangladeshi groups. Ain O Salish Kendra (ASK), another prominent human rights organization, remained under pressure for reporting on enforced disappearances and extrajudicial killings.

In several instances, critical editors and journalists were sued by government supporters. Journalists and civil society activists critical of Bangladesh's war crimes tribunal faced contempt charges and trials. Several bloggers and their publishers were hacked to death by Islamist militants in 2015 for promoting secularism. (Human Rights Watch, 2016)

China: The Chinese government tightly restricts freedom of expression through censorship and punishments. While the Internet has offered a marginally freer space, the government censors politically unacceptable information through means such as the "Great Firewall." Despite media censorship, journalists and editors have at times pushed the limits of acceptable expression.

While China is rhetorically committed to gender equality, its lack of respect for human rights means that women continue to face systemic discrimination on issues ranging from employment to sexual harassment. Family planning policies, which control the number and spacing of children people can have, continue to impose severe restrictions on women's reproductive freedoms. In October, authorities announced an end to its decades-old "one-child" policy; couples may now have two children. (Human Rights Watch, 2016)

Iran: Security authorities continued to clamp down on free speech and dissent, and revolutionary courts handed down harsh sentences against social media users, including death sentences in some cases. As of December, according to Reporters Without Borders, Iran held at least 50 journalists, bloggers, and social media activists in detention.

Scores of people held for their affiliation with banned opposition parties, labor unions, and student groups were in prison. The judiciary targeted independent and unregistered trade unions, and security and intelligence forces continued to round up labor activists and leaders. (Human Rights Watch, 2016)

4. Towards Regional Protection

4.1. Prioritizing the Cultural Diversity

Upholding the heterogeneity in Asian traditions does not, in any way, settle down the issues of the existence of individual freedom and political liberty within this very culture. One may argue that the traditions extant in Asia differ even among themselves, but, nevertheless they share some common characteristics too. But, the question is, whether the Asian countries share the common feature of being skeptical to freedom and liberty, while emphasizing order and discipline only?

It is equally true that the authoritarian reasoning also often gets backup from the West itself. There is clear tendency of USA and Europe, implicitly and even explicitly assume the political freedom of the people of Asia. The post-colonial hangover is yet to be overthrown.

4.2. Theory Applied in Practice

It is important to recognize that many of the historical leaders in Asia not only emphasized the importance of freedom and tolerance, they had clear theories as to why this was appropriate thing to do. Since, the Islamic tradition is sometimes seen as being monolithic, this is particularly important to emphasize the rules of Muslim Emperors esp. of Akbar. In the way they carried out all the diversity of religions and cultures, is undoubtedly a remarkable example of peace and harmony.

The subject of tolerance, of peace and harmony was indeed much discussed by many writers during the period of confrontation of religious traditions and the associated politics.

4.3. Sub-regional Human Rights Protection Mechanism

Whereas Europe, Africa and the Americas established their respective human rights instruments with the corresponding enforcement mechanism, the Asia-Pacific region remains the only UN defined region without a specific human right treaty and without a region-wide mechanism directed at the promotion and protection of human rights. Although the final aim, the setting up of regional human rights machinery, has not been reached so far, progress has been made in the protection and promotion of human rights through the engagement of the UN in creating a regional human rights mechanism, and through the creation of sub-regional human rights protection mechanism as the ASEAN Intergovernmental Commission on Human Rights.

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Laws Governing International Organizations: An Overview

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Abstract

International organizations have played an ever more active role in international affairs, with implications at the international and national levels. This development or active role of international organizations has been arising from a response which is evident in international intercourse rather than to the philosophical or ideological appeal of the notion of global government. This intercourse advances in the mechanism of transport and communications with the desire for trade and commerce which ultimately called for laws and regulations by international means. Each organization of course has its own governing law deriving from its constituent instrument as well as its established practices and found themselves with an increase in the breadth and nature of their activities. These laws and practices create a legal framework of the organizations to conduct their own intercourse for fruitful outcome of their undertakings. This study encompasses the common law of international organizations and also oversees the influence of customary international law on the mechanism of international organizations.

Keywords: Constituent Instrument, Established Practices, General International Law, National Law.

Introduction

International organizations are legal persons, whose activities are governed by law, including obligations under general rules of international law, under their constitutions, and under international agreements. Their powers are derived directly from their constituent instruments as reflecting the intention of their founders, and are subject to the limits of law. In general terms the sources of legal obligations establishing the parameters within

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which such activities may be lawfully carried out may be divided into two broad categories. The first category comprises the "rules of the organization," sometimes referred to as the "internal law" of the organization. The second category - sometimes referred to as the "external law"-compiles those rules arising outside the organization itself, of which there are two types: the rules of international law (in particular treaties and custom) and the rules on nation.

The Constituent Instrument

The constituent instrument of an international organization is almost always a treaty, although in some exceptional cases an international organization may be created by an act of one or more existing international organization e.g. Global Environment Facility.[3] The constituent instrument will provide for the functions and objects of the organization, and indicate how they are to be achieved. It will also provide for the framework against which secondary acts of the organization may be adopted and its other practice developed, even if such practice sometimes departs from the original objects of a particular provision of the constituent instrument.

As a treaty the constituent instrument will be governed by the rules reflected in the 1969 Vienna Convention on the Law of Treaties (as well as those of the 1986 Vienna Convention), which are expressly stated to apply 'to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice any relevant rules of the organization' (Art.5(3)).

The constituent instrument of an organization is the subject of elaboration and adoption mush like any other treaty. Once two or more states have agreed on the need to create an international organization, they will establish a negotiating process (which could be *adhoc* or established under the auspices of an existing international organization) which could be open ended in time or established for a limited period.

Once the draft text has been adopted, which may sometimes occur at a Diplomatic Conference of the representatives of the negotiating states, the constituent instrument will enter into force in accordance with its provisions on enter into force. Some constituent instruments require certain named states to have ratified to bring it into force: the UN Charter,

[3] The Global Environment Facility (GEF) was established in1990 as a three-year 'experiment' to provide grants to developing countries for investment projects, technical assistance and research to protect global environment and transfer environmentally benign technologies jointly by WB, UNEP and UNDP.

for example, came into force within four months of its signature, after ratification by the five permanent members and by a majority of the other signatory states (Art.110(2)). Other constituent instrument come into force upon a particular event: the Articles of Agreement of the IBRD came into force once instruments of ratification had been deposited by governments whose minimum subscriptions to the Bank comprised not less than 65 per cent of the required total subscriptions (Art.XI(1)). And yet others come into force once a certain number of states have become parties: the OAS Charter came into force once two-thirds of the majority states had deposited their instruments of ratification (Art.145).

Practice is mixed on the subject of reservation to the constituent instruments of international organizations. Some instruments expressly prohibit reservations, for example those establishing the International Sea-Bed Authority and the World Trade Organization.[4] Other instruments, such as the UN Charter, are silent. None appear to expressly permit reservation. In the absence of an express rule it will be the rules on reservation reflected in Arts 19 to 23 of the Vienna Convention which will determine the permissibility of a reservation, including, in particular, whether it is compatible with the objects and purposes of the treaty (Art.19(c)). The permissibility of reservations will generally only be an issue when the instrument is silent on the subject, although an express prohibition (or even authorisation under certain conditions)[5] does not exclude the possibility of issue arising, since state may enter reservations raising questions about their compatibility with such conditions.

Related to the questions of reservation is that of declarations (or interpretative declarations): where a state introduces a declaration but does not describe it as a reservation, how will it be characterised? In practise the depository of the constituent instrument will usually communicate the "declaration" to other parties or, in the case of international institution, to the relevant organ.[6] In many cases the declaration will have an overly political character, for example in relation to the refusal to recognise the state of Israel[7] or the sovereignty claimed by the United Kingdom over the Malvinas/Falkland Islands.[8]

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4 1982 UNCLOS, Art.309: 1994 Agreement establishing the World Trade Organisation. Art. XVI (5).

5 E.g. Asian Development Bank, Art. 56 (2).

6 This is the practice, for example, of the UN Secretary- General: Report of the UN Secretary General on the practice followed by depositaries on the subject of reservations, YILC, 1965, II, p.79.

7 Iraq's declaration to the IDA.

8 Argentina's declaration under 1982 UNCLOS.

Where a reservation has been entered the question arises as to who is to determine its effect: is it the state parties or the institution? Prior to the 1969 Vienna Convention this remained an open and sometimes controversial question, and practise was mixed.

Practise was largely been superseded by Art.20 (3) of the 1969 Vienna Convention, which provides that:

> 'When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.'

This provision makes clear that, subject to an express provision otherwise; it is the organization and not the individual states which decide on the admissibility of a reservation. The main question which will arise then becomes: which organ is competent to determine the admissibility of a reservation? Most constituent instruments do not address this question. It will therefore be the organ which is charged with deciding on the candidacy of a state wishing to join the organisation which will adjudge the reservation. Ultimately this may go to a plenary organ or, one has been provided for, a judicial or other body charged with authoritative interpretation.[9]

Apart from reservation there are mainly two other principal questions arise: which body is authorized to interpret definitively the constituent instrument, and what techniques of interpretation are to be applied?

As to the first question, the matter is sometimes addressed expressly by the constituent instrument, but more often is not. Where it is so address, the constituent instrument can provide for authoritative interpretation by non-judicial means (by the political or technical organs of an organisation) or by judicial means, or a combination of the two. In practise the vast majority of disputes concerning interpretation are settled by the political or technical organs, and authoritative interpretation by judicial organs remains the exceptions rather than the rule.[10]

With regards to the different approaches set forth in constituent instruments, an example of the mixed approach is provided by the Article of Agreement of the IMF. Article XXIX(a) of which provides that "any question of interpretation of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to

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[9] Imbert, *Les reserves aux traitesmultilateraux*, Paris, 1979, p. 173.

[10] Sohn. ''The UN System as Authoritative Interpreter of its Law'', in Schachter and Joyner (eds), *United Nations Legal Order* (1995), pp. 169-229.

the Executive Board for its decision." Where the Executive Board has given its decision, within three months any member may require that the question be referred to the Board of Governors "whose decision shall be final" (Art.XXIX(b)).

The UN Charter contains no specific compromissory clause providing for the judicial settlement of disputes with regard to the interpretation of the Charter, having noted the absence from the Charter of any procedure enabling the I.C.J. has itself concluded that each organ must, in the first place at least, determine its own jurisdiction and the presumption of validity would apply to such determination.[11]

Most of the specialised agencies contemplate the settlement of disputes on interpretation by negotiation within the political organs of the organisation, although often subject to a right of appeal to an outside body. In some cases such as the IAEA (Art.17A) or the WHO (Art.75), reference is made to settlement by negotiation without specifying any particular organ. In other cases, the organ is specified, as in the case of the Conference of the FAO (Art.XVII). It is the Council, the organ of 27 states, with its own Rules for the settlement of Differences, which plays an important role to disputes settlement in the case of ICAO (Art.84).[12]

Other institutions do not specifically mention the powers of their own organs to interpret the convention in the event of a dispute, but provided that such disputes shall be referred directly to arbitration, as in the case of the UPU (Art.32) and WMO (Art.29), or to the I.C.J. or a tribunal specially appointed, as in the ILO (Art.37) or UNESCO (Art.XIV).[13] It cannot seriously be contended that this excludes the organs of the organization from attempting to settle points of interpretation; indeed, if, through an organ, the question can be settled there will be no dispute remaining to be submitted to the outside body. Moreover, in general it will often be better for such disputes to be settled internally.

It must finally be observed that all the specialised agencies bar the UPU have been authorised by the UN General Assembly to request advisory opinions from the I.C.J. This is the only way in which the organization as such can appeal to the court for an interpretation of its constitution. The

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11 *Certain Expenses of the UN*, Advisory Opinion [1962] I.C.J. Reps. p. 168.

12 Appeal relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) (1972) I.C.J. Reps. p. 46. And note that the ICAO Council may also hear complaints under the numerous bilateral Air Transport Agreements.

13 Hence the reference, under Art.14 (2), to an *ad hoc* tribunal of the question whether member of the Executive Board who cease to be members of the delegation of their states are eligible for re-election: the *UNESCO (Constitution*) Case, (1949) A.D. case p. 113.

disadvantages is that the advisory opinion is not, *per se*, binding; to get a binding decision the organization would have to have power to submit the dispute to some other arbitral body.

Beyond the UN and the specialised agencies the practise is varied. At the AU the Charter is to be interpreted by the African Court of Justice (Art.29), but until that body is established, "such matters shall be submitted to the Assembly of the Union, which shall decide by a two-third majority."[14] At the E.C. it is the ECJ which is charged with resolving disputes between member states (Art.27), between the Commission and member states (Art.226), and between certain community institutions and member states or third persons having a sufficient legal interest (Arts 230 and 232). Within the Law of the Sea Convention institutions, interpretative differences relating to the International Sea Bed Authority may go to the Sea- Bed Disputes Chamber of ITLOS (1982 UNCLOS, Art.187(a)). Additionally, the ITLOS Rules provided for advisory opinions to be given "on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."[15]

In contrast to these agreements, the constituent instruments of yet other institutions- such as the OECD, NATO, the Council of Europe and the league of Arab States- make no provision for a special rule or procedure expressed to deal with the interpretation of the constituent instrument, whether by judicial or non- judicial means.

With regard to the techniques of interpretation, the I.C.J. has confirmed, when it has been called upon to interpret the UN Charter, that 'it has followed the principles and rules applicable in general to an interpretation of treaties, since it has recognised that the Charter is a multi- lateral treaty, albeit a treaty having certain special characteristics.'[16] This approach has been confirmed by the 1969 Vienna Convention, the provisions of which apply without prejudice to any relevant rules of the organisation, including in relation to interpretation (Art.5). There is some authority for the proposition that a treaty of a constitutional character should be subject to different rules of interpretation to allow for the "intrinsically evolutionary

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[14] Art.29 AU Charter. Note that in 2004 it was decided that the African Court of Justice would be merged with the African Court of Human and Peoples' Right due to concerns over the growing number of AU institutions, and in an attempt to create a single effective court. Under Article of the Protocol of the Court of Justice, adopted at the 11th AU Summit, held in Sharm El Sheikh, Egypt in June/July 2008, the court is to have jurisdiction in relation to the interpretation of the AU Charter 19.

[15] Rules, Art. 138 (1).

[16] *Certain Expenses Case*, [1962] I.C.J. Reps. p. 157.

nature of a constitution."[17] Subject to this perspective, and the comments set out below which address the practise of various international courts in relation to the interpretation of constituent instruments, the matter is generally governed by Article 31 and 32 of the 1969Vienna Convention. Article 31 establishes the primary rule that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A person seeking to rely on a special meaning for the terms of the treaty, as opposed to the ordinary meaning, will have to prove that special meaning.[18]

Nevertheless by way of summary, it is clear that the case law of some of these international courts and tribunals, in particular the I.C.J. and the ECJ, indicates a tendency towards seeking to ensure that the approach to interpretation which is relied upon will assure the effectiveness of the organization. This requires careful consideration of the objects and purposes of the organization, by reference to what has been referred to as a "technological approach."[19] It is reflected, for example, in the approach of the I.C.J. in the *Reparation* case, giving effect to a principle of implied powers deeming the UN to have powers conferred upon it 'by necessary implication as being essential to the performance of its duties.'[20]

The essentially dynamic character of a constitutional text, as opposed to the normal multilateral treaty, has led to a general organization of the need for a specific clause envisaging revision or amendment of the text.[21] The procedures for revision are by no means uniform but may be appropriately discussed at this juncture. Before proceeding to a discussion of the three main types of amendment clause, two general observations may be made. First, whilst amendments are usually carried out by the established organs of the organization, it is sometimes envisaged that a special "review conference" may be conveyed to deal with any comprehensive proposals for amendment: this is precisely what is envisaged in Art. 109 of the Charter, in Art.18 (B) of the IAEA Statute, and in Art.48 of the EU Treaty.

The second general observation is that normally the amendment procedure involves two stages: the first is the vote of adoption within the organ or conference, the second is the depositing of ratifications by members. In

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17 Jennings and Watts (eds), *Oppenheim's International law*, 9th edn, 1992, p. 1268 (citing Rights of US Nationals in Morocco, [1952] I.C.J. Reps.176, p. 211.

18 Legal Status of Eastern Greenland Case, P.C.I.J. (1933) Ser. A/B No.53, 49.

19 Amerasinghe, Principles of the Institutional Law of International Organisations (2005), pp. 42-44.

20 [1949] I.C.J. Reps. p. 174.

21 Phillips, "Constitutional Revision in the specialised agencies" (1968) p. 62.

some cases it will be observed that though unanimity is not required for the first, it is for the second in that ratification by all members is required for the entry into force of the amendment; hence one is dealing with a "consent" principle and not a "legislative" principle.

As might be expected, the principle that amendments to the constitution require the consent of all the members is the older and more established principle. It was to be found in the League of Nations (Art.26)[22] and still found in Art.94 (a) of ICAO which specifies that an amendment adopted by a two-thirds vote of the Assembly (first stage) comes into force only when ratified by not less than two-thirds of the members (second stage) and then only 'in respect of states which ratified such amendment.'

The contrasting principle is that which allows a majority of members to adopt an amendment to a constituent instrument which becomes binding on the dissenting minority. This is the principle adopted in the UN that, under Art.108, after adoption by two-thirds of the assembly and ratification by two-thirds of the members including all the permanent members of the Security Council, amendments of specific provisions enter into force for all members.[23]

Beyond the provisions set forth in an organisation's constituent instrument, as may be subject to amendment from time to time, it is now well established that the rules of an organisation including relevant institutional acts. As described earlier, the constituent instrument of an organization will very often provide for one or more of its organs to adopt acts to give effect to the objects and purposes of the organization. These acts can be normative or procedural, and range from formally binding acts (for example, Security Council resolutions, or regulations, directives and decisions of European Communities) to those which are explicitly non-binding such as (for example, resolutions of the UN General Assembly). In addition, there will be other acts which are often not expressly provided for, for example, the Bulletin adopted by Security- General of the United Nations, whose normative status will not always be clear.

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[22] A revision of Art. 26, allowing the Assembly to adopt amendments by a three quarters majority vote, including the votes of all members of the Council, never came into force when ratified by a majority of the Assembly, including all the Council, never came into effect: it failed to do so because of stringency of the old amendment clause.

[23] To date there have been three amendments of the UN Charter under this provision: 1965 (Arts 23, 27 and 61); 1968 (Art. 109); 1973 (Art.61).

Established Practice of the Organization

The established practice of the organization also forms a part of the rules of the organization. In the *Namibia* case, the I.C.J. took the view that an established body of practice forms an integral part of the rules of the organization.[24] The ECJ has reached similar conclusions in relation to the practice of the Council, the Commission and the Parliament with the strict limit that such a practice 'cannot derogate from the rules laid down in the treaty.'[25] The practice must be established but which is uncertain or disputed will usually not be treated as 'established'.

General International Law (Including Secondary Legislation of Other International Organizations)

As an international person an international organization is subject to the rules of international law, including in particular conventional and customary rules. As the I.C.J. put it in an advisory opinion:

> 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[26]

The I.C.J. had little difficulty in concluding that the United States, as a party to the 1947 Headquarters Agreement between it and the UN was under an obligation, in accordance with s.21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the UN.[27] And the ECJ has frequently referred to the obligations of the community arising under international agreement to which it is a party to give rise either to substantive causes of action (where the convention is intended to create rights and obligations directly enforceable in community law) or to construe provisions of the constituent treaties or secondary legislation.

With regard to rules of international law other than treaties, the I.C.J. has similarly recognised that international organizations are subjects to the

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24 [1971] I.C.J. Reps, p. 22.

25 Case 68/86 United Kingdom v Council [1988] E.C.R. 855; Case 131/86 United Kingdom v Council [1988] 905.

26 *Advisory Opinion on the interpretation of the Agreement of March 25, 1951 between the WHO and Egypt*, [1980] I.C.J. Reps. p. 73.

27 [1988] I.C.J. Reps. P.12, Advisory Opinion on the Interpretation of the agreement of March 25, 1951 between the WHO and Egypt, [1980] I.C.J (a contractual legal regime was created between Egypt and the Organisation which remains the basis of their legal relations today).

rules and principles of general international law. This is implicit in the approach taken in the *Reparation for injuries* case, finding that an international organization is "a subject of international law and capable of possessing international rights and duties,"[28] and also from more recent decisions of the Court.[29] What this means in practice is that the organization should, in the conduct of its activities, be assumed to be subject to rules of customary international law, including any rules of *jus cogens*, which may be relevant to the conduct of its activities. In our view this would include, for example, rules of customary law relating to matters such as the protection of fundamental human right, the protection of the environment, and the conduct of activities in maritime areas and in outer space. In relation to human rights one commentator has stated the position as follows:

> 'The Universal Declaration and the International Covenants represent minimal standards for all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community.'[30]

This view appears unimpeachable. We also consider that international organizations, as subjects of international law, are bound by general principles of law recognised by civilized nations, that is to say principles common to national legal systems. These could include procedural rules and requirements, as well as principles such as proportionality, legitimate expectation, and equity.

Indeed, in the *Rwamakuba* case[31], the Trail Chamber of the ICTR, in considering the applicability of general human rights norms, held that "the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights."[32] Thus, notwithstanding the fact that an international organization is not a party to, say, a human right treaty or an agreement for the protection of the environment, if the rule contained in an agreement is reflected in general international law then it can, as such, bind an international organization.

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28 [1949] I.C.J. Reps. p. 174.

29 *Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt*, [1980] I.C.J. Reps. p. 73.

30 M. Cogen, "Human rights, prohibition of political activities and the lending policies of the World Bank and the International Monetary Fund", in S.R. Chowdury et al. (eds), The right to Development in International Law (1993), p. 387; but cf. E. Denters, IMF Conditionality in De Waartet al. (eds), International Law and Development (1988) pp. 240-244.

31 *The Prosecutor* v. *Rwamakuba* (Decision on Appropriate Remedy) [2007] ICTR- p. 98.

32 *Ibid*, at para. 48.

Similar considerations apply in relation to other areas of international law, including the principle of state responsibility. By way of recent example, the UN Secretary General promulgated a Bulletin stating that the fundamental principles and rules of international humanitarian law set out in the bulletin are applicable to UN forces conducting operations under UN Command and Control.[33]

In the European Community context the ECJ has frequently referred to provisions of the European Convention on Human Rights, to which the Community is not a party, to assist it in reaching its conclusions, it has also made reference to international law more generally, so far as it represents a codification of general customary international law.[34]

A related issue concerns the question of whether one international organization might in some way be bound by the acts of one or more others and whether there is, in the words of one commentator, an emerging "common law" of international organizations, which appears to refer to the fact that rules exist that are common to all international organizations (regarding, for example, personality, membership, withdrawal, etc.)?[35]

In addressing this issue it appropriate to distinguish between the situations where the relevant organizations are linked by some special institutional relationship and where they are not.

In first case, for example, when the EC became a member of the FAO like any other member it became bound by the obligations flowing from the FAO's constituent instrument and mandatory institutional acts of the organizations. Short of membership, organizations will often agree to enter into co-operative agreements, which establish certain links between the organizations. These generally do not establish detailed obligations, but they do sometimes specify the effect of acts of one organization on the other.[36]

Similarly, specialized agencies will frequently undertake to co-operative with ECOSOC. In general, however the particular relations between the UN and different bodies will need to be considered separately.

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33 UN Secretary- General's Bulletin on the observance by UN Forces of International Humanitarian Law, August 6, 1999, 38 ILM 1656 (1999).

34 *Intertanko & Other v Sec of State for Transport* (c-308/06), at para.51.

35 Lauterpacht, "The development of the Law of International Organisations by the decisions of International Tribunals". (1976-IV) *R.C.A.D.I.* p. 396.

36 Report of the UN Secretary-General, Doc. A/6825, September 15, 1967, pp. 98-103.

National Law

Beyond their international law and obligations under international law, international organizations are also by necessary in connection with the national law of one or more states. This will be because they are located within the territory of a state, whether a member or not, or because the conduct of some of their activities which seek to give effect to their object and purposes- examples might including making loans and grants, purchasing commodities, or engaging in peacekeeping operations- will necessary have a close connection with national legal systems. Other activities of international organizations relate to everyday operations, for example, purchasing materials needed to run office. Each of these activities brings them into contract with third persons and can subject them to one or more regimes of national law.

A. Contractual Relations

The principle that contractual relations of an international organization can be governed by the national law applicable to the contract is largely accepted.[37] In some international organizations this is set out in implicit or express terms. For example, Art.288 (*ex Art.215(1))* of the EC Treaty provide that "the contractual liability of the Community shall be governed by the law applicable to the contract in question." The provision recognizes that the community is not to be entitled to any special privileges or immunities, and that it is not envisaged that there will develop a community law of contract to which the community institutions will be subject.[38] Community contracts governed by national law will therefore be subject to rules of private international law, including possibly the harmonized rules for choice of law in contracts for cases before national courts.[39]

Indeed, for reasons of expediency most of the contracts of international organizations are partly or all of their contracts are subject to one or more systems of national laws, and this practice has generally not created difficulties. The practice applies equally to organizations of universal membership (and certain UN specialized agencies) as to regional organizations. By way of example, most contract of the UPU and some of

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37 See for example Monaco, "Observations sur les contracts conclus par les organisations internationals", in Melanges Modins, 1968, 93-94; Lysen, ''*The non- contractual and contractual liability of the European Communities",* 1976.

38 Hartley, *The Foundations of European Community Law*, 4th edn. 1998, at p. 442.

39 1980 Rome Convention on the Law Applicable to contractual Obligations, [1980] O.J., C266.

those of the WHO are governed by Swiss law, whereas those of the ICAO are governed by the law of the province of Quebec.[40]

In some instances national law governs contracts of employment concluded with local persons[41] and contracts of insurance.[42] Without Controversy national law is also applied to real estate transactions in application of the *les reisitae* principle. For these types of contracts local law is appropriate because it is able to address the various issues which are likely to arise in relation to the performance of contractual obligations, and the local juridical system is the one which is most closely related to the conduct of these activities.

For other types of contract national law may be justified by the technical character of the subject matter of the contract. This is the case for loan agreements of the IBRD and the IMF, which are governed either by the law of the place of the loan, or by the law of the state on whose territory the private contracting banks are incorporated,[43]or by the law of the state of New York.[44]

Another example may be found in the *Westland* case where a contract between the Arab Organization for Industrialization (AOI) and a private company named Westland Helicopters United was governed by Swiss law.[45]

The identification of the national law which is applicable to a contract of an international organization may be established by operation of an express contractual clause (clauses reflecting the will of the parties will tend to predominate over other factors),[46] alternatively (if the contract is silent) by operation of ordinary conflicts of laws rules. Additionally, the application of a national law may result from normative instrument of more general application, such as a headquarters agreement.

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40 Klein, La responsabilite des organizations internationals (2011), p. 173.

41 E.g. C. Dominice, 1984-4 Hague Academy, Vol.187, p. 191.

42 Wilfred Jenks, The Proper Law of International Organisations, 1962, pp. 171-172.

43 Delaume, "The Jurisdiction of Courts and International Loans," 1957 *A.J.C.L.* 208.

44 E.g. Art.11(a) of the loan agreement between the IMF and the monetary Agency of Saudi Arabia, Decision No.6843(81/75), May 6, 1981, Annex B in "Selected Decisions of the IMF", Annex to 14th issue, Washington DC, April 30,1989.

45 *Westland Helicopters ltd and AOI,* I.C.C. Court of Arbitration, Case 3879/AS, March 25,1985, 80 ILR 596 et seq.

46 The Decision of Advocate General Slynn in European Commission *v*. CO.DE.MI, making reference to the 1980 Rome convention to confirm the principle of the pre-eminence of the will of the parties in determining the law of the contract (case 318/81, 1985 E.C.R. 3697).

The Choice of national law to govern contracts of an international organization in not entirely without its inconvenient aspects, of which the most notable is the potential for subjecting an organization to the legislative, will of the state whose law is applicable. This should not, however, be over-stated since it has not much arisen in practice. The problem is less significant than for contracts between two states, where one party to a contract may have a direct interest in unilaterally modified its terms by way of a unilateral act. States are less likely to engage in such acts of benefit the private persons who are normally the parties to private contracts with organisations.

B. Non-Contractual Obligations

Outside the realm of contract, the activities of international organizations in the territory of states (and indeed beyond) can have the effect of causing damage or harm to third persons, including private persons. Classical examples include road traffic accidents involving an official car of the organisation. In cases such as this, the applicable national law will be determined not by the clauses of a contract but rather by principles of general law governing the non-contractual liability of the international organizations. It is therefore necessary to determine what law will apply to such situations.

The general principle that an international organization will be responsible for damage resulting from its activities in the territory of a state is not controversial and is by now well-established.

In some cases non-contractual liability is provided for in the treaty establishing the organization. Such in the case of Art.22 of Annex III of UNCLOS which states that the ISBA "shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its power and functions". It is also the case for the non-contractual liability of the EC: Art.288(2) (formerly 215(2)) provides that "the Community shall, in accordance with the general principles common to the laws of the member states, make good damage caused by its institutions or by its servants in the performance of their duties".[47] In practice, the European Court of Justice has been slow to recognize such liability, having early on adopted a high threshold which a claimant would need to reach to bring a successful claim against a community institution.

Non-contractual liability also finds expression in a number of agreements between organizations and states. Examples include Art.8(1) of the

[47] Euratom Treaty (Art. 188(2)).

Agreement between the Netherlands and the "ESRO" on the creation and functioning of the European Centre of Space Technology.[48] But the principle of responsibility has been accepted even absent an express treaty provision. To take just one example, the UN accepted a priori the principle that it should repair damage caused to property by the UNEF arising from acts of negligence and where military necessity could not be invoked.[49]

The application of national laws to the case of non-contractual liability of the international organisations is reflected in the practice of organisations. Thus, the internal law of the state on whose territory UN peacekeeping operations take place will play an important role in disputes relating to such operations.[50] In the *stairways* case, the arbitral *compromis* charged the arbitrators with the task of determining the non-contractual liability of the UN for damage to third persons in the course of UN operations in the Congo, by a plane rented by the organization to a third company. The text of the rental agreement envisaged that the law applicable to this question would be that of the former Belgian Congo, which remained in force in the newly established Democratic Republic of Congo.

The application of the *lex loci delicticommisi* to establish non-contractual liability is also recognized by many commentators.[51] The principle constitutes a logical consequence of the obligation of all international organizations to respect the law in force in the territory of the states in which they carry out their activities, in so far as these do not go against the privileges and immunities which are recognized in respect of it. On occasion they may be a genuine conflict between what the organization is required to do by its internal law, and the requirements of the national law of the state in which it carries out that activity. For example, national legislation may prohibit the publication of information which the organisation is, as a result of its statutory obligations, entitled or required to publish.

In some circumstances the *lex loci* may not be appropriate, for example, where national law is invoked to determine the responsibility of an international organisation it may be that general principles of law are more

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48 Agreement between the Netherlands and the ESRO on the creation and functioning of the European Centre of Space Technology, U.N.T.S Vol.808, p. 145.

49 The study arising from the establishment and operation of UNEF, Report of the Secretary General, UN Doc A/3943, October 9, 1958, p. 122.

50 The UN legal service has referred to local law in an opinion relating to the responsibility of the UNDP for a road accident caused by one of its drivers. See UNJY 1991.p. 309.

51 Jenks op. cit, 212 et seq; P.M. Dupuy, loc. Cit., 1386; Amerasinghe, Principles of the Institutional Law of International organisations, 1996, 228. See Also Freidman, ''International public corporations," 1943 MLR 205; Mann, ''International Corporations and National Law," 1967, B.Y.I.L. 164.

appropriate. In respect of the liability of UNEF, for example, Professor Bowett was circumspect in observing that "not least of the problem faced by a claims commission attempting to deal with civil claims against the United Nations is the absence of an agreed 'proper law', for it is by no means clear that the *lex loci* will be applied or will it even be suitable."[52] In this context, organizations will develop their own system of material norms and maintain an emerging relationship between national law of one or more states and that of international organizations.

Conclusion

This Article has sought to demonstrate that in determining the content of customary international law with the actual practice of states in addressing that subject. It has shown, first, that customary international law has not in the past been frozen by treaties dealing with a particular subject. It has also shown that practice can even modify or destroy treaty obligations themselves, which of course suggests that practice can be at least as important in its effects on customary rules that are derived from treaty obligations. This Article has also demonstrated that one must take care in considering particular treaties as representing state practice in-formed by 'opinio-juris' because these treaties may show that, far from believing the treaty to represent a rule of custom, the parties to them believe that but for the treaty, they would have no obligation to adhere to a particular rule. This belief, moreover, may be reflected in the express language of the treaty or implied by the parties' treating the obligations as not carrying the constraints that would apply if the obligations were legally binding.

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[52] See Bowett, *United Nations Forces – A Legal Study of the United Nations Practice*, 1964, pp.150 and 244, respectively. See also Simmonds, *Legal Problems Arising from the UN Military Operations in the Congo*, 1968, p. 235.

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Rights of Prisoners in Bangladesh: A Legal Analysis

Tanjila Tamanna[1]

Abstract

The rights of the prisoners are still not recognized as other rights are recognized by the state and international instruments in Bangladesh. In Bangladesh, the prison system still follows the same out-dated statutes and regulations of the British rulers. This paper explores the issue of prisoners' rights. The laws governing prisons in Bangladesh, namely, *The Prisons Act of 1894*, its accompanying Rules, and a range of internally issued circulars, notices and orders which together form *The Bengal Jail Code of 1920*. Here, I try to draw the attention of the reader to know about the most invisible population and their legal status under the perception of law. In addition, to cover broader issues like legal status of a prisoner and prisoners' rights litigation and the later issues include recommendations and some ethical reflection with an aim to open a new prospect for prisoners' rights. Finally conclude the paper with hope that it will reduce prisoners' sense of injustice and creating their own citizenship room as individual with the spirit of dignity.

Keywords: Prison, Prisoners' Rights, Litigation, Fundamental Rights, Constitution, Authority.

Introduction

When we imagine a courtroom first thing always comes in our mind is the portraying of the blindfold lady with sword and scales which signify the impartial supervision of justice and its principal purpose is to ensure justice under law. Here raises a question whether the responsibility of law ends by ensuring the punishment only. From my perspective something is left and this is the responsibility of law and the society to protect the dignity of a convicted person who is mostly known as prisoner. Sometimes we forget that they are human beings like us and argue that prisoners don't have or should not be allowed to enjoy their human rights because they are sinners. From our child hood we all are taught that hate the sin, not the sinner but in reality we always hate the sinners who are mostly known as

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prisoners. This paper is concerned with the extent to which rights litigation may improve the quality of the lives of defenceless and downgraded prisoners. At this point I try to focus on the effects of certain fundamental rights contained in the *Constitution of People's Republic of Bangladesh* on prisoners. I am of the view that rights, 'if purposively interpreted and consistently enforced, are nevertheless capable of making invaluable contributions to the pursuit of social justice'.[2]Moreover, it may be argued that how far the prisoners' rights extend and how far it can be possible to ensure the application of their rights. In this paper, I will have an endeavour to narrowly focus on prisoner's legal status in the eye of the law. Prisoners are very rarely given reasons for decisions that affect them, however directly; nor do they have an opportunity to make representations before these decisions are taken.[3]

Finally the most prominent feature of the issues plotted in this paper is the absence of supervision by the courts, to a lesser role of Legislature, leaving so much at the discretion of the prison authorities and recognize those rights which are guaranteed for the prisoners are silent behind prison cells.

Objective of the Study

This paper explores the issues of prisoners' rights. The principal objective of this study is to draw the attention of the reader to know about the most invisible population and their legal status under the law. The specific objective of this study has been stated below:

- ✓ To know the present situation of the legal rights of the prisoners in Bangladesh.
- ✓ To find out the causes of violation of prisoners' rights.
- ✓ To suggest measures for the improvement of the prisoners' condition in Bangladesh.

Methodology of the Study

The methodology includes qualitative and quantitative methods but in this paper the qualitative method has been mostly utilized. Due to the limited

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2 Marius Pieterse, 'The Potential of Socio-Economic Rights Litigation for the Achievements of Social Justice: Considering the Example of Access to Medical Care in South Africa Prisons' (2006)50(2) *Journal of African Law* 119.

3 Graham Zellick, 'Prisoners' Rights in England' (1974) 24(4)*The University of Toronto Law Journal* 345.

time span, I could not able to utilize the quantities method broadly. To get in depth knowledge about the subject document study, observational study, descriptive study and case study method has also been used. To reach to the conclusion of the critical study of the Bangladeshi Laws relating to prisoners' rights the qualitative evaluative method has been followed.

Prisoners' Law: From Antiquity

Bangladesh inherited present prison system from the British as colonial legacy. It is noted that prisons still follow the out-dated statutes of the British colonial rulers, which were framed in the 19th century. The main objective of the prison system was the confinement and safe custody of prisoners through suppressive and disciplinary measures and this is a humanitarian alternative to harsh and brutal penal methods of the dark ages.[4]Until 19th century that the reformatory movements took practical shape when for the first time classification, separation, individualized treatment and vocational training of inmates, were given due consideration.[5]It was the law of the time which never allowed any state prisoner to even think of his fundamental rights that he or she could not be behind the bar at one time or released from the commands of the authority at the other on the will of the controllers.[6]After the complete domination over sub-continent there was a requirement to amend the law relating to prisons in British India and to provide rule for the regulation of such prisons which under their control an Act No. IX of 1894 was passed by the Governor General of India in Council on the 22nd March.[7]The Prisons Act was enforced on 1st July1894 comprised twelve chapters and sixty two sections on establishment, maintenance, duties of prison staff and admission, discipline, rights and obligations of prisoners.[8]Act III of 1900, the Prisoners Act received the assent of the Governor General on 2nd February 1900 came into force at once and The Act included nine parts and fifty-three sections had the guidance on admission, removal, discharge, attendance in court and employment of prisoners etc.[9]The origin of jail administration based on a comprehensive law dates back to 1864 when the Government of Bengal framed a detailed jail code and Until 1864, jail administration was carried out by means of sporadically issued

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4 Mazhar Hussain Bhutta, Muhammad Siddique Akbar, *"Situation of Prisons in India and Pakistan: Shared Legacy, Same Challenges"* (2012) 27(1) *South Asian Studies* 172.

5 *Ibid.*

6 *Ibid* 173.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

circular letters and general orders.[10] There had been an outcome on no uniformity in the jail procedure.

However, The Bengal Jail Code of 1864 developed in the subsequent years into a compendium of rules and regulations issued from time to time and meant for the superintendence and management of all the jails including the subsidiary jails throughout the province.[11]The Bengal Jail Code of 1864 that is in operation in Bangladesh today also draws extensively on the provisions of a number of Acts such as the Prisons Act (No. IX of 1894 as amended), Prisoners Act (No. III of 1900 as amended), Identification of Prisoners Act 1920 with aim to regulate the management of jail establishments, confinement and treatment of the prisoners therein, and the maintenance of discipline among them.[12] The Bengal Jail Code includes clear instructions that the provisions of the civil procedure code (Act V of 1908), criminal procedure code (Act V of 1898 as amended) and the Penal Code (Act XIV of 1860 as amended), which relate to the confinement of prisoners, execution of sentences, prisoners' appeals, lunatics, and the like, must also be complied with.[13]

The Sighting of Prisoner's Legal Status

All of new rights and changes in prison programs and philosophy leave us with a new set of questions and those questions are How far do prisoners' rights extend, and to what end do they lead? And the bottom line remains the same: What difference does it make?[14]To make a difference we have to identify the legal status of each prisoner. First of all, 'Legal right is defined in jurisprudence as an interest recognized and protected by a rule of right and it is any interest in respect of which is a duty, and disregard of which is a wrong'.[15] 'To claim a right is to make an assertion of a duty on another that entails either an act of performance or forbearance on the other's part'.[16] Consequently, 'the legal rights of a prisoner can be understood as legally enforceable claims requiring the accomplishment, or restraint, of certain actions on the part of the prison service'.[17]

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10 *Ibid.*

11 AMM Shawkat Ali, *Jail Administration*, <http://www.banglapedia.org/HT/J_0031.htm, > access at 12/1/2018.

12 *Ibid.*

13 *Ibid.*

14 Geoffrey P. Alpert (ed), *Legal Rights of Prisoners* (Saga Publication, 1st ed, 1980) 15.

15 *Fazal Khan* v. *State*(1962) 14 DLR (SC) 235.

16 Davit Scott, 'The Politics of Prisoner Legal Rights' (2013) 52 (3) *The Howard Journal of Criminal Justice* 234.

17 *Ibid.*

The rules of the prison were ambiguous and unspecific and due to this prisoners are being unaware of their content and therefore, unable to ensure their impartial application of their rights. The nature and extent of prisoners' rights have been debated in courts and among professionals for long time. 'Judges are concerned with protecting and conserving those values, institutions, interests and relationships upon which society is founded and unsurprisingly, are naturally sympathetic to such institutions that uphold and enforce the law, such as prison administrators'[18]. *The Universal Declaration of Human Rights (UDHR*) states that 'all human beings are born free and equal in dignity and rights'[19] Like all other countries the Government of Bangladesh and the people who belong to this cultured society never try to recognize the rights of the prisoner as a human being which are guaranteed for them by the state and international instruments. *The International Covenant on Civil and Political Rights* which preserved the right of prisoner as 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.[20]It applies to all persons deprived of their liberty including prisoners also.

Part III of our *Constitution* contains number of rights which is called fundamental rights. The framers of the Constitution were particularly impressed with the formulation of the basic rights in the *Universal Declaration of Human Rights* and if we make comparison between parts III of the *Constitution* with the *Declaration*, we shall find that most of the rights enumerated in the *Declaration* have found place in our *Constitution* as fundamental rights.[21] The *Declaration* followed two Covenants – *Covenant on Civil and Political Rights* and *Covenant on Economic, Social and Cultural Rights* and our courts will not enforce those *Covenants* as *treaties* and *Conventions*, even if ratified by the State, are not part of the *Corpus juries* of the State unless these are incorporated in the municipal legislation.[22] However the court can look into these *Conventions* and *Covenants* as an aid to interpretation of the Provision of Part III particularly to determine the rights implicit in the rights like right to life and the right to liberty.[23]

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18 *Ibid* 238.

19 *The Universal Declaration of Human Rights*, GA Res 217(III),UN GAOR,3rd Sess,183rd plenary meeting, UN Doc A/810(10 December 1948) Article 1.

20 *The International Covenant on Civil and Political Rights*, open for signature 19 December 2009, UNTS vol. 999 p. 171 and vol. 1057, p. 407(entered into force 23 March 1976) Article 10.

21 Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, 2nded, 2010) 88.

22 *Ibid* 89.

23 *Ibid*.

In the eye of law, prisoners are persons not animals and Prison houses are part of State and the *Constitution* cannot be held at bay by jail officials and when Part III is invoked by a convict when a prisoner is traumatized, the Constitution suffers a shock.[24]To address the conception of the prisoners legal status three broad principle can apply: the human rights principle, the principle of legality and the principle of proportionality.[25]The human rights principle establish the presumption that the legislature ,the executive and importantly the Judiciary respect human rights and the principle of legality and proportionality apply in establishing the legitimacy of human rights limitations or put another way they are the language in which we justify rights limitation.[26] A conception of a prisoner's legal status in a legal system dedicated to the protection of human rights is guided by the human rights, legality and proportionality principles. In fulfilling these principles, the conception of the prisoner's legal status must clearly and consistently adhere to the key distinction and make explicit in which context prisoners' rights are limited.[27]

In other words, 'it must establish whether the prisoner's rights are limited as a consequence of the penal sanction or as a consequence of prison administration'.[28] In order to achieve this, the conception of the prisoner's legal status must also establish, and consistently adhere to, the purpose of the custodial sanction as distinct from, and as well as, the purpose of prison administration.[29]

Finally there have undoubtedly been great improvements this century in food, clothing, the relation between inmates and officers, the abolition of the silence rule, opportunities for association, and much else. But in so many respects the legal position of the prisoner in Bangladesh remains autochthonous. Unlike the rest of us, the prisoner may not infer that he can do whatever is not expressly prohibited. Here the debatable issue is now it is high time to identify the legal status of the prisoners so that they can make their own individual citizenship room like other citizens.

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24 *Sunil Batra* v. *Delhi Administration* (1980) AIR 1579 Supreme Court 1579.

25 Liora Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69(5) *The Modern Law Review* 740.

26 *Ibid.*

27 *Ibid* 741.

28 *Ibid.*

29 *Ibid.*

Prisoners' Rights Litigation: A Preliminary Analysis

The newly emerging awareness of rights of convicted is phenomenon none shared by most of the free world and among jurists, statement and legal writers, a shift in emphasis has recently occurred from the "rights lost" to "rights remaining" to imprisoned convicts.[30]The concept of prisoners' rights there has been a growing realization that once the door of the prison close behind them, unfettered access to the courts remains for them as fundamental right as any they may have. If the lines of communication between the inmate and the courts are not kept open, all of his other rights become illusory, as dependent entirely on the whim of prison officials[31]. To defend the rights of a prisoner the access to the courts ought to ensure. Every court of justice is to open to all citizens.[32]

Every Court, in absence of any express provision in the Code for that purpose, must be deemed to possess, as inherent in its constitution, all such power as are necessary to do the right and to do a wrong in the course of the administration of justice and when law gives a person anything it gives him that without which it cannot exist.[33] Where the rights of a prisoner, either under the *Constitution* or under other law, are violated the writ power of the court can and should run to his rescue.[34]The court has power and responsibility to intervene and protect the prisoner against mayhem, crude or subtle, and may use *habeas corpus* for enforcing in-prison humanism and forbiddance of harsher restraints and heavier severities than the sentence carries.[35] The judges are guardians of prisoners' rights because they have a duty to secure the execution of the sentences without excesses and to sustain the personal liberties of prisoners without violence on or violation of the inmates' personality.[36]

Conviction does not render a person a non-person and his rights cannot be at the whims of the prison official, his liberty within the jail precincts cannot be unreasonably and arbitrarily curtailed.[37]Article 32 of our *Constitution* provides that no person shall be deprived of life and liberty and as Article 32 includes both substantive and procedural due process, the principle laid down by the America and Indian Court is applicable in

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30 Alpert, above n 14, 155.

31 *Ibid* 156.

32 Islam, above n 21, 217.

33 *Bangladesh* v. *ShahjahanShiraj* (1980) 32 DLR (AD) 1.

34 *Sunil* (1980) AIR 1579.

35 *Ibid* 1603.

36 *Ibid.*

37 *Ibid* 1590.

Bangladesh with full force.[38]A person because of his detention or imprisonment does not forfeit all his fundamental rights and he can claim his right to life and liberty even in detention or imprisonment as well.

As way of punishment handcuff may be used by the authority in jails under rule 716 of *Bengal Jail Code* and it may be iron bar handcuffs, spring-catch handcuffs or chain handcuffs.[39] Handcuff may be imposed on the wrist in front or behind, by day or night for a period of not more than 12 hours a day.[40]Whether a person should be physically restrained and, if so, what should be the degree of restraint is a matter which affects the person in custody so long as he remains in custody and also consistent with the fundamental rights of such person the restraint can be imposed.[41]It is grossly objectionable that the power given by the law to impose a restraint, either by applying handcuffs or otherwise, should be seen as an opportunity for exposing the accused to public ridicule and humiliation and nor is the power intended to be used cruelly or by way of punishment.[42]If the prisoners break downs because of mental torture, psychic pressure or physical infliction beyond the licit limits of lawful imprisonment the prison administration shall be liable for the excess.[43]

No prisoners can be personally subjected to deprivation not necessitated by the fact of incarnations and sentence of court and all other freedoms belong to him to read and write, to exercise and recreation, to mediation and chant, to creative comforts like protection from extreme cold and heat, to minimal joys of self-expression, to acquire skills and technique and all other fundamental rights tailored to the limitations of imprisonment.[44]*Prisons Act*, section 29 talks about solitary confinement of prisoners and any harsh isolation from the society by long, lonely, cellular detention is penal and so must be inflicted only consistently with fair procedure.[45]*Prisons Act 1894,* section deals with confinement in irons and it must be restored to only in gravest situation.[46]

An alarmingly large number of men and women, children including, are behind prison bars for years awaiting trial in courts of law. Speedy trial is

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38 Islam, above n 21, 197.

39 The Bengal Jail Code 1920 Rule 716.

40 *Ibid,* 717.

41 *Prem Shankar Shukla* v. *Delhi Administration* (1980) AIR Supreme Court 1535, 1546.

42 *Ibid,* 1547.

43 *Sunil* (1980) AIR 1579, 1581.

44 *Ibid,* 1581.

45 *Ibid,*1581.

46 *Ibid.*

of the essence of criminal justice and, therefore, delay in trial by itself constitutes denial of justice. Though speedy trial is specifically enumerated as a fundamental right under Article 35(3) of our *Constitution* but we can see the accused are in the custody without trial for indefinite period.[47]Expeditious trial and freedom from detention are a part of human rights and basic freedoms and a judicial system which allows incarceration of individuals for long periods of delay without trial must be held to be denying human rights.[48] About 7409 person who are under trial person has been furnished by the petitioner to show that these persons are also suffering in custody without trial for indefinite period of time.[49]The case has been made out by the Petitioner, is that the impugned action of the respondent is without lawful authority is the violation of the prisoners fundamental rights to personal liberty and to a speedy trial as guaranteed by Article 31, 32 and 35(3) of the *Constitution* and also violation of Government obligation under International Human Rights treaties, in particular Article 14 of the *International Covenant on Civil and Political Rights* to a speedy trial.[50] If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violation of his fundamental right and he would be entitled to enforce such fundamental right and secure his release.[51]

Remission earned on the basis of rules framed under Section 59 of *Prisons Act* reducing 20 years imprisonments to 14 years and after 14 years completion the matter to be referred to the Government for action and convict cannot claim 14 years as a matter of right.[52]Prisoners can be released only in the exercise of the power conferred on the Government by Section 491 of the *Criminal Procedure Code*.[53]Though the provision of Remission available for the prisoners but with restriction. Inspector General (Prison) are inform that presently more than ten thousand inmates who are convicted with lifelong imprisonment are staying in jails and the released process of 1042 inmates still on progression.[54]This delay occurred because the Home Affairs Ministry asked documents like FIR, Charge Sheet, and judgment copy of those inmates though there is no such provision in *Jail Code* and Jail authority failed to produce those

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47 Islam, above n 21, 213.

48 *Ibid.*

49 *BLAST* v. *Bangladesh* 57 DLR (2005) 12.

50 *Ibid.*

51 *HussainaraKhatoon & Ors* v. *Home Secretary, State Of Bihar*, (1979) AIR Supreme Court, 1360.

52 *Muhammad Hussain* v. *The State* (1968) 20 DLR (WP) 25.

53 *Ibid.*

54 Ministry of Parliamentary Standing Committee on Home Affairs, Bangladesh Parliament, *Remission and Procedure of Release of Long Term/Imprisoned Prisoners* (2010) 132.

documents. As a result the progression of release of those inmates delayed with passage of time and he also claimed that as a condition of release asked for 20/30 years previous documents from the inmates is far away from humanity.[55]However, to focus only on litigation would be too inadequate. Legislatures and executive agencies have also had key roles to play to protect the legal status of prisoners.

An addition, it is crying shame on judicial system which permits incarnation of men and women for such long periods of time without trial.[56]Why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is the highly unsatisfactory bail system and where an accused is to be released on his personal bond; it insists that the bond should contain monetary obligations which require the accused to pay a sum of money.[57] The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the Court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the Police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties.[58] The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until the court is able to take up their cases for trial which leading to grave consequences.[59] It is indisputable that an unnecessarily prolonged detention in prison of under trials before being brought to trial is an affront to all civilized norms of human liberty.[60] Law-makers would take an important step in defence of individual liberty if appropriate provision was made in the statute for non-financial releases.[61]

Recommendations and Some Ethical Considerations

What should be done about the prisoners' condition in Bangladesh jails, if anything? Is there something that one could recommend to improve the present condition in cells and which also protect the wellbeing of

55 *Ibid.*

56 *Hussainara Khatoon* (1979) AIR 1361.

57 *Ibid* 1361.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

prisoners? Needless to say, we are going to give recommendation which can be made immediate implication or has long term impacts. This is a reference by the Government under section 6 (Ena) of the Law Commission Act, 1996 seeking opinion and recommendations of the Law Commission on some specific recommendations made by the Jail Reform Commission, 1978, for prison reforms.[62] The recommendations of the Jail Reform Commission with which we are concerned in this reference are as follows:

Firstly, the proposal of the Ministry of Law, Justice and Parliamentary Affairs for enforcing the *Probation of Offenders Ordinance, 1960* may be accepted and implemented.[63] By implementing this Ordinance there might be created the opportunity to reduce the prisoners' problems. If we look at the Act in section 4 which deals with the conditional discharge of the convicted having not more than two years imprisonment by considering some facts like the age, character, antecedents or physical or mental condition of the offender.[64]

Secondly, if the Government takes a policy decision to introduce community service as an alternative to imprisonment, a legal framework for the purpose may be evolved by suitable legislation.[65] As alternative to Imprisonment such as, bail, conditional discharge, suspension of sentence, probation, binding-over, fines, community service order, compensation, restitution, etc.[66] To take another example the state might facilitate exercise of freedom of speech by ensuring that prisoners have ready access to forms of cultural stimulation and forums in which they can express their ideas among themselves and to the general public.[67]

Thirdly, the judges trying criminal cases and the magistrates may be sensitized to apply the existing law of bail conscientiously and on judicial consideration and judicial consideration alone and not on any consideration other than judicial and the police officers may be sensitized to exercise their powers to grant bail to an arrested person properly and conscientiously.[68] It is high time that risk of monetary loss is not the only deterrent against fleeing from justice but, there are other factors which act

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62 Law Commission, *Report on the Reference of the Government on Prison Reforms,* Serial No.54 (2003) 1.

63 *Ibid.*

64 *The Probation of Offenders Ordinance, 1960* Section 4.

65 Law Commission, above n 62, 1.

66 *Ibid.*

67 Richard L. Lippke, 'Toward a Theory of Prisoners' Rights' (2002) 15(2) *Ratio Juries* 122.

68 Law Commission, above n 62, 1.

as equal deterrent against fleeing and there might be other relevant consideration like family ties, roots in the community, job security, membership of stable organization should be determent factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation to ensure speedy trial.[69]

From ethical reflection, need to emphasis on the more contact staff have with prisoners the less punitive they become, possibly because the interaction humanizes prisoners in their eyes. The research also suggests that the more prison staff members engage with prisoners to change their behaviours and improve their lives, the more likely they are to be no punitive in their attitudes. Therefore, these findings would suggest that training and staff development which exposes staff, of all social backgrounds, to these rehabilitative roles will reduce overall levels of punitive attitudes among staff. One possible approach with rights fully retained by prisoners is to hold that state facilitation should allow prisoners to enjoy or exercise such rights in ways that are at least roughly comparable to the ways in which free citizens do so. But to say this is only to raise a series of problems, not address them[70].The parole system has long been recognized as the single most inequitable, potentially capricious and uniquely arbitrary corner of the criminal justice map.[71]

Another ethical consideration, too many in our society, the impact of imprisonment on prisoners and their families is a matter of little or no importance. The effects of incarceration include the high financial, emotional and social costs which prisoners' family members are often forced to pay.[72] Such costs have been termed 'invisible punishment', because they often leave prisoners' families feeling as if they have been penalized for crimes they have not committed.[73]Many people are directly and indirectly affected by crime each year, the worst crimes at times dropping entire families into devastating loss. However, as a society we are in control of our response to crime and the way in which we punish.[74]

Subject to consideration of security and discipline, liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit

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69 *Hussainara Khatoon* (1979) AIR 1363.

70 Lippke, above n 67, 133.

71 Alpert, above n 14, 38.

72 Jessica Breen,' Prisoners' Families and the Ripple Effects of Imprisonment' (2008) 97(385) *An Irish Quarterly Review 60.*

73 *Ibid.*

74 *Ibid* 68.

of rights and shall be respected.[75]There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and social agencies.[76]

Conclusion: Taking to Forward

Though much work remains to be done on the specific rights of prisoners' retain fully or in part, but it should be admitted that State has the accountability to ensure those retained rights of the prisoners. Suppose that while some of their rights are justifiably curtailed, prisoners retain important rights such as freedom of speech and religion, the right to work, the right to vote, and the right to health care.[77]In reply State might claimed that by committing crimes of a serious kind, prisoners have put themselves in a position where they may not be able to enjoy or exercise their retained rights. The State is therefore not obligated to offer them any special help or support and this argument implies that inability to exercise or enjoy retained rights is part of the cost to the guilty of their criminal misconduct.[78]Here we can draw the attention of the state as the prison population may well include some of the most reviled members of the community and similarly, in modern conflicts the respectful treatment of prisoners is essential for legitimacy, and international rights standards are seen as key guarantees of good treatment.[79] The essential feature of rights is precisely that they are available to all, even those who through their actions may appear to be less deserving than others and rights should, therefore, not be linked to virtue.[80]

To recognize prisoners as general rights-holders and would, therefore, acknowledge their citizen status, but it would also mean recognizing a separate category of rights resulting from their prisoner status.[81]There is also the question of how far we may legitimately restrain or intervene upon those rights that confinement requires us to shorten. To answering these questions would require us to look at our *Constitution* where part III enumerates some fundamental rights for all citizen of this country and here

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75 *Sunil* (1980) AIR 1579, 1581.

76 *Ibid* 1601.

77 Lippke, above n 67,131.

78 *Ibid.*

79 Susan Easton, 'Constructing Citizenship: Making Room for Prisoners' Rights' (2008) 30(2), *Journal of Social Welfare & Family Law*142.

80 *Ibid.*

81 *Ibid* 144.

prisoners are not exception. To address the conception of the prisoners legal status three broad principle can be applied: the human rights principle, the principle of legality and the principle of proportionality with full spirit.

For purposes of discussion, there might be scope for argument that lawbreakers forfeit all their rights due to their criminal delinquency. The decrease of offense is, without any doubt, one of the central justifying aims of legal punishment. However, to defend the rights of a prisoner the access to the courts ought to ensure and to the progress achieved in the recognition of fundamental freedom as available also to confined felon, the right of access to the court.[82] Initially a brief overview of the international approach to protection of prisoners' right in general and their right of access to the courts in particularly ensured.

For concluding remarks, bringing a rights-based claim can itself promote respect for the law on the part of the prisoner through reaffirming his or her nationality.[83]Finally we hope that within the prison system, it may contribute to decent order by reducing prisoners' sense of injustice. It may also satisfy states' obligations under law.

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82 Alpert, above n 14, 130.

83 Susan Easton, 'Constructing Citizenship: Making Room for Prisoners' Rights' (2008) 30(2), Journal of Social Welfare & Family Law 142.

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Freedom of Thought and Social Networking in Bangladesh: Case analysis on Facebook

S. M. Saiful Haque[1]

Abstract

Freedom of thought, conscience and expression are the primary elements to upheld liberty and human free spirit against any tyrannical ruling. The Bangladesh Constitution safeguards this as a fundamental rights in Part III, Article 39 with reasonable restrictions. This study is an attempt to take a look at the role of social network site; Facebook in light to the constitutional safeguards on exercising freedom of thought in Bangladesh. Now a day's, Facebook has opened a new era of networking. People find it as an unavoidable tool of sharing words, thought and feelings. Studies revealed that almost 92% of the Bangladesh people, especially youths are keen in using Facebook and their aims are to share words, thoughts with others. Though, Facebook has a tremendous role in connectivity with others but at the same time, Facebook is found as a media of disseminating false news, abetting unsocial activities, terrorism and even anti-state activities. This article offers an understanding on freedom of thought and expression in Bangladesh inter alia is to evaluate in legal rights perspective. This qualitative research work analyzes on the presence and reality of the phenomenon in Bangladesh by analyzing secondary data, national and international provisions relating to freedom of thought and expression, conscience, press, and fundamental human rights.

Keywords: Freedom of Thought, Social Networking, Legal Framework, Challenges, Comparative Discussions.

Introduction

Facebook is a tool of great innovation; it offers an opportunity to interact with an extraordinarily expressive universe with the known and unknown people. For a creative mind, it works as an introduction into a 'business' like as thinking on how to "market" one by himself. Social networking

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sites enhance communication widely to stay connected all together. Scholars found that modern connectivity, communication and free thoughts and expression of human feeling are quite impossible without this kind of tool in this digital world. The common connotations and uses of words and phrases such as 'freedom of thought', 'freedom of expression', 'freedom of speech', 'right to communication', 'communication right', 'right to information' and 'access to information' are intertwined and always synonymous. In this article, the phrase 'freedom of thought and freedom of expression' will include all the words and phrases mentioned above.

Social networking can be defined as those categories of network which work as a tool of creating connectivity, sharing and creating global community. The Cambridge dictionary defined it as "the use of websites and other internet services to communicate with other people and make friends".[2] At the same the English Oxford Living Dictionaries mentioned "The use of dedicated websites and applications to interact with other users or to find people with similar interests to one's own".[3] So it may be called as the networking which is based on electronic connection of different websites and aims to create more and more friendship among the people who have find some common set of values.

Background of the study

Article 18 of the Universal Declaration of Human Rights of 1948, (UDHR)[4] provides that everyone has the right to freedom of thought, conscience, and religion. The same provision is found in Article 18 of the International Covenant on Civil and Political Rights of 1966 'everyone shall have the right to freedom of thought, conscience, and religion'. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

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2 R. Kraut, M. Patterson, V. Lundmark, et al, 1998. Internet paradox: A social technology that reduces social involvement and psychological well-being?. American psychologist, 53(9), p.1017.

3 'Social Networking, Definition Of Social Networking In English By Oxford Dictionaries' (*Oxford Dictionaries | English*, 2018) <https://en.oxforddictionaries.com/definition/social_networking> accessed 17 March 2018.

4 M.A. Glendon., 1997. Knowing the Universal Declaration of Human Rights. *Notre Dame L. Rev.*, *73*, p.1153.

Today freedom of speech, and the freedom of expression, is also recognized in international and regional human rights law. The right is enshrined in Article 19 of the International Covenant on Civil and Political Rights(ICCPR),[5] Article 10 of the European Convention on Human Rights (ECHR),[6] Article 13 of the American Convention on Human Rights(ACHR),[7] and Article 9 of the African Charter on Human and Peoples' Rights(ACHPR).[8] Based on John Milton's arguments, freedom of speech is understood as a multi-faceted right. International, regional and national standards also recognize that freedom of speech, as the freedom of expression, includes any medium, be it oral, written or in print, through the internet or through art forms. This means that the protection of freedom of speech as a right includes not only the content but also the means of expression. Now let me discuss the nature of those bloggers who have recently been killed in Bangladesh. They said that they were seculars; but what is the nature of 'secularism' to us? Secularists should not be against any individual who has religious faith. "Secularism" is a term which was invented by a British writer named Holyoake. From his point of view, secularism is a concept that will promote a social order separate from religion but it has to be without actively dismissing or criticizing religious belief.

In the context of bloggers activities in Bangladesh, what we have found is that bloggers mostly use words of hatred against religions. They are keen in criticizing, insulting and also trying to justify that the religions are not correct. I am not sure from where the bloggers have got the right to insult others' religions. I think no civilized nation has adopted the law of 'right to insult' others and any religion. In the name of free thought, knowledge-based argument, and scholarly contributions freethinkers are not free to insult others' beliefs. As a secularist, you can have your right to 'freedom of expression' but that has to be with due respect of others' beliefs. You must not forget your duties and responsibilities relating to freedom of expression.

The statement mentioned above, however, it does not justify the acts of those who have killed the bloggers. Those brutal murderers were completely in the wrong and against the laws of Bangladesh. People should not forget that we have an active judiciary whose duty is to ensure

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5 R. W. Hoag., 2011. International Covenant on Civil and Political Rights.In Encyclopaedia *of Global Justice* (pp. 544-545).Springer Netherlands.

6 C. Grabenwarter., 2014, February. European Convention on Human Rights. In *European Convention on Human Rights*. Nomos Verlagsgesellschaft mbH& Co. KG.

7 P. Sieghart., *The international law of human rights*. Oxford University Press.

8 R. N. Kiwanuka., 1988. The meaning of "people" in the African Charter on Human and Peoples' Rights. *American Journal of International Law*, *82*(1), pp. 80-101.

justice. The government should carefully look into the matter and bring them to justice to protect the future bloggers. On the other hand, the government should also re-examine the 'freedom of expression' with regard to the right to religious matters. We may need some censorship to protect the bloggers as well as the religious believers.

Freedom of thought

Nikolas Rose sets out the key characteristics of this approach to political power and analyses the government of conduct.[9] He analyses the role of expertise, the politics of numbers, technologies of economic management and the political uses of space. He illuminates the relation of this approach to contemporary theories of 'risk society' and 'the sociology of governance'. He argues that freedom is not the opposite of government but one of its key inventions and most significant resources. He also seeks some rapprochement between analyses of government and the concerns of critical sociology, cultural studies and Marxism, to establish a basis for the critique of power and its exercise. The book will be of interest to students and scholars in political theory, sociology, social policy and cultural studies. In the case of Advocate *Md. Salauddin Dolon* v. *Government of Bangladesh and others*[10], it was held that the University Declaration of Human Rights, in Article 1 states that "all human beings are born free and equal in dignity and rights". Article 2 provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 3 provides hat "everyone has the right to life, liberty and security of person." In line with the said above provisions, powers of Freedom, first published in 1999, offers a compelling approach to the analysis of political power which extends Foucault's hypotheses on governmentality in challenging ways.[11]Another study finds that the first restrictive approach of freedom of speech was religious in nature, and the first justificatory arguments for freedom of speech were reactions to such religious restrictions.[12]

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9 N. Rose., and P. Miller., 1992. Political power beyond the state: Problematics of government. British journal of sociology, pp.173-205.

10 Writ Petition No. 4495 of 2009, High Court Division of the Supreme Court of Bangladesh. http://www.blast.org.bd/content/judgement/Judgment%20-%20Writ%20Petition%204495%20of%202009.pdf, Accessed on 14/03/2018.

11 N. Rose., 1999. Powers of freedom: Reframing political thought. Cambridge University Press.

12 T. Hassan., A Historical Analysis of the Development of Free Speech Justifications (December 1, 2015). The Journal Jurisprudence, Vol. 28 (2015), 487-506. Available at SSRN: https://ssrn.com/abstract=2734752.

The legislative stand of Freedom of Thought

In the Universal Declaration of Human Rights (UDHR), which is legally binding on member states of the International Covenant on Civil and Political Rights, freedom of thought is listed under Article 185: The Human Rights Committee states that this, "distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally." Similarly, Article 19 of the UDHR guarantees that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference. Article 20 (2) of the International Covenant on Civil and Political Rights (ICCPR), states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. This Article clearly says that people are not completely free to express their views on religious matters and a certain degree of international consensus that the right of freedom of religion must, in order to be meaningfully protected, entail a right to be free from insults and offence directed at one's religious practices, beliefs or teachings. Furthermore, if we see the Article 10 of the European Convention on Human Rights (ECHR) then we can clearly identify the duties and responsibilities that may be subject to restrictions prescribed by law for the protection of reputation or right of others. Furthermore, Article 17 of the ECHR talked about the prohibition of abuse of rights. It says that you cannot perform any act aimed at the destruction of any of the rights and freedoms, if you do so, you will be restricted. In Europe, right to 'freedom of expression' is not that much wide and each state has enough 'margin of appreciation' to protect the national interest. In our country, we do not have such laws which can control any activities against any religion.

National legislative stands include the Constitution of Bangladesh and the Information, technology and communication Act, 2006. At present the draft Digital Security Act, 2016 has covered key important provisions and its affect freedom of expression and press. The freedom of speech and expression and freedom of press have been guaranteed by Article 39(2)1 of the Constitution. Though freedom of press is implicit in the freedom of speech and expression but considering the importance of print media, freedom of press has been mentioned separately. But these freedoms are subject to some reasonable restrictions imposed by law in the interest of the security of the state, friendly relations with foreign states, public order, decency or morality, in relation to contempt of court, defamation or incitement to an offense. All the citizens of Bangladesh can exercise their

freedom of speech and expression by remaining within the constitutionally stated horizon. If anybody oversteps the boundary she/he will be considered to have violated the constitutional provision and will be subject to the sanction of law.[13]

Freedom of Press, an offshoot of freedom of thought, conscience, and speech, has become instrumental in establishing a democratic state where fairness, transparency and free expression constitute skeleton of that policy. Every segment of the above right is very important as freedom of thought and conscience is essential for developing human personality, knowledge, and civilization. Freedom of speech and expression including freedom of press is the very foundation of democracy. Without ensuring free expression, criticism and open discussion democracy cannot function smoothly. But this freedom, like other rights, is not unfettered as it has been given to the citizen is subject to a number of conditions including the right of the persons to remain unsoiled by the press reports. Freedom of press is important but the right to reputation is also important, as it is the most dearly valued property and attribute of a citizen. So law has to accomplish the delicate task of maintaining a balance between two very important but conflicting rights. The recent amendment to the Information and Communication Technology Act, 2006 is a good case to examine. Under section 57 of the ICT (Amended) Act, if any person deliberately publishes any material in an electronic form that causes to deteriorate law and order, prejudice the image of the state or person or causes to hurt religious belief the offender will be punished for a maximum of 14 years and a minimum of seven years' imprisonment. It also made the crime non-bailable. The amendment also empowered the police to arrest the offender without the authorization of the court.

The 15th amendment to the Constitution includes language that equates criticism of the constitution with sedition. There are laws which can help protect the right to freedom of expression and information, including media freedom in Bangladesh, such as the Community Radio Installation, Operation and Broadcast Policy, 2008, The Right to Information Act, 2009 and the establishment of an Information Commission under this Act; the National Policy on Information and Communication Technology (ICT), 2009 and The Whistle Blowers Act, 2011. The Right to Information Act, 2009 guarantees the rights to all information held by public bodies, simplifies the fees required to access to information, overrides existing secrecy legislation, and grants independence to the Information Commission tasked with overseeing and promoting the law.

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[13] S. M. Feldman., 2006. The Theory and Politics of First Amendment Protections: Does the Supreme Court Favor Free Expression Over Religious Freedom. U. Pa. J. Const. L., 8, p.431.

An analysis on the Information and Communication Technology Act, 2006

The concerned section of the Information & Communication Technology Act, 2006 states, "If any person deliberately publishes or transmits or causes to be published or transmitted in the website or in electronic form any material which is fake and obscene or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it or causes to deteriorate or creates possibility of deteriorating law and order, prejudicing the image of the State or person or causes to hurt or may hurt religious belief or instigate against any person or organization, then this activity of his will be regarded as an offence. In providing punishment it says, whoever commits an offense under subsection (1) of this section 57 he shall be punishable with imprisonment for a term which may extend to ten years and with fine which may extend to Taka one core.

The intent of the administration in amending the law can be questioned on several grounds. Firstly, it was decreed as an ordinance only days before the parliament was due to meet denying the august body to deliberate on the amendment that had a major bearing on the enjoyment of fundamental rights of the citizens. Secondly, little effort was made to engage the public on the issue before proceeding with the act. Thirdly, no explanation offered by the government as to why the punishments were being augmented without clarifying the vagueness that exists in the original provisions of the law. An elementary knowledge of law would entail that provisions of penal laws should be clear and unambiguous. Moreover, in a situation where the criminal justice system is plagued by inordinate delays instead of putting in place measures to expedite disposal of cases, increasing the length of punishment will only undermine justice. Finally, the government has failed to assign reasons for making offenses under section 57 cognizable, giving the police the authority to arrest alleged offenders without the court's order. The decisions to give the ill-equipped and ill-trained, and increasingly partisan police force, that authority will only go against the enjoyment of rights by the people. Observers have noted that the amendment had done away with the little degree of protection (non-cognizable and non-bailable) that the original law provided. The amendment would make the accused stay in prison for the entire duration of the legal proceeding until s/he is proven innocent or guilty. The imprudent amendment has elicited an adverse response from informed sections of society.

An Implication on the Digital Security Act (draft), 2016

The draft Digital Security Act 2016 aims to address the new form of threat in the present era of digital Bangladesh. Though the concern authorities are justifying its necessity but at the same members of civil society, media men and freelancer activists, experts have expressed their concerns over the draft law, according to their understanding, this law may impinge people's freedom of expression which Bangladesh constitution guarantees as a fundamental right "the right of every citizen to freedom of speech and expression" under article 39. Experts found that draft Digital Security Act, 2016, may unreasonably deny the freedom of thought, expression and individual's sprit to speak freely in online.

Though the act is a new one but it has not defined new types of offenses. At the same a law is still absent to ensure safe online environment for people rather than punishing just because of one's exercising logical freedom in online. The draft of the law has been made in Bangla considering easy understanding of the peoples, but the definitions of the various legal and technical terms are given in Section 2 are both in Bangla and English, which may cause confusion to understand easily. The proposed digital security act not concentrates to the general people's security in addition the act is criticized widely for its vague definitions of legal terms, creation of another special agency, endangering peoples right of freedom of expression and disproportionate penalty measure for the same issues which already fallen under the ICT ACT, 2006. In addition to that section 13 of the law is very vague and sweeping[14]. It extends criminalization of freedom of speech, thought, and online protest in the name of widest umbrella of national security. At the same section 19 are contained provisions to define immoral activities in a not precise manner. Surprisingly the thing is covered under sections 295-298 of the Penal Code, 1860.

Section 37 of the draft Digital Security Act, and section 71 of the ICT Act, empowered a judge not to give bail if he has suspicions against the accused. This kind of suspicion is work by applying presupposition of guilt before trial which exactly a denial core principles of law and natural justice.

The ICT Act and this draft Digital Security Act provisons are clearly conflicting with Article 19 of the Universal Declaration of Human Rights

[14] Digital Security Act, 2016, How does it affect freedom of expression and the right to dissent? Available at http://www.thedailystar.net/opinion/interviews/how-does-it-affect-freedom-expression-and-the-right-dissent-1305826, accessed on March 23, 2018.

(UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and even Article 39 of our own Constitution.

Social Networking tools

If an employer looks at an employee's Facebook wall, is that an application of computational social science? Is Facebook itself a computational social science tool? Is ad–targeting based on browsing habits or personal information from other applications a form of computational social science? We see these examples as everyday uses of social media–based computational social science. Social media systems contain particularly valuable information. This data derives its value from its detail, personal nature, and accuracy. The semipublic nature of the data means it is exposed to scrutiny within a user's network; this increases the likelihood of accuracy when compared to data from other sources. The social media data stores are owned and controlled by private companies. Applications such as Facebook, LinkedIn, and the Google+, including Google search, YouTube, Double-click and others, are driven by information sharing but monitories through internal analysis of the gathered data a form of computational social science. The data is used by four classes of users: business clients, government, other users within the social media platform, and the platform provider itself.

It is tried to identify the complexity of protecting constitutional values like privacy and free speech in the age of Google and Facebook, entities that are not formally constrained by the Constitution. On the one hand, it is tried to offer an optimistic story, escaping Facebook past, and promoting free speech on YouTube and Google. In each of these cases, it is possible to imagine a rule or technology that would protect values like free speech and privacy in this changing world. An expansion of disappearing data technology and an enlightened leadership at companies like Google and Twitter also needs to protect free speech rather than suppress it. But whether these good rules or technologies will, in fact, be adopted depends crucially on what sort of rules and technologies, the public demand.

Facebook has reluctantly made it easier to delete data in the face of user demand (and legal threats from Europe), although it is still the case that the demand for privacy will be outweighed by the demand for exposure. And Google, despite its commitment to free expression, chose not to resist political demands to expand its categories of prohibited speech on YouTube. Those categories, of course, are ultimately enforced by users and therefore reflect community standards rather than resisting them. Will Government of Bangladesh take note of these international views on the

concept of freedom of speech in this new era of Facebook and Google while imposing criminal liability upon the citizens? Will citizens around the globe demand laws and technology that protect liberty rather than threaten it? The choice is ours. We now demand immediate action to ensure freedom of expression on Facebook and request to restore the site for the sake of all users in Bangladesh. We also call on the government to stop all kinds of censorship and surveillance both in offline and online media. We urge the government to ensure freedom of expression and promote the right to access to information with human rights standard and democratic values.

Freedom of Thought and Social networking in Bangladesh: Some Case Studies.

Case analysis-1

A blogger was convicted in Dhaka for his writing. A group of people who backed him in the press now faces the same charge. Why is this happening in Bangladesh? The trial court in Bangladesh has initiated contempt of court charges against twenty-three people who had signed a letter in support of British journalist and blogger David Bergman, who himself was convicted of contempt of court in December 2014.

Case analysis-2

Freedom of expression and freedom of religion are respectively articulated in article 39 and article 41 of the Constitution of Bangladesh. Both freedoms are credited as 'Fundamental Rights', delinquencies of which are enforceable at court provided that these rights will be subject to public policy, morality, public health, national security etc.

Now the debating questions pop up which are construed in diverse ways by both sides of the debate: first, have these fundamental rights of Avijit Roy been infringed? And second, is his murder plausible?

Let's pitch into the matter. Avijit Roy is a renowned writer and researcher and he is assumed as a coherent person. A writer has right to express his or her opinion but subjects to the reasonable restrictions in the constitution because as a citizen he/she is obligated to go after the dictums of the constitution. Being 'Atheist' is your right but offending other religion and religious personalities is not certainly 'Exercise of your Freedom of Expression'. Atheism means you are a 'disbeliever' and you should not hurt or attack other 'believers' of other religions. You should be placid

about your stand and you should not thrust into others people's lives and security. Movements of Atheist Bloggers in Bangladesh seem to be quite apart from this basic notion of 'Atheism'. Instead, by this way or that way their actions are resulting in breeding anarchies in a society which is a clear menace to the national integrity.

Though 'Freedom of Expression' is constitutionally catered to all citizens, before exercising it, they should ponder on their writings and preaching that whether those meet the 'reasonable restrictions' provided in the constitution or not. Regarding Avijit Roy and his writings, lots of words for and against him is being spoken. It is my request to all to check his writings whether those pass in the test of 'Constitutionality' or not. Regarding the second question, the murder of Avijit Roy is not in any way plausible. This is not the right of so-called Jihadist to take his life. This is God who has created and who will take this very 'Life'. If all sanctions (from the angle of *jihadis*) are meant to be on this earth, why God kept 'Judgment Day' then? Besides that, our 'Human' identity comes first, and then religion comes. Extremism and chaos in name of religion are entirely maddening. Nobody should be let on to do anything which goes against the essence of brotherhood and national integrity of a country.

Freedom of Expression should be utilized by citizens in *bona fide* intention without any clandestine drive and subject to reasonable restrictions. In our country, when people live on the street in winter or die out of hunger, or child beggars are seen in streets, well, are a debate on 'Religious belief' going to help them? Let's forget the factors segregating us and focus on the factors connecting us because our motherland should look forward to a sparkling future where basic needs of everybody will be sufficed.

Avijit Roy Case Avijit Roy: (12 September 1972 – 26 February 2015) was a Bangladeshi-American online activist, writer, blogger known for pioneering Bengali *freethinkers'* weblog-forum, *Mukto-Mona*. Roy was a prominent advocate of free expression in Bangladesh, coordinating international protests against government censorship and imprisonment of bloggers. He founded *Mukto-Mona*, an internet community for freethinkers, rationalists, skeptics, atheists, and humanists of mainly Bengali and other South Asian descent. He was hacked to death by machete-wielding assailants in Dhaka, Bangladesh, on 26 February 2015; Islamic militant organization Ansarullah Bangla Team claimed responsibility for the attack.

Case analysis: 03

Blogger Niloy Murder, his wife Asha Moni pressed charges against four unidentified persons with the Khilgaon Police Station late on Friday night, Inspector Anwar Hossain Khan told bdnews24.com.

Niloy was hacked to death in his home in Gorham on that Friday afternoon by suspected Islamist militants. Al-Qaeda's Indian offshoot AQIS's 'Bangladesh Branch' has purportedly claimed responsibility. Police say that the murder was planned. The UN, US, and the Amnesty International have condemned the killing and called upon the authorities to bring the killers to justice. Niloy is the fourth blogger to have been killed this year. All of them were involved with the Ganajagaran Mancha, a popular movement demanding maximum penalty for war crimes convicts and outlawing of religion-based politics.

Niladri Chatterjee Niloy was killed in front of his wife at his flat in East Gorhan on Friday afternoon, Khilgaon Police Station OC Mustafizur Rahman said.

The Home Minister Asaduzzaman Khan Kamal promised, when as police have failed to crack cases in regard to the killing of three other blog activists earlier this year. Niloy, 27, was an activist of the Ganajagaran Mancha, the popular movement demanding maximum penalty for war crimes convicts and outlawing of religion-based politics. Niloy, who wrote against communalism and fundamentalism, was known as Niloy Neel on social networking sites and he used to blog under this name on website 'Istishon' (Station).

He recently received numerous threats for his writings and his stand against radicalism said people close to him. Those threats made him take down all his photos from his Facebook page. In one of his posts on Facebook three months ago, he said he knew he was a target of the extremists. Niloy wanted to file a general diary (GD) but police as early as possible' instead, read the May 15 post. Khilgaon police OC Rahman told bdnews24.com that five assailants armed with machetes entered the flat in two groups after the Juma prayers.

Niloy, who worked in an NGO, had been living with his wife Asha Moni for the past two years in the flat since they got married in court without the consent of their families. OC Rahman said the attackers entered his home on the pretext that they wanted to rent a flat. "They fled right after slaughtering Niloy." DMP's Detective Branch Joint Commissioner Krishnapada Roy told reporters at the crime scene, "There were signs of

haphazard hacking on Niloy's throat and neck." "The nature of the attack is very similar to those on other bloggers murdered earlier," he said. Radical militants earlier killed four other pro-liberation bloggers and legendary writer Humayun Azad in the same style of attack. Upper parts of the body, particularly head and neck, were the main targets.

Niloy is the fourth blogger to have been murdered this year after Avijit Roy, Oyasiqur Rahman Babu, and Ananta Bijoy Das. He was hacked to death in the same way as the others. The 'Bangladesh branch' of al-Qaeda in Indian Subcontinent (AQIS) has claimed for the latest murder. An email sent out to the media said the AQIS carried out the killing and threatened more such attacks on secular blog activists. But police say they have no information about AQIS or al-Qaeda proper's involvement. The UN, USA and Amnesty International have condemned the killing and called upon the authorities to bring the killer to justice.

Findings

Freedom of thought is also called the freedom of conscience or individuals freedom. A person generally holds or considers a fact differently from viewpoint or thought independent of others. It is different from and not to be confused with the concept of freedom of expression. 'Freedom of thought' is the derivative of and thus is closely linked to other liberties: freedom of religion, freedom of speech, and freedom of expression. It is a very important concept in the Western world but nearly all democratic constitutions protect these freedoms. For instance, the U.S. Bill of Rights 1 contains the famous guarantee in the First Amendment that laws may not be made that interfere with religion "or prohibiting the free exercise thereof". A US Supreme Court Justice (Benjamin Cardozo) reasoned in *Palko* v. *Connecticut* (1937) that: Such ideas are also a vital part of international human rights law.[15] Like the same, countries around the globe are also grasping the uniqueness and potential severity of cybercrimes. National and international efforts are underway to include or amend cybercrime laws mentionable as the Budapest Convention on Cybercrime, EU Cyber Security Strategy 2013, and the US Cyber security act 2015 a to name a few. We need not to oppose law but the texts of the draft Digital Security Act should be materially changed. It should reflect a chain of security for the people's free expression of thought in online rather than keeping people silent and restrain them with a fear of tyrannical laws.

[15] Wermiel, S.J., 1998. Law and human dignity: The judicial soul of Justice Brennan. Wm. & Mary Bill Rts. J., 7, p.223.

Recommendations

1. Need to amend section 57 of the ICT Act so as ensure any contemplated restrictions on freedom of opinion and expression are consistent with international law and standards. Amend section 57 of the ICT Act to ensure prohibited expression is clearly defined. Amend the ICT Act to ensure that any restriction on freedom of expression and information, including any sanction provided for is necessary to a legitimate objective and proportionate to the harm caused by the expression. Take steps to ensure that provisions of the ICT Act are not used to violate the right to freedom of expression, including limiting the legitimate exercise of comment on public matters which might contain criticism of the Government;

2. The draft Digital Security Act should enact complying concretely with Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 39 of the Bangladesh Constitution. It should aims to ensure security for the people's free expression of thought rather than keeping people silent and restrain them with a fear of a draconian law;

3. Ensure the protection of freedom of expression in the context of religion for all individuals and all communities at all times, by recognizing that freedom of expression is essential to sustaining a pluralistic society and by respecting all religious belief and opinions, creating an enabling environment for the exercise of freedom of expression in the context of religion, implementing laws, and accompanying policy measures relating to freedom of expression in the context of religion in a non-discriminatory manner especially in relation to women & LGBT people;

4. Ensure that core legal instruments such as the constitutions provide for equal status to all religions and beliefs, protect freedom of expression online and offline, in accordance with international human rights norms and standards;

5. Repeal laws at the national and sub-national levels that criminalize 'defamation of religion', 'insult to religion', 'blasphemy', apostasy, as per the Rabat Plan of Action;

6. Repeal laws at the national and sub-national levels that criminalize the expression of sexuality as well as laws imposing dress codes, including in the name of religion; Revise and strengthen existing anti-

discrimination legislation to meet universal standards towards substantive equality across all groups, communities, men and women;

7. Allow and enable religious minorities' parliamentarians to raise issues relating to freedoms of expression and religion, and the intersection of these rights, in the parliament and other forum;

8. Condemn and prevent, without discrimination, all instances of violations of freedom of expression in the context of religion and incitement of hatred resulting in violence, including those uttered and disseminated in the name of religion;

9. Creating more awareness to refrain from promoting or disseminating incitement of hatred, including in the name of religion, and from censoring individuals engaged in the legitimate exercise of their freedom of expression. This includes ensuring that media and telecommunication regulators, education and agencies concerned with religion abide by this principle.

Conclusion

Digitalisation, access to e-tools upraises people's addiction on social networking and extends space to exercise freedom of thought, conscience and free sharing in online. At the same, this rapid expansion of cyber space and uprising e-connectivity are liable to cause choke on free thinking and writing in cyber sphere. Despite the risk, still the cyber space remains vibrant to the young people for expressing their minds on various national and international issues. Study found that section 57 of the ICT Act is a serious threat to free thinkers and continuous protests are going on against this tyrannical provision. In addition to that the government has planned to launch the Digital Security Act which will further tighten the strap on free thinking work as armour to repress human free will sprit. At the same the realities is too harsh, we lost several bloggers and cyber activists, who have been brutally murdered. Many more left the country in fear of further assaults. Authorities are alleged for using ICT provision as a tool to muffle the voice of journalist, freelancer, and online activists. The ICT Act, particularly Section 57, and the proposed Digital Security Act are inconsistent with the fundamental human rights.

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The Impact of Academic Libraries and Copyright Issues: Bangladesh Perspective

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Abstract

Library is the key place for copyright violation process. As a facilitator, the librarian has connected to authors, publishers, aggregators, distributors, vendors, and users and so on. The toughest task for librarian is to balance copyright and use of copyrighted material within the purview of laws. The librarian can ensure the reputation of organization and may avoid misuse of copyrighted material by its stakeholders by creating awareness about copyright laws. As per the law the person who has infringed the material is solely held responsible for his act. Violating copyright laws would lead to legal disputes between Copyright holder, publisher, distributor, vendor, aggregator and user or stakeholder of concerned institution. The main objective of the study is to highlight the scope of Copyright law on academic library issues in Bangladesh. Both primary and secondary sources have been used during the time of research. Some of the findings of the study indicated that copyright violation and inadequate provisions regarding copyright implementation in Bangladesh is a regular affair. At last some suggestions have been provided to minimize the existing grey areas of academic library and copyright issues.

Keywords: Libraries, Copyright, Copyright Act 2000, Copyright Infringement, Copyright Exception.

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Objectives

Following are the objectives of the research:

1. To highlight the impact of Library and Copyright Protection.
2. To analyse the relationship between Library and Copyright issues.
3. To identify existing impediments and provide possible solutions.

Methodology

Both primary and secondary sources have been used during the time of research. For this research survey method has been employed and collected opinions through questionnaire from experts in the field of law and library science. A survey questionnaire was used to collect data. There were multiple choice questions as well as questions asking for short suggestions. Focus group discussion and interviews were conducted with teachers, librarians and students for data collection to shed light on their perspective. A number of institutions have also been visited to examine their situation.

Introduction

Academic libraries play a key role in education institutions in many spheres, including copyright. Library collections house both copyrighted and public domain materials and their missions are to make these works available to students and faculty in support of teaching, learning, research and scholarship. Some of these copyrighted works are owned by faculty members, universities and publishers but academic libraries also create copyrightable works. Librarians and library staff members develop copyrighted works and libraries often are the moving force behind the work done by colleges and universities to re-examine their copyright ownership policies in light of changing technologies, pedagogies and delivery methods for courses. Copyright is a branch of Intellectual Property Rights and an exclusive legal right given by the judiciary to the creator on his creation. As a creator (he/she/group) has rights to enjoy financial and other benefits associated as per the law over the creation. On the other hand law permits libraries to use copyrighted material for research and academic purpose without any permission from the copyright

holder. Further, any violation or an infringement of fair use of library resources is punishable under copyright act.[3]

Library

A library is a collection of sources of information and similar resources, made accessible to a defined community for reference or borrowing. It provides physical or digital access to material, and may be a physical building or room, or a virtual space, or both. A library's collection can include books, periodicals, newspapers, manuscripts, films, maps, prints, documents, CDs, cassettes, videotapes, DVDs, Blue-ray discs, E-books, audio books, databases etc. Libraries range in size from a few shelves of books to several million items.

Types of Library

In the current world various sort of library exists. Some of them are given below:

1. Academic libraries: Academic libraries are generally located on college and university campuses and primarily serve the students and faculty of that and other academic institutions.

2. Children's libraries: Children's libraries are special collections of books intended for juvenile readers and usually kept in separate rooms of general public libraries. Some children's libraries have entire floors or wings dedicated to them in bigger libraries while smaller ones may have a separate room or area for children.

3. National libraries: A national library serves as a national repository of information, and has the right of legal deposit, which is a legal requirement that publishers in the country need to deposit a copy of each publication with the library. Unlike a public library, a national library rarely allows citizens to borrow books.

4. Reference libraries: A reference library does not lend books and other items; instead, they must be read at the library itself. Typically, such libraries are used for research purposes only.

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[3] N M Anjaneya Reddy and Aswath Lalitha, "Understanding Copyright Laws: Infringement, Protection and Exceptions" (2016), International Journal of Research in Library Science, Volume 2, Issue 1 (January-June) 2016,48-53. ISSN: 2455-104X.

5. Special libraries: All other libraries, fall into the "special library" category. Many private businesses and public organizations, including hospitals, churches, museums, research laboratories, law firms, and many government departments and agencies, maintain their own libraries for the use of their employees in doing specialized research related to their work. Depending on the particular institution, special libraries may or may not be accessible to the general public or elements thereof. Special libraries are in specialized environments, such as hospitals, corporations, museums, the military, private business, and the government.

Significance of Library

1. For scholars and researches, it is an indispensable source of knowledge and up-to-date information.

2. It fulfils the academic requirements of student, and also provides mental recreation through novels and story-books.

3. The importance of library in schools is immense. There should be at least one library in every school, whether it is a primary, secondary or higher secondary school. The school library should be updated regularly. There should be introduction of new version of books at regular intervals. The books that contain the latest information and bases on the latest syllabus should only be kept in the library. When students get ample opportunity to study in a calm atmosphere with appropriate infrastructure, then it will result in better result at the exams.

4. There is need of libraries in both cities and villages. In recent times, the issue of Adult literacy has been raised by many. These adults, who want to get themselves educated, can go to these libraries and educate themselves.

5. It is very important to acquire the habit of regularly visiting the library. Whatever the teachers teach should be supplemented with library-work. That makes study both sound and satisfactory.

6. Modern libraries are computerizing the system of work. Gradually CDs (Compact Disc) may replace voluminous books like encyclopedias. Readers will just touch one or two keys or click the mouse to get the necessary information flashed on the monitor.

Shortcomings of library in Bangladesh

1. Lack of technically trained staff: Library personnel in Bangladesh, in general, have inadequate knowledge in computers and their uses in libraries. Lack of suitably trained library staff in computers and their uses in libraries hindered the automation process of the libraries in Bangladesh.

2. Insufficient of funds: The libraries in Bangladesh are handicapped by a shortage of funds. As a result measures are not fully taken for financing the automation process. Sometimes the parent organization allocates funds for the purchase of a computer, but not its maintenance.

3. Inadequate Mission and Objectives: There is no formal document stating the mission and objectives for library education in Bangladesh.

4. Insufficient Full time Faculty: Most institutions primarily use part-time faculty for the certificate course and post-graduate diploma course. They have an insufficient number of full-time skilled and experienced faculty members. As a result, the students are not getting the kind of assistance or academic support that they could expect from full time faculty members.

5. Poor Infrastructure: Institutions offering certificates or postgraduate diplomas have no space, adequate classrooms, laboratories for cataloguing and classification, and so on.

6. Inadequate Library Collections: For library science students, the library is like a workshop or a laboratory. Many institutions have either no library at all, or a library with an inadequate collection of textbooks and reference books. Availability of the latest editions of textbooks and reference sources is altogether out of the question. Access to electronic databases is still limited or not available to most students due to lack of institutional subscriptions to expensive foreign databases.

Copyright

Copyright is related with a creative artistic or literary expression. The copyrighted material can be a book, a picture, a sculpture, a painting, jewellery designs, a motion picture, music, or anything that is the result of a person's creative mind that take a physical shape and has no function

other than the beauty and creativity of the thing itself. However, copyright only protects the expressive elements of a broad range of works–including books, graphical works, dramatic works, choreography, musical compositions, sound recordings, films, sculpture, architectural works, and computer programmes. It does not extend to facts, ideas, or utilitarian aspects of such works in the form of an article, paper or a book, not the idea as such. Copyright law promotes creativity in literature and the arts by affording authors and artist's lengthy terms of protection against copying.[4]

Protection of Copyright in Bangladesh

In Bangladesh copyright is a subject-matter of statutory protection of intellectual property. Prior to 1962, there were no specific laws as regards copyright in the Pakistan or East Pakistan (later Bangladesh). At that time different laws (the Code of Civil Procedure, 1908, Penal Code, 1860 and Specific Relief Act, 1877) and the British copyright system were applicable in case of copyright enforcement. In 1962, a copyright Ordinance amalgamating the different copyright laws which were existed at that time, was promulgated, namely, the Copyright Ordinance of 1962. This Ordinance was administered up to 1999. After that, a new law containing different provisions in the line of International standard was enacted in 2000, namely, the Copyright Act, 2000 (No 28 of 2000) and it was amended up to 2005. The Act (amended in 2005) contains, among others, the subject-matters of the TRIPS agreement in respect of copyright and related rights, computer programmers, database, cinema, broadcasting rights, performer's rights, phonograms rights etc. Bangladesh has been extending co-operation with the World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and UNESCO for enriching her copyright system.[5] In Bangladesh the bases of present copyright protection are as follows:

- The Copyright Act, 2000 (herein referred to as the 2000 Act).
- The Copyright Rules, 2006.
- The Berne Convention for the Protection of Literary and Artistic Works, 1886 as revised up to 1971 since May 4, 1999.

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4 Kumar Narender, "University Libraries and Copyright Laws" (2009), downloaded from crl.du.ac.in/ical09/papers/index_files/ical-69_248_718_1_RV.pdf

5 Hossain, Md. Milan, "Present Situation of Copyright Protection in Bangladesh" (2012), Bangladesh Research Publications Journal, Volume: 7, Issue: 2, Page: 99-109, ISSN: 1998-2003.

- The Agreement on Trade-Related Aspects of intellectual Property Rights (herein referred to as TRIPS Agreement), 1994 since January 1995.

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. 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:[6]

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[7]:

- 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
- 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.

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6 Section 71 of Copyright Act, 2000.

7 *Ibid.*

Copyright exception

The present copyright law at the same time provides certain cases where no infringement can arise.[8] 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.

Piracy is considered to be the illegitimate use of materials held by copyright.[9] 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.[10] 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 author's and investor's 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.[11] 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.

Remedies for Copyright Violation

In Bangladesh in compliance with the provisions of TRIPS Agreement, there are three kinds of remedies against infringement and piracy of copyright, namely:

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8 Section 72 of Copyright Act, 2000.

9 Owen, Lynette (2001) Piracy Association of Learned and Professional Society Publishers 14(1) p. 67.

10 WIPO (1988), Background Reading Material on Intellectual Property, WIPO Publication No. 659(E) p. 288.

11 International Intellectual Property Alliance (IIPA) 2009 Special Report on Copyright Protection and Enforcement.

1. Civil remedies: The owner of the copyright can bring civil action in which relieves such as Anton Pillar Order[12] or (Search Order) injunction, accounts and damages can be sought.[13] A suit or other civil proceedings relating to infringement of copyright is to be filed in the Court of District Judge,[14] within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant Civil suits provides remedy for claiming compensation for infringement of copyright and loss of profits as well. Anton Pillar Order is very essential to prove the infringement. As a result the copyright office, in collaboration with custom authorities can inspect any vehicle, ship, air-craft, dock or premises on the basis or a complaint lodged by the owner of a copyright or his duly authorized agent and can take action to prevent importation of illegal copies.

2. The present Act provides criminal remedies under above circumstances for the imprisonment of the accused or imposition of fine or both, seizure of infringing copies etc in the following ways:

   Firstly: The infringement of copyright is a cognizable offence and is punishable with imprisonment for a period extending from six months to four years and a fine ranging from Tk. 50,000/- to Tk. 2,00,000/-.[15]

   Secondly: The Act provides for seizure of infringing copies and confiscation of all duplicating equipment used for manufacturing counterfeit copies.[16] However, if the Court of Session is satisfied that infringement is committed without having an intention for profit or non-commercial purpose, the court may give lesser punishment, which may be imprisonment for less than six months and fine for less than 50,000 taka.

   Thirdly: In case of piracy of computer programs, the amount of fine is extended by an amendment to the Copyright Act on May 18, 2005, which is now minimum Tk.1,00,000 and maximum Tk.4,00,000, if it is committed for commercial purpose.[17] However, in case of mere use

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12 Anton Pillar Order is in nature of interlocutory remedy which would allow a victim of copyright infringements to enter the premises of the infringer and seize the infringed articles including instruments of infringement. This remedy was first given to a British case- *Anton Piller* v. *Manufacturing Process*.

13 Section 76 of the Copyright Act, 2000.

14 Section 81 of the Copyright Act, 2000.

15 Section 82 of the Copyright Act, 2000.

16 Section 93 of the Copyright Act, 2000.

17 Section 84 of the Copyright Act, 2000.

of infringing copy or if the court is satisfied that it is committed for non-commercial purpose; the court may impose lesser punishment and lesser fine as well.

3. Administrative remedies: Administrative remedies consist of moving to the Registrar of copyrights to ban the import of infringing copies into Bangladesh, when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright. Counterfeit/ pirated goods, can, if it is proved by the court as an act of infringement, be destroyed by the administrative authority.

Copyright Material and Library

Libraries are the key intermediaries in providing information to the users and the librarians, are the managers to provide different types of information resources through different channels. Information could be categorized as published, un-published, print and non-print works. As a facilitator, the librarian has connected to authors, publishers, aggregators, distributors, vendors, and users and so on. The toughest task for librarian is to balance copyright and use of copyrighted material within the purview of laws. The librarian can ensure the reputation of organization and may avoid misuse of copyrighted material by its stakeholders by creating awareness about copyright laws. As per the law the person who has infringed the material is solely held responsible for his act. Violating copyright laws would lead to legal disputes between Copyright holder, publisher, distributor, vendor, aggregator and user or stakeholder of concerned institution. Utmost care should be taken during subscription and its agreements with regard to any kind of electronic resource procurement, and better to consult legal expert during the process. Librarian need to ensure protection of copyrights while providing library access to public.[18] Library is the key place for copyright violation process. However, there are a few exceptions to the Copyright laws. They are:

1. **Libraries and archives:** Libraries and archives are permitted to make up to three copies of unpublished copyrighted works for the purposes of preservation, security or for deposit for research use in another library or archive. Libraries can also make up to three copies of a published work to replace a work in their collection if it is damaged, deteriorated or lost, or the format of which has become obsolete.

[18] N M Anjaneya Reddy and Aswath Lalitha, "Understanding Copyright Laws: Infringement, Protection and Exceptions" (2016), International Journal of Research in Library Science, Volume2, Issue 1 (January-June) 2016, 48-53. ISSN: 2455-104X

2. **Fair use:** The definition of the term 'Fair Use' needs to be explained in the light of the following facts: a. It should be used for non-profit educational purpose, not for commercial purpose; b. Nature of the copyright work; c. Whether the whole work has been copied or small part of the work is copied.

3. **Disposition:** The matter of disposition of a particular copy of a copyright is limited by the first sale doctrine, according to which the owner of that particular copy of the work may sell or transfer that copy. Libraries lending and marketing of used books are governed by the first sale doctrine.

Reasons for violating copyright laws

Violation of copyright law may differ from case to case, the reasons might be lack of resources, unavailability or inadequate copies, out of print/stock, lack of awareness about law and so on and so forth. To know the reasons for copyright violations and as a part of research, the survey had been conducted in the Cox's Bazar district in Bangladesh among academic library professionals. The respondents of this survey were library professionals from Universities and colleges such as Medical, Engineering, and regular Degree. For the survey questionnaire 200 questionnaires were distributed, all the respondents were responded and reasoned as mentioned in the following table. According to the survey, the opinions have been scattered in an academic environment among professionals with regard to violation or infringement of copyright. Below table reveals that majority of the respondents have no idea on plagiarism (22%), because of high cost of original material they generally used pirated copies (20%), not enough understanding on copyright provisions (16%), unavailability of sufficient quantity of books in library (12%) and unavailability of resources (12%) etc. are the common or main reasons for violating copyrights.

	Reason 1	Reason 2	Reason 3	Reason 4	Reason 5	Reason 6	Reason 7
Details	Cost of the material	Unavailability of resources (out of print, out of stock etc.)	Unavailability of sufficient quantity/ Copy	Misconception of fair use	Copyright provisions not clearly understood	lack of trained and skilled people	No Idea on idea plagiarism
Percentage	20%	12%	12%	10%	16%	8%	22%

Findings

1. Copyright Violation is a very regular affair in Bangladesh and copyright violation in academic activities increasing day by day.

2. A large number of people, especially students are using pirated books to save their money and huge number of people has misconception of fair use.

3. Copyright provisions are not clearly understood by massive segment of the academic and library related personalities. However, the present copyright law of Bangladesh is not formulated to protect the best interests of libraries and archives.

4. Lack of academic resources, such as; books, articles, journals and other internet related resources in educational institution.

5. Teachers and students have inadequate knowledge on "Plagiarism". On the other hand, lack of skilled people in academic libraries in Bangladesh.

6. Ineffective activities of copyright board and department of copyright in Bangladesh.

7. Law enforcing agencies and law officials have poor knowledge and training on copyright issues.

Suggestions

1. Publishers of original books should need to fix a price where price of the book will be students friendly. However, Government should provide more funds for University Libraries to procure more books and to subscribe to electronic resources. Government should also encourage and support local publishers and authors to engage in textbook writing and publishing for the university level as is being done for the basic and senior high school levels. Currently, the majority of the textbooks used at the university level are foreign owned and published outside the country. If such textbooks could be published locally and subsidized by the government, students would have greater access and at affordable prices.

2. Educational institutions should take a closer look at the activities of the commercial photocopy operators on their campuses. They must be

properly registered with the concerned University and Copyright Board should ensure that photocopying activities are done in the most acceptable manner. The academic institutions should appoint a Copyright Service Librarian, who will keep librarians and other members of the institution community informed about new developments in copyright. The Copyright Service Librarian would also be responsible for sensitizing and orientating students on copyright matters.

3. Educational materials such as textbooks are still a major source of knowledge for developing countries such as Bangladesh; therefore, it is important for law makers to make laws that enable students to have greater access to these materials. For example, Copyright Act 2000, may include that "permitted use of protected copyright work by library and archive" should be extended to cover private tertiary institutions and universities that absorb a large number of students who could not find places in the country's public tertiary institutions.

4. Librarians and their representative organizations should be involved in any future national debates on copyright and should be consulted when the laws on copyright are being discussed and revised. This way, they can articulate the concerns applicable in educational contexts and that of their users.

5. Educational and research institutions must convey the details of fair use of copyright or copyright exception to their stakeholders. Moreover, Plagiarism is an academic offence thus the practice of plagiarism should need to introduce in every school, colleges and universities so that students can understand the negative impact of plagiarism in their early academic stage as well as government should supply plagiarism related software free of cost to the universities.

6. Government should take necessary steps to amend current copyright law. The best interest of the libraries and archives should need to include in the current law. In addition, punishment process under the copyright law should need to increase for the violation of copyright. Proper training program on increasing knowledge of copyright issues for law enforcing agencies and law officials are needed to implement regularly.

7. Copyright board and copyright department of Bangladesh should implement their all function properly to prevent copyright violation. However a separate mobile force to prevent copyright as well as a

Court or tribunal can be established to mitigate copyright disputes strictly.

Conclusion

Currently copyright violation is in alarming situation, especially in the academic institution in Bangladesh. Authors, publishers, librarian, faculty members and students are engaging in infringement of copyright. However article 42 of the constitution of Bangladesh has guaranteed about right to property which includes intellectual property and copyright is a subject matter of intellectual property. Copyright Act, 2000 is the existing law regarding protection of copyright but it seems that the law is not up to date and it has inadequate provisions to dissolve copyright violation in academic libraries. It is also necessary for institutions to come out of their apathy towards government policy formulation and legislation in copyright matters. They should examine whether current legislations are sufficient to enable them to continue their mission of educating people or whether any amendments in laws are required to facilitate their task in the light of new technologies.

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In what extent Interference in the Actions of Individuals in a Civilised Community against their Wills can be justified?

Mohammad Riaz Uddin[1]

Abstract

In this research I discussed whether there is any justification of state interference in the actions of individuals in a civilised community against their wills. Here I considered J.S. Mill's liberal and utilitarian nature thinking and also discussed anticipatory stage of his liberty and harm to others principle by which I started writing my research. Then I followed by Mill's famous theory of the limitation of state's interference over any individual's liberty that is best known as harm to others principle. Then I discussed 2nd aspect of A.V Dicey's famous theory of rule of law in contrasting with that of J.S Mill. Therefore I quoted some lines from some famous writers' article and books, likely Victorian writer Sir Fitz James Stephen to justify Mill's so called harm principle. Furthermore, I added recommendation of Wolfenden report on homosexuality by which I tried to support Mill's view upholding his principle. However, therefore added Lord Devlin's view and his objection as to Wolfenden report then I stated broadly H.L.A. Hart's redefined and modern harm principle as well as his views regarding morality and immorality, morality and law to encounter Lord Devlin's arguments by redefining Mill's so called harm to others principle by which Hart stated that the state is justified in interfering in the actions of individuals to protect them from physical harm and that harm cannot include offence caused merely by knowledge that others acting in ways that you think are wrong.

Keywords: Interference, Justification, Actions, Individuals, Community.

Introduction

Normally it is thought that if an individual is punished by the state, it is justified. But it's not justified in every case. From ancient time, a debate has been going on amongst the people over the issue that whether the society or state can interfere over any individual of the community. All

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great philosophers including Plato to modern English philosopher Hart, all had joined in this debate. But for the first time a complete principle on this issue was represented by the most influential liberal and utilitarian English philosopher John Stuart Mill.

Mill's Ideas

However, in his essays *On Liberty*, Mill considered the nature and the limits of the power which can be exercised legitimately by the society over any individual of that society. Mill says that 'the will of the people practically means the will of those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number, and precautions are as much need against this as any other abuse of power.'[2] This was termed by Mill as "the tyranny of the majority" and is included among evil against which society requires to be on its guard.'[3] Mill also says that there must be "a limit to the legitimate interference of collective opinion with individual interference."[4]

Mill's 'Harm to Others' Principle

Mill also says that there is 'no recognized principle by which the propriety or impropriety of government interference is tested. People decide according to their personal preferences.'[5] At this point J. Mill represented his more famous and influential principle of 'harm to others principle' stating that "the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right."[6] Furthermore Mill says that "the only part of the conduct of any one for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is

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2 *On Liberty* p 62 edited by G Himmelfarb, 1974.

3 *Ibid.*

4 *Ibid* p 63.

5 *Ibid* p 67.

6 *Ibid* p 68.

sovereign."[7] JS Mill thinks that if there is no harm to other there should not be any interference of the society over the liberty of any individual of a community. The main problem in Mill's harm to other principle is that Mill ignored the extent of harm. He undermined that harm to himself may also cause to others

Dicey's View

In the same time of Mill, A.V Dicey expressed a little contrary view of personal liberty of an individual in his book 'Introduction to the study of law of the Constitution'. He said that no man is punishable or can be lawfully made suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law.[8] Therefore, it can be said that the power exercised legitimately by the society is justified on two grounds that is to say*;* either because a person is accused of some offence or because he has been duly convicted of some offence and must suffer punishment for it. According to Sir AV Dicey an individual can be subject to the punishment only if he commits an offence or be convicted for an offence. On the other hand, JS Mill termed it as 'harm to others' which Dicey believed as an offence. Therefore, if a rule or order made by a state or our society is breached then it will be considered as an offence in terms of Dicey whether it harms to other or not.

Analysis of the Principle

Ever since its publication, *On Liberty* has suffered much more criticism.[9] Mill's essays actually reflect his liberal and utilitarian nature of his thoughts. Great Victorian Sir Fitz James Stephen challenged the utilitarian nature of Mill's essay. Good utilitarian grounds, he argued, were wanting in defending the liberty principle. It was what the person was at liberty to do which was of importance. He also objected to the distinction made by Mill of harm to oneself (self-regarding actions) and harm to another (other-regarding actions). Stephen believed that such a distinction was fallacious and nebulous and could not be maintained. He advocated that the legitimate function of legislation lay with punishing, *per se,* "[the] grosser forms of vice."[10] Furthermore, Stephen C Mavroghenis criticised

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7 *Ibid* p 69.

8 A.V Dicey, Introduction to the Study of the Law of the Constitution (8th edition, Reprinted Liberty Classics Edition, London).

9 Stephen C. Mavroghenis, Mill's concept of harm redefined (UCL Jurisprudence Review, 1994).

10 Sir J.F. Stephen, *Liberty, Equality, Fraternity (*1865. Reprinted edition, Cambridge University Press, 1967).

Mill's essays of *On Liberty* stating that Mill's liberty principle claims to be "one very simple principle" and at first reading this is indeed what it seems. According to Stephen C Mavroghenis, 'the problem lies with Mill's essay itself; Mill formulates the concept of harm differently in the course of *On Liberty*. It has often been maintained that harm should be looked upon and interpreted in the light of self and other-regarding acts, the so called public-private sphere of actions. This has led to many commentators postulating that it is impossible to isolate such actions since as the metaphysical poet John Donne has told us, *"No man is an island"*. All actions whether performed in private or public affect society as a whole.'[11]

Long after the J.S. Mill had represented his famous harm to others principle, in 1957 there has been a fantastic debate on the issue whether the law should actually concern with the enforcement of moral soon after the publication of Wolfenden Report.[12] The Committee was established under the chairmanship of Sir John F Wolfenden. The Committee was formed in order to consider the law and practice as to homosexual offences and the persons convicted for such offences by the courts as well as to report what changes if any. After proper investigation, the Committee had reached in a conclusion that "unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law's business."[13] Therefore, as to homosexuality, the committee recommended that "homosexual practices between consenting adults in private should no longer be a crime."[14] In relation to prostitution the committee said that "we are not attempting to abolish prostitution or to make prostitution in itself illegal. We do not think the law ought to try to do so … What the law can and should do is to ensure that the streets of London and our big provincial cities should be free from what is offensive or injurious."[15] Mill's liberty and harm theory, in reality, had been reflected in Wolfenden report and this had again resumed the modern debate on harm principle which had ended in Hart versus Devlin debate. Following this debate Hart redefined Mill's harm theory and approached his modern harm principle.

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11 *Ibid* p 3.

12 Cmnd. 247 H.M.S.O London.

13 *Ibid*para 257.

14 *Ibid*chap 5, para 61.

15 *Ibid*chap 9, para 285.

Hart v. Devlin

After the publication of Wolfenden report, the debate began on whether morals behaviour should be criminalised. Lord Devlin gave his assessment of the issues conducted by the report in his book *The Enforcement of Morals.*[16] He discussed over the topic: between crime and sin and to what extent, if at all, should the law of England concern with the enforcement of morals and punish sin or immorality as such? In response to this answer Devlin expressed his view saying that morality is that which the ordinary man 'on the Clapham omnibus' thinks and those moral views that a man has for which he has very strong feelings of indignation are, just for that reason, enforceable by criminal sanction. Lord Devlin opposed to the recommendation of Wolfenden report regarding the decriminalisation of homosexual acts between consenting adults in private on law and morality grounds. He also considered that "the suppression of vice is as much the law's business as the suppression of subversive activities"[17] In his argument Devlin went beyond Mill's harm to other's principle and liberty where Mill believed that no one should be penalised without being responsible to cause harm to others. In the final chapter of his book, Devlin pointed out another additional issue. He opined that as the law takes into account moral turpitude in determining punishment for a crime so it is reasonable for law to be equally concerned with moral turpitude in deciding whether a particular act should be a crime.[18]

However, in response to Lord Devlin's argument Hart accepted Mill's so called 'harm to others' principle by expanding it to his modern Harm principle and uses it to encounter the arguments of Lord Devlin. Hart explains the key difference between two sides in this debate in terms of a practical example that the fact that racial discrimination was held morally acceptable in different societies did not, on the utilitarian analysis, show that it was justifiable to enforce this practice by law.[19]

Before setting out his argument Hart points out two issues, the first case to be taken by proponents of the argument for punishing sexual immorality as such in England was *Shaw* v. *DPP* [1961] 2 All ER 446.[20] Shaw composed and procured the publication of a magazine called the Ladies Directory, which gave the names and addresses of prostitutes, in some cases nude photographs and an indication in code of their practices. Shaw was

16 Patrick Devlin, The Enforcement of Morals (Oxford 1965).

17 *Ibid* p 15.

18 *Ibid* last chapter.

19 The Morality of Criminal Law, 1959 p 37.

20 Baiili.

convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences: (1) Conspiracy to corrupt public morals; (2) Living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956; and (3) Publishing an obscene publication contrary to section 2 of the Obscene Publications Act, 1959.[21]His appeal to the House of Lords had been dismissed.[22] Secondly Hart pointed out the recommendations made by Wolfenden Committee in 1957 relating to changes to the law in the areas of homosexuality and prostitution.

At this stage Hart argues that 'the controversy as to whether the enforcement of morality is morally justified or not involves discussing morality at two separate points.'[23] Not only is the issue about morality but it is also a question of morality. Considering this, Hart distinguishes between utilitarians as "positive morality", which is the morality accepted and shared by a given social group and "critical morality,"[24] which is the general moral principles used in the criticism of actual social institutions, including positive morality. Therefore he goes on to introduce the importance of the issue of justification. He considers that 'the use of legal coercion by a society calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good.'[25] He identifies two objectionable consequences, namely the fact that enforcement involves punishing the offender resulting in some form of depravation. The other relates to those who are coerced into obedience by the threat of legal punishment. This has the undesirable consequence of impeding the exercise by individuals of free choice but also, in the context of a law enforcing a sexual morality, the repression of sexual impulses. Hart considers that "the consequences of this form of repression are different from those involved in the abstention from ordinary crime and he sees it as involving something which affects the development or balance of the individual's emotional life, happiness and personality."[26] Then, after drawing on the distinction already made between positive and critical morality, he raises the issue as to which morality is to be enforced. On this point, the utilitarians and their critics differ. For the utilitarians, likely J.S. Mill, law should only punish activities, which are harmful, regardless of whether the utilitarian morality has been accepted as the positive morality of the society while their critics consider that it is precisely because certain

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21 Baiili.

22 *Ibid.*

23 HLA Hart, The Law, Liberty and Morality (Stanford University press 1962) p. 17.

24 *Ibid* p. 20.

25 *Ibid.*

26 *Ibid* p. 22.

standards of behavior enjoy the status of a society's positive morality that they are enforced by law.

Hart goes on to develop further his thesis by arguing that 'the examples given by opponents of the utilitarian-based approach are not accurate examples of the use of law solely to enforce morality.'[27] The third of his examples, the crime of bigamy, is the perhaps most insightful for the purposes of examining the theoretical underpinnings of the law in Scotland on offences of indecency. Hart acknowledges that "there are a variety of harm-based reasons for punishing the bigamist. These include the need to protect public records from confusion or the need to protect religious feeling from offence by a public act desecrating the ceremony of marriage."[28] Furthermore, he adds that 'intervention by law on this latter ground involves punishing the bigamist neither as irreligious nor as immoral but as a nuisance.' Like the Lord Justice Clerk's reasoning in *Dominick*, Hart considered that correctly conceptualized, law is not concerned with the immorality of the bigamist's private conduct but with the offensiveness to others of his public conduct. He points out that the importance of this distinction can be seen by reference to the fact that in the past any denial of the truths of Christianity were punished as blasphemy whereas in modern times we would only consider punishing this behavior if made in an offensive or insulting manner likely to cause a breach of the peace. A similar dividing line exists in relation to sexual matters. This is not a new concept for in Roman times a distinction was drawn between the Censor, who was concerned with morals, and the Aedile, who was concerned with public decency. Although this distinction has sometimes been forgotten, Hart reinforces the point by reminding us that "sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency."[29] While Hart acknowledges the slight force of the argument that distress caused by the bare thought of others offending in private against morality could be encompassed by the harm model, like the Lord Justice Clerk in *Dominick* he considers that these cases are of subsidiary importance and that they cannot be acknowledged by anyone who recognises individual liberty as a value.[30]

Hart similarly dismisses the substantive arguments made by those in favour of the legal enforcement of morality. He considers that Lord Devlin advances a moderate thesis while Stephen proposes an extreme thesis. This

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27 *Ibid* p. 41.

28 *Ibid* p. 42-44.

29 *Ibid* p. 45.

30 *Ibid* p. 46.

thesis requires that even conduct, which may not cause any harm, must nevertheless be viewed in terms of its effect on the moral code. A breach of moral principle, therefore, is an offence against society as a whole and society may use law to preserve its morality as it uses it to safeguard anything else essential to its existence. This is why the "suppression of vice is as much the law's business as the suppression of subversive activities."[31] Lord Devlin does not offer a proven causal link between an immoral act and the breakdown of society and Hart attributes this inadequacy to what he terms an "undiscussed assumption"[32] on the part of Lord Devlin. According to Hart, the basis for this assumption was Lord Devlin's idea that all moralities, including sexual morality, form a single seamless web so that those who deviate from any part are likely to deviate from the whole. From this acceptable proposition that shared morality is essential to the existence of society, Hart detects a move to an unacceptable proposition that a society is identical with its morality at any given point in time. Viewed in this light, any change in morality is the equivalent of the destruction of society. It is on this basis that Lord Devlin makes his argument that law must prohibit private immorality and that sexual immorality, even when it takes place in private, is tantamount to treason. Hart argues that 'far from being like a violent overthrow of government a society's change in morality is more like a peaceful constitutional change in the form of government. Such changes are consistent not only with the preservation of society but with its advance.'[33] The extreme thesis prizes the enforcement of morality not merely for its instrumental value but also for its inherent value. Thus, on this model, there is no need to show harm or how the act weakened the moral fibres of society.

The most important issue Hart considers is means of enforcement that is coercion. Hart says that 'punishment is the appropriate return for evil committed. He added that a theory which does not attempt to justify punishments by its results, but simply as something called for by the wickedness of a crime, is certainly most plausible and perhaps only intelligible, where the crime has harmed others, and there is both wrongdoer and victim'- when it is felt that it is right or just that one who has intentionally inflicted suffering on others should himself be made to suffer.'[34] Hart also opined that apart from any justification that can be found for the punishment of immorality on the grounds of retribution then punishment can be justified on the ground that it has value as

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31 Patrick Devlin, Enforcement of Morals (Oxford university press 1965) 139.

32 *Ibid* p. 53.

33 *Ibid* p. 52.

34 *Ibid* p. 39.

denunciation.[35] Then Hart says about 'those who believe that law should properly fulfil this denunciatory function in reality they are saying that law should act to instil and strengthen respect for moral code'[36] Hart says that "moral values are changeable from time to time with social changes. So, the use of legal punishment to freeze into the immorality at a particular time in a society's existence may possibly succeed but even where it does contribute nothing to the survival of the animating spirit and formal values of social morality and may do much more harm to them."[37] Though Hart did not believe on punishment for immorality but at least believes that citizens should be encouraged to follow moral rules rather than legal coercion.

Conclusion

So, can it be said that interference in the actions of individuals in a civilised community against their wills is justified? There are a number of justifications, most of them are as follows: that interference in the liberty of an individual by the society or any sort of punishment will only be justified and accepted if his acts causes harm to others or poses others into the risk of harm or he is accused of some offence or because he has been duly convicted of some offence.

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The Enforcement of Intellectual Property Rights in Bangladesh

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Abstract

In this era of globalization and rapid expansion of world economy, intellectual property and the corresponding rights over intellectual property are crucial to the economic, social and technological development of any country beyond doubt. Globalization also has made the intellectual property rights a subject matter of international concern. All nations who want to promote and protect their development in all aspects must protect the rights over intellectual property by granting legal veil through exclusive enactments. In today's world intellectual property surrounds us in nearly everything we do. No matter what we do, we are surrounded by the fruits of human creativity and invention. In the knowledge based new economy the intellectual property (hereinafter, IP) community has entered a new era characterized by the rapid expansion of demand for new forms of intellectual property protection, greater global coverage. As a result, IP is no longer to be perceived as a distinct or self-contained domain, rather as an important and efficient policy investment that is relevant to a wide range of socio-economic, technological and political environmental concern. Realizing this fact, all industrialized countries of the world have enacted laws for the protection of 'works of mind'. To comply with the international obligations Bangladesh also has introduced intellectual property rights protection system. This study is an overview of the enforcement mechanism of intellectual property rights in Bangladesh and the development of intellectual property law in Bangladesh. The main objective of this study is to seek how enforcement mechanisms in Bangladesh are intrinsically precious, effective and thenceforth, worth in protecting the rights of IP holders. As an obvious flow of discussion the paper reiterates to look beyond the constraint and formulation of a comprehensive legal framework for IP protection. This paper will attempt to refer some recommendations in this regard.

Keywords: Intellectual, Invention, Protection, Imagination & Infringement.

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Introduction

Albert Einstein the father of the modern science, said, "Imagination is more important than knowledge". Einstein's preference for imagination over knowledge is a starting point of Intellectual property (IP) which is based on the power of imagination. Einstein understood that it is the ability to stand on an existing foundation of accepted knowledge and see beyond to the next frontier of discovery that is the source of personal, cultural and economic advancement. The world economy, trade and rapid technological obsolescence and fierce competition in the world trade have made it imperative to protect the innovations using the tool of Intellectual Property Rights (IPR) system. An innovator does not feel encouraged to develop new products without having any rewards or interest on the basis of new products according Intellectual Property System and an investor will not invest capital into new ideals without the same interest. As a result, innovative initiatives will be obstructed, thus IP protection becomes an indispensable instrument for commercialization of new creation worldwide. Different countries are adopting National Intellectual Property laws with different procedures and time limit of protection. This heterogeneity in the world Intellectual Property Right System creates bars and problems in smooth operation of free world trade. To remove these trade barriers TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement was brought in screen by WTO in 1995. It expressed necessity of new multinational companies/organizations a minimum standard for protection of IPR as well as procedures and process for their enforcement. It also announced out in elaborately the responsibilities of the member countries to set standard in their national laws for the protection of IP rights as well as procedures for executing rights against infringement. Modernization of national IP laws for Bangladesh is very difficult as it requires expertise, infrastructure, adaptations and enforcement of new rules which is not in place now. Yet the Government of Bangladesh has taken necessary steps to modernize and update its legislations on IPR through new laws on Copyright, Patents, Trademarks and Designs and Plant breeder's right in compliance with the provisions of the TRIPS Agreement.

Objectives of the Study

The ultimate objects of this paper will be:

a. To define the intellectual property and its development in Bangladesh.

b. To describe the nature and basis of intellectual property.

c. To identify the factors contributing to the infringement of intellectual property rights.

d. To observe the measures taken by the government of Bangladesh and the international institutions for the protection of intellectual property rights.

e. To analyse the coverage and strength of international and domestic instruments regarding intellectual property for the protection of intellectual property rights.

f. To develop an explanatory theory that will help to raise voice for the protection of rights of IP holders and this study will also try to recommend some policies for protecting the rights of IP holders.

Intellectual Property Rights

The World Intellectual Property Organization WIPO provides that 'intellectual property' shall include rights relating to:

a. Literary, artistic and scientific works;

b. Performances of performing artists, phonograms and broadcasts;

c. Inventions in all fields of human endeavors;

d. Scientific discoveries;

e. Industrial designs;

f. Trademarks, service marks and commercial names and designations;

g. Protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. According to the list of TRIPS agreement intellectual property rights cover the following areas: - (a) Copyrights and related rights (i.e., rights of performers, producer of sound recordings and broadcasting organizations) (b) Trademarks including service marks (c) Geographical Indications including appellation of origins (d) Industrial designs. (e) Patents including protection of new varieties of plants (f) Layout designs (Topographies) of integrated circuits (g) Protection of undisclosed information including trade secret and test data.

Kinds of Intellectual Property

There are different kinds of Intellectual property rights i.e. patents, copyright, industrial design rights, trademarks, trade dress, and in some jurisdictions trade secrets. There are also more specialized varieties of sui generis exclusive rights, such as topographies of semiconductor products, plant breeders' rights, plant variety rights, industrial design rights, supplementary protection certificates for pharmaceutical products and database rights[3].

a. Patents

A patent grants an inventor the right of making, using, selling, offering to sell, and importing an invention for a limited period of time, in exchange for the public disclosure of the invention. Patent is a document issued upon application by the government office describing an invention and creates a legal situation in which patented invention can normally be exploited with the authorization of the owner of the patent.

b. Copyright

A copyright gives the author of an original work exclusive right to it, usually for a limited time. Copyright approves a wide range of creative, intellectual, or artistic forms, or "works". Copyrights include artistic creations such as poems, novels, music, paintings, cinematographic works etc[4]. The expression 'copyright' refers to the main act of literary and artistic creations, made only by the author or with his authorization. That the making of copy of the literary or artistic work, such as a book, a painting, a sculpture, a photograph, a motion picture.

c. Industrial Design

Industrial Design belongs to the aesthetic field to serve as the patterns for the manufacture of products of industry or handicraft. An industrial design right protects the visual design of subjects that are not purely utilitarian. An industrial design includes of the creation of a shape, configuration or composition of pattern or color, or combination of pattern and color in three-dimensional form containing aesthetic value.

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3 http://en.wikipedia.org/wiki/Intellectual_property (Accessed on 20th November, 2014).

4 *Ibid.*

d. Trademark

A trademark is a recognizable sign, design or expression which showing distinguishes between products or services of a particular trader from the similar products or services of other traders. A trademark is a symbol which indicates the responsible for the goods placed before the public. Different makers or sellers of the same goods use (different) trademarks. The public use trademarks in order to choose whose goods they will purchase. If they are satisfied with the goods they purchased they can then repeat their order simply by using the trademark. It is not necessary to know who actually owns the trademark.

e. Trade Dress

Trade dress is a legal term of art that generally refers to characteristics of the visual appearance of a product or its packaging or even the design of a building that signify the source of the product to consumers.

f. Trade Secrets

A trade secret is a formula, process, practice, design, instrument, pattern or compilation of information which is not generally ascertainable, by which a business can obtain an economic advantage over competitors or customers. Trade secret law varies from country to country[5].

Infringement of Intellectual Property Rights

"Infringement" is the violation of intellectual property rights in relation to patents, copyright, and trademarks, and "misappropriation" in relation to trade secrets, may be a breach of civil law or criminal law depends on the type of intellectual property involved, jurisdiction, and the nature of the action.

a. Patent Infringement

Patent infringement means using or selling a patented invention without permission from the patent holder. The scope of the patented

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5 *Ibid.*

invention or the extent of protection is defined in the claims of the granted patent[6].

b. Copyright Infringement

If any person or body is reproducing, distributing, displaying or performing a work, or to make derivative works, without permission from the copyright holder, which is typically a publisher or other business representing or assigned by the work's creator is called copyright infringement which is commonly known as "piracy". If the owner registers the copyright he can claim damages. Enforcement of copyright is generally the responsibility of the copyright holder.

c. Trademark Infringement

Trademark infringement occurs when one party uses a trademark which is identical or confusingly similar to a trademark owned by another party, in relation to products or services which are identical or similar to the products or services of the other party. In case of copyright common law rights protecting a trademark, but registering a trademark provides legal advantages for enforcement. Infringement can be addressed by civil suit and, in several jurisdictions, under criminal law.

d. Trade Secret Misappropriation

Patents and registered copyrights and trademarks are publicly available but by definition trade secrets are secret and trade secret misappropriation is different from violations of other intellectual property laws. Confidentiality and trade secrets are regarded as an equitable right rather than a property right but penalties for theft are roughly in the Commonwealth common law jurisdictions[7].

World Intellectual Property Organization (WIPO)

World Intellectual Property Organization (WIPO) is the world organization to work for the development and protection of IP rights. It assists governments and organizations to develop the policies, structures and skills needed to harness the potential of IP for economic development.

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6 Alison Firth & Jeremy Philips, Introduction to Intellectual Property Law, Third Edition, Butterworths-London, (1995).

7 Supra Note 2.

It coordinates international treaties regarding intellectual property rights. Its 184 member states comprise over 90% of the countries of the world, who participate in WIPO to negotiate on intellectual property matters such as patents, copyrights and trademarks.[8] The agreement between the UN and WIPO work for appropriate action in accordance with its basic instrument, treaties and agreements administered by it. It is promoting creative intellectual activity and facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development[9].

a. Structure

General Assembly elects an executive committee consisting of one-fourth of the member states, meets annually. WIPO itself has four organs: the General Assembly, the Conference, the Coordination Committee, and a secretariat called the International Bureau.

b. Functions

The WIPO main functions are[10]:

- assisting campaigns development to improve IP protection all over the world and to harmonize national legislations in this field;
- signing international agreements on IP protection;
- applying the administrative functions of the Paris and Berne Unions;
- rendering technical and legal assistance in the field of IP;
- collecting and disseminating the information, conducting researches and publishing their results;
- ensuring the work of the services facilitating the international IP protection;
- applying any other appropriate actions.

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8 http://www.encyclopedia.com/topic/World_Intellectual_Property_Organization.aspx (Accessed on 5th December, 2014).

9 *Background Reading Material on Intellectual Property,* WIPO publication no. 659E, ISBN 92-805-0184-4, pg. 37-38.

10 http://www.simplydecoded.com/2013/04/10/introduction-to-wipo-its-functions/ (Accessed on 5th December, 2014).

The prime and most important WIPO function is administering multilateral international conventions, i.e. depositing treaties, states' instruments of accession, of conflicts settlement, ensuring treaties review, applying the registration functions for treaties reviewing the international registration of IP objects[11]. Today, the WIPO administers the treaties in the fields of industrial property, copyright and related rights.

Paris Convention for the Protection of Industrial Property

The first intellectual property treaty is the Paris Convention for the Protection of Industrial Property which was signed in Paris, France, on 20 March 1883. It established a Union for protecting the industrial property[12]. The substantive provisions are divided into three main categories: national treatment, priority right and common rules. Notably, Taiwan and Burma are not parties to the Convention. However, according to Article 27 of its Patent Act, Taiwan recognizes priority claims from contracting members[13].

Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention for the Protection of Literary and Artistic Works is an international agreement governing copyright, which was first accepted in Berne, Switzerland, in 1886[14]. The Berne Convention allows every signatory to recognize the copyright of works of authors from other signatory countries (known as members of the Berne Union) in the same way as it recognizes the copyright of its own nationals.

Laws on Intellectual Property in Bangladesh

Bangladesh inherited the legal framework on intellectual property (IP) dating back to the British- India. The Patents, Designs and Trademarks Act of 1883 is the earliest legislation found to protect IP. Subsequently it was repealed and the new Patents and Designs Act was enacted in 1911 and the Trademarks Act in 1940. In 2003, both the Patents and Designs Act, 1911 and the Trademarks Act, 1940 were amended and the Department of

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11 *Ibid.*

12 http://en.wikipedia.org/wiki/Paris_Convention_for_the_Protection_of_Industrial_Property (Accessed on 6th December, 2014).

13 http://en.wikipedia.org/wiki/Paris_Convention_for_the_Protection_of_Industrial_Property (Accessed on 6th December, 2014).

14 http://en.wikipedia.org/wiki/Berne Convention (Accessed on 10th December, 2014).

Patents, Designs and Trademarks (DPDT) was formed under the Ministry of Industries merging two independently operational offices - the Patent Office and the Trademark Registry Office. In 2008, the Trademarks Ordinance was promulgated and in 2009, the Trademarks Act was enacted. Copyright system in Bangladesh was originated from the British copyright system and later the copyright ordinance, 1962, an amalgamation of existing different copyright laws was promulgated. This ordinance was administered up to 1999. After that, the Copyright Act, 2000 was enacted in 2000 and was amended in 2005. In addition, "The Penal Code of Bangladesh" comprises several penal laws against the violations of various intellectual property rights (IPR). Bangladesh participated in the convention establishing the World Intellectual Property Organization (WIPO) on May 11, 1985. Bangladesh became a member of the Paris Convention for the Protection of Industrial Property in 1991 and of the Berne Convention for the Protection of Literary and Artistic Works in 1999[15]. Bangladesh is a signatory of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of the World Trade Organization (WTO), which came into force on January 1, 1995. The TRIPS Agreement sets detailed, compulsory and common standards for all countries following the dispute settlement system of the WTO. Being a member of LDCs Bangladesh is enjoying the extended transition period to bring herself into compliance with its rules[16].

To comply with the international obligations Bangladesh has introduced intellectual property rights protection system in protecting the rights of IP holders. Innovation is the key driver of economic growth and development in the short & medium to long term[17]. A well-balanced, affordable and reliable system of intellectual property rights has an important role to play in this process[18]. To protect the rights of intellectual property Bangladesh has enacted laws regarding Trademark, Copyright, Patents and designs. The existing laws regarding intellectual property in Bangladesh are as follows:

1. The Patents and Designs Act, 1911.
2. The Trademark Act, 2009.
3. The Copyright Act, 2000.

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15 Naznin, S.M. Atia, *"Protecting Intellectual Property Rights in Bangladesh: An Overview,"* Bangladesh Research Publications Journal, Volume: 6, Issue: 1, (Sept.-Oct., 2011).

16 http://www.markscan.co.in/SiteImg/BRPJ.pdf (Accessed on 20th December, 2014).

17 Naznin, S.M. Atia, *"Protecting Intellectual Property Rights in Bangladesh: An Overview,"* Bangladesh Research Publications Journal, Volume: 6, Issue: 1, (Sept.-Oct., 2011).

18 *Ibid.*

We will discuss the basic features and protection measures for IP under those instruments.

The Trademark Act, 2009

A trademark is a visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured or otherwise dealt in by a particular person as distinguished from similar goods manufactured or dealt in by other persons.

a. Trademark Defined

The Trademark Act, 2009 (hereinafter referred as the Act, 2009) regulates trademarks in Bangladesh. As per section 2(23) of the Act, "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, or numeral or any combination thereof. The Act, 2009 defined trademark as-

(a) any registered trademark or any mark which is used in relation to any goods for the purpose of indicating rights of the user/proprietor of the mark on that goods in the course of trade.

(b) any mark which is used in relation to any service for the purpose of indicating rights of the user/proprietor of the mark on that service in the course of trade[19].

b. Functions of a Trademark

Under modern business conditions a trademark performs four functions[20]-

(a) it identifies the product and its origin; that is, it represents the manufacturing company. For example, Radhuni of Square.

(b) it guarantees its unchanged quality.

(c) it advertises the product.

(d) it creates an image for the product.

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19 Section 2(8) of the Trademark Act, 2009, Bangladesh.

20 Naznin, S.M. Atia, *"Protecting Intellectual Property Rights in Bangladesh: An Overview,"* Bangladesh Research Publications Journal, Volume: 6, Issue: 1, (Sept.-Oct., 2011).

c. Which Marks are required to be registered

It must be distinctive. (Section # 6[21]) Distinctiveness is one of the prime criteria for the registration of a trademark. How distinctiveness can be determined:

(a) Common sense.

(b) Discretionary reaction.

Section 6 of the Act, 2009 imposes some preconditions for registration. Section 6 mentions a trademark shall not be registered unless it contains or consists of at least one of the following particulars, namely-

(a) the name of a company, individual or firm represented in special or particular manner.

(b) the signature of the applicant for registration or some predecessor in his business.

(c) one or more invented words.

(d) one or more words having no direct reference to the character or quality of goods and not being according to its ordinary signification, a geographical name or surname or the name of the sect, caste or tribe in Bangladesh.

(e) any other distinctive mark.

d. Deceptive Similarities are not Acceptable

Section 2(20) of the Act, 2009 "deceptively similar mark" means any mark which is likely to deceive or cause confusion and which is similar to any mark, registered under the Act. Section 10 of the Act, 2009 imposes prohibitions on registering trademarks with similarity or deceptive similarity, which are as follows: Section 10(1): a trademark shall not be registered if it is identical with or deceptively similar to an earlier trademark and goods and services covered by the trademark, registered in the name of another owner. Section 10(2): joint/concurrent uses of a trademark can be approved by the Registrar under suitable terms and conditions for any honest purposes or reasonable causes. Section 10(4): trademark of any goods or service shall not be registered if it is formed by translation of any identical mark or trade description of other business firm which is well-known

[21] Section 6, The Trademark Act, 2009, Bangladesh.

in the country. Section 10 (5): in case of similarity to any well-known trademark, trademark of that goods or service shall not be registered, if – (a) it may create wrong conception that said goods or service has relation with the registered owner. (b) said uses may cause violation of rights or ruin interest of the registered owner. Section 10 (7): prohibitions under the provisions of deceptive similarity shall not make any obstacle to register a trademark if there is consent of the owner of the earlier registered trademark.

Deceptive similarity includes not only confusion but also deception. Factors to be taken into consideration in determining deceptive similarities:

(a) the nature of the marks;

(b) the degree of resemblance;

(c) the nature of the goods or services;

(d) the class of the consumers (their level of education and intelligence);

(e) any other surrounding circumstances.

e. Characteristics of Good Trademarks

(a) it must be easy to pronounce and remember, if the mark is a word;

(b) it must be easy to spell correctly and write legibly;

(c) it should not be descriptive but may be suggestive of the quality of the goods;

(d) it should be short;

(e) it should appeal to the eye as well as to the ear;

(f) it should satisfy the requirements of registration;

(g) it should not belong to the class of marks prohibited for registration.

f. Which Marks are not required to be registered:

As per section 8 of the Act, 2009, no trademark nor part of a trademark shall be registered if –

(a) it comprises or contains scandalous obscene matter;

(b) be contrary to any existing law;

(c) it is of such nature as to deceive the public or to cause confusion;

(d) be likely to hurt the religious susceptibilities of any class of the citizens of Bangladesh;

(e) it uses name, first letter of a name, hallmark, monogram, map, flag, symbol, sign, of a country or international organization or any organization formed through international treaty or convention without approval of the competent authority or person; or it contains identical, partially identical or part of it.

(f) is not fit for obtaining the protection of Court for any other reasons;

(g) any application is made for ill-motives or by adopting unfair means.

g. Registration Procedure

Who can apply and how

Section 15(1)[22]: if the proprietor of a trademark used or proposed to be used desires to register it shall apply in the prescribed manner to the Registrar. As per section 15(2)[23] separate applications must be made for each class of goods or services[24].

Where to apply

Section 15(3)[25]: in case of single applicant, application shall be filed in the office of the Trademarks Registry within whose territorial limits the head office of business of the applicant is situated. In case of joint applicants, application shall be filed in the office of Trademark registry under whose territorial limits the head office of business of the applicant whose name is first mentioned in the application is situated. As per section 15(4) of the Act, if the applicant does not carry on business in Bangladesh, application is to be submitted in the office of the Trademarks Registry where the correspondence office of the applicant is situated.

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22 The Trademark Act, 2009, Bangladesh.

23 *Ibid.*

24 Section 15 of the Act 2009.

25 The Trademark Act, 2009, Bangladesh.

h. Registration

As per section 20 of the Act, 2009 the Registrar shall register an applied trademark giving effectiveness from the date of application on the following situations:

(a) an application for registration of a trademark has been accepted;

(b) the application has not been opposed and the time for notice of opposition has expired;

(c) the application has been opposed, and the related decisions has been taken in favour of the applicant.

As per section 20(2), on registration of a trademark, the Registrar shall issue to the applicant a certificate in the prescribed form, sealed with the seal of the Trademarks Registry.

i. Duration, Renewal and Restoration of Registration

As per section 22(1)[26], duration/tenure of the registration of a trademark shall be for a period of seven years, but may be renewed. As per section 22(2)[27], upon application made by the proprietor in the prescribed manner and subject to payment of prescribed fee, the Registrar shall renew the registration of a trademark for a period of ten years from the date of expiration of the original or renewed registration. Unless renewed, the trademark will be public property.

j. Infringement of Trademark

Infringement of trademark means using a registered trademark without the consent of its registered proprietor. Section 26(1)[28] defines infringement as "if a person, not being registered proprietor or user, uses any distinctive or deceptively similar trademark in relation to goods or service in his own trade, it will be considered that he has infringed a registered trademark.

[26] The Trademark Act, 2009, Bangladesh.

[27] *Ibid.*

[28] *Ibid.*

k. Which Categories of Trademark will be Treated as Infringement

As per section 26(2)[29], using such trademarks that falls under the following categories will be treated as infringement:

(a) marks identical and goods or service similar;

(b) marks similar and goods or service identical;

(c) marks identical and goods or service identical;

Using following marks will also be considered as infringement as per section 26(3):

(a) Marks identical or similar and goods or service not similar. For example, an application to register "Gluvita" as a trademark for biscuit was refused, because similar trademark "Glucovita" is being used for glucose powder by another registered use.

(b) Using a mark without due causes takes unfair advantage of or is detrimental to the distinctive character or repute of a well-reputed registered trademark in Bangladesh.

l. Defenses of the Defendant

In a case of infringement of a trademark, the defendant may plead one or more of the following defences as may be applicable to his case:

(a) the plaintiff has no title to the suit;

(b) registration of the mark is not valid and is liable to be expunged;

(c) the use of the mark complained of is not an infringement of the registered trademark;

(d) the defendant's use is prior to the registration and use of the plaintiff.

(e) the defendant has a right to use by virtue of honest concurrent use;

(f) the plaintiff's trade is fraudulent, or his trademark is deceptive.

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[29] *Ibid.*

As per section 26(8)[30], if the defendant in a case of infringement of a trademark can satisfy the Court of the followings:

(a) the use complained is not likely to deceive or cause confusion to the people;

(b) it does not indicate a business relationship between the proprietor/user of a registered trademark and any goods or service under such mark complained of;

In such case, the Court will not impose any sanction or grant any other relief in favour of the plaintiff.

The Copyright Act, 2000

The basic legal instrument governing copyright law in Bangladesh is the Copyright Act, 2000 (hereinafter referred as the Act, 2000).

a. Objects of Copyright

According to section 15[31] copyright subsists in

- literary works
- dramatic works
- musical works
- artistic works (*i.e.* painting, sculpture, drawing, engraving or a photograph, a work of architecture and any other work of artistic craftsmanship)
- cinematographic films
- sound recordings

and includes computer programmes (s. 14 sub-s. 2[32]) as well as addresses and speeches (s. 17 cl. d[33]). Foreign works are covered by section 69 read with the International Copyright Order, 2005.

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30 *Ibid.*

31 Section 15 of the Act, 2000, Bangladesh.

32 The Copyright Act, 2000, Bangladesh.

33 *Ibid.*

b. Owner of Copyright

The first owner of copyright in general is the author (exceptions: works for hire, Government works; s. 17[34]). The owner of copyright may assign the copyright (s. 18[35]) or grant any interest in the copyright by license (s. 48[36]). Licenses may also be granted by the Copyright Board (ss. 50–54[37]). Registration of copyright with the Copyright Office is not obligatory, but if registration has taken place the Register of Copyrights gives prima facie evidence of the particulars entered therein (s. 60[38]).

c. Term of Copyright

Copyright in a literary, dramatic, musical or artistic work published within the life time of the author subsists until 60 years from the beginning of the calendar year next following the year in which the author dies (s. 24[39]). Copyright in a cinematographic film (s. 26[40]), a sound recording (s. 27[41]), a photograph (s. 28[42]), a computer programme (s. 28A[43]) or a work of the Government, a local authority or an international organization (ss. 30–32[44]) subsists until 60 years from the beginning of the calendar year next following the publication of the work.

d. Meaning of Copyright

Copyright means inter alia the exclusive right

- to reproduce the work
- to issue copies of the work to the public
- to perform or broadcast the work

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34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

- to make any translation or adaption of the work (for details see s. 14).

In addition, special moral rights lie with the author (s. 78[45]) as well as a droit de suite (s. 23[46]).

e. Copyright Infringement

When copyright is infringed (s. 71[47]), the owner of copyright (as well as the exclusive licensee) is entitled to certain civil remedies (injunction, damages, accounts; s. 76). Jurisdiction lies with the court of District Judge of the place where the person instituting the proceeding resides or carries on business (s. 81). Infringing copies are deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof (s. 79). Infringing copies may be seized by the police (s. 93) and can be forbidden to be imported (s. 74). Copyright infringement may also lead to criminal charges (ss. 82 to 91) to be tried by no court inferior to that of a Court of Sessions (s. 92[48]).

The Patents and Designs Act, 1911

Patent is a right of an inventor upon his new invented thing. It is a document issued by the Registrar of the Department of Patents, Designs and Trademarks to the inventor as regards his invented thing by which he can exclude others from unauthorized use. In order to make, use or sell anything, the owner of a patented invention must seek authorization from the Department. The Patentee may use his rights himself or assign them or grant licenses.

An invention must meet several conditions if it is to be eligible for patent protection. These, most significantly, that the invention must consist of patentable subject matter, the invention must be industrially applicable (useful), it must be new (novel), it must exhibit a sufficient "inventive step" (be non-obvious), and the disclosure of the invention in the patent application must meet certain standards[49]. Any person, whether he or she is

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45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 The Patents and Designs Act, 1911.

a citizen of Bangladesh or not, and either alone or jointly with any other person, may apply for a patent. The protection conferred by the patent is limited in time (generally 20 years); but in Bangladesh it is 16 years. Any person who is interested to get patent letter or patent protection he must make an application to the Patent Office by fulfilling the conditions of the Act, that is, an invention must have industrial applicability, novelty and non-obviousness (inventive step); it should not be contrary to law or morality[50].

If any person makes sells or uses an invention without the license of patentee, or counterfeits it, or imitates it is an infringement of a patent. If there is an infringement of a patent by any person, the patentee may institute a suit against the person in a District Court having jurisdiction to try the suit. The legislation provides remedies for any infringement of a patent. The remedy is civil in nature, and includes both interim and final remedies. The interim or preliminary remedies include an order for an injunction, inspection or account while final remedies include financial compensation[51].

Legal Action and Remedies

1. **Civil remedies -** Civil suits offer remedy for claiming compensation for infringement of copyright and loss of profits as well. The owner of the copyright can file civil action in which reliefs such as Anton Pillar Order injunction, accounts and damages can be sought. A suit or other civil proceedings involving to infringement of copyright is to be filed in the Court of District Judge, within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant[52].

2. **Criminal remedies -** Criminal remedies grant for the imprisonment of the accused or imposition of fine or both, seizure of infringing copies etc. Normally a person can claim under Penal Code of Bangladesh for criminal misappropriation. But criminal proceedings are available in order to punish the persons who have violated the copyright law under Copyright Act as special law. The infringement of copyright is a cognizable offence and is punishable with imprisonment for a period extending from six months to four years and a fine ranging from Tk.

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50 *Ibid.*

51 *Ibid.*

52 Code of Civil Procedure, 1908.

50,000/- to Tk. 2,00,000/[53]. The Act also provides for seizure of infringing copies and confiscation of all duplicating equipment used for manufacturing counterfeit copies. However, if the court is satisfied that infringement is committed without having an intention for profit or non-commercial purpose, the court may give lesser punishment, which may be imprisonment for less than six months and fine for less than 50,000 taka[54]. However, in case of piracy of computer programs, the amount of fine is extended by an amendment[55], which is now minimum Tk.1,00,000 and maximum Tk.4,00,000[56], if it is committed for commercial purpose. However, in case of mere use of infringing copy or if the court is satisfied that it is committed for non-commercial purpose; the court may impose lesser punishment and lesser fine as well.

3. **Administrative remedies -** The owner can move to the Registrar of copyrights to ban the import of infringing copies into Bangladesh, when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright.

4. **Patents-** Under the Patents and Designs Act, 1911 the remedy is available in form of injunction, delivering up of infringed patented product, damages for an account of the profits. Besides, certain acts of infringement have been made liable to be punished by offences to be judged by criminal courts.

5. **Designs-** The Patents and Designs Act, 1911 provides civil remedies for the infringement of the copyright of a registered design[57]. Last but not the least, level of skill and awareness of public in general, government officials and profession regarding IP rights is at a marginal stand[58].

Department of Patents, Design and Trademarks (DPDT)

Initially, the Patent Office and the Trademarks Registry Office worked separately under the Controller of Patents & Designs and Registrar of

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53 The Copyright Act, 2000, Bangladesh.

54 *Ibid.*

55 The Copyright Amendment Act on May 18, 2005.

56 *Ibid.*

57 Supra Note 27.

58 S.M. Atia, Naznin, "Protecting Intellectual Property Rights in Bangladesh: An Overview," *Bangladesh Research Publications Journal,* Volume: 6, Issue:1, (Sept.-Oct., 2011): Pg.-20-21.

Trade Marks respectively. Both offices were merged into the Department of Patents, Design & Trademarks in 1989. They are entrusted with the responsibilities of administering the activities of DPDT[59]. The patents and design wings of the DPDT deals with the matters related to patents and designs, while the trademark registry wing grants registration for trademarks. The DPDT is also expected to administer GIs and utility models, after the respective laws, which are in the process of formulation, are enacted. The DPDT is located in Dhaka and has one regional office at the port city of Chittagong. It does not have any institutional arrangements with any district level organization or department to provide regional services on behalf of them[60]. The DPDT operates in an inadequate office space and does not have a separate establishment for preserving records. As a consequence, the records are maintained manually within the office premises and there are chances of loss and misplacement of credentials. There are several other limitations including a shortage of adequate economic resources and manpower. Moreover, DPDT staffs do not bear adequate technical and legal knowledge on IP issues. It is rare for the technical personnel and managers of the DPDT to avail opportunity to avail in country or foreign trainings on IP issues and acquire specialized knowledge on' the subject. With support of an EU-funded project, a very basic level of automation was accomplished in the DPDT, which covers nearly 5% of the total activities of the organization[61].

Findings

We have examined the historical evolution and the development of intellectual property law in Bangladesh. We also tried to identify the factors contributing to the infringement of intellectual property rights. The motive of this study was also to find out the enforcement procedure of national IP laws for the protection of intellectual property rights. On the basis of all this discussions, this paper has some findings as are given below:-

1. Intellectual properties laws in Bangladesh are not adequate. Some of them are not compatible with international treaties and conventions. Some of them are not advanced with the digital based society.

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59 http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/notices/5c4a8a90_d825_46f9_8cc8_3505e47e0053/IP%20Policy.KS.pdf (Accessed on 22nd December, 2014)

60 *Ibid.*

61 *Ibid.*

2. In Bangladesh there are no laws on trade secrets, unfair competition, geographical indication and lay out design (topographies) of integrated circuits still today.

3. Institutional capacity of DPDT (Department of Patents, Designs and Trademarks) and Copyright Office are very poor due to manual system, shortage of number of officers and staff, expert on intellectual property.

4. Besides, peoples are not aware about these rights.

5. Copyright piracy is very frequent and the rate is highest amongst the world.

Recommendations

1. Introducing basic concept on IP laws to the undergraduates and post graduates courses in colleges and universities with specific courses;

2. Creating alertness through seminar, symposiums and national workshops among the all classes' educated people of the country;

3. Establishing IP Protection courts, at least, in the divisional level and training the judges and advocates and thus making the skilled;

4. Developing mechanism to ensure prompt and cheap resolution of disputes and litigation by infringement;

5. Employing special branch of the members of law forces for the implementation of the IP laws and training them;

6. Introducing new laws on trade secrets, unfair competition, geographical indication and lay out design of integrated circuits;

7. Modernizing or introducing a new Patents and Designs Act; as the 1911 Act is not compatible with international treaties and convention;

8. Updating Trademark Rules; because Trademark Rules 1963 are unable to meet the IP requirement of 2020. Besides, under the 2009 Act, new provision of collective mark has been inserted but the procedure of registration of it has not been point out in the Act, 2009. The procedure of publication of trademark journal is not specified in the current law; it should be determined by the new rules. Different forms

of trademark, service mark, certification mark or collective mark should be updated to maintain the uniformity of the digital based society. So, the replacement of 1963 Rules with a new one is a necessity; and,

9. Appointing necessary officers and staff for the DPDT and Copyright office and training them on IP laws at home and abroad.

Conclusion

The development and protection of intellectual property rights largely depends on the useful enforcement mechanism. Strong enforcement mechanisms for the protection of intellectual property rights promote an environment in which creative and innovation industries can thrive and contribute to economic expansion. Though the government has modernized laws on the point but it is evident from the above discussion that the present legal framework as well as administrative set up is insufficient to provide expected protection of intellectual property for entrepreneurs who seek to protect their invention, trademark and other intangible business property. In any initiative for better protection and promotion of the rights of IP holders the significance of enhancing public consciousness and skills of concerned officials of the authorized departments can hardly be inflated. An equitable, modernized and protected IP rights regime provides recognition and material benefits to the originator, constitutes motivations to the inventors and innovative activities. In order to maximize utilization of intellectual property rights there is no alternative amending legislation in this area. But the most significant thing is the awareness of people in general that can only stop the rampant violation of intellectual property rights. Thereby, the government should not only formulate and reform the law on this context rather, should take all crucial steps to make people conscious. Every people should know that they have right for everything both inside and outside.

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