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Mission & Vision

Bangladesh Institute of Legal Development (BiLD) is to serve as a Center for comparative research of legal development in Bangladesh. The institute is committed to scholarly activities as well as legal development programs across the country. It has focuses on several programs. It is to strive to be an internationally recognized research center in the sector of legal research, development, publication and education in Bangladesh and rest of the world. As an independent legal research institute, the Institute is committed to a healthy and respectful environment of free intellectual inquiry and exchange, and the protection of freedom of thought.

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 constitutional law, adoption related law, construction laws and others. I hope that the articles published in the second issue of the second 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 Advisory Board for their kind support and valuable advising. BiLD family is deeply indebted to them for the time and effort that they put into the journal. Words are inadequate to express our gratitude to them because it would not be possible to publish the issue of the journal without their constant support and immense sustenance.

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

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

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

Finally, I certainly hope you all will enjoy this second issue of the second 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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Integrated Circuit Layout Design Protection Law: Bangladesh and International Perspective

Dr. Md. Nayem Alimul Hyder[1]
Dr. Md. Abdul Jalil[2]

Abstract

The layout designs of integrated circuits are creations of human intellect and that is why it is known as intellectual property (IP). It takes enormous investment of time and money to invent a new layout design of integrated circuits or to renovate the existing integrated circuits. But a chip pirate can easily replicate the layout design of a chip in a few months by removing the chips plastic/ceramic casing and photographing each layer of the translucent silicon material at a fraction of the original cost. The objectives of this study are to discuss the current situation of legal protection of integrated circuit layout designs in Bangladesh, to identify various international legal instruments on integrated circuit layout design and to highlight the necessity and significance of enactment of a new law on integrated circuit layout designs in Bangladesh. Secondary sources have been used in this research. The article has been written based on the Washington treaty, TRIPS Agreement, the Semiconductor Integrated Circuit Layout Design Act 2000 in India, different books, articles of prominent researches, newspaper reports and websites. Some important findings have been stated at the end of the research. The article suggests introducing a new legislation on layout design (topographies) of integrated circuits in Bangladesh.

Keywords: IP Law, TRIPS Agreement, Semiconductor Integrated Circuit Layout Design Rights, Piracy, New Legislation, Lack of Awareness, Expert Training.

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Methodology

The paper shows the present situation of integrated circuit layout design protection law under the current IP laws of Bangladesh. Qualitative research methodology has been adopted in this research. The study is basically literary based with an overall combination of analytical reasoning. Secondary sources have been used in the research. The article is mainly based on Washington treaty, TRIPS Agreement, the Semiconductor Integrated Circuit Layout Design Act 2000 in India, books, articles of prominent researches, newspaper reports and websites.

Objectives of the Study

The objectives of the research are as follows:

1. To discuss the current situation of legal protection of integrated circuit layout designs in Bangladesh;
2. To identify various international legal instruments especially Indian legislation on the protection of integrated circuit layout designs;
3. To recommend the enactment of a new legislation on integrated circuit layout designs for Bangladesh.

Introduction

In intellectual property arena integrated circuit layout design are playing a significant role. In modern technology, integrated circuits are essential elements for a wide range of electrical products including articles of everyday use, such as watches, television sets, washing machines, cars, sophisticated computers, smart phones and other digital devices. Developing innovative layout designs of integrated circuits is essential for the production of ever-smaller digital devices with more functions. While the creation of a new layout design is usually the result of an enormous investment, in terms of finance and time required from highly qualified experts, the copying of such a layout design may cost only a fraction of the original investment. Such copying or infringement of integrated circuit design will discourage research, invention, development and investment of huge amount of money.

In order to prevent unauthorized copying of layout designs and to provide incentives for investing in this field, the layout design (topography) of integrated circuits is protected under a sui generis intellectual property

system. The objective of this article inter alia is to evaluate the present position of integrated circuit layout design law in Bangladesh and to suggest for the enactment of a new legislation on integrated circuit layout design in Bangladesh which will encourage the entrepreneurs to invest money in this field of technology.

Meaning of Technical Terms

An integrated circuit (or "chip") is an electronic device that incorporates individual electronic components within a single "integrated" platform of semiconductor material, typically silicon, configured so as to perform a complex electronic function. Typically, an integrated circuit comprises active elements such as electronic switches and gates (like transistors or diodes) and passive electronic components (such as resistors and capacitors). Broadly speaking, integrated circuits are classified into microprocessors and memories. A microprocessor typically performs information-processing functions because it has logic circuits capable of electronically performing information processing. Memories enable storing and retrieval of data. An integrated circuit is thus formed when a miniaturized electrical circuit is embodied within a chip. All the active and passive components are created in the semiconductor wafer during the fabrication process itself and are therefore inseparable once the chip has been produced. For the purpose of intellectual property protection, the terms ‘integrated circuits’ and ‘layout design (topography)’ are defined as follows:

- An ‘integrated circuit’ means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

- ‘Layout-design (topography)’ means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

- Layout-designs of integrated circuits are also called topographies of integrated circuits or mask works of semiconductor chip products.

Picture 01: Integrated circuit layout design

A layout design of an integrated circuit can be protected if it is original and new in the sense that it is the result of the creator's own intellectual effort and not commonplace among creators of layout designs and manufacturers of integrated circuits at the time of the creation.

In general, protection of the topography requires that an integrated circuit be registered or commercially exploited. In general, the owner has the exclusive right to prevent or stop others from commercially using the protected layout designs. In other words, the original layout design cannot be reproduced entirely or partly for commercial purposes by others, without the authorization of the holder of the right. Further, without the authorization of the owner a protected layout design of integrated circuits cannot be incorporated on any article or an article incorporating such a layout design cannot be imported, sold or otherwise distributed for commercial purposes in Bangladesh.

The terms of protection vary from one country to another. According to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), members must provide for a minimum protection of at least ten years from the filing of the application for registration or from the first commercial exploitation of integrated circuits.

Importance of the Protection of Layout Designs of Integrated Circuits

The layout designs of integrated circuits are creations of human thinking. Entrepreneurs invests huge amount of money, time and energy to produce a new layout design. But a chip infringer can easily replicate the layout design of a chip in few months without investing money, time and energy. Integrated circuits are manufactured in accordance with very detailed plans or layout designs. They are usually the result of vast investment, of both expertise and financial resources. There is a continuing need for the

creation of new layout designs that reduce the dimensions of existing integrated circuits and simultaneously increase their functions and facilities. Whilst creating a new layout design for an integrated circuit involves a major investment, it is possible to copy such a layout design for a small fraction of that cost. Copying may be done by cloning each layer of an integrated circuit and preparing masks for the production of the integrated circuit on the basis of the cloning obtained. The high cost of the creation of such layout designs and the relative ease of copying are the main reasons why layout designs need protection in order to foster sustainable investment and innovation in the field. While the exclusive right to the topography is intended to encourage creativity, the possibility of reverse engineering by others for the purpose of evaluation, analysis, research or teaching is meant to strike a balance in order to enable improvements of existing integrated circuits and their compatibility.[3]

Hence, we can say that it is essential to protect integrated circuit layout design to encourage investors to invest money for research and invention of new integrated circuit layout design or to renovate the existing integrated circuit layout design for better functions and services.

International Instruments regarding Protection of Integrated Circuit Layout Designs

The Universal Declaration of Human Rights (UDHR) 1948 provides: "Everyone has the right to the protection of moral and material interests resulting from scientific, literary or artistic production of which he is the author."[4]

Protection to semiconductor chips was first given in the US through Semiconductor Chip Protection Act (SCPA) in 1984 and its impact was felt virtually throughout the world. Japan introduced similar protection in 1985, viz., Japanese Circuit Layout Right Act (JCLRA). An EC Directive,[5] with implementing legislation in all Member States of the EU accelerated international efforts resulting in formulation of 1989 Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) under the auspices of WIPO. The IPIC Treaty was later made part of the TRIPS

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3 Patent Expert Issues: Layout Designs (Topographies) of Integrated Circuits, available online: http://www.wipo.int/patents/en/topics/integrated_circuits.html, accessed on 10.07.17

4 Article 27(ii), The Universal Declaration of Human Rights (UDHR), 1948.

5 [1987] 24 OJL 30.

Agreement. TRIPS called for adherence to most of the substantive provisions of the IPIC Treaty.[6]

A diplomatic conference was held at Washington, D.C., in 1989, which adopted a Treaty on Intellectual Property in Respect of Integrated Circuits, also called the Washington Treaty or IPIC Treaty. The Treaty, signed at Washington on May 26, 1989, is open to Members States of WIPO or the United Nations and to intergovernmental organizations meeting certain criteria. The Treaty has been incorporated by reference into the TRIPS Agreement of the World Trade Organization (WTO), subject to the following modifications: the term of protection is at least 10 years from the date of filing an application or of the first commercial exploitation in the world. But Members may provide a term of protection of 15 years from the creation of the layout design. The exclusive right of the right-holder extends also to articles incorporating integrated circuits in which a protected layout design is incorporated, in so far as it continues to contain an unlawfully reproduced layout design. The circumstances in which layout designs may be used without the consent of right-holders are more restricted. However, certain acts engaged in unknowingly or for research purpose will not constitute infringement.

The IPIC Treaty is currently not in force, but was partially integrated into the TRIPS agreement. Article 35 of TRIPS in Relation to the IPIC Treaty states:

> "Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions."

Article 2 of the IPIC Treaty gives the following definitions of integrated circuit and layout design:

(i) 'integrated circuit' means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the inter-connections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

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[6] Article 35 of TRIPS Agreement obliges adherence to Article 2 to 7 [other than Article 6(3) on compulsory licences], Article 12 and Article 16(3) of the IPIC.

(ii) 'layout-design (topography)' means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture ...,

Under the IPIC Treaty, each contracting party is obliged to secure, throughout its territory, exclusive rights in layout designs (topographies) of integrated circuits, whether or not the integrated circuit concerned is incorporated in an article. Such obligation applies to layout designs that are original in the sense that they are the result of their creator's own intellectual effort and are not commonplace among creators of layout designs and manufacturers of integrated circuits at the time of their creation.

The contracting parties must, as a minimum, consider the following acts to be unlawful if performed without the authorization of the holder of the right: the reproduction of the lay-out design, and the importation, sale or other distribution for commercial purposes of the layout-design or an integrated circuit in which the layout-design is incorporated. However, certain acts may be freely performed for private purposes or for the sole purpose of evaluation, analysis, research or teaching.[7]

In a US case *Brooktree Corp. v. Advanced Micro Devices Inc*., 977 F.2d 1555, 1564-65 (Fed. Cir. 1992), the court held that infringement under the SCPA does not require that all parts of the chip be copied. Specifically, mask works fixed in a chip were held to infringe a protected mask work even though the infringing mask works were only eighty percent similar to the protected mask work. Two problems remain with the Federal Circuit's reliance on copyright law. First, the appropriateness of applying copyright law, which protects aesthetic rather than functional designs, remains in question since mask works are functional. Second, the interpretation of infringement under the SCPA remains uncertain even after Brooktree because the courts have yet to articulate a certain standard for finding infringement under the SCPA.

Indian Perspective

India has enacted a special legislation on the Semiconductor Integrated Circuits Layout Design Act, 2000. It gives recognition to a new form of

[7] Ahmed, Rajin, "Layout Designs of Integrated Circuits". Law Help BD(May 27, 2017), downloaded from http://lawhelpbd.com/intellectual-property/layout-designs-integrated-circuits, accessed on 15.07.17.

intellectual property, namely, the 'layout-designs' used in semiconductor integrated circuits as has been defined under section 2(h) of the Act. As a member of TRIPS Agreement, India has enacted the Semiconductor Integrated Circuit Layout Design Act, 2000. The Semiconductor Integrated Circuit Layout Design Act 2000, protects original, inherently distinctive layout designs that have not been previously commercially exploited and registration is a necessary pre-requisite for protection. The Act makes provision for a registry to be headed by a Registrar for the purpose of registration of layout designs. Protection under the Act extends for ten years and commences from the date of application for registration in case of layout designs which have not been commercially exploited. For layout designs, which have been commercially exploited (for less than two years) before the date of application for registration, protection commences retrospectively from date of first commercial exploitation. The registered-proprietor has the exclusive right to reproduce by any means the registered layout design or any substantial portion of it. But the Act permits 'reverse-engineering' of a layout design for limited purposes. The registered proprietor also has the exclusive right to import, sell or distribute for commercial purpose any semiconductor chip products in which the registered layout design is embodied. The Act provides for criminal remedies for the infringement of a layout design expressly, civil remedies too are available to enforce rights under the Act. A registered layout design can be assigned or transmitted with or without the goodwill of the business concerned. Registration of assignment or transmission is necessary to establish title to the registered layout design. The Act also provides for reciprocal arrangements between convention countries.[8] Following are the highlights of Indian legislation (SICLD Act 2000)[9]:

- There is protection of semiconductor integrated circuits layout and designs by a registration process.
- There is a mechanism for distinguishing which layout designs can be protected.
- There are rules to prohibit registration of layout designs which are not original or which have been commercially exploited.
- Protection of 10 years period is provided to layout designs.

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[8] Gupta, Atul, "Integrated Circuits and Intellectual Property Rights in India", Journal of Intellectual Property Rights, Vol. 10, November 2005, pp. 474-479.

[9] Rajkumar, Dubey, Semiconductor Integrated Circuits Layout Design In Indian IP Regime (24 September 2004), downloaded from http://www.mondaq.com/india/x/28601/technology/Semiconductor+Integrated+Circuits+Layout+Design+In+Indian+IP+Regime

- Provisions regarding infringement and evidence of validity are mentioned.

- There are provisions for determining payment of royalty for registered layout designs in case of innocent or unintentional infringement.

- Penalties in the form of imprisonment and fine are imposed for willful infringement and other offences in the Act.

- The Registrar is appointed for the purpose of registration of ICLD and the Appellate Board is established for facilitating the legal remedies.

Current Situation in Bangladesh

The Constitution of Bangladesh in its Article 42 guaranteed the citizens' right to property. And within the general definition of property, property produced through creative thoughts can also be included. To support this proposition it is better to argue that 'the concept property has been expanded by courts to include practically all rights. Thus patents, licenses, trademarks, copyrights, industrial designs and integrated circuits layout designs are held to be property distinct from physical or material property.'[10] Following this proposition it can be argued that, Constitution, the supreme law of the land gives recognition of the intellectual property rights in express terms. In Bangladesh there are some laws regarding protection of intellectual property rights, such as Patent Act 1911, Trademark Act 2009, Copyright Act 2000, Geographical Indications Act 2013 etc. However, there are no laws on integrated circuit layout design in Bangladesh. The Law Consultants are trying to make a draft for the Layout Design (Topographies) of Integrated Circuit Bill. Integrated circuits are used in virtually all electronic equipment today and have revolutionized the world of electronics. Computers, mobile phones and other digital home appliances are now inextricable part of the structure of modern societies. It became possible due to the low cost, small size and less weight of integrated circuits. These integrated circuits improved the functional performance of every gadget in which they were being attached. When these integrated circuits became so much important, the need for protecting them also aroused. The main problem here which is also common to all IPs is the problem of piracy, as it is clear that the structure

[10] Munim, F. K. M. A., Rights of the Citizen under the Constitution and Law, Bangladesh Institute of Legal and International Affairs (BILIA), Dhaka, 1975.

and components of integrated circuits are not protected. In Bangladesh electronic goods market is flooded with counterfeit and substandard items due to legal loopholes and inaction of the law enforcers against the unscrupulous importers and traders, stakeholders.[11] The primary reason behind the growth of counterfeit products is the consumer's lack of awareness and understanding of the difference between fake and original products and intellectual properties. It can be said that Bangladesh is suffering from the absence of any specific law on the protection of integrated circuit layout designs.

Findings

1. Piracy of Integrated Circuit layout design is very common affair in Bangladesh.

2. Intellectual property protection is not up to the mark in Bangladesh. The IP related laws in Bangladesh are in a very premature form and few in number. That's why a large area of IP rights cannot be protected.

3. There is no specific law or provision for the protection of integrated circuit layout design.

4. Level of skill and awareness of public in general, government officials and professionals on IP rights is at a marginal stand.

5. Government agencies are not well equipped to combat the enemies of IP rights especially for IC related crimes.

6. Even experts on integrated circuit layout design have inadequate knowledge and idea on the legal protection.

7. There is lack of manpower in the government and private agencies regarding IP rights.

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[11] Ahsan, Badrul, "Fake, substandard electronic goods flood local market", The Financial Express (25 August 2013), available online: http://print.thefinancialexpress bd.com/old/ index.php?ref=MjBfMDhfMjVfMTNfMV8xXz E4MDk1Ng==

Suggestions

Under the above circumstances, the following steps should be taken to protect integrated circuit layout design (ICLD):

1. Introducing basic concept on IP laws to the undergraduate and postgraduates students in colleges and universities.

2. Enacting new laws on layout design (topographies) of integrated circuits by the parliament.

3. Creating awareness through seminar, symposiums and national workshops among the all classes of educated people of the country. Both government as well as private sectors may be involved here.

4. Establishing IP Protection courts, at least, in the divisional level and training the judges and advocates and thus making experts in this field.

5. Developing ADR mechanism to ensure speedy and cheap resolution of disputes and litigation related to infringement.

6. Employing special teams of the members of law forces for the implementation of the IP laws and providing them adequate training.

7. Recruiting necessary officers and staff for integrated circuit layout design (ICLD) office and training them on IP laws at home and abroad.

Conclusion

The intellectual property protection for integrated circuit layout design is a key factor throughout the world, and more so in Bangladesh because it does not have a strong intellectual property protection policy in software. Bangladesh is a developing country in order to turn her into mid-developed one; there is no alternative to give priority on IP rights and laws. By removing the present challenges which have been shown in the paper, better IP protection can be ensured for the entrepreneurs who can turn Bangladesh into an industrially developed country. The SICLD Act fulfils India's obligation under the TRIPS agreement as approved by the members of WTO. The Indian legislation therefore provides a comprehensive protection to the layout designs of the semiconductor integrated circuits as recognized intellectual property and bundle of rights to the proprietor of the registered layout design. As integrated circuit

layout designs are in its early stage in Bangladesh, it is important that the country should boost strong protection policy by enacting Integrated Circuit Layout Design Act. The number of Bangladeshi companies focusing on integrated circuit layout designs is beginning to grow and this would force major semiconductor companies to set up their offices and to address the needs of the domestic market. This will encourage a lot more companies to base their operations in Bangladesh.

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The Recent Role and Views of Bangladesh Judiciary in Enforcing Right to Life, Liberty and against Inhuman Punishment: A Study

Md. Milan Hossain[1]

Abstract

The judiciary is an important organ of the State assigned by constitutional laws and general laws to protect and enforce citizens' rights either fundamental or non-fundamental legal rights. The main objective of this paper is to determine the role of the judiciary in protecting citizens' rights special reference right to life, liberty and right against inhuman treatment or punishment in the recent years particularly in the period (2008-2016); another objective is to examine what judicial views have been developed on the said rights in the mentioned period; next is to find out what are reality for citizens regarding their rights; and lastly is to identify the problems which were really hampering the judiciary in protecting citizens' rights special reference to life, liberty and right against inhumane treatment or punishment. In this paper, it is found that the judiciary has upgraded its role in protecting citizens' rights special reference to life, liberty and right against inhuman treatment or punishment in the several judicial pronouncements in recent years particularly in the period (2008-2016). It is also found that the judiciary could not show better performance overall in the said period as its disposal rate of cases was lesser than filing of cases due to many existing problems (Identified in Problems' Section). The reality comes out that along with the trend of pending cases, the numbers of extra-judicial killings and enforced disappeared citizens are gradually increasing each year in the said period except one or two cases which are giving alarming message to the citizens regarding their right to life, liberty and right against inhuman treatment or punishment (See Real Scenario Section).

Keywords: Judiciary, Citizens' Rights, Separation, Subsequent Period (2008-2016).

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Introduction

Judiciary is an important organ of the state assigned to protect, enforce citizens' rights and to establish the rule of law. Such organ is the custodian and protector of the citizens' rights including the right to life or liberty and right against inhumane treatment or punishment (8 SCOB AD1). The term 'Judiciary' refers to all courts and tribunals of a country. Bangladesh judiciary can be classified broadly into (i) the Supreme Court of Bangladesh (The Constitution of the People's Republic of Bangladesh, art.94) (hereinafter as the Constitution) and (ii) the subordinate courts (the Constitution, Art. 114); The Supreme Court is the highest court in Bangladesh having two Divisions (a) High Court Division (hereinafter as HCD) and (ii) Appellate Division (hereinafter as AD). The onerous responsibility of the Supreme Court is to protect citizens' fundamental rights including right to life, liberty and right against inhumane treatment or punishment enshrined in Part-III of the Constitution. The Supreme Court is empowered and guaranteed by the Constitution (Art. 44 & 102) to protect such rights. The subordinate courts are lower judiciary consisting of district civil, criminal or special courts. They are also assigned by the existing general laws of the country to provide remedies for protecting and enforcing citizens' non-fundamental legal rights relating to life, liberty or right against inhumane treatment or punishment. It is apt to state that generally the subordinate courts can give remedies available under the general laws for the infringement of non-fundamental rights and that the Supreme Court can enforce citizens' fundamental rights including right to life, liberty and right against inhuman treatment or punishment. It is also important to state here that the Supreme Court can also give remedies for the infringement of non-fundamental rights if all alternative remedies are exhausted (66 DLR 475). Therefore, it can be said that the higher judiciary can issue writ orders for the enforcement of fundamental rights as well as of non-fundamental legal rights [64 DLR (AD) 152]. Bangladesh Judiciary was officially separated in 1st Nov.2007. In the separation subsequent years particularly in the period (2008-2016) what is the role of the judiciary in protecting and enforcing citizens' rights special reference to right to life, liberty and right against inhuman treatment or punishment, a matter of research.

Objectives

The objectives of the study are as under:

1. To evaluate the role of the judiciary in protecting and enforcing citizens' rights special reference to right to life, liberty and right

against inhuman punishment in the judiciary separation's subsequent time particularly in the period (2008-2016)?

2. To determine the reality in the society regarding citizens' right to life, liberty and right against inhuman treatment or punishment?

3. To identify the problems which are really hampering the judiciary in protecting citizens' said rights.

Methodology

Qualitative and quantitative, both methods have been used in conducting this study. Data have been collected from both, primary and secondary sources. Primary data was collected from litigants, advocates and judges through questionnaires; in case of questionnaire, structured questionnaire, open-ended & close-ended questions were applied. Quantitative secondary data were collected from the registrar office of Bangladesh Supreme Court, from the websites of Bangladesh Supreme Court and Ain O Salish Kendra. Qualitative data were collected through content analysis, document study, case study, and observation method. In order to apply these collected data, analytical approach has been taken as methodology and such data have been presented through table, percentage with the help of MS Word.

Rationale of the Study

The study is mainly focused on the role of the judiciary in protecting and enforcing citizens' rights special reference to right to life, liberty and right against inhuman punishment in the judiciary separation's subsequent time particularly in the period (2008-2016). Such study has been conducted in order to evaluate recent views of the judiciary on the mentioned rights in the mentioned periods and to determine the reality in the society regarding such rights; it is true that many scholars, jurists (as for example, Ahmed, 2001; Ahmed, 2003; Akkas,2004; Alam, 2007; Biswas, 2012; Farooqui, 1996; Islam, 2014; Rahman, 2012; Razzaque, 2000 etc.) worked, or have worked on judiciary, factors of judiciary, citizens' rights or human rights. Under these circumstances, analysis of the recent role of Bangladesh Judiciary in protecting right to life, liberty or against inhuman punishment will create new knowledge. Besides, general people have also immense interest to know how the Judiciary performs in the separation subsequent period. By considering all these facts, this paper has been conducted which will be useful for the people of the society, especially for the litigants,

academicians, judges, advocates; it will be helpful for making policy to remove the obstacles which are hampering the judiciary in enforcing citizens' rights in Bangladesh.

Definition of Right to Life, Liberty and against Inhuman Punishment

The people of a country as citizens are entitled to the rights declared by the supreme law and under general laws of the country where some rights known as citizens' fundamental legal rights; some known as non-fundamental legal rights. Whether citizens' fundamental or non-fundamental rights are recognized and enforced by laws of the country including the supreme law of the land, the citizens of a country as human being are morally entitled to claim human rights for their growth as human beings. But all human rights are not recognized and enforced by law in a country; the recognition, protection and enforcement of some human rights in the Constitution of a country turns them into citizens' fundamental rights or civil & political rights. Right to life, liberty and right against inhumane treatment or punishment right to movement, right to speech, right to association are examples of such rights; some human rights are also recognize in the constitution of a developing country like Bangladesh, India, Pakistan etc but they are not enforced; they only get priority in taking state policy.

Right to life may be said as the most important right of each citizen of a country as all other rights are accruing and surrounding it. It is an indispensible right of all human being whether he is citizen of a country or stateless people. The Universal Declaration of Human Rights, 1948, Article 3 declares that everyone has the right to life, liberty and security of person. International Covenant on Civil and Political Rights (ICCPR) 1966, Article 6(1) states: "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." Such right is recognized and ensured to the citizens of Bangladesh under Bangladesh Constitution by Articles 31 and 32. Article 32 provides that no person shall be deprived of his life and personal liberties save in accordance with law. Lawful deprivation of life is only justifiable when it is needed to ensure safety, security and personal liberty in the society so that individual citizens can enjoy their life and liberty. Death sentence is valid when it is given to protect the lives of other citizens in the society (Islam, 2012, P. 271). A citizen cannot deprive of his right to life or liberty even in imprisonment or detention (*Ibid*, P. 261). And no action detrimental to life shall be taken except in accordance with law (Art. 31). No one can expect that the state should provide livelihood (means of living) rather citizens think that state should not take any action

or pass any unreasonable law containing inhumane punishment and causing detrimental to his livelihood as livelihood is covered by the term right to life (*Ibid*, P. 255).

The right to life is also explained in several judicial pronouncements by the Supreme Court of Bangladesh and the ambit of such right is being frequently expanded. In *BJMAS* v. *Ministry of Home Affairs* 2008 BLD 580 it is explained as 'the right to life' includes right to security of life which is interpreted as security against natural disasters like earthquake in another case (63 DLR 71). Before these two judicial pronouncements the terms 'right to life' was explained as 'right to protection of health and normal longevity' in a judicial pronouncement (48 DLR 438) and in another as 'right to sound mind & health' (52 DLR 413). Such right may be right to protection and improvement of environment (55 DLR 69); right to a decent and healthy way of life in a hygienic condition; it also means a qualitative life from environmental hazards (*ibid*). Another inclusion we found in 'right to life' in another judicial pronouncement as right to environment and ecology [65 DLR (AD) 181]**.** Personal liberty means the freedom of an individual to act as he or she wishes except lawful restraint by law (Black's Law Dictionary). Each citizen has right to personal liberty for his smooth living in the society (Article, 9 ICCPR, 1966). Article 10, ICCPR, 1966 requires anyone deprived of liberty to be treated with dignity and humanity. If his right is wrongfully restrained by any other individual, group of people, law forces or by even State herself, he or she or his representative can take legal action. Even the HCD can *sou moto* interfere when it comes to its knowledge that liberty of a citizen had been taken away by the unlawful ground by the order of the subordinate court (64 DLR 462).

The constitution guarantees the citizens and non-citizens of Bangladesh from inhuman treatment and punishment as per Art.35 (5) by saying, "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment". The same view is reflected in Article 7, ICCPR, 1966. The higher judiciary also gave rule against torture or to cruel, inhuman treatment or punishment. In this point the HCD held that the very system of remand with a view to interrogation and seeking information by application of force is totally against the spirit and clear provision of the Constitution (55 DLR 363).

The Recent Role of Judiciary in Enforcing Citizens' Right to Life, Liberty and Right against Inhuman Treatment or Punishment

The judiciary is assigned to protect citizens' rights (fundamental and non-fundamental legal rights) including right to life, liberty and equal protection of law under constitutional law (the Constitution, Articles 44 & 102) and general laws of the country and uphold the rule of law. It is rightly said that the Judiciary is the custodian and protector of the citizens' rights (8 SCOB AD1). A citizen can go to the HCD for the enforcement of his fundamental rights including right to life, liberty and equal protection of law directly under Article 102 (1) of the Constitution. He can also go for the enforcement of non- fundamental legal rights under Article 102(2) subject to exhaustion of all efficacious remedies available under general laws in lower judiciary (66 DLR 475). Even a citizen can bring a petition before the Court under Article 102 for the enforcement of fundamental rights though his rights are not directly and personally affected through public interest litigation.

In a case the Appellate Division gave an *obiter dictum* that when any violation of fundamental rights enshrined in the Constitution was alleged as the only ground and no violation of legal right or any provision of law protecting citizen's right was raised, only then resort may be taken to fundamental rights to protect any citizen of such right (61 DLR (AD) 28).

It is pertinent to mention that the higher judiciary cannot give remedies against the violation of rights by a private individual or private corporation, institution etc. In this case, citizens can seek remedies from subordinate district civil or criminal courts under general laws viz. Penal Code, Specific Relief Act. District criminal courts either session courts or judicial magistrate courts can try offences affecting citizens' right to life, liberty and right against inhumane treatment or punishment enshrined in the criminal laws existing in Bangladesh.

The above discussion conveys the theoretical approach regarding the role of the judiciary (both-higher and lower) in protecting citizens' rights where data based study will give a practical role of the judiciary on citizens' rights. Under this circumstance, a data based study regarding number of filing and disposal of cases in the District Session Judge Courts, Equivalent Special Criminal Courts & Tribunals and Judicial Magistrates' Courts in recent years particularly in the period (2008-2016) will convey an idea on the recent role of the judiciary:

Table No.1: Number of Filing and Disposal of cases, in the District Session Judge Courts, (Equivalent Special Criminal Courts & Tribunals) and Judicial Magistrates' Courts in the Period (2008-2016)

	District Session Judge Courts (including equivalent special criminal courts & tribunal)		Judicial Magistrates Courts	
Year	**Filing New Cases**	**Disposal of Cases**	**Filing New Cases**	**Disposal of Cases**
2008	159403	131988	7,58,578	4,42,725
2009	159290	125076	5,92,008	4,62,235
2010	195618	149928	7,41,838	7,09,112
2011	219226	161366	7,06,069	6,71,628
2012	269785	198551	8,00,282	7,25,523
2013	261792	191730	7,51,180	6,62,022
2014	314624	219336	7,92,433	7,34,359
2015	358697	265200	7,76,181	8,47,398
2016	348995	278631	7,32,049	7,80,805
Total	2382043	1552981	66,50,618	60,35,807

Source: High Court Division, Supreme Court of Bangladesh,
Annual Reports on Numbers of Cases of Bangladesh 2008-2016

It is revealed from the above table that within the period (2008-2016) total numbers of filing cases in all sessions' courts are 2382043 whereas the total number of disposal of cases in mentioned courts are 1552981. At the end of year-2016 the total pending cases in session courts stand as 647422 (excluding transfer cases) whereas it was 253832 (excluding transfer cases) in the beginning of the year-2008 (HCD, The Supreme Court of Bangladesh, 2008 & 2016). As a result, in the mentioned period (2008-2016) new pending cases stand as (647422-253832)=393590 (excluding transfer cases) whereas it was 253832 (excluding transfer cases) from the year 1972-2007 for last 36 years (Annual Reports, 2008 & 2016, HCD, Supreme Court of Bangladesh). So the trend of pending cases in the said period (2008-2016) is about twice in comparison with previous period (1972-2007). It is also revealed that in the judicial magistrate courts 66,50,618 cases have been filed in the said period (2008-2016) but 60,35,807 cases have been disposed of in the mentioned period. At the beginning of year-2008 the total pending cases in the judicial magistrate courts were 618671 (excluding transfer cases) which have stood as 865536(excluding transfer cases) at the end of year 2016 (HCD, The Supreme Court of Bangladesh, 2008 & 2016). Therefore, within the said period (2008-2016) new pending cases have been increased as 246865.

This new pending cases have been added to the old list of pending cases in the judicial magistrate courts like session courts. Such data analyses regarding pending cases in criminal courts convey the message that the judiciary has not shown better performance in ensuring the criminal justice to the citizens comparatively in the recent years. As a result, it can be said that affected citizens whose right to life or liberty under threat or pressure or violated have not got quick relief under general criminal laws from the criminal courts in the recent years particularly in the period (2008-2016).

Right to life, liberty and right against inhumane treatment or punishment are citizens' fundamental rights. If they are affected exclusively and if no question of violation of legal right or any provision of law protecting citizen's right to life or liberty was raised under general laws, aggrieved citizens can go to the HCD and bring an action in the form of habeas corpus writ for the enforcement of their right to life or liberty. Under these circumstances by considering the number of filing and disposal of writs in Writ Courts (HCD Benches) in the recent years particularly in the period (2008-2016), we can get an idea regarding the role of the judiciary on ensuring and protecting citizens' right to life, liberty and right against inhumane treatment or punishment which are as under:

Table No.2: Number of Filing and Disposal of writs in Writ Courts in the Period (2008-2016)

Year	Writ Courts (HCD Benches)		Remark
	Filing New writs	Disposal of Writs	Disposal Rate
2008	11,402	8915	Disposal < Filing
2009	8,848	6370	Disposal < Filing
2010	10,175	7303	Disposal < Filing
2011	11,421	10924	Disposal < Filing
2012	17,876	8028	Disposal < Filing
2013	12,958	7473	Disposal < Filing
2014	12843	8688	Disposal < Filing
2015	14,284	13457	Disposal < Filing
2016	16,965	9857	Disposal < Filing
Total	1,16,772	81,015	Disposal < Filing

Source: High Court Division, Supreme Court of Bangladesh,
Annual Reports on Numbers of Cases of Bangladesh 2008-2016

It is evident from the above table that disposal rate was lesser than filing rate of writ in the writ courts per year. In the said period (2008-2016), total 116772 writs have been filed whereas only 81015 writs have been

disposed of. At the end of year-2016 the total pending writs in the writ courts stand as 69326 whereas it was 40980 in the beginning of the year-2008(HCD, The Supreme Court of Bangladesh, 2008 & 2016). As a result new pending writs stand as (69326-40980)= 28346 in the said period. Therefore, it can be said that within the said period new pending writs stand 28346 for only nine years whereas it was 40980 for last 36 years from the year 1972-2007 (HCD, The Supreme Court of Bangladesh, 2008 & 2016). So, in the recent years, particularly, in the said period, the trend of pending writs has been increased in comparison with previous period (1972-2007).As a result, citizens could not get back their right to life, liberty and right against inhumane treatment or punishment more quickly. It is relevant to mention that within the said period the number of population has also been increased and the number of judges has also been increased but it was inadequate in comparing with developed and developing countries which researcher will discuss in the problems section of this paper.

Judicial Recent Views/Trends

Whenever the rights of a citizen are affected, it is the constitutional mandate upon the court to adjudicate it and enforce it (Islam, 2012). Because of the Constitution empowers the HCD as custodian to protect the citizens' fundamental rights including right to life, liberty and right against inhuman treatment or punishment (The Constitution, Article 44). And the judiciary is always upgrading and expanding the scope of citizens' rights including right to life, liberty and right against inhuman treatment or punishment. In recent years particularly in the period (2008-2016) the active role of the judiciary in protecting citizens' right to life, liberty and right against inhumane treatment or punishment have been found in several judicial pronouncements.

It is now well settled proposition of law that even the HCD can sou moto interfere when it comes to its knowledge that liberty of a citizen had been taken away by the unlawful ground. In such matter the court should avoid technicality. When the State does not raise any objection in such circumstances, this court can certainly interfere, when the liberty of a citizen is curtailed and his valuable right of freedom is taken away by the order of the subordinate court. The HCD is empowered under section 491 of the Code of Criminal procedure to set at liberty of the victim who is found to be detained illegally or improperly (64 DLR 462).

In another recent leading case the judiciary declares the extra-judicial punishment by the name of execution of Fatwa without proper authority is

violation of fundamental rights enshrined in Articles 31, 32, and 35 of the Constitution and does not have any legal effectiveness (63 DLR 1). In this case it is also decided that the failure of the State to take any systematic action to address to such incidents of imposition and execution of extra judicial penalties involves a breach of its obligation under the Constitution and international law to ensure the right to freedom from cruel, inhuman and degrading treatment or punishment. The following directions have also been issued to prevent extra-judicial punishment by the name of execution of Fatwa:

(a) The persons who by the name of execution of Fatwa impose any extra-judicial punishments and their abettor(s) shall be held responsible under Penal Code and other existing laws in the regard.

(b) The law enforcing agencies and the Union Parishads and the Pourashavas across the country shall take preventive measures and legal steps to stop extra-judicial punishments in the name of execution of Fatwa.

(c) The Ministry of Local Government shall intimate the law enforcing agencies, all the Union Parishads and the Pourashavas across the country that imposition of extra-judicial punishment is beyond the Constitution and is punishable under the law. The Government shall take appropriate steps for creating awareness amongst people regards extra-judicial punishment in the name of execution of Fatwa as impermissible in law and, in fact, a crime.

(d) The Ministry of Education shall give priority in incorporating various articles and educational materials in the syllabus in School, College and University level and particularly in Madrasha level highlighting the supremacy of the Constitution and the Rule of law and discouraging imposition of extra-judicial punishment of any form in the name of execution of Islamic Sharia/Fatwa.

The judiciary has recently given another landmark decision regarding mandatory death in any statute in the case of ***BLAST & Others v. Bangladesh & Others,*** **(2015) 1 SCOB (AD) 1 and *BLAST* v. *Bangladesh,* (2011) 63 DLR 10 in which the judiciary** declared mandatory death penalty in any statute as inconsistent with citizens' rights accruing particularly in Articles 27, 31, 32 & 35 of the Constitution and so such provisions are ultra vires the constitution and therefore they are void. The provisions of different statutes like Sub-sections (2) and (4) of section 6 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, subsections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000

and section 303 of the Penal Code are declared ultra vires the Constitution. It is also declared that there shall be no mandatory sentence of death in respect of an offence of murder committed by an offender who is under a sentence of life imprisonment.

It is also seen in a recent judicial pronouncement the judiciary has shown an important views regarding for protection of citizens' right to life in a severe earthquake time (63 DLR 71). In the case of ***HRPB*** v. ***Bangladesh*** (2011) 63 DLR 71 it is held that the government is bound to protect life and property of the people in the discharge of its constitutional obligation. The Government is therefore directed to make available sufficient necessary equipment for rescue of the citizens soon after occurrence of a severe earthquake. And it is also declared that recent news items published in different national dailies creates great anxiety among the citizens of Bangladesh. Even it is also declared in this case that if further direction is needed, the parties will be at liberty to make applications in the instant rule as this rule nisi will be treated as continuous mandamus.

In the case of ***BLAST v. Bangladesh,*** (2011) 63 DLR 643 the judiciary has upgraded its views regarding the corporeal punishment upon the children in the educational institutions and declared it as violative of Articles 27, 31, 32 and 35 of the constitution. The higher judiciary also declared corporeal punishment as absolutely prohibited, inflicting it be deemed as misconduct of the concerned teachers, and gave directions to the concerned authorities of the Government to take necessary steps to prevent the imposition of corporeal punishment by way of framing and adopting and disseminating appropriate guidelines, directions or orders to all concerned authorities.

The following directions are issued on the demand of emergency:

1. Corporeal Punishment is absolutely prohibited in all educational institutions of the country

2. Giving corporeal punishment to the students shall be treated as misconduct.

3. District Educational Officers and Upazila Secondary Education Officers shall take necessary measures to end corporeal punishment; they shall take steps against the teachers imposing corporeal punishment under the Penal Code, 1860, the Children act, 1974 and where fit by taking departmental steps.

4. Head of the Educational Institutions shall take effective steps to stop corporeal punishment in their institutions.

5. School Management Committee shall take measures for identification of the teachers inflicting corporeal punishment and shall take actions with rules against the concerned teachers accused of corporeal punishment.

6. Inspectors of the concerned offices, departments and board of education under the Ministry of Education shall monitor whether in the educational institutions corporeal punishment is inflicted and shall take necessary steps to stop it in there.

The judiciary gave a milestone views in the case of ***Z. I. Khan Panna v. Bangladesh & ors,*** 7 SCOB (2016) HCD 7 on the right of the victim of custodial death by law enforcing agencies during the period of "Operation Clean Heart" to bring legal action and seek compensation through the writ jurisdiction. It is stated in 75 Para of the Judgment:

> "The affected persons/victims of brutalities or torture or the dependents/family members of the deceased in case of custodial deaths during the 'Operation Clean Heart' will be at liberty to file cases against the perpetrators of the crimes, that is to say, the concerned members of the joint forces/law-enforcing agencies both under civil and criminal laws of the land for justice. They may also invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution for compensation, if they are so advised, in addition to the reliefs sought for under prevalent civil as well as criminal laws of Bangladesh."

The court argued for adequate compensation awarded to the victims of human rights violations in the custody of law enforcing agency/ joint forces. The amount of compensation will vary from case to case upon the facts and circumstances of each case.

In the case of *BELA v. Bangladesh,* (2010) 62 DLR 463 the court recognized the right to protection of law, to life and to hold properties of the villagers guaranteed by the Constitution and urged the respondents to discharge their duties to ensure those rights of the villagers. The court also gave direction upon the respondents to stop illegal extraction of sand from the bed and banks of the river and outside the designated area of the Fazilpur Sand Quarry.

The Judiciary has given another important views on premature death of citizens and their right to life in the case *of* ***Bangladesh Beverage v. Rowshan Akter*** **(2010) 62 DLR 483.** In this case the court said that life is bundle of incident. Every child is born with expectation of life and with constitutional guaranteed rights of basic requirements for living. Death is inevitable but premature death in whatever form is not expected and cannot be consoled. Accidental death is also a premature death. Government is answerable to all such premature death as Government is to protect the citizen and is responsible for the life of a citizen.

Real Scenario of Citizens' Right to Life, Liberty and Right against Inhumane Treatment or Punishment

In the previous section the active role of the judiciary has been noticed in protecting citizens' right to life, liberty and right against inhumane treatment or punishment in recent several judicial pronouncements but what are the reality in the society to such rights can be realized in the following data:

Table No.3: Scenario of Enforced Disappearances of the Citizens in the Recent Years

Year	Number of Victims	Body Discovered	Traced
2017 (Jan-July)	45	2	10
2016	97	11	29
2015	55	8	12
2014	88	23	25
2013	72	5	10
2012	56	4	18
2011	59	16	4
2010	47	6	7
Total	519	75	115

Source: Ain O Salish Kendra

From the above table it is evident that the numbers of enforced disappeared citizens are gradually increasing each year except one or two cases which are giving very alarming message regarding citizens' right to life or liberty.

Table No.4: Scenario of Extra Judicial Killing of the Citizens by Law Enforcing Agencies in the Recent Years

Year	Total
2017 (Jan-July)	109
2016	195
2015	192
2014	154
2013	189
Total	730

Source: Ain O Salish Kendra

From the above table it is also revealed that the numbers of extra-judicial killings have been increased per year except 2014 which is also alarming message for citizens regarding their constitutional right to life, liberty and right against inhumane treatment or punishment. Such extrajudicial killings are arbitrary or unlawful deprivation of citizens' life which is not acceptable at any cost in any sort of society. Under these circumstances this year (28.03.17) the United Nations expressed their concern and criticized Bangladesh (in a report on political and civil rights by the UN Human Rights Committee) for a "high rate" of extrajudicial killings and enforced disappearances at the hands of police, RAB and other law enforces. Quoting on this report, Al Jazeera said than more 1300 cases of extrajudicial killings and 325 enforced disappearances traced out since 2009 (en. prothomalo.com, 30 March, 2017). On the other hand, it is often seen on the daily newspapers and heard here and there that the victims are not interested to go to courts for bringing an action due to the presence of culture of not getting justice and severe harassment from the government. Indeed, this is a continuous real scenario regarding citizens' right to life, liberty and right against inhumane treatment or punishment. Even the National Human Rights Commission of Bangladesh can do nothing to investigate such extrajudicial killings by the state actors. Therefore, the UN has expressed concern at the failure to empower the NHRCB to investigate such gross violation of rights of citizens by the state actors and recommended empowering it to probe the complaints of such violation (*ibid*).

Problems/Restraints in Enforcing Citizens' Right to Life, Liberty and Right against Inhuman Treatment or Punishment

The judiciary is under constitutional obligation to protect and enforce citizens' rights including right to life or liberty. And in the previous

sections particularly in judicial recent views' section, it is found that the judiciary has shown its upgrading role in protecting and enforcing citizens' right to life, liberty and right against inhumane punishment; it is also found in the role of judiciary section, that the performance of the judiciary was not satisfactory in the said period for the disposal rate of cases being lesser than filing new cases and therefore, backlog of cases are increasing rapidly in the judiciary which are really hampering the judiciary in protecting and ensuring citizens' right to life or liberty and establishing the rule of law. The real problems behind such performance of the judiciary are as under:

a. Inadequate Number of Judicial Officers

Bangladesh is over populated country where the judiciary is extremely suffering from huge backlog of cases (more than 3.16 million of pending cases) with shortage of judicial officers; there are only 1268 judges of approved 1655 posts and having vacancies of 387 posts in the lower judiciary. And there are only 98 judges in the higher judiciary (Sinha, 2016). These numbers of judicial officers are very inadequate with the total number of citizens in Bangladesh and backlog of cases in comparing with the number of judicial officers of developed and developing countries in proportion to their citizens as under in the Table:

Table No.5: Comparative data on judicial officers

Name of Country	Number of Judges per 10 Lakh Citizens
USA	107
Canada	75
UK	51
Australia	41
India	18
Bangladesh	**10**

Source: The Speech of Chief Justice, BD
at National Judicial Conference, 2016.

From the above table it is evident that in Bangladesh the number of judicial officers is so poor because of there are only 10 officers per 10 lakh citizens where it is 18 in India in our neighboring developing country like us; in developed country like USA it is more than 10 times in comparing with us.

b. Absence of Separate Investigation Cell

In Bangladesh there is no separate investigation cell under the judiciary or judicial magistrate courts; the investigation of an offence or accusation is to be assigned to the police officers, who are under the control of State Ministry. They often take huge time in giving a report and often fail to give a strong report. Therefore, the accused get discharged and victim citizens are depriving of justice. It is often seen that police are more interested to arrest the criminals than to submit an investigation report or present witnesses before the court which is directly responsible for not insuring justice to the victim citizens and they often lose the confidence upon the judiciary. In a field survey conducted by the researcher, it is found that among 30 judicial officers 83.33% respondents (25) gave their opinion for separate investigation team under the judiciary for ensuring citizens' rights; only 10% (3) disagreed; and 6.67% (2) made no comments.

c. Backdated Laws on Evidence

Still today in our judiciary the evidence is taken and witnesses are examined under the Evidence Act, 1872 which is not suitable at the present time where digital system should get priority in disposing of the cases. Digital recording system and examining the witnesses through the video conference system should be introduced in the Evidence Act to dispose of the case more quickly. Besides, the examination of witnesses is very lengthy system which is also responsible for delaying justice to the citizens should be updated. Under these circumstances, Bangladesh Supreme Court drafts witness management policy with a view to reducing litigation time and slash backlog of cases and posted it on the SC website on 31 August, 2017(The New Age, 7th Sep. 2017).

d. Lack of Proper Security to the Witnesses

In the criminal cases particularly murder cases or grievous hurt cases the witnesses are not interested to testify before the courts due to lack of security. As a result, the criminals are getting acquittal due to not prove of the allegation against them which is depriving of justice to the victim citizens. Under these circumstances, Bangladesh Supreme Court proposed a policy in the 21-point witness management policy that the vulnerable or threatened witnesses would be examined through video conference (BD SC, 2017).

e. Corruption

The general people cannot keep confidence upon the judiciary due to corruption but fair trail is the citizens' fundamental rights (The Constitution, Art.35). In a NHCR survey it is seen that conviction rate among the cases brought into trial is only 10% - extremely low often due to corruption (The Daily Star, 24th December, 2011). In a seminar, Prof. Abul Barakat, Ex-Chairman, Janata Bank, claimed that "judgments of lower and higher judiciary are selling". Though, it was denied by the present chief Justice Surendra Kumar Sinha. He claimed it would be 5-10% (The Daily Star and the Prothom Alo, 3rd April, 2016). In a field survey conducted by the researcher, similar view was found on corruption in judiciary. It is found that 66.11% (119) respondents among 180 citizens think that a citizen has to face corruption in order to get justice from court; only 23.89% respondents disagreed with this; and 10% respondents made no comments.

f. Lack of Independent Public Service Commission: Govt. Unskilled Lawyers

In Bangladesh, there is no independent public service commission. Therefore, there is no proper recruitment mechanism in appointing public prosecution. Generally, public prosecutors are appointed in political consideration; as a result inefficient and inexperienced lawyers are being appointed as public prosecutors who are often failing to prove the case and the victim citizens are deprived of getting justice and are losing confidence upon the judiciary. Besides, it is often seen that by using political backing, most of them get involved in corruption to make quick money; they do not present important witnesses or do not produce the required documents. As a result, the accused get acquittal at the final hearing.

g. Lack of Adequate Accommodation

The Judiciary-either higher or lower both face extremely accommodation crisis. At present 170 judicial officers are sharing the court-room by shifting which interrupts the judicial activities and waste the judicial working hours (Sinha, 2016). Besides, the government often creates new special courts- woman and child torture prevention tribunal, Speedy Trial Tribunal, Environment Court, Land Survey Tribunal, Labour Tribunal, and Administrative Tribunal etc under existing and new laws without considering the distinct establishment for them which also creates accommodation crisis for judicial officers and hamper their regular activities where the citizens suffer lots and gradually lose their confidence upon the judiciary.

Findings and Concluding Remarks

The judiciary is under obligation by constitutional laws and general laws to protect and enforce citizens' rights either fundamental or non-fundamental rights including right to life, liberty and right against inhumane treatment or punishment. And the judiciary has upgraded its role in the several judicial pronouncements in recent years particularly in the period (2008-2016) in protecting and enforcing citizens' rights special reference to right to life, liberty and right against inhumane treatment or punishment.

In a recent judicial pronouncement in the case of *Emran Ahmed v. Bangladesh,* (2012) 64 DLR 462 the judiciary declares that the HCD can *sou moto* interfere when it comes to its knowledge that liberty of a citizen had been taken away by the unlawful ground. It is also pronounced in the same case that the HCD is empowered under section 491 of the Code of Criminal procedure to set at liberty of the victim who is found to be detained illegally or improperly.

***In the case of BLAST v. Bangladesh,* (2011) 63 DLR 10 the Judiciary** declared mandatory death penalty in any statute as inconsistent with citizens' rights accruing particularly in Articles 27, 31, 32 & 35 of the Constitution and so such provisions are ultra vires the constitution and therefore they are void.

In the case of ***HRPB** v. **Bangladesh,*** (2011) 63 DLR 71 the judiciary has shown an important views regarding for protection of citizens' right to life in a severe earthquake time. The Government is directed to make available sufficient necessary equipment for rescue of the citizens soon after occurrence of a severe earthquake.

In the case of ***BLAST** v. **Bangladesh,*** (2011) 63 DLR 643 the judiciary has upgraded its views regarding the corporeal punishment viz. caning, beating, and chaining upon the children in the educational institutions. The court declared such punishment as prohibited absolutely, and gave directions to the concerned authorities of the Government to take necessary steps to prevent the imposition of corporeal punishment by way of framing and adopting and disseminating appropriate guidelines, directions or orders to all concerned authorities.

Though the judiciary has upgraded its role in protecting and enforcing citizens' rights special reference to right to life, liberty and right against inhumane treatment or punishment in several judicial pronouncements in recent years particularly in the period (2008-2016), it could not show

better performance overall in the said period due to the less disposal of cases than filing of cases. As a result, the numbers of pending cases have been increased rapidly (See Recent Role of the Judiciary Section).

At the end of year-2016 the total pending cases in session courts stand as 647422 whereas it was 253832 in the beginning of the year-2008 (HCD, Supreme Court of Bangladesh, Annual Reports, 2008 & 2016,). As a result, in the mentioned period (2008-2016) new pending cases stand as 393590.

At the Beginning of year-2008 the total pending cases in the judicial magistrate courts were 618671 which have stood as 865536 at the end of year 2016 (HCD, The Supreme Court of Bangladesh, 2008 & 2016). Therefore, within the said period (2008-2016) new pending cases have been increased as 246865.

At the end of year-2016 the total pending writs in the writ courts stand as 69326 whereas it was 40980 in the beginning of the year-2008(HCD, Supreme Court of Bangladesh, 2008 & 2016). As a result new pending writs stand as 28346 in the said period.

So, in the recent years, particularly, in the said period (2008-2016), the trend of pending cases or writs has been increased rapidly in comparison with previous period (1972-2007). As a result, citizens could not get back their infringed right to life, liberty and right against inhuman treatment or punishment more quickly.

Along with the trend of pending cases, the numbers of extra-judicial killings and enforced disappeared citizens are gradually increasing each year in the said period except one or two cases which are giving alarming message regarding citizens' right to life, liberty and right against inhuman treatment or punishment (See Real Scenario Section).

Under these circumstances this year (28.03.17) the United Nations expressed their concern and criticized Bangladesh (in a report on political and civil rights by the UN Human Rights Committee) for a "high rate" of extrajudicial killings and enforced disappearances at the hands of police, RAB and other law enforces.

Besides, it is often seen on the daily newspapers and heard here and there that the victims are not interested to go to courts for bringing an action due to the presence of culture of not getting justice and severe harassment from the government. This is a continuous real scenario regarding citizens' right to life, liberty and right against inhumane treatment or punishment where

even the National Human Rights Commission of Bangladesh can do nothing to investigate such extrajudicial killings by the state actors.

The reasons behind the backlog of cases being increased rapidly in the recent years are many (See Problems' Section):

There is huge vacancy of judicial officers in lower and higher judiciary. Besides, the number of judges in proportionate to the people is very low in comparing with developing and developed countries. As a result, the affected citizens are deprived of getting their rights in due time and are losing their confidence upon the judiciary in spite of its separation from the executive.

The Judiciary are extremely facing accommodation crisis. At present 170 judicial officers are sharing the court-room by shifting which interrupts the judicial activities and waste the judicial working hours.

There is no separate investigation cell under the judiciary or judicial magistrate courts. The judiciary has to depend on Police who are under the control of State Ministry, take huge time to give a report and often fail to give a strong report. Therefore, the accused get discharged and victim citizens are depriving of justice.

Still today, in a case, the evidence is taken and witnesses are examined under the Evidence Act, 1872, which is very backdated laws on evidence in which there is no application of digital system for quick disposal of cases and delivering justice to the affected citizens in due time.

On the contrary, in the criminal cases particularly murder cases or grievous hurt cases the witnesses are not interested to testify before the courts due to lack of security. As a result, the criminals are getting acquittal due to not prove of the allegation against them which is depriving of justice to the victim citizens.

Corruption, inefficiency of govt. lawyers, and lack of public service commission are also responsible for the failure of the judiciary in ensuring and enforcing citizens' rights.

Conclusion

Under the above circumstances, in order to ensure better performance of the judiciary and for ensuring citizens' rights including right to life, liberty

and right against inhumane treatment or punishment, the identified problems should be solved; the vacancies of judicial officers should be filled up and the number of judges should be increased in proportionate to the number of citizens with adequate accommodation at least Indian model should be followed here; the law regarding evidence should be updated with ensuring proper security and facilities to the witnesses for their encouragement; separate judicial investigation cell and independent public prosecution service commission should be established; the state actors must stop extra-judicial killings of citizens; if they are notorious criminals, they can be tried by special courts within very short time; and the National Human Rights Commission of Bangladesh can be empowered to investigate such gross violation of rights of citizens by the state actors.

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Law Relating to Adoption: A Contemporary Demand to Be Enacted; Bangladesh Perspective

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Abstract

Adoption is a common practice in almost every society throughout the world and Bangladesh is not an exception to this. Adoption carries a potential value not only from the social context but also from the religious aspects of Hindus, Christians etc. of Bangladesh. Although not being recognized by their religion Bangladeshi Muslims are often seen to take child in adoption. In most of the cases the practice is going on without any legal sanction. People who are willing to take adoption legally can only acquire legal guardianship of a minor child. Despite of being a pluralistic country, Bangladesh (legislatures) has been showing frown to this issue. This study aims to visualize the importance of taking legislative initiative with regards to the issue of adoption amplifying its social urge/demand along with the problems likely to be arose if so legalizes and solutions thereto.

Keywords: adoption, guardianship, *Dattak*, artificial parenthood.

Introduction

Parentage is an urge of probably every human being from the very birth of this universe. Parentage involves both paternity and maternity. There are two way of filiations known to the law: as a rule, the law treats the natural parents as the father and mother of the child; sometimes, however, adoption leads to the result that those who are not the biological parents, acquire rights similar to theirs.[2] Though adoption is not recognized by Mahomedan law[3] and consequently not legally permitted in most of the Islamic countries of the word, rearing the children of others is seen to have been commonly practiced. The practice is appreciable socially, morally and ethically from the aspect of having accommodated an abandoned child

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2 Fayzee, Asaf A A, *Outlines of Mohammadan Law*, Fifth edition; Oxford University Press (Bombay) at p.186.

3 *Muhammad Allahdad v. Muhammad Ismail*, (1888) 10 AII 289 340.

whereby he/she can have a better life. This practice is becoming possible by way of taking legal guardianship (custody of the child) from the Family Court or outside the court by mutual consent. This process undergoes some problems regarding the rights and liabilities of the respective parties, due to the want of proper and specific legal sanction in this regard. In Bangladesh adoption is legally allowed only for members of the Hindu faith under section 37 of The Civil Courts Act 1887; and statutorily restricted for Muslims by section 3 of the Muslim Personal Law (Shariat) Application Act 1937[4]. Practically, people from every community in Bangladesh silently adopt child for various reasons. This study aims to focus on the problems arising from this widely but unrecognized practice of adoption in Bangladesh and to show a way-out to resolve the problem with reasonable justification.

Adoption: Meaning and Definition

Adoption can be defined as the legal creation of a parent-child relationship, with all the responsibilities and privileges thereof, between a child and adults who are not his or her biological parents.[5] Adoption incorporates a child into a family as an offspring and sometimes a sibling, regardless of genetic ties.[6] There are two main categories of adoption practices, generally termed as closed[7] adoptions and open[8] adoptions. However, in reality most adoption practices fall somewhere on a continuum between fully open and fully closed.[9]

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4 Section 3 (c) "that he is a resident of 4 [the territories to which this Act extends], may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of 5 [the provisions of this section], and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified."

5 Muslim Women's Shura Council, "Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child", *The Digest*, para 2, p.5 (August, 2011) available at <http://www.wisemuslimwomen.org/images/activism/Adoption_%28August_2011%29_Final.pdf> (last visited on 14th March, 2016).

6 *Ibid.*

7 **Open Adoption**: An open adoption allows for some form of association among the birth parents, adoptive parents and the child they adopted. This can range from picture and letter sharing to phone calls, to contact through an intermediary or open contact among the parties themselves. Many adoptions of older children and teenagers are at least partially open since the children may already know identifying or contact information about members of their birth families, or may want to stay in touch with siblings placed separately.

8 **Closed adoption**: Where no identifying information about the birth family or the adoptive family is shared between the two, and there is no contact between the families.

9 *Ibid.*

The Juvenile Justice (Care and Protection of Children) Act 2000, prevalent in India, defines adoption as[10]-

> "…the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship"

The Juvenile Justice Act 2000 of India calls adoption - the creation of a parents-child relationship between persons who are not related so by birth. In practical terms, it means that the same mutual rights and obligations that normally exist between parent and a child born to them would automatically apply to the adopted child in relation to the adopted family.

Adoption has been considered to be "The creation of a parent-child relationship by judicial order between two parties who usually are unrelated; the relation of parent and child created between persons who are not in fact parent and child. This relationship has brought about only after a determination that the child is an orphan or has been abandoned or that his parent's parental rights has been terminated by court's order."[11] Adoption creates a parent-child relationship between the adopted child and adoptive parents with all the rights, privileges and responsibilities that attached to that relationship, though there may be agreed exceptions.[12]Therefore it can be said that adoption is a socially sanctioned scope to create artificial parenthood where in between the adopted child and the adoptive parents all rights and responsibilities *e.g.* using parental identity, maintenance, inheritance and maintaining relationship with the family members are regulated as those of the natural parent-child relationship.

Historical Review

The history, practice and recognition of adoption of children are of extreme antiquity great interest. Adoption was widely practiced by the ancient Romans. Two kinds of adoption was recognized and practiced in Rome, but both required that the adopter be male and childless.[13] The first was known as *arrogatio* and applied where the person to be adopted was

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10 Section 2.

11 Garner, A Brayan, *Blaks Law dictionary*, USA 9th edition (2009) at p-55.

12 *Ibid.*

13 *Ibid.*

sui juris.[14] In such cases the adoption must be sanctioned by the *comitia curiata*.[15] The second form of adoption was adoption *proper*.[16] That applied to those that were still under the rule of the father, the *patria potestas*, and were thus *alieni juris*,[17] and was accomplished by the father going through the form of selling his son by a formal *mancipatio* to the adopter, which was followed by the rendition of a judgment of adoption. As time passed many other limitations developed; e.g., women could be adopted but could not be arrogated. Neither could they adopt[18]. Finally codification took over.

In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, but he reduced the system to a code, which simplified the proceedings[19]. The effect of adoption was to cast the succession on the adopted in case the adopting father died intestate.[20]

Adoption was practiced at a very early time among the Jews.[21] The Bible tells of the story of the discovery of an abandoned Jewish baby who was adopted by Pharaoh's daughter and named Moses.[22] However, one of the civilizations that have retained its ancient customs, longer than most, including the custom of adoption of male children, is that of the Hindus.[23]

It is the same in Japan. “The same concept shows up in Japan. The Emperor is the direct descendant of the sun and the male line is unbroken for thousands of years. You may ask: "How is this possible?" The answer is simple: "When there failed to be an heir one was adopted."[24]

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14 Quarles Luis, “The Law of Adoption-A legal Anomaly”, *Marquette Law Review*, Vol 32, Issue-4. P. 249

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 23 Nettleship, op. cit., "Adoption".

19 <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3388&context=mulr> (Last visited on 15 March, 2017).

20 In re Session's Estate, 70 Mich. 297, 38 N.W. 249.

21 Quarles Luis, “The Law of Adoption-A legal Anomaly”, *Marquette Law Review*, Vol. 32, Issue-4. P. 249.

22 Exodus 2:5-10.

23 Quarles, Louis, “The Law of Adoption - A Legal Anomaly”, Marquette Law Review, Issue 4 February 1949 (Article 2), Volume 32, p. 240.

24 Supra note 14.

Adoption; Different Thoughts and Practices

i) Under Civil Law: In the twenty-first century, many national and international laws have modernized the practice of adoption, giving recognition to the identity and background of the child, Adopted children often have the legal right to know about their origins and are encouraged to embrace their cultural, ethnic, and biological heritage.[25] In the New South Wales province of Australia, for example, children are allowed to retain the last name of their birth family, inheritance can be decided by a will, and continuing communication between the birth family and the adoptive family is made possible by a mutually agreed "Adoption Plan."[26] The notion of an adoption absorbing an adopted child's identity is no longer the ruling paradigm.[27]

In many countries with large Muslim populations, such as Sudan, Tanzania, and India, different laws regulate adoption and *kafala* for non-Muslim than for Muslim children.[28] In a number of Muslim-majority countries, such as Jordan, Algeria and Morocco, regulations governing foreign adoption have been modified to allow for, under certain conditions, transfer of guardianship (*kafala*) of the child to Muslim parents, with the option of later adopting the child under the law of their own country, once the child comes to the new community[29].

ii) Under Muslim Personal Law: according to the Islamic view, raising a child who is not one's genetic child is allowed and, in the case of an orphan, even encouraged but, the child does not become a true child of the "adoptive" parents.[30] For example, the child is named after the biological, not adoptive, father.[31] The holy Quran does say "Nor has

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25 Supra note 18.

26 Adoption in NSW: Information for the Muslim Community," available at <http://www.community.nsw.gov.au/docswr/_assets/main/documents/adoption_muslim_broch.pdf.> (last accessed on 9th March 2017)

27 *Ibid.*

28 < http://dawoodi-bohras.com/forum/viewtopic.php?t=9294> (Last visited on 15 March, 2017)

29 "Adoption of Children from Countries in which Islamic Shari'a law is Observed," Intercountry Adoption, Office of Children's Issues, US Department of State, available at <http://www.adoption.state.gov/pdf/Adoption%20of%20Children%20Countries%20Islamic%20Sharia%20Observed.pdf> (last accessed on 10th March,, 2017).

30 < https://en.wikipedia.org/wiki/Islamic_adoptional_jurisprudence> (Last visited on 13 March, 2017).

31 Huda, "Adoption in Islam", *About.com Religion & Spirituality*. Available at <http://islam.about.com/cs/parenting/a/adoption.htm> (last visited on 14th March, 2017).

He (Allah) made your adopted sons your (true) sons. Such is (only) your (manner of) speech by your mouths. But God tells the truth, and He shows the way. Call them by (the names of) their fathers, that is better in the sight of God. But if you do not know their fathers, they are your brothers in religion…"[32] The child is also a *non-mahram* (not within prohibited degree) to members of the adoptive family.[33] Thus many Muslims treat adoption (in the common sense of the word) as impermissible by Islam, but that it is permissible to take care of another child, which is translated into Arabic as: *kafala*.[34] *Kafala* is defined as "the commitment to voluntarily take care of the maintenance, the education and the protection of a minor, in the same way a [parent would do for a child]".[35] Although the previously stated verse of the Quran focuses on adoption and not *kafala*, in some cases *kafala* may lead to adoption.[36] However, the adoptive child can become a *mahram* to his adopted family, if he or she is breast-fed by the adoptive mother before the age of two.[37] Adoption is practiced in various forms in many Muslim-majority countries. For example, unofficial adoptions within families, as well as secret adoption, occur alongside the *kafala* system.[38] Thus, most of the Muslim majority countries don't have legally recognized adoption process.

iii) **Under Hindu Personal Law:** Adoption is recognize by the Hindu *sasthra*/religious law, but even in that system of law there may be a family or caste custom prohibiting adoption; and if such custom is proved, effect will be given to it by the courts.[39] In order to fulfill the criteria of adoption, the person to be adopted must be a male[40] and also belong to the same caste as the adoptive parents. He should not suffer from any infirmity or be an orphan. [41]The object of adoption is twofold: the first is religious, to secure spiritual benefit to the adopter

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32 Quran 33: 4-5.

33 *Ibid.*

34 <https://en.wikipedia.org/wiki/Islamic_adoptional_jurisprudence#cite_note-1>. (last visited on 14th March,2017)

35 International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), *"Specific Case: Kafalah,"* Fact Sheet No 51, (Geneva: ISS, 2007).

36 *Ibid.*

37 Supra note 18.

38 Supra note 4 at p 42.

39 *Fanindra v. Rajeswar,* (1885) 11 Cal 463 12 IA 72; *Verubhai v. Bai Hirabu,* (1903) 27 Bom 492 30 IA 234.

40 *Gangabai v. Anant* (1889) 13 Bom 690.

41 Huda, Dr. Shahnaz, "Personal Law in Bangladesh: The Need for Substantive Reforms", XV(I) (2004) *Dhaka University Studies*, PP.103-126 at p. 124.

and his ancestors by having a son for the purpose of offering funeral cakes (pinda) and libations of water to the manes of the adopter and his ancestor.[42] The second is secular, to secure an heir and perpetuate the adopter's name.[43] To complete a valid adoption there needs to be the performance of a *Dattahoma* (oblation to fire) ceremony and the adoption is competed by an actual giving and taking.[44] Adoption has the effect of transferring the adopted boy from his natural/biological family to the adoptive family and it confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son.[45]An adopted son is considered to occupy, for all purposes, the same position as a natural son.[46]At the same time the adopted son loses all the rights in his natural family including the right of claiming any share in the estate of his natural father or coparcenary property.[47] It doesn't severe the tie of blood between him and his natural family and therefore he cannot marry in his natural family within the prohibited degrees.[48] The only cases in which an adopted son is not entitled to the full rights of a natural born son are where a son is born to the adoptive father after the adoption and where he has been adopted by a disqualified heir.[49] The right to adopt belongs primarily to only males and a wife cannot adopt without the consent of her husband if he is alive and able to give such consent.[50] A widow under the *Dayabagha* School of Hindu law, (applicable in Bangladesh and in West Bengal and Assam in India) may adopt, but only based upon the implied or expressed consent of her husband given before he died.

iv) Christian Personal Law: Under Christian religious law, adoption is accepted and a child may be *baptized*[51] in the Catholic Church[52]. In Christianity, adoption is considered a sacred work.[53] Christian

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42 Desai. T. Sunderlal, *Mulla, Principles of Hindu Law, Bombay* (15), 1982 at p. 490.

43 *Sitaram v. Harirar,* (1911) 35 Bom 169 179 180 8 I.C. 625.

44 Supra note 18.

45 *Ibid.*

46 *Anath Bandhu Guha v. Sudhansu Sekhar Dey*, 31 DLR (1979) 312.

47 *Ibid.*

48 *Mootia v. Uppon,* (1858) Mad SD 117.

49 Supra note 23 at p. 44.

50 Supra note 29.

51 Christian religious ceremony.

52 Huda, Shahnaz, *A Child Of One's Own, Bangladesh Shishu Adhikar Forum*, Dhaka (2008) at p. 67.

53 Due, Rev. Dr. Noel (Coromandel Baptist Church) "The Biblical Doctrine of Adoption" *New Creation Teaching Ministry-Monthly Ministry Study*, 28 October 2009–MMS82.

personal law not only permits adoption but also encourages it. According to Christian religious law, adoption is equivalent to devoutness to God. The Bible says: "Whoever receives one such child in my name receives me" *i.e.* when you adopt a child you are saying yes to receive God's blessings.[54] Christians believe that God created everyone and does not divide people by race; there are people all around us who have needs and it's important to follow where God is leading you. If you do adopt a child it's another extension of God's love to treat them as your own biological child.[55]

Adoption process in Bangladesh

In 1972, the procedure of adoption was simple under the Bangladesh Abandoned Children (Special Provisions) Order 1972, mainly for speeding up the adoption of liberation war orphans by the foreign foster parents.[56] But this procedure was amended in 1981. The 1981 amendment states that the foster parents can now only get the guardianship of a child.[57] However, only Bangladeshi citizens are eligible to apply for guardianship of Bangladeshi children.[58] The Guardianship and Wards Amendments Ordinance, 1982 prohibits the granting of guardianship of Bangladeshi children to non-Bangladeshi parents.[59]

Their respective personal/religious laws govern family or private matters of Muslims, Hindus and of other communities in Bangladesh, including the practice of adoption.[60] From the perspective of personal laws of the different communities, there are different thoughts regarding adoption. As seen from the above, it is easier for a Hindu or Christian couple to adopt than it is for a Muslim couple.

It has been mentioned already that Muslim law permits a system of guardianship (*kafala*), which resembles foster-parenting, but is more

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54 "*The Book of Genesis (The Holy Bible)",* Matthew 18:5.

55 "And when he was exposed, Pharaoh's daughter adopted him and brought him up as her own son." Quoted from "*The Book of Genesis (The Holy Bible)*", Acts 7:21.

56 "Babies born to Bengali women consequent of their being raped by the Pakistani soldiers and other criminals who took advantage of the situation of the war in 1971"- Banglapedia- National Encyclopedia of Bangladesh (2030); Vol-10 at p. 345.

57 Last visited on 20 April, 2016 http://lawandpractice.com/law-practice/child-adoption-procedure-bangladesh/

58 Section 7, the Guardians and Wards Act, 1890.

59 *Ibid.*

60 Huda, Dr. Shahnaz, "Anglo-Mohammedan and Anglo-Hindu Law- Revisiting Colonial Codification", *Bangladesh Journal of Law*, Vol-07 (2003) p. 01.

stable.[61] In this continuation, adoption has not been legally recognized in any legislation as the majority population of Bangladesh follows Islam. Only the Hindu community of Bangladesh can legally adopt a son as their religious law so permits. But the matter of fact is that there is no legally recognized adoption procedure even for the Hindus. Irrespective of their religion, all the communities of Bangladesh follow the provision of taking legal guardianship of a minor[62] (*Palak/dattak*[63]).

If any citizen of Bangladesh is willing to adopt a child legally there is no direct way open for him other than acquiring the legal guardianship of the child through the intervention of the Family Court under the Guardians and Wards Act, 1890.

The process of taking legal guardianship is as follows:

The interested party has to apply to the Family Court seeking legal guardianship of the minor. A Bangladeshi citizen[64], who is interested in adopting a child, may contact organizations who are working in the area of child adoption like an NGO or an orphanage or even an individual, who is willing to give a child up for adoption. An application for legal guardianship must be made to the Family Court which has the sole jurisdiction over family matters.[65]

There are some documents required for obtaining legal guardianship of a child, including the child's birth certificate, an irrevocable release of the child, signed by the biological parents (if any) before a Notary Public or Magistrate in Bangladesh and a 'no objection' certificate from the Home Ministry[66]:

Along with these listed documents the foster parent/s must apply to and satisfy the Family Court to appoint him/them as custodian or guardian of the adopted child. It is the discretionary power of the Court to allow the adoption/guardianship.[67] If he/they get the permission from the Court, he is/they are legally permitted to take guardianship over the child, with the title of "court appointed guardian". After getting the permission from the

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61 Supra note 5 at p. 42.

62 Information collected from Akramul Hoque Samim, Assistant Judge, Kishorganj (former Judge of Khulna Family Court).

63 Local term of Adoption.

64 Section 7, the Guardians and Wards Act, 1890.

65 *Ibid*, Joint effect of section 7, 8 & 9.

66 Available at <https://adopt.com/bangladesh/> (last accessed on 19 April 2017).

67 Supra note 64.

court he/they needs to show it to the respective person or organization under whose immediate custody and guardianship the child stays.[68] Once the documents of permission are presented, the legal guardian can take the child in custody and the 'adoption' procedure is completed.

Limitation/lacuna of the existing legal provision regarding adoption

Appointment of legal guardian and taking legal adoption are two solely distinct matters with distinct objects, rights and obligations. Having different legal provision and procedure from that of the adoption, people of Bangladesh often undergo some difficulties, these are -

i. **Cessation of guardianship:** Legal guardianship obtained from the Family Court of a ward (whose person or property there is a guardian appointed by the court[69]) can only be allowed if the ward is a minor and the guardianship ceases on the minor's attainment of majority or, if the ward is a girl, on her marriage[70]. On the other hand, adoption means an eternal parent-child bond. One of the prime objects of taking adoption is to ensure social security of the adoptive parents, especially during old age. Here, if either of the parties to a guardianship willfully/deliberately renounces the relation, the other does not have any legal way to enforce it. In case of an issueless couple having no means of their own (financially unstable/ill/ physically disable) who adopted a child by taking legal guardianship to meet their urge of parenthood, if the ward, on attaining his/her majority wants to leave them, they do not have the recourse to enforce maintenance rights through the court under the **Parents Maintenance Act 2013**[71] as the guardianship has ceased in the eye of law.

ii. **Want of Recognition of Adoptive Parents name in formal/legal documents/ activities of the adopted child:** The relationship of a court appointed guardian and ward doesn't permit the ward to use his/her adoptive parent's identity in any of his identity documents like National Identity card or passport. Neither can the ward legally represent his legal guardians in any of their professional activities.

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68 *Ibid.*

69 *Ibid,* Section 2.

70 *Ibid,* Section 41.

71 This Act of 2013 compels both male and female child of elderly parents to provide maintenance.

iii. **As to the determination of prohibited degrees:** Every religion has set down some prohibited degrees of relationships within which marriage is considered to be void. Hindus considered the adoptive son as their natural son and prohibited degrees accordingly apply to him. Unlike Hindus, a marriage of an adoptive Muslim son or daughter with any of the relation of his/her adoptive family, which would have prohibited to their natural child, is legally valid but seems indecent and goes against social and ethical values.

iv. **Unrecognized right of inheritance:** In the present law there is no standard of determining rights and liabilities over the property of the adoptive parents by the adopted child. An adoptive child does not legally possess any right over the property of his/her adoptive parents. In Bangladesh, for Muslim families, since the adoption process is only legal by way of taking legal guardianship, it does not actually create any parent-child relationship. As Hindu *Shastric* law permits adoption, there is no such legal bar for the Hindus[72] Thus, the adoptive son of a Muslim adoptive parent is not entitled to inherit any part or share of the latter's property.

v. **Unauthorized practice:** For want of appropriate law, people sometimes adopt children out of the kindness of their heart, and under no legal authority or interference of the court. In such practices neither party can claim any legal support in reference to the adoption. For example, if a daughter is adopted without following any legal process and treated as a maid depriving her of all the privileges of a daughter, she won't even be able to enforce her right of maintenance.

vi. **Lack of monitoring mechanism:** Due to lack of monitoring mechanism, children adopted informally and without any interference from the court, may become victims of trafficking for child labour, prostitution, begging; and forced to participate in other kinds of anti-social activities.

Importance of Adoption under the socio-cultural perspective of Bangladesh

As the majority of our population follows Islam and adoption is not recognized under *Shariya* Law, no step has yet been taken to smoothen the way of taking adoption directly.

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[72] Section 37, the Civil Courts Act, 1887.

Infertility is a problem in our country and one of the main reasons why adoption is popular – even the informal, undocumented kind. According to the doctors involved in the business of infertility treatment, there are over 3 million identified infertile couples and 10% to 15% of the couples are suffering from infertility[73]. Due to the changes in global environment, food habits, socio cultural practices etc. the infertility rate is apparently increasing in our country. These couples can have a child by way of using test tube technology, but it is too expensive; and surrogacy[74] and sperm donation are taboo or not supported due to social, legal and religious aspects.

On the other hand, due to poverty, there is a huge quantity of abandoned street children in Bangladesh, especially in Dhaka. A survey commissioned to BIDS by the organization ARISE on 'Estimation of the Size of Abandoned Street Children and their Projection for Major Urban Areas of Bangladesh 2005' shows that the number of street children in Dhaka 249,200; Chittagong 55,856; Rajshahi 20,426; Khulna 41,474; Barisal 9,771; Sylhet 13,165 and the total number in Bangladesh is 679,728.[75] According to this research, it has been estimated that the probable number will be 1,144,754 in 2014 and 1,615,330 in 2024.[76] The government does not have the adequate means to accommodate and rehabilitate this large number of destitute children.

It is also stated in the Third and Fourth Periodic Report of the Government of Bangladesh, under the Convention on the Child Rights (2007); Government of Bangladesh under Ministry of Women and Child Affairs:
"Bangladesh has 85 orphanages with the capacity to accommodate 10300 children, 6 baby homes (capacity 550 for abandoned children aged 1-5 years); 3 Adolescents Development Center with the capacity of 550, 6 Destitute and Vagrant Center (capacity 1900); 3 Shishu Paribar in 3 hill districts; 6 Safe Home (capacity 400) and 2 homes with the capacity of 500 children. These homes are also alleged to have committed certain child abuse."[77]

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73 http://ubinig.org/index.php/home/showAerticle/14/Farida-Akhter/#sthash.0F67FE2F.dpuf

74 "A traditional surrogate is a woman who is artificially inseminated with the father's sperm. She then carries the baby and delivers it for the parents to raise. A traditional surrogate is the baby's biological mother" collected from <http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> (last accessed 19 April 2017)

75 Available at <http://www.unicef.org/bangladesh/Protection_of_Children_Living_on_the_Streets.pdf> (last accessed 19 April 2017)

76 *Ibid.*

77 Available at <http://www.unicef.org/bangladesh/BD_CRC_Report.pdf> (last visited on 19 April 2017).

Approximately 4.9 million children between the ages of 5-14 work, often very long hours in hazardous conditions on very low wages, a majority portion of these children are abandoned.[78]

Not only do these children deserve to live life with humanity and dignity, and the state has the responsibility to ensure the same, the adoption of abandoned/orphan children by the issueless couples or by well-off interested parties, can lessen the burden on government.

Solution/Recommendations

To solve the aforesaid problems a separate civil law/legislation can be enacted to legalize adoption for the entire citizen of Bangladesh irrespective of religion where both boy and girl child can be adopted by any competent/qualified citizen of Bangladesh. Dr. Shahnaz Huda says[79]

> "Like the Guardian and Wards Act, 1890 the parliament may enact a law allowing adoption without any reference to religion. This law will ONLY be available to those who wish to adopt."[80]

In 2005, Bangladesh Mahila Parishad had proposed the same, allowing adoption of the children up to the age of 5 by persons of not below the age of 25.

This article would like to recommend the enactment of a separate legislation on adoption which will be applicable to any citizen of Bangladesh willing to adopt. The legislation should focus on some controversial issues (discussed earlier under the head "Limitation/lacuna of the existing legal system regarding adoption") that may likely arise:

The enactment should contain the following issues-

- All kinds of adoption should be regulated under this new Act and will be adjudicated by the Family Court. Adoption should be included in the jurisdiction of Family Court and the Family Courts Ordinance 1985[81] should be accordingly amended.

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78 (Last accessed on April 2017) <http://www.unicef.org/bangladesh/Protection_of_Children Living_ on_the_Streets.pdf>

79 Supra note 52, at p. 47.

80 *Ibid.*

81 Section 5.

- As nowhere in Bangladesh adoption is defined, an exhaustive definition should be formulated containing the distinctive features of adoption.

- All adoption must be made with the permission of the Court following all relevant legal procedures.

- The adoptive parent must execute a specific ***adoption deed*** through the intervention of court, which must be duly registered.

- Adoption should be made permissible at any age of the adopted son or daughter but the earliest be encouraged.

- Qualification of the adoptive parent should be well-defined and the principle of ***best interest of the minor*** as explained in the Guardians and Wards Act 1890[82] should be taken into consideration to grant adoption.

- Adoptive parent's name should be authorized to use in any documents after the adoption process is accomplished. Showing the registered adoption deed will be enough to use so.

- All the rights and responsibilities between the adoptive parent and adopted child should be well determined and fixed and regulated as if the parties are natural parents-child.

- If we want to make a uniform law on adoption there may be problems arising from prohibited degrees. This problem can be solved by providing four principles:

    i) Prohibited degree will be extended to both the families (adoptive and natural);

    ii) Prohibited degree with the natural family would continue as per the rules of their personal law. If both the parties of an adoption profess the same religion, they will follow their own personal law to determine prohibition.

    iii) If they are from different religions the legislation should set the prohibition as to the marriage in accordance with the standard of decency, social and ethical values.

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[82] Section 17.

iv) If any marriage with a prohibited relation takes place, the adoption will be allowed to be revoked and the marriage to sustain.[83]

- Another controversy may arise with inheritance rights of the adoptive child. As we know inheritance is regulated by the personal law e.g. Hindu Law, Muslim law, Christian law etc. which are distinct to each other. The suggested Act can make the provision of **mandatory bequest** of a certain portion of the adoptive parent's property in favor of the adopted child irrespective of sex like Indonesia, Tunisia etc. Dr. Shahnaz Huda suggested making a will during the course of adoption process to guarantee the right to property of the adopted child, rather than leaving it to the whims of the remaining adoptive parent.[84] The benefit of transferring the property through testamentary instrument is that there will be no scope left to deprive or dispossessed the adoptive parent from the property during his life time and the heirs after his death.

- The adoptive parents (who do not have any other means) must have legally enforceable maintenance rights under the Parents Maintenance Act 2013. Adoptive parents should have the right to get maintenance from the adopted child's property in life interest.

- Rolling review by the court must be ensured for the better protection of the rights fixed by law. With this view a **monitoring authority** can be introduced.

- Any practice of adoption without the interference of court or violating any provision of the adoption law shall be taken into account and made unlawful. Thus, an enactment will protect children in more ways than just giving them a parent/family.

Conclusion

Across the world child adoption is considered as one of the strongest mechanisms to help the government in accommodating and rehabilitating the orphaned, abandoned, destitute and poor children. It can also be the last resort of the childless couples. All the developed countries have their

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83 Evlat Edinme, Adoption, *Adalet Hukuk. Available at* <http://www.doc88.com/p-9713193109147.html> (last visit on 20 April 2017).

84 Supra note 52, at p. 47.

formal laws to make legal adoption possible. Numerous significance of child adoption can be properly judge by the presence of adoption related provisions in different international instruments.

The United Nations Convention on the Rights of the Child (CRC) under Article 21 stipulates controlling and monitoring mechanism for ensuring the standard of adoption process and safeguarding the welfare of the adopted child. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993 is the exhaustive instrument to regulate inter-country adoption for the best interest of the child. But the matter of regret is, Bangladesh is not the signatory of the Hague convention[85] and has imposed reservation[86] on the application of Article 21 although of being a signatory of the CRC. If Bangladesh withdraws the restriction and becomes signatory of these two international instruments on child adoption, it would make the next step of legalizing adoption easier for us.

[85] Signatory list available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last visited 20 April 2017).

[86] Reservation on article 21 available at < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec > (last visited 20 April 2016).

Effect of Repeal of Statutory Law: A Judicial Precedent Based Study

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Abstract

Society is never static but always dynamic and change is the supreme law of human society. To keep pace with this trend, every legislature responds to changing social, political, economic and other conditions through the instrumentality of enacting new laws or repealing the existing laws. This article examines the effects of abrogation or revocation of a statute by legislative act through express declaration in a new statute or as a result of irreconcilable conflict between an old law and a newly enacted law. This article also endeavors to study the general consequences of repeal in line with the interpretations as given by the apex court of Bangladesh and, in some cases, India and Pakistan. Apart from analyzing the general effects of repeal, this article also aspires to examine and clarify the consequential differences between the repeal of temporary statute and perpetual statute based on judicial precedents.

Keywords: Effect of Repeal, Temporary Statute, Perpetual Statute, Statutory Enactment, Judicial Precedent.

Introduction

The authority of enacting laws in Bangladesh is constitutionally committed to the parliament which is one of the three organs of the state[3]. Though the

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[3] Article 65 of the Constitution of Bangladesh provides that there shall be a parliament in which the legislative powers of the state shall be vested subject to the provisions of the Constitution.

parliament has not been vested with the exclusive power of making laws, it is the principal source of legislation and the power of parliament in making laws takes precedence over the law making power of the executive and judicial branch of the government and it has to enact laws within the limits prescribed by the constitution[4]. The parliament is competent, in its plenary powers, not only to introduce a new law but also to repeal it by another enactment or to revive or re-enact a legislation which had already expired by lapse of time. This legislative power to repeal prior laws is not precluded by constitutional limitations, but exists as an integral part and increment of the legislative power and function[5]and it is not within the power of any parliament to prevent the repeal of any of its own Acts, or to bind its successors[6]. Consequently, no statute can make itself secured against being repealed unless it falls within the boundary of the fundamental features of the Constitution[7]. In this respect Sidney Smith says *"*When I hear a man talk of unalterable law, the effect it produces upon me is to convince me that he is an unalterable fool*"*[8].

The normal effect of repealing a statute without providing a saving clause is to obliterate it from the statute-book as completely as if it had never been passed and had never been existed[9] except as to matters and transactions past and closed[10]. But whenever there is a repeal of a statute, the consequences laid down in sec. 6 of the General Clauses Act, 1897 shall follow unless a different intention can be presumed from the repealing statute[11]. In this regard, the Supreme Court of Bangladesh, through its judicial pronouncements, has given divergent interpretations to the consequences of repealing an enactment either by another enactment or by judicial precedent in

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4 Islam, Mahmudul, Interpretation of Statutes and Documents, Mullick Brothers, Bangladesh, 2009, p. 9.

5 Sutherland: Statutory Construction, Vol.1 (3rd Ed.), Art.2003, pp. 449-450.

6 Wilberforce: Statute Law, at p.309; Craies: Statute Law, 4th Ed., p.292; Here "to bind its successors" means depriving all the future parliaments of their authority to legislate.

7 *Anwar Hossain v. Bangladesh,* 1989, BLD (SPL)1; Article 7B of the Constitution of Bangladesh provides that "Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means".

8 Sidney Smith in Vepa P. Sarathi: The Interpretation of Statutes, (Delhi: Eastern Book Company, 1968), p. 383.

9 *Keshovan v. Bombay,* AIR 1951 SC 128; *Punjab v. Mohar Singh,* AIR 1955 SC 84; AIR 1981 Pat.236.

10 *Attorney General v. Lamplough,* L.R. 8 Ex. D. 223.

11 *Arshad Ali SK. v. Govt. of Bangladesh,* (1977) 29 DLR 302.

exercise of the judicial review power under article 102 of the Constitution of the People's Republic of Bangladesh.

Meaning of repeal

Repeal is the abrogation or destruction of a law by legislative enactment. A substitution of one legal provision by another is in fact a repeal[12]. Accordingly, where the schedule to an Act is substituted by a new schedule, sec. 6 of the General Clauses Act, 1897 would apply and the rights and liabilities incurred under the repealed schedule would be enforceable even after the repeal[13]. A new law re-enacting the provisions of an earlier enactment, with or without modifications, nonetheless repeals that enactment, either expressly or by implication[14]. There is no difference at all between a case where the legislature says that a particular section will stand amended in a particular way and a case where it says that the section stands repealed and its place will be taken by a new section if the new section is the same as the amended section[15]. Sec. 6 of the General Clauses Act, 1897 is applicable whether it is repeal or amendment[16]and there is no reason for giving any different effect to these two methods which achieve the same result[17]. But the suspension of a statute for a limited time is not repeal[18]. Repeal may be either total or partial. It is a total repeal when a statute is abrogated in its entirety and partial when there is abrogation or modification of a provision of a statute only.

(1) Does 'omission' amount to 'repeal'?

The word 'repeal' connotes the abrogation of one Act by another and it is the same thing as omission of certain provisions of an Act by subsequent

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12 *Md. Yaseen v. Province of East Pakistan,* 15 DLR 13.

13 *Kohinoor Mercantile Corpn. v. Hazera Khatun,* 14 DLR 47 (DB); PLD 1963 Dacca 238.

14 *Begum Lutfunnessa v. Secretary, Ministry of Works,* 41 DLR193; 14 DLR 47; PLD 1963 Dhaka 238; AIR 1996 SC 2181.

15 *Saeed Ahmad v. State,* 16 DLR SC 584; PLD 1964 Supreme Court 266.

16 *Eastern Federal Union Insurance Co. v. Commissioner of Income Tax,* 1966 taxation, Vol.14.211, rel.

17 *Mohammad Sorwar v. Hassan Shamsi,* 2001 YLR 180(a); *Saeed Ahmad v. State,* 16 DLR SC 584; PLD 1964 Supreme Court 266.

18 *Brown v. Barry,* 8 Dall. 365.

Act, there being no difference between 'repeal' and 'cancellation'[19]. Sec. 6A of the General Clauses Act, 1897 provides as follows:

> When the provisions of amending Act has duly been incorporated in the amended Act by "omission, insertion or substitution of any matter" in the amended Act then even though the amending Act is repealed, the "omission, insertion or substitution" thereunder made in the amended Act shall not be repealed but shall continue to be in-operation unless a different intention appears in the repealing Act that has repealed the amending Act.

The use of the words "repeals by express omission, insertion or substitution" covers different aspects of repeal and this is also, at the same time, a legislative indication that "omission" does amount to "repeal". Similar indication is reflected in *Fazlul Huq Haider @ Molla v. The State*[20] where the Court considered the omission of sec. 437 of the Code of Criminal Procedure by the Law Reforms Ordinance of 1978 as repeal and held that such omission is governed by sec. 6 of the General Clauses Act, 1897. Consequently, exercise of jurisdiction under the omitted sections is permissible if the proceeding started at any date earlier than such omission[21]. But a contradictory view is taken in *General Finance Co. Anr. v. Asstt. CIT*[22] where the Supreme Court of India held that:

> "The principle embodied in sec. 6 of the General Clauses Act, 1897 as saving the right to initiate proceedings for rights accrued or liabilities incurred during the prevalence of the Act, will not apply to omission of a provision in an Act but only to repeal, as omission is different from repeal."

The Court while holding such view, did not elaborate how an omission is different from a repeal. However, some trifle differences can be drawn between repeal and omission like in case of repeal an original section or article is discarded without keeping its replacement and it is considered that the enactment so discarded had never been enacted by the legislature and another difference is that an enactment repealed can be revived under sec. 7 of the General Clauses Act but such revival is not possible in case of an omitted enactment[23].

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19 AIR 1955 NUC 5449 Lah.

20 35 DLR 1; see also 15 DLR 13.

21 *Sachindra Chandra v. Md Mofizuddin*, 1984 BLD (AD) 67.

22 (2002) 21 SITC 450 (SC); see also (1969) 2 SCC 412; (2000) 2 SCC 536.

23 Sec. 7 of the General Clauses Act, 1897 provides that for the purpose of reviving a statute repealed, it is necessary to expressly state that purpose in the reviving statute. It can clearly be presumed from the wording of sec. 7 that revival of repealed enactment, not omitted enactment, directly comes within the boundary of this section.

(2) Repeal by implication

Repeal may be either express or implied. It is express when declared in direct terms and implied when the intention to repeal is inferred from subsequent contradictory or inconsistent legislation. Though there is a presumption against repeal by implication and repeal by implication is not favored by the courts[24], yet, if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two Acts cannot stand together, then the presumption is rebutted and the earlier stands impliedly repealed by the later one[25]. However, when two enactments exist together on the same subject, they need not be necessarily repugnant to each other, if both the statutes can harmoniously be construed[26]. If the two Acts are in conflict with each other on the same subject and there is no space of reconciliation, the latter and special Act does prevail in that case[27].

So far as statutory construction is concerned, no distinction is made between the effects of express repeal and the effects of repeal by implication and sec. 6 of the General Clauses Act comes into play whenever a previous enactment is repealed either expressly or by implication[28]. However, the application of sec. 6 of the General Clauses Act can be ruled out where a law, which replaces an old Act, provides for the continued operation of the old law in respect of certain matters and for the operation of the new law in respect of some other matters[29]. A statute is presumed to have been repealed impliedly in the following cases[30]:

a) If the provisions of the former enactment are clearly repugnant to those of the subsequent enactment.

b) If the application of the two statutes at the same time would wholly result in absurd consequences.

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24 *Jose Gonzalo v. State,* 21 DLR (WP) 90.

25 *Abdul Gani v. Harendra,* 6 DLR 637; 8 DLR 457; PLD 1996 SC 77; *State of Orissa v. M.A. Tulloch & Co.,* AIR 1964 SC 1284; *Delhi Municipality v. Shiv Shankar,* AIR 1971 SC 815.

26 *Omar Sons v. Labour Court,* 28 DLR 178.

27 *Abul A'la Maudoodi v. Govt. of West Pakistan,* 17 DLR (SC) (1965) 209.

28 *Kohinoor Mercantile Corpn. v. Hazera Khatun,* 14 DLR 47 (DB); PLD 1963 Dacca 238; *State of Orissa v. M.A. Tulloch & Co.,* AIR 1964 SC 1284.

29 *Indira Sohanlal v. Custodian of Evacuee Property, Delhi,* AIR 1956 SC 77.

30 *Mumtaz Ali Khan v. Pakistan,* PLD 2001 SC 169; *Abul A'la Maudoodi v. Govt. of West Pakistan,* 17 DLR (SC) (1965) 209 (Per Hamoodur Rahman J).

c) If the entire subject matter of the first enactment is taken away by the second enactment.

Consequence of Repeal of Statute

Under the common law rule the normal presumption of repealing a statute without a saving clause[31] is to obliterate it from the statute-book as completely as if it had never been enacted except as to transactions past and closed[32]. As a result, no proceeding under the repealed statute could be commenced or continued after the repeal and all incipient rights and all causes of action that might have arisen under the repealed statute came to an end with the repeal. But this presumption has been rebutted and the necessity of inserting a saving clause in each and every repealing statute has been rendered unnecessary for sec. 6 of the General Clauses Act, 1897 being existent in Bangladesh. This section provides as follows:

Section 6: Effect of Repeal.

Where this Act, or any Act of Parliament or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) after any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal

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31 The saving clause is used in order to exempt something from being destroyed. It is generally used in repealing statute for the purpose of preventing them from affecting rights accrued, penalties incurred or duties imposed or proceedings started under the statute sought to be repealed. See AIR 1951 Punj. 52.

32 *Punjab v. Mohar Singh,* AIR 1955 SC 84; *Attorney General v. Lamplough,* L.R. 8 Ex. D. 223.

> proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

The consequences provided by sec.6 applies to all types of repeals whether total or partial[33], express or implied[34] or whether a repeal simpliciter or a repeal accompanied by fresh legislation[35]**.** It also applies when a temporary statute is repealed before its expiry but it has no application when such a statute is not repealed but comes to an end by expiry. Repeal of a subordinate law by an enactment[36]or repeal of a rule by another rule[37]or repeal of a statute by judicial pronouncement is also out of the attraction of this section[38]**.** This section may not also be available in cases where rules are repealed merely because it is provided in the enactment under which the rules are made that they shall have effect as if enacted in the Act[39].

Repeals have prospective Operation only

It is well settled that parliament being the supreme legislative authority subject to the constitutional limitations under Article 65 has the plenary power to pass any law on any subject both prospectively and retrospectively[40]. But in the absence of any express or implied provision in the Act to indicate that the Act will have retrospective effect, the Act would apply prospectively[41].Whenever an Act, whether amending or repealing, is enacted, it would have operation prospective in nature unless a contrary intention can be ascertained from the consideration of all the relevant provisions of the repealing law[42]. But where the intention as to being retrospective is doubtful the statute would be construed as

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33 *Ekambarappa v. Excess Profits Tax Officer,* AIR 1967 SC 1541.

34 AIR 1964 SC 1284.

35 63 DLR(AD) 18; *Md. Nazimuddin v. State,* 30 DLR 49 (FB) 70, at para-60.

36 *Chowdhury Nasimul Baqui v. Bangladesh Steel and Engineering Corpn. & others,* 52 DLR (AD) 125.

37 *Rayala Corporation v. Director of Enforcement,* AIR 1970 SC 494 at 503; *Kolhapur Cane Sugar Works v. Union of India,* AIR 2000 SC 811 at 819.

38 *Jannat-ul-Haq v. Abbas Khan,* 2001 SCMR 1073(c).

39 *Emperor v. Rajon,* AIR 1944 Bom. 250.

40 *Mofizur Rahman Khan v. Government of Bangladesh,* 34 DLR (AD) 321; *Hajee Abdul Shukoor & Co. v. State of Madras,* AIR 1964 SC 1729.

41 *Maharaj Chintamani Sara Nath Shahdeo, Appellant v. State of Bihar,* AIR 1999 SC 3609.

42 *Md. Nazimuddin v. The State,* 30 DLR 49 (FB) 70 at para-60.

prospective only[43]. However, in determining the effects of repeal, a distinction is drawn between statute dealing with substantive rights and statute dealing with procedure only.

(1) Repeal of Substantive law

A substantive law is prima facie prospective in its operation[44]. Sec. 6 of the General Clauses Act would apply to legal proceedings in respect of substantive rights which have already accrued under a repealed enactment and would not embrace a case where only a procedural right is granted[45]**.** It was also observed in *Maharaj Chintamani Sara Nath Shahdeo, Appellant v. State of Bihar*[46] that "the amending Act affects the substantive right of the appellant; therefore, it would have prospective operation". The reason is that the legislature could not have intended affecting vested rights or to impose new burdens retrospectively unless the words compel the court to give effect to it retrospectively[47].

(2) Repeal of Procedural Law

Unlike the substantive law, procedural law is always retrospective unless a different intention is expressly made in the statute itself and no one has a right far less a fundamental right, to trial by particular court or a particular procedure,[48] unless any constitutional objection by way of discrimination or the violation of any other fundamental right is raised[49]. But the prohibition under Article 35(1) of the Constitution[50] does not extend to merely procedural laws changing the forum or reducing the trial time and procedural law would not contravene Article 35(1) merely because retrospective effect is given to it[51]. If a statute deals merely with the

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43 *State v. Norwood*, 12 Md. 195.

44 This proposition is based on the well-known maxim *"Nova Constitutio Futuris Formam Imponere Debet, Non Praeteritis"* meaning any new law that is made affects future transactions, not past ones.

45 *Khushiram v. Custodian Evacuee property*, 17 DLR (SC) 431.

46 AIR 1999 SC 3609.

47 *R. Rajagopal Reddy v. Padmini*, (1995) 213 ITR 340 (SC).

48 *Abdul Kader Mirza v. Bangladesh*, (2008) 60 DLR (AD) 185; *Bangladesh v. Sk. Hasina Wazed*, (2008) 60 DLR (AD) 90; *MA Sattar v. State*, (2009) 14 BLC (AD) 74; *Muhibur Rahman v. Bangladesh*, (2003) 55 DLR 636; 49 DLR (AD) 115; 20 DLR (SC) 315; 1 BLC 158; PLD 1965 (SC) 681; AIR 1979 SC 602.

49 AIR 1953 SC 394.

50 Article 35(1) of the Constitution provides that "No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission".

51 *Bangladesh v. Sk. Hasina Wazed*, 60 DLR (AD) 90.

procedure in an action and does not affect the rights of the parties, it will be held to apply, prima facie, to all actions pending as well as future[52] and a subsequent omission by way of amendment of a procedure cannot be of any consequence in respect of the proceeding against the litigant[53]. But where a new period of limitation was provided after the cause of action arose, sec. 6 of the General Clauses Act would not apply and the new limitation prescribed by the amending Act would govern the case[54]. However, change in the manner for trial or dismissal of litigation no more a procedural change of law and hence it is protected by the General Clauses Act[55]. But if the rights under the repealed statutes are saved and the repealing statute does not provide any new procedure applicable to the rights so saved, it would be consequential that the old procedure is saved as the only machinery for enforcing the old rights[56].

(3) Repeal of Right of Appeal

An appeal is a continuation of the proceedings of the original suit[57] unless otherwise provided by law[58] and the right of appeal is not a mere matter of procedure but it is a substantive right. This right becomes a vested right on the date the original proceeding is initiated[59]. A statute creating a new right of appeal is prospective in nature[60] and cannot be applied retrospectively unless the law either expressly or impliedly gives retrospective effect to it[61]. So the right of appeal is to be governed by the law prevailing on the date of filing the suit not on the date of the decision by the court below or the date of filing of the appeal[62]. But where the appellate court is abolished without providing alternative forum, the right of appeal to the abolished court must perish with its abolishment[63]. However, if a new forum is

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52 *Abdul Wadud v. State,* 48 DLR 6.

53 *Chowdhury Nasimul Baqui v. Bangladesh Steel and Engineering Corpn.,* 52 DLR (AD) 125.

54 *Bank of India v. Mohammad Sharif,* PLD 1965 (WP) Karachi 69 (DB); In this case the Court resonated the well-established principle that the period of limitation is ordinarily a matter of procedure only.

55 *Star Medical Store v. Subordinate Judge, Artha Rin Adalat,* 53 DLR 254.

56 *Jatindra Nath v. Jetu Mahato,* AIR 1946 Cal 339.

57 *Shyam v. Shagun,* AIR 1967 All 214; *Kristnamchariar v. Mangammal,* ILR 26 Mad 91.

58 *Umedlal v. Chopra,* AIR 1967 Bom 514.

59 *Md. Nazimuddin v. State,* 30 DLR 49.

60 *DC & G Mills v. ITO,* AIR 1927 PC 242.

61 *Hussein Kasarn Dada (India) Ltd. v. State of M.P.,* AIR 1953 SC 221; *Colonial Sugar Refining Co. Ltd. v. Irving,* [1905] AC 369; *Jose Da Costa v. Bascora,* AIR 1975 SC 1843.

62 *Garikapathi v. Subbiah,* AIR 1957 SC 540.

63 *Ittyavira Mathai v. Varkey,* AIR 1964 SC 907 at 914; *Ganapat Rai v. Chamber of Commerce,* AIR 1952 SC 409; *Daji Saheb v. Shakar,* AIR 19567 SC 29.

provided, the right would subsist and the right is to be exercised in the new forum even in respect of old cause of action as a litigant has no vested right to a trial by a particular court[64].

Perpetual Statute and Temporary Statute

A statute providing no fixed time for its duration is a perpetual statute[65]. Even though in the preamble the purpose of a statute is mentioned as temporary, the statute cannot be treated as temporary if no fixed period is specified for its duration[66]. The Finance Acts which are annual Acts are not temporary Acts and they often contain provisions of general nature having permanent operation[67]. A perpetual statute is not perpetual in the sense that it cannot be repealed or amended by the legislature; it is perpetual in the sense that it is not decimated or abrogated by the expiry of time. As a result, whenever a perpetual statute is repealed, the effect as provided by sec. 6 of the General Clauses Act would follow.

On the other hand, a temporary statute is a statute that contains a clause limiting the duration of its validity and operation. A statute is temporary when the legislature fixes the period during which it remains in operation and unless extended ceases to have operation on the expiry of the period so fixed by the legislature[68]. The duration of a temporary statute may be extended by a fresh statute or by exercise of power conferred under the original statute[69]. Even, a temporary statute may be made perpetual before its expiration and when so made it becomes perpetual *ab initio*[70].

(1) Repeal of Temporary Statute

If a temporary statute is repealed by an enactment before its expiry by lapse of time the provision of sec. 6 of the General Clauses Act would be applicable to it[71]and, accordingly, a right accrued or proceeding pending under that repealed statute would be protected.

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64 *Bangladesh v. Sk. Hasina Wazed,* (2008) 60 DLR (AD) 90; *Maria Cristina v. Amira Zurana,* AIR 1979 SC 1352; *New India Ass. Co. Ltd. v. Shanti Misra,* AIR 1976 SC 237.

65 *Jotindranath v. Province of Bihar,* AIR 1949 FC 175.

66 *Maganti v. A.P.,* AIR 1970 SC 403.

67 *Madurai District Central Co-operative v. ITO,* AIR 1975 SC 2016.

68 *Jotindranath v. Province of Bihar,* AIR 1949 FC 175.

69 *Inder Singh v. Rajasthan,* AIR 1957 SC 510.

70 *Rex v. Morgan,* Str. 1066; *Bombay v. HemonSant Lal,* AIR 1952 Bom 16.

71 *Shah Ekramur Rahman v. Secretary, Ministry of Land, Dhaka,* 1994 BLD 538; *Punjab v. Mohar Singh,* AIR 1955 SC 84; AIR 1957 Cal. 257.

(2) Expiry of Temporary Statute

In the absence of any saving provision, once the temporary statute expires, no right can be claimed nor any liability can be imposed under that statute and the position is as if the temporary statute had not been passed at all[72]. The effect of expiry of temporary statute can be discussed under the following points:-

(a) Legal Proceeding under Expired Temporary Statute: A question often arises whether the legal proceeding under an expired temporary statute can be initiated or continued after its expiry? The legislature generally provides a saving clause in a temporary statute in the following words "The temporary Act shall expire on the specified date except as respect things done or omitted to be done''. If a temporary statute has a saving clause for continuance of the proceeding, then it would have effect similar to that of sec. 6 of the General Clauses Act[73]. In the absence of any saving clause, sec. 6 of the General Clauses Act has no application to expiry of a temporary statute[74]and proceedings which are commenced against a person under a temporary statute will automatically terminate on the expiry of the statute[75]. Similarly, a person's detention under a temporary statute relating to preventive detention will automatically come to an end on the expiry of temporary statute[76]. All that sec. 6 of the General Clauses Act means is that in spite of the repeal a statute is deemed to be in force in respect of the particular matters enumerated in that section *i.e.* its original life would continue in spite of the repeal, but sec. 6 certainly does not mean that by the repeal it would be in force even after the period for which it was legally to be in force as enacted[77].

(b) Subordinate Legislation under Expired Temporary Statute: Sec. 24 of the General Clauses Act does not apply to Acts or Orders which have lapsed by efflux of time[78] and any notification,

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72 Islam, Mahmudul, Interpretation of Statutes and Documents, Mullick Brothers, Bangladesh, 2009, p. 277.

73 *Wicks v. Director of Public Prosecution,* [1947] 1 All ER. 205.

74 *District Mining Officer v. Tata Iron & Steel Co.,* AIR 2001 SC 3134 at 3135; AIR 1996 SC 2560; (2001) 7 SCC 358.

75 *Gopichand v. Delhi Administration,* AIR 1959 SC 609.

76 *S. Krishnan v. Madras,* AIR 1951 SC 301.

77 *State v. Muhammad Sharif,* PLD 1960 Lahore 236-PLR 1960(2) WP Lahore 126 (DBP).

78 *Hot Chondra Shamdas v. Lala Shri Ram,* AIR 1963 All 234.

appointment, order, scheme, rule or by-law made or issued under a temporary statute come to an end with the expiry of the statute and will not be continued even if the expired temporary statute is re-enacted[79]. The well settled principle in this regard is that "whenever a machinery of law, which constitutes the life-giving source from which other pieces of legislation derive their life-stream, expires and dies, everything done under it, including "subordinate" legislation made thereunder, automatically dies when the source of life is dried up"[80].

(c) Expired Temporary Statute Is not Dead for All Purposes: Even without a saving clause the expiry of a temporary Act does not render the temporary Act dead for all purposes. The expiry of a temporary statute, even though leaves no trail, it has no effect on a matter past and closed[81] and a person who has been prosecuted and sentenced during the continuance of a temporary Act for violating its provisions cannot be released before he serves out his sentence, even if the temporary Act expires before the expiry of full period of the sentence[82]. Because of expiry of any temporary law by efflux of time or lapse of the Ordinance for non-compliance of the requirements of Art.93(2)[83], the actions taken during its continuance, as such, are passed and closed having acted upon shall remain valid until the parliament enacts a law operating retrospectively nullifying all actions taken under the Ordinance[84].

(d) Repeal of Amending or Repealing Temporary Statute: When an amending or repealing temporary statute is repealed by any enactment before its expiry, there is no doubt that the repeal would be regulated by ss.6A & 7 of the General Clauses Act. But the question arises is if the amending or repealing temporary statute expires, will the amendments or repeal brought come to an end?
The answer would be that if the expired statute is an amending temporary statute, then the amendments brought during the validity period of the amending temporary statute remain

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79 *Trust Mai Lachhmi Sailkot Brandari v. Amritsar Improvement Trust,* AIR 1963 SC 976.

80 18 DLR (1966) 35, para-28.

81 18 DLR 1; 3 BLT (HCD) 35; *Kazi Abdul Kader v. Election Tribunal,* AIR 1994 SC 2196.

82 *State of Orissa v. Bhupendra Kumar,* AIR 1962 SC 954; AIR 1949 FC 90.

83 Article 93(2) provides that "An Ordinance made under clause (1) of article 93 shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.

84 *Moudud Ahmed v. State,* 68 DLR (AD) (2016) 150, Para-76.

unaffected at the expiry of the statute and it is immaterial to argue that it is being an expired amending temporary statute the provision of the General Clauses Act is not applicable in the instant case[85].

If the expired statute is a repealing temporary statute, would the repealed statute revive on the expiry of the repealing temporary statute? SS. 6 &7 of General Clauses Act do not give any clear answer to this situation and ultimately the Courts have held that the answer will depend upon the construction of the repealing statute as observed by *Gajendragadkar, J.* that "the intention of the temporary Act in repealing the earlier Act will have to be considered, and no general or inflexible rule in that behalf can be laid down"[86]**.** Following the same principle, it was held that the Joint State Civil Service Regulations 1945 which were repealed by Pepsu Ordinance No. 16 of Samvat 2005 did not revive after six months when the Ordinance expired for the intention in repealing the Regulation was to repeal them absolutely[87].

(e) Revival of Expired Temporary Statute: A temporary statute expired considered never had in existence. So if such a statute expires, it cannot be made effective only by amending it and it can be revived only by re-enacting a statute expressly saying the expired statute is revived[88].

Effect of Repeal of Amending Statute

Sec. 6A of the General Clauses Act, 1897 refers to the textual amendment[89] and clarifies the effect of repeal of amending statute. It is a well settled principle of law that the repeal of a statute does not repeal such portions of the statute as have been incorporated into the amended statute[90]

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85 *Ibid,* at para-75.

86 *State of Orissa v. Bhupendra Kumar,* AIR 1962 SC 945 at pp. 953,954.

87 *State of Hariyana v. Amarnath Bansal,* 1997 (1) Scale 434, at pp.351, 352.

88 *Jatindranath v. Bihar,* AIR 1949 FC 175; *Inder Singh v. Rajasthan,* AIR 1957 SC 510.

89 The word 'text' in its dictionary meaning means 'subject or theme'. When an enactment amends the text of another, it amends the subject or theme of it, though sometimes it may expunge the unnecessary words without altering the subject. The word "text" is, therefore, comprehensive enough to include the subject as well as the terminology used in a statute and sec. 6A refers only to enactment making amendments which are textual amendments. This section, however, will not apply where the amendment is not of a textual nature but is intended to modify the interpretation or application of an earlier enactment. Ref. 2 BSCD 92; *Jethananad Betab v. The State of Delhi,* AIR 1960 SC 89.

90 *Solicitor, Govt. of Bangladesh v. Dulal Alias Fariduddin,* 2 BSCD 92.

as the amendments brought by a statute, in fact, becomes a part and parcel of the main Act[91]. The Judicial Committee of the Privy Council in *Secretary of State v. Hindustan Co-operative Insurance Society Ltd*. [92] observed that "the independent existence of the two Acts is recognized; despite the death of the parent Act, its offspring survives in the incorporating Act".

The main object of repealing Act is only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of the over –increasing state of legislation and to remove confusion from the public mind[93]. In *Raman Saldevan v. R Kesavan Nair,*[94] the High Court of Kerala held:

> "The purpose of an amending Act is to plant the necessary amendments in the parent or the main Act and once such planting has been effected, the amending Act having served its purpose need not remain any more to tend the plant, as it were the plant has taken root in the main Act."

Therefore from the aforesaid discussion it can be concluded that the repeal of an amending Act does not affect the amendments which have been inserted in the main Act. However, the effect of sec. 6A is not absolute as shown by the wording of the section itself. The operation of the section is dependent upon the intention of the legislature as indicated in the repealing statute[95].

Revival of Repealed Enactment

The common law rule was that when an Act repealed another Act, the second Act so repealed would revive *ab initio*[96] and not merely from the passing of the reviving Act[97]. This is not the position now because of the presence of ss. 6(a), 6A and 7 of the General Clauses Act, 1897. The result, therefore, is that if one Act is repealed wholly or partially by a second which again is repealed by a third, the first Act is not revived

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91 *Abdul Majid v. Custodian of Evacuee Property*, PLD 1962 (WP) Karachi 306 (DB).

92 AIR 1931 PC 149.

93 *Jethananad Betab v. The State of Delhi,* AIR 1960 SC 89; *Khuda Bux v. Manager, Caledonian Press,* AIR 1954 Cal. 484; 2 BSCR 92.

94 AIR 1973 Ker 136.

95 *Solicitor, Govt. of Bangladesh v. Dulal Alias Fariduddin,* 2 BSCD 92.

96 *Ab initio* is a Latin term meaning "from the beginning" and is derived from the Latin *ab* and *initio*. *Ab* means 'from' and *ignition* means 'beginning or inception'.

97 *Syed Shamsuddin v. Munira Begum,* AIR 1963 Andh. 459.

unless the third Act makes an express provision reviving the first one[98]. To revive a repealed statute, it is necessary to manifest an intention to do so in the reviving Act[99].

Effect of Repeal of a Provision Incorporated in another Act by Reference

If the provisions of a statute are incorporated by reference in a second statute and the earlier statute is repealed but without re-enactment, the second statute would continue to be in-operation with the incorporated provisions of the repealed statute treated as being part of it[100] and repeal or amendment of the earlier statute would not affect the later statute or the provisions incorporated in the later statute[101], if it is possible for the later statute to function effectually without the amendment or addition[102]. But this rule is now subject to the qualification enacted in sec. 8 of the General Clauses Act, 1897[103] providing that when an Act is repealed and re-enacted, unless a different intention is expressed by the legislature, the reference to the repealed Act would be considered as reference to the provisions so re-enacted[104]. The principle underlying sec. 8 applies to the construction of statutory rules and notifications issued under the various statutes, even though they do not fall within the express terms of sec. 8[105] . The principle is also applicable to the construction of judicial orders and decrees[106]. However, to attract the application of sec. 8, at least three sets of enactment must be there: one, which has been repealed, the other which has been re-enacted, and the third, which has made reference to corresponding provision in the re-enacted statute[107]. Illustrating, the Village Courts Ordinance, 1976 has now been replaced by the Village Courts Act, 2006. Reference in any enactment to the Village Courts

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98 41 DLR 193; *Ameerunnissa Begum v. Mehboob Begum,* AIR 1955 SC 352; *Akter Hossain v. West Pakistan,* PLD 1970 SC 146.

99 *Vidhya Behn v. J.N. Bhatt,* AIR 1974 Guj. 23; *Syed Shamsuddin v. Munira Begum,* AIR 1963 Andh. 459.

100 AIR 1964 SC 1967.

101 *Ram Sarup v. Munshi,* AIR 1963 SC 553; *Secretary of State v. Hindustan Co-operative Insurance,* AIR 1931 PC. 149; *Daulatpur Jute Mills v. ITO,* 24 DLR 88; *Tofazzal Hossain v. East Pakistan,* 19 DLR 79.

102 *Daulatpur Jute Mills v. ITO,* 24 DLR 88 at para-13.

103 *National Sewing Thread Co. V. James Chadwick & Bros.,* AIR 1953 SC 357.

104 1994 Lab IC 2220 (Mad); *Om Prakash v. State,* 1972 AWR 428; *R. v. Goswami,* [1968] 2 WLR 1163.

105 AIR 1976 HP 6; AIR 1969 Del. 330.

106 AIR 1966 Pat. 297 (FB).

107 AIR 1981 Cal. 67.

Ordinance, 1976 must therefore be construed as reference to the Village Courts Act, 2006.

Effect of Repeal on Subordinate Legislation

When a statute, under which any subordinate legislation by way of rules, regulations or by-laws is made, is repealed, those rules regulations and by-laws stand repealed and cease to have validity unless a saving clause providing to the contrary is inserted[108]. However, if a statute is repealed and re-enacted, then sec. 24 of the General Clauses Act would come forward to protect the subordinate legislation made under the statute so repealed and consequently, any appointment, notification, order, scheme, rule , form or by-laws made or issued under the repealed statute shall continue unless they are inconsistent with the provisions re-enacted[109]. For instance, notification issued under the Forest Act, 1878 were continued to be in force though the said Act was substituted by the Forest Act, 1927[110].

Effect of Repeal of and by Ordinance

An Ordinance shall, from the date of its promulgation, have the like force of law as an Act of parliament and by reason of section 30 of the General Clauses Act, 1897[111] and article 152(2) of the Constitution of Bangladesh[112]the word "Act" or "enactment" would include an Ordinance promulgated by the president under article 93(1) of the Constitution[113]. Therefore, the same principles of interpretation as incorporated in ss. 6, 6A, 7 of the General Clauses Act should be applied when an Ordinance repeals a previous enactment. If an Ordinance is repealed by an enactment before its actual expiry, there is no doubt that sec.6 of the General Clauses

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108 *K.A. Kader v. Election Tribunal E. Pak,* 18 DLR (1966) 1; AIR 1958 Andh. 427.

109 *State v. Shaft M Sehwani*, PLD 1997 Lah. 583(c); *Bombay v. Pandurang*, AIR 1953 SC 244; *Bhilai Steel Project v. Steel Workers' Union,* AIR 1964 SC 1333.

110 *Crown v. Wall Dad*, PLD 1954 Lahore 236.

111 Section 30 of the General Clauses Act, 1897 provides that an Act of parliament shall be deemed to include an Ordinance made and promulgated by any person having authority to legislate under any constitutional provision or by the President of Bangladesh under the Constitution.

112 Article 152 (1) of the Constitution provides that the General Clauses Act, 1897 appliers to the interpretation of the Constitution or any enactment repealed by this Constitution, or which by virtue thereof becomes void or ceases to have effect, as it applies in relation to any enactment repealed by Act of Parliament.

113 Article 93(1) of the Constitution of Bangladesh provides that at any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require.

Act would apply to protect the matters pending as well as closed and past[114]. But a question arises as to what would be the consequences when an Ordinance comes to an end for reason of non-compliance with the requirements of article 93(2) of the Constitution. It is true that an Ordinance is a temporary law and an Ordinance, like any other temporary law, on expiry or disapproval shall be deemed never to have existed except for the past and closed transactions[115]. Thus where an Ordinance lapsed or ceased to operate as a result of disapproval of the legislature, the Ordinance would not become void *ab initio* and there would be no revival of the posts which were abolished by the said Ordinance, unless the legislature passes an Act to that effect or create a new post of like nature[116]. The Apex Court of Bangladesh applied sec. 6A of the General Clauses Act to the interpretation of an expired Ordinance observing that the amendments brought to an Act by an Ordinance becomes a part and parcel of the main Act and it cannot be held that the amended provision of the Act ceased to have effect for non-compliance of the requirements of article 93(2) of the Constitution and thus the amendments or the actions which are already taken in pursuance of the amending Ordinance being closed and completed matters shall remain valid even though the amending Ordinance has expired[117]. Therefore, a mere disapproval by parliament of an Ordinance cannot revive closed and completed transactions. That does not mean that the parliament is powerless to bring into existence the same state of affairs as they existed before an Ordinance was promulgated even though they may be completed and closed matters under the expired Ordinance. That can be done by passing an express law operating retrospectively to the said effect, of course, subject to the other constitutional limitations[118]. However, earlier it was held that repeal of a perpetual statute by an Ordinance is effective only as long as the Ordinance remains in force unless it is followed by an Act of Parliament[119]. The permanent repeal of a perpetual statute by Ordinance is *ultra vires*, and the repealed Act revives as soon as an Ordinance 'ceases to operate', irrespective of the fact whether in the Ordinance the repeal was intended to be permanent or temporary[120]. The aforesaid two decisions are not only contradictory to the decision of *Moudud Ahmed v. State*[121] but

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114 *Mohmood Hassan Harvi v. Federation of Pakistan,* PLD 1999 Lah 320(d); *Riaz Ahmed khan v. Mohammed Yusuf Khan,* PLD 1956 (WP) Karachi 255-PLR 1956 WP Karachi 1781 (DB).

115 *Orissa v. Bhupendra,* AIR 1962 SC 945.

116 *Venkata Reddy, T v. State of AP,* (1985) 3 SCC 198 at Para 19-20; AIR 1985 SC 724.

117 *Moudud Ahmed v. State,* 68 DLR (AD) (2016) 118, at para-75.

118 *Ibid,* at para-75.

119 *Surnjit Sen Gupta v. Election Tribunal,* 1981 BLD 132.

120 11 DLR (SC) (1959) 285.

121 68 DLR (AD) (2016) 118.

also the decisions are *per incuriam*[122], that is, a decision given in ignorance of the terms of the Constitution or of a law or of a rule having the force of law, does not constitute a binding precedent[123]. In this situation, the established principle 'the latest judgment should be relied upon' shall apply. So the decision of *Moudud Ahmed v. State*[124] shall prevail here as it is also the decision of the Apex Court of Bangladesh.

Conclusion

The statutory rules of interpretation dealing with the effects of repeal of enactment are underlined in the provisions of ss. 6, 6A, 7, 8, and 24 of the General Clauses Act, 1897. But the word 'repeal' is no longer confined within its literal meaning and extended to be comprehensive enough to include amendment, omission, insertion, substitution, addition and re-enactment. However, right of repeal being inherent in the legislature alone, any change of law including its annulment otherwise than by legislation would not constitute 'repeal' as to protect any right, obligation acquired, accrued or incurred under annulled law[125]**.** When the legislature repeals an enactment, it does so consciously, but when it says that a particular statute shall be void to the extent of inconsistency, it is contemplating a possible conflict, and is not necessarily contemplating repeal, and therefore the contemplation of any saving clause is out of the question[126]. The consequences of repeal as provided in the aforesaid sections are also not absolute and have been made subject to the qualifications set forth in different decisions of the Apex Courts. For instance, the effect of sec. 6 attracts the repeal of a perpetual statute but the position is not same in case of repeal of a temporary statute. Again, the wordings of sec. 8 are problematic and may result in giving retrospective operation to a substantive law and violating article 35(1) of the Constitution of the People's Republic of Bangladesh. In this regard an amendment should be brought to this section providing a clear distinction between incorporation of procedural and substantive provision of an earlier statute by reference to

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122 *Per Incuriam* means wrongly decided because the judge was ill-informed about the applicable law. The expression '*Per Incuriam'* is a Latin word which means 'through inadvertence' or 'through want of care'. A decision of court is not a binding precedent if given *Per Incuriam*, without the court's attention having been drawn to relevant authorities. Ref. 21 BLD (HD) 30; 4 BLC 284.

123 *Sufia Khatoon v. Mahbuba Rahman,* 2010 BLD (AD) 41; (2010) 62 DLR (AD) 298; 2010 BLD (AD) 41; AIR 1989 SC 38.

124 68 DLR (AD) (2016) 118.

125 *Jannat-ul-Haq v. Abbas Khan,* 2001 SCMR 1073(c).

126 *Muhammad Bashir v. Province of West Pakistan,* PLD 1958 (WP) Lahore 853-PLR 1958 (2) WP Lahore 735 (FB).

in a later statute. Where the reference of the former may mean reference to provision as amended from time to time and reference to the latter would mean reference to the provision as on the date of the reference.

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Arrest without warrant and Police Remand: A Critical Analysis of High Court Division of Bangladesh on Rubel Case

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Abstract

The issue of custodial deaths in the recent time has been occurred in an alarming rate. This is because of the black provisions of the Code of Criminal Procedure, 1898 and the Special Powers Act, 1974 which is the violation of the fundamental rights of the citizens and also disobey the principles of the Constitution of Peoples Republic of Bangladesh. As a result, Rubel Case[2] is the beginning of the beginning in the history of the SC against the reckless power of the police officer and the political government. The executive must rethink to implement the directives of the SC. So, the article seeks to explore the Rubel Case. It also focuses that the State should give quick response to amend the laws and implementing the directives. Furthermore, the paper presents, in short, the analysis and assessment of suspicion arrest and police remand by the different political government.

Keywords: Arrest, Police Remand, SC Directives, Fundamental Rights

Introduction

Arrest is the beginning of imprisonment.[3] Arbitrary arrest, detention and custodial torture by law-enforcing agencies have remained a persistent feature of our criminal justice system. These practices have been widespread in Bangladesh irrespective of the forms of political government and successive governments have failed to stop this endemic problem. Arbitrary arrest, detention and infliction of torture are unacceptable in any form of government that is committed to democracy and the rule of law. The violation of this right by the executive authorities, particularly by the law enforcing agencies is the common phenomenon in

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2 *BLAST v. Bangladesh*, 55 DLR (2003), HCD, p.363.

3 Md. Abdul Halim, Test Book on Code of Criminal Procedure, CCB Foundation, Dhaka, 2009, 3rd Edition, p.63.

Bangladesh.[4] Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh.[5]

Objectives of the Study

Now-a-days arrest without warrant and police remand is the bargaining issue in Bangladesh. This study will smooth the progress to know about the terminology like arrest without warrant and police remand. This paper explores the status of section 54 and 167 of CrPC under the shadow of some leading cases especially Rubel Case. Besides giving a better understanding of the of the status of law with respect to abuse of police power, this study, it is hoped, will give a parameter to the police force about their limit to arrest and police remand. The study will become significant as it progress with present situation regarding arrest and remand by implementing the SC directives.

Methodology

Methodology is one of the important parts of a study and also need to understand the assumptions underlying various methodologies. The study is based on both primary and secondary sources. The primary sources used in this writings are collected from Statutes, Case laws, Conventions etc. The secondary which is used in this study to collect relevant information to fulfil the objectives of the study is text-books, journal articles, newspaper articles, reports and websites. This study is prepared by using the analytical approach of research which is the most important one and widely used in academic legal research.

Fact of the Case

Shamim Reza Rubel, an IUB student picked up on July 23, 1998 by plain clothes law enforcers, tortured and killed in their custody.[6] Rubel, a soft spoken, shy student had been chatting with the shopkeeper of neighborhood lungi shop in the afternoon. On July 23, at around 4pm a

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4 Sarkar Ali Akkas, Constitutional Rights against Arbitrary arrest and Detention: The Case of Bangladesh, Bangladesh Journal of Law, 2011.

5 Dr. Abdullah Al Faruque, Professor, Department of Law, University of Chittagong, Analysis of the Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh, National Human Rights Commission, Bangladesh (NHRC), January 2013.

6 Aasha Mehreen Amin, Remembering Rubel, The Daily Star, Editorial, p.6, May 22, 2016.

microbus with several members of the DB (Detective Branch) came to Rubel's house; in a matter of minutes they had caught the young man and started beating him up indiscriminately, accusing him of having illegal weapons.[7] They were in plainclothes but everyone knew who they really were. They took him away. At the DB office in Mintu Road, the torture continued until Rubel, to save himself, 'confessed' that there were indeed weapons in his house. They brought him back. But there were no weapons and when Rubel admitted he had lied just so they would stop the beating their fury knew no bounds. The young man's bloodcurdling screams were heard by many in the neighborhood. One of the men stuck Rubel on the head, another one kicked him so hard he hit the electric pole. Then they dragged him back into the microbus, despite the desperate pleas of the young man's father who asked them to take him along with his son. In a matter of seconds, Rubel was gone.[8] The family didn't give up and tried everything to get him back. They did get him back but as a corpse with gruesome marks of torture on his body. The post mortem report stated that Rubel died of haemorrhage and shock due to severe beating.[9] So Rubel was arrested by police under section 54 of CrPC and died in the police custody due to alleged torture by the police.[10]

As a result, Rubel's death in custody had encouraged a writ petition to be filed as public interest litigation before HCD (High Court Division) by human rights organization by the petitioners including Bangladesh Legal Aid and Services Trust (BLAST), Ain-O-Salish Kendra, Sammilita Samajik Andolon and some other individuals. The subject matter involves a burning question of the day which is now hotly debated by the intellectual quarters, lawyers and even the general public. It has been alleged in this writ petition that the police, by abusing the power given under section 54 of the Code of Criminal Procedure, has been curtailing the liberty of the citizens and that by misuse and abuse of the power of taking an accused into police custody as given in section 167, has been violating the fundamental rights guaranteed under different Articles of the constitution. In this writ petition, several instances of such abusive exercise of power and violation of fundamental rights have been narrated. This led to the High Court issuing directives on April 7, 2003 to stop the arbitrary arrests of citizens on mere suspicion and on the way the arrestees were to be treated while in custody.[11]

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7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *BLAST v. Bangladesh*, 55 DLR (2003), HCD, p.363.

11 Aasha Mehreen Amin, Remembering Rubel, The Daily Star, Editorial, p.6, May 22, 2016.

Arrest without warrant and Police Remand under the Laws of Bangladesh

Section 54 and 167 of the Code of Criminal Procedure, 1898, gives wide powers to the police to arrest a person without warrant on reasonable suspicion. The phrase 'reasonable suspicion' is not defined and as such creates ample scope for misuse by police.[12] This is the general power of police in that sense a police officer can arrest without any warrant or any kind of order from the superior authority or Court or Magistrate. So there different grounds where the police may arrest without warrant. Any police-officer may, without an order from a Magistrate and without a warrant, arrest[13]-

> *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;
>
> *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 of 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

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12 Dr. Abdullah Al Faruque, Professor, Department of Law, University of Chittagong, Analysis of the Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh, National Human Rights Commission, Bangladesh (NHRC), January 2013.

13 Section 54 of the Code of Criminal Procedure, 1898.

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, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.[14]

Now, let us see what is provided in section 167 of CrPC. Section 167 of the Code said about the police remand. Relevant provisions of the section 167 are produced below by sub-section.

"(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

[14] Section 54 of the Code of Criminal Procedure, 1898.

(4) If such order is given by a Magistrate other than the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, he shall forward a copy of his order, with his reasons for making it to the Chief Metropolitan Magistrate or to the Chief Judicial Magistrate to whom he is subordinate.

(4A) If such order is given by a Chief Metropolitan Magistrate or a Chief Judicial Magistrate, he shall forward a copy of his order, with reasons for making it to the Chief Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate.

(5) If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation- "

High Court Division directives on Arrest and Detention

In our country, there is a wide spread practice that the government first arrests an individual under Section 54 of CrPC or under the one of the four Metropolitan Ordinances and thereafter an order of detention is served or he is shown arrest in some other cases pending.[15]

The shocking death of private university student Shamim Reza Rubel in police custody 18 years ago had triggered a storm of protest in the country, promoting some rights bodies to start a legal battle against police's discretionary power to pick up people on suspicion and torture of arrestees in remand.[16] After a long battle, the HC on April 7, 2003 delivered a verdict, barring the government from detaining a person under the Special Powers Act upon arrest on suspicion. It also came up with 15 directives and ruled that sections 54 and 167 of the CrPC dealing with the arrest on suspicion and subsequent remand were not consistent with the fundamental rights guaranteed by the Constitution.[17] The directions are as follows:

1. No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

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15 M. Jashim Ali Chowdhury, An Introduction to The Constitutional Law of Bangladesh, Northern University Bangladesh, Dhaka, 2010, 1st Edition, p.204.

16 Sad death gives hopes for all, The Daily Star, pp.1-2, May 25, 2016.

17 *Ibid.*

2. A police officer shall disclose his identity and, if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

3. He shall record the reasons for the arrest and other particulars as mentioned in recommendations A(3)(b) in a separate register till a special diary is prescribed.

4. If he finds, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor.

5. He shall furnish the reasons for arrest to the person arrested within three hours of bringing him to the police station.

6. If the person is not arrested from his residence or place of business, he shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him to the police station.

7. He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relations.

8. When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation could not be completed within twenty-four hours, why he considers that the accusation or the information against that person is well-founded. He shall also transmit copy of the relevant entries in the case diary BP Form 38 to the same Magistrate.

9. If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

10. If the Magistrate releases a person on the ground that the accusation or the information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(c) of the Code against that police officer who arrested the person

without warrant for committing offence under section 220 of the Penal Code.

11. If the Magistrate passes an order for further detention in jail, the Investigating officer shall interrogate the accused, if necessary, for the purpose of investigation in a room in the jail till the room as mentioned in recommendation B(2)(b) is constructed.

12. In the application for taking the accused in police custody for interrogation, the investigating officer shall state reasons as mentioned in recommendation B(2)(c).

13. If the Magistrate authorizes detention in police custody, he shall follow the recommendations contained in recommendation B(2)(c)(d) and B(3)(b)(c)(d).

14. The police officer of the police station who arrests a person under section 54 or the Investigating Officer who takes a person in police custody or the jailor of the jail, as the case may be, shall at once inform the nearest Magistrate as recommended in recommendation B(3)(e) of the death of any person who dies in custody.

15. A Magistrate shall inquire into the death of a person in police custody or in jail as recommended in recommendation C(1) immediately after receiving information of such death.[18]

The Hon'ble Supreme Court of India also in *D.K. Basu Case*[19] has given directions to be followed scrupulously after the arrest of an accused person that we can see in Rubel Case. Subsequently, in Saifuzzaman Case[20] the Court issued guidelines to be followed by the government, magistrates and police in respect of arbitrary arrest, detention, investigation and treatment of suspects.[21]

Failure to comply with the said directions shall render the concerned Police Officer liable for Departmental action and he will also be liable to be punished for contempt of Court. All Officers arresting an accused must

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18 *BLAST v. Bangladesh*, 55 DLR (2003), HCD, pp.380-381.

19 *D.K. Basu v. The State of West Bengal* (AIR 1997, S.C. 610).

20 *Saifuzzaman v. State and others*, (56 DLR (HCD) 2004 324).

21 Arafat Hosen Khan and Kazi Ataul-Al-Osman, Ensuring Effective Policing: Bangladesh High Court's Guidelines on Arrest without Warrant, http://www.blast.org.bd/news/news-reports/91 nipsa (accessed on 7 June, 2016).

therefore, follow the guidelines.[22] The verdict contained the directives to the police, the jailors and the Sessions judges to ensure that no violation of human rights occurred to anyone arrested on suspicion.[23]

It is expected that the sincere fulfillment of the above requirements will reduce the abusive power of the police and harassment of citizens in their custody.[24] On May 24, 2016, the apex court upheld the HC directives with some modifications and guidelines to stop arbitrary arrests by police on suspicion and torturing in remand.[25] The SC's verdict is viewed by legal experts and human rights activities as a boost to people's liberty and fundamental rights. They said the judgment also set an example of how a student's death came as a hope for ensuring fundamental rights.[26]

Reasons behind the Non-implementation of the Directives

Though, the HC asked the government to amend the relevant sections of the CrPC within six months from the date of the ruling. Within this period, different government had been passed their regime. But no one had taken the initiative to implement the directives of HC. Then BNP-led alliance government opted to challenge the verdict by filing an appeal with the Appellate Division of the Supreme Court.[27] Now, the AL-led government is pursing that appeal. This is because the political parties apparently investing their total efforts and time for devising ways and means mainly to go to power.[28] Here democracy is being used in a limited sense because all the political parties, while in power, hardly make any attempt voluntarily to strengthen the bases of democracy and human rights.[29] Though, the government is turning a blind eye on the activities of its law enforcement.[30] Even, the government officials and the law enforcement agencies could not hold their candid role to overcome the problem. Later

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22 *D.K. Basu v. The State of West Bengal,* (AIR 1997, S.C. 610).

23 Tapos Kanti Das and Manzur H Maswood, Arrest without Warrant on Suspicion: Police Flout HC directives, New Age, February 10, 2016**.**

24 Shadeka Jahan, Section 54 and 167 of CrPC: some recommendations, The Daily Star, Law and Our Rights, July 30, 2005.

25 Sad death gives hopes for all, The Daily Star, pp.1-2, May 25, 2016.

26 Sad death gives hopes for all, The Daily Star, pp.1-2, May 25, 2016.

27 Sad death gives hopes for all, The Daily Star, pp.1-2, May 25, 2016.

28 Javaid Rehman, International Rights Law- A practical Approach, New Warsi Book Corporation, Dhaka, 2013, 2nd Edition, p.34.

29 Javaid Rehman, International Rights Law- A practical Approach, New Warsi Book Corporation, Dhaka, 2013, 2nd Edition, p.34.

30 S. Augender, Questioning the Universality of Human Rights, Indian Socio Legal Journal, 2002, 3rd Edition, p.80.

on, the Supreme Court expressed dismay at the government's unwillingness to implement the 15 directives issued by the High Court 13 years ago to stop policemen making arbitrary arrests on suspicion and torturing arrestees on remand.[31] Appellate Division of the SC during the hearing on an appeal on the issue said "Thirteen years back, the High Court had given some specific directives on the detention of any person and subsequent dealings with the detainees on remand. But the government did not implement any of them".[32] Because this undue force has been used by every government as a brutal weapon to suppress anti-government movement, sometimes democratic movement and to perpetuate rule.[33]

Suggestions

The study considering the above mentioned discussions it can be easily presumed that the arrest without warrant and custodial death is done ignoring the laws. So, it is an extreme necessity to lessen the unruly arrest and custodial death in the police custody. However, there are some suggestions that may be easier to sort out the problem.

- Emphasize on the proper application of law which is stated in the Code of Criminal Procedure, 1898.
- The law enforcing agencies need to maintain the judicial precedent especially which is related with arrest and police remand.
- The government needs to provide the proper salary to the police officer so that they cannot take the bribery when someone is arrested.
- A mandatory special law relating to the arrest and police remand can be passed without any reservation.
- Voices have to be raised to implement the verdict of Rubel Case so that no one can be a victim of unruly arrest and custodial death.

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31 Power abuse by police: SC irked as HC directives unheeded, No action by government in 13 years, The Daily Star, pp.1-2, May 18, 2016.

32 Power abuse by police: SC irked as HC directives unheeded, No action by government in 13 years, The Daily Star, pp.1-2, May 18, 2016.

33 Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, CCB Foundation, Dhaka, March, 2008, 4th Edition, p.298.

At the end of the discussion, we may say that the government may actively take into consideration the above suggestions.

Conclusion

The law enforcing agencies are prohibit to practice the unruly arrest and all forms of cruel, inhuman and degrading treatment in custody and these are the violation according to the Constitution and UDHR and the International Covenant on Civil and Political Rights (ICCPR). Despite these standards, and important safeguards enunciated in national laws and through judgments of the High Court, torture remains widespread across the country. At the end of the discussion, we may draw a conclusion that a person has the right to life. No person should be arrested unduly, unruly, unjustly or extra judicially. The modern State is more responsible for the protection and the promotion of the human rights. The effective implementation of the directives ruling by the SC may lessen the unruly arrest by the law enforcer agencies.

Downfall of Political Question Doctrine and Rise of Judicial Self-Restraint in the Judicial Arena: A Case-based Approach

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Abstract

This article aims at examining the justifiability of the political question doctrine while adjudicating political litigations in the light of constitutional dictation as well as exploring the rise of the principle of judicial self-restraint as an alternative to the doctrine for determining what cases are to be taken into cognizance albeit political in nature and what cases the court should refrain from investigation and trial and leave to the domain of the other branches of the government. The study method applied is the analysis of secondary materials like books, journal articles and research reports and papers of major reputable institutions working on political questions. The study points out that in earlier times the political question doctrine applied frequently by the courts so as to exclude from its jurisdiction political cases altogether. But nowadays, the judiciary has given up this rigid practice of non-interference with the policy decisions. At the same time, it also finds out that currently the courts are inflicting the principle of judicial self-restraint to repeal or wipe out any statutes on the ground of its being impractical or unconstitutional. Although in such circumstances fresh laws or policies are to be made by the executive or legislative organs of the government. Finally, it concludes by saying that for the smooth adjudication of political cases there is no need to make the political question doctrine justifiable instead the principle of judicial self-restraint could serve the best purpose.

Keywords: Political question doctrine, judicial review, judicial self-restraint, judicial activism.

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Introduction

In many of the cases where the constitution does not ascribe any constraints upon the political branches, the political question doctrine is simply confusing and inessential mode of exposing the clear point that the courts should not also impose such a confinement (*Henkin*, 1976). In fact, the doctrine might be discarded for its little impact on matters relating to political question. Under this doctrine, matters which can best be solved by one or the other department of the government, the court can deny judicial review (*New Jersey v. United States*, 1996). As the issues are political in nature, the court deems that they can best be resolved by political accountability, rather than by the mandate from the courts. But one has to observe the salient features to ascertain whether any other mechanism instead of the court system is required. Indeed, there are many countries which in spite of their lack of knowledge on this could run the judiciary smoothly and speedily. In the USA constitutional law, this doctrine is closely connected with the concept of justifiability due to the reason that the court has the authority to hear and adjudicate only legal questions being justifiable, not political one as they are non-justifiable (Huhn, 2016). Unlike the other requisites of justifiability, political question doctrine being one of them, delimits the issues that can be taken into consideration by the courts irrespective of the circumstances. And by doing this, the doctrine frees political branches as regards certain issues from judicial review altogether. It represents that as to certain matters the government will perform best if the political branches can function out of the control and interference of judiciary. One might agree or disagree with this view but simply freeing the political branches from judicial review and its intervention just for ensuring smooth functioning of the government might cause more harm than good.

On the other hand, the principle of judicial self-restraint requires the judges to deal with legal issues only rather than spending time over policy decisions. Previously, under the political question doctrine, the courts did not pay heed to the constitutionality of a statute or policy. Presently, unlike the doctrine, the judicial self-restraint acknowledges if any statute or policy violates constitutional provisions though it declines to adjudicate the same and thereby attributes its supports towards resolution of policy disputes by other governmental organs. And by doing this a judicially self-restrained judge decides a case in such a way as to make it consistent with the statutory provisions. In fact, nowadays the frequent practice of judicial self-restraint by the courts establishes it as the most suitable way of dealing with external affairs rather than confronting to the conservative political question doctrine.

This article seeks to examine the justifiability of the political question doctrine in the courts while resolving political issues by mentioning constitutional provisions. Apart from analyzing the doctrine, the study also aims to explore the emergence and primeness of the principle of judicial self-restraint while deciding political cases, alongside making a brief but critical analysis of the political question doctrine in the context of Bangladesh, taking practical insights from the jurisprudence of the United States of America, the States wherefrom this doctrine originated and also from the empiric jurisprudential stands of India, Pakistan and Malaysia in this regard.

Political Question Doctrine: Concept, Origin and Development

(i) Political Question Doctrine: Concept

The term "political question doctrine" is a vague term. There is no international or regional legal instrument providing for a plain and precise definition of the concept of political question. However, a few scholars have described the notion of this doctrine from their viewpoint rather than giving an exhaustive definition. Basically, the political question doctrine is a rule created by the Supreme Court of the USA. It was originated from the separation of power theory, as evidently and precisely laid down in the constitution of the United States. The doctrine prevents federal courts from deciding politically sensational cases, since this kind of cases belong to the decision-making authority of elected officials or other organs of the government namely, legislature or executive, whereas the judicial organ decides matters relating to question of law (*Luther v. Borden*, 1849).

As per the definition mentioned in the Black's Law Dictionary, political questions are questions of which the court will refuse to take cognizance, or to decide, on account of their purely political character or just because their determination would involve an encroachment upon the executive or legislative powers (Garner, 2009). Though the definition provided here holds an admirable beginning, there is a debate as regards whether political questions must deal with questions that are purely political in nature or not. To describe the term 'purely political' Rohde and Spaeth opined that a matter will be considered as a purely political question if the court believes it to be a matter more appropriate for resolution by either of the two branches of government, or one that the judges consider themselves incompetent to resolve because the character of the dispute is not amenable to resolution through judicial process (Rohde, and Spaeth, 1975).

Nwosu in order to clarify the meaning of the concept political question by referring specially to the "Justifiability theory" stated that political question is a non-justifiable issue. A legal matter is justifiable if it is such that can be entertained by a court, not having breached the rule as to mootness, standing and ripeness (Nwosu, 2005). However, Nwosu's definition of political question with reference to the justifiability theory was not accepted universally and has been criticized extremely by many scholars. The strongest one of which is made by Ben Nwabueze who countered that addressing political question as non-justifiable issue invites a re-definition of justifiability concept or introduction of an entirely new class of what is or is not justifiable (Nwabueze, 2005). He also opined that justiciability is a veritable concept, at once pre-eminently meaningful and intelligible, and rests upon objective rules and principles, which delimit or seek to delimit the province of the judicial function. It is what confers jurisdiction on the court and matters which are justiciable are simply matters which the court can rule upon (Ibid.). The definition of Nwosu is one which could hardly be defended, and recognizing this, political questions could rightfully and comprehensively be defined as composing mainly of those matters or issues which is clearly and unambiguously considered by the superior court of record to have been constitutionally and statutorily allocated to the legislative or executive organ of the government for conclusive resolution, and in addition, it further includes matters or issues, which would, in the opinion of the court for just reasons, be improper for it to resolve through judicial process and which it deem itself to be functionally unauthorized to resolve and enforce (Ibid.). Although the definition covers all the fundamental components of the political question doctrine yet these elements generally vary while their authors are influenced by the circumstances of each particular case. Thus, there will be as many definitions of political question doctrine as there are researchers working on this particular legal area. Therefore, in a nutshell, it can be concluded from the above discussion that the political question doctrine is a vague term which cannot be defined conclusively.

(ii) Political Question Doctrine: Origin and Development

(a) The Classical Form of the Doctrine

The political question doctrine derived its birth from the USA jurisdiction where, due to the rigid practice of separation of power theory, the Supreme Court could not encroach upon the matters which in its view were left at the disposal by the other organs of the government under the constitution (*Elrod v. Burns*, 1976). The political question doctrine was, for the first time, spoken of in the historic *Marbury v. Madison* case, where Marshall CJ stated that

questions, which are, political in nature, or constitutionally and by laws, submitted to the jurisdiction of the executive can never be made in this court. Again, emphatically it is the province and obligation of the court to enunciate what the law is (*Marbury v. Madison*, 1803). However, by saying this Marshall CJ retained the political question doctrine within a narrow confinement. Theoretically, the judiciary by refraining itself from solving the political matters, keeps the judges away from politics and indulges them in adjudicating legal disputes (Seidman, 2004). Additionally, the Federalist Papers of Alexander Hamilton obsessed the classical form of the political question doctrine. He upholds the separation of power theory and recapitulated the momentous role of the judiciary while interpreting the law (Hamilton, 1788). Moreover, Hamilton marked the primeness of the judiciary in so far it operates as a check on the other organs of the government (*Marbury v. Madison*, 1803). It can therefore be concluded that, although the court has the authority to redress individual grievances, yet it cannot intrude upon the public liberty by enforcing its judgment on purely political question.

(b) The Prudential Form of the Doctrine

In contrast with the classical form of the doctrine, another version, well explained by Alexander Bickel and further developed by the federal courts is the prudential form of the doctrine (Bickel, 1961). Under this concept the court can refuse, for prudential causes, to hear and adjudicate any dispute that might transgress into the territory of the executive branches (*Barkow, 2002).* Unlike classical form, prudential one is not confined to the recitation of the constitution. Rather, it incorporates the view that the court should refrain from resolving issues which could be solved in a better way by the other organs of the government (Tushnet, 2002). Professor Bickel expressed that the prudential force of the doctrine is required for supplying the judiciary with instruments so that it can abstain from exercising its adjudication authority (Scharpf, 1966).

(c) Baker Formulation and the Application of the Doctrine Post-Baker

Formerly, in *Luther v. Borden*, the court after analyzing the arguments, of either parties to the dispute and the Guarantee Clause itself, came to a decision that the challenge was nothing but a political question. In this case the court according to the General Clause concluded that the USA promised for each of its State a Republican form of government and its decision is obligatory upon all the government branches and is

not subject to be questioned before court. Furthermore, in this case, the court remarked some prudential reasoning weighing against the judgment to avoid chaos that could have arisen if court declared the State government invalid (*Luther v. Borden*, 1849). However, *Baker* case revealed the modern political question doctrine in response to the decision of the court that an ascertainment of whether state allocation contravened the plaintiff's equal protection rights was not at all a political question. In *Baker v. Carr*, Brennan J. settled down six formulations, the existence of which might cause a case to be discarded under the doctrine. These are:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or

2. A lack of judicially discoverable and manageable standards for resolving it; or

3. The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or

4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or

5. An unusual need for unquestioning adherence to a political decision already made; or

6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question (*Baker v. Carr*, 1962).

As the formulations were wide in themselves, Justice Brennan, being inspired by former case laws, narrowed down the scope of the doctrine (May, 2008). According to him, it is to be applied fully with reference to ascertained political questions attached to the elected branches of the government only, and not to the ordinary political litigations *(Breedon*, 2008). Since the settlement of *Baker* case in 1962, simply two verdicts of the Supreme Court uphold the view that a dispute should be dismissed in appliance of the doctrine. Firstly, in *Gilligan v. Morgan* the court held that courts should not indulge in scrutinizing the training of the Ohio National Guard (*Gilligan v. Morgan*, 1973). Later on, in *Nixon v. United States*, the Supreme Court decided that the issue of impeaching a judge was a political question. Although these two claims were regarded as political questions founded partly on

textual undertaking of the matters by the courts as per the Powers of Congress Clause and the Impeachment Trial Clause (*Nixon v. United States*, 1993). But the critics differ by saying that the Supreme Court lacks endeavor to redefine the political question doctrine, and to describe the prudential form of it which ultimately makes the doctrine an ill-destined one as per the result of the Baker test and its Post Baker appliance in Supreme Court judgment *(Breedon,* 2008). And that is why nowadays, the courts of USA quits their former conservative views concerning the doctrine instead the courts take a flexible approach in solving lawful dispute impartial of its relevancy with the political question doctrine. Recently, in *Zivotofsky v. Clinton,* the court refused to apply the political question doctrine for satisfying the legal demand of a plaintiff and thereby affixed an interpretive approach to narrow down the doctrine's area of operation. In this case, the Supreme Court adjudged that Zivotofsky had invoked a statutory claim, and the court's liability to ascertain whether statutes are valid extends to political question also (*Zivotofsky v. Clinton*, 2012). Under the Indian legal lexicon the political question doctrine is applied to a limited extent. Here, it was sought to be used in domestic constitutional question (*Rajasthan v. India*, 1977). The Supreme Court of India denied resorting to this doctrine in respect of justifiability question for satisfaction of the President as regards the existence of emergency (*A.K. Roy v. India*, 1982). In Pakistan, the Supreme Court observed that there are many cases which possess political timbres but that cannot take a case away from the judicial scrutiny by the court. As the constitutional legitimacy of Yahya Khan was not a political question, the Supreme Court of Pakistan adjudged him to be a usurper (*Asma Jilani v. Punjab*, 1972). Again, in *Abdul Baqui Baluch v. Pakistan,* the Supreme Court of Pakistan decided that the question whether emergency has ceased to subsist is a political question which is outside the jurisdiction of the courts to adjudicate (*Abdul Baqui Baluch v. Pakistan,* 1968). Likewise, the Privy Council held the Ian Smith's government unconstitutional (*Madzimbamuto v. Lardner-Burke*, 1968). Recently, in Malaysia, the Privy Council held that the executive government may be instructed to prescribe the President for withdrawing the emergency (*The Cheng Poh v. Public Prosecutor*, 1980).

Political Question Doctrine: Justifiability

The term "justifiability" pertains to the perimeter of law and judgment and is connected with the question of what matters are qualified enough to be the subject matter of juridical regulations and court's decision (Bendor,

1997). Being closely connected with the theory of separation of power the doctrine postulates that in order to maintain independence and autonomy of the three organs of the government, neither of the organs should interfere in the workings of the other and each of the organs is supreme in its domain (*Kilbourn v. Thompson*, 1880). As such the doctrine asserts that the political branches must ascertain policy and resolve political disputes and the judiciary, being not a political organ, must not take into consideration these non-justifiable issues (*Fong Yue Ting v. U.S.*, 1893). Moreover, justifiability also related to the arena under which the law and judiciary can smoothly operate. As regards political questions, the justifiability refers to limits that the judicial authority cannot supersede especially on matters the adjudication of which are left at the jurisdiction of the executive or legislative organs of the government. For instance, matters like emergency, foreign affairs and state security. The doctrine seldom deals with the question of justifiability as to periphery of statute rather it focuses more on the province of the court to resolve cases particularly political cases. Jesse H. Choper suggested four standards for ascertaining whether to banish questions of interpretation to the political branches as per constitution. First, the Court should refrain from deciding questions where there is a textual commitment to a coordinate political department that is, when the constitution itself is interpreted as clearly referring the resolution of a question to an elected branch. Second, pursuant to a functional rather than a textual approach, when judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme, the court should decline to exercise its interpretive authority. Third, the court should not decide issues for which it cannot formulate principled coherent tests as a result of a lack of judicially discoverable and manageable standards. Finally, it would be tentatively suggested that constitutional injuries that are general and widely shared are also candidates for being treated as political questions. These four criteria have a common thread and they identify questions either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution (Choper, 2004). The political question doctrine since its birth ensured its justifiability in a court of law by making constitutional issues to be settled particularly by government's political organs and not by the judicial authority. It further causes the political issues non-justifiable on the basis of Baker formula (*Baker v. Carr*, 1962). In a number of cases Lower Federal courts dismissed cases on the basis of this doctrine (*Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 2011). Likewise, certain disputes were dismissed under this doctrine by alleging that the adjudication might prejudice the foreign policy interests of the United States (*Al-Shimari v. CACI Premier Technology, Inc.*, 2014).

Again, lower court also held in other cases that discretionary military determinations are committed textually to the political authorities and the courts have deficiency regarding manageable standards for reviewing them. For instance, a District Court in the D.C. Circuit dismissed a case which challenged the tasks of the government "kill lists" referring it as a political question (*Al-Aulaqi v. Obama*, 2010). The court deciding it cannot resolve the claim due to the absence of judicially manageable standards. Moreover, in *El-Shifa v. United States*, the D. C. Court of Appeals decided that a case wanting review of the President's decision to launch an attack on a foreign target rendered a non-justifiable political question. The court resolved by saying that the political question doctrine debarred courts from assessing the merits of the President's decision to launch an attack on a foreign target. And this green doctrine sanctioned the judiciary to refuse to adjudicate political issues regardless of the question of whether it was actually under duty to solve the dispute (*El-Shifa Pharmaceutical Industries Co. v. United States*, 2010). Finally, it can be said that a political question is non- justifiable when the subject matter is of such a nature that the ordinary provision of judicial review is not applicable provided the other obstacles to justifiability exits (Rutledge, 1947). Furthermore, the subsistence of a political controversy does not *ipso facto* debar a court from taking cognizance of such a matter. Only a few issues contained in that case are left outside its jurisdiction (Prize Cases, 1862). Obviously, where issues of constitutional right are concerned the doctrine disappears and the court holds the ultimate authority to expound of the constitution, which is supreme in theory (*Marbury v. Madison*, 1803).

Political Question Doctrine and Judicial Self-Restraint: The Experiences of the Supreme Court of Bangladesh

(i) Application of Political Question Doctrine in Bangladesh: Judicial Approach

Before considering the judicial approach towards the political question doctrine, it would to some extent be advantageous to consider the status and role of judiciary in a democratic society. Among the other branches of the state, the judiciary is the least perilous organ possessing neither wish, nor strength and no pursue but only judgment (Bickel, 1986). Although the critics argue that judges are not powerful in every matter due to their lack of constitutional legitimacy and institutional capability yet in practice they have a definite political role and can efficiently manage political issues and make effective social reforms. Moreover, the concept of non-interference in political cases is of no place in modern jurisprudence. In

reality every legal dispute is politicized (Allison, 1994) and judiciary being the guarantor of constitutional supremacy, it has to realize constitutional goals through active performance (Mason, 1996). Even in Bangladesh, the fragile judiciary also tries to expose itself as a mastodon for ensuring constitutionalism. As Judges are duty bound by law and precedent to guide the nation in shaping its destination within the legal and constitutional framework they have to look into the matters which could have been solved otherwise then by the courts (*SAS Bangladesh Ltd v. Engineer* Mahmud-ul *Islam*, 2004). In another case Kamal, J says, whenever the executive or legislature attempts to deviate from the constitution, the higher judiciary is under obligation to push them back to the constitutional circle by providing essential guidelines (*Secretary, Ministry* of *Finance v. Masdar Hossain*, 1999).

In truth, the justifiability concept faced substantial challenge after the inception of the political question doctrine in the legal domain of Bangladesh. A close scrutiny of the cases incorporating the doctrine discloses that the judiciary frequently applies either of the following two approaches:

A) Restrictive Approach

The acceptance of this approach by the judicial authority in Bangladesh indicates that if a political body is permitted to exercise powers, either by the constitution or by the legislation and legitimately exercised the power as per the terms, substance and objectives attached to it, thereafter the judiciary lacks competency to trespass into the matter. In *Dulichand Omraolal v. Bangladesh,* the court viewed with regard to the constitutional legitimacy debate of Yahya Khan that if the justness or legitimacy of a law could otherwise be determined then the court should refrain itself from responding to such a political question (*Dulichand Omraolal v. Bangladesh*, 1981). In fact, under this approach due to the lack of any constitutional or legislative force the court put on the clothes of judicial self-restraint and often tries to escape its role towards the adjudication of political issues leaving it open to the mercy of the politicians. Similarly, in the case of *Khondaker Modarresh Elahi v. Bangladesh*, the court thought that this political issue should in all fairness be decided by the politicians (*Khondaker Modarresh Elahi v. Bangladesh*, 2001). Further, in *Abdul Mannan Bhuiyan* and another *v. State,* the court in exercise of its judicial self-restraint declined to enter into the political question of virtues and vices of hartal and strike in the absence of any constitutional imperative or compulsion (*Abdul Mannan Bhuiyan* and another *v. State*, 2008).

B) Permissive Approach

The most comprehensive opinion on permissive approach is that once the court is entrusted with justifiability under the constitution or statute, it cannot exercise its discretionary power of denial of jurisdiction on the ground that the matter as to which the jurisdiction has been conferred is a political question. In *Idrisur Rahman v. Bangladesh*, it was held that the constitutional system does not justify the applicability of the political question doctrine (*Idrisur Rahman v. Bangladesh*, 2008). Likewise, in *Rafique Hossain v. Speaker, Bangladesh Parliament*, the court held that the legality of a non-MP minister's speaking on a matter unrelated to his portfolio and the speaker's ruling on a constitutional issue was held justifiable (*Rafique Hossain v. Speaker, Bangladesh Parliament*, 2002). Again, in matters like proclamation of emergency, the court gives priority to the decision of the executive authority, which does in no way mean that the court lacks competency to adjudicate due to the political question doctrine. In fine, it is absolutely clear that though in the earlier constitutional history of various countries of the world the courts were entrusted with judicial pronouncements in favor of the doctrine, later on they gave up their former approach towards this doctrine and adopted a generous and permissive approach. Currently, the judges around the world do not consent to the fact that they have no authority to decide an issue involving political question, rather they indisputably accepted that they should settle a legal issue impartial of its relevancy with political question. In the light of the above discussion, it can be said that unlike earlier times nowadays the judiciary plays a very active and unprecedented role towards adjudication of cases. Previously, the jurists and the judges gave emphasis on law and legal theory and not on moral concern for answering the question of justifiability of political issues while settlement. But at present the political question doctrine is of no existence in the real practice because of the advancement of affirmative behavior of the courts as regards the disputes whatever might be its nature whether political concern or execution concern, and imposing check on the whimsical attitude of the mighty executive and legislature and thereby eradicating all forms of injustices. Therefore, from the jurisprudential perspective it is obvious that the political question doctrine is submissive to judicial scrutiny. Moreover, it is wise and crucial to grant power upon the judiciary so as to try the accuracy of any activities of whatever nature by the judicial procedure and solve them under the mandates of the constitution.

(ii) Rise of Judicial Self-Restraint in Bangladesh: An Alternative to Political Question Doctrine

Judicial self-restraint is a principle of judicial interpretation whereby the judges are stimulated to keep down their authority to exercise individual power of striking down laws unless they are obviously unconstitutional. It requires the judges to hesitate while confronting with the question of whether or not to knock out any law although the term "obviously unconstitutional" is in itself open to debate. Being motivated by the principle of *stare decisis,* the principle of judicial self-restraint requires the court to pronounce its judgment on the basis of this principle. The principle frequently applies in the Supreme Court which has the authority to repeal or wipe out any laws on the ground of inefficacious, unfair or unconstitutional. It seeks to delimit the powers of a court to make fresh laws and policies and requires that it should be left to the other governmental institution to enact laws and decide policy matters so long they are performing their activities as authorized by the constitution. Often, a judge being judicially self-restrained has to resolve matters in a way that will affirm statutes enacted by legislatures. Such a judge by his qualified constructionism reveals solemn reverence to the separation of governmental disputes. The fact that court recognizes the contravention of constitutional provisions though it refuses to adjudicate the same can be designated as judicial self-restraint. While exercising the power of judicial review the judicial self-restraint follows two different approaches namely procedural or substantive. Procedural approach restrains a court from resolving legal and constitutional matters unless justice otherwise requires. Whereas the substantive approach requires a court to consider constitutional mandate, and to sanction and pronounce judgment invalidating political actions when it is satisfied that the elected organs have clearly violated the constitutional provisions. In a landmark case, where the constitutionality of some Pennsylvania state statutory provisions relating to abortion was challenged, the Supreme Court of the United States upheld the right to an abortion as a continuance of the decision of the Warren Court (*Planned Parenthood v. Casey*, 1992). Again, in *State of Rajasthan v. Union of India,* the court rejected the prayer alleging that it involved a political question and as such the court would not go into the matter (*State of Rajasthan v. Union of India,* 1977). Here, the court applied the principle of judicial self-restraint. Furthermore, in *S.R. Bommai v. Union of India,* the judges held that there are certain circumstances under which the political element dominates and judicial review is not possible (*S.R. Bommai v. Union of India,* 1994). Schwartz speaking about the application of political question doctrine and judicial self-restraint commented that the political question doctrine is itself an anomaly in a system in which government acts may ordinarily be weighed in the judicial

balance and if necessary, found constitutionally wanting. A good case can be made for restraining the doctrine to the field of foreign affairs. It is one thing to hold that there must be judicial self-limitation in cases bearing directly on the transaction of external relations. It is quite another to use the political question doctrine as a formula to avoid decision in cases involving only internal affairs. If there is one principle that is fundamental in the constitutional system, it is that of having the judiciary as the ultimate arbiter on all domestic constitutional questions. That indeed, is what Americans normally mean by the rule of law (Schwartz, 1979).

If we look into the scenario of Bangladesh, the government of Bangladesh is parliamentary in nature having a flexible separation of power so as to avoid controversies regarding difference with other branches of the government. The inquiry on whether a certain government is basically constitutional one is a question to be determined with reference to the constitution itself. Like other similar constitutional questions, this should be left outside the jurisdiction of the court unless the dispute between the parties demands such a solution. In cases of proclamation of emergency, election procedure, administrative action, the court has to affix great attention to the opinion of the executive branches which should not mean that it is incompetent to hear and adjudicate due to the political question doctrine. One of the prominent scholars Mahmudul Islam opined that there is no necessity to adopt and apply the political question doctrine rather the judicial body should be guided by the principle of judicial self-restraint in cases directly related to the external matters (Islam, 2012). In this connection, Afzal. C. J. opined that there is no allurement in the phrase "political question". Whereas the court's maintenance of judicial self-restraint is the absolute referee to determine whether in a particular case it is proper to take in hand the task of announcing decision on matters that may be designated as political (*Special Reference No 1*, 1995). In *Re MPs' Resignation (Advisory Opinion)*, the Appellate Division of the Supreme Court of Bangladesh was anxious to keep itself aloof from political controversies but not at the cost of its responsibility to resolve legal issues. The court was asked by the President to advise whether continuous boycotting of Parliament by opposition MPs for consecutive 90 days would render their seats vacant for being absent from Parliament for such a period, as continuously mandated in article 67(1) (b). Faced with knotty political crises, the whole nation was expecting the apex court to play its due role as the guardian of the constitution. The court picked-up the public expectation well and answered the reference affirmatively. Afzal, C.J. viewed that we are plainly at a loss to appreciate why the absence of the members of the opposition should not be construed as absence. Does it enhance the cause of constitutionalism by construing their absence as presence? That will be onerous for holding by-election if such a large

number of seats fall vacant at a time is no ground for giving a twisted meaning to the word 'absent' (*Constitutional Reference No 1*, 1995).

The principle of judicial self-restraint has been introduced to depolarize the courts and judges established by the Constitution of the People's Republic of Bangladesh. As for instance, article 94(4) of this Constitution announces that subject to the provision of this constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions. Again, Article 116A stipulates that subject to the constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions. Moreover, there are universally accepted legal norms that judges should refrain from participating in the activities of political groups and other organizations so that at the time of administering justice they could maintain liberty. Additionally, while trying cases they should be guided by statute only. In the same line, governmental institutions, parliament members, other officers of the government, political parties, political and public organizations and citizens should refrain from interfering with the workings of a judge or judicial body. Furthermore, the judiciary and executive branches of the government shall undergo liability as provided for by statute. This gives rise to the question about the instruments that judicial self-restraint should be maintained while resolving political questions which may arise in a court of law. The first and foremost instrument is the statute whereby the courts are established and their formation, efficiency and jurisdictions are described. Again, the rules under the statutes are also necessary to give a reply to the question about whether the concept of political question is the effective tool in determining the justifiability or non-justifiability of a case or ascertaining the decisions that should be reduced to the level of judicial review. The second instrument is the behavior and the case laws referring to the freedom and neutrality of the courts while disposing the cases within the organs of the political authority and assuring the constitutionality of the political system. In conclusion, a few observations on political question doctrine are-whether the legitimation of political questions is possible? Whether the political question can naturally be transformed into purely legal questions? May every legal question in its turn be transformed into political question? That would certainly open the unlimited possibilities to charge and criticize the courts as purportedly politicized and pass political decisions. Therefore addressing the political question doctrine as the most important thing is not to deny the possibility to investigate and to settle the political questions in a judicial way at all, but to consider what terms, conditions and procedures are required in order to allow political questions to be settled in the court, and in what cases solving of certain political questions has to be excluded from the competence of courts and when the

courts would be obliged to refuse to investigate such applications in order to clearly demarcate certain fields of politics and law. Moreover, when the rights of a citizen are infringed, the constitution has mandated adjudication of the right by the court. As there is no express mandate on the political question in our constitution or any law in operation, it is a sort of escaping duty on the part of the judicial authority by invoking the doctrine. If we interpret the constitutional provisions regarding allocation of powers among the state organs we will find that the doctrine has no place, rather article 106 authorizes the President to take opinion on matters of public importance not dividing whether political or not from the apex court. The preamble and articles 7, 26, 94(4), 102 which ensure the supremacy of the constitution are the deathblow on the political question doctrine. Therefore, it can be said that the principle of judicial self-restraint stands as a guide to the court and plot the vanishing points of the political question doctrine towards solving the political issues.

Conclusion

The political question doctrine since its inception in the United States legal arena through the *Marbury case* tried to establish the rigid theory of separation of power which required the judiciary to keep its hands off from the adjudication of political issues and other governmental policy decisions and left it to be decided by the executive and legislative branches of the state. The doctrine asserts that each of the three organs of the government is supreme in their field and therefore, must not be intervened by the other while performing their assigned functions. As such the political issues must be ascertained by the political branches of the government and the court should not spend its time over these issues. However, the six formulations uttered in the Baker case limits the scope of the doctrine and concludes that the doctrine must be applied with reference to the definite political issues of the elected representative organs and should not cover the ordinary political cases.

This article reveals that previously the Supreme Court of the USA in a number of disputes made the political question doctrine applicable to ascertain the justifiableness of cases and dismissed those accordingly. But afterwards they dispatch their earlier rigid practice and started to solve litigation irrespective of its relevancy with the doctrine. And that is why currently, the existence of political issues like emergency, foreign policy or state security do not make a case non-justifiable as a whole rather the higher courts of various countries of the world rarely invoke the doctrine to settle political disputes. Indeed, they rely more on the principle of judicial self-restraint to halt the courts authority to adjudicate policy

decisions unless they are obviously unconstitutional. In fact, the existence of political controversy does not altogether deprive a court from taking cognizance rather in such a situation the court keeps out some of the claims from its decision. However, a close scrutiny of the political cases of the United States of America, India, Pakistan and Malaysia makes it evident that in modern times the doctrine is applied in a very confined way to solve political disputes. And just because a case contains political fibers does not altogether take it away from the jurisdiction of the court.

The study further finds out that in the context of Bangladesh, where the concept of checks and balance among the three organs of the government is prevailing instead of the rigid separation of power, the political question doctrine has a limited scope. Rather the principle of judicial self-restraint is followed to resolve political cases. Moreover, the Constitution of the People's Republic of Bangladesh specifically authorizes the judges to be independent and impartial while performing their judicial functions. And the provisions under which the courts are formed and functioning in our country also discloses that there is no need of the political question doctrine instead the judicial self-restraint plays the vital role of an umpire to see whether any particular political issue is to be adjudicated by the court or not. Therefore, the prime object of incorporating the principle of judicial self-restraint in Bangladesh is not to debar the judicial investigation, trial and judgment of political issues, but to fix the criterion under which the court can deny such petitions for determining the arena of law and politics. Finally, it can be concluded by saying that there is no justification for the application of the political question doctrine in our constitutional system instead the principle of judicial self-restraint is to be observed by the court to decide what matters they should designate as political and stay away from adjudicating and what matters they should resolve irrespective of the question of their being political in nature.

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Patriarchal Influence and Women subordination in Bangladesh and Violation of Mothers' Right to custody of Child: A critical Analysis in reference to existing statutes and case laws

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Abstract

Custody of minor children is a very brittle and susceptible issue. Typically the term child custody is used in family law courts to the exemplified legal guardianship of a child under the age of eighteen. When the spouses are divorced then the question of child custody arises. Every parent have an equal right in the time of custody of their child even they are separate. The social practices of Bangladesh are institutionalized within a patrilineal and patrilocal system. Family, kinship and marriage play a major role in shaping social gender practices. The patriarchal structure of our society, seclusion of women from others, women subordination and factors like discrimination against women are not letting them enjoy their natural rights of womanhood. In consequence, the women in Bangladesh are getting deprived of their natural right to get the custody of their children and to some extent also from the guardianship. However in this write up an attempt has been taken to focus on the issues that in the unequal fight for custody between the sexes, it is regularly the women who lose because of their social disabilities and monetary constraints but behind which they themselves had no fault. Moreover, there is no stipulation that how much the child will proliferate both mentally and physically being in stroke with the mother. As both the *shariah* law and statutory law in our country is conferring the responsibility of maintenance of the children to the father and father is also considered as the legal guardian, therefore mothers' financial condition cannot be a decisive factor to justify her capability to get the custody of her child. Although, much has been talked about this instant issue but owing to patriarchal mind-set and women subordination, the mothers' right to get the custody is very much within the theory and mostly not in practice.

Keywords: Custody, patriarchy, subordination, divorce, discrimination, guardianship.

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Prologue

Bangladesh has a legal system consisting two types of laws, the general and the personal laws. The general law could be said to be based on egalitarian principles of sexual equality but the personal or family law based on religion, does not operate on the basis of absolute equality to men and women moreover, the patriarchal interpretation of the law continues the dominance of patriarchal attitudes. But the religious and official family laws of Bangladesh clearly aim for gender equality. The crux of the problem is that many women in Bangladesh today are deprived even of the rights granted by the religious and state sponsored family laws. Women in Bangladesh are subordinated within an intensely hierarchical system of gender relations which constantly attempts to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled (Kabeer Naila, 1998, pp. 95-121). Islamic law is based primarily on the religion of Islam. The Holy Quran and the early Islamic law are concerned about the betterment of the status of women (Khan Qamaruddin, 1990, p13). On the other hand, Hindu personal laws are based on Hindu dharma or religion which had its origin in India.There is three sources of dharma: Sruti (Vedas), Smrti (memory) and good customs. Vedas constitute the fundamental sources of Hindu religion. The Vedic texts, considered to be revealed and heard (sruti or oral knowledge) by the most ancient sages from God and handed down from generation to generation, are of primary importance Smrti or memory is the second source of dharma and includes, amongst others three codes like the Code of Manu, the Code of Yajnavalka and the Code of Naroda. It has rightly commented that every moral obligation defined in the sharia does not form a legal obligation under the fiqh (Fyzee Asaf. A. A., 1976, pp 14-32). However, Muslim scholars unfortunately differ widely on the interpretation of the verses, of the Holy Quran. Moreover, most of the verses were interpreted and developed by the all male classical Jurists in their own way only to serve patriarchal interests (Fyzee Asaf. A. A., 1974, pp. 14-32).

Usually the term child custody is used in family law courts to characterize legal guardianship of a child under the age of eighteen. When the spouses are living separately or the marriage has broken down and the parties are divorced then the question of child custody arises. Custody means the power or right to supervise an individual along with his or her property, who is unable to look after him or herself such as minor or mentally imbalanced ones. Each parent has an equal right to the custody of the child when they are separate. But in most cases both parents continue to share legal child custody but one parent gets physical child custody. According to the different religious and statutory laws the right to get the custody and

guardianship of the children lies on different persons. According to Muslim law a mother is recognized as one of the most desirable person to have the custody of a small child. But in the matter of guardianship of children, a Muslim woman is definitely at odds. Under the Muslim law the father alone is the legal guardian of the children. Under the Hindu law the Dharmashatra did not deal with the law of guardianship. During the British regime it came to be established that the father is the legal guardian of the children and after his death mother is the natural guardian. However regarding the right to the custody of the children the codified laws for Hindus indicate that the children of tender age should be committed to the custody of the mother and older boys should be in the custody of the father but older girls in the custody of the mother. But whatever be the law, the practical situation does not always complied with that.

However this write up will focus on custody and guardianship cases of Bangladesh in detail basically for two reasons. First, custody cases frequently bring to mind the primordial emotions and lead to bitterness and litigations, the victims of which are the children. Second, in the unequal fight for custody between the sexes, it is regularly the women who lose because of their social disabilities and monetary constraints but behind which they themselves had no fault. Here, we cannot in any way say that nonexistence of law is the main cause rather favorable court attitude, wakefulness among the common people and confirmatory action is necessary to ensure the unimpeded access of women to the courts of Justice.

Research Methodology

This study would be based among other, on primary sources such as books, articles, journals, case materials, Internet sources, so that the analysis is taken with a multiple nary approach by keeping the phase of justice method and socio economic variables in considerations. Moreover, combining both formal and informal methods of investigation. While quantitative data are necessary to determine the prevalence of a phenomenon. It is the qualitative study that reveals the complexities. In the present study the combining of methods were considered essential to overcome the difficulties involved in the study. The primary respondents being the women it was necessary to allow them space to talk freely and without inhibitions. Moreover, since in this write-up I have taken an attempt to focus on the practical scenario of patriarchal arbitrariness and women subordination in the society as well as the deprivation of the women from the right to get the custody of the children.

The socio-economic and legal sphere and female subordination

Women in Bangladesh are perceived to be degraded to the position of second-class citizens because of their economic, social, political and legal bondages in relation to gender. (Oakley, 1972, p18). The discrimination against women as women depends on many causes. Not only the traditional cultures, patriarchal structures or seclusion are responsible, but also the social science literature, T.V., radio, theatre and cinema all depict and perpetuate the inferior status of women. It is thus arguable that an important reason for women's continued subordination is that the social science literature on 'Bengali women' deals with such second-rate status rather than emphasizing the significance of traditional female roles. This clearly aggravates the circumstances. For example, a Bengali intellectual has simply stated that men dominate all societal spheres, domestic and non-domestic, and that women suffer from through discrimination underpinned by social and religious mores (Hossain, 1975,). Some writers go to the extreme when they state that this female inferiority and perpetual dependence on men emanates from the social beliefs that a women is physically weak, intellectually poor, mentally inconsistence, timid, irrational and psychologically emotional.

Thus undermining the women our society itself is shaking the position of women regarding their right to get the custody and guardianship of their own children. On the other hand, women are seen as an embodiment of God's power, as the creative power is most obviously working in a woman. From this point it is argued that women are in fact superior to men because of their special power to bear children and nature, which men do not have. But women are hardly given any credit for it.

The general law and the Constitution are premised on sexual equality, while the family law provides only equitable rights. The limited literature on women and law in Bangladesh confuses this, missing significant points of the realities of women's lives in a patriarchally dominated society. However, sexual equity can be meaningfully developed by better enforcement of the existing legal rights.

Gender Relations in Bangladesh

Bangladesh belongs to what has been described as the belt of *classic patriarchy* characterized by extremely restrictive codes of behavior for women, including *purdah* or seclusion of women (Kabeer, 1988, p.101). This implies that the social practices of Bangladesh are institutionalized

within a patrilineal and patrilocal system. Family, kinship and marriage plays a major role in shaping social gender practices.

Reinforcing the social, cultural and religious traditions, the society of Bangladesh promotes a division of social space and difference in behavioral norms between men and women. From childhood, women are raised with an awareness of their inferior position in relation to their brothers (Amin, 1989). They are taught to develop their sense of modesty and secure physical chastity, because these female virtues are intertwined with the honor of the family (ibid). Thus, discriminatory gender norm practices for men and women begin at home and govern the rest of their life.

The practice of patrilineal descent clearly devaluates women by allowing them no independent social identity (Kabeer, 1988, p101). Children are identified by their father's name. Women are also in an inferior position concerning socio-economic status compared to men. Even though they constitute of half of the total population, they are far beyond their male counter parts in relation to education, health and employment opportunities. Since women are considered as subjects to be protected, the household remains their primary domain, for them to be secured. Therefore, they are assigned the role of home-makers (Begum, 1989, pp.519-528). Consequently, there is less stress on formal education for women, which makes them dependent on their male guardians (Amin, 1989). Moreover, investments in daughters are limited by the idea of "watering the neighbor's tree; you take all the trouble to nurture the plant, but the fruit goes to someone else" (Kabeer, 1988, p. 101). This implies that there are few benefits from investing in daughters, since by marriage they become the assets of their husband's household.

Culturally, women's sufferings to the benefit of brothers, fathers, and children are cultivated as their glorifying qualities of self-sacrifice (Amin, 1989, Pp.4-10). At a structural level, as the male participation dominates the political spheres, the system runs in favor of men, while it subordinates women (ibid). The institution of *purdah* limits women's physical mobility make them confined to private spheres (Kabeer, 1988). Thus, "the structural elements of patriarchal control are reinforcing and include aspects of kinship system, political system and religion" (Cain, 1979, p. 406).

There is no big difference in the gender norms for rural and urban women (Amin, 1989). However, it is generally argued that women's education, employment, and fertility, and the social processes associated with it, affect the status of women. Therefore, the urban culture is not highly

traditional. While increased education brings mental transformation of by empowering the individuals with information, consciousness, capabilities and confidence; labor force participation brings them out of the stereotype traditional roles (Afsar, 1990). But very surprisingly to be considered as a good one the male nation of our society does not even need to have any qualities mentioned above for woman. A man is a perfect human being and qualified to enjoy all fundamental and human rights only due to the very fact that he is a male which is a complete violation of the principle of gender equality. Basically, for this patriarchal approach of our society even the mothers are getting deprived from the natural right of having the custody of their children.

Right of Custody of Children as a natural corollary of divorce

In Islam divorce is considered as an exception to the status of marriage. The Prophet Muhammad (pbuh) declared that among all the things which have been permitted by laws, divorce is the worst. Very surprisingly, though according to Muslim Law Marriage is a civil Contract but it is the easiest and simplest transaction among all other legal transaction. Thus the party breaking the contract is remaining irresponsible to bear the consequences if the breach entails any hardship or other difficulties to another party. Islam has provided a good number of provisions relating to the obligations of the husband and rights of the wife before and after the divorce. But due to the misinterpretation of laws by the male Islamic jurist most of the people are not aware of their rights and duties after the divorce.

Thus the unilateral right of the husband to divorce his wife without the intervention of the court is often exercised arbitrarily and irrationally, making the lives of women miserable. Most of the women are not solvent in our society. Before marriage, the women depend on parents. After marriage, women depend on husband. But after dissolution, women come back to their parent's family. Women become a burden for her family. Divorced women become helpless and her maintenance and accommodation become uncertain. According to George Mason University sociology and law professor and author Lenore Weitzman, women are more likely to face damaging financial consequences and a diminished standard of living than their male counterparts. Her studies found that after a divorce, a woman experiences a 73 percent reduction in standard of living while a man's standard of living is enhanced by 42 percent. It's important to take into account, however, that the results of these studies can fluctuate depending on several contributing factors such as dependents and stable employment. "For divorced women maintenance should be

provided on a reasonable (scale). This is a duty on the righteous". (Al-Baqara: 241) But most of the divorced women do not get their deserved maintenance. Divorced women get maintenance only for *Iddat* period not more. But the Decision of *Shah Banu case* was reversed by *Hefzur Rahman v. Shamsun Nahar Bagum and Others*, 59 (1999), DLR, AD, 172. "Where it says that a Muslim divorced woman is entitled to have maintenance till the period of *iddat* and no further"

Divorce creates several cases relating to maintenance, dower, guardianship and custody. Usually, after the dissolution of marriage, the communication gap between the parties is increased. So it is being difficult for the women to recover the dower and maintenance, simultaneously it become too tuff on her part to establish her right of custody regarding her children.

The Statutory Laws Relating to Custody and Guardianship in Bangladesh

Custody of a child in Bangladesh is governed by the Guardians and Wards Act 1890. The Act stipulates that the courts of Bangladesh is obliged by the personal law to which the minor is subject in case of custody of a child. In this respect the courts mostly consider the age, gender and religion of the minor and also the character and capacity of the proposed guardian, the courts also consider the minors own opinion if s/he is old enough to give their opinion. In respect of Muslims, the general rule is that the divorced mother is always entitled to custody over their male child till the age of 7 (classical Hanafi position) and over female child till puberty. Under the legislation, if the minor is very young or is a female, the courts are directed to give preference to the mother. In all cases, the interests of the ward are paramount. This has been confirmed by a number of judgments, such as *Muhammad Abu Baker Siddique v. S.M.A. Bakar & others*, (38 DLR (AD) 1986). The Court's ruling contradicted the classical dictates of Hanafi law according to which the mother's custody over a boy ends at 7. The Court stated that "indeed, the principle of Islamic Law (in the instant case, the rule of *hizanat* or guardianship of a minor child as stated in the Hanafi School) has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the children welfare." (Nazly 2014). Qumrunnessa Nazly also cited in his write up titled "Muslims personal Laws in Bangladesh: Issues of Women's Equality" that The Court also pointed out that the rationale for the departure from classical positions is justified as there is no clear and distinct statement of the Quran or *Sunnah* to rely upon, and also because the jurists themselves never reached any consensus. The *Zohra Begum v. Latif Ahmed Munawar* (1965 (17) DLR (WP) and PLD 1965 (Lah) 695)

case, and other rulings deviating from classical law are also cited. As there are detailed rules for the division of estates according to classical law, there is little legislation in this area. In general, property devolves upon the heirs according to Hanafi or Jafari rules of succession. The Muslim Family Laws Ordinance 1961 also introduced obligatory bequests in favor of orphaned grandchildren, allowing them to inherit from their maternal or paternal grandparents in place of their deceased mothers or fathers.

The Guardians and Wards Act, 1890 (GWA) is the core law which addresses guardianship and custody disputes in Bangladesh. The Family Court Ordinance, 1985 (FCO), a relatively recent law, made a few changes. These have been insignificant in respect of substantive legal provisions. However, they provided a new court with exclusive jurisdiction over all family matters, including guardianship and custody disputes. According to Section 5 of the FCO, a Family Court shall have "exclusive jurisdiction" to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) dissolution of marriage; (b) restitution of conjugal rights; (c) dower; (d) maintenance; (e) guardianship and custody of children."

The GWA, however, is not a self-contained law as it reserves the courts' (now the Family Courts) power to appoint guardians in accordance with the personal law applicable to the minor. Section 17 of the GWA further strengthens this rule by requiring courts to be guided by considerations of the minor's welfare as consistent with the personal law to which she /he is subject. Stipulated factors for consideration include the age, sex and religion of the minor and her/his capacity to form intelligent preferences and the character and capacity of the guardian, among others. Unlike Muslim personal law, the GWA does not differentiate between custody and guardianship and it charges the guardian with custody of the minor. In practice, the father being the guardian of the child under Muslim personal law is entitled to his/her custody, and the mother has little scope to apply for custody of the minor under GWA. However, the definition of 'guardian' in the GWA, if read independently, including any person having the care of the person or property of a minor and it has been decided in a significant number of cases in South Asia that a mother can also file a petition for return of her minor child to her custody when such minor is removed from her custody.

Muslim Law and Mother's Right to Custody of Children

Normally children are supposed to live both with their father and mother. The question whether a child will be with their father or mother may come

when the parents got separated from one another either by divorce or by any other form of dissolution of Muslim marriage.

According to Shari'a, basically a father is the natural guardian of his children's persons and as well as her/him property. *Shia* doctrine also gives the child's paternal grandfather joint guardianship According to Shari'a, a child's paternal grandfather is his or her natural guardian after the father. Under the laws of countries such as Kuwait, guardianship passes to the next relative on the father's side if the father and paternal grandfather are unable to act as guardian (Kalanauri 2016). Depending on local laws, a father may be able to transfer his power of attorney over his child to other family members.

The right to physical custody of child is not an absolute right in the sense that a mother or father who possesses physical custody of a child may not prevent each other from seeing their child. While the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, he or she must bring the child to a place where the other parent can see him or her. Furthermore, in order to have physical custody, a parent must fulfill certain conditions. Firstly, the father or mother seeking custody must have reached majority and must be sane. He or she must also be capable of raising the child, looking after its interests, and protecting its physical and moral interests. Aside from these basic requirements, there are specific requirements based on the parent's gender. Since, by definition, Muslim fathers satisfy the specific requirements of a male custodian, the following discussion will address only the requirements placed on a mother.

Muslim law entrusts *hidana* (custody) of children in their tender age to mother and the guardianship to father during formative years of the child. In the event of the father being alive, he is the sole guardian of the person and property of the minor children. We can appoint any person by his will, a guardian of his children. The right of *hidana* belongs to the mother and nothing can deprive her except her own misconduct. It is a right recognized solely in the interest of the children but it is not an absolute right. This means that if at any time it is felt that in the circumstances other life it would not be conducive to the physical, moral or intellectual welfare of the child to be kept in her custody, she can be deprived of it`. In the classical Hanafi Law the custody of the child is first vested in the mother. The *Hanafi* law as plasticized in India recognizes -the mother‘s custody until the son reaches 7 years or a daughters puberty wherefrom the custody is transferred to the father. Thus mother’s right to custody is qualified. Under the Indian Divorce Act 1869 the Court has an unfettered discretion in making interim orders for the custody, maintenance and education of the

child. The discretion is to be exercised by the court in considering the consideration of any particulars case. No hard and fast rule can be laid down. Thus it is evidenced that to Act 1869 emphasizes the father's prerogative.

Hindu Law and Mother's Right to Custody of Children

Right to custody and right to guardianship do not bear the same legal doctrinaire. Guardianship is a broader term than custody. Former comprises looking after the` interest of the child, such as education etc. but custody on the other hand implies physical closeness and control "over the child and its upbringing. Under the Guardians' & Ward, Act 1890, the superior right of the father in respect of guardianship- was established. The position of the mother as a guardian of her children was of the second grade. Even the father could under old. Law nominates a guardian of his children so as to exclude the mother of the child through orally or the process of the execution of deed. The mother had no power to appoint testamentary guardian even if the father of the child had expired.

The Hindu Minority and Guardianship Act were established in 1956 as part of the Hindu Code Bills. Three other important acts were also created during this time and they include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Adoptions and Maintenance Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to modernize the then current Hindu legal tradition. The Hindu Minority and Guardianship Act of 1956 were meant to enhance the Guardians and Wards Act of 1890, not serve as its replacement. This act specifically serves to define guardianship relationships between adults and minors, as well as between people of all ages and their respective property (Wikipedia, 2016).

The Hindu Minority and Guardianship Act 1956 reiterate the traditional superiority of men and inferiority of women. The Kerala High Court established in the case of Rama Chandra K.V. Annapurni Ammalithat under Sec. 6 of the Act 1956 the father is natural guardian and it is only after him the mother can be natural guardian only in the case of an ,illegitimate child, the mother is recognized as fully capable of looking after the child. The Act 1956, for the first time conversion the mother of the child the right to appoint a guardian by will ignore the testamentary guardian appointed by the father. The Act 1956 also lay down that the custody of the child up to the age of 5 years will be with the mother. The right to custody has been qualified by the word, ordinarily'. This has raised the dilemma in the judiciary.

The Act 1956 does not categorically specify the welfare of the children as a paramount consideration for conferring guardianship between father and the mother though Sec. 13(1) of the said Act has recognized that in case of declaration of any person a guardian of the Hindu minor by Court. The welfare of the children shall be the paramount consideration. In the same way when in a matrimonial proceedings under the Hindu Marriage Act 1955 spouse demands the custody of the children under Sec. 26 of the Act the court should not strictly adhere to the priority of the fathers claim of custody and guardianship over mothers claim. The Court should consider not only the economic position of the parents but the interest and welfare of the child should be taken into consideration. The 'welfare' is defines or illustrated in the Acts it is difficult to" state; The Kerala High Court in case of Reddy V Fleddy' has clarified 'welfare is not merely material but also moral welfare. Whenever the welfare of the children has been considered as paramount the courts everywhere raises a presumption in favor of mother.

In the United State Cases is observed that a child of tender years is best served by, being entrusted to his mothers custody. Similar attitude has been reflected in the Indian Contemporary verdicts pronounced by High Courts and Supreme Court has now considered the welfare to the minor dismissing the preferential right arguments. The impact of the provision of sec. 6(a) of Hindu Minority and Guardianship Act 1956 claiming father's prerogatives, over mother has now been watered down by the judicial activism regard being had to the Section 13(1) of the Act 1956. Though Sec. 13(1) is specifically meant for guardianship and not for custody the courts have applied it to the disputed cases of custody of children under Sec, 26 of the Hindu a Marriage Act 1955 considering that both guardianship and custody are interlocked concept.

In an unreported case of 2013, the Bombay High Court has held that a father cannot take away custody of a minor child from the mother if the latter has separated from him. The claim of the father in such a case that he was a lawful guardian of the child would be naturally partly correct. However, the mother is equally lawful guardian as in the absence of father she becomes the lawful guardian of the child, said Justice Roshan Dalvi in a recent judgment.

The Supreme Court of India has constantly held that in deciding cases of child custody *'the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute'*(Jayant,2013). In a landmark judgment the SC driving home the equality of the mother to fulfill the role of a guardian held that '*gender equality is one of the basic principles of our Constitution, and, therefore,*

the father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category. To the lay person, this was akin to the highest Court in the country saying gender was not a consideration in deciding matters of child custody and guardianship (Jayant, 2013).

Requirements of a Mother Custodian

For deciding physical custody of a child, most juristic schools maintain that a mother must not be married to a stranger (a non-relative) or to a relative who is not in a prohibited degree of relation to the child. The Shias, however, prohibit a mother from retaining custody if she marries any other man as long as the child's father is alive and eligible for custody.The *Hanbali* and *Shafii* schools do not distinguish between girls and boys regarding the duration of female custody. The *Hanbalis* schools rule is that the female custodian have a duty to have custody from birth to till the child reaches the age of 7 years, at which point he or she may choose between parents. The *Shafiis* allow female custody until the child reaches the age of discretion and may choose either parent as custodian. On the point of view of *Malikis* schools is that the female custody of a male child shall last until he reaches puberty, and for a female child until she marries. Under the *Hanafi* School, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most *Hanafi* jurists set this age of independence at seven years, although some set it at nine.

There are no Quranic verses fixing the age limit of custody of children. But in the moral sphere it is specified in the Quran that the mother should breast-feed her offspring for two whole years (Rahman, 1907) this moral injunction implies in the ethical sense that custody in the first instance belongs to the mother. The *Hanafi* school entrust to the mother to have custody of her daughter until she attains puberty and of her son till he attains seven years of age, while the *shafi* and *Maliki* school to have the custody of the children until her second marriage (Tyabji 1940,). The right of the mother to the custody of her children continues even when she is divorced by the father of her children, but she forfeits the right of custody in certain circumstances, if she resides during the subsistence of marriage at a distance from the child's father's place of residence, if she neglects her children or fails to take care; if she leads an immoral life, e.g. if she is a prostitute or if she marries a person related to the minor's prohibited degrees or by marring a stranger or by change of religion (Rahman, 1907, p 212).

In the Pakistani Period a Commission on Marriage and Family laws was established on August, 1955 to find solutions of different family law issues. The Commission on Marriage and Family law argued that it is admissible to propose changes and modifications in the matter of custody of minor children under *Hanafi* law, as the divine origin or practice of the Prophet did not fix any age limit and some of the Muslim Jurists have expressed the view that the matter of age limit in this respect is an open question.

The critic of the Commission cited a *hadith* on which the *Hanafi* law of custody is based (Mernissi,1988). The *hadith* stated that 'it orders children to observe prayers at the age of seven, making it obligatory for the father to start religious education of his children when they attain the age of seven.' Hence he can take over the custody of the children at that age. However the mother is entitled to the custody of a female child up to the age of puberty. According to the dissenting note, not only up to the age of puberty but up to the time of her marriage. (Smock, 1977) But other traditional writers did not take recourse to the modification of the legal age but were in favour of the theory of welfare of the child and cited illustrations where the mother was given custody when it was in the best interest of the child (Ali, 1985, pp 185-229). Traditional writers did not take recourse to the modification of the legal age but were in favour of the theory of the welfare of the child and cited illustration where the mother was given custody when it was in the best interest of the child (Islahi, 1959. p 220). Traditionally the right of guardianship of children always vested in the father. The Judiciary in Bangladesh is also not giving any enlightened judgments in cases of guardianship. They are mainly following the conservative line of interpretation of not recognising a woman as a natural guardian of her children.

But the cases on custody in Bangladesh protect women more, as they exhibit mother's right of custody of young children as almost an absolute right. Enlightened pronouncements in the cases of custody of young children have encouraged mothers to claim custody beyond the conventional limitations relying on arguments about the welfare of the child. Like India and Pakistan, the hizanat or custody law of minor children is being governed in Bangladesh by the combination of statute laws i.e. The Guardians and Wards Act, 1890, Muslim personal laws, case law, and Court's concern for children well being. However, the modern trend of judgment started, in fact, from the Pakistani period. The cases of custody demonstrate that the judiciary in Bangladesh is deciding the problem on the paramount consideration of the welfare of the minor. In Abu Bakar Siddique v S.M.A. Bakar and Others, 38 DLR (1986) AD 106 on the strength of precedents in the Pakistani period, the Appellate

Division ruled: 'It is true that, according to Hanafi School, father is entitled to the hizanat or custody of the son over 7 years of age.

In the case of *Mst. Fahmida Begum v. Habib Ahmed, 20 DLR (1968) WP 254* it had been held that the Court in Pakistan can ignore the rules in textbooks on Muslim law, since there is no Quranic or traditional text on the point. Further on, the court concluded that it would be permissible to depart from the rules stated in those textbooks if on the facts of a given case its application was against the welfare of the minor. However, it is an established fact that a mother is normally seen as better qualified to care for the child in his or her tender years and that committing the custody to her is of advantage to the child (Rahimullah Chowdhury v Mrs. Sayeda Helali Begum, 20 DLR (1968). But in Dr. Rashiduddin Ahmed v Dr. Quamrunnahar Ahmed. 30 DLR (1978) 208-211 the High Court considered it to be in the best interest of the children to place them in the interim custody of their father while the issue was finally settled in the lower court.

In the case of Smt. Surinder Kaur Sandhu v. Hurbux Singh Sandhu AIR 1984, SC 1224, where the Supreme Court of India said: 'Section 6 of the Hindu Minority and Guardianship Act 1956 constitute the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conclusive to the welfare of the minor boy. The boy ought to be in the custody of the mother.' In the present case the personal law and the welfare doctrine conflicted, the welfare doctrine would have precedence. But this is only rare case where a woman as a specific individual was recognised as having the right to custody when her own ability and interest to help the child was greater than that of her husband. Moreover, the custody rules are only juristic views and are not based on the Quran and Sunnah. No accord has been established among the jurist, these rules diverge from school to school.

However, the cases discussed above show that in custody matters the higher court lead in favour of mothers. It is more so in the lower courts. Family court of Dhaka city has shown this healthy trend. The favourable attitude of these courts has encouraged mothers to put forward claims for custody of children above the age limit, laid down by the classical jurists of the Hanafi School, and rely on the welfare doctrine of custody. This seems to reflect sensitization of the judiciary to give more rights to women.

Conclusion

When a couple go for separation by divorce then the wife has been compelled to get out of her husband's house leaving everything over there including her own children. Moreover as in Bangladesh, a son is looked upon as the father's natural apprentice and successor or supporter of the parents in old age. Sons are supposed to build up family prestige and prosperity. A father believes that he will continue to live in this world through his son. Therefore, even after the divorce if the child of that couple become boy, the father always feel like to get both the custody and guardianship of that child as if the mother has no title, no rights to her son. Generally, the socio-economic conditions of women have the effect of not favouring their cases and the preconceived idea remains that women are unable to maintain their children. Most probably due to these reasons Fatima Mernissi stated that the main problem of Muslim women subordination is not rooted in religion or tradition, but in patriarchal influence and arbitrariness which has dominated women for centuries.

In Bangladesh, though the judiciary is supposed to hand over the custody of child to the mother on the basis of the principle of welfare but it is always found that the financial condition of the mother is always becoming a considering factors behind renouncing the custody of the child to the mother. But there is no reservation that how much the child will grow rapidly both mentally and physically being in stroke with the mother. And it is only the mother who can afford the best care and support to the child. However, it is a matter of grief that whenever the question of custody comes, the question of material comfort comes at first and in majority cases the custody to the mother is denied. If the financial condition of a mother is always becoming a considering factors behind renouncing the custody of the child then in a country like Bangladesh no women will be considered as an eligible one to get the custody of her children. Because, in Bangladesh still women are considered to be backward and the percentage of earning women in Bangladesh is low, therefore, considering the financial capacity as the only decisive factor behind the custody of the child is totally irrational and unexpected one. Moreover, a mother's love and affection cannot be compared or measured with anything else. As both the *shariah* law and statutory law in our country is conferring the responsibility of maintenance of the children to the father and father is also considered as the legal guardian therefore it should not be a matter of consideration whether the child is with the mother who is not financially solvent because the father is bound to provide the maintenance.

But the consideration factor should be the wellbeing of the child rather than the mother's financial condition. Mother herself alone is able to ensure the best interest of the child irrespective of her financial condition. According to our *shariah* law and statutory law father is always responsible to be responsible for maintenance of the child. Whether the child belongs to the mother or father is not the factor here. Therefore, the financial condition of the mother should never be a concern in case of denying the custody of the child to the mother rather the principle of welfare should be taken into consideration and mother should for eternity get main concern to get hold of the custody of the child.

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White Collar Crimes in Bangladesh Perspective

Ahsan Shajib[1]

Abstract

The concept of white collar crime is usually associated with Professor E.H. Sutherland whose penetrating work in this area focused the attention of criminologists on its demoralizing effect on the total crime picture. Professor Sutherland pointed out that besides the traditional crime such as assault, robbery, dacoity, murder, rape; kidnapping and other acts involving violence, there are certain anti-social activities which the persons of upper strata carry on in course of their occupation or business. These activities for a long time were accepted as a part of usual business tactics necessary for a shrewd professional man for his success in profession or business. Thus any complaint against such tactics often went unheeded and unpunished. A white collar criminal belong to upper socio-economic class who violates the criminal law while conduction his professional qualities. Thus misrepresentation through fraudulent advertisements, infringement of patents, copyrights and trademarks, are frequently resorted to by manufacturers, industrialists and other persons of repute in course of their occupation with a view to earning huge profits. Of all the factors, the economic and industrial growth throughout the world has perhaps been the most potential cause of increase in white collar crimes in recent years including in Bangladesh also.

Keywords: White Collar Crime, Corruption, Upper socio-economic class, Shares, Trademarks.

1.1 Introduction

It is common knowledge that certain professions offer lucrative opportunities for criminal acts and unethical persons in business, various professions and even in public life. They tend to become unscrupulous because of their neglect at school, home and other social institutions where people get training for citizenship and character building. These deviants have scant regard for honesty and other ethical values. Therefore they carry on their illegal activities with impunity without the fear of loss of

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prestige or status. The crimes of this nature are called white collar crimes and they are essentially an outcome of competitive economy. It should not, however, be concluded that there was no such problem or awareness of it until Sutherland focused his attention on this variety of crime about forty years ago. Sutherland started a systematic research into the criminal practice of the elites usual reports had a tendency, he argued, to give an impression that criminality largely has been concentrated in the lower class and economically underprivileged people. The reports gave a misleading idea that respected people including highly placed business persons and political persons are righteous and free from criminality. The rise of white collar criminality in many countries (including Bangladesh) has coincided with the progress made in those countries in the economic and industrial fields.

It is hardly surprising that the two processes should go together considering the most of the white collar crimes are directly or indirectly connected with production and distribution of wealth. The industrial revolution had initiated the great social changes in the economic and social structure of property, comprising the transformation of an increasing proportion of wealth from property is tangible, visible and mainly immoveable goods into ownership in intangible and invisible powers and rights such as shares, trademarks, patents, copy-rights etc coincided with the growth of the large-sized corporations replacing individual entrepreneurs. This development *inter alia* led to concentration of economic and consequent political power in a few hands, absentee ownership and impersonal monopoly, emphasis on money and credit and decline in the sense of social responsibility on the part of owners of large property. The advance of technological and scientific development is contributing to the emergence of mass society with a large rank and file and small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethical behavior is necessary for the event and honest functioning to the new social, political and economic processes.

1.2 Objectives of the Study

This research topic deals with the crime which relates to white color crimes. The objectives of this research are as followings.

a) Whether White Collar Crime Negative Impact in Corporate sector?

b) The remedy in case of White Collar Crime.

c) To evaluate the statutorily provision & other legal context relating to

research topic.

d) To identify the problems of the White Collar Crime in case of such crime.

e) To accumulate the wide ranging & reliable information about the White Collar Crime.

1.3 Research Methodology

This research is conducted on the basis of data collection of primary and secondary sources. The methodology followed throughout the research paper has been point out below:

a) Dividing the research paper into different sections.

b) Collection of study materials with the help of the concerning teachers' researches friends and others regarding the person and institutions.

c) Study and discussion with the concern persons.

d) Concentrated study through many books, journals, national and international newspapers.

1.4 Importance of the Study

The white collar criminal always has the initiative to commit their crimes. They have no respect for society and their victims. White collar criminals consider your humanity as a weakness to be exploited in the execution of their crimes. By the humanity, I mean ethics, morals, and our great laws that create the presumption of innocence until proven guilty. Our trust, morality, ethics, and our great legal system limit your behavior, while giving white collar criminals freedom to commit their crimes and obstruct justice. The researcher tried to describe the future conditions and consequence of this matter on practical scenario. There is no complete research on this topic. So this research will contain great importance for the government of our country.

1.5 Definition of white collar crime

The concept of white collar crime found its place in criminology for the first time in 1941 when Sutherland published his research paper on white collar criminality in the American sociological review. He defined white collar crime as a crime committed by persons of respectability and high

social status in course of their occupation. A white collar criminal belong to upper socio-economic class who violates the criminal law while conduction his professional qualities. Thus misrepresentation through fraudulent advertisements, infringement of patents, copyrights and trademarks, are frequently resorted to by manufacturers, industrialists and other persons of repute in course of their occupation with a view to earning huge profits. Other illustrations of white collar criminality include publication of fabricated balance sheets and profit and loss account of business, passing of goods, concealment of defects in the commodity for sale etc. Professor Southerland further pointed not that a white collar crime is more dangerous to society than ordinary crimes because the financial loss to society from white collar crimes is far greater than the financial loss from burglaries, robberies larcenies etc.

Sir water Reckless, an eminent American criminologist suggests that white collar crime represents the offences of businessmen who are in a position to determine the policies and activities of business.

Referring to this variety of the upper would of crime, Barnes and Testers quoted Lord Acton who said, power tends to corrupt and absolute power tends to corrupt absolutely. Whenever citizens of a particular community become apathetic to the working of the in government, grafts, corruption and alliance between public servants and the criminal world are common phenomenon resulting into breach of trust, fraud and other malpractices.

2.1 Historical Background

The concept of white collar crime is usually associated with *E.H. Sutherland* whose penetrating work in this area focused the attention of criminologists on its demoralizing effect on the total crime picture. Sutherland pointed out that besides the traditional crime such as assault, robbery, dacoity, murder, rape; kidnapping and other acts involving violence, there are certain anti-social activities which the persons of upper strata carry on in course of their occupation or business. These activities for a long time were accepted as a part of usual business tactics necessary for a shrewd professional man for his success in profession or business. Thus any complaint against such tactics often went unheeded and unpunished. It must, however, be stated that Sutherland was preceded by other writers who focused attention on the dangers to society from the upper socio-economic group who exploited the accepted economic system to the detriment of common masses.

Thus Albert Morris refers to a paper entitled ‘Criminal Capitalists’ which

was read by Edwin C. Hill before the International Congress on the Prevention and Repression of Crime at London in 1872. In this paper the learned writer underlined the growing incidence of crime as an organized business and its evil effects on society.

In1934, Morris drew attention to the necessity of a change in emphasis regarding crime. He asserted that anti-social activities of persons of high status committed in course of their profession must be brought within the category of crime and should be made punishable. Finally E.H. Sutherland through his pioneering work emphasized that these 'upper world' crimes which are committed by the persons of upper socio-economic groups in course of their occupation violating the trust, should be termed **"**White Collar Crime**"** so as to be distinguished from traditional crime which he called, "Blue Collar Crime". Thus, he observed that if a border shoots his wife's lover, that is not a white collar crime, but if he violates the law and is convicted in connection with his business, he is a white collar criminal.

2.2 Nature of white collar crime

Professor Sutherland presented his concept of white collar crime in his a dress to the American sociological society in 1949. Sutherland defined white collar crime as crime committed by a person of respectability and high social status in the course of his occupation. Later, be seems to have added a refinement to the definition by defining a white collar criminal as a person of the upper socio-economic class who violates the criminal law in the course of his occupational or professional is more dangerous to society than ordinary crimes, firstly, because of the were higher and, secondly, because of the damage inflicted an public moral. Comparing the financial losses resulting from white collar crimes with those from ordinary crimes, he observes.

The financial loss to society from white collar crime is probably greater than the financial loss from burglaries, robberies and larcenies committed by persons of the lower socio-economic class. The average loss per burglary is less than one hundred dollars, a burglary which yields as much as fifty thousand dollars is exceedingly rare, and a million dollar burglary is practically unknown. On the other hand, there may be several million dollar embezzlements reported in one year. Embezzlement, however, are peccadilloes compared with the large scale crimes committed by corporations, investment trusts and public utilities holding companies, reports of fifty million dollar losses from such criminal behavior are by no means uncommon.

Regarding the damage to morale and institutions, Sutherland expresses the view that the financial loss is less important than the damage to social relations since it creates distrust, lowers morale and produces disorganization on a large scale. On the other hand, the social damage from ordinary crime is said to have relatively little effect on our institutions and social organizations. How legal institutions and laws are brought into contempt and disrepute is illustrated by Marshall B. Clinard. He points out that the wartime black market crimes set an example of disobedience of law by presumably reputable businessmen for more flagrant than in the case of most robberies burglaries and larcenies.

2.3 Contributing factors of white collar crime

Of all the factors, the economic and industrial growth throughout the world has perhaps been the most potential cause of increase in white collar crimes in recent years. The changing socio-economic scenario of the society coupled with increase in wealth and prosperity has furnished opportunities for such crimes. Commenting on the growing incidence of white collar crime in India, the law commission in its twenty ninth report observed that modern scientific and technological developments and monopolistic trends in business world have led to enormous increase in white collar crimes.

The post-independence period in India ushered an era of welfare activities which necessitated regulatory measure on the part of government of control means production and distribution so as to sub-serve the common good. The contravention of such regulatory measures generally gives rise to white collar criminality.

Marshal B. Clinard asserted that the problem of social relations, since it creates distrust, lowers morale and produces disorganization on a large scale. On the other hand, the social damage from ordinary crime is said to have relatively little effect on our institutions and laws are brought into contempt and disrepute is illustrated by Marshall B. Clinard. He points out that the wartime black market crimes set an example of disobedience of law by presumably reputable businessmen far more flagrant than in the case of most robberies burglaries and larcenies.

2.4 Classification of white collar crime

White collar crimes are as difficult to detect as they are easy to commit. The detection mechanisms on which police and government traditionally

rely seem singularly inadequate for this vast new body of crimes. White Collar Crimes may be divided into Occupational Crime and Organizational Crime but in common parlance there exist 10 popular types of White Collar Crimes as:

Bank Fraud: to engage in an act or pattern of activity where the purpose is to defraud a bank of funds.

Blackmail: A demand for money under threat to do bodily harm, to injure property or to expose secrets.

Bribery: when money, goods, services or any information is offered with intent to influence the actions, opinions and decisions of the taker, constitutes bribery.

Cellular Phone Fraud: unauthorized use or tampering or manipulating cellular phone services.

Embezzlement: when a person who has been entrusted with the money or property, appropriates it for his or her own purpose.

Counterfeiting: Copies or imitates an item without having been authorized to do so.

Forgery: when a person passes false or worthless instruments such as cheque or counterfeit security with intent to defraud.

Tax-Evasion: frequently used by the middle — class to have extra-unaccounted money.

Adulteration: Adulteration of foods and drugs.

Professional crime: Crimes committed by medical practitioners, lawyers in course of their Occupation

2.5 White collar crime in certain professions

Some of the professions involving technical expertise and skill provide sufficient opportunities for white collar criminality. They include medical profession, engineering, legal practice, private educational institutions etc.

2.5.1 Medical Profession

White collar crimes which are commonly committed by persons belonging to medical profession include issuance of false medical certificate, helping illegal abortions, secret service to dacoits by giving expert opinion leading to their acquitted and selling sample drugs and medicines to patients or chemists. Bribery, corruption and abuse of power have become inevitable part of all types of institutions of Bangladesh; health sector is not an exception to this. Patients of different government hospitals do not get medicine, which they are supposed to get. Rather some officials of the hospitals sold the medicine at a lower price to the surrounding medicine shops. Through this process lac taka's medicine of Dhaka Medical college Hospital are trafficked and sold.

In 2005, health sector, among others, was identified as one of the most corrupt sectors. Health Complex (61.9%), Medical College Hospital (17.06%), Office of Family Planning (5.95%), Office of Civil Surgeon (1.98%), specialized-hospital (1.59%), private clinic doctor (4.37%) were the sub-sectors to be involved in corruption. Among different types of corruption in health sector, the most prevalent were misappropriation (43.7%), negligence of duty (31.1%), abuse of power (11.1%), bribery (8.7%), and cheating (2.4%). In this sector, the first class officers were mostly involved in corruption, which constituted 62.4 percent.

Doctors are said to have involved in money-making malpractices, such as prolonging treatment, issuing false medical certificates, helping in illegal abortion, giving simulated expert opinion, and referring patients to diagnostic centers, from where they get regular commission. Some medical officers prepare annual budget of government hospitals, showing cost, many times more than the actual one, of various medicines and other medical instruments, which account for 100 crore taka loss of the national treasury

2.5.2 Engineering

In the engineering profession underhand dealing with contractors and suppliers, passing of sub-standard works charged labor are some of the common examples of white collar crime. Scandals of this kind are reported in newspapers and magazines almost every day. Engineers have lot of opportunities to do corrupt practices, which they are alleged to do by underhand dealing with contractors, letting perfunctory construction of infrastructure, including road, building, bridge, culvert etc. The transaction of public procurement contracts creates ample opportunities of corruption

for the engineers. Public procurement contracts are supposed to go to the lowest bidder, but in many of the cases they do not, as appropriate authority is bribed. "Even an award in favor of the lowest bidder may involve corruption, if the firm has paid the highest bribe to bring this about. The scope for exchange of money remains because normally there are ways in which the lowest bidder may be eliminated on technical (e.g. specifications, quality) of procedural (e.g. the ways the documents have been drawn up) grounds. In this latter case, the tender committee member's gain the cost of the bidding firm, not the state, at least in the short runs. In the long run, the state is the likely loser because the contracting firm may try to recover the bribe to the tender committee by again bribing the supervisors to take a sleepy attitude toward the quality of work done, services rendered, or materials supplied."

Abuse of tender of the road development projects of LGED has become usual incident. The cadres of government party are forcibly taking the tender before opening the tender box.

They get construction works by underhand dealing with the authority, namely, engineers. For cadres, it is a profitable business, as they make huge amount of money out of the construction works, but they are not at all committed to their work. An investigating Committee has revealed financial irregularities of 8 crore taka by three officials of Chittagong WASA, including Chief Engineer, who were later on suspended. In a project 1 thousand 2 hundred 25 metric ton wheat was allotted, of which 9 hundred 10 metric ton was sold out in black market by the engineers of the Water Development Board.

2.5.3 Legal profession

In Bangladesh the lawyer's profession is not looked with much respect these days. There are two obvious reasons for this. The deteriorating standards of legal education and unethical practices resorted to by the members of legal profession to procure clientage are mainly responsible for the degradation of this profession which was one considered to be one of the noblest vocations.

2.5.4 Educational Institutions

Yet another field where white collar criminals operate with impunity are the privately nun educational institutions in this country. The government bodies of these institutions manage to secure large some by way of

government grants or financial aid by submitting fictitious and take details about their institutions. The teachers and other staff working in these institutions receive a meagre salary for less than what they actually sign for, thus allowing a big margin for the management to grab huge amount in this illegal manner. Yet another field where white collar criminals operate with immunity are the privately run educational institutions in this country. The governing bodies of these institutions manage to secure large sums by way of government grants of financial aid by submitting fictitious and fake details about their institutions. The teachers and other staff working in these institutions receive a meagre salary far less than what they actually sign for, thus allowing a big margin for the management to grab huge amount in this illegal manner. The victimized teachers can hardly afford to complain about this exploitation to high ups because of the fear of being thrown out of job. They are, therefore, compelled to compromise with the situation. Although the Government has introduced the scheme of treasury-payments for teachers of private institutions, but the problem still persists in one form or the other. That apart, fake and bogus enrolment of students who are residing far away from the place of location of these institutions is yet another source of illegal earning for them. They charge huge amounts by way of donations or capitation fees from such needy students to appear in different examinations on the basis of manipulated eligibility certificates or domicile certificates in return for huge sums. These dishonest and unscrupulous practices have damaged the standard of education in Bangladesh to such an extent that it is causing an irreparable loss to the younger generation.

More often than not, these privately managed educational institutions as also those imparting some professional education enjoy the patronage of some influential politicians and many of them are even owned by them. Many such institutions are virtually non-existent and are functioning as commercial shops, enabling the students to get degrees on payment of huge sums in beaten violation the government rules, regulations and norms. The magnitude of this white collar criminality has adversely affected the standard of education in most States, and, therefore, the problem needs to be tackled through stringent statutory measured.

2.5.6 Corruption of Judges

Judges were punished for their proved involvement in corruption. Out of them 4 judges were give forced retirement, 4 were recommended to be sacked. Permission of the High Court Division was sought to file departmental cases against 7 judges. Among the judges 2 held posts equivalent to District and Sessions Judge, 4 were Additional district and

Sessions Judges, 7were Joint District Judges and 2 were Senior Assistant Judges. The Bureau of Anti-Corruption and Intelligence Branch had received allegations against 8 judges about their involvement in taking bribery and corruption. All of them are owners of crores of money. They have industries, factories, luxurious abode and a number of flats in their name or names of their family members.

2.5.7 Corruption of Government Officials

Corrupting, bribery, and abuse of power are not related to any specific government of Bangladesh. In one of their report in 2002, Transparency International identified police department of Bangladesh as the most corrupt among all the departments. Lower judiciary placed the second position, public health sector third, education sector fourth and electricity sector fifth. In 2005, among the people involved in corruption, 64.1 percent were government officers and staffs. Absolute and discretionary powers, lack of accountability and weak administrative system are the causes of high level of corruption among the government officials. In 38.1 percent corruption cases, no action was taken, in 18.1 percent cases administrative action was taken, in 19.1 percent cases incident of corruption was informed to the authority, in 16.3 percent cases it was not known whether any action was taken. By scanning newspaper reports, Transparency International has found that almost all the government sectors are involved in corruption. Among these education, police, health and family welfare, and local government were the most corrupt sectors. In education sector most of the corruptions took place in high schools (33.55%), and college (15.31%). Abuse of power (59.61%) and bribery (30.95%) were highly used corrupt practices. In the police department, Thana police (77.26%) and traffic police (11.37%) were the most corrupt. Among the methods of corruption, bribery (31.76%), extortion (33.3%), and abuse of power (25.88%) were most prominent. In local government sector, Union Parishad (32.67%), Bureau of local Government Engineering (16.73%), DC office (5.58%), Municipality (9.56%), and UNO office (11.16%) were involved in corruption.

3.1 Growth of White Collar Crimes

The rise of white collar criminality in many countries has coincided with the progress made in those countries in the economic and industrial fields. It is hardly surprising that the two processes should go together considering the most of the white collar crimes are directly or indirectly connected with production and distribution of wealth. The industrial

revolution had initiated the great social changes in the economic and social structure of property, comprising the transformation of an increasing proportion of wealth from property is tangible, visible and mainly immoveable goods into ownership in intangible and invisible powers and rights such as shares, trademarks, patents, copy-rights etc coincided with the growth of the large-sized corporations replacing individual entrepreneurs. This development *inter alia* led to concentration of economic and consequent political power in a few hands, absentee ownership and impersonal monopoly, emphasis on money and credit and decline in the sense of social responsibility on the part of owners of large property.

The advance of technological and scientific development is contributing to the emergence of mass society with a large rank and file and small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethical behavior is necessary for the event and honest functioning to the new social, political and economic processes. The inability of all sections of society to appreciate in full this need results in the emergence and growth of white collar and economical crimes. The two world wars also contributed towards white collar crimes in a substantial way. The traditional mores and ethical restraints were vitally affected due to the scarcity of things and mounting demands. Since 1947 till the War of Liberation in 1971, our country had faced a tremendous biasness of the government to the West Pakistani people. That discrimination deprived the people of Bangladesh a lot and after the independence many of the people started committing different types of crimes to meet their need, especially white collar crimes. During the last forty years Bangladesh has seen the execution of various five-year plans involving the huge expenditure of the government for various nation building activities. Corrupt officers, businessmen and contractors never had it so good. No doubt the country did make some progress but a big chunk of money earmarked for developmental projects has been pocketed by white collar criminals.

3.2 Present situation of White Collar Crime in Bangladesh

In Bangladesh white collar crimes, in contrast to blue collar crimes, are on the rise. Here politics has criminalized and corruption has taken strong hold. Transparency International, a German based non-governmental organization, has identified Bangladesh as the most corrupt country in the world for consecutive five years. But in this year it increased and positioned after ten People of upper socio-economic class, ruling elites and people of different groups are committing white collar crimes. They are

making huge amount of money by corruption, manipulation and abuse of power causing severe detriment to national economy. The latest size of black money in the country stands at least taka 60,000 crores, a volume which is equivalent to one-third of the gross national income. Their crimes are insufficiently focused, most of the time undetected and remain beyond the domain of legal process. They are very influential in terms of power and money.

In Bangladesh, not only the people of upper socio economic class are involved in white collar crime, the people from top to bottom are practicing this vice, so far corruption, bribery and other malpractices are concerned. All the categories of white collar crimes are present here, but corruption occupies the most prominent place. In identifying and discussing white collar crime in Bangladesh, all pervasive corruption has taken the foremost priority. A person (acting individually or as a member of a group) is said to be engaged in corruption if he

(i) enjoy any power or position which has been acquired through explicit contract or through solemn promise (stated or implied) in order that by virtue of them he can best protect or advance the goals of those persons or institutions on whose behalf he is required to act, but

(ii) deliberately abuses his power or position to advance his personal or parochial interest.

If any person wilfully abuses his power for personal or parochial gain, he is said to have committed an act of corruption. Though the term 'corruption' has many meanings, but usually it refers to a particular type of exchange, activity or behavior. "For instance, corruption could mean a process of physical decay or degeneration; the loss of innocence; a state of moral impurity or moral deterioration; perversion in taste or language; and also the wrongful, negligent or wilfully corrupt act of a public official in the discharge of his or her public duties. In Bangladesh, corruption stands for 'the misuse of public power for private profit.' Corruption, in the reality of Bangladesh, refers to the exchange, activity, process or behavior which takes place when the public domain comes into contact with private domain.

Corruption has gained much currency –in discussion, newspaper reports, columns, rhetoric, but there is dearth of in-depth analysis, article, and empirical study to understand the problem. The causes of corruption, political, economic, and social, need to be identified, both in its origin and impact on the good governance and true development of Bangladesh.

Some researchers try to explain corruption of Bangladesh in terms of 'modernization' theory. According to them, Bangladesh has not reached 'modern' state of policy, still it exists in primitive stage of development, hence showing signs of 'traditional' forms of organization, among which corruption occupies prominent place. Some authors hold that capitalism and search for 'modernity' give rise to corruption. Politicians, bureaucrats, the state apparatus, regulatory policies, political upheaval, tradition, culture and western influence have been also identified for high rate of corruption in Bangladesh.

In addition to the above, some other causes seem to be plausible. Situation may compel to do corrupt practices in the context of gap between legitimate salary and real expenditure. Greed and unlimited desires, in the absence of sufficient social control, seem to contribute to corruption and its voluminous increase. Anomie and social control theorists suggest that when social control is either absent or weakens, it will lead to deregulation in the society, where many problems arise. Bangladesh is passing a transition—from its Endeavour to reach 'modernity' from 'primitive' stage, from rural to urbanization, from agriculture to industrialization. This transition is conditioned by various maladies, including corruption.

Corruption is not a typical feature of less advanced developing societies; it is also present in developed societies. In those societies, corruption is less visible and confined within the people of upper socio-economic class. There the rich, wealthy and senior members of government, bureaucracy and civil society are involved in corrupt practices. Corruption in the developing societies is not restricted within an elite network, rather extends to various levels of socio-economic and political activity. "Corruption in these societies prevails at virtually every point of contact between the state and the market, or the public with the private. In Bangladesh, for instance, as has already been stated, there is ample evidence to show that corruption is not the exception to the rule. It is found at virtually every level of activity in which the state plays a role—from the national, political level to the far-flung rural level. Corruption permeates not only the relatively higher, politically sensitive, and sensitive aspects of state activity, but also its routine functions and structures.

4.1 Are all White Collar Criminals Rich and Powerful?

Most white-collar offenders are ordinary people who got into financial difficulty and who saw their way out of it through illegal and fraudulent measures. Business fraud is "as familiar in their business context as are street crimes in poor communities. It is the "small fish" who gets caught,

while the big fish get away because the "big fish" are more capable of insulating themselves from prosecution scrutiny. When it comes to conviction, the higher socioeconomic status of the offender, the stiffer the sentence juries vote for. Thus, the cards are not always stacked against the small fish. Goals must be achieved, but often this can be accomplished only by cutting corners. Top management does not have to "get their hands dirty" by directly ordering subordinates to break the law. "It is not difficult" to structure their affairs so that all of the pressure to break the law surface at a lower level of their organization or a subordinate organization. There are more people occupying small time white-collar positions. So, it would be remarkable if there were many "big fish" arrested, since they are so rare to begin with.

4.2 Why don't While Collar Criminals go to Jail?

Clearly a double standard exists between white-collar crimes and street crimes. The following are some reasons that explain why white-collar criminals are not more rigorously pursued.

The Best Lawyers

White-collar criminals have money and can therefore afford the best legal advice.

Favorable Laws

Laws are generally written in favor of the white-collar criminal. People who commit white-collar crimes are sometimes the same people who are in a position to see to it that their crimes are not defined too negatively.

Individual Perception

Whereas the impact of white-collar criminals on the nation is great, the cost to each individual is small. White-collar crimes do not impact individuals with the same intensity as when one individual is victimized by a petty criminal.

Little Police Effort

Virtually no police effort goes into fighting white-collar crime. Enforcement is many times put in the hands of government agencies (like the Environmental Protection Agency - EPA). Often these agencies can act only as watchdogs and point the finger when an abuse is discovered.

Difficult to Assign Blame

Assigning blame in white-collar crime cases can be difficult. For example, pollution may be the result of corporate neglect, but corporation cannot be sent to jail. Corporations could be heavily fined (a viable option), but the social impact of severely punishing an institution that may provide jobs to hundreds of people, as well as supply social necessities, may be more detrimental than the initial violation of the law.

4.3 Judicial attitude

Generally courts have been giving differential treatment to white collar criminals. Sometimes instead of punishing the guilty courts have used cease and desist orders in case of white collar criminals. It is a technique which is not resorted to for ordinary criminals. As pertinently observed by Taft and England, "We do not warn the burglar to desist, we arrest him forthwith There, however, seems to have occurred lacunas of the judicial attitude in the USA of late as manifested in the famous *General Electric case* of electrical equipment companies decided in the year of 1961. In the words of Taft and England,

"The plea of *nolo contendere* by a person formally accused of a crime is a backhanded plea of guilt. For decades businessmen accused of violating the anti-trust laws have pleaded *nolo contendere* when the evidence against them was clearly overwhelming. Never until 1959 did imprisonment follow such a plea in that year to their astonishment four Ohio businessmen were sentenced to jail for anti-trust law violations."

Trial courts in Bangladesh so far sometimes fail to realize the gravity of the white collar criminality and, therefore, tend to be contended by awarding light or even token punishments to white collar criminals. The law commission is aware of the judicial smugness which is occurred by the white collar criminals and the dangers inherent in them. In the case of *M. H. Hoskot v. State of Maharashtra, (1954) AIR* the Supreme Court of India has made its approach to white collar crimes absolutely clear. The court observes the economic crimes committed by the upper berth 'Mafia' ill serve social justice so that soft sentencing against them is a sort of gross injustice. In Bangladesh, courts have given strict interpretation to the socio-economic statutes which do not require any *mens rea* either in the form of intention or knowledge for committing an offence. This is how it should be thought it may be pointed out that courts have been somewhat reluctant in finding *mens rea* excluded from statutes dealing with more

traditional crimes. It can obviously be deemed as a change in the judicial attitude regarding white collar criminality in Bangladesh.

4.4 Constitutional provisions

Bangladesh constitution is one of the richest constitutions of the world. Hopes and aspirations of the people have been reflected here. As the solemn expression of the will of the people it is the supreme law of the country. The highest law is pledged to ensure exploitation free society. So establishing corruption society is the prime concern of this constitution. The constitution tells equal opportunity of its citizens and invites the state to create the scope of work for the people removing social and economic inequality. Simultaneously, the constitution has the responsibility to the state for ensuring such conditions that prevents the people to earn unearned income. Side by side the constitution has imposed the following duties to the citizens as well as the public servants:

(i) to observe the constitution and the laws,
(ii) to maintain discipline,
(iii) to perform public duties and to protect public property,
(iv) to strive at all times to serve the people.

4.5 The Anti-Corruption Commission

There has been a major change brought about the Anti-corruption regime in Bangladesh pursuant to the enactment of the Anti-Corruption Commission Act, 2004 which has come into force on 9th May, 2004 vide SRO No. 126- Law/2004 dated 9.5.2004 published in the official Gazette. An independent commission has been established there under for the purpose of effective detection, enquiry, investigation and conduct of corruption cases before the court. On the commencement of this Act, the Anti-Corruption Act, 1957 has been repealed and the Bureau of Anti-Corruption (BAC) has been abolished with all the powers there under hitherto before exercised by BAC and the government has been vested in the Anti-Corruption Commission. As provided under section 20 of the Anti-Corruption Commission Act, 2004 the Commission has the exclusive power to investigate into the offences specified in the Schedule of the Act and the investigating officer duly authorized by the commission shall have the power of the Officer-in-Charge of a Police Station so far the investigation of the offences are concerned. Under this Act the two offences in respect of failure of a person to furnish property statement within the specified time or furnishing false statements and the acquisition

of property disproportionate to declared sources of income have been made punishable under section 26 and 27 respectively.

The Anti-Corruption Commission framed the Anti-Corruption Commission Rules, 2007 dated 29March 2007 published in an official Gazette. These rules appeared to be somewhat deficient and confusing with regard to the enquiry and investigation of the Anti-Corruption cases. Rule 20 defines that enquiry into the allegations of corruption on preliminary matters with a view to finding the *prima facie* truth or falsehood thereof. This stage is simply a fact finding stage. Under rule 10 the time limit for completion of investigation has been fixed 45 working days from the date of receipt of the order of investigation. In the event the investigation is not completed within the period as aforesaid the investigating officer on obtaining extension of time from the Officer-in-Charge shall complete the investigation within next 15 working days. Section 32 of the Anti-Corruption Commission Act, 2004 contains mandatory provisions of prior sanction of the commission for each and every case of corruption as pre-condition. It puts a bar that no court shall take cognizance of the offence for trial under the Act without the sanction of the commission.[45] The country just passed an emergency declared by the President on 11 January, 2007. Under the Emergency Powers Ordinance, 2007, The Emergency Power Rules, 2007 had also been framed in respect of speedy investigation and trial certain cases including corruption cases. On the commencement of the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission has been substituted in place of the government in respect of the investigation, sanction, appeal, revision and withdrawal from the prosecution. Thus during the regime of the care taker government many political leaders, high officials of the republic as well as the famous businessmen were arrested and prosecuted although very few of them faced punishment regarding their wrong-done due to the faulty legislation and enforcement mechanism in Bangladesh.

4.6 Role of an Ombudsman

Generally an ombudsman acts as the defender of the citizens' right. In this way he may uphold the dignity and image of the public functionaries, which can be deemed as very important criteria in preventing white collar criminality. According to *the Ombudsman Act, 1980*, some powers are conferred to the ombudsmen who are as follows:

(i) The ombudsman may require any public officer or any person to furnish information or produce any document.

(ii) The ombudsman shall have all powers of a civil court under the *Code of Civil Procedure, 1908* namely: summoning and enforcing the attendance of a person before him, requiring the discovery and production of documents, requiring evidence of affidavit, requisitioning of public document from any court or office etc.

4.7 Alternative Remedial Measures

In a country like Bangladesh where large scale starvation, mass illiteracy and ignorance affect the life of the people, white collar crimes are bound to multiply in large proportion. Control of these crimes is a crucial problem for the criminal justice administration in this country. However, some of the remedial measures for combating white collar criminality may be stated as follows:

(i) Create public awareness against these crimes through the press and other ways.

(ii) Intensive legal literacy programmers may perhaps help in reducing the incidence of white collar criminality to a considerable extent.

(iii) Special tribunals should be constituted with power to award sentence of imprisonment up to ten years for white collar criminals.

(iv) Stringent regulatory laws and drastic punishment for white collar criminals may help in reducing these crimes. Even legislation with retrospective operation may be justified for this purpose.

(v) A separate chapter on white collar crimes and socio-economic crime should be incorporated in the Bangladesh Penal Code by amending the Code so that white collar criminals who are convicted by the court do not escape punishment because of their high social status.

(vi) White collar offenders should be dealt with sternly by prescribing stiffer punishments keeping in view the gravity of injury caused to society because of these crimes.

5.1 Recommendations

The following recommendations should be followed to prevent the white collar crimes from the society.

(i) The existing law does not sufficiently provide compensation to victims of the White Collar crime for injuries caused or loss suffered by them due to the offender's White Collar act. The payment of compensation may be made from the money recovered by the State from the offender by way of fine.

(ii) White Collar Crime reporting in Bangladesh continues to be faulty even to this day. As a result of this, crimes are either Suppressed, minimized or not reported. The reporting procedure, therefore, needs to be improved.

(iii) The government may develop a separate authority to monitor the abuse of White Collar.

(iv) White Collar crime related cases could be adjudicated under the under the special Tribunal.

(v) Regular training campaigning should be arranged for the skill development of experts who are going to chase this White Collar criminal.

(vi) The modern western trend favors deletion of all such offences from the White Collar Act which are solely dependent on morality.

7.3 Conclusion

Above discussion clearly shows that the present condition of white collar crimes in Bangladesh is not satisfactory. However, the proposed measures for overcoming the shortcomings of white collar crimes are alarming to all. Independent and particular policy for white collar criminals, they are involving some types of criminals. To avoid these types of criminalities, we should not be shaky about initial problems. We must work hard with all of our sincere efforts determination to prove that the White Collar criminals which once made are not the main problems in our country. Above all, public vigilance seems to be the cornerstone of anti-collar crime strategy. Unless white collar crimes become abhorrent to public mind, it will not be possible to contain this growing menace. In order to attain this objective, there is need for strengthening of morals particularly, in the

higher strata and among the public services. It is further necessary to evolve sound group-norms and service ethics based on the twin concepts of absolute honesty and integrity for the sake of national welfare. This is possible through character building at grass-root level and inculcating a sense of real concern for the nation among youngsters so that they are prepared and trained for an upright living when they enter the public life. Finally, it must be stated that a developing country like Bangladesh where population is fast escalating, economic offences are increasing by leaps and bound besides the traditional crimes. These are mostly associated with middle and upper class of society and have added new chapter to criminal jurisprudence. To a great extent, they are an outcome of industrial and commercial developments and progress of science and new technology.

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