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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 and rest of the world with its rich contents.

I am pleased to present eight articles in this issue that in their own ways contribute to a better understanding of a range of issues traversing jurisprudence, constitutional law, criminal law, personal laws, cyber law and others authored from four different countries. I hope that the articles published in this issue will reflect the journal's new focus.

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

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

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

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

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

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

Finally, I certainly hope you all will enjoy this first issue of the fourth 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

CONTENTS

Title & Author(s)	Page No.
Constitutional Boundaries of Executive Powers and the Impasse over the Appointment of an EFCC Chairman in Nigeria: Critical Comparative Perspectives from the United States Constitution Olusola Babatunde Adegbite	7-27
Section 302: Matter of Death and Life on the Sentences Preference Sadiya S. Silvee	28-44
Extending Moral Standing to Environmental Entities-Whom and How? Concerns and Considerations Ujal Kumar Mookherjee	45-59
An Appraisal of Causes and Consequences of Juvenile Delinquency in Bangladesh: Search for a Durable Solution Md. Aktarul Alam Chowdhury & Md. Hasnath Kabir Fahim	60-80
Polygamy in Bangladesh and Legal Advancement: A Critical Appraisal Mst. Ummay Munmun & Sadia Afroz Binte Siraj	81-105
Hindu Marriage Act 1955 and other Contemporary Laws of India: Gender Friendly Reforms and Comparing the Situation to Bangladesh Nushera Tazrin Darin	106-122
Cyberbullying and Preventive Measures: Bangladesh in Context Arifa Afroz Smriti & Nazmun Nahar	123-136
Unfair Termination and Conundrum surrounding the Remedy of Compensation in Tanzania Shaibu M. Pastory	137-153

Constitutional Boundaries of Executive Powers and the Impasse over the Appointment of an EFCC Chairman in Nigeria: Critical Comparative Perspectives from the United States Constitution

Olusola Babatunde Adegbite[1]

Abstract

Nigeria's 4th Republic boast of a laundry list of different episodes of unconstitutional behaviours, top on the list being the gross abuse of Executive powers as domiciled in the Office of the President. This Paper seeks to examine one of such acts, which is the most recent, and one that is still a subject of ongoing legal and academic inquisition. This Paper refers to the constitutional crisis surrounding the confirmation of the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), Mr. Ibrahim Magu, as a substantive EFCC Chairman. This Paper's Analysis does not purport to change the law, but seeks to provide a proper understanding of the scope of the President's executive powers in making appointments of this nature. It endeavours to propose a balanced and practical solution to a crisis that has attained an unprecedented level of complexity giving rise to confusion and uncertainty, by considering the wide variety of arguments, while at the same time extrapolating gainful insight from a leading Constitutional Democracy i.e. the United States of America, toward providing for Nigeria, a clearer, surer, and more decent interpretation of the law, consistent with the purposes and principles of contemporary Constitutional Jurisprudence.

Keywords: Executive Powers, Appointment, EFCC, Senate, and Constitution.

1. Introduction

At the centre of 21st century notion of Constitutional Democracy is the exercise of Executive powers. This flows essentially from the authority vested in the Executive as one of the three branches of government. Notwithstanding that these powers are not only clearly spelt out by the Constitution as they

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apply to each of these branches,[2] and irrespective of the fact that each of these branches are deemed to co-exist in a tightly fitted framework of equality and mutual respect, the wide spectrum of powers donated to the Executive has over time given it an appearance of superiority over the other two, such that it is not strange to see the Executive often times exercise its powers in such a manner that is clearly unconstitutional.

Nigeria's constitutional democracy has not been short of such episodes in the last 19 years of the 4th Republic. From May 29, 1999 successive Chief Executives have practically made it a habit to insufferably test the patience of the law, by nonchalantly exceeding the scope of their powers with the result being a deluge of unnecessary controversies, heating up of the polity, and damage to the country's constitutional framework. The latest in line is the crisis over the confirmation of the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), Mr. Ibrahim Magu. On this matter the country has remained sharply divided for over two years and so protracted is the crisis that there appears to be no light at the end of the tunnel. Certainly, there is no gainsaying the fact that all is not well with the Magu appointment. As things stands, the Office is currently hopping on one leg, with the other dangling ominously and any accurate kick either from a successive government or judgement of court, is bound to cause the entire house tumbling down. The Paper therefore seeks to examine the appointment of Mr. Ibrahim Magu as Acting EFCC Chairman within the province of the President's Executive powers, drawing perspectives from the exercise of similar powers under the American constitution, to see how valuable insights can be gained. The sole aim of the Paper is to see how drawing such parallel can help put the issues in context and deepen Nigeria's constitutionalism.

2. What is 'Executive powers'?

When Executive power is understood in terms of the ambivalence between the weak formal executive in theory, and the strong informal executive in practice, a quick overview of its history becomes necessary particularly to establish how this ambivalence is to be construed.[3] From Aristotle who deliberately ignored the Chief Executive, to Machiavelli who conceived it, to Locke who constitutionalized it, to Montesquieu who made it less terrible and enabled a free government to govern without frightening its citizens, the

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[2] These branches are fundamentally the Legislature which is empowered to make laws, the Executive clothed with powers to execute the law, and the Judiciary which reserves the exclusive powers to interpret the law.

[3] For a valuable perspective *see generally*, Harvey C. Mansfield, 'The Modern Doctrine of Executive Power' (1987) 17(2) Presidential Studies Quarterly - The Origins and Invention of the American Presidency 237-252. Richard Neustadt also talks about the ambiguity of the American President being both a 'Clerk' as well as 'Leader' in the context of American understanding of Executive powers. In this respect, see John. A. Rohr, 'Public Administration, Executive Power, and Constitutional Confusion' (1997) 20(4) International Journal of Public Administration 887-905.

notion of Executive powers has grown and evolved over centuries.[4] Sir William Blackstone was one of the early thinkers advocating the theory that in external affairs the King was the sole authority of the State, and that the English Constitution donated so much powers to the executive 'for the sake of unanimity, strength, and dispatch, such that in the exercise of this prerogative, the king is deemed absolute, so absolute, that there is no legal authority that can challenge his powers.[5] What then is 'Executive powers'?

Generally, the term connotes the sum total or bundle of powers constitutionally donated to the executive branch, to be exercised by the Head of the branch usually the President and Commander-in-Chief.[6] Under a Presidential system of government, Executive power connotes that the Constitution vest in the President the power to execute all laws and policies of the State within the context of his Office as 'Chief Executive'.[7] The Chief Executive vested with such powers constitutionally has control over the execution of laws, principally federal laws.[8] The power also has to do with overseeing the political and administrative functions of the State. This power is 'executive' in nature, in the sense that the holder of the power i.e. the President is charged with the responsibility of day to day running of the affairs of the country, and he is deemed to have been elected by the popular will of the governed through a democratically structured electoral process. 'Executive powers' has also been defined as a general grant of powers.[9] The powers in question also span a wide spectrum and include domestic powers such as the power of appointment and execution of policies, as well as such dangerous external powers such as powers to declare war, or the unilateral use of force.

Scholars have expressed divergent views on the general notion of Executive powers, and principally two schools of thought have emerged in this area. The first is that which argues that the President possesses the power to control the entire executive arm of government, an idea rooted in the Unitary Executive Theory.[10] This theory posits that all executive powers are vested in one single

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4 ibid

5 William Blackstone, *Commentaries on the Laws of England* (1st edn, Clarendon Press 1765) 1, 232.

6 Saikrishna B. Prakash, 'The Essential Meaning of Executive Powers' (2003) 3 University of Illinois Law Review 701.

7 Gary Lawson, 'The Rise and Rise of the Administrative State' (1994) 107(6) Harvard Law Review 1231; L.S. Liberman, 'Morrison *v* Olson: A Formalist Perspective on Why the Court Was Wrong' (1989) 38 American University Law Review 313.

8 ibid 819.

9 This position seems to suggest a wide latitude in the exercise of such powers without limitations. For an overview of this *see generally* Julian G. Ku, 'Unitary Executive Theory and Exclusive Presidential Powers' (2010) 12(2) University of Pennsylvania Journal of Constitutional Law 616.

10 Steven G. Calabresi and Saikrishna B. Prakash, 'The President's Power to Execute the Laws' (1994) 104(3) Yale Law Journal 541; Martin S. Flaherty, 'The Most Dangerous Branch' (1996) 105(7) Yale Law Journal 1725; Connected to this is the doctrine of Presidential administration, in which the President is clothed with full control over agencies of the State. *See* Elena Kagan, Presidential Administration (2001) 114 Harvard Law Review 2245.

powerful Chief Executive known as the 'Executive President'.[11] This is a landmark feature of the US Constitution,[12] and is further reflected in its notion of 'Executive Agreements' in which the President does not require congressional approval for certain acts.[13] It has also been a frequent justification for the unilateral use of force by American Presidents in the protection of National Security.[14] The argument is that this is an offshoot of Executive powers.[15] Others have said the unitary executive theory is a ruse,[16] as it has been rejected by the courts,[17] while in contemporary times controversies have continued to rage between the early and later theorists.[18] The Second school of thought are those who talk of a plural executive, where executive powers is dispersed amongst different elected officials in the executive branch. It must however be stated that the idea of a unitary executive is the generally accepted norm in most constitutional democracies,[19] though Scholars have posited its operation should at all times be limited by the Constitution.[20]

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11 At the time of drafting the American Constitution, the founders toyed with the idea of vesting executive powers in a Committee in the executive branch, that notion was later abandoned in favour of an all-powerful President.

12 Steven G. Calabresi and Kevin H. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105(6) Harvard Law Review 1153-1179; Steven G. Calabresi, 'Some Normative Arguments for the Unitary Executive' (1995) 48 Akron Law Review 23.

13 Gary J. Schmitt, 'Separation of Powers: Introduction to the Study of Executive Agreements' (1982) 27(1) The American Journal of Jurisprudence 114-138.

14 Robert J. Delahunty and John C. Yoo, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbour or Support Them' (2001) 25 Harvard Journal of Law and Public Policy 487-493.

15 Schmitt (n 13).

16 Lawrence Lessig and Cass R. Sunstein, 'The President and the Administration' (1994) 94(1) Columbia Law Review 1-2.

17 *Morrison v Olson*, (1988), 87 U.S. 654.

18 For a rich discussion on the controversy between the early liberal unitary executive theorists, and the later day hardliners, *see generally*, Richard J. Pierce, Jr, 'Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of *The Unitary Executive* by Steven G. Calabresi and Christopher S. Yoo' (2010) 12(2) University of Pennsylvania Journal of Constitutional Law 593-594.

19 For a more insightful understanding of this general position, *see generally* Steven G. Calabresi and Christopher S. Yoo, 'The Unitary Executive During the Second Half-Century' (2003) 23 Harvard Journal of Law and Policy; Christopher S. Yoo, Steven G. Calabresi and Laurence D. Nee, 'The Unitary Executive During the Third-Half of the Century, 1889-1945' (2004) 80 Notre Dame Law Review; Robert V. Percival, 'Presidential Management of the Administrative State: The Not-So-Unitary Executive' (2001) 51(3) Duke Law Journal 963; Steven G. Calabresi and Gary Lawson, 'The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia' (2007) 107(4) Columbia Law Review 1002-1047.

20 For deep expositions on this position see Christopher R. Berry and Jacob E. Gersen, 'The Unbundled Executive' (2008) 75(4) University of Chicago Law Review 1385-1434.

3. Executive Powers under Nigeria's 1999 Constitution

Nigeria operates a Presidential system of government, modelled heavily after that of the United States of America, in which full Executive powers is vested in one sole individual, who combine several statuses, top of which is that he is referred to as 'Executive President'.[21] Under this system, the President as 'de jure' ruler symbolizes the power, prestige, and might of the State through his designation as Commander-in-Chief, a position that literally puts the survival or extermination of the State in his hands, as regards defending its territorial integrity from both internal and external aggression.[22] He commands enormous powers, enjoys an abundance of privileges, and is consistently regaled in pomp and pageantry, so much so that he is accorded the same manner of royalty and majesty that was the sole prerogative of ancient dynasties and constitutional monarchies.[23] Everyone beholds to him as he holds a wide discretion over the distribution of the resources of the State, thus embodying its prosperity. He is the domain of the State's sovereign powers, which is exemplified when he represents the country on the international scene, where he is accorded full diplomatic rights and privilege, such as for instance international legal protection under the doctrine of sovereign immunity.

A unique product of separation of powers is that it is known to generate consistent tensions amongst the different branches of government particularly the Executive and Legislature, in some sort of supremacy battle which is a

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21 Under modern Presidentialism, the designation 'Executive President' is not an exercise in semantics, but a politically instructive classification. The insertion of the word 'Executive' helps to separate the Chief Executive under a Presidential system, from the Head of State in a Parliamentary system of government, who even though is referred to as President, does not wield Executive powers, but is simply a ceremonial figure. Under such a system, executive power is usually vested in the Prime Minister who doubles as the Head of Government, while the President or by whatever name he is called, simply carries out ceremonial functions in a subordinate role. An example was the structure in Nigeria's first Republic where even though Dr. Nnamdi Azikiwe was consistently referred to as 'President' he was no more than the ceremonial head, with Alhaji Tafawa Balewa as Prime Minister exercising executive powers.

22 This is the kind of Status the Nigerian President enjoys. For instance, Section 217 of the Constitution of the Federal Republic of Nigeria, 1999 provides that, "*There shall be an Armed Force for the Federation which shall consist of an army, a navy, an Air Force and such other branches of the armed forces of the Federation as may be established by an Act of the National Assembly*". The Armed Forces has the constitutional mandate to defend Nigeria from external aggression and maintain her territorial integrity as well as secure her borders from violation by land, sea, or air. It is pursuant to this that the same Constitution provides that, "*The powers of the President as the Commissioner-in-Chief of the Armed Forces of the Federation shall include power to determine the operational use of the armed forces of the Federation*". See Section 218 (1), Constitution of the Federal Republic of Nigeria, 1999.

23 On the characteristics and the uniqueness of the English royal prerogatives and immunities, *see generally*, Blackstone (n 5); Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, Thomson Brookers 2007) 628-630; Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) Oxford Journal of Legal Studies 105-106; H. W. R. Wade, 'Procedure and Prerogative in Public Law' (1985) 101 Law Quarterly Review 180-191.

resident characteristic of many stable democracies.[24] In this regard, Nigeria is not an exception and it is based on this that Scholars have argued that it is fundamental that every State defines the scope of executive powers through the fundamental law i.e. the constitution. According to Twomey, given the inherent dangers involved in vague undefined executive powers, the likely use of this power to undermine the federal distribution of powers in the Constitution is a reality.[25] Flowing from the above, Executive Powers is a main feature of Nigeria's 1999 Constitution. Specifically, the Constitution provides that:

> Subject to the provisions of this Constitution, the executive powers of the Federation - Shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and; shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.[26]

The Constitution provides that the President can exercise this power either by himself or through his Ministers appointed for that purpose.[27] In addition, the Constitution provides for a number of enumerated powers.[28] Thus, without doubt the Nigerian President, like his counterparts in other constitutional democracies enjoys constitutionally guaranteed executive powers, however the question to ask is if this power extends to presidential appointment powers, particularly powers to appoint an EFCC Chairman unilaterally such as in the case of Mr. Magu.

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24 Pius N Langa, 'The Separation of Powers in the South African Constitution' (2006) 22(1) South African Journal on Human Rights 2-9.

25 Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, The Prerogative, and Nationhood Powers' (2010) 34 Melbourne University Law Review 313-343.

26 Section 5 (1) (a) & (b), Constitution of the Federal Republic of Nigeria, 1999.

27 It is important to state that though the power to execute laws and policies devolves from the executive power of the President, the delegation of such authority to a subordinate like a Minister or Head of Agency does not on an equal footing translate into a delegation of executive powers as such. It is also within the same understanding that the Minister or Head of Agency, carrying out a delegated function on behalf of the President should not be seen as exercising the executive power. Such a Minister or Head of Agency must be seen as acting as an agent of the President and subject to his direct control and interest. Executive power is vested sole in the President as Chief Executive.

28 These enumerated powers include the power to assent to bills from the National Assembly, power of appointment and removal from office, power to grant prerogative of mercy i.e. presidential pardoning power, power to appoint the Inspector-General of Police, power of command and operational use of the Armed forces of the Nation, power to appoint the Chief Justice of Nigeria, and the power to declare a State of Emergency where there is breakdown of law and order. See Section 147(3); Section 171(1); Section 175(1); Section 215(1) (a); Section 218(1) (2) (3); Section 231(1) (2); and Section 305(1) (2) (3).

4. Abuse of Executive Powers under the Nigerian Constitution – The Conundrum over the Appointment of an EFCC Chairman

The Nigerian President, Muhammadu Buhari on assumption of office on May 29, 2015 nominated Mr. Ibrahim Magu, a former Director of Operations, and an Assistant Commissioner of Police (ACP) to take over as the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), upon the sack of the erstwhile Chairman, Mr. Ibrahim Lamorde. As it has been customary with the Commission, Mr. Magu was meant to hold office in acting capacity for brief period pending his confirmation by the Nigerian Senate, except that this has not seen the light of day given the back to back refusal of the Senate to confirm his appointment.

Since the crisis began, it has generated great furore as one of the many contemporary imponderables of Nigeria's constitutional journey, most especially as an uncanny replication of an unsavoury past that most Nigerians would want to forget in a hurry. The crisis has blown and is still blowing a fissiparous wind across the constitutional landscape of the country. Mr. Magu was presented before the Nigerian Senate for confirmation by the President, where things went awry as he was ambushed by a damning report submitted to the Senate by another Agency of the same Federal government, the Department of State Services (DSS).[29] Mr. Magu's cross was aggravated by the attendant shoddy performance he put up at the Senate Chambers. Following this below par outing, Mr. Magu was subsequently rejected by the Senate and in defiance of the Senate, he returned to Office to continue as the Acting Chairman of the EFCC.[30] Following this initial rejection, Mr. Magu was again presented by the President to the Senate, only to be further

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[29] On December 15, 2016 the Senate for the first time rejected Mr. Magu and refused to confirm his appointment. For a more detailed overview *see generally*, Ifreke Inyang, 'Details of DSS Report that stopped Magu's Confirmation as EFCC Boss' *The Daily Post Newspaper* (Lagos, 16 December 2016) <http://dailypost.ng/2016/12/16/details-dss-report-stopped-ibrahim-magus-confirmation-efcc-boss> accessed 7 March 2018.

[30] Abu Najakku, 'Why has the Senate refused to Confirm Magu?' *The Daily Trust Newspaper* (Abuja, 15 November 2016) <www.dailytrust.com.ng/news/opinion/why-has-the-senate-refused-to-confirm-magu/171719.html> accessed 7 March 2018; Levinus Nwabughiogu, 'Buhari Receives Senate Report on Magu's Rejection' *The Vanguard Newspaper* (Lagos, 19 March 2017) <www.vanguardngr.com/2017/03/buhari-receives-senate-reports-on-magus-rejection-by-senate> accessed 7 March 2018; Henry Umoru, Dapo Akinrefon, Charles Kumolu, Wahab AbdullaGbenga Oke & Ikechukwu Nnochiri, 'EFCC Confirmation Screening: DSS not credible – Magu' *The Vanguard Newspaper* (Lagos, 16 March 2017) <www.vanguardngr.com/2017/03/efcc-confirmation-screening-dss-helped-senate-stop-magu> accessed 7 March 2018.

rejected.[31] Since then, there has been the back and forth argument as to whether Mr. Magu can continue in Office without the Senate confirming his appointment, while Mr. Magu has remained in limbo.[32] While all this lasted, many kept calling on the Presidency to do the right thing,[33] while the response of the Presidency was that it was acting in line with the law,[34] just as the Senate vowed to turn back further appointees from the President.[35]

In the course of the controversy, the Presidency suddenly adopted a new posture claiming that the Constitution does not require Mr. Magu to go through a Senate confirmation process to be appointed. The Presidency rested its argument on the parsimonious text of Section 171 of the Constitution which catered for extra-ministerial departments,[36] claiming that the EFCC is nothing but an extra-ministerial department having its umbilical cord tied to the Office of the President. Since then, different shades of opinions have been proffered by the contending parties. With each argument, the water is further muddled and for three years and still counting, Nigeria's constitutional

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31 Davidson Iriekpen and Omololu Ogunmade, 'Again, Buhari Tell Senate to Confirm Magu as EFCC Chair' *Thisday Newpaper* (Abuja, 24 January 2017) <www.thisdaylive.com/index.php/2017/01/24/again-buhari-tells-senate-to-confirm-magu-as-efcc-chair> accessed 7 March 2018; Olalekan Adetayo and Leke Baiyewu, 'Senate to Presidency: No Going back on Magu' *The Punch Newspaper* (Lagos, 8 July 2017) <https://punchng.com/senate-to-presidency-no-going-back-on-magu/> accessed 7 March 2018; D. Iriekpen and D. Oyedele, 'Ibrahim Magu: The Last Straw? *Thisday Newspaper* (19 March 2017) <www.thisdaylive.com/index.php/2017/03/19/ ibrahim-magu-the-last-straw> accessed 7 March 2017.

32 Ismail Mudashir, 'Can Buhari appoint Substantive EFCC Chair without Senate Approval?' *Daily Trust Newspaper* (Abuja, 31 January 2017) <www.dailytrust.com.ng/can-buhari-appoint-substantive-efcc-chair-without-senates-approval.html> accessed 7 March 2018; Agatha Ezendiaru, 'Buhari, Magu, and Anti-Corruption War' *New Telegraph* (Lagos, 31 August 2017) <https:// newtelegraphonline.com/2017/08/buhari-magu-anti-corruption-war> accessed 7 March 2018.

33 Ebuka Onyeji, 'Senate's Rejection of Magu: Lawyers React, Blames Presidency' *The Premium Times Newspaper* (15 March 2017) <www.premiumtimesng.com/news/headlines/226210-senates-rejection-magu-lawyers-react-blame-presidency.html> accessed 7 March 2018.

34 Augustine Ehikioya, 'Buhari Believes Magu is Right Man for EFCC Job, Osinbajo Insists' *The Nation Newspaper* (Abuja, 7 March 2018) <http://thenationonlineng.net/buhari-believes-magu-right-man-efcc-job-osinbajo-insists-2> accessed 7 March 2018; Henry Umoru, 'Buhari says Magu, SGF Lawal Cleared of Corruption Allegation' *The Vanguard Newspaper* (Lagos, 24 January 2017) <www.vanguardngr.com/2017/01/breaking-buhari-says-magu-sgf-lawal-cleared-corruption-allegation> accessed 7 March 2018.

35 Taiwo-Hassan Adebayo, 'Senate Suspends Confirmation of RECs to protest Buhari's Refusal to Sack Magu' *The Premium Times Newspaper* (Lagos, 28 March 2017) <https://www.premiumtimesng.com/ news/headlines/227338-updated-senate-suspends-confirmation-of-recs-to-protest-buharis-refusal-to-sack-magu.html> accessed 7 March 2018.

36 *Section 171(1) which provides thus: "Power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the President." Subsection (2) states that "the offices to which this section applies are, namely-*
Secretary to the Government of the Federation;
Head of the Civil service of the Federation;
Ambassador, High Commissioner or other Principal Representative of Nigeria abroad;
Permanent Secretary in any Ministry or Head of any Extra-Ministerial Department of the Government of the Federation howsoever designated; and Any office on the personal staff of the President.

framework has been the casualty. But what are these arguments and how constitutionally sound are they? The succeeding analysis answers this question.

4.1. Section 2(3) of the EFCC Act and the 'Inconsistency with the Constitution' Argument

The EFCC (Establishment) Act 2004,[37] (*hereinafter* referred to as the 'EFCC Act') which is the main document that superintends Mr. Ibrahim Magu's appointment as EFCC Chairman provides for a process of confirmation, without which the appointment would be deemed inchoate. The Act though a legislation subsidiary to the Constitution was made by the National Assembly pursuant to its powers under the Constitution to strengthen the process of such an important office.[38] Specifically, Section 2(3) of the EFCC Act provides as follows, "*The Chairman and members of the Commission other than ex-officio members shall be appointed by the President subject to the confirmation of the Senate*". This is the legal provision that has become a major clog in the wheel of Mr. Magu's appointment, given that it has been subjected to a myriad of extra-constitutional interpretations. There is therefore a need for a thorough and forensic analysis of this provision, particularly its interaction with the provisions of the Constitution in terms of application. The major sticky point here is the argument that notwithstanding the provisions of Section 2(3) of the EFCC Act, the founders of the Constitution never envisaged that the President in the exercise of executive powers in this regard should have it subject to a Senate confirmatory process, hence the position that Section 2(3) is inconsistent with the 1999 Constitution. There is therefore a great deal to dissect here.

To glean the mind of the Constitution on whether the makers would have imagined that the EFCC Chairman be not subjected to a Senate confirmation, the way to go is to ask, "*Does a Senate confirmation of the EFCC Chairman harm the appointment process as to be inconsistent with certain provisions of the constitution, or does it help the process?*" In answering this question, this Paper argues as follows - The additional layer in the confirmation process is not just to ensure that the man saddled with such wide appointment powers does not become a prisoner of his own personal fallibility by appointing his lackey into office, but more importantly to ensure that the appointment process is a very rigorous and thorough one, in which the Legislature as the representatives of the people serve as a necessary check on the executive powers of the President. Where such a sensitive appointment was to be left in the hand of just a man, the chances are that it would be open to abuse and an exercise without judicious introspection.

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37 CAP E17, Laws of the Federation of Nigeria (LFN), 2004.

38 See Section 4, Constitution of the Federal Republic of Nigeria, 1999.

One may need to ask again, is Section 2(3) of the EFCC Act, indeed in conflict with extant provisions of the Constitution? This Paper takes the position that such notion is totally unfounded, however to understand its unremarkable nature there is a need to be clear about the correct understanding. Like every other Constitution before it, the 1999 Constitution provides in its Supremacy Clause that, "*If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law, shall to the extent of its inconsistency, be void*".[39] The operative phrase here is "if any other law is inconsistent", as such the issue for determination is whether Section 2(3) of the EFCC Act indeed (*emphasis mine*) runs contrary to the Constitution.

In ascertaining the sense in which the idea of 'inconsistency' is construed here, a proper argument is to say that enabling statutes such as the EFCC Act are not viewed as antithetical or in conflict with the Constitution, but rather as complementary toward achieving the overall mandate of the rule of law. The EFCC as an Agency was created as a response to decades of brazen acts of corruption and mindless looting which had become the insignia of public office in Nigeria.[40] The Commission also became necessary to counter the monster of advance fee fraud and other financial crimes that sought to destroy the image of the country both home and abroad. From inception, the Agency was never attached to any ministry of government except for the general oversight granted to the Federal Ministry of Justice, only in respect of prosecutorial powers. Corruption and stark embezzlement of public funds is not an indication of prosperity in any society and so where a Law in recognition of the perils in allowing corruption a free reign, prescribes the procedure for the appointment of an anti-corruption Czar to be water-tight through a second-stage of senate confirmation, it becomes difficult to see how such can be argued as inconsistent with the Constitution. Even as one does not subscribe to the omnipotence of the EFCC Act, the province of the law is that no Constitution can cater for every foreseeable situation, and so Statutes as a source of law come in to complement the work of the Constitution.

It is within this reasoning that Section 2(3) of the EFCC Act, must be seen as a building block, carefully created 5 years after the Constitution had come to life, to further strengthen the appointment process of an EFCC Chairman, working hand in hand with the executive powers of the President under Section 5 of the Constitution. Given the delicateness of the job of the EFCC Chairman, and the temptation by any President to have his loyalist hold such office, the strategic importance of having such person subject to a senate confirmation cannot be over-emphasized. Such a person's appointment is a

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39 Section 1(3), Constitution of the Federal Republic of Nigeria, 1999.

40 Generally, in Nigeria public office is become prebendal channels that unscrupulous politicians use to ferry out public funds and empty the national treasury. See Richard Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge University Press 1987).

matter of national security, such that it must receive the imprimatur of the general assembly of the peoples' elected representatives, which is what the senate represents.

The above argument finds some comfort in the doctrine of textualism, a potent tool under American constitutional jurisprudence, which proposes that the intent of any statute must start with the written word.[41] Applying this principle, when one juxtaposes the letters of Section 1(3) of the Constitution and Section 2(3) of the EFCC Act, it becomes difficult to see where one contradicts the other except that the former only clearly reinforces the latter. It needs no reinstating that a law establishing a Statutory Agency like the EFCC, can only be viewed as in conflict with the Constitution where its provision is not only at variance, but is clearly designed to destroy the objectives of the Constitution. For instance, a core aspiration of the Nigerian Constitution is to ensure good governance and the attainment of prosperity for the State.[42]

The baneful influence of a narrow construction of the notion of 'inconsistency' in this context is to argue for just a single individual (*emphasis mine*) being the President, to be clothed with unquestionable powers to appoint the Head of a highly sensitive agency like the EFCC. Certainly, that could never have been a part of the underlying objectives of the rule of law, except to call it what it exactly is - the mischief of the rule of men. It is incomprehensible that the Presidency would disagree with a procedure meant to strengthen an appointment process, due to its inability to quieten the opposition voices within its own political family, and its shortcomings in managing the political valves leading to the confirmation process.[43]

5. The EFCC, Statutory Agencies, and Extra-Ministerial Departments within the Context of Section 171 of the Constitution – Critical Analysis and Comparative Perspectives under United States Law

A key principle of constitutional interpretation is the American doctrine of 'Originalism', which aims at discovering what the founders or drafters of any

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41 Antonin Scalia, 'Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 22.

42 In this regard, the Constitution provides that "*the security and welfare of the people shall be the primary purpose of government*". See Section 14 (2) (b), Constitution of the Federal Republic of Nigeria, 1999.

43 Capturing these same thoughts, a former Director-General of the Nigerian Institute for Advanced Legal Studies (NIALS), Prof. Epiphany Azinge SAN in a brilliant analysis is made in the Guardian Newspaper. For a detailed report, *see generally* Joseph Onyekwere, 'Is Confirmation of Executive Appointment by Senate inconsistent with Section 171 of the 1999 Constitution? Lawyers say No' *The Guardian Newspaper* (Lagos, 25 July 2017) <https://guardian.ng/features/is-confirmation-of-executive-appointment-by-senate-inconsistent-with-section-171-of-1999-constitution-lawyers-say-no> accessed 14 March 2018.

Constitution intended for its provisions to mean at the time of execution.[44] This instrument of interpretation is relevant to the analysis in this Paper. To start with, the EFCC as an Agency of the Federal Government was established in 2004 pursuant to an enabling statute.[45] It is pertinent to state that this Act, a Federal law was passed five (5) years after Section 171(2) (a-e) of the 1999 Constitution had become full law. It is therefore safe to say that the drafters of the 1999 Constitution could never have made a provision prospectively to bind a future Agency that was yet to be established. After all, the Office of the EFCC Chairman had not even been created at the time the Constitution was adopted on May 29, 1999, and so how can it be argued that a Constitution that came before an Office was created, had designated the same office as an "extra-ministerial department"?

Rather, the logical reasoning that can be drawn is that the intent of the makers of the 1999 Constitution would be that men of good conscience, who in the future would be charged with the responsibility of executing provisions of the constitution, would hold Section 171 (2) (a-e) as simply relating to offices within the usual definition of "extra-ministerial" in the common and ordinary usage, particularly as it operates in sisters jurisdictions like the United States of America where valuable insights can be drawn. It is the position of this Paper that as at May 29 1999 Section 171(2) (a-e) had clearly envisioned the offices to be designated as 'Extra ministerial bodies', which of course would mean offices either already in existence at that time, or offices that even though not in existence, are offices that would be of an 'Ad hoc' nature to be attached to the Office of the President to help him in carrying out the demands of his *office*. This point was brilliantly re-echoed by Ozekhome who said:

> The pith and substance of my argument is that there is no conflict whatsoever and howsoever between the clear provisions of Section 2(3) of the EFCC Act which insists that the President shall have powers to appoint its Executive Chairman <u>subject to confirmation</u> by the Senate, and Section 171 of the 1999 Constitution, which <u>never</u> envisaged an EFCC created 5 years later, <u>never</u> provided for it, but which merely provides for certain bureaucratic positions of government that are not created by Statute, such as Extra – Ministerial Departments (EMDs). Such EMDs are not like statutorily created bodies, such as the EFCC, NNPC, CBN, NAFDAC, FRSC, Prisons, Customs, etc. Such EMDs once enacted into an Act of the National Assembly, they cease to be EMDs. They are governed solely by the provisions of the parent creating Act and no more.[46]

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44 W.F. Murphy et al., *American Constitutional Interpretation* (2nd Edn, The Foundation Press 1995) 385; Philip Bobbitt, *Constitutional Fate* (Oxford University Press 1982) 26.

45 Economic and Financial Crimes Commissions (EFCC) (Establishment) Act, No. 1, CAP E17, Laws of the Federation of Nigeria (LFN), 2004.

46 Mike Ozekhome, 'Constitution Superior to any Act of National Assembly' *The Vanguard Newspaper* (Lagos, 4 May 2017) <www.vanguardngr.com/2017/05/constitution-superior-act-nassembly-ozekhome> accessed 14 March 2018.

Taking the argument further, the question becomes apposite, what exactly are extra-ministerial departments? In answering this question, it is important to return to the Constitution. The 1999 Constitution provides that the President may exercise the function of his office either by himself or through Ministers. Ministers in a Presidential system of government are not seen as exercising executive powers,[47] rather the powers they exercise is a delegated form of the executive powers vested in a single President.[48] However, because Ministers alone are not sufficient to carry the heavy burden in most governments, the President is given authority to appoint other officers. For instance, under the 1999 Constitution every State is required to have at least one Minister in the Federal Executive Council (FEC),[49] making a total of 36 Officers, which is a far cry from what the President requires to fulfil his mandate. It is within this understanding that Constitution made room for extra-ministerial departments.

Conceptually, extra-ministerial departments are simply units in government, separate, and independent of the regular ministries, established not by an enabling law or federal law, but whose appointments are left to the discretion of the President, and who come in as assistants to help handle certain aspects of the demands of his office. The most common examples are offices like that of the Chief of Staff and the Secretary to the Government of the Federation. It is settled law that when an Office is established by a Statute, it derives its legitimacy, powers, and totality of its existence from the operation of that Statute alone. Proper constitutional understanding demands that a clear parallel is drawn between Statutory Agencies like the EFCC that are created pursuant to an Act of the National Assembly, and ordinary Extra-Ministerial bodies that are designed as '*all other necessary bodies needed to fulfil the mandate of the President's Office*'. The use of the word 'extra', clearly betrays this truth.[50]

The position of this Paper is that the Nigerian President must take inspiration from the United States Constitution, which in comparative terms has relevant provisions that would help the President understand the length, breadth, and

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47 It is trite law that you cannot give what you do not have, expressed in the Latin maxim, '*Nemo Dat Quod Non Habet*'.

48 For argument that such Agencies can only be seen as exercising Executive powers as donated to them by the President, see M. Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 University of Pennsylvania Law Review 603.

49 See Section 147 (3), Constitution of the Federal Republic of Nigeria, 1999.

50 If the EFCC is an extra-ministerial body, certainly the CBN must also be an extra-ministerial body since there is nowhere in the 1999 Constitution where the appointment of the CBN Governor is required to undergo a confirmation procedure in the Nigerian Senate, except for the provision in the CBN Act, an Act *in pari materia* with the EFCC Act. Strangely all of the CBN Governors so far appointed, including the current office holder all had to go through a Senate confirmation process, with no one raising the roof. This point was also made by Mike Ozekhome, SAN in his brilliantly rendered article. See Bartholomew Madukwe, 'S. 171 of the Constitution not Superior to S.2(3) of the EFCC Act – Ozekhome, SAN' *The Vanguard Newspaper* (Lagos, 27 April 2017) <www.vanguardngr.com/2017/04/s171-constitution-not-superior-s-23-efcc-act-ozekhome-san> accessed 14 March 2018.

width of his powers. To start with, the Appointment Clause of the US Constitution states as follows:

> The President shall be commander in chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.
>
> He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are herein not provided for, and which shall be established by law; But the Congress may by law vest the appointment of such inferior offices, as they think proper, in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.[51]

The above provision calls for proper examination as to how it can help provide the needed interpretative guide to laying the Magu conundrum to rest. The first part of the above provision, relevant to this analysis is the phrase, <u>whose appointments are herein not provided for, and which shall be established by law</u>. This phrase when examined in its literal sense connotes that in the wisdom of the drafters of the Constitution, the constitution has brilliantly taken care of future conflict that may arise, where a President decides to appoint a public officer pursuant to a law that would be made after the American Constitution had been adopted. The reasoning is that such appointments would be in tandem with the enabling law, particularly as it relates to the appointment process, and no conflict would be deemed to be in view since such laws would have been made pursuant to constitutional powers donated to the US Congress to make laws.

An aspect of Article II, Section II of the US Constitution reproduced above applies *mutatis mutandis* to the stormy debates on the meaning of 'Extra-Ministerial Departments'. The relevant clause is that which say, <u>but the Congress may by law vest the appointment of such *inferior offices*, as they think proper in the President alone, in the courts of law, or in the heads of departments</u>. Concerning this clause, the drafters of the US Constitution clearly demonstrates their depth of knowledge in constitutional making. Understanding clearly that the demands of the Office of the President is such that he will always require 'extra-ministerial' officers to handle other matters

[51] Section 2, Article II, United States Constitution.

that ministries/departments may not be able to cover, the drafters with insight granted powers to the President to appoint these officers all by himself, hence the expression 'in the President alone'. However, to ensure a clear-cut difference between these officers and the regular Officers of the United States Government already captured in the expression 'Ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States', the drafters referred to the extra-ministerial appointments as 'Inferior Officers' to show that by reason of how less weighty their job function is in relation to the life of the State, their appointment can be made by the President alone. Within this reasoning, one can argue that it would be considered an affront on the Constitution for the US President to refer to the Heads of Statutory Agencies such as the US Internal Revenue Service (IRS), Federal Reserve Bank (FRB), Drug Enforcement Administration (DEA), or Federal Trade Commission (FTC) as 'Inferior Officers'. In the same vein, it would be viewed as abuse of Executive powers for the US President to arrogate to himself powers to unilaterally appoint the Heads of the IRS or DEA, without such appointment going through a confirmatory process at the US Senate. The reason is simple, these bodies are all established by relevant US Federal Statutes clearly stipulating the procedure for appointment.

Even though the American Constitution, pursuant to the above provision is not an authority binding on Nigeria, it needs reinstating that given the high affirmation it has received in today's constitutional jurisprudence, it remains a rich source of persuasive reasoning, offering illuminatingly useful insights into how the executive powers in the context of appointments of this nature must be understood. This point becomes more relevant when one considers the fact that the current 1999 Constitution, where the Nigerian President derives his powers, provides for a Presidential system of government, heavily modelled after American Presidentialism.

On the basis of the above, it is an assault on the rule of law for the Presidency to stubbornly refuse to re-present Mr. Ibrahim Magu for confirmation as EFCC Chairman. If Mr. Magu is the best man for the job, he must proceed to justify this confidence by acquitting himself creditably before the only body constitutionally charged with the confirmation of his appointment. The point must be made that the Presidency has the right to present Mr. Magu to the Senate as many times as it may deem fit, just as the Senate equally possess the powers to reject his nomination as many times as they may find him unqualified and unfit for the job. However, the Presidency does not have the powers to take refuge in aloofness and create its own constitutional reality by refusing to re-present Mr. Magu. Such stiff-necked refusal to re-present Mr. Magu is a refusal to act, and a refusal to act in this instance is nothing but an abdication of the functions of office, and a confrontation with the authority of the constitution.

In most discussions on the exercise of Executive powers, one difficult question that has always emerged, is the question of if the President in any

given situation has 'faithfully executed' the provisions of the Constitution he swore to protect.[52] This question is fundamental as it helps present the framework within which the President exercises his powers.[53] Certainly, the express provision of the Constitution mandates the President to acts faithfully at all times in the discharge of his duties. To this end the President's executive powers to appoint an EFCC Chairman, must be exercised in good faith in light of the overall object and purpose of the Constitution. This is supported by the view of Scholars who have posited that the Constitution as a document must be construed with its original historical meaning.[54]

6. The Magu Confirmation Crisis and the Need to Approach the Court

One of the pillars of modern constitutional governance is the constitutionally designed role of the courts in acting as arbiters between individual members of the society, agencies of the State, and most importantly the key branches of government. In this wise, the war of attrition between the Executive and the Senate should not have degenerated into a public spat. This Paper posits that following the Senate's non-confirmation of Mr. Magu for a second time, and given the President reluctance to go down that route having reached his wit end, two important alternatives were available – He either finds another candidate that will fit the eye of the political needle or where that fails, do that which the rule of law prescribes, which is to approach the court and in this regards, the Supreme Court of Nigeria for a determination of the boundaries of his powers in relation to appointments of this nature.

In this matter, the apex court is assigned original jurisdiction to dissect the richly textured lines of the Constitution and its meeting points as well as divergence with the EFCC Act, and the powers of the Court is one without negative or restrictive words.[55] It is worth mentioning that in the leading case

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52 See *Youngstown Sheet & Tube Co. v Sawyer*, (1952) 343 U.S. 539, 587, where it was established that the President of the United States must exercise his law execution power to, "*take care that the laws be faithfully executed*".

53 Founders of the American Constitution had, "*assumed that the president would be a political eunuch, with the duty of only assuring that the laws passed by Congress, which is where the political action would occur, be faithfully executed*". However, between independence on July 4, 1776 and now, the reality does not appear to support this notion. In fact, the total reverse is the case. Scott P. Johnson and Christopher E. Smith, 'White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform' (1999) 33 New England Law Review 907-912.

54 For an outstanding discussion on the Doctrine of Originalism, *see generally*, Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849-862; C. Thomas, 'Judging' (1996) 45 University of Kansas Law Review 6-7.

55 See Section 232(2), Constitution of the Federal Republic of Nigeria, 1999. See also Section 1 of the Supreme Court (Additional Original Jurisdiction) Act 2002. In this wise, the Supreme Court can exercise its Original Jurisdiction in two lights. First is to consider this matter as one bordering on an interpretation of the Constitution. Second, is to become seized of the matter as a matter between the President and the National Assembly. In any of the two instances, the question of jurisdiction would have been duly answered.

of *Cooper v Aaron*,[56] the US Supreme Court has made it profoundly clear that in all questions of constitutional interpretation, the Supreme Court is entrusted with a special and distinctive role as the ultimate guardian of the meaning of the Constitution and government officials are forbidden from interpreting the constitution for themselves, but to look to the court's interpretation and take it as authoritative.[57] This responsibility is especially insistent in light of the fact that where it comes to the exercise of executive powers, moral issues frequently become constitutional issues, with the result that political actors end up abandoning existential moral codes in favour of the carrots of survival.[58] It has been argued that government officials cannot decide that they have a mind of their own (emphasis mine), as regards what they perceive to be peril to constitutional norms.[59]

The judicial powers of the court in this respect is therefore apt and it is the Executive headed by the President whose appointee has serially been turned down, that shoulders the responsibility of approaching the apex court for a judicial determination of its powers and not the other way. For the Executive to consistently taunt the Senate, who has in no way refused to confirm, and who has no further burden to discharge in this matter, to go to Court is a disrespect to constitutional processes. By the principles and usages of law, it is he who asserts that must prove,[60] and no man is allowed to be a Judge in his own cause, because his interest would certainly bias his judgement and most probably corrupt his integrity.[61] Since the Presidency has asserted that the Senate is not required to confirm the appointment of the EFCC Chairman, the primary duty of discharging this burden falls on its shoulders.

In an earlier landmark decision, the same US Supreme Court had close to two centuries before the *Cooper rule*, illuminatingly considered the notion of Executive powers in *Marbury v Madison*,[62] a move that indeed provoked a new jurisprudence and that has become a pedestal for several judicial milestones later.[63] According to the court, in the performance of certain

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56 (1958) 353 U.S. 1.

57 ibid

58 On this matter, the opinion of Scholars has been divergent. While some argue that granting the Court such exclusive power is to grant them the authority to irrevocably fix the policy of government, others say that being the custodian of the intent of the Constitution, the Court is well within the sphere of its power in this regard. On the controversy as to whether it is desirable for the Supreme Court in exercise of Judicial supremacy, to have the power to settle constitutional questions, *see generally*, Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110(7) Harvard Law Review 1377.

59 Lawrence Gene Sager, 'Fair Measure: The Status of Under-enforced Constitutional Norms' (1978) 91 Harvard Law Review 1212-1227.

60 This is expressed as, "*Affirmanti non neganti incumbat trio*".

61 This powerful rule is espoused in the Latin maxim, "*Nemo Judex in causa sua*".

62 (1803) 5 U.S. (1 Cranch) 137.

63 Following the Marbury Rule, the US Supreme Court has deepened the understanding of Executive Powers in a number of leading cases. See generally, *McCulloch v Maryland*, (1819) 17 U.S. (4 Wheat.) 316; *United States v Curtiss- Wright Export Corp*., (1936) 299 U.S. 304; *Brown*

executive acts, the President is vested with political powers, the exercise of which he is expected to use his discretion and in which regard he is only accountable to his conscience, and to the people who may utilize their electoral power to either re-elect him or refuse him at the polls.[64] In the opinion of the Court, to aid the President in the performance of his duties, he is authorized to appoint certain officers, who not only act by his authority, but certainly based on his orders.[65] In this wise, the appointees acts are his acts, the appointee's duties are expected to conform precisely to the will of the President, and they are merely his organ.[66] The conclusion therefore is that for such politically appointed agents, their appointment and acts are only examinable politically and have no business with the Courts.[67]

However, further submitting, the *Marbury Court* opined that where a specific duty is assigned the President by law (emphasis again mine), and individual rights depend on the performance of that duty, it is abundantly clear that such appointment must follow the due process of the law, and where that is not done, it becomes examinable by the judicial authority of the court.[68] Connecting these two judicial proclamations with the Magu controversy, it is clear that the appointment of the EFCC Chairman is one in which the President is assigned a specific duty by law, and is an appointment so fundamental given that the office would be involved in the investigation, arrest, detention, and prosecution of persons in which matters of individual rights would be in issue. Property worth billions of naira would be seized and the Commission is so powerful that it is empowered by law to seek the extradition of individuals that may have fled to other countries for the purpose of holding them accountable.

And so, for such appointments that are beyond the political firmament, where there is a contest as to where the finality of appointment powers lies, it becomes the business of the court to given direction. Sadly, since the debacle began instead of the Presidency to approach the Supreme Court for an interpretation of Section 171(2) (a-e) it has chosen to adopt self-help by not representing Mr. Magu, but retaining him as an Acting Chairman and preferring an environment in which his actions in Office continue to bear the yoke of unconstitutionality. Just recently however, following a suit filed by a Legal Practitioner, a Federal High Court in Abuja has ruled that the Senate is

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v Board of Education, (1954) 347 U.S. 483; *New York Times Co. v United States*, (1971) 403 U.S. 713; *United States v Nixon*, (1974) 418 U.S. 683; *Clinton v Jones*, (1997) 520 U.S. 681,703.

64 ibid

65 ibid

66 ibid

67 ibid

68 ibid

indeed empowered to confirm all appointees of the President, including appointees to the Office of the EFCC Chairman.[69]

7. Conclusion

That the people have a right to establish for themselves such principles, as in their opinion shall most conduce to their happiness is the basis on which the modern Constitution is designed. This principle so established is deemed fundamental. This original and supreme will organizes the State and government and assigns to the different unit their respective powers, as well as boundaries not to be transcended. The government of Nigeria is of this description. The distinction between a government with limited and unlimited powers is abolished, when those boundaries do not restrain those on whom they are imposed. Executive powers under the constitution are clearly defined and the boundaries not permitted to be mistaken or forgotten.

It is manifest that since the start of the 4th Republic, Nigeria has unremittingly been characterized by naked evidence of gross abuse of the constitution by an avaricious political class. Interestingly, since 1999 Nigerians have demonstrated extensive fortitude tolerating the shenanigans of the political class. However, it would be dangerous to normalize this reckless use of powers. Our history of reliance by the political class on contours and gaps in the law so as to circumvent well established constitutional norms, is one that should be stoutly resisted. 'Executive powers' does not connote political idolatry, and it is injurious to any society with democratic aspirations when a cult personality is built around the Executive, supported by rhapsodic adulations in support of unconstitutional behaviour.

The intended and unintended but necessary consequences of such glorification is to create a sort of "Father-figure President", whose favour everyone seeks and to whose benevolence the society must remain grateful. Such characterization is typical in most developing societies in Africa where democracy still remains largely a pipe dream. In these societies trapped in the personhood of political patriarchy, executive power is exercised with an entitlement mentality, rather than in obedience to constitutional norms. As long as wrong political acts continue to outstrip the right democratic attitude, Nigeria will continue to claw at the short end of the stick. There is a deontological perception that public officials have a character of soiling their

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69 For a comprehensive overview of the judgment, *see generally* Ikechukwu Nnochiri, 'EFCC Chairmanship: Senate has powers to reject Magu - Court' *The Vanguard Newspaper* (Lagos, 1 February 2018) <www.vanguardngr.com/2018/02/efcc-chairmanship-senate-powers-reject-magu-court> accessed 7 March 2018; Onyedi Ojiabor, 'Senate to Buhari: Nominate Magu's Replacement' *The Nation Newspaper* (Abuja, 1 February 2018) <http://thenationonlineng.net/senate-buhari-nominate-magus-replacement> accessed 7 March 2018.

hands with power,[70] as such there is a duty on the Executive that this perception does not take further roots downwards. There is also no short cut to the rule of law, and for a nation to gain any modicum of respect there must be a minimum adherence to the moral content of its laws.[71]

It is therefore this Paper's submission that in exercising executive powers, it is imperative that the Presidency observes circumspection, in order to convey that which is reasonable to the average mind. The body of thought in the modern world, both legal and judicial is one in which the fundamental law of most nations imposes an unqualified limit on the executive powers of the President, by subjecting his actions to the just consent of the legislature, while condemning all unilateral acts as forbidden fruits.[72] This truth was echoed by a leading light of the US Supreme Court, Justice Robert Jackson when he said:

> With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[73]

The Jurisprudence in Nigeria is not different from the above, and the Nigerian President must save the honour of the office he holds and return to the path of law. As pointed out by Mr. Justice Sutherland, the distinction between power and discretion is not only very plain but important.[74] As it has been rightly posited, while obedience to the Constitution is not expected to be a suicide mission, it has been firmly stated that any President wielding executive powers is at all times subject to constitutional and legally imposed constraints, from which he cannot extricate himself.[75] This Paper cannot agree more. This Paper therefore affirms that the appointment of Mr. Ibrahim Magu as substantive EFCC Chairman is not discretionary, rather it is a matter of law. And so, the President must return to the Senate for its imprimatur in this respect, or go before the court to test the law. To continue in the arena of self-help, can only continue to blow an ill wind which will do no one any good.

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70 On this philosophical position, *see generally* Michael Walzer, 'Political Action: The Problem of Dirty Hands' (1973) 2(2) Philosophy and Public Affairs 160.

71 D. O. Aihe and P.A. Oluyede, *Cases and Materials on Constitutional Law in Nigeria* (University Press Plc 2006) 60.

72 There is a vast literature in this respect. Ranking top includes Alan F. Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet and Tube Co. V. Sawyer*, (The MacMillan Co. 1958; William H. Rehnquist, 'Constitutional Law and Public Opinion' (1986) 20(4) Suffolk University Law Review 751-752; William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow and Co. 1987); Louls Fisher, *Constitutional Conflicts between Congress and the President* (4th edn, University Press of Kansas 1997); Robert J. Spitzer, *President and Congress: Executive Hegemony at the Crossroads of American Government* (Temple University Press 1993); M. A. Genovese, *Presidential Powers* (Oxford University Press 2000).

73 *Youngstown Sheet & Tube Co. v Sawyer*, (1952) 343 U.S. 579, 655.

74 See *Carter v Carter Coal Co*., (1936) 298 U.S. 238.

75 Richard H. Fallon, 'Interpreting Presidential Powers' (2013) 63 Duke Law Journal 391.

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

Sadiya S. Silvee[1]

Abstract

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Synopsis of the Sentencing Practice in High Court and Trial Court

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

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

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

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

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

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

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

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

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

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

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

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

A. Tender age a Mitigating Factor or Not?

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

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

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

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14 31 DLR (1979) HCD 312.

15 32 DLR (1980) HCD 227.

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

17 4 (1984) BLD (HCD) 228.

18 31(1979) DLR (HCD) 312.

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

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

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

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

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

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19 32 (1980) DLR (HCD) 227.

20 ibid

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

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

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

24 Malik (n 22) 64.

25 42 (1990) DLR (HCD) 465.

26 6 (1986) BLD (HCD) 402.

27 46 (1994) DLR (HCD) 423.

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

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

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

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

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

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

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

31 60 (2008) DLR (HCD) 481.

32 31(1979) DLR (HCD) 312.

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

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

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

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

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

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34 Rahman (n 28) 212-215.

35 31 (1979) DLR (HCD) 312.

36 5 (1985) BLD (HCD) 129.

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

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

39 20 (2000) BLD (HCD) 45.

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

C. Other Relevant Factors as Mitigating Factor or Not?

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

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

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

41 60 (2008) DLR (HCD) 420.

42 6 (1986) BLD (HCD) 352.

43 25 (2017) BLT (HCD) 503.

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

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

46 35 (2015) BLD (HCD) 457.

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

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

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

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

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

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

Nexus between Bench System in HCD and the Inconstancy in Sentencing

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

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

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

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

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

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

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

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

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

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

54 ibid

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

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

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

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

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

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

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

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

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

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

61 ibid

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

Conclusion

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

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

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62 13 (2005) BLT (AD) 12.

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

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

65 40 (1988) DLR (AD) 139.

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

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

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

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Extending Moral Standing to Environmental Entities- Whom and How? Concerns and Considerations

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Abstract

Extension of moral standing to non-human entities has been a much contested issue. Several philosophers have advocated for bringing the entities of ecosystem into the domain of our moral consideration in order to afford them better protection. Others have resisted the idea. As environmental issues form one of the core areas which needs to be focussed on- given the rampant destruction of ecological footprints, this article seeks to analyse the cases for and against the extension of moral standing to entities beyond humans- how the same may be done, the considerations that need to be kept in mind and the concerns regarding the same- based on the analysis of various jurisdictions that have, in fact, extended moral standing to entities other than humans. It also makes an effort to suggest a way forward.

Keywords: Moral Standing, Moral Consideration, Environmental Ethics, Rights of Nature, Ecosystem.

Introduction

For extending protection to certain entities what is required is that the entity must possess some sort of a moral standing or have the moral consideration. That implies being the objects of his 'social instincts and sympathies'. If history of man may be traced, even slaves, children and women were historically considered to be being without rights, hence, without moral standing in relation to other humans, i.e. males. But gradually, in course of evolution, all these entities were bestowed with some sort of rights, thus giving them some sort of moral status in relation to other human beings (man). But extension of moral standing to entities beyond humans has been a contentious issue. Early philosophers and their emphasis on rationality as a basis for moral consideration meant that entities other than human beings could not have any sort of moral standing. The 'sentience' theorists advocated for extension of moral standing to non-human animals for their ability to feel pain. Later theories like those of 'ethical holism', 'deep ecology' and 'wild law' have argued for the inclusion of the ecosystem as a whole into the sphere of moral standing in relation to man. They have advocated the provision of certain sorts of rights to non-human entities, popularly known as 'rights of

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nature'. But this has led to certain practical difficulties in terms of feasibility of such a step. Also, certain difficulties did arise in the countries that did extend some sort of moral standing to non-human entities. This article seeks to analyse the philosophical background behind the extension of moral standing to non-human entities and the problems in implementing the same. It tries to look at the various countries that have, in fact, provided rights to non-human entities and to suggest a way forward.

What is Moral Standing?

The word 'standing', in its usage as an adjective, means standing having a supporting base. For e.g.: 'a standing lamp'. Used in a noun form, it means social or financial or professional status or reputation 'of equal standing', 'a member in good standing' etc. 'Moral Standing', ordinarily, is used in the later of the two senses. It implies having a status; a locus. The adjective or the qualification of the noun 'standing' is 'moral'. Moral Standing, in ethics, means the status of an entity by virtue of which it is deserving of consideration in moral decision making. An entity has moral status if and only if it or its interests morally matter to some degree, not for the sake of anyone else, but for the entity's own sake.[2] For instance, an animal may be said to have moral status if its suffering is considered to be morally bad, on account of this animal itself and regardless of the consequences for other beings. The question of moral standing is one of importance in the domain of ethics- it is a key topic of debate in bioethics, medical ethics, environmental ethics etc. To ask the question (by a human being)- if someone or something has moral standing or not is to see if that whether the well-being of that entity should be taken consideration of by humans. It implies a determination of the question- if that entity possesses some sort of a moral value or worth and can make claims. The entity concerned is regarded as a moral patient. Moral patient is an antonym to moral agents. Moral agents are beings who are capable of acting morally, acting for moral reasons and striving for moral improvements. Moral patients are entities towards which moral agents can have moral obligations.[3] A being with moral standing is not merely a beneficiary of moral consideration, rather having moral standing implies, to be directly owed some moral considerations. Moral Standing has three features:

- Relational
- Scalar

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[2] Agnieszka Jaworska and Julie Tannenbaum, 'The Grounds of Moral Status', *The Stanford Encyclopedia of Philosophy Archive* (Spring edn, 2018) <https://plato.stanford.edu/archives/spr2018/ entries/grounds-moral-status/> accessed 31 January 2019.

[3] Nancy S. Hancock, 'Theories of Moral Standing' (2002) 4(2) Interdisciplinary Environmental Review <https://doi.org/10.1504/IER.2002.053890> accessed 31 January 2019.

- Unilateral[4]

Relational implies that the being's moral standing is nothing but a function of the considerations that they owe from others,[5] i.e. an entity has oral standing only in relation to another entity. If not, the entity cannot be said to have moral standing. In determining the question- who or what has moral standing, we essentially seek to answer which entity owes moral consideration from human beings.

Scalar can imply three things. Firstly- how many other beings owe it some sort of moral consideration? Secondly- how many considerations are owed and thirdly- the stringency of the consideration owed.[6]

Lastly, moral standing is **unilateral**, as it only considers what is owed by one to the entity concerned, and not what the entity in turn owes to the other.

As can be implied from the aforesaid discussion, having moral standing implies nothing but having the benefits of moral consideration. But as has been emphasised earlier, it also to some extent normative, because, having consideration does not by itself give an entity a moral standing in relation to another entity.

Having developed a brief understanding of what is standing and moral standing, in the next section the researcher shall proceed to analyse how the question of moral standing works in case of environmental ethics.

Environmental Ethics and Moral Standing

Fundamentally speaking, environmental ethics examines how human beings should interact with the non-human world around them.[7] It is an attempt to extend the traditional moral discourse, based on normativity, with an aim to incorporate the whole or parts of nature within the domain of moral relevance.[8] As it is normative in nature, the concepts of 'value', 'worth' and 'good' are fundamental to it.[9] As, the word 'environment' is of very broad connotation, the domain of environmental ethics is broad too. The term 'ethics' introduces the idea of 'should' or 'ought' and the study of ethics is

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4 Andrew I. Cohen, 'Dependent Relationships and the Moral Standing of Nonhuman Animals' (2008) 13(2) Ethics and the Environment 1-21 <https://www.jstor.org/stable/40339157> accessed 30 January 2019.

5 ibid

6 ibid

7 Clare Palmer, *Environmental Ethics* (ABC-CLIO 1997) Inc 6.

8 Martin Schonfeld, 'Who or What Has Moral Standing?' (1992) 29 American Philosophical Quarterly 353 <https://www.jstor.org/stable/20014430> accessed 24 December 2018.

9 ibid

concerned with how we should live, what exactly we ought to do, etc.[10] So, understanding the conjoint connotation, environmental ethics is the study of how humans should or ought to interact with environment.[11] Palmer speaks of three steps of environmental ethics:

- Firstly, acquisition of knowledge and understanding about environmental questions as far as possible.
- Secondly, developing skills of excavating and analysing the different welter of human interests, attitudes and values that are, in some way, related to the environmental problems.
- Thirdly, the prescriptive element, i.e. offering a guidance or provision of rules about what may be an ethically correct behaviour towards environment.[12]

Charles Darwin observed that the history of man's moral development has been a continuous proliferation by extension of his social instincts and sympathies.[13] If examined through the historical lens, man's circle was extremely limited. But gradually his social circle enlarged, as Darwin says, to men of all races- to the imbecile, the maimed and other lesser members of the society, and finally to lower animals.[14] In ancient families, everyone outside the family was considered aliens. Even within the family, certain people had little or no rights (like the children). The slaves, women, children, blacks, prisoners and foetuses- all used to have little or no rights in the earliest times. But with passage of time, most of them have become possessed with rights, either fully (like slaves and women) or partially (like children).[15] Today, in view of the birth of eco-centric ethics, the concept of standing is being enlarged gradually, wherein the rights of the ecological entities are being recognised, without having recourse to human interests.

The major differences of environmental ethics and other fields of applied ethics like bioethics, medical ethics is that the former is essentially an expansionist project.[16] Business ethics, for example, makes an attempt to draw out the implications of traditional moral theories for decision making and policy formation into the business world. Same is the case for medical ethics also. But the underlying agenda of environmental ethics somewhere is devoted to change than application.[17] Historically in moral philosophies, the moral

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10 Palmer (n7) 6.

11 ibid 6.

12 Palmer (n7) 6.

13 Charles Darwin, *Descent of Man* (Murray 1874).

14 ibid

15 *In re* Gault 387 U.S. 1(1967) wherein basic constitutional protections were guaranteed to juveniles.

16 Gregory Cooper, 'Teleology and Environmental Ethics' (1998) 35(2) American Philosophical Quarterly 195-207 <www.jstor.org/stable/20009930> accessed 5 February 2019.

17 ibid

patients have been limited to human beings. However, a survey of the literatures of environmental ethics suggests that its object has been to expand the class of moral patients.[18]

Philosophical Discussions relating to Extension of Moral Standing

Various philosophies and philosophers have viewed the question of moral standing differently. In this section, an attempt has been made to gain an understanding about the divergent views regarding the same. Pythagoreans and the Neoplatonists, in the earliest of times[19] had urged for respecting the interests of other animals. Their view holds a position of significance in the advocacy of animal rights, which finds expression in a more concrete form in some later theories. They were believers in transmigration of souls between human and animal bodies.[20]

Rationality as a basis

Aristotle, in his 'Logic', sees the world as a totality comprising of the whole of the nature. Man is said to be the part of nature in twofold sense: One, he is a part of matter and as such, partakes experience. On the other hand, he is endowed with active reason which distinguishes him from all other parts of nature. So, he is capable of formulation of his will according to the insights of his reason. Citation of this rationality as a criterion for moral standing has been used many times to exclude and include groups into the moral community.[21] To Aristotle, morality was an expression of human nature.[22] His view was that rationality is present in different groups of human beings to different degrees. He even denied moral standing to women and slaves on grounds that their rational faculty was neither authoritative, nor fully developed. His teleological view of nature saw the world in form of a hierarchy within which the animals and plants had value only in relation to human beings.[23] Immanuel Kant argued for a deontological view wherein human beings have direct moral duties to other human beings. He too assigned a critical role to morality. To him, a moral principle must be one of pure reason, i.e. imposed by reason itself and not of empirical reason.[24] Kant's Categorical Imperative says: "I should never act except in such a way that I

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18 ibid

19 Pythagoreans- 6th-4th Century BCE and Neoplatonists- 3rd-6th century CE.

20 Steven. M. Wise, 'Animal Rights', *Encyclopaedia Britannica* (Aug 18, 2016) <www.britannica.com/topic/animal-rights> accessed 5 February 2019.

21 Hancock (n 3).

22 Palmer (n 7) 6.

23 Wise (n 20).

24 Hancock (n 3).

can also will that my maxim should become a universal law," and "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means".[25] However, Kant's 'phenomenon' and 'noumenon' implies that moral agent's reason must be sharpened by experience. Experience is brought into order and shape by human mind.[26] To him, only moral agents are rational beings, i.e. humans. Also, only moral agents have the capacity to perform acts of moral worth and hence only rational agents can be moral agents.[27] And, all and only moral agents have moral standing. Non-rational beings unlike the rational beings are not ends in themselves, but have 'only a relative value as means'.[28]

Sentience Criteria

'Sentience' as a criterion has been the focus of the work of the utilitarians like Jeremy Bentham and John Stuart Mill. The cardinal question in determination of moral standing for utilitarians like Bentham was if an entity can suffer.[29] Bentham, in regards to animals wrote that the question is not if they could reason, but 'can they suffer?'[30] According to Bentham, nature has placed man under the empire of pain and pleasure and that he, who pretends to withdraw himself from this subjection, knows not what he says.[31] This understanding of utilitarianism was, to a large extent, neglected until Peter Singer published his book 'Animal Liberation' in early 1970s. Herein, he argued, because of the capability to suffer, account must be taken in of animals while making ethical decisions.[32] In Singer's view, all valid moral claims derive from the principle of equal consideration of interests. The comparable interests of all sentient beings must be given equal weight in moral deliberations. Since all and only sentient beings have interests, all and only sentient beings have moral status. The comparable interests of all sentient beings are equal – for example, the interest a parakeet has in satisfying his hunger is on a moral par with the interest a human has in satisfying hers.[33] Tom Regan has argued for the standing of animals based on his 'subjects of life' formulation. He argued that animals also possess natural rights, in particular, right to life,[34] and that the

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25 Immanuel Kant, *Grounding for the Metaphysics of Morals* (Hackett Publishing Company 1785).

26 V.D. Mahajan, *Jurisprudence and Legal Theory* (Eastern Book Company 2016) 512.

27 Hancock (n 3).

28 ibid

29 ibid

30 Palmer (n 7) 13.

31 Jeremy Bentham, *Principles and Morals and Legislation* (Clarendon Press 1907).

32 Peter Singer, *Animal Liberation* (Avon Publishers 1977).

33 ibid

34 Palmer (n 7) 14.

same are inviolable. However, many have argued that Regan did not go far enough for inclusion of environment into our ethical concerns.[35]

Inclusion of the Entire Ecosystem

One of the most important works in this field has been that of Paul Taylor, in his book 'Respect for Nature'. Taylor has argued for an egalitarian conception of moral standing based on the ground that although humans have capacities that animals lack, men also lack the capacities possessed by animals.[36] He argues that all living things are ends in themselves and not merely instruments.[37] Taylor thus argues that human beings have duties towards all living beings equally, but he stops short of extending his position to include ecosystems or species.[38] Arne Naess first framed the distinction between 'shallow' and 'deep' ecology in 1973. Deep ecology movement, of which he himself is a part, was concerned with the ways with which humans relate to the environment. He argued that much of the Western philosophies came to view humans as separate from nature. He called for development of a 'holistic' outlook of sorts[39] and recognising the 'intrinsic value of nature'. Deep ecology has developed in different forms since 1973. Some of the core principles of deep ecology are as follows:

- The well-being and flourishing of human and nonhuman Life on Earth have value in themselves (intrinsic value). These values are independent of the usefulness of the non-human world for human purposes.
- Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.
- Humans have no right to reduce this richness and diversity except to satisfy vital needs.
- The flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of nonhuman life requires such a decrease.
- Present human interference with the nonhuman world is excessive, and the situation is rapidly worsening.
- Policies must therefore be changed. These policies affect basic economic, technological, and ideological structures. The resulting state of affairs will be deeply different from the present.
- The ideological change is mainly that of appreciating life quality (dwelling in situations of inherent value) rather than adhering to an

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35 Palmer (n 7) 15.

36 Schonfeld (n 8).

37 ibid

38 Palmer (n 7) 15.

39 Palmer (n 7) 16.

increasingly higher standard of living. There will be a profound awareness of the difference between big and great.

- Those who subscribe to the foregoing points have an obligation directly or indirectly to try to implement the necessary changes.[40]

Deep Ecology is a part of the radical ecology movement and though it argues for the extension of standing to nature, it argues that just doing so may not be sufficient in itself.[41]

Albert Schweitzer advocated for 'reverence for life',[42] i.e. all living things have a will to live and that human beings must not interfere to extinguish such a will.[43] According to his view, moral standing is accorded to all living beings and equal moral consideration is provided to all of them. He rejected the contention of hierarchy of status amongst beings with moral standing. Social ecology was founded by Murray Bookchin during the 1970s. Influenced by Marxist thoughts he argued that man's conceived superiority over nature is nothing but the extension of the hierarchical nature of human relationships.[44] Aldo Leopold's 'Land Ethic' was published in the year 1949, wherein he spoke about extension of ethics to its 'third element', i.e. human environment. Leopold spoke about the Ten Commandments that govern the individual ethics, but does not provide anything similar for land ethics. Rather he goes on to define certain rules which help to judge what is right and what is wrong. One of his basic normative principle is- 'A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community'. Leopold's work on Land ethic is of much significance as it provides a moral consideration to the biotic community as a whole. One of the significant philosophical works relating to the debate about to whom moral standings should be extended is one by J. Baird Callicott. In his influential essay, 'Animal Liberation: A Triangular Affair',[45] Callicott argues that the debate over the liberation and rights of animals is not a bipolar one, as has often been maintained, but is, rather, three-sided. The three competing positions are, as Callicott distinguishes them, ethical or moral humanism, humane moralism, and environmental ethics. The ethical humanists argue that nonhuman animals are not worthy of having moral standing because only human beings are rational, or capable of having interests. This does not necessarily mean that animals may be treated inhumanely. Rather, animals may be treated as 'means' and need not be treated as persons or ends in themselves. The humane moralists, on the other hand, argue that even in lieu of possessing the aforesaid

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40 Bill Devall & George Session, *Deep Ecology* (Gibbs. M. Smith 1985).

41 Alaisdair Cochrane, 'Environmental Ethics', (September 2008) *Internet Encyclopaedia of Philosophy* <https://www.iep.utm.edu/envi-eth> accessed 2 February 2019.

42 Hancock (n 3).

43 Cochrane (n 41).

44 Palmer (n 7) 17.

45 J. Baird. Callicott, 'Animal Liberation: A Triangular Affair' (1980) 2(4) Environmental Ethics 311-338 <http://faculty.smu.edu/jkazez/ar13/callicott.pdf> accessed 2 Feb 2019.

qualities that serve to constitute personhood, animals are 'sentient' beings and hence, we are morally obliged to consider their suffering as much as human suffering. Callicott argues that these two views are similar in important ways. He argues that adherents to both of these theoretical approaches locate moral value in 'individuals'. Both approaches extend moral consideration to some individuals and exclude others. In the end Callicott argues that both positions are atomistic, reductive, and distributive.[46] As distinguished from ethical humanism and humane moralism, Callicott defines environmental ethics as a 'holistic or collective', and therefore not atomistic or reductive, theoretical approach to the valuation of animals. His environmental ethic is called 'ethical holism' because it locates ultimate value in the 'biotic community'. Cormac Cullinan, a South African legal practitioner, influenced by the 'rights of nature' discourse of the likes of Peter Burdon, Thomas Berry and likes, spoke about the ill-effects of the industrialised world on human relationship with nature. He pointed out that how natural sciences had an effect on how we tend to look at the environment. Criticising 'Cartesian Dualism', he said that the notions of separateness of the mind from the body has contributed to the creation of a false notion of separateness of man from nature. He said that quantum physics nullified many of the myths natural sciences had given birth to. He said that when human laws were framed, the environment was never in contemplation (i.e. never within the frame) and hence arises all the difficulties with regards to the implementation of rights of nature. He urges the need to observe and learn from the 'Great Jurisprudence' and to frame 'Earth Jurisprudence'. He speaks about 'wild laws' which implements 'earth jurisprudence'.[47]

Understanding the philosophical moorings behind the argument for extension of moral standing stands at the heart of understanding which entities should be given moral standing, and the considerations behind the same. But, the most significant question that remains is how? More so, if moral standing is extended to the biotic community as a whole as someone like Callicott argues, then where do these extended entities stand so far as their legal standing is concerned? The author has sought to provide an answer to these questions in the upcoming sections.

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46 Richard. J. Klonoski, 'Callicott's Holism: A Clue for a Classical Realist Contribution to the Debate over the Value of Animal', (1991) 7(2) Between the Species <https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1562&context=bts> accessed 8 February 2019.

47 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green 2011).

Extension of Moral Standing to Entities Beyond Humans- How?

Anthropocentrism, as an understanding, is deeply embedded in the Western philosophical roots.[48] As Lynn White argues in his article,[49] viewing humans as separate and superior to nature is deeply embedded in the Christian view. This poses perhaps the challenge at the inception for extending moral standing to entities beyond humans. The acceptance and inculcation of eco-centric ethics is still at a nascent stage. Laws and policies across the world are still dominated by a human centred view of environment. In the literature on environmental ethics the distinction between instrumental value and intrinsic value has been of considerable importance. The former is the value of things as means to further some other ends, whereas the latter is the value of things as ends in themselves, regardless of whether they are also useful as means to other ends. Many traditional western ethical perspectives are anthropocentric or human-centred in that either they assign intrinsic value to human beings alone or they assign a significantly greater amount of intrinsic value to human beings than to any non-human things such that the protection or promotion of human interests or well-being at the expense of non-human things turns out to be nearly always justified.[50] Emergence of the discipline of environmental ethics posed a challenge to the norms of anthropocentric world view. In the first place, it questioned the assumed moral superiority of human beings to members of other species on earth. In the second place, it investigated the possibility of rational arguments for assigning intrinsic value to the natural environment and its non-human contents. Some theorists in this field felt no need to develop new anti-anthropocentric views. They rather focussed on development of enlightened anthropocentrism.[51] In this view, all moral duties we have towards the environment are derived from the direct duties we have towards our human cohabitants. They have argued that practical purpose of environmental ethics is to provide moral backing for formulation of social policies aimed at protecting the earth and prevent environmental degradation. For it, to the enlightened anthropocentrists, argue that their view is sufficient. In fact, they consider the same to be more effective in delivering desired outcomes than other non-anthropocentric views, because of the backing they need to provide for their radical theories advocating for intrinsic value for the environment. Brennan says that some 'prudential anthropocentrists' may argue for some sort of 'cynical anthropocentrism' that argues that humans have a higher-level anthropocentric reason to be non-anthropocentric. The basis of the argument is that even if some find the idea of intrinsic value hard to swallow, a day to day non-anthropocentrist may tend to act more benignly

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48 Andrew Brennan and Yeuk-Sze Lo, 'Environmental Ethics', *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2016), <https://plato.stanford.edu/archives/win2016/entries/ethics-environmental/> accessed 3 February 2019.

49 Lynn White, Jr, 'The Historical Roots of Our Ecological Crisis', (March 10, 1967) 155(3767) Science, New Series, <http://www.jstor.org/stable/1720120 > accessed 5 August 2009.

50 Brennan and Lo (n 48).

51 ibid

towards environment, and the same may lead to generation of a non-anthropocentric worldview in general. He argues that for such a sort of strategy, it may be essential to hide one's position of even cynical anthropocentrism from others and herself also. This view has a lot of criticism too. It has been argued that the entire anthropocentric conception is flawed as it proceeds on certain assumptions like- human beings are separate from nature, they are superior to other entities of nature, there are no planetary boundaries to natural resources.[52] There are inaccurate assumptions as to how something as complex as nature behaves which assumes a self-regulatory side of the nature. It has been argued that nature must be viewed as a complex adaptive system and that human beings must be viewed as being dependent on natural processes and not vice versa.[53] The 'wilderness area' approach to environmental protection- the idea that nature must be left alone, has been accredited to this sort of anthropocentrism. As Lynn White argues, 'neither atavism nor prettification will cope with the ecological crisis of our times'.[54]

Even if certain entities are given moral standing, the question as to its implementation is another important point where complex questions arise. Provision of moral standing is coupled with the question of how such standing is to be made compatible with the laws, i.e. the question of legal standing assumes significance. Provision of legal standing to non-human entities has been a challenge for the legal systems that have treaded that path. Christopher Stone's influential article[55] has sought to delve into these questions. Extension of moral standing to non-human entities requires also the provision of certain rights, which subsequently become recognised by law. Inanimate right holders have also come to be recognised under law, like trusts, corporations, municipalities etc. He proposed the provision of legal rights to forests, oceans, rivers and other so-called 'natural objects'- to the environment as a whole,[56] though he did not advocate the provision of all the rights that human beings are possessed of. Such rights cannot have any content until and unless public authoritative bodies are prepared to give some amount of review to actions which are inconsistent with such rights. He draws the analogy of a stream in a common law system. The stream, not being possessed with rights of itself, one of the ways in which it can be protected is by the conception of lower riparian, another riparian, whose rights are also infringed by the upper riparian polluting the stream. But the lower riparian is hardly concerned with the pollution of the stream as such. She is concerned only about her own interest in having unpolluted water in the stream. Sometimes, the economic loss

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52 Jan.G. Laitos and Lauren Joseph Wolongevicz, 'Why Environmental Laws Fail' (2014) 39(1) William & Mary Environmental Law and Policy Review <http://scholarship.law.wm.edu/wmelpr/vol39/iss1/2> accessed 1 February 2019.

53 ibid

54 White (n 49).

55 Christopher. D. Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) South California Law Review.45, 450.

56 ibid

suffered by the lower riparian may be very little after offsetting the cost of bringing a suit. So, the lower riparian may not institute a suit at all. Even where the lower riparian has a right to receive unpolluted water and the upper riparian has a duty not to pollute, certain limitations are placed like: reasonable use, balance of convenience, public interest etc. But what is hardly considered is the damage to the stream, its fish turtles and lower life. Also, the cost benefits of such a human based jurisprudence is assigned to the lower riparian and hardly assigned for the improvement of the conditions of the stream. Stone says that though the law applicable specifically to common resources like rivers, lakes, streams, air etc. are different in certain aspects, they as an entity do not get any standing of its own rights. He advocates for provision of rights to these entities for their own- to be recognised as 'persons' before law. He argues for a legal system, where friend of a natural entity perceives its danger and can move the court as a guardian or someone *in loco parentis.*[57]

Analysis of certain cases in regard to provision of such legal standing may be helpful in providing light on the issue. In *Scenic Hudson Preservation Conference v FPC*,[58] environmental conservation group, Scenic Hudson Preservation Conference was held to have the *locus standi* to initiate a suit as they were 'aggrieved by' the license that had been granted by Federal Power Commission to New York Consolidated Edison to construct a hydroelectric project on Hudson River at Storm King Mountain as their activities and conduct exhibited a special interest in 'aesthetic, conservational and recreational aspects of power development'.[59] In *Road Review League v Boyd*,[60] plaintiffs, which included a non-profit organisation, the Road Review League brought an action to set aside determination of Federal Highway Administrator regarding the alignment of an interstate highway. Argument was that the same would have an adverse effect upon local sanctuaries. Court held that the plaintiffs had standing to obtain the judicial review. However, in *Sierra Club v Morton*,[61] the United States Supreme Court rejected a lawsuit by the Sierra Club, which had sought to block the development of a ski resort at Mineral King, a valley in Sierra Nevada Mountains as the club had not alleged any personal injury. But the case is famous for the dissenting opinion of Justice Douglas who asserted that natural resources ought to have right to sue for their own protection, in their own name. He pointed out that the suit would have been more properly labelled as *Mineral King v Morton*. People having meaningful relationship to a resource should be able to speak for the values that such resource represents. This opinion was given, I order to allay the fears that any new organisation may spring up and institute litigation as 'aggrieved persons' leading to flooding of the courts with cases without merit.

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57 Stone (n 55)

58 354 F.2d 608 (2d Cir. 1965).

59 ibid

60 270 F. Supp. 650 (S.D.N.Y. 1967).

61 405 U.S. 727 (1972).

Centre for Environmental Legal Defence Fund (CELDF), a non-profit organisation has been a key player in recognition of certain sorts of rights for nature within the United States legal framework. In 2006, residents of a rural township in the U.S, Blaine, engaged the CELDF to oppose the expansion of a coal mining project within their community. With the assistance of CELDF, the Blaine community, with the assistance of the CELDF, drafted an ordinance that sought to ban corporations from mining in their area.[62] It recognised the rights of ecosystems and aimed at stripping the corporations of their power to override the ordinances. Following this, the CELDF worked with hundreds of other communities to protect the environment, and, quite significantly, was also able to influence the Constitution of Ecuador,[63] which became the first country in the world to recognize the rights of nature in their constitution. In 2010, Bolivia passed the Law of the Rights of Mother Earth which recognised the right of earth as a whole.

New Zealand and India, very recently followed the precedent of Ecuador and Bolivia in granting personhood to inanimate entities. New Zealand granted its third largest river Whanganui river legal personhood. It had earlier granted personhood to the Te Urewera national park personhood.[64] Indian Uttarakhand High Court immediately after declared Ganga and Yamuna as 'persons' before law.[65] The Uttarakhand High Court, in a later decision declared the entire animal kingdom of Uttarakhand as a 'person' before law.[66] In case of Whanganui River, the river has been appointed two guardians- one by the Government and one by the Maori tribe. In case of Ganga and Yamuna rivers, Director of the Namami Gange project, Chief Secretary and Advocate General for the state of Uttarakhand were assigned as legal parents. In India's case, the Uttarakhand government filed a suit against the order in the Supreme Court. The plea also asked if in case of human causalities in flood, affected people can sue the Chief Secretary of the State and if the State Government would be liable to bear the financial burden. The Supreme Court stayed the order of the High Court. One of the contentions raised by the State Government was that if it was proper to make the government of Uttarakhand liable if the river was polluted in other States through which the river also flows.[67] These issues are seriously ones that need consideration and ones that are extremely pertinent to granting of legal status to non-human entities. The rights-duty

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62 Peter D. Burdon, 'The Rights of Nature: Reconsidered' (2010) 49 Australian Humanities Review 69 <https://ssrn.com/abstract=1709015> accessed 4 February 2019.

63 ibid

64 George Dvorsky, 'India and New Zealand Were Wrong to Recognise Rivers as Persons' *Gizmodo* (24 March 2017) <https://gizmodo.com/india-and-new-zealand-were-wrong-to-recognize-rivers-as-1793612698> accessed 5 February 2019.

65 ibid

66 Dvorsky (n 64).

67 Supreme Court stays Uttarakhand high court's order declaring Ganga and Yamuna 'living entities'. *The Times of India* <https://timesofindia.indiatimes.com/india/supreme-court-stays-uttarakhand-high-courts-order-declaring-ganga-and-yamuna-living-entities/articleshow/59489783.cms> accessed 7 February 2019.

interrelationship posits that since non-living entities are not capable of having duties, granting rights to them is not feasible. Also, others argue that true legal persons deserve specific sets of freedoms and protections. The needs of rivers and trees are objectively different from the needs of actual people. Rivers are objects and not subjects, although they do need to be kept clean and safe.[68] Practical implementation of the provision of independent rights to non-human inanimate entities posits certain difficulties so far as provision of some sort of legal standing to ecological entities are concerned.

Conclusion

Extending moral standing to entities beyond human has been a chief contention of environmental ethics movement for a long time. Some sort of a moral consideration for these entities are the need of the day so as to preserve the environment, without having regard to human interests, rather to aim at conservation of nature of whom human beings are part. Extending moral standing, hence, to the non-human entities, whose welfare has long been neglected in face of human self-interest seems to be a morally correct argument. As has been argued, it may well be seen as some sort of enlightened anthropocentrism or ecocentrism- what matters is to aim at survival of nature, because that is how human beings may have a future. But the cardinal question that remains is how to make humans less human-centric? Probably the answer lies in a more duty-based approach towards environment conservation. A duty not imposed only on individuals, but there is a requirement of some sort of affirmative action from the State itself. We have already overused the environment for our benefit and merely providing rights to the environment may not be sufficient. Rather, there should be an affirmative effort made to undo the harms that have already been committed on the environment. There is a need to create positive environmental externalities also so that nature can procure benefits from human transactions. Environmental entities should also be vested with some sort of rights towards which, human beings must have a duty to protect or refrain from violating. Human beings, through historical processes has been gradually more and more divorced from nature, in whose close proximity they once used to live. Their own sustenance was once perceived to be dependent on nature and hence, protection of nature was part of the human culture- something which can be traced even today by observing the indigenous tribes. But this perception has gradually changed as time has passed and human beings have come to view themselves as separated from nature and even superior at times. Having said so, the arguments for extension of moral standing to biotic entities seem to be cogent and well founded. For, provision of rights to natural entities and inculcation of a duty- based approach it the basic ethical change that needs to take place irrespective of the questions highlighted above.

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[68] ibid

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An Appraisal of Causes and Consequences of Juvenile Delinquency in Bangladesh: Search for a Durable Solution

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Abstract

In today's global village juvenile delinquency is treated as one of the most ominous and touchy offences mischievous for the social order of a country. The trend of juvenile crimes is sharply rising in Bangladesh like many other countries of the world. Due to socio-economic circumstances like absence of proper guidance from family, poverty, situation of residential area, non-accomplishment of basic needs, misuse of social media and internet, both male and female teenagers are getting involved in various types of anti-social activities like ragging, carrying illegal arms and drugs, killing, sex offences, engaging in gangs, smuggling, criminalized politics and many other delinquent actions. These issues are of serious anxiety for the entire nation and immediate solution must be sought out to save youths of the country. This paper, however, tries to trace out the causes of offences committed by juveniles and challenges to eradicate them in the perspective of Bangladesh. To this end this article seeks to analyse the existing national juvenile justice system and their limitations regarding the treatment of juvenile offenders. Finally this study suggests to expand the reactive approach of treatment with special attention for the protection of the interest of the juveniles and to ensure youth-friendly environment in every stage of respective institutions.

Keywords: Juvenile Justice, Juvenile Delinquency, Separate Trial System, Reformative Approach.

1. Introduction

Children are often considered as the most vital object of a nation and future citizens to lead the prosperity of a country. The fundamental unit of human civilization is family and the teaching of parents makes a perpetual impact in

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the mind of a child. Thorough care and realistic education by both parents play the utmost role to develop the physical and mental maturity of a child. Outside a family, the socio-economic and political situation of society makes impact on the nature and behaviour of its members, mostly on juveniles. These juveniles gradually develop, make own views, desire separate identity from parents and increase their ability to decide about social, political, cultural and sexual issues. These changes are said to be normal indeed but problem grows when juveniles greed delinquent tendencies and act against the laws and social norms of country.[3] However, social system and norms vary from country to country and anti-social activities of a country may not have the same status in another country. There is an intimate connection between crime and age as criminality tops in adolescence and falls with age.[4] An addiction to commit crime most often shakes the mind of Juveniles. One of the common disasters of society occurs when juveniles respond to social anomalies in ways not permitted by social norms and values.[5] In general observation, juvenile is a child who has not yet attained the age of majority and cannot think rationally as well as fails to realize the consequences of his/her deed. Under the provisions of UNCRC, 'juvenile' refers to a person below the age of eighteen years. As per the legal concept, a juvenile becomes delinquent when he commits violation of penal laws of country. The Second United Nations Congress on the Prevention of Crime and Treatment of Offenders (1960) states, 'By juvenile delinquency should be understood the commission of an act which, if committed by an adult, would be considered a crime'. Juvenile delinquency indicates to a variety of misbehaviour of juveniles which are hazardous to society and some sort of penalty and reformative measures are there. At present the juveniles are not only confined in traditional offences like running away from school, telling lies, stealing stationeries but they are engaged in numerous suspicious activities which constitute serious violation of law and order of the country.[6] Different types of offences such as kidnapping, gambling, drinking, theft, vagrancy, drug peddling, murder, teasing, smuggling and sexual harassment are often alleged to be committed by juveniles. These delinquencies by juveniles have got different patterns because some of these offences are committed by individual delinquent, some are by companionship and some are by situational delinquent.

Bangladesh is one of most densely populated countries of the world and it is a common scenery of the country that people continuously shift to urban from village due to industrialization, urbanization and numerous working opportunities. As a result the population in urban area is highly rising and these

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3 Deepshikha Agarwal, 'Juvenile Delinquency in India- Latest Trends and Entailing Amendments in Juvenile Justice Act' (2018) 3(3) PEOPLE: International Journal of Social Sciences 1365-1383.

4 Rizvi Ahmad, *Theory and Practice of Criminology: Bangladesh Perspective* (2nd edn, University Publications Titu publication 2017) 188.

5 Farhana Helal Mehtab, 'Juvenile Justice System of USA and Bangladesh: A Comparative Study of Diversion and Alternative Measures and Hard Realities of Juvenile Justice System in Bangladesh' (2009) 12 The Dhaka University Journal of Law 54.

6 ibid (n 4).

people usually forget their previous norms, ethics and social customs. Like many other countries of the world juvenile delinquency has become a leading issue of concern for Bangladesh while many sociologist and criminologist believe that the rate of juvenile delinquency is increasing due to the result of growing urbanization and industrialization.[7] Juveniles are deemed to be the most sensitive portion of every society as their reaction towards any social problem is very rapid. In Bangladesh juvenile is a person who attained the age of thirteen but yet to attain age of eighteen while the age of criminal responsibility under the Penal Code of Bangladesh is above the age of nine years.[8] Several reports show that majority of the families impose over pressure and control on juveniles which lead them to get involved in many delinquent activities.[9] These disorders throughout the society have increased the rate of juvenile delinquency as well as it is a serious threat for the future nation because juvenile delinquency is the root of adult criminology. The social structure of Bangladesh has become immensely unsuccessful in providing the juveniles a friendly environment and nature for their ultimate mental and physical growth. There are about 40 million children of age 5 to 17 years in Bangladesh and among them around 550,000 children are addicted to drugs, some of them are involved in picketing, mugging and human trafficking.[10] Theft, teasing, sexual violence, homicide, gang formation other similar criminal activities are very common among the juveniles. Not only the juveniles from poor families but the juveniles of rich and aristocratic families are roughly getting involved in many criminal activities. In many cases it is found that some parents of both poor and rich families are often engaged with some sore sort of activities businesses which also induce their children to involve in crimes.

However, the Constitution of Bangladesh under in its Article 28 braces up the state to initiate special arrangement in favor of women or child or citizens of backward section for ensuring a better treatment under the justice system. In the cases of *The State v The secretary, Ministry of law, Justice and Parliamentary Affairs and others*[11] as well as *The State v The secretary, Ministry of Law, Justice and Parliamentary Affairs and others*,[12] a number of recommendations were made directing the Government to bring essential reformation in the Children Act following the requisite standard guided by the UN Convention on the Rights of the Children (CRC) 1989. Keeping the

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7 ibid

8 Tahsin Khan, 'Protecting the Rights of a Child Offender: The Bangladesh Perspective' (2017) 22(3) IOSR Journal of Humanities and Social Science 49.

9 Iqbal Ahmed Chowdhury, Mohammad Maniruzzaman Khan and Imtiaz Uddin, 'Causes and Consequences of Juvenile Delinquency in Bangladesh: A Sociological Analysis' (2012) 1(4) International Journal of Social Science Tomorrow 1-11.

10 Shibly Noman, 'Treatment of Juvenile Delinquency under the Criminal Justice System in Bangladesh: An Overview' (2018) 3(2) BiLD Law Journal 54.

11 See for details 59 DLR 72, (2007).

12 See for details 29 BLD 3, (2016).

international standard guided by UNCRC and following the recommendations of the apex court, the Children Act was enacted by the parliament in 2013 for ensuring adequate protection and proper treatment with juvenile delinquency under the criminal justice system of Bangladesh. The major role in fostering the administration of juvenile justice in Bangladesh is played by the Ministry of Social Welfare and responsible with duties of maintaining correctional and welfare methods such as probation etc for juvenile offenders. But unfortunately adequate means of identifying, counselling and planning of rehabilitation for juvenile delinquents are absent in reality and the current system has failed to equip juvenile delinquents with fundamental abilities to lead their normal life after release.[13]

Objectives

The general objective of this paper is to explore and overview the both formal and informal treatment mechanisms towards juvenile delinquents under the criminal justice system of Bangladesh. Moreover, this study aims to observe the reasons and current perspective of juvenile delinquency throughout the country as well as to trace out probable and immediate solution to reduce this anarchy of society. This paper also tries to identify the upcoming challenges to diminish the occurrence of juvenile delinquency in the country.

Methodology

This study is designed on information that is gathered from both primary and secondary sources of data. Primary data has been collected from several existing national and international legislations and case references. On the other hand, secondary data has been collected from the books, articles, journals, internet etc relating juvenile delinquency in Bangladesh. To this context both qualitative and descriptive method of study has been used in this article.

2. Meaning of Juvenile Delinquency

The term ‘Delinquency’ is evolved from the Latin word ‘*delinquar*’ which means ‘to omit’. This term was used by the Roman to refer to ‘the failure of a person to perform the assigned task or duty’. William Coxson used the term ‘delinquent’ in 1484 to relate a person found guilty of customary offence. In 1605 this word was used by Shakespeare in his famous play Macbeth. In broad sense, delinquency refers to any form of misbehaviour or alteration from the conventional norm of behaves of society. In general it is quite difficult to bring out the precise definition of juvenile delinquency. The legal definition of juvenile delinquency does not often assist to realize the exact

[13] Dr. Nahid Ferdousi, ‘Juvenile Justice for the Best Interest of the Children in Bangladesh: A Legal Analysis’ (2013) 18 Journal of Law, Policy and Globalization 22.

nature of delinquency and the status of juvenile offender as the criminal procedures depend upon different circumstances in the cases of juvenile delinquency.[14] Another problem is that the legal definition differs from country to country and time to time. Sociologist Robert said 'a child can be considered as delinquent only when it becomes necessary to take legal steps for the tendency of his anti-social behavior'. According to the definition of Criminologist Ferdinand 'the failure of the children to show expected behavior to the society is called juvenile delinquency'. Dr. Sethna rightly said 'juvenile delinquency involved wrong doing by a child or a young person who is under an age specified by the law of the place concerned'. In some particular cases juvenile delinquency refers to some non-criminal activities which are permitted if committed by an adult person like smoking or staying outside home at night but if such acts are done by a juvenile, it is treated as juvenile delinquency.[15] In 1960 juvenile delinquency was discussed in the United Nations 2nd congress on Crime and Criminal Justice and it was concluded that 'all the activities committed by children are delinquency which are violations of criminal law, inconsistent and not recognized by society'. Thus commission of any forbidden act by a juvenile is called juvenile delinquency and the juvenile found guilty of such offence is called juvenile delinquent.

3. Historical Background of Juvenile Justice System in Bangladesh

The aptitude of juvenile delinquency existed throughout the ages. Both the adult and juvenile were treated equally in case of conviction in early Europe. Under the doctrine of common law, the legal system of American colonists brought from Britain, a juvenile of 7 years or older would be subject to same penalty as an adult person.[16] In Norway, for the offence of stealing adult might lose both hands and children may lose one hand as penalty. The first ever concept of juvenile justice along with separate court system was introduced in the United States of America in 1899. In 1923 first international attention regarding the safeguard of children was introduced by Geneva Declaration under the approval of League of Nations.[17] Finally after the successful establishment of United Nations in 1945, the interest of children as human rights based agenda made its position in numerous international instruments.

Bangladesh has a long history of promulgating laws for juveniles which is adopted from British reign in Indian sub-continent. During the British period

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14 Ahmad (n 4).

15 ibid

16 M. Bulbul Ahmed, 'A Crucial Observation on Juvenile Delinquency: Bangladesh Perspective' (2011) 5 ASA University Review 297-310.

17 Ferdousi (n 13).

there was no mobilized movement for the ensuring welfare of children.[18] In 1850 for the first time in India Apprentice Act was passed highlighting on the ensuring the interest of children. However, in British India the milestone development in the long history of juvenile justice system was the Report of Indian Jail Committee 1919-2020.[19] Separate trial system, establishment of children court and proper treatment mechanism for juvenile offenders were recommended by the committee and suggested precise probation system under the supervision of probation officer.[20] Accordingly the Madras Children Act, 1920, the Bengal Children Act, 1972 and the Bombay Children Act, 1924 were enacted.[21] During the regime of Pakistan the Probation of Offenders Ordinance was passed in 1960 which provided provisions of probation service for juvenile delinquent.[22]

In Bangladesh there is no separate law on juvenile justice. After the independence of Bangladesh, the Children Act, 1974 and the Children Rules, 1976 were passed which contracted all the past legal frameworks. These laws were passed before the commencement of many international instruments and failed to ensure the separate treatment mechanism for juvenile delinquents from adult criminals during legal proceedings. Reflecting the principles of the CRC 1989, the Government of Bangladesh newly enacted the Children Act, 2013 repealing the Children Act of 1974. Newly enacted Children Act, 2013 is the fundamental law dealing with children in need of safety and care as well as children in conflict with law and order of the country.[23] Currently there are three specialized juvenile courts along with three specialized correctional institutions for the rectification and rehabilitation established in the country for the juvenile offenders. These institutions are named as the Child Development Centres and among them two centres are for male juveniles located in Tongi and Jashore and another is in Konabari, Gazipur for female juveniles.

4. Causes behind Juvenile Delinquency in Bangladesh

Interdisciplinary observations uncover that there are different causes for juvenile delinquency. Non-fulfilment of basic needs, crime in residential area, lack of family control, internal conflict in family, negative impact of internet,

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18 Khushboo Shah, 'What is an age? Consider the Neuroscience Dimension of Juvenile Law' (2017) 26 Southern California Interdisciplinary Law Journal 167.

19 Abdul Hakim Sarker, '*Juvenile Office in Dhaka City: A Socio-Economic Perspective'* (1988) Institute for Social Welfare and Research, Dhaka University, Dhaka.

20 Shah (n 18).

21 M. S. Hossain, 'Separate Treatment Measures for Juvenile Offenders in Indian sub-continent: A Brief Historical Description' (2008) Human Rights, Investment-Prosecution and Juvenile Treatment, Dhaka: Social Science Research Council, Ministry of Planning 121.

22 See (n 13) for details.

23 Noman (n 10) 53-81.

involvement in child labor, absence of proper recreation etc are some of the fundamental causes of juvenile delinquency. Sociologists give emphasize on social causes while economists, biologists and psychiatrists give emphasize on economic, physiological and psychological causes. In general all these causes are responsible for juvenile delinquency.

4.1 Social Factors

Juvenile delinquency is a social crux and usually juveniles gain much delinquent behaviour depending what upon what opportunities are obtainable in their society.[24] In this regard, proper care of parents towards children is the most essential element for their normal physical and mental growth. Family is the first and foremost place where the formation of personality starts growing. But in the families where there is lack of proper parental control over the children, there is possibility that children of that family may get involved in delinquent activities. A happy conjugal life of parents entirely influences the lifestyle and thinking of their children but the lack of harmony in the relationship of parents badly disturbs the mental stability of children and tends them to follow wrong paths. Insecurity within the family, misunderstanding, quarrel between siblings etc have adverse impact in the emotion of children as they often forget to show respect to the elders. Presently the rate of divorce is sharply rising in Bangladesh and this is another major cause of juvenile delinquency. Children of such broken family do not get the proper affection from their parents. Absences of mother or father due to divorce or death, misunderstanding among parents are remarkably indebted to juvenile delinquency. Some families are there having good number of children and if anyone of them face undue discrimination in respect of affection and opportunity, they subconsciously grow delinquent tendency. Companionship has strong influence on juveniles while violent companionship turns juveniles into juvenile delinquent.[25] Gradually these juveniles form gangs in the society and the extent of their delinquency gets more aggressive. Criminality of parents can be a significant reason of juvenile delinquency as some research reports show that where anyone of the parents is engaged in criminal activities, their children often become criminal.[26] Such criminal actions of parents indulge their children to commit crimes. Some juveniles also attain such delinquent habit by imitating some of their relatives who are criminals. The risk of being delinquent by the children of such family is very high as they become curious and thrilled by criminal deeds of relatives.

4.2 Economic Factors

One of the most important causes of juvenile delinquency is poverty. Bangladesh is yet a developing country and majority of the juveniles fail to

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[24] Agarwal (n 3).

[25] Chowdhury, Khan and Uddin (n 9) 1-11.

[26] Ahmad (n 4).

achieve their basic needs from family and it leads them to pick wrong way and involve in delinquent activities. Children of poor families of Bangladesh often fail to achieve primary education and don't earn adequate knowledge to differentiate between right and wrong activities. As a result they choose illegal jobs to earn money and fulfil their basic needs. Child labor has been treated as a serious factor that operates juvenile delinquency. Almost majority of juvenile delinquents lead their life by hard working.[27] Many delinquents take part in killing operations, robbery and bank looting in exchange of money. Underworld godfathers are often alleged to use juveniles for fulfilling their criminal missions. These juveniles earn money by getting involved in smuggling, hijacking, pick pocketing and drug selling to fulfil their basic needs. Juveniles of rich family receive liberal amount of money which incites them to make wrongful use of that money. They get easily involved in gambling, visiting porn websites, political sabotage, buying illegal drugs and arms etc.

4.3 Biological and Environmental Factors

According to biological and physiological explanation people are influences by their genetic makeup. Many vital hormonal changes take place inside the body of juveniles which are responsible for impassioned and disobedient behavior.[28] Some kind of illness and incomplete growth may also be liable for juvenile delinquency. Many medical explanations opine that the criminals bear different physiological characters from righteous people.[29] Environmental and ecological factors play momentous role in the growth and behavior of juveniles. For socialization the environment of slum area of Bangladesh is not at all suitable but such residential environment has bigger role for building up the attitude and mentality of juveniles. Existing environment of slum area never brings good lesson for juveniles and promotes them to become criminal gradually. Due to such nasty condition of residential area the number of female delinquents beside male is also alarmingly rising. It is well established that if the residential area is very effective for the development of socialization among the juveniles, the rate of juvenile delinquency automatically reduces.

4.4 Psychological Factors

It is often realized that teenagers are mostly guided by their emotion rather than logic. Such emotional behaviors are equally liable for occurrence of

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27 M. Tajul Islam, 'Juvenile Delinquency in Bangladesh: Identifying the Causes with Reference to Some case Studies' (2015) Law Journal Bangladesh <http://www.lawjournalbd.com/2015/02/juvenile-delinqueny-in-bangladesh-identifying-the-causes-with-reference-to-some-case-studies/> accessed 6 January 2019.

28 ibid (n 3).

29 ibid (n 26).

juvenile offence. Before approaching towards any act the juveniles fail to judge the probable circumstances and upcoming result of that act. Some sociologist described that juveniles accomplish their desire by abnormal means when they fail to satisfy their fundamental needs.[30] Majority of the children in Bangladesh fail to get proper recreation from their home, educational institution and other social institutions. In such situation they do not get due support to grow up mentally which leads them to engage in various offences. In many families where both the parents are service holder outside home often fail to spend reasonable time with their growing children. These children spend lonely time in house which induces them to find their happiness outside home. Frequently spending time outside home and mixing with bad company increases the risk of deviation in the behavior of children as they do not hourly get their parents beside them to share their feelings. Furthermore, present world is the world of technology with both blessing and fatality for mankind. Juveniles in Bangladesh are seen to be always busy in using smart phones, watching action movies, chatting with friends through internet etc which deter them from learning some social values as well as continuous use of these technologies have severe negative impact on their brain functioning. Very few numbers of movies are now produced with good social lesson but mostly are full of action, fight, sensual and breath-taking scene and many other anti-social activities which make deep psychological knock on juveniles.

4.5 Cultural Factors

The prosperity in the field of industrialization helps to strengthen the economy of a country. But the running industrialization and urbanization are repeatedly breaking the joint families and reducing family influence over the children. Many families are continuously migrating to urban area for want of service and education but making it over crowded. In some regions of Bangladesh river erosion has become a major problem. Residents of those areas are losing their homeland and coming to urban areas in search of accommodation and job. The cost of living as well as slum dwellers are uniformly rising. Poverty, illiteracy and unemployment have added more sufferings to these people. At the end the children of these families having no other occupation get involved in massacre, smoking, drug business, prostitution, snatching and many other delinquent acts and even some politicians also use these juveniles to sustain their dominance within their locality.[31] Some unjust cultures from neighbouring countries have exceedingly intruded and diminishing the local cultures.

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[30] ibid

[31] ibid

5. Incidents and Cases of Juvenile Delinquency in Bangladesh

Throughout ages Bangladesh has witnessed many horrible occurrences of juvenile delinquency. One of those is the murder of both the parents by Oishee whose age was nearly 19 years. She brutally killed both her parents while they were sleeping in their house. Oishee had been suffering from depression since many years. Once she was a topper in school but later was equally addicted to drugs and had bad companies. After killing of her parents Oishee confessed her offence and described that her parents never tried to understand her emotions and failed to fulfil her basic needs. She never received proper recreation from her family and was often subject to severe punishment. The incident took place in 2013. Oishee used sleeping pill in coffee which was served to her parents. When they were asleep she firstly killed her father and then her mother. Her aggression towards her mother was very horrible as she made around eleven wounds on her mother's body. When her younger brother found their parents dead, Oishee lied to her brother and house mate. She left home in next morning with jewelleries. Some friends of Oishee were alleged to induce her in commission of this murder case. Oishee was sentenced to death penalty and later High Court Division commuted her sentence to life imprisonment. Another notable incident took place in 2018 at Chattogram when a girl named Tasfia was murdered who was a student of nine standards of Sunshine Grammar School and College. She was a girl of 16 years who went on a date with her boyfriend Adnan. On that day she did not return home and on next day her dead body was found at the Naval Road area. Tasfia and Adnan first became friends on social media. Later on their friendship turned into amour. She went out to meet her boyfriend at a restaurant without informing her parents. Her father claimed that the murder was pre-planned by her boyfriend. Her father added that several gangs of juveniles in the urban areas of Chattogram are engaged in many anti-social activities. The case is still pending before the court.

6. International Instruments towards Juvenile Delinquency

The problem of juvenile delinquency around the world is not a new issue but frequently taking more aggressive form. Considering the ongoing situation many international conventions, rules and guidelines were made for ensuring the legal rights of children getting involved in conflict with law. Notable numbers of initiatives are taken by the United Nations for setting the standard of treatment for these delinquent children such as the UN Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules[32]), the UN Guidelines for the Prevention of

[32] 'Beijing rule' is a UN General Assembly Resolution on the treatment of juvenile prisoners and offender of its member states which is called United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Juvenile Delinquency (Riyadh Guidelines[33]), the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), Guidelines for Action on Children in the Criminal Justice System and many more.

6.1 The UN Convention on the Rights of the Child (UNCRC) 1989

The UNCRC Convention is the comprehensive international instrument which provides a standard for the state parties while children engages in any criminal activities as well as requires state parties to take every necessary approach for the safeguard of children against any severe and degrading punishment or discrimination. The Convention also contains directions towards public and private social welfare bodies, court and any other relevant administrative authorities to ensure proper welfare means for the enhancing the rights of children. CRC describes that state parties shall ensure that a child under age of 18 years shall not face any punishment in the form of torture, cruel and inhuman treatment or imprisonment and shall not be deprived of liberty arbitrarily.[34] Such a child shall also not be tried jointly with adults and must be given adequate scope to maintain contact with family. Under the aforesaid article, if any child under 18 is deprived of his liberty then he will have the right to challenge such deprivation in the court of law. The Convention on the Rights of Child says that any child during trial shall be deemed to be innocent until proven guilty and has the right to take legal assistance from parents. A child shall not be compelled to confess guilt and if he/she fails to understand the language of court, an interpreter to be appointed. The Convention guarantees the child's right to privacy during the whole stage of proceedings. With conformity with the direction of the Convention the state party must enact laws, make regulations and establish courts for the separate trial system applicable to the children alleged to be delinquent. The state party also bears a duty to fix a minimum age below which a child shall not be presumed to have the ability to commit any violation of penal laws.[35] There shall be availability of adequate means of care, guidance, probation, vocational training program, counselling, foster care and other relevant institutions necessary for the welfare of children.[36]

6.2 Beijing Rules 1985

Provisions of separate and specialized system of juvenile justice are highly emphasized by the Beijing Rules of 1985 and discouraged capital as well as corporal penalty for the children. These rules ensure the education and care

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33 'Riyadh Guidelines', Adopted and proclaimed by General Assembly resolution 45/112 of 14 December complementing the Standard Minimum Rules for the Administration of Juvenile Justice adopted in 1985, paving a positive and pro-active approach to prevent the rise of crime in the youth.

34 The UN Convention on the Rights of the Child (UNCRC), 1577 UNTS 3(CRC), adopted 20 November 1989, entered into force 2 September 1990.

35 Khan (n 8) 47-54.

36 Noman (n 10) 53-81.

mechanism for the children under detention during trial procedures. Directions to the court are also made by these rules to exercise its discretion for the best interest of children. Beijing Rules of 1985 have discussed that the minimum age of aggregating criminal responsibility must not be fixed at too low age level and state must take initiatives for conserving the privacy of the child offenders by keeping all the relating records confidential. Establishment of special police cell is encouraged by the Rule 12 of Beijing Rules.[37]

6.3 Riyadh Guidelines 1990

The UN guidelines give more importance on the extensive plan and effectiveness of institutional crime regulating agencies so that prevention of juveniles from committing crime will be more possible. Similarly Riyadh Guidelines also impose restriction on cruel and degrading punishment upon juvenile delinquents.[38]

6.4 Havana Rules 1990

Havana Rules impose strict restriction to keep all the records confidential relating the trial of child offenders. Imposing any capital punishment on child offenders in the form of cruelty or inhumanity is totally barred. Havana Rules require the state government to formulate and supervise reasonable number of Child Development Centres for the reformation, training and accommodation of child offenders as well as to sustain a minimum standard of care in such development institutions.

7. National Legal Response to Repress Juvenile Delinquency

There are good numbers of legislations relating to children but the Children Act, 2013 is the comprehensive law in Bangladesh dealing with child rights, delinquent children, their correction mechanism and separate justice system from adult offenders. Apart from this, the Constitution of Bangladesh, the Penal Code, 1860, the Compulsory Primary Education Act, 2013, the Vagrancy Act, 1943, the National Children Policy, 2011, the Prevention of Violence against Women and Children Oppression Act, 2000 including some other laws are related to the Juvenile matters within Bangladesh.

7.1 Constitutional Mandate

In Bangladesh the supreme law to govern the fundamental rights of the entire citizen is the Constitution of the People's Republic of Bangladesh. Article 28 has empowered the state to bring special provisions in favour of women and children. Besides, Article 15 describes about the fundamental responsibility of

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37 ibid (n 33).

38 ibid

the state to safeguard the right to social security. Accordingly Article 31, 32 and 35(3) have guaranteed the fundamental rights of protection of law against arbitrary arrest, right to life, right of equal protection of law and right to speedy and fair trial equally applicable for both adult and juvenile.

7.2 Treatment under the Children Act, 2013

The Government of Bangladesh has enacted the Children Act, 2013 which is a substantive law as well as the principal law dealing with the protection of children and children in conflict with law. This Act has repealed the previous Children Act of 1974. The Children Act, 2013 is also known as 'Shishu Ain, 2013' which comprises of 100 sections. The preamble of the Act reveals that this Act has been enacted with the aim of implementing the United Nations Convention on the Rights of the Child. The Children Act, 2013 has mentioned that a child means a person of 18 years or below the age of 18 years. One or more Probation Officers in the district, upazila and metropolitan areas shall be appointed by the government under this Act. Formation of a National Child Welfare Board under the supervision of the Ministry of Social welfare is also recommended.

For the purpose of the Children Act, 2013 at least one court shall be established in every district headquarter and metropolitan area which will be known as 'Children's Court'. The Government of Bangladesh is empowered to establish juvenile courts under the Children Act, 2013 and in absence of juvenile court the High Court Division or Sessions Court or Additional Sessions Court will be empowered to act as juvenile court. The juvenile court shall have the jurisdiction to try a case in which a child is alleged to commit any offence and dispose of any such case following the proceedings of the Act. The room or building of the juvenile court shall be a separate one from the regular courts of adult. During the trial stage of any juvenile offender the court shall consider his/her age, character, socio-cultural background and living circumstances.[39]

The Children Act, 2013 states that the Ministry of Home Affairs shall take proper initiative to establish of a 'Child Affairs Desk' at every police station headed by a 'Child Affairs Police Officer (CAPO)' who will not be below the rank of Sub-Inspector (SI). Under this Act if any police officer arrests a child, then his age must be determined by birth certificate, school certificate or any other information relating birth date of the child. The arresting police officer must inform the Child Affairs Police Officer (CAPO) immediately about the reason, place and details of such arrest of child. No arrested child shall be handcuffed or tied with rope around his waist and must be kept in safe and appropriate place in police station or in a safe place separated from adult offenders.[40] It is declared by the Appellate Division of the Supreme Court of

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39 ibid

40 ibid (n 26).

Bangladesh that arrest or preventive detention of any child under the age of 9 years in any circumstance is illegal.[41] The Children Act has also strictly prohibited the arrest of any person under the age of 9 years. After the arrest of any child, the CAPO must inform the parents or in their absence, the legal guardian or member of his/her family or foster care or probation officer where necessary. If informing any one of these persons is not possible then on the first day of appearance before the court CAPO must submit a report with reasons for his failure to do so. The Children Act, 2013 provides essential procedures to be followed after the arrest of any child and where the Act is silent, the rules of the Code of criminal Procedure, 1898 will be applied.

The Act has forbidden the joint trial of juvenile offenders with adults. In the case where a child took part in commission of offence with adult, separate charge sheet shall be submitted for child offenders.[42] Section 52 of the Children Act indicates that keeping other laws aside, if the case of any child does not deal with by way of diversion, the child may be released on bail with or without surety. A child offender shall have the right to be presented by legal counsels and if his/her guardians fail to afford a legal counsel, they will receive all sort of assistance from legal aid. The Children Act also forbids public trial of any child offenders and publication of any public report disclosing the identity of the child concerned is strictly prohibited. No sentence of death penalty, transportation or imprisonment shall be passed against a juvenile offender unless the learned court finds that he/she has committed very serious crime or the nature of the juvenile is very unruly or wicked that he/she cannot be committed to the certified instituted. Such delinquent juvenile can be sentenced with imprisonment that may extend from 3 to 10 years. The Children Act, 2013 enumerates other alternative approach instead of detaining juvenile offenders in prison. Under the Act the Government or the juvenile court may appoint probation officer for particular juvenile and duties of such probation officer will be supervised by the juvenile court. If the court is satisfied the juvenile offender may be discharged after admonition, released on probation under the care of parents or any other responsible authority. The court after such release of child offenders shall receive regular report about the behavioural and mental condition of the child. It is necessary to note that section 37 of the Act describes that the probation officer will take initiatives to settle the dispute between the victim and the juvenile offender.

7.3 Trial Procedures under the Code of Criminal Procedure, 1898

In Bangladesh, provisions regarding separate trial system for the juvenile delinquents are provided by the Code of Criminal Procedure (Cr.PC), 1898.

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41 ibid (n 23).

42 ibid (n 26).

This law bars the joint trial system of juvenile and adult offenders.[43] Section 392 says about the method of inflicting penalty by whipping to the juvenile offender below the age of sixteen years and such whipping shall not exceed thirty strips. Provision relating to the confinement of juvenile delinquent in reformation system is found is Section 399. If anyone below the age of fifteen years of age is sentenced to imprisonment, the court may order to confine such offender in reformatory centre instead of being imprisoned. Under Section 497(1) any person under the age of sixteen years being an accused of a non-bailable offence may be released on bail unless the charge brought against him is punishable with death or life imprisonment.

7.4 Juvenile Delinquency in Penal Code, 1860

The age of criminal responsibility has been fixed by the Penal Code, 1860 of Bangladesh. This Code says that anything done by a child below nine years old is not an offence. It is also mentioned that if a child between nine years to twelve years of age is to be convicted of an offence, it must be ascertained that he has full maturity to realize the nature and consequences of the act committed.

7.5 Provisions of Vagrancy Act, 1943

The Vagrancy Act ensures the rights of vagrant child asking for alms and living upon the help of others. The arrest and detention of such children as well as threat to these children to extort bribe is also arbitrary under this Act.

7.6 Correctional Measures under the Probation of Offenders Act, 1964

Probation is basically a form of suspension of sentence and exemption of offenders from imprisonment. Probation mechanism for juvenile delinquent is governed by the Probation of Offenders Act, 1964 beside the Children Act, 2013. Under this Act juveniles who are first and minor offenders enjoy probation irrespective of age, behavioral and mental condition. These juvenile delinquents will receive social education as correctional system under the supervision of probation officers.

8. Deficiency in Present Juvenile Justice System to deal with Juvenile Delinquency

The age of criminal responsibility is the utmost vital factor to consider a child as a juvenile delinquent. In the legal system of Bangladesh determination of the age of children is always a challenge. The definition of a child under the laws of Bangladesh is not precise and specific. Different laws show different

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[43] ibid (n 10).

age limit for the delinquents.[44] It is very unfortunate that there is no specific method in the Children Act, 2013 or in any other regulations to determine the age of children of a disadvantaged class like street children, poor and orphan children who were never admitted in school and have no birth certificate. It is very much impossible to understand the age of such juveniles and often reported that these children are kept in prison with adult as their age could not be determined. These juveniles often face torture and harassment by adult criminal and get negative lesson.

The government of Bangladesh has also failed to take any pre-preventive measures to diminish the trend of juvenile delinquency. There is huge lacking in the training system of public officers regarding juvenile justice system. Lack of separate prison for juvenile delinquent, faulty reporting system, no precise system of monitoring, corruption of police department, non-establishment of child help desk in police station have added more agony in the juvenile justice system. As a result juvenile delinquents are continuously being deprived of care and their chance of being reform is not growing. Sufficient number of children court with extended jurisdiction has not yet established.[45] Absence of child-friendly environment in court room, treating like adults during trial, same lockup for both adult and juvenile, non-arrangement of camera trial etc have made the condition of child offenders miserable.

Adequate numbers of Child Development Centers have not come into existence and shortage of budget and man power still remains. Vocational training institutions are equally short with their numbers and trainers as well. Proper education and awareness based on juvenile delinquency in primary, secondary and graduation level is absent and thus it has created big knowledge gap among children about good and bad deeds. There is not even any direct article regarding juvenile justice in the Constitution of Bangladesh as well as no separate procedural law and penal law made exclusively for juvenile justice system. No separate Child Rights Commission has also been formed and ADR in cases of juvenile delinquency becomes very rare due to absence of such welfare institutions.[46]

9. Recommendation

Juvenile justice system of Bangladesh has been formed by adopting alternative diversionary mechanism instead of customary and complicated justice system to safeguard the best interest of the juveniles coming in conflict with law. Mere promulgation of laws will not bring success but their precise and reasonable implementation is necessary. Many considerable arrangements

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44 Ferdousi (n 13) 22-32.

45 ibid (n 10).

46 ibid

are not possible to implement in Bangladesh unless it is practically cultivated by Government, family members, community members and other stakeholders indeed. Thus, for ensuring the fruitful treatment of the juvenile delinquents, following recommendations can be made to deal with the issue of juvenile delinquency in Bangladesh:

- The Government shall take effective pre-preventive measures to deter the juveniles from commission of any type of anti-social activities. In this regard Joint co-ordination of Government and NGOs may take a pivotal role to deal with the aspects of juvenile justice within procedural and non-procedural approach.

- Adequate number of juvenile courts with precise jurisdiction must be established. These courts must be totally separated from traditional criminal courts engulfing flexible and child-friendly trail system.

- In addition, establishment of 'Child Affairs Desk' at every police station headed by a Child Affairs Police Officer (CAPO) must be ensured. (CAPO) must be well trained up particularly on the matters relating to lockup, monitoring and supervision of adolescents.

- To deal with the administration of juvenile justice more efficiently, professional training and courses must be arranged for personnel such as judicial officers, lawyers, police officers and probation officers.

- Mechanism to ascertain the age of juvenile delinquent must be introduced in more specific and practical way to avoid the possibility to treat him/her like adult criminal in trial proceedings.

- Sufficient number of child friendly institutions with all facilities such as food, medical care, educational and training management should be formed. Proper health care and social education shall be maintained for those juveniles victim of neglect and violence.

- Proper monitoring system must be ensured by setting up a special cell in the Department of Social Service under the Ministry of Social Welfare. In the Divisional Headquarters, some branch offices may also be opened.

- Complications to access to court such as court fees and lawyer fees have to be removed. The National Welfare Boards should be placed to take all possible steps to facilitate the juvenile offenders and his/her family to seek assistant of court free from any tangled issues.

- In the cases of juvenile delinquency, ADR mechanism in the form of mediation, diversion or arbitration should be encouraged. All the procedural information of court proceedings should be informed to the concerned juvenile and family.

- Study program on issues regarding the proper behavior, juvenile delinquency and punishment must be taught in educational institutions to breed awareness among children about juvenile delinquency.

- An active and factual Child Rights Commission should be embedded to protect the rights and interest of the children in conflict with law.

- Social awareness must be made about the negative effect of social media, pornography, internet and adverse foreign culture upon the lenient mentality of the children. Criminal politicians those are inducing juveniles must be socially boycotted.

- Lastly not least the family, society and the state need to be more conscious and concerned about the learning and daily deeds of the juveniles. Family should deal with the juvenile delinquents with positive and reformative approach rather than dogmatic and punitive tactics.

10. Conclusion

Juvenile delinquency and social disorder related to this is a common panorama in many countries of today's materialistic world. However, this problem is more formidable in the developing countries and Bangladesh is not free from this most momentous social anxiety of current time. In the society of rapid pace of globalization and industrialization, the control of parents and elders that was previously effective to deter juveniles from getting involved in criminal activities has become faint. In this fast changing world of science and technology people have changes their lifestyle a lot. The basic socialization that worked through groups like family, peer groups, ties of neighborhood, close kin circles is gradually becoming abortive in the societies of Bangladesh. Juveniles face negative effect by these changes of society and led them to become a criminal. Due to poverty, absence of parental affection, conflict within families, lack of basic needs and criminalization of politics etc are the considerable factors behind the alarming rate of juvenile delinquency in Bangladesh is rising alarmingly. They are getting involved in drug and arms business, sexual offences, kidnapping, murder, bombing and many other anti-social activities. The Children Act, 2013 of Bangladesh can be considered as a progressive step by the Government of Bangladesh to establish comprehensive juvenile justice system to keep pace with changing trends in juvenile crimes. But existing legal frameworks and practices do not entirely comply with the standards of international instruments and there remains a gap in implementation to defend the best interest of the children. The lack of knowledge and absence of institutional development towards the rights of the children by those dealing with justice system such as judiciary, police and probation officers are still remaining. Arrest, detention and trial procedures for juvenile offenders are still not suitable. It is now a must for the Government to train up these personalities concerned in criminal justice system so that worthy

implementation of the law can be ensured. More effective and least time consuming more juvenile courts should be established in every district. The civil society as well as the institutional management system shall be accompanies with constructive social policy for the preclusion of juvenile delinquency with emphasis on free learning and employment. Furthermore, the juvenile system of Bangladesh should be shaped with a non-traditional criminal justice system which will be the conjunction of the non-formal attributes with formal procedures and system to deal with juveniles in conflict with law.

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Polygamy in Bangladesh and Legal Advancement: A Critical Appraisal

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Abstract

Polygamy as a valid practice is included in the legal system of many countries who apply Shariah in the personal matters. Islam allowed marrying up to four wives in an exceptional situation. But the system is often widely practiced as a special prerogative of a husband and is manipulated over the time. Many states made necessary changes by way of *ijtihad* and made it applicable and accommodated the practice according to the social transformation. Polygamy cannot be considered as a matter of religious interpretation only it embraces social, economical, psychological and personal liberty and security. It can also be treated as reason and consequence for torture (both mental and physical) against women, dowry and domestic violence. A very few states prohibited the system but could not bring desired result because of other social problems occurred for making it a non-accessible scheme. The existing law of restricting polygamy in Bangladesh failed to reflect the actual aim of the Shariah. This paper aimed to discuss the system of polygamy existing in Bangladesh, made a comparison with the contemporary nations who brought required changes. Focused on judicial activism as a parallel weapon but suggested for necessary statutory intervention as a probable solution.

Keywords: Polygamy, Shariah, Reform, Statutory Intervention, Polygamous Marriage.

Introduction

Polygamy as a permitted practice exists in many countries of the world where *Sharia* is in operation. However the corresponding trouble caused by the institution which contemplates both legal and social, are hardly addressed. Polygamy is permitted only in an exceptional situation but in societies it has often been treated as a right of a male. Generally polygamy is a process where a man is allowed to have more than one wife at time. Polygamy is lawful in

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many countries around the world. There are lots of arguments argued by the society in favour of polygamy both from religious and secular perspectives. Despite the fact that, the very concept of polygamy upraises various legal injuries in 21st century, family disputes being one, have failed to secure much legislative attention. As a result, many countries either outlawed or imposed legal restrictions for entering into polygamous marriage including Bangladesh. The procedural restrictions on polygamy in Bangladesh has been enacted five decade ago which currently declines to meet the actual aim of the statutory prohibition. Therefore, in Bangladesh the laws regulating polygamy has a room to renovate its provisions by accommodating the progressive legal reforms of other countries in the world.

From the time of British period there is a development of changing religious laws by legislative enactments to encounter the challenges of time. Before the partition of India and Pakistan, matters concerning family relationship were governed by the Shariah eventually modified by the interpretation. Subsequently, in 1972 Bangladesh as an independent country recognized that, all the laws that were in force in Bangladesh on 25th March, 1971 continued to be so in force by the proclamation of the Laws Continuance Enforcement Order, 1971.[3] As a result, most of our statutory laws operating in family issues were the enactment of the then East Pakistan Government. Among those The Muslim Family Laws Ordinance 1961 plays a pivotal role in the settlement for personal dispute. This Ordinance legitimates polygamous marriage of Bangladeshi Muslims community subject to certain restrictions. History of legal reforms verified that this evolutionary enactment was the achievement of regular persuading by All Pakistan Woman's Association in 1950s to curb polygamy in Pakistan (including East Pakistan, now known as Bangladesh) and the reformers admitted some reasonable compromise between traditionalist and modern view of polygamy.[4] In due course, society demands more secured laws in family matters to diminish the agony of polygamous marriage.

In current trend, many Islamic state or the states which apply Shariah have been endeavouring to configure the Muslim personal law with contemporary legal improvement but obviously not at the cost of its holy nature.[5] The objective of writing this paper is three folded: to critically analysis the existing laws on polygamy in order to determine the widest possible scope for reforms; to review the modern legislation relating to polygamous marriage in different countries, and finally, to suggest some appropriate legal recommendations to make it more effective and a better accessible institution.

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3 Judicial Portal of Bangladesh, 'History of Judiciary of Bangladesh' <www.judiciary.org.bd/en/judiciary/history-of-judiciary> accessed 3 November 2018.

4 Naila Maqsood, 'The Debate over Polygamy in the Context of Muslim Family Law' (2016) 28(4) Sci. Int. 5.

5 Mohammad Ataul Karim and Saeed Ahsan Khalid, 'ADR Mechanisms in Polygamy and Divorce under the Statutory Laws of Bangladesh: A Critical Analysis' (2016) 4 Jahangir Nagar University Journal of Law 1, 3.

Polygamy in Islam

Monogamy is the ruling of Islam, whereas polygamy is an exception.[6] Islamic law allows, subject to strict Quranic conditions, a man may marry up to four wives at one time in complying appropriate narrow circumstances.[7] The Holy Quran expressly states that: "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one or what your right hands possess; this is more proper, that you may not deviate from the right course".[8] The aforesaid verse is very clear that if a man is hesitant to perform equal behaviour to his each existing wives, monogamy is the only choice. Again the Holy Quran unequivocally declares:

> "And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging. And if you amend [your affairs] and fear Allah - then indeed, Allah is ever forgiving and Merciful".[9]

These two arguments imply that monogamy is the preferred rule in Islam as because it is impossible or hard to satisfy the sacred imposition of Quran for a human being. Unfortunately, this permission of polygamy is widely misused by many Muslim societies and the social perception is that a man can marry up to four wives unconditionally[10] irrespective of the stipulation that they must act 'equal' among them. The word *Adle* is used to express the term Justice between the wives which translates 'Just Behaviour'. There are several jurist who felt doubt about the biasness of human being and it is quite impractical to behave justly or equally with every single wife.[11] Nasir commented:[12] 'Indeed, it is now widely held, because the condition of justice and fairness in all things is too difficult to fulfil, that men should lead monogamous lives, unless the circumstances of any particular Muslim society necessitate otherwise.'

In addition, polygamy is not a general rule and must not be practiced generally, but an exceptional rule that Almighty Allah has bestowed many wives for capable Muslim men, as a different preference who can meet the prerequisite of Quranic verse such as necessity, and not for gratification.[13]

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6 Dr. Muhammad Faiz-ud-din, *A Text Book on Islamic Law* (Shams Publication 2009) 56.

7 Muhammad Ekramul Haque, *Muslim Family Law* (LCLS(S) 2015) 204.

8 Sura An-Nisa, Verse- 3. <www.noblequran.com> accessed 10 November 2018.

9 Sura An-Nisa, Verse- 129. <www.noblequran.com> accessed 10 November 2018.

10 Haque (n 7) 204.

11 Tanzilur Rahman, *A Code of Muslim Personal Law* (Islamic Publication 1978, vol. 1) 92.

12 Jamal. J. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (3rd edn, Brill Arab and Islamic Laws Series 2009) 26.

13 Dr. Raudlotul Firdausbinti Fatah Yasin and Dr. Mohd. Shah Jani, '*The Efficiency of Legal Provision on Polygamy in Malaysia, A Critical Analysis from Qur'anic Perspective'*

Some jurists conclude the policy of polygamy in Islam as 'rukhsat' (permission), and not 'azimat' (fixed rule).[14] The answer of this permission can be found by the analysis of the situation when Surah Al-Nisa of the Holy Quran was revealed. After the battle of Uhud, dozens of Muslim were martyred leaving behind widows and orphans in want of support.[15] On that particular time, it was rational to allow continuing matrimonial liability with more than one wife to balance the society with male and female ratio. Moreover, there was a huge possibility of social illness regarding women exploitation. Polygamy was considered as the single accepted policy for the best protection against indulgence in indecent activities. It also offered a moral, practical and humane solution for those problems.[16] Another important reason was to establish close ties after the war of Uhud with the neighbouring communities who were earlier found to be fighting and showing hostilities.

The Islamic law considers the system of polygamy as one of the last recourse to be taken and practiced as of rights. As divorce was considered a worse practice, Polygamy was instituted as a better alternative. Before including the concept of polygamy men used to take wives not limited within a number so it is evident that the reason behind was to minimize the number up to four.

As of today, Shariah is being prevailed to interpret laws relating to Muslim personal matters. The laws concerning polygamy should uphold the will and aspirations of Islamic disclosure of the specific verses of the Quran. In short, the main objectives of polygamy in Islam might be summed up as follows:

1. Monogamy is the general rule of Islam but polygamy may be tolerated subject to comply with certain rigid conditions. The object of polygamy was to create and sustain marriage and to legalize the relationship of men and women in exceptional circumstances. One of the strong reasons behind allowing polygamy is to give respect and protect rights of widow and orphans not only social protection but also economic, as the property of a man devolves upon its wed locked wife and not upon the divorced wife.

2. Polygamy is not prohibited by Islam. However Shariah limits the number of woman to be married as wives and the limit will not be more than four[17] and the intention is to do justice, fairness and any sort of ease in favour of the women.[18]

(International Conference on Multidisciplinary Innovation for Sustainability and Growth, Kuala Lumpur, 27-28 August 2014) 5.

14 Rahman (n 11) 93.

15 Komayal Hassan, 'When Polygamy is Allowed in Islam?' <https://blogs.tribune.com.pk/story/26080/when-polygamy-is-allowed-in-islam/> accessed 10 November 2018.

16 Raushan Ara, 'Receding Traditional Controvercies Regarding Women's Right in Islam' in D. M. Khan (ed), Women's Right in Islam (The Nahar Light Foundation 2009) 75.

17 Sura An-Nisa, Verse- 3. <www.noblequran.com> accessed 10 November 2018.

18 Yasin and Jani (n 13) 5.

3. The ultimate aim of the permitting polygamy is to do justice to vulnerable women but it does not permit to do injustice to his existing wife and children.

In conclusion, according to Quranic restrictions it is clear that polygamy is not encouraged by Islam as a norm to lead a family life. It is very unfortunate that many Muslims believe that they can have four wives without any doubt and responsibility. In another word, it could be a misconception of patriarchal society. Therefore, enactment of new law covering the areas of Muslim Personal laws consisting Islamic perceptions should be covered up with all the possible aspects and objectives which can ensure the end of justice both the individuals and society.

Polygamy: The Transformation from Islamic Approach to Statutory Intervention

Many countries around the world enacted different laws either to permit or to prohibit polygamy. Most of the countries imposed some procedural requirements to be confirmed by a male contracting polygamous marriage. For example, Syria, Iraq, Jordan, Pakistan, Bangladesh and Malaysia have made polygamy subject to permission by statutory authority of fulfilling certain conditions. On the other hand, many Islamic countries discouraged polygamy and tried to put embargo by the way of stipulation through their legislation. For instance, Tunisia and Morocco has prohibited polygamy on their personal law.[19] The reason for preventing the rights of polygamy under statutory laws has a religious overtone. Because, the Quran itself inserts strict conditions to carry out polygamy and also reminded the probable chance to do mischief in the society. In fact, Islam tolerates more wives for a husband as a secondary option in support with socio economic background of him where the alleged purpose of Quran may well be satisfied. For example, a very poor man (who does not have the capacity to provide maintenance to his existing wife) or a man of wicked reputation (for misbehaving with his wife) should not be permitted to marry more than one at a time. Thus a state can take initiatives for scrutinizing their social perceptual experience and sustainability for enabling polygamy in respect of Islamic overtone.[20]

In present context, right to polygamy is a debating issue for many Islamic countries, especially those who adopted secularism within the purview of Shariah and has undergone remarkable changes. Among the states some argue for draconian legal barriers and abolishment to do polygamy and many Islamic countries still permit many wives unreservedly. The issue can be realized by the various facts and circumstances of standing and legal implementing mechanism of individual state party.

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[19] The Moroccan Family Code 'Moudawana' 2004, The Tunisian 1956 Code of Personal Status.

[20] Haque (n 7) 206.

Origin of legal provisions of Polygamy in Bangladesh

After the emergence of Bangladesh in 1971, initially there was no change of laws and the judicial system. Bangladesh adopted all the personal laws of Pakistan including both statutory and personal. In fact, most of the Pakistan's legal system was enacted by the British colonial administration. Following the Warren Hastings's legal reforms in 1780, the British established secular civil and criminal justice system in lieu of the administration of Islamic law, counting the customary usages of Muslim, with regard to personal and family matters.[21] Beside this, the various eminent Muslim leaders raised objections for applying common law respecting Shariah provisions in personal matters.[22] In 1937, the Muslim Personal Law (Shariat) Application Act was passed by the British and the enactment re-enforced application of Shariah on the number of specified matters such as marriage, divorce, maintenance, dower, guardianship, gift and intestate succession.[23]

After the independence of India and Pakistan, over a decade, family law did not experience any refoms. In 1961, Muslim family Laws Ordinance was promulgated bearing in mind the constitutional provision of Pakistan in 1956 that no law repugnant to Islamic injunctions would be enacted and that all exixting law would be considered and amended in light of this provision.[24] The context of this ordinance is quite interesting and encouraging for all woman who were struggling for their precise religious and constitutional rights as a human being and also a citizen of a country. The former president of Pakistan, Muhammad Ali Bogra, remarried his secretary Aliya Begum in 1955 although still having his first wife Begum Hamida, who was an activist of an organisation named 'All Pakistan Women Association' (APWA). subsequently, APWA along with another organisation named 'United Fornt of Women's Rights' managed to introduce a new Ordinance/Bill for the protection of rights of woman in family relations.[25] Much debate has been done between the committee of Modernist vs. Traditionalist in the pakistan and finally in 1961 Pakistan initiated their first legal step towards ensuring men and women 'equal rights' through the declaration of The Muslim Family Laws Ordinance 1961(MFLO) in March 1961.[26] The ordinance coated the question of succession, marriage registration, polygamy, divorce, maintenance, dower and dissolution of marriage. The Muslim Family Laws Ordinance was the first legal attempt in pakistan to codify Muslim Personal

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21 Ridwanul Hoque and Md. Morshed Mahmud Khan, 'Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh' (2007) 14(2) Islamic Law and Society, 214.

22 From the statement of object and reasons accompanying the Bill of The Muslim Personal Law (Shariat) Application Act 1937 Act no XXVI of 1937.

23 The Muslim Personal Law (Shariat) Application Act 1937 (Bangladesh), s 2.

24 Maqsood (n 4) 1.

25 ibid

26 ibid

Law maintaining reliability with religious analysis. Converselly, it had much significance towards the safeguards of women in marriage, polygamy, divorce and so on.[27]

Following the legacy of India and Pakistan, all the laws relating to shariah and MFLO 1961 are existing in Bangladesh depending on certain modifications and required amendments.[28] In 1974, Bangladesh introduced its first statute in relation to Muslim Family Law as the Muslim Marriages and Divorces (Registration) Act 1974 and later on The Family Court Ordinance 1985[29] (composed of judges of the lowest civil tier of the judiciary) with exclusive authority to try and entertain suits relating to five specified matters: dissolution of marriage, restitution of conjugal rights, dower, maintenance, and custody and guardianship of children.[30] However, matters on polygamy is not the exclusive jurisdiction of the Family Court rather the law reffers that pre permission to do polygamous marriage has to be obtained by the Arbitration Council.

Existing (Statutory) Provisions on Polygamy in Bangladesh

The Muslim Family Laws Ordinance, 1961 imposes a restriction on arbitrary polygamy in Bangladesh. Section 6, Sub-section (1) to (5) discuss on the conditional restriction on the permission of polygamous marriage and its effect, application procedure, duty of the Arbitration Council, revission of the decision of the council and lastly the remedy for the existing wife.[31] However, having those rules still the practical social senario in Bangladesh about polygamy is not demonestrating the actual objectives of islamic tone with the core statutory aim of such restrictions of having many wives at a time. Before the explanation of the efficiency and justification of the existing laws on polygamy in Bangladesh, a brief introduction is necessary of the said provisions are following:

6(I) A man, who have a living wife or wives shall not contract marriage again, without the prior written permission[32] of the Arbitration Council, and without such permission the contracted marriage shall not be registered too.[33]

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27 Mumtaz Ahmad, 'The Muslim Family Laws Ordinance in Pakistan' (1993) 10 International Journal on World Peace, <www.jstor.org/stable/20751912?seq=3#metadata_info_ tab_contents> accessed 12 November 2018.

28 Abdullah Raihan, 'The Legal Reform of the Islamic Family Law in Indian Sub-Continent' in D. M Khan (ed), *Women's Rights in Islam* (The Nahar Light Foundation 2009) 1-15.

29 As amended by the Family Courts Ordinance (Amendment) Act 1989.

30 S. 5.

31 The Muslim Family Laws Ordinance 1961 (Bangladesh), s 6.

32 The Muslim Family Laws Rules 1961 (Bangladesh), r 15.

33 ibid (n 31) s 6(1).

6(II) A written application of such proposal shall be presented to the chairman of the Arbitration Council in the prescribed manner, along with the prescribed fee, and shall specify the grounds and importance for the intended marriage, and whether the consent of the existing wife or wives has been obtained thereto.[34]

6(III) In reply to any submission, the chairman shall inquire the applicant and his existing wife/wives each to recommend representative, and the arbitration council so composes may with the satisfaction of another proposed marriage is just and necessary while in presence of an existing marriage then may allow the aforesaid proposition.[35]

In judging the application by the Arbitration Council shall consider to conditions for instance, sterility, physical infirmity, physical unfitness for the conjugal relation, unreasonable avoidance of decree for restitution of conjugal rights or insanity on behave of the existing wife and shall record of the explanation of the assessment.[36]

6(IV) If any party aggrieved by the decision of Arbitration Council may, file an application for revision to Assistant Judge Court, on the prescribed manner within the stipulated time and the judgment of assigned court shall be absolute, and cannot be called in inquiry in any court.[37]

If any man fails to pursue the set rules will be deemed as a punishable offence and the punishment will be

6(V) (a) full payment of dower, if due to any existing wife/ wives, and (b) on demonstrating definite guilt, the accused shall be punishable with simple imprisonment which may extend to one year, or with fine which may extend to ten thousand taka, or with both.[38]

Explanation of the Efficiency of Legal Rules on Polygamy in Bangladesh

The statutory authorized provisions on polygamy on the aforesaid ordinance of 1961 have been chosen in order to ensure that it may "transform a family dispute resolution system from one that disrupts and tears apart families to one that helps to heal them".[39] The main features of the ordinance are to ensure and enable to maintain Muslim lifestyle. However, with all the earnest efforts

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34 ibid s 6(2).

35 ibid s 6(3).

36 ibid s 14.

37 ibid s 6(4).

38 ibid s 6(5).

39 Barbara A Babb and Gloria Danziger, 'Families Matter: Recommendations to Improve Outcomes for Children and Families in Court' (June 2014) <http://ssrn.com/abstract=2504076>or <http://dx.doi.org/10.2139/ssrn.2504076> accessed 7 November 2018.

of our lawmakers, the prevailing enactments regulating polygamy have been entangled with the following loopholes and uncertainties.

Party to whom this statutory restriction is applicable?

In Bangladesh, the restriction for polygamous marriage is only applicable for Muslim citizens not for others as like Hindus, Buddhist, or Christians. Section 1(2) of the Muslim Family Laws Ordinance, 1961 states that it shall be applicable to whole Bangladesh and all Muslim citizens of Bangladesh; wherever they may be. Here it is worth mentioning that the marriage between a Muslim male and a Christian (Kitabia) female is valid under the Muslim personal law. Regarding this issue, in a book written by *Serajuddin* invoked some pertinent questions, for example does the MFLO's title itself point out that provisions of this ordinance are only applicable to Muslim couples? Or are they equally applicable where husband alone is a Muslim citizen of Bangladesh?[40] This vary inquires also have been dealt by the Supreme Court of Pakistan through a case of *Syed Ali Nawas v Muhammad Yusuf*[41] where the respondent counsel argued that the provision of MFLO are applicable only to those cases where both the parties of marriage are Muslim citizens of Pakistan. Though, the court did not agree with the contention rather make an explanation that in section 6(1) of MFLO use the terms 'existing marriage' and 'another marriage' are stood unqualified. Therefore, section 6 is also applicable for each valid Muslim marriage whether the party both is a Muslim or husband is a Muslim and the wife is a Christian (Kitabia). Similar plea arisen in case of dual citizenship when the party register their one marriage outside the national jurisdiction.[42] Thus the said ordinance has some ambiguity regarding the issue of parties to whom this restriction of polygamy is applicable?

Prior Permission of doing Polygamous Marriage

It should be noted that the law has clearly mention no one can make polygamous marriage without the previous permission of the Arbitration Council and if anyone does, the marriage shall not be registered under statutory law as well as punishable offence.[43] But it is interesting to refer that non-registration of a marriage is not vitiate the validity of marriage rather it is a punishable offence too.[44] In Bangladesh, the validity of marriage does not depend on registration consequently people have tendency of non-registration of their marriage. For example, in 2015, a report was published by The Dhaka

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40 Karim and Khalid (n 5) 1, 12.

41 PLD [1963] SC 51.

42 *Mst. Fauzia Hussain v Main Khadim Hussain*, [1985] PLD 165 (SC).

43 The Muslim Family Laws Ordinance 1961, s. 6.

44 The Muslim Marriages and Divorces (Registration) Act 1974 (Bangladesh), s 5.

Tribune shows that about two-third of contracted marriage are not registered by law.[45] Furthermore, according to Hazi Masum Billal,[46] the existing office of the marriage registration in Bangladesh has no mechanism to scrutinize the information of having permission or not. In this case, the registrar has to believe the party's truthfulness. As a result, the term used by the said ordinance 'without such permission the contracted marriage shall not be registered too' cannot congregate the suitable restriction of polygamy. Conversely, the punishments attached for non-compliance of this provision is too simple to deter the husband from contracting polygamous marriage.[47]

Application to the Arbitration Council

According to the Ordinance, the application of polygamous marriage containing with cause of further marriage and with the permission of existing wife or wives must be submitted to the chairman of the Arbitration Council.[48] However, the status, structure and powers of Arbitration Council under the MFLO have embraced many criticisms in case of satisfying the ultimate aim of family law in Bangladesh. Firstly, the Arbitration Council under MFLO is constituted by the Chairman and representative of each of the parties to a matter is termed as a mere quasi formal authority which is a non-judicial body has the power to interpret the law. Under this Ordinance the fundamental mechanism for authorization through the application of polygamous marriage is under the supervision of a non-judicial body that do not have any formal legal or religious expertise to resolve the family issue. Legally the chairman of the Arbitration Council is the elected member of the Union Parishad (UP) of each district of Bangladesh and the person is mostly nominated by the political party who does not need to have any kind of expertise to be a Chairman of Arbitration Council. As a result, the percentage of such permission giving trial in Bangladesh is very low, particularly in rural areas. Secondly, the ordinance does not provide any explanation of arbitration procedure as well as no accountability of fail to do their obligation. Conversely, Under the Muslim Family Laws Rules, 1961 there is no guidelines as to how the proposed marriage can be ascertained to be 'just and necessary'[49] and the council may take into consideration several circumstances such as sterility, physical infirmity and insanity on the part of an existing wife.[50] It is interesting to mention that the law is still vague to

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45 Md. Kamrul Hasan and Asif Showkat Kallol, 'Two third of marriages in 2015 were not registered' *Dhaka Tribune* (Dhaka, 4 January 2017) <www.dhakatribune.com/bangladesh/2017/01/04/two-thirds-of-marriages-in-2015-were-illegal> (accessed 25 November 2018).

46 Hazi Masum Bilal, interviewed by self, 26 November 2018, (Dhanmondi Kazi Office), Dhaka.

47 The Muslim Family Laws Ordinance, s 6(5).

48 ibid s 6(2).

49 ibid s 14.

50 The Muslim Family Laws Rules, r 15.

control the discretionary power of the Council and obviously the Council on their part is hardly seen to take all these into consideration and found to permit second marriages on insignificant excuse.[51] Thirdly, if the chairman is a party or he is a non Muslim, then the Council has to nominate a Muslim UP member by the Parishad by a resolution which is time consuming to get the remedy.

Consent of Existing Wives

There is another requirement of filing an application of polygamous marriage to the Arbitration Council is that the application must be supported by the permission of the existing wife/wives.[52] This is also mention in Muslim Family Laws Rules 1961.[53] However, both statutes unfortunately have failed to ensure the requirement as a mandatory one. On the other hand, the justifying grounds of the proposed marriage is under the sole consideration of the Arbitration Council where the consent of the existing wife/wives is just an option in order to take the decision of giving permission of second marriage.[54] In our country there is a misconception exists with the people is that the consent of existing wife is enough to contract another marriage.[55] As a result, seeking consent from the existing wife or not cannot restrict the party to do second marriage when there is a written permission of the Arbitration Council. The court has been cleared this issue and held that legislative intent was to restrict arbitrariness of husband in polygamous marriage. Accordingly The Muslim Family Laws Ordinance, 1961 has not made the consent of existing wife/s compulsory for contracting another marriage.[56] Finally, the law of polygamy does not reflect the actual aim which is to control the arbitrary polygamous marriage through the consent of existing wife/s.

Punishment for Non-compliance of the Provision

Certainly, non-compliance of the set rules about polygamous marriage is a punishable offence. But the question is whether the punishment is sufficient to persuade the main objectives? According to the section 6(5) of the Ordinance the punishment has two folds: First one is that the husband has to pay the full dower of the existing wife or wives if it is due whereas payment of dower is a consequence of valid marriage.[57] Dower is a unilateral obligation on the

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51 Dr. Nusrat Ameen, 'Dispensing Justice to the Poor: The Village Court, Arbitration Council Viz-a-Viz NGO Mediation' (2005) Part-F 12(2) The Dhaka University Studies 103.

52 The Muslim Family Laws Ordinance, s 6(2).

53 The Muslim Family Laws Rules, r 15.

54 Haque (n 7) 229.

55 ibid 221.

56 *Abul Basher v Nurun Nabi*, [1987] 39 DLR 333.

57 Haque (n 7) 142.

husband which has been imposed by Shariah and it has to be paid as an inalienable right of a wife. Therefore, payment of dower could not be an appropriate punishment for polygamy. Instead of this, law can ensure another or extra financial benefit for the wife or wives to secure their safety and dignity. For example, many Islamic Countries has the option to insert stipulations on their marriage deed regarding subsequent polygamy by their husband. Secondly, on confirmation of unambiguous fault, the husband shall be punished with simple imprisonment which may extend one year, or with fine which may extend to ten thousand taka, or with both.[58] This provision is made as a preventive mechanism for restricting polygamy and the possible way out of unjust treatment by the husband where he concealed the fact that he is already married. At this instant, a very evident question can be raised that does the husband have an obligation to inform the second wife about his first wife? The answer is no, there is no certain law in *fiqh* in this point that can oblige a man to disclose the fact of his existing wife to his to be second wife.[59] It is worth mentioning here that in the Penal Code 1860 there is an offence relating to marriage. The particular sections implies that according to section 494, "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine" and the section 495, "Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine". Although the offence which is related to this issue under section 494 and 495 is not applicable in case of Muslim male's polygamous marriage.[60] This is because the offence of concealment of earlier marriage and marrying during the lifetime of a husband or wife only occurs when the subsequent marriage is invalid of having existing spouse. Hence, the status of the polygamous marriage is valid but punishable offence. Contrasting the reality and contemporary trend of penalties, the punishment for polygamy is relatively low thus insignificant. Paradoxically, if a husband determines to do second marriage without abiding the law nothing can seriously frighten him to do it.

To summarize the competency and effectiveness of the existing legal provisions on polygamy in Bangladesh, we can conclude that the prerequisite for obtaining the consent of the Arbitration Council and indirectly, the approval by the present wife or wives to the subsequent marriage under Sec. 6 of the Muslim Family Laws Ordinance, 1961 has in reality no realistic importance for most women in Bangladesh rather it elevated multifaceted

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58 The Muslim Family Laws Ordinance, s 6(5).

59 Haque (n 7) 225.

60 Ratanlal and Dhirajlal, *The Indian Penal Code* (27th edn, Lexis Nexis Butterworths Wadhwa Nagpur 1985) 414.

grievance to them. Moreover, the consent of existing wife may be easily managed from a wife economically and if not burden of dependency on the husband.[61] In fact, our legislator had tried to satisfy themselves by enacting such an immature and impractical law on polygamous marriage whereas many Islamic countries have interpreted the Quranic injunctions regarding polygamy are impossible to comply today and certainly prohibit polygamy completely.

Contemporary Legal Reform through Judicial Pronouncement

Marriage and other related issues which are actually getting its legal consequences out of the marital wedlock, such as divorce, custody of children, legitimacy of children and inheritance Waqf, pre-emption and gift are the other areas governed by Muslim Law.[62]

The system of polygamous marriage amongst the other areas of Muslim law in practice held a notable area for further development both in terms of statutory intervention and social approach. The present social condition made it beyond repairable system because of its hugely mal practiced nature in last few decades. So the paper is suggesting statutory intervention to make it an exceptionally accessible scheme. Since, most of the states have brought legislative changes in their personal laws, deviating from their traditional approach.

The existing system left the burden of rationalizing the act of polygamy on the Arbitration Council as they are the body to permit second marriage judging the circumstances and need for another marriage in existence of the first one. The council is empowered to look into the matter of the second marriage if necessary and just.[63]

Another requirement is the consent of first wife and whether consent has been taken or not, that must have been proved too, but the vulnerable social position of women makes their consent almost non-existent because of the fact of their illiteracy and non-favourable social structure. The system is mostly practiced in the rural areas where women hardly can read and write, because of this fact husband can easily extract their consent by describing the paper whatever they want it to mention. The insufficiency of the statutory punishment which is confined only in, payment of remaining portion of dower

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61 Shanaz Huda, 'Protection of Women in the Marriage Contract: An Exploration' (2001) 5(1&2) Bangladesh Journal of Law 77.

62 Shahdeen Malik, 'Recent Case Law on Custody and Second Marriage in Bangladesh: A Trend Towards Secularisation of the Legal System?'(1995) 28(1) Law and Politics in Africa, Asia and Latin America 103, 109.

63 The Muslim Family Laws Ordinance, s 6 (2, 3).

and 1 year simple imprisonment hardly play any role against the practice of polygamy.

We are observing a trend on judicial activism for ensuring social justice crucial for enhancing the concept of welfare state. Welfare state - the term no longer exists in ensuring economic competence but establishing a society for enjoyment of rights by male, female and third gender. Judiciary being one of the key organs can play a decisive role in ensuring enjoyment of rights irrespective of their gender. Accordingly it is observed that judiciary tried to make positive changes in the area of polygamy but proved to be insufficient as the scenario of polygamy being almost same in the last few decades.

The very early example of judicial intervention after the birth of Bangladesh was the case *Faruque Miah v Tahera Begum*[64]. First reported case on polygamy, led to the Amendment of MFLO in 1962. The issue was raised for notifying that in absence of a Union Council or a Chairman whether the parties can avoid the requirement of taking permission from the Arbitration Council as provided by Section 2(a). By this Amendment it was fixed by section 3 that permission for second marriage can be taken from 'Chairman from Union Parishad and Pourashava' who will be considered as competent authority to fulfil the requirement of Arbitration Council.

In *Abul Basher v Nurun Nabi*,[65] it was held that how the council is going to judge the term 'necessary and just' or 'reasonable' that is not very clear, or there are no prescribing guidelines to interpret those terminologies. Though there is a guideline in Rule 14 of MFLO Rules and included sterility, physical infirmity, physical unfitness for conjugal life, wilful avoidance for a decree of restitution of conjugal rights, or insanity on the part of the existing life. Though these are not the only grounds for allowing for taking a second wife, but if we try to identify the reasons for giving such permission those are all for the incapability i.e. physical or mental on the part of the wife for not being able to perform the marital functions or responsibilities.[66] Hence leaves opportunity to further development and inclusion of new grounds accommodating the recent need.

In *Makbul Ali and Others v Munwara Begum*,[67] the Court emphasized the same reasons as probable grounds for taking a second wife in marital wedlock. So further it was rather defined as not a right but only a permitted practice allowed under Muslim Law. So asking permission from the Arbitration Council and get it granted is not a 'matter of right' on the part of husband rather a matter of discretion on the part of the Arbitration Council which must be judged very carefully taking circumstances in consideration. Religious

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64 [1981] BLD 165.

65 [1987] 39 DLR 333 (HCD).

66 Malik (n 62) 103, 119.

67 [1987] 39 DLR 183 (HCD).

leader and legal activists have always paid due regard to the vulnerability of women in the matter of polygamy.[68]

In *Nelly Zaman v Giasuddin Khan*[69] it was held that husband suing for the forced restitution of conjugal rights against an unwilling wife is both out-dated and unreasonable.

Regarding the activities of Arbitration Council hardly we can have information as almost no record is found. One of a rare publication of such record has been produced by Asia Foundation in 2002 which said that Union Parishad is quite biased and not having pro women mentality in ensuring justice to women and poor and in some cases declined to convene session.[70]

A notable case in this regard is *Mohammad Ilias v Jesmin Sultana*,[71] where Appellate Division ruled out the decision of High Court Division which through its pronouncement guided legislature to abolish polygamy from the society. The Court held that 'Muslim Jurists and Scholars are almost unanimous in taking the view that in the context of modern society it is virtually impossible to be able to deal with the wives justly and as such the Quranic sanction for taking a second wife under specified conditions virtually amounts to a prohibition in taking a second wife during the subsistence of an existing marriage'.[72] So the Honorable High Court Division suggested a sanction of 'prohibiting polygamy'. But unfortunately the Judgment was ordered to be obliterated.

Muslim women continue to encounter resistance when they seek to obtain judicial separation, polygamy being one of the approved act and husbands are very rarely facing consequences as a result of polygamy.[73]

Furthermore, in several judicial decisions the Court has condemned on the act of polygamy. In some instances they seemed contended with the law. As in *Shafiqul Islam v State*, the Court termed it as a unilateral act since it involved the Arbitration Council[74] but did not enlighten what can be the role of the Council. The mere presence of the permission of Council hardly deterred the practice. Similarly in *Dilrunba Akter v A.H.M. Mohsin*,[75] the Court opined to

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68 Attila Ambrus, Erica Field and Maximo Torero, 'Muslim Family Law, Prenuptial Agreements, and Emergence of Dowry in Bangladesh' (2010) 125(3) The Quarterly Journal of Economics 125.

69 [1982] 34 DLR 221 (HCD).

70 ibid (n 68).

71 [1999] 17 BLD (HCD).

72 Barrister Turin Afroz, 'Judicial Interpretation of Polygamy' *The Daily Star* (Dhaka, 7 April 2007) <https://www.thedailystar.net/2007/04/01.index.htm> accessed 26 December 2018.

73 Hoque and Khan (n 21) 227.

74 *Shafiqul Islam v State*, [1994] 46 DLR p 228.

75 [2003] 55 DLR 569.

possess a strong position against polygamy even by taking recourse from the Criminal Law. As a result the Court imposed a maximum fine against such act and not only that a step heading further the Court ordered the compensation to be paid to the wife. Though here the husband pleaded that it was not an act of polygamy as he divorced his wife before entering into the second marriage but failed to prove it as the divorce procedure was not completed as required by the Section.

A parallel tendency we are observing in recent past is denying the fact of second marriage to avoid the liability. In *Ashraful Alam v State*,[76] being a Criminal offence the first wife was liable to prove the second marriage and as she could not provide the Kabin Nama,[77] and the witnesses she produced was not fairly reliable as result the accused was acquitted. By this case another related problem is detected that is not taking the responsibility of the second marriage and putting the second wife in a vulnerable position.

In some instances even the second wife being accused of abetting the husband to get married with him leaves the position of husband completely clean creating further social dilemma and leaving the second wife in unnecessary hassle. As it has been observed in *Reshma Chowdhury v State*[78]. The Court held that 'there is no such provision whereby a person can be convicted for abetting an offence under 6(5) of the Ordinance', as charge of abetment was brought against the second wife. Court found it a mere waste of time as marrying second time is not a penal offence. So it seems that the system or procedure of polygamy needs to be restructured as it is mal functioning.

Reforms brought by different Muslim countries – borrowing the experience

Only in two countries polygamy is properly controlled which is Tunisia and Morocco. Tunisia and Morocco has declared polygamy as invalid as well as criminal offence. Hanafi Law in theory gives women the right to stipulate the clauses in marriage contract that restricts a man to exercise right to Polygamy.[79] So, insertion of necessary stipulations on barring polygamy can also be a credible solution.

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76 [2005] 57 DLR 719.

77 Marriage deed as defined in the Muslim Marriages and Divorces (Registration) Act, 1974 (as amended in 2009).

78 [2012] 17 BLC 816.

79 Sally Baden, The position of women in Islamic countries: possibilities, constraints and strategies for change (1992) Institution of Development Studies, University of Sussex 15.

Malaysia

By the latest amendment in 2005 of The Islamic Family Law Act 1984, Malaysia brought few changes in the system of polygamy.

According to Section 23, "No man during the subsistence of a marriage shall except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act".

There are certain conditions to be fulfilled by the applicant or husband, before their application is approved. The conditions are codified under section 23 clause (3).

According to clause (3), "An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the ground on which the proposed marriage alleged is to be just or necessary".

In the declaration includes the present status of the applicant, particulars of his commitments and his ascertainable financial obligations liabilities, the number of his dependents, including persons who will be his dependents as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained or not will be assessed carefully.

Pursuant to this provision, there are requirements to be fulfilled by the applicant which are as follows:

1. The proposed polygamy marriage is alleged to be just or necessary.
2. The presence of the applicant in the court.
3. The particulars of the applicant's financial income, commitments and liabilities.
4. The number of his existing and future dependents. This includes his existing wife/wives and children, as well as prospective wife.
5. Whether consent of existing wife/wives has been obtained.[80]

Provided that the Court may if it is shown that such marriages is according to Hukum Syara (the deciding court) order it to be registered subject to section 123 of The Islamic Family Law Act 1984. So the provision suggests that a husband can marry another woman with the written approval or permission of the Court. Here the court is to judge the existing situation and grant permission in the favour of the second marriage. The Court will carefully

[80] Yasin and Jani (n 13) 15.

examine whether all the conditions stipulated in the Contract of Marriage have been performed or not. The Court needs to be satisfied that the proposed marriage is actually necessary. The financial stability is brought into consideration also to ensure the future of the children both existing and from second marriage.

To secure the interest of first wife Section 23 has also included that wife can claim her share in matrimonial property if husband exercises his right of polygamy.[81] The amendment made it mandatory for the husband, that current wife and prospective wife to appear before the court and to satisfy the marriage being *just*. The hearing where applicant's existing wife\wives and prospective wife can come for their statement and other persons can come up with the necessary information related to the proposed marriage too s. 23(5)[82] will ensure their mutual collaboration in support of the marriage. Most importantly they are getting all the information regarding the marriage. The Court simultaneously giving permission can require the husband to pay maintenance or even can order to divide the jointly acquired or owned property.

This approach tried to keep the traditional concept embracing the requirement of guaranteeing the social security of the first wife and the offspring. So polygamy is subsisting and can be practiced only after securing the rights of both husband and wife and the children.

Tunisia

Tunisia by enactment of the Personal Status Code 1956 formally abolished polygamy. By Article 18 it is declared as prohibited and made to be subject to fine and punishment of 1 year. In addition, the second marriage is declared as invalid under Article 21.

Article 18 stated that—

1. Plurality of wives is prohibited. Any person who being already married and before the marriage is lawfully dissolved, marry again shall be liable to imprisonment for one year or for a fine of 240.000 malims/franc, or to both, even if the second marriage is in violation of any requirement of this Code".
2. Any person who has married in violation of the provision laid down in Law No. 3 of 1957 relating to organization of civil status and contracts a second marriage while living in matrimony with the first wife shall be liable to the same punishment.
3. A person who knowingly marries someone liable to punishment under the forgoing clauses shall also be liable to the same punishment.

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81 ibid

82 Islamic Family Law (Federal Territory) Act 1984 (Malaysia).

Tunisia by allowing liberal interpretation (which allowed much adaptation) prohibited polygamy by taking recourse to *ijtihad* of the verse which asked to treat every wife 'fairly' which is almost impossible to comply by ordinary human being. It is suggested to seek further understanding of the spirit of the Qur'anic text in order to produce jurisprudential texts based on values of equality. Tunisia borrowed the context of justice in Sharia which emphasized on justice explicitly and to uphold the true inner essence of Islam Tunisia prohibited the practice of polygamy to ensure gender justice.[83]

It is nearly impossible to guarantee fairness in polygamous family in modern era. So in finding the inherent spirit Tunisia explained that 'making restrictions on the number of women who can be married is a sign of the prohibition on polygamous marriages'. They further opined polygamy if not done in complete fairness will initiate various forms of violence and confusion both within the family or society. A husband who practices polygamy without ability to uphold fairness, he will treat arbitrarily their wives and children in putting their fate at stake. Therefore, "the writer argues that the prohibition of polygamy that has been established by the Government of Tunisia is example of the progress and the success of Islamic law in applying reinterpretation of Islamic doctrine toward the provision."[84]

Tunisia borrowed the context of justice in Sharia and to ensure gender justice they prohibited the practice of polygamy.

Indonesia

The position of Indonesia in the system of Polygamy has similarity with the system of Malaysia.

Indonesia has enacted a separate law solely concentrated on marriage termed as Marriage Law, 1974. After this law they could able to reduce number of polygamous marriage. They included taking permission from the Religious Court. The Court can permit the husband to practice polygamy, if—

1. His wife cannot fulfil her duty as a wife.
2. His wife has physical defect and/or an incurable diseases
3. His wife cannot bear children
4. The husband must have the consent of his existing wife/ wives
5. Be able to financially support all his wives and children

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83 Ayyus Sahidatul Chusnaiyaini, 'Dynamics of Tunisian Polygamy Law in Gender Perspective' (Undergraduate Thesis, The State Islamic University of Maulana Malik Ibrahim, 2014) 352 <www.researchgate.net/publication/313087483> accessed 7 November 2018.

84 ibid.

6. Must ensure that he treats all his wife and children justly.

Upon fulfilment of the abovementioned conditions only court can permit polygamous marriage, which can be registered and being considered legal. But practice shows that to avoid the long procedure many perform unregistered marriage, which is polygamous of course.

Recommendation

Polygamy is disgraceful for women in terms of their dignity, self-respect as well as self-esteem. Moreover, polygamous families have much possibility to manipulate of each legal right such as inherited property or other facilities of husband like pension or allowance etc. In Bangladesh the law restricting to polygamy not only fails to be effective but also misleading. For more effectiveness there are some suggestions:

1. The permission for polygamy should be taken from the formal court rather Arbitration Council.
2. The Party should enclose all the necessary particulars in document which can satisfy the need of second marriage is just not it is depended on only the discretion of the permitting authority.
3. Making a digital database accessible by the appropriate authority where along with other information the information regarding marriage and offspring will be included.
4. The right of first wife on husband's property can be made absolute and separable under the ownership of the first wife on the event of second or subsequent marriage.
5. The experience of Malaysia and Indonesia of creating a judicial body to judge the necessity of second marriage and providing permission in addition of the consent of first marriage (elaborated earlier) can be borrowed.
6. Separate pre-nuptial agreement can be put forward as an easy way out for the wife who will be applicable on the occasion of second marriage.[85]
7. The punishment for husband and the remedy for wife are to be justified and sufficient to meet the consequences.

[85] Nina Nurmila, 'Polygamous Marriage in Indonesia and their Impacts on Women's Access to Income and Property' (2016) 54(2) Al Jami`ah: Journal of Islamic Studies 427.

Conclusion

Polygamy in Islam – is often a much debated issue taken into consideration and explained in a rather literal format deviated from its original spirit. The background and the reasons for the initiation is frequently overlooked rather mostly practiced as a general phenomenon. Islam acknowledges marriage as an essential requirement of the wellbeing of the individual and the society[86] whereas Polygamy often grounds of misery for Muslim women, often resulting in loneliness, mostly for those who can produce and sense that they are being used by their husband's needs, as result it tends to feel them of emotional rejection and inadequacy.[87] So keeping the society free from all kinds of evil activity is a motivation too. The recent practice of taking more than one wife is totally unacceptable from that perspective. Marriage in presence of another wife was allowed to do when the first marriage in almost frustrated. The obligation of protecting and caring the wife and children, carrying the household affairs, marital sex satisfaction and compatibility of behaviour as between spouses are component of the far reaching purposes of marriage.[88] The Quranic verses are partially adopted ignoring the requisite of being 'just and equal' to every wife who the Almighty considered almost impossible to do for human. Polygamy exists in most of the countries where Islamic law is in operation and the institution is given much attention, may that be regarding statutory alteration keeping the main spirit alive and focusing on the social implication. Most states approved it as a valid institution and concentrated on its legal application and tried to incorporate stipulation to fit into the social structure having an intention to allow this practice with little opportunity for only in the very exceptional situation where it is extremely needed. The observance of the practice is not left alone only on the will of the men but rather the duty of the state to make it a less accessible one. They allowed polygamy after fulfilling many conditions in few levels. The giving of permission made two tiered where the permission of wife is not the only criteria but a judicial body after judging the necessity of taking another wife will give permission, along with will try to ensure the treatment of all the wives and their offspring remains equal.

From the experiences of other states having either the similar social structure or Islamic belief this paper tried to find an avenue to accommodate the true spirit of Islam. So it's proposing an immediate legal attention to put strict restriction to make the practice available only for the appropriate instances. Muslim Family Laws Ordinance 1961 hardly brought any changes in last decades in its substantial matter regarding polygamy. We tried to focus in the judicial activism and found it quite insufficient and hardly worked as a

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86 Zahidul Islam, 'Restricting Polygamy in Bangladesh' *The Daily Star* (Dhaka, 28 April 2007) <archivethedailystar.net/law/2007/04/04index.htm> accessed 7 December 2018.

87 Heather Johnson, 'There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future' (2005) 11(3) William & Mary Journal of Women and the Law 563.

88 ibid (n 86).

discouraging practice. There is no milestone judgment ensuring limited use of polygamy.

In today's social structure and position of women may be taken into consideration for giving a more progressive interpretation of statutory and non-statutory matters. It has been opined by Haque Ridwanul that though there are several progressive verdict by the Honorable Supreme Court regarding various issues of Muslim Family Law the 'Court have been reluctant to attempt a radical reconstruction of Shariah Law which arguably is possible within the framework of Quran and Sunnah'.[89]

So we are strongly suggesting immediate statutory intervention with a comprehensive stipulation performable before taking aid of polygamy in only appropriate cases. The judicial body may be incorporated to permit it along with previous wife/wives consent. There must be a provision for right to property for the wife and children from previous marriage.

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[89] Hoque and Khan (n 21) 227.

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Hindu Marriage Act 1955 and other Contemporary Laws of India: Gender Friendly Reforms and Comparing the Situation to Bangladesh

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Abstract

The laws enacted during the colonial period are still applicable to the Hindus of Bangladesh and were never revised in the post-independence period while at the same time our neighboring country India have radically changed the Hindu law and completely reformed the law in a gender friendly process, particularly in the case of Hindu marriage such reformation is strongly evident, which can be observed in The Hindu Marriage Act of 1955. In this article, the laws and principles applicable to Hindu marriage in India and related concepts such as divorce, polygamy, maintenance, marriage registration etc. will be discussed in comparison with the situation of Bangladesh. The areas of gender inequalities of Bangladeshi Hindu Law will be identified here which is being perpetuated by the ancient rules as existed in our country. In consistence with the reformed Hindu Laws of India several recommendations are made in this article for incorporating it in possible Hindu Family Law of Bangladesh.

Keywords: Hindu Marriage, Women, Divorce, Gender Discrimination, Reformation.

1. Introduction

The present article deals with the reformation of Indian Hindu law which was brought during 1955-1956 period. Such reformation is much more gender friendly and Indian Hindu women now gets equal rights with their male counterpart in marriage and other related concepts, e.g. divorce, maintenance, adoption, property rights etc. Though this article attempts to explore the provision of modern Hindu Law applicable for Indian Hindu women regarding marriage and related concepts, the main focus of the article is on the discriminatory status of Bangladeshi Hindu women who are still guided by the ancient shastric rules. The purpose of the study is to present a comparative view of the situation of Hindu women of India and Bangladesh on the basis of the legislative reforms made in India after partition of 1947. It appears from historical study that progressive changes are essential features of

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the development of Hindu law. While there were regressive turns and obstructions caused by various facts of history, it is not difficult to identify these changes which indicate a general movement forward. Hindu law as it presents itself today in Bangladesh or in India or in any other country is the result of such changes.[2] Now if we think about such changes in Hindu Law we can observe through the present study, Bangladesh is lagging behind than India. The law applicable for Hindu community in Bangladesh is much more gender discriminatory as the Hindu women are not entitled to get equal rights with Hindu men in comparison with our neighboring country India regarding marriage and related concepts.

It has been imagined that the Hindu laws in Bangladesh, where most of the people are Muslims, are not reformed because of the politicization of religion while radical changes have been brought in India in response to the changing trends of society, where the majority of the population is Hindus.[3] In Bangladesh after 1947 there was no particular law for Hindu people till the year of 2012, when the Hindu Marriage Registration Act, 2012 was enacted. The Act of 2012 only deals with the issue of registration and rest of the matter such as marriage, conditions of valid marriage, divorce, maintenance, etc. are still unreformed while India with the passing of Hindu Marriage Act, 1955 brought a significant reformation in such matters. This article will demonstrate such reformations and it is suggested through this article that Bangladesh should bring such reformation in the existing Hindu Law as this country is significantly lagging behind in bringing the justice system in line with the demands of time in this area of law.

2. Development of Hindu Family Law

a. The Sources of Hindu Law

Srutis as the divine revelations are the original sources of Hindu law. All others are derivatives from *srutis*. In this sense *srutis* are formal sources of Hindu law, from where law derives validity. All other sources are material sources of law. Literally *srutis* mean that what were heard from above or the words of God.[4]

Smritis are primary material source of law. Literally *smriti* means that which was remembered. In fact, *smritis* are also divine utterances and instructions which have been heard and remembered long afterwards and handed down by the *rishis* from generation to generation and compiled in book forms by many

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2 Dr. M. Shah Alam, 'Review of Hindu Personal Law in Bangladesh: Search for Reforms' (2004) 8(1&2) Bangladesh Journal of Law 15.

3 Sharmin Akter and Abu Syead Muhammed Abdullah, 'A Comparative Study on Hindu Law between Bangladesh and India' (2007) 29(4) Asian Affairs 61.

4 R.K. Agarwala, *Hindu Law* (Central Law Agency 2012) 14.

eminent sages over several hundred years which came to be known as *smritishastra* or *dharmashastra*.[5]

Commentaries on *smritis* are the next important source of Hindu law. *Smritis* are now practically replaced by commentaries. Authors of the commentaries modified and supplemented the rules of s*mritis*, in part by means of their own reasoning and in part in the light of usages and customs that were in vogue in a particular time at a particular place. In fact, they frequently created new rules of conduct to meet the changing ideas of the people,[6] and the commentaries following the progressive traits of the later *smritis* (Narod, Brihashpati) made rational use of the doctrine of long usages and the principle of equity to meet the practical needs of the people.[7]

Customs have a special place in the system of sources of Hindu law. It is not only one of the most important sources as under Hindu law clear proof of usage will outweigh the written text of law.[8]

These sources remain mainly uncodified. Besides the uncodified sources, there are codified sources which include legislative enactments and precedents.

b. Hindu Law in British Colonial Period

The Colonial Government of India had the legislative authority to change the personal laws of the Indians and they used this power in several cases. Several enactments had come into force with the advent of British rule in India. These legislative enactments which declare, abrogate or modify the ancient rules of Hindu Law, thus form an additional modern source of Hindu Law.[9] Combined effect of the legislations accomplished during two centuries of British rule, therefore, was rather meager to have any major impact on the traditional Hindu law. Yet many progressive changes especially those relating to women's rights brought about during this period cannot be denied to have taken place, Hindu Law achieved a higher level of reforms by the time the British quitted India.[10]

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5 ibid 15.

6 Sri Dinesh Chandra Devnath, *Hindu Ain* (Srimati Benu Devnath 1982) 3.

7 Mridul Kanti Rakshit, *The Principles of Hindu Law* (5th edn, Kamrul Book House 2005) 25, 56-57.

8 *Collector of Madura v Mootoo Ramlinga*, (1868) 12 MIA 397.

9 Zakir Hossain Khan, *Hindu Law of Bangladesh* (1st edn, Law Book Company 2010) 16.

10 Alam (n 2) 31.

It is to be noted that all legislations relevant to Hindu women were enacted in the British colonial period,[11] namely:

- The Hindu Widow's Remarriage Act, 1856;
- The Hindu Women's Right to Property Act, 1937;
- The Hindu Women's Right to Separate Residence and Maintenance Act, 1946.

At the end of colonial rule, after partition in 1947 the development of Hindu law experienced dual fate. The meaning of this expression has been described under the following two sub headings:

c. Hindu Law of Bangladesh after Partition in 1947

Codification of Hindu Law, which is applicable to Bangladeshi Hindus, was done during the British period. The name of such laws has been mentioned in 'Hindu Law in British Colonial Period'. The mentioned laws remained in force after partition in 1947 and no legislative changes had been made in the then Pakistan and the same trend still continuous after the independence of Bangladesh. The Hindu law of Bangladesh thus, generally remains at the position the British left it in 1947.[12] Without those enactments in all other cases the ancient shastric law, which is based on scriptures and philosophies and which arises out of the ancient and primary sources of Hindu law, applies in Bangladesh.

d. Hindu Law of India after Partition in 1947

India, albeit being a Hindu majority country, true to their commitment to secularism and equality, continued with their social reforms through legal enactments even after the British left.[13] As it has been expected, removal of the shackles of colonialism paved the way for true reforms of Hindu law in India, and reforms were effected. Indian reforms depicted not only modern norms of human rights, but also the nature of changes inherent in Hindu law itself, by blending the progressive elements of various of its schools. The enactments through which the Hindu Law of India has been entirely reformed are as follows:

- The Hindu Marriage Act, 1955;
- The Hindu Adoptions and Maintenance Act, 1956;

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11 Shah Ali Farhad, 'Reform of Laws on Hindu Marriage and Related Areas in Bangladesh: A 'Legal' Take on a very 'Social' Issue' 2.

12 Werner F. Menski and Tahmina Rahman, 'Hindus and the Law in Bangladesh' (1988) 8(2) South Asia Research 111-131.

13 ibid (n 11) 2.

- The Hindu Succession Act, 1956;
- The Hindu Minority and Guardianship Act, 1956; and
- The Special Marriage Act, 1954.

3. Hindu Marriage Act, 1955 and other Contemporary Laws

The years of 1955 and 1956 saw placing before the Indian Parliament four separate bills on Hindu law which were duly passed ushering in radical changes of the law relating to marriage, inheritance, maintenance, adoption and guardianship. The Hindu Marriage Act by an Act of the Parliament of India enacted in 1955. The main purpose of the Act was to amend and codify the law relating to marriage among Hindus and others. Besides amending and codifying Shastric Law, it introduced separation and divorce, which did not exist in Shastric Law. This enactment brought uniformity of law for all sections of Hindus.[14] The other three important Acts are: Hindu Succession Act, 1956; Hindu Adoptions and Maintenance Act, 1956; and Hindu Minority and Guardianship Act, 1956. All these enactments are applicable in India and not in Bangladesh. The changes brought in India through those enactments were the reflections of the modern notions and norms of human rights, one of the fundamental elements of which is equality between man and woman.[15]

Now some key factors such as, marriage, conditions of valid marriage, divorce, registration of marriage, adoption, maintenance, property rights of Hindu women etc. as are applied in Bangladesh are compared here with the situation of India on the basis of its gender friendly reformation:

3.1 Hindu Marriage

There are two main schools of Hindu law: a) Mitakshara and b) Daya-bagha. The Hindu laws on marriage as applied in Bangladesh are principally based on the Daya-bagha school. Marriage is a very important concept in Hinduism. Unlike Muslim law, where marriage is considered to be a contract, marriage in Hindu law is a sacrament.[16] In accordance with the ancient and Bangladeshi Hindu law, Hindu marriage is the last of the ten sacraments for men and perhaps the only sacrament for females.[17] It's a matter of gender discrimination between Hindu men and women. According to the Shastric Law Hindu marriage cannot be regarded as contract because there is no dissolution of marriage. As Hindu marriage is not regarded as contract in

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14 <https://en.m.wikipedia.org/wiki/The_Hindu_Marriage_Act,_1955> accessed 30 January 2019.

15 Alam (n 2) 31.

16 *Tikait Munmohinti v Basant Kumar*, ILR 28 Cal. 758.

17 Aktar and Abdullah (n 3) 64.

Bangladesh, there is no necessity that the parties must have attained the age of majority. So, ultimately there is no bar to the marriage of minors.

On the other hand, in India after the passing of the 'Hindu Marriage Act, 1955', Hindu marriage is now like a civil contract. Because it is now a condition of valid marriage, that the bridegroom must have completed the age of 21 years and the bride 18 years.[18] Besides that, Hindu marriage is now a civil contract in the sense that after the passing of the Act either the husband or the wife has the opportunity to get the marriage dissolved. So, radical changes have been brought in India as regards Hindu marriage.

3.2 Conditions for the validity of Hindu Marriage

In India, the 'Hindu Marriage Act, 1955' provides certain conditions of a Hindu marriage. According to the Act, a marriage to be valid has to fulfil the following conditions:

i) Age of Marriage

The bridegroom should have attained the age of 21 years and the bride 18 years at the time of marriage. [Section 5(iii)];

While in Bangladesh, there is no minimum age of marriage according to the Shastric Hindu law. So child marriage is allowed under Hindu Religious Law. Though, according to the Child Marriage Restraint Act, 2017, a marriage between a male under 21 years age and a female under 18 years age is a punishable offence but the marriage itself is not invalid.

ii) Capacity and Consent

At the time of marriage, the parties should be capable of giving a valid consent to the marriage. A person who is of a sound mind shall be considered to be a person capable to give a valid consent. Neither party, though capable of giving a valid consent should be suffering from mental disorder of such kind or to such an extent as to be unfit for marriage and procreation of children. Neither party should be suffering from recurrent attacks of insanity or epilepsy.[19]

In Bangladesh, according to ancient Hindu traditions, the purpose of marriage is considered to be the acquiring of a male heir who has the capacity to confer spiritual benefit upon the deceased at the funeral ceremony,[20] which is a matter of gender discrimination. This objective of marriage coupled with the fact that a Hindu marriage is a sacrament and not a contract, makes it apparent

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18 The Hindu Marriage Act 1955 (India), s 5(iii).

19 ibid, s. 5(ii).

20 John Dawson Mayne, *Treatise on Hindu Law and Usage* (7th edn, Higginbotham 1906).

that although there is an element of physical capacity involved, infancy or mental incapacity is however, irrelevant.[21]

As regards consent, though we find a difference between Bangladeshi and Indian law as regards the necessity of consent to marriage, both jurisdictions are however, agreed in one respect. That is, if the consent is obtained by fraud or force, then the marriage is invalid.[22]

Without these two major conditions there are other three conditions mentioned in section 5 of the Act of 1955 such as- neither party can marry again having a living spouse;[23] marriage can't be solemnized among prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;[24] the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two.[25] These conditions must be fulfilled for a valid marriage in India.

3.3 Inter Caste Marriage

The ancient Hindu rules, as applied in Bangladesh, provide a barrier in marriage between members of different castes. Hindus are barred from marrying outside their caste and hence, inter-caste marriages are invalid in the eyes of law. Thus it has been held that a marriage between a *Brahmin* bridegroom and a *Kayastha* bride is invalid.[26] However, The Hindu Marriage Registration Act, 2012 indirectly abolish the bar on inter caste marriage as section 6 of the Act mentions that a Hindu marriage is completed if it is done according to Hindu religion, principles and rituals there is no requirement of same caste.

On the other hand, in India there is no bar on the inter caste marriage. As Section 5 of the Hindu Marriage Act, 1955 states that a marriage may be solemnized between two Hindus and Section 29(2) of the said Act declares that marriage solemnized before the commencement of the said Act, shan't be deemed to be invalid by reason only of the fact that the parties thereto belonged to different castes or divisions of the same caste.

It is difficult to imagine that even in the 21st century concepts such as caste division have managed to survive in Bangladesh.[27] According to the survey carried out by South Asian Institute of Advanced Legal and Human Rights

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21 Farhad (n 11) 4.

22 ibid.

23 The Hindu Marriage Act 1955, s 5(i).

24 ibid, s 5(iv).

25 ibid, s 5(v).

26 Aktar and Abdullah (n 3) 72.

27 Farhad (n 11) 6.

Studies (SAILS), among a total number of 175 people, 104 voted for abolition of the rule prohibiting inter caste marriages, 65 voted for retaining the rule and 6 people gave no responses.[28] Thus, in line with the general public opinion, it has been suggested that the law should remove the bar on inter-caste Hindu marriages.

3.4 Polygamy

In Bangladesh, Hindu men too, do not have the option to divorce. However, this relative disadvantage is far outweighed by the one sided prerogative bestowed only to the men folk under Hindu laws. Men are permitted to engage in polygamy. Simultaneously, they can take as many wives as their heart desires. There is no condition precedent, neither is there any cap on the highest number of wives they can take. There is however, no corresponding right to polyandry. Women are not given the chance to take more than one husband.[29] So we can again observe the matter of gender discrimination in the ancient Hindu Law which is applicable in Bangladesh.

Polygamy amongst the Muslims is also permitted and polyandry is prohibited and punishable by criminal law. However by virtue of the Muslim Family Laws Ordinance 1961, restrictions have been introduced to the right of polygamy amongst the Muslims and a man wanting to marry again during the subsistence of a marriage must take permission from the appropriate authorities.[30] Unlike the 1961 Act restricting the Muslim mans' right of polygamy to a certain extent, a Hindu man in Bangladesh wishing to marry during the subsistence of his marriages, faces no restrictions whatsoever. Thus in case of Bangladeshi Hindu law the situation becomes especially hard for Hindu women since divorce is not allowed.

In India after the passing of the 'Hindu Marriage Act, 1955', it is now a condition of marriage that the bridegroom must not have another wife living at the time of marriage. So by virtue of this Act monogamy has been established and bigamy is punishable both for the male and female. Section 5(1) of the Indian Hindu Marriage Act thus prohibits not only polyandry but also polygamy. Section 11 of the Act makes a bigamous marriage null and void and section 17 makes it a penal offence for both Hindu males and females under sections 494 and 495 of the Indian Penal Code.[31]

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28 Dr. Shahnaz Huda, 'Combatting Gender Injustice: Hindu Laws in Bangladesh' (2011) South Asian Institute of Advanced Legal and Human Rights Studies (SAILS).

29 Farhad (n 11) 5.

30 Section 6 (1) of the Muslim Family Laws Ordinance, 1961 states; No man, during the subsistence of an existing marriage, shall, except with the pervious permission in writing of the Arbitration Council, contract, another marriage, nor shall any such marriage be registered under the Muslim Marriage and Divorces Registration Act 1974 (LII of 1974).

31 Paras Diwan, *Modern Hindu Law* (Allahabad Law Agency 1993) 106-108.

The fact that polygamy is no longer a desirable in Bangladesh as well as popular entitlement is made abundantly clear by the field survey carried by SAILS, where among 56 questioned, 41 were against polygamy, 6 supported its continuation and 3 had no responses.[32]

3.5 Hindu Marriage Registration

Before the year of 2012, in Bangladesh Hindu marriages were solemnized merely through some religious rituals. There was no marriage registration system for Hindu people in Bangladesh. Now according to the Hindu Marriage Registration Act, 2012, a Hindu marriage can be registered on an optional basis,[33] as the marriage registration is not compulsory if a marriage is not registered then a Hindu woman will be more affected rather than a man. So the registration of a Hindu Marriage should be compulsory.

There was an overwhelming public support favouring a compulsory registration mechanism. The survey carried out by SAILS[34] shows that of a total of 175 questioned, 118 were supporting a compulsory move towards registration, whereas 29 were against and 28 gave no responses.

Regarding Marriage Registration, Indian Hindu Marriage Act, 1955 also provides the same provision. As per section 8 of the Act registration of marriage is optional in India but the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the marriage registration shall be compulsory in the State or in any part thereof.[35]

3.6 Divorce

For the Hindus the marital bond is eternal and unbreakable. The sacramental marriages amongst Hindus have three characteristics:[36]

- It is a permanent and indissoluble union;
- It is an eternal union;
- It is a holy union.

Shastric Hindu law does not allow dissolution of the marital tie, however painful cohabitation may be.[37] However in some communities the custom of divorce obtained and the courts enforced such custom provided they fulfilled

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32 Huda (n 28).

33 The Hindu Marriage Registration Act 2012 (BD), s 3(1).

34 Huda (n 28).

35 The Hindu Marriage Act 1955 s 8(2).

36 Dr. Shahnaz Huda, '"Double Trouble", Hindu Women in Bangladesh - A Comparative Study.....' (1998) IX(1) Part-F The Dhaka University Studies 119.

37 ibid.

the requisites of a valid custom.[38] Since Bangladesh predominantly follows Shastric Hindu law, divorce is practically not permitted here and in reality many Hindu women in Bangladesh lead lives of abject misery in case of abandonment by the husband who can marry as many times as he wishes.[39]

But in India, under section 13 of the Hindu Marriage Act of 1955, either husband or wife may seek divorce on grounds of cruelty, adultery, desertion, insanity or incurable disease and so forth. This Act also grants the wife additional grounds for dissolution of marriage.[40] Section 12 of the Act provides that marriages may be voidable and may be annulled by a decree of nullity on grounds of impotency of the respondent. Like the traditional concept of option of puberty for the Muslims recognized by section 2(vii) of the 'Dissolution of Muslim Marriage Act, 1939', the Indian Act of 1955 by Section 13(2) (iv) provides that Hindu wife may petition for dissolution of her marriage on the ground:[41]

> 'that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.'

Thus, it is quite clear that compared to India, the law regarding divorce for a Hindu woman in Bangladesh is rife with unfairness and is badly in need of modernization. There is widespread support for introducing the provision of divorce in Hindu marriages. A survey carried out by the South Asian Institute of Advanced Legal and Human Rights Studies (SAILS) shows that of a total of 175 Hindu people interviewed, 125 supported the right to divorce, 45 were against it and 5 had no responses.[42]

3.7 Essential Ceremonies of Hindu Marriage

Another essential of a Hindu marriage in Bangladesh is that the prescribed ceremonies have to be performed. There are a number of such rituals and ceremonies both preceding and following the actual wedding. However, according to the Supreme Court in *Amulya Chandra Modak v The State*,[43] only two requirements are mandatory, which are as follows:

- *Viva homa*, that is, invocation before the sacred fire; and
- *Saptapadi*, that is, the taking of the seven steps before the sacred fire by the bride and the bridegroom.

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38 *Sankaralingam v Subban*, 1894 ILR 17 Mad 479.

39 Akter and Abdullah (n 3) 76-77.

40 The Hindu Marriage Act 1955, s 13(2).

41 Huda, 'Double Trouble' (n 36) 120.

42 Huda, 'Combatting Gender Injustice' (n 28).

43 35 DLR (1986) 160; see also *Utpal Kanti Das v Monju Rani Das*, 50 DLR (AD) 1998 47.

Thus this case has very specifically established that *viva homa* and *saptapadi* must be performed for the validity of a Hindu marriage. Otherwise the marriage is void.

On the other hand, in India the 'Hindu Marriage Act, 1955' prescribes no particular form of ceremonies for the validity of marriage. A Hindu marriage may be solemnized according to customary rites & ceremonies of either party thereto.[44]

3.8 Maintenance

Under traditional Hindu Law which is applicable in Bangladesh, the husband has the duty to maintain his wife and minor children. A father is bound to maintain his daughter until marriage. The responsibility to maintain his wife is a personal obligation arising out of the fact that she is his wife and independent of the possession of any property by him. After the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, a woman may be entitled to maintenance even if she is living separately, based on several grounds.

Under the Hindu Marriage Act of 1955, applicable to India, both parties to the marriage can make an application for maintenance *pendente lite* as well as for permanent maintenance and alimony.[45] Under the Hindu Adoptions and Maintenance Act of 1956, 'maintenance' is defined as including, '...provisions for food, clothing, residence, education and medical attendance and treatment...'[46]

The Act makes provisions for civil proceedings to obtain maintenance while under Section 125 of the Indian Criminal Procedure Code, 1973 maintenance is made recoverable by summary proceedings. The above mentioned section also clarifies that 'wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried'. Thus, under the Act a destitute divorced wife may be entitled to maintenance until remarriage.

3.9 Property Rights of Hindu Women

In Bangladesh the kinds of property that a Hindu woman may possess continues to be divided into a) *Stridhan* and b) Property inherited by her and to which she has limited rights. *Stridhan* property is property over which a woman generally has absolute control. So, *Stridhan* means property which a woman has power to give, sell or use independently and which passes on her death to her heirs.[47]

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44 The Hindu Marriage Act 1955, s 7.

45 ibid, ss. 24-25.

46 S. 3(b)(i).

47 Huda, 'Double Trouble' (n 36) 120.

When a Hindu man inherits property, whether from a man or a woman, he takes absolutely and becomes the fresh stock of descent i.e. after his death the property passes to his heirs. When however, a female inherits property whether from a male or a female she only takes a limited estate and upon her death the property reverts back to the reversioner, i.e. the next heir of the person she had inherited the property from. The estate inherited by a widow from her dead husband is called widow's estate. Although the woman is entitled to enjoy the estate inherited by her she cannot dispose of such property by gift, sale and so forth.[48]

A daughter's right to her father's property depends, astonishingly enough, upon whether she has or can have a son. Little wonder therefore the importance placed upon a male offspring. The daughter is fifth in line to her father's property. In the absence of a son, son's son, son's sons son, widows the daughter inherits. Preference is given to the maiden daughter who may possibly have a son in the future, then to a daughter who has a son. Barren daughters, widowed daughters who have no children or who have daughters are excluded.[49]

While in India however, after independence, the State, through direct and positive intervention brought about fundamental and radical changes in the law of succession in breaking violently with the past.[50] In 1956, the Hindu Succession Act was enacted.

Of the broadest changes made by the Hindu Succession Act, 1956 is the abolition of the limited estate of the female Hindu. A Hindu female had now the right to deal freely with and dispose of in any manner any kinds of property acquired by her. Section 15(1) of the Act states that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

By the 1956 Indian Act the property of a male Hindu devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction.[51]

3.10 Adoption

Adoption is recognized under Hindu law. The aim of adoption under Hindu law is two-fold. The first is religious i.e. to secure spiritual benefit to the

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48 ibid.

49 Huda, 'Double Trouble' (n 36) 124.

50 Prem Chowdhry, 'Conjugality, Law and State: Inheritance Rights as Pivot of Control in Northern India' (1993) Special Issue on Feminism and Law INLSJ 106.

51 Hindu Family Law: An action Study on proposed reforms of Hindu family law; BNWLA, NY 13.

ancestors and to the adopter by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular i.e. to secure an heir and perpetuate the adopter's name. In Bangladesh the Shastric uncodified law relating to adoption continues to exist.[52] Under this law only a male can be adopted. He must belong to the same caste as his adoptive parents and his mother must not be within the prohibited degrees to his adoptive father, i.e., he must not be a boy whose mother his adoptive father could not have married. Under Shastric law only a man can adopt unilaterally. A wife or a widow, in most places, may adopt only with the husbands express consent.

The Hindu Adoptions and Maintenance Act of 1956 has changed, amended and codified the law relating to adoption in India. All adoption in India after 1956 are secular, and to be valid must conform to the requirements of the Act.[53] In the case of adoption changes have been made in India which gives a woman rights almost equal to that of a man. A married Hindu male cannot adopt without the consent of his wife [Section 5(1)]. A Hindu woman, unmarried, widow or divorcee can adopt but a married woman cannot adopt even with her husband's permission. The husband must adopt with her permission (Section 8).

4. Why Bangladeshi Hindu Law should be Reformed?

Women enjoy a discriminatory status under all major religions in Bangladesh including Islam, Hindu, Buddhism and Christianity. The condition of Hindu women is worse than the women belonging to other communities in Bangladesh.[54] All legislations relevant to Hindu women were enacted in the British colonial period and no further laws have been enacted in Bangladesh after the British left, both as part of Pakistan as well as an independent nation. It is as if the issue of social reforms for Hindu women has been forgotten by successive regimes and governments since 1947. But our neighboring country India continued their social reforms for the Hindu women through legal enactments even after the British left.

Though Bangladesh has already been quite successful in formulating legal measures to combat social ills against women, for example, in areas like domestic violence, violence against women and children generally, acid crimes, dowry etc. But unfortunately, the same cannot be said of family laws.[55] This is one area of law where Bangladesh is still now, significantly lagging behind than other countries particularly India, in bringing the justice

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52 Huda, 'Double Trouble' (n 36) 122.

53 ibid 123.

54 Report on Legislative Initiatives and Reforms in the Family Laws, Dhaka, Bangladesh Legal Aid and Services Trust (BLAST) 4.

55 Farhad (n 11) 1.

system in line with the demands of time. Although fresh reforms have been effected in personal laws to eliminate gender discrimination in other Countries, the law makers in Bangladesh is yet to demonstrate its success towards any workable initiative to bring about a significant change in its legal system which would establish a society on the basis of gender equality and justice.

When it comes to legislative reforms in Bangladesh, the position of Hindu women has received little attention when compared to the position of Muslim women. Such neglect on part of law has also greatly affected the socio-economic lives of Hindu women. Such a position fails to take into account that Hindus are the largest minority in Bangladesh. They constitute roughly around 9.2 per cent of the population.[56] After observing the historical development of Hindu law including radical reforms in modern India it is, we believe, expedient to make a critical review of the existing Hindu family law in Bangladesh exploring the possibilities of any reform to move the law from where it had anchored in 1947.[57] So, it's a demand of time in this 21st century that the discussed areas of ancient, gender discriminatory Hindu Law applicable in Bangladesh have to be reformed immediately.

5. Conclusion

After analysing the provisions of The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; and The Hindu Adoption and Maintenance Act, 1956 we can imagine that radical changes as regards Hindu laws have been made in India which is more gender friendly and enhance social dignity, security and liberty of a Hindu woman. But in Bangladesh the ancient pre 1947 laws have remained in force and the marriage related matters are regulated by the Orthodox Hindu Law by which the Bangladeshi Hindu women are discriminated to a greater extent.

Although initiative has been taken by some stakeholders, to reform Hindu family laws but it didn't work out successfully. The government recently enacted the Hindu Marriage Registration Act, 2012. This provides for registration of Hindu marriages on an optional basis. Many felt that the registration process should be made mandatory and hence this law has been subject to sustained and cogent criticisms from women's and human rights organizations.[58]

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[56] Bangladesh Bureau of Statistics, 'Bangladesh Population Census 2001' (2004) cited in Bangladesh Bureau of Educational Information and Statistics, *Bangladesh: Country Profile*, <http://www.banbeis.gov.bd/bd_pro.htm> accessed 5 February 2019.

[57] Alam (n 2) 43.

[58] 'Law making Hindu marriage registration optional condemned' *The Daily Star* (Dhaka, 21 September 2012) <https://www.thedailystar.net/news-detail-250684> accessed 5 February 2019.

The government of Bangladesh ratified CEDAW on 6 November 1984 with four reservations. In 1997, it had partially lifted reservations from Article 13(a) and 16(f) of the CEDAW. Though the Convention provides a comprehensive range of mechanisms and policy measures for combating gender discrimination, the Government of Bangladesh has not ratified CEDAW in full and has retained reservations to Article 2 and Article 16(c) on the grounds that they are in direct contradiction with the *Shariah* and other personal laws.[59] Bangladesh has not lifted its reservation from Article 16(1)(c) which stipulates for women's equal rights with men in marriage and its dissolution. The problem is exacerbated by the fact that the Constitution also mandates for equal rights for men and women in public life[60] but remains silent about private life. Consequently, the Hindu women continue to be subjected to discrimination under religious personal laws while claiming their right to marriage, divorce, inheritance and some related matters. I think the reservations on Article 2 and 16(1)(c) of CEDAW together with Articles 19(3) and 28(2) of our Constitution are the main obstacles to reform the family laws of Bangladesh. Thus, the ancient Hindu Law which is much more gender discriminatory is still applicable and has not been reformed like India. But initiative has to be taken as early as possible to remove all kinds of discrimination between Hindu man and woman in their private life. Hindu Marriage, Adoption, Maintenance and Succession related codified Act should be enacted immediately, which will ensure gender equality and justice for the Hindu women in Bangladesh in their private life.

Salient features of a possible Hindu family law bill of reforms may be recommended to consist of the following:

- Introduction of monogamy and the prohibition of bigamy or polygamy;
- Dissolution of marriage union by way of divorce or otherwise on the initiative of either parties to the union and its enforcement by the decree of the court on the fulfilment of certain conditions prescribed by law;
- Remarriage after dissolution of marriage;
- Registration of marriage should be made compulsory;
- Absolute ownership of the property of the women as against limited ownership as presently existing;
- Principles regarding maintenance should be clarified and the issue of post-divorce maintenance provided for;
- Right of the women, married or unmarried, to adopt a boy or a girl;
- Right of a female child to be adopted by an adoptive father or mother;

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59 Report on Legislative Initiatives and Reforms in the Family Laws 10.

60 The Constitution of the People's Republic of Bangladesh 1972 (BD), Articles 19(3) and 28(2).

- Women should have preferential rights regarding guardianship of children; and
- There should be strict legal requirements for a valid marriage, regarding, age, consent, capacity and form.

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Cyberbullying and Preventive Measures: Bangladesh in Context

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Abstract

Modern technological inventions are always blessings towards mankind. But it may turn into hassle by unfair use of technology. Recently worldwide rampant use of internet accelerates to emerge various kinds of misdeeds and bullying is one of them. In traditional bullying approach one may hesitate to do so for fear of humility and punishments, contrarily online bullying or cyberbullying has become a reluctant practice to harass any individual. The objective of this paper is to analyse into an empirical research approach about the reasons and consequences of cyberbullying. The study has a comprehensive perspective about the bitter impact of cyberbullying and provides a bird's eye view about the legal mechanism of Bangladesh to eradicate such mishap. Cyberbullying as a faceless evil in virtual space has the greater possibility of threats, alarm, distress, slander and physical danger that go hand in hand with real world bullying. The authors of this article try to explore available legal approach in the context of Bangladesh. It is arguable that a number of statutes may be of assistance in relation to cyberbullying. However, due to the lack of clear definition of cyberbullying, the applicability of these laws is an open debate. This paper recommends initiating a separate procedural law to resolve such kind of technological misdemeanour and to make cyber world a better place of security.

Keywords: Cyberbullying, Cyber Crime, Harassment, Social Networking Sites, Cyberspace.

1. Introduction

In present decades it is rarely possible to find out any person without having a Facebook or Twitter or Instagram or WhatsApp account. Only a single finger-tip is quite enough to maintain social communication throughout the world by variety of technologies. Innovation of latest devices, apps, software programs have added new dimension to our communication system. That's why

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miscreants take advantage of bullying via virtual world to accomplish their wicked intension. Social networking has taken bullying to an extreme level of agitation. Cyber space has become the perfect place to reach out anonymously to just about anybody, at any time and any place.[3] Any person can be bullied even within the safe premises of his dwelling place. Inexpensive and easy access to internet with the possible anonymity is being used as a tool to bully others. Lay person to celebrity, almost everyone is being targeted in cyberspace. A culinary artist faced backlash in cyberspace, and often time mobbed for her experiment in cooking. It went to the extent that she addressed it in several interview by the local newspapers.[4] Even the politicians find themselves in the courtyard of the bullies. Often time, it is seen that memes are created of the pictures or update posted in the official pages of the politicians. Recently, pictures of graduation party of a high school graduate went viral and pilloried for holding such party.[5] Though, the high school graduate did not have any celebrity image.

In this paper, the authors therefore, travel over the existing laws and the challenges that exist to establishing cyberbullying legislation in the context of the Bangladesh. The paper is focused upon qualitative and descriptive study on the basis of secondary information like national & international journals, research reports, news reports, different websites, existing national legislations etc.

2. Characteristics of Bullies and their Behaviour

2.1 Definition

Cyberbullying is comparatively a new idea. With a gap in research publication, there is also no international legal instrument defined the term 'cyberbullying'. It is not defined under the existing laws of Bangladesh as well. Definition of cyberbullying by the researchers from psychological school of thought is actually an extension of traditional or offline bullying. Researchers from the late twentieth century defined the term 'bullying' in institutional settings. According to Professor Dan Olweus,[6] bullying is an intentional aggressive behaviour carried out by an individual or a group

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[3] Dr Olivia, 'Bullying Essay' (*Essay Lab.Com*, 13 February 2017) <https://essaylab.com/blog/cyberbullying> accessed 28 December 2018.

[4] Hasan Dabir Uddin, Interview with Keka Ferdousi, 'Cooking is not easy', *Dhaka Tribune*, (Dhaka, 17 October 2016) <https://www.dhakatribune.com/showtime/2016/10/17/keka-ferdousi-cooking-not-easy> accessed 13 January 2019.

[5] This incident was not reported in any daily and there is also no news if the victim has filed any complaint.

[6] Dan Olweus is a professor of Psychology at the University of Bergen, Norway. He is well noted for his research on problems of bullying and victimization.

repeatedly and overtime against a victim.[7] The victim, in such case, finds it difficult to defend themselves.[8] They also claimed that bullying is based on an imbalance of power and can be defined as a systematic abuse of power.[9] Extending the earlier research on offline or traditional bullying, an attempt has been made to define the term 'cyberbullying' over the past decade.[10] It is defined as an aggressive act or behaviour that is carried out using electronic means[11] by a group or an individual repeatedly and over time against a victim who cannot easily defend him or herself.[12] It takes place by using digital devices like cell phones, computers, tablets where people can view, participate or share their content. In short, cyberbullying refers primarily to covert actions such as teasing, exclusion, social rejection, and spreading rumours. It includes some sort of false documents, mean contents, sexual remarks or private information to embarrass someone in front of others in virtual arena. It can also include sharing private information about someone else.[13] Sometimes virtual bullying crosses the line into unlawful or criminal behaviour. Scholars argue that the application of the three aspects of the traditional bullying, namely intentionality, repetition, and an imbalance of power, would be difficult in case of cyberbullying.[14]

2.2 Characteristics and Behaviour of Bullies and Reason for such Behaviour

Cyberbullying has a better grasp of reasons behind it. In general sense bullies are considered as jealous, unhappy or just unkind people.[15] Shawn Edgington, a paediatrics opined that bullies is easily angered; is obsessed with violent games, TV or literature; has parents who enable behaviour by either inaction or encouragement; has no remorse for his or her actions; blames others; has deep depression with extreme mood swings; has high frustration levels and poor coping skills; abuses drugs, alcohol and other substances; is disrespectful

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7 Please note that this definition by Professor Olweus was given in the context of educational institution. At that time, it was a surfaced concern in education institutions around the world, especially North America and Europe; See Dan Olweus, 'Bully/victim problems in school: Facts and intervention' (1997) 12 (XII) European Journal of Psychology of Education 495, 496.

8 Peter K. Smith and Katerina Ananiadou, 'The Nature of School Bullying and the Effectiveness of School-Based Interventions' (2003) 5(2) Journal of Applied Psychoanalytic Studies 189.

9 Shelley Hymel and Susan M. Swearer, 'Four Decades of Research on School Bullying' (2015) 70(4) American Psychologist 293.

10 Peter K. Smith, 'School Bullying' (2013) 71 Sociologia, Problemas E Práticas 81, 82-83.

11 Here the electronic means do not only limit to the devices that has access to internet.

12 Robert Slonje and Peter K. Smith, 'Cyberbullying: Another main type of bullying?' (2008) 49 Scandinavian Journal of Psychology 147.

13 United States government, 'What Is Cyberbullying' (stopbullying.gov) <https://www.stopbullying.gov/cyberbullying/what-is-it/index.html> accessed 13 January 2019.

14 ibid

15 Carrie Rogers-Whitehead, 'What really causes cyberbullying?' (17 October 2018) <https://www.heraldmailmedia.com/life/what-really-causes-cyberbullying/article_9ff3c3ed-b55c-5b89-9e04-a8c8dcbb9137.html> accessed 21 January 2019.

to others, humiliates and sets traps to embarrass; glorifies violence and intimidates others; has been personally abused or has witnessed abuse in the home.[16] Competition for status and esteem may often be a reason behind peer cyberbullying. Young people take revenge of getting hurt after their breakups via cyberbullying. Girls are more likely to be both perpetrators and victims of cyberbullying than boys.

A number of ways are being followed by the bullies namely spreading their personal pictures or videos, in most cases this are edited from the real version to make obscene in order to belittle them, or by posting rude status or comments on someone's picture or posts, in a word there are many elements by which one can intentionally degrade anyone. Surprisingly a new trend has emerged among teens to use slangs, harsh language or troll any person on social websites. They take it very casually to make fun of others by bulling on virtual world. Even adults are getting engaged day by day with such kind of bullying practices. Very rarely the victims seek strong legal mechanism to resolve their situation though it has become a common phenomenon.

2.3 Forms of Cyberbullying

Cyberbullying is more forwarded version than traditional bullying system. It can happen in a variety of ways. According to Willard (2006), 'there are different forms of cyberbullying. These forms include flaming, harassment, denigration, impersonation, outing, trickery, exclusion, cyber stalking, and cyber threats'.[17] Various forms of cyberbullying are discussed below:

- **Harassment:** Harassment involves the bully sending offensive and threatening notes through instant messaging or any other forms of communication to the victim.[18]It may include licking the personal messages or personal information of the victims.

- **Denigration:** Denigration is such type of endeavour to outspread unfounded gossip or rumours to ruin victim's reputation. In some cases

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16 Shawn Edgington, 'What are the characteristics of a typical cyberbully?' Sharecare <https://www.sharecare.com/health/teen-perspective-bullying/what-characteristics-of-typical-cyberbully> accessed 2 January 2019.

17 Nancy Willard, 'Cyberbullying Legislation and School Policies: Where are the Boundaries of the "Schoolhouse Gate" in the New Virtual World?' (2007) Center for Safe and Responsible use of the Internet <http://www.embracecivility.org/wp-content/uploadsnew/2012/10/cblegislation.pdf> accessed 2 January 2019.

18 Swity Sultana Monni and Alma Sultana, 'Investigating Cyber Bullying: Pervasiveness, Causes and Socio-Psychological Impact on Adolescent Girls' (2016) 6(4) Journal of Public Administration and Governance <http://www.macrothink.org/journal/index.php/jpag/article/view/10132> accessed 2 January 2019.

blogs, online polls, discussion groups etc. may even be set up by the bully to expose altered or crazy content that ridicules or humiliates the bullied.[19]

- **Masquerading:** Masquerading is a disguise form of cyberbullying where the bully pretends to be someone else who they are exactly not. Here the bully can create fake e-mail addresses or instant messaging or might use someone else cell number to harass the bullied.

- **Flaming:** Flaming refers to hostile online interaction via emails, instant messaging or chat rooms. It is also known as bashing. It is a type of public bullying that often directs harsh languages, or images to a specific person. Flaming is most commonly seen on YouTube where users reluctantly pass comments over any videos.

- **Exclusion:** This includes make someone intentionally leaving out from a specific group and then spread unfavourable comments about the leaving person.[20] Though such kind of activity may not have a direct impact on victims but can develop something worse. Often members of various online groups use this method of isolation to taunt a person.

- **Outing:** Outing is an act of sharing or publishing private information online. Here a bully can spread on someone's personal images, messages, information or videos in public sites from a revengeful intention.

- **Cyber stalking:** Cyber stalking is the most harmful and malpractice form of bullying where anyone can stalk or harass an individual, group or organization without being detected.[21] It may include sending e-mails, instant or text messages, social posts, creating websites for the sole purpose of tormenting the victim.[22] Stalkers figure out their targets by using search engines, online forums, bulletin, discussion boards, chat rooms and through online communities like as Twitter, Facebook, Google Plus etc.

- **Trolling:** Trolling is a deliberate act of provocation to online content which initiates to pass over comments in a disgraceful nature. Cyber trolling has become popular fashion on social networking sites to bombard people with insulting, threatening language.

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19 Cyber Bullying, 'Cyber Bullying and Its Consequences' <https://www.help123.sg>cyber-bullying> accessed 13 January 2019.

20 Cyber Bullying, 'How to Deal with Cyber Bullies' <https://www.help123.sg>cyber-bullying> accessed 13 January 2019.

21 ibid (n 14).

22 https://en.oxforddictionaries.com/definition/bully.

2.4 Effects and Consequences of Cyberbullying

Cyberbullying is considered as trickier, unpredictable, uncertain annoyance rather than any other form of nuisance. Its impact is more terrible when it is often done in secret with the bully hiding who they are by creating fake profiles or names or sending anonymous messages. As contents or messages are shared online, it can be recorded and saved in different places of websites. Even making fun of a particular person by silly trolling defames one's goodwill. It's been a new trend in our society to disgrace any person, either intentionally or unintentionally through online bullying. Various incidents have been taken place worldwide in this regard. Victims get themselves indulged with depression, low self-esteem, and loneliness, vengeful because of cyberbullying. The worse effect of such kind of public embarrassment often leads to suicidal attempts. Victims choose the path, suicide, to get relief from such humiliation. It tends to utmost psychological hazard to the victim; sometimes they may involve themselves in alcohols or drug addiction. According to the survey report of Centers for Disease Control and Prevention (CDC), 16% of high school students are effected by cyberbullying.[23]

3. Cyberbullying around the World

Cyberbullying is the consequence of the new and fast-paced growth of cyber technology over the last decade. In USA, the concern over cyberbullying raised upon the suicide incident of Megan Meier, a 13 years old girl.[24] The fact of the leading case[25] is that her neighbour Lori Drew, mother of a former friend of Meier, created a fake or hoaxed account in a social media sites namely MySpace. Posing as a fictitious 16-year-old boy, Josh flirted with Meier and extracted intimate details of her life. Later on, the sweet Josh turned mean on her and abruptly ended their friendship. One of his final comments wrote 'The world would be a better place without you.' After this incident Meier family found her hanged herself to death from a belt. Initially no charge was filed against Mrs Drew claiming that her conduct may be immature and rude but not illegal.[26] Afterwards, Mrs Drew was charged for computer fraud.[27] This case is considered the first case of cyberbullying in USA.

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23 https://www.psycom.net/effects-of-bullying> accessed 30 January 2019.

24 Christopher Maag, 'A Hoax Turned Fatal Draws Anger but No Charges' *The New York Times* (New York, 28 November 2007) <https://www.nytimes.com/2007/11/28/us/28hoax.html> accessed 31 January 2019.

25 *U.S. v Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

26 Dardenne Prairie, 'Parents say fake online 'friend' led to girl's suicide' *CNN* (Missouri, 17 November 2007) <https://web.archive.org/web/20071118052137/http://www.cnn.com/2007/US/11/17/internet.suicide.ap/index.html> accessed 31 January 2019.

27 Jennifer Steinhauer, 'Verdict in MySpace Suicide Case' *The New York Times* (US, 26 November 2008) <https://www.nytimes.com/2008/11/27/us/27myspace.html> accessed 31 January 2019.

Followed by *Meier* case, series of cases were filed in US.[28] It is reported that, in USA, more than one out of every five students report being bullied according to the National Center for Educational Statistics report of 2016.[29]

In UK, Keeley Houghton is considered to be the first person to be jailed on cyberbullying case. Ms Keeley, an 18-year-old girl, was bullying her former classmate, Emily Moore, for four years.[30] She threatened Ms Moore 'Keeley is going to murder the bitch. She is an actress. What a ******* liberty. Emily ****head Moore', leading the case.

With high rate of internet accessibility Australia has ranked as worst place for cyberbullying in recent decades.[31] In India, cyberbullying was first time dealt in a land mark case of *Vishaka v State of Rajasthan*.[32] Indian children are considered the third highest online bullying victim after China and Singapore in a report conducted by Microsoft Corporation.[33]

4. Cyberbullying in Bangladesh

4.1 Background

The election manifesto 'Vision 2021' of the current ruling party of Bangladesh with the promise of a 'digital Bangladesh' made it possible to have inexpensive and easy access to technology and internet.[34]Without balance and check, it also paved way to commit crimes over cyber space and posing a challenge to the criminal justice system. In Bangladesh, there is a lack of research and published article on cyberbullying. Like most of the countries, it is comparatively a new challenge for the criminal justice system

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28 Kalhan Rosenblatt, 'Cyberbullying Tragedy: New Jersey Family to Sue After 12-Year-Old Daughter's Suicide' *NBC News* (US, 1 August 2017) <https://www.nbcnews.com/news/us-news/new-jersey-family-sue-school-district-after-12-year-old-n788506> accessed 31 January 2019; CBN News, 'Cyberbullying pushed Texas teen to commit suicide, family says' (TEXAS CITY, 7 February 2017) <https://www.cbsnews.com/news/cyberbullying-pushed-texas-teen-commit-suicide-family/> accessed 31 January 2019.

29 National Bullying Prevention Center, Bullying statistics, Pacer.org <https://www.pacer.org>resources>stats> accessed 2 January 2019.

30 Luke Salkeld, 'Facebook bully jailed: Death threat girl, 18, is first person put behind bars for vicious internet campaign' *The Daily Mail* (UK, 21 August 2009) <https://www.dailymail.co.uk/news/article-1208147/First-cyberbully-jailed-Facebook-death-threats.html> accessed 31 January 2019.

31 Zawn Villines, 'Cyber-bullying: A Global trend' (2014) IDG Connect <https://www.idgconnect.com>opinion>.

32 MehakSharma, 'MustRead: What is Cyber Bullying or Anti-Bullying Laws in India' MyAdvo (India, 6 Oct 2018) <https://www.myadvo.in>blog>.

33 India Ranks Third on Global Cyber Bullying List <https://www.endcyberbullying.org/india-ranks-third-on-global-cyber-bullying-list>.

34 Shariful Islam, 'Digital Bangladesh a reality now' (Dhaka, 11 July 2018) <https://www.dhakatribune.com/bangladesh/2018/07/11/digital-bangladesh-a-reality-now> accessed 14 January 2019.

in Bangladesh, and has extensive social, political and economic implications. We have spoken to a number of stakeholders from different background on cyberbullying.[35] With the advantage in communication technology, the form of cyberbullying has also changed. During the nineties, when mobile and land phone came in Bangladesh, usually random calls were made in the landline numbers since caller's number were not visible mostly. Random caller's would ask explicit questions, and often made persistent request to be friends and chit-chat with them. Sometimes the request of being friends would end up in request for a romantic relationship. Internet was expensive and was not available like it is today. When Bangladesh linked with an undersea submarine cable in 2006 and cyber café business boomed, social networking sites namely email became popular among the internet users. Afterwards, other social networking sites namely Facebook, Instagram etc. became popular and the users of these sites boomed. As of November 2018, there are over 90 million of active internet users.[36] Alongside, the expense of internet reduced in Bangladesh and the prices of Smartphone, SIM and computers also reduced. With the easy access to information and technology availed anonymity and reach of mass population within seconds. On the other hands, there are lack of awareness and laws to prevent or mitigate the situation. A survey report has revealed that about 49% of school students in Bangladesh fall a victim of cyberbullying.[37] Women are the main victim and target of cyberbullying.[38] Recently, the UNICEF called for concern over the increased cyber violence against the children and youth in Bangladesh.[39]

4.2 Mandates under the Existing Law

There are no existing laws in Bangladesh specifically defined the term 'cyberbullying'. Therefore, it cannot directly say that cyberbullying is an individual offence under the existing laws of Bangladesh. However, if it supports or constitute any offence under the existing laws of Bangladesh it can be brought under the mandate of existing laws. Unlike the other common law countries, civil litigation cannot be brought in this case,[40] and only criminal cases may be brought before the Court.

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35 We have spoken to our peers and acquaintances and ask them a few questions. The stakeholders were from different gender, age group and profession.

36 BTRC (Dhaka, 2018) <http://www.btrc.gov.bd/telco/internet> accessed 28 January 2018.

37 Unb, '49% Bangladeshi school pupils face cyberbullying' *The Daily Star* (Dhaka, 9 February 2016) <https://www.thedailystar.net/bytes/%E2%80%9849-bangladeshi-school-pupils-face-cyberbullying%E2%80%99-287209> accessed 28 January 2019.

38 Faisal Mahmud, 'Women increasingly falling prey to cyberbullying' *The Independent* (Dhaka, 25 October 2018) <http://www.theindependentbd.com/post/171850> accessed 25 January 2019.

39 UNICEF Bangladesh, 'UNICEF calls for concerted action to prevent bullying and harassment for the 32 per cent of children online in Bangladesh' (Dhaka, 5 February 2019) <https://www.unicef.org/bangladesh/en/press-releases/unicef-calls-concerted-action-prevent-bullying-and-harassment-32-cent-children>.

40 In common law countries defamation is a civil offence.

The Information and Communication Technology (ICT) Act 2006 is the very first law specifically addressed cyber crimes. It was enacted to legally recognise and provide security of information and communication technology and to prepare rules of relevant subjects. This Act of 2006 recognises electronic records legally. Section 57 of this Act provided punishment for publishing fake, obscene or defaming information in electronic form. Amid the wide criticism by the stakeholders on its broader and ambiguous wording, this section, however, was repealed by the Digital Security Act 2018.[41] Under the ICT Act a Cyber Crime Tribunal was set up.[42]The mandate for 'cyberbullying' under the ICT Act has, thus, became narrow and can only be used against person who was entrusted of any of the power under the ICT Act discloses confidentiality and privacy.[43] However, until recently this law, especially section 57 was frequently used against cybercrimes. Since there is no mention of cyberbullying specifically, it also came beneath the broad range of cybercrimes under this Act.

Under the Digital Security Act 2018 it is an offence to send or publish any information that is offensive, false or intimidating etc.[44] Therefore, if someone continuously publish or sends any offensive, false or intimidating information with the intention to bully others using any technology may constitute an offence under the Act of 2018.

Penal Code 1860, being the parent criminal law, can also be invoked in this case. Criminal intimidation,[45]defamation[46] or any kind of extortion[47](threatening another with any injury to his person, property, reputation etc.) are the offences under the Penal Code, 1860 that can be invoked if cyberbullying constitutes any of the aforementioned offences. In number of cases relating to information technology, cases have been filed for defamation. Case of Naem Nizam,[48] editor of Bangla daily Bangladesh Protidin, and Barrister Mainul Hosein[49] could be exemplified here, though

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41 Ashif Islam Shaon, 'The question of Section 57' *Dhaka Tribune* (Dhaka, 10 August 2018) <https://www.dhakatribune.com/bangladesh/law-rights/2018/08/10/the-question-of-section-57> accessed 28 January 2019.

42 The Information and Communication Technology Act 2006, s 68.

43 ibid, s 63.

44 The Digital Security Act 2018, s 25.

45 The Penal Code 1860, s 503.

46 ibid, s 499.

47 ibid, s 383.

48 Star Online Report, 'Bangladesh Protidin editor, publisher get bail in defamation case' *The Daily Star* (Dhaka, 15 January 2018) <https://www.thedailystar.net/politics/bangladesh-protidin-editor-publisher-get-bail-defamation-case-news-report-awami-league-leader-motahar-hossain-1520143> accessed 30 January 2019.

49 UNB NEWS, '3 more defamation cases filed against Mainul' *UNB* (Dhaka, 28 October 2018) <http://unb.com.bd/category/bangladesh/another-defamation-case-filed-against-mainul-in-rajshahi/5219> accessed 30 January 2019.

credibility of these cases is in question. Nevertheless, it is not unheard of to bring a suit of defamation for crime relating to information and technology.

Harming a person's social status, black mailing or inflicting emotional abuse on a person by means of pornography in respect of cyberbullying will be penalized under Pornography Control Act 2012.[50]

One stop service has been opened by the Bangladesh Telecommunication Regulatory Commission (BTRC) complains can be lodged by calling at +880-29611111 or by emailing at btrc@btrc.gov.bd. In addition, cyber helpline has been launched by the government. Victims can call at +8801766678888 to submit their complaints. A specialized police unit named Cybercrime Investigation Center (CIC) recently started their operations, which is equipped with software named Open Source Intelligence (OSINT) to trace out any remarks or postings that are defamatory and constitute an offence under ICT Act.

4.3 Incidents that may Fall under Cyberbullying

In Bangladesh, the widely circulated incident of cyberbullying is perhaps the country witnessed in 2016 when an investigative report was aired in a satellite TV channel on the quality of education and the quality of GPA 5.[51] In the aired report the journalist interviewed 10-13 students who passed the secondary school certificate examination and got GPA 5. They were asked some basic questions like 'what would be the translation of the Bangla sentence *ami GPA 5 peyechi* [I have got GPA 5], when is the independence day of Bangladesh etc. The interviewees could not answer the questions, and one of the interviewees was seen translated 'I am GPA 5' instead of 'I have got GPA 5'. Without considering the other substances, the journalist went on questioning the quality of the students getting GPA 5. The faces of the interviewees were exposed to the viewers. As soon as the report was aired mixed reaction came forward from the stakeholders namely concern over ethics of journalism. Relevant to our topic, the sentence 'I am GPA 5' became a troll over the internet and the whole report became a humorous way of questioning quality of one's education.[52] If we filter this incident to the definition (mentioned at the beginning of the paper), all three core elements were present. The aired news was uploaded by the news channel in their official site. Though the video was later on removed but by the time it was viewed numerous times and downloaded and re-uploaded. Since it is stored in

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50 The Pornography Control Act 2012, s 8(ii).

51 The highest Grade Point Average (GPA) one can get in the secondary and higher secondary school certificate examination. The recorded news is still available in YouTube. We are not citing the link of the news here since the faces of the interviewees are exposed.

52 Star Online Report, 'Viral video: These wrong answers will shock you' *The Daily Star* (Dhaka, 30 May 2016) <http://sandbox.thedailystar.net/trending-socially/viral-video-these-wrong-answers-will-shock-you-1231687 accessed 31 January 2019>.

cyberspace the news re-surfed. The interviewees were never given a chance to defend themselves and, practically after the news was aired it was impossible for them to defend themselves because of the apparent fear of social exclusion and rejection.

Another incident maybe relevant here is the circulated answer of a beauty pageant contestant in the question-answers round. When asked by a judge 'What is H2O?', the contestant replied 'a restaurant in Dhaka'. After the program was aired it became a source of meme and troll in the social media sites among the Bangladeshi users.[53] The same elements of cyberbullying were present here. It was repeating and the victim was apparently socially shamed and shunned.

5. Conclusion

It is difficult to establish cyberbullying as an independent offence without a clear definition. Even the most recognized definition cannot always strictly follow. Establishing the intention of the bullies would be difficult without an explicit provision as well. Extensive research is also needed in this regard to bring forward the true fact and to address the real situation. Enactment of particular law regarding cyberbullying and it's strict application is also required to control cyber harassment. However, when urging for clear dentition it should also not contradictory to the rights protected under the Article 39 of the Constitution of Bangladesh.

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Unfair Termination and Conundrum surrounding the Remedy of Compensation in Tanzania

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Abstract

Once an arbitrator or the court finds that an employee was unfairly terminated, they are empowered to order the employer to reinstate, re-engage or pay compensation to the dismissed employee. In terms of section 40(3) of employment and Labour Relations Act (Act No. 6 of 2004) as hereinafter referred as ELRA, it states that "Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment." Therefore, this section is to the effect that, where the court or an arbitrator may order the employer to reinstate or re-engage the employee whose dismissal was substantively unfair; but the arbitrator's or court's order is at the whims of the employer to decide whether or not to compensate or re-engage the wrongfully terminated employee. This article examines the extent to which the aforementioned provision infringes the fundamental right to work and receive remuneration to the employee. Firstly, it discusses the concept of unfair termination, followed by qualifying period of protection against unfair termination. This article also examines the ILO standards on unfair termination, more interestingly this study analyses the legislative framework concerning Unfair Termination in Tanzania. In the main this article focuses on the remedies of unfair termination particularly compensation as a remedy by reviewing a number of cases where the courts in Tanzania found termination were substantively unfair and order reinstatement or reengagement but the decision was rested to employer to decide. Finally conclusion was made before suggesting the ways forward.

Keywords: Unfair Termination, Statutory Remedies, Reinstatement, Re-engagement, Compensation.

Introduction

Unfair termination of employment refers to the process of dismissing employee in the absence of a substantial reason. It is the removing of someone

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from a work for reasons which are not legally accepted. Unfair dismissal normally cannot be valid in the grounds where an employee is dismissed for genuine redundancy, incapability, or misconduct and more importantly when the procedures prescribed by the laws are not adhered to.[2]

A termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid; that the reason is a fair reason, related to the employee's conduct capacity or compatibility or based on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure.[3] Unfair termination has also been defined in *Abubakar Haji Yakubu v Air Tanzania Co. Ltd*,[4] in this case, Rweyemamu, J. when considering unfair termination said '…refers to termination for an invalid reason and or using improper procedure as enumerated under section 37(2) of the Act'.[5]

Protection against unfair Termination of Employment

Before go into details as what constitutes unfair termination of employment, it is of a great importance to understand the position of the law on who may claim for unfair termination of employment both under ILO standards, ELRA and the Code of Good Practice Rules, 2007.

To start with, the International Labour Organisation (ILO) recommendation accepted that certain categories of work could legitimately be excluded from protection against unfair dismissal, such as those taken on for a specified rather than indefinitely, those on probation and those employed on a causal or temporary basis.[6] The same vein has been well stated under the ERLA whereby, only employees who have the right to claim unfair dismissal and they must have completed a minimum qualifying period of continuous employment which presently stands at one year.[7] For this reason an employee who has worked for less than six months cannot successfully claim for unfair

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2 Alexander S Madinda, 'Unfair Termination of Employment at Workplaces: The Case of Tanzania' (2014) 1(5) International journal of Emerging Trends in Science and Technology 764-82.

3 The Employment and Labour Relations Act No. 6 of 2004 (Tanzania), s 37(2).

4 Lab. Div., DSM, Rev. No162 of 2011, 24/10/2012.

5 The Employment and Labour Relations Act No. 6 of 2004 (Tanzania).

6 Gwyneth Pitt, *Employment Law* (6th Edition), Sweet & Maxwell, 2007, p. 227.

7 Section 35 of the ELRA which *inter alia* states that 'The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts'. Also Rule 10(4) of the Employment and Labour Relation Act (Code of Good Practice), Rules of 2007, which *inter-alia* provides that 'the period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector'. Further sub rule 5 of the same Code states that 'An employer may after consultation of with the employee, extend the probationary period further reasonable period if the employer has not yet being able to properly assess whether the employee is competent to do the job or suitable for employment'.

termination of employment as was in *Stella Temu v Tanzania Revanue Authority*,[8] the Court of Appeal held that:

> There was no right of hearing since there was no termination but rather non-confirmation……..that probation is a practical interview and reason is not given where one has failed in the interview.

The same view was taken by court in *Agness B. Ruhere v UTT Micro Finance Plc*,[9] under this case the court had this to comment, "An employee who is under probation period when terminated cannot sue or file a dispute for unfair termination, the court further stated Termination of probation employee without fallowing the legal requirements amounts to unfair labour practice".

ILO Standards on Unfair Termination

International Labour Organisation in its efforts to set standards of practice in the work place particularly relating to security of employment fashioned out recommendations concerning termination of employment and Convention on Termination of Employment.[10] The organization was influenced in its decision to fashion out the above recommendation and convention as a panacea to the ugly situation where an employer can dismiss his employee without any reason or motive. Such a situation is described as a violation of all things fair and just.[11] It is also said that such a situation amounts to violation of Article 4 of ILO Convention,[12] which provides that:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of undertaking, establishment or service.

The thrust of the Convention is to ensure both substantive and procedural fairness before dismissal or termination of employment at the will of the employer. Thus, the employer is required to give a valid reason for the dismissal. A reason is valid if it is connected with the capacity or conduct of the employee. Such reasons that are connected with the capacity or conduct of the employee are reasons such as gross misconduct, incompetence, disobedience, negligence and such reasons that may be deemed to be

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8 (2005) TLR 178 at 189.

9 HC Labour Division at Dar-es-Salaam 2017.

10 Pitt (n 6) 312.

11 Emmanuel OC Obidimma, MI Anushiem and UMJ Ekeneme, 'Unfair dismissal in Nigeria: Imperative for a departure from the common law' (2016) 7 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 136.

12 ibid 147.

connected with the operational requirements of an undertaking, establishment or [13] service such as transfer of undertaking.[14]

This makes it clear that the ILO only recognises three broad categories of permissible grounds upon which the employee's services may be terminated those related to misconduct, incapacity, or the employer's operational requirements. It is also clear that the termination must be based on a valid reason which can be classified within one of these categories. It is submitted that the degree or severity of a particular behaviour can play a role in determining whether the behaviour can be categorised as a valid reason for dismissal.[15]

More importantly, Article 5 of Convention C158 states that, a number of reasons shall not constitute valid grounds for termination. Included in the list are union membership; acting in the capacity of a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and absence from work during maternity leave.[16] Worth to note that labour laws in Tanzania have comprehensively covered the standards articulated under the Convention on Termination of Employment, the standards are covered under both the Employment and Labour Relation Act as well as under the Code of Good Practice.

Legislative Framework concerning Unfair Termination in Tanzania

As it stands in the above position of ILO, in Tanzania the legislative intent seems very clear under section 37(2) ELRA,[17] plainly envisage giving effect to the Article 4 of the Convention that:

> A termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason is a fair reason, related to the employee's conduct, capacity or compatibility or based

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13 P Smit and BPS van Eck, 'International perspectives on South Africa's unfair dismissal law' (2010) 43(1) The Comparative and International Law Journal of Southern Africa 49.

14 ibid.

15 ibid.

16 ibid. The position under Article 5 of Convention C158 is quite similar to section 37(3)(a) (i) to (v) of ERLA, which inter-alia provides that "It shall not be a fair reason to terminate the employment of an employee for the reason that- discloses information that the employee is entitled or required to disclose to another person under this Act or any other law; fails or refuses to do anything that an employer may not lawfully permit or require the employee to do; exercises any right conferred by agreement, this Act or any other law; belongs, or belonged, to any trade union; or participates in the lawful activities of a trade union, including a lawful strike; (b) for reasons- related to pregnancy; related to disability, and that constitute discrimination under this Act."

17 Act No 6 of 2004.

> on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure.[18]

It is evident that decided cases signalled a clear intention of the legislature in protecting the employees from unfair practices done by the employers. Thus the courts have been very instrumental in construing the provisions with respect to unfair termination. The spirit of the courts can be well evidenced in the case of *Naftal Nyangi Nyakibari v Board of Trustees – NSSF*,[19] the background of the dispute in brief is that the applicant (Naftal Nyange Nyakibari) was employed by the applicant, (Board of Trustees-NSSF) on 1st April, 1999 as a compliance clerk. On 3/3/2009 while the applicant was at Benefit Section received a letter from his superior which informed him to have been shifted from Benefit Section to Data Entry Section. On the same date, 3/3/2009 the applicant wrote a letter to the Director General of the respondent complaining of his transfer. He was charged of failure to comply with the instructions from his superior. The disciplinary hearing was conducted and at the end the respondent decided to terminate the applicant's employment effectively from 17th December, 2009 for misconduct contrary to NSSF Staff Regulations. The CMA found that the applicant's termination was fair both substantively and procedurally. Being dissatisfied with the CMA award the applicant knocked the doors of the High Court Labour Division, hence this application for revision:

> It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, See Section 37 (2) of the Act. I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4.

From the above cited case, clearly has shown that as matter of law, the termination of employment for it to be valid needs to substantively fair in that the reasons for termination either be for misconduct, incapacity or operational requirements.

A similar line of thought was well articulated by labour court in *Tanzania Revenue Authority v Andrew Mapunda*,[20] the background of the dispute in brief is that the respondent (Andrew Mapunda) was employed by the applicant, Tanzania Revenue Authority (TRA) on 22nd May, 2002 as an Assistant Custom Officer on permanent employment terms. The respondent was terminated from employment on 10/5/2012 for misconduct based on

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18 ibid

19 Lab. Div., MZA, Revision No. 12 of 2014, 20/03/15.

20 Lab. Div. DSM, Revision No. 104 of 2014, 09/01/15.

fraudulent clearing of goods contrary to Schedule 2 (19) of TRA Staff Regulation of 2009 and demonstrating behavior contrary to schedule 2 (24) of the TRA Staff Regulation of 2009. Aggrieved by such decision, the respondent referred his complaint to the CMA on 11/6/2012. The CMA determined the complaint which revolved around unfair termination of employment in both substantive and procedural fairness. The CMA found that the applicant's termination was unfair both substantively and procedurally in that the reason was not valid and even procedurally not adhered too. Being dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application for Revision:

> It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

In the same vein of a case the court when construing an aforementioned section in reflection with the ILO spirit, went on saying that:

> I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4. In that spirit employers are required to examine the concept of unfair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees.[21]

It is trite law that, for the termination of employment to be justifiable the procedural fairness is one of paramount consideration in that for the complaint which revolve around unfair termination to stand such a termination should be both substantively and procedurally unfair Also Article 7 of the Convention,[22] provide for the fair procedure before the termination of an employee, the article provides:

> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

As it appears in the above position under ILO, correspondingly in *Stamili M. Emmanuel v Omega Nitro (T) Ltd*,[23] Aboud, J. took the same view and he had this to comment:

> It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other

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[21] Lab. Div. DSM, Revision No. 104 of 2014, 09/01/15.

[22] Termination of Employment Convention (ILO) C158 of 1984

[23] Lab. Div., DSM, Revision No. 213 of 2014, 10/04/2015.

> words there must be substantive fairness and procedural fairness of termination of employment, See Section 37 (2) of the Employment and Labour Relations Act, No. 6 of 2004.

He then went on to add that:

> On the issue as to whether the procedures for termination of employment was followed fairly, the law under Section 37 (2) (c) of the Act provides that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. See also Article 7 of the Termination of Employment Convention (ILO) No. 158 of 1984.

Remedies for Unfair Termination in Tanzania

According to the ELRA, once a court or arbitrator finds that an employee has been unfairly terminated from employment, the Labour Court or arbitrator is empowered to order the employer to reinstate the employee,[24] or to re-engage the dismissed employee,[25] or to pay the dismissed employee compensation.[26]

Reinstatement

The term reinstatement it refers to an order that employer shall treat the complainant in all respects as if he had not been dismissed and must include benefits payable in respect of the period since dismissed and the rights and privileges must include seniority and pensions. This remedy was designed to be a primary remedy for unfair termination, an order akin to the specific performance which the common law refuses to grant.[27]

The employee may also be given the old job but without the rights which he used to enjoy in the old job. The attitude of the Labour court is that, if it finds that the employee has been unfairly terminated, the employee may be reinstated from a date not earlier than the date of dismissal. Reinstatement on its ordinary meaning suggests that the period of service between dismissal and resumptions of service is deemed unbroken. It has been observed that in practice and vast of majority cases, unfairly dismissed employees who returned to work are granted reinstatement. The term reinstatement also suggests an order that may not be conditional or coupled with any qualification, other than something less than full retrospectively.[28]

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24 ELRA, s 40(1)(a).

25 ibid s 40(1)(b).

26 ibid s 40(1)(c).

27 John Bowers, *A Practical Approach to Employment Law* (7th edn, Oxford University Press 2005) 391.

28 Kanego Ndobela and Kola O. Odeku, 'Revisiting the Remedies of Unfair Dismissal at the Workplace' (2015) 6(4) J Sociology Soc Anth 517- 524.

A finding that a termination is unfair is a conditional precedent for ordering a remedy. In this regard South African court when interpreted section 193 of LRA in *De Beers Consolidated Mines Ltd v CCMA and Others*,[29] where the court had the following opinions:

> The onus is on the employer to prove the fact upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of arbitration proceedings, then *cadit quaestio*, the employer has failed to prove the fairness of the dismissal. On the other hand if the employer does prove the fact upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement. The arbitrator is not at large to substitute what he or she considers being fair sanction in the circumstances. This intention of legislature is plain from a reading of section 193 as a whole. Moreover, an opinion that finds a particular decision unfair or not is quantitatively different from one concerned with whether it is fair or not. One hardly need to be a master of language to understand that to find that something is not unfair is not the same as finding it if fair.

The ELRA is silent on what constitute reinstatement, but reinstatement it means the restoration of the employment contract so as to ensure continuity of the employment relationship. An employee who has been unfairly terminated can only be reinstated if he or she is willing to avail him or herself to the employer. Reinstatement is interpreted to mean placing an employee back in service on the same or similar terms and conditions of employment enjoyed as if that the dismissal had never taken place.[30] Since reinstatement restores the *status quo* it may not be conditional or coupled by qualification which is contrary to full retrospectively. Where an employer is ordered to reinstate an employee, it does not bar the employer from changing the working arrangements of the reinstated employee in accordance with its contractual rights.[31]

The labour tribunal has considerable discretion about making such orders and there are tests of practicability and justice. The labour tribunal will take into account the complainant wishes and whether it is practicable for the employer to comply for an order of reinstatement. It will also take into account whether such an order would be just in the circumstances where the employee contributed toward the dismissal.[32]

The position can be well stated in *Lucy Kessy v National Microfinance Bank Plc Ltd*.[33] The background of the dispute in brief is that the applicant (Lucy

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29 (2000) 9 BLLR, 995(LCA) at 1007.

30 Jean Chrysostome Kanamugire and Terence Vincent Chimuka, 'Reinstatement in South African Labour Law' (2014) 5(9) Mediterranean Journal of Social Sciences 257-310.

31 ibid 280.

32 Malcolm Sargeant and David Lewis, *Employment Law* (Pearson Education Limited 2008) 160.

33 DSM. Revision No. 123 of 2015, 30/10/15.

Kessy) was employed by the respondent, NMB in 11/11/1990 as a Clerk II. The applicant was terminated from employment for gross misconduct based on first, failure to attend at work several times without permission from the employer and secondly, disobedience of her superior orders. Aggrieved by such decision applicant referred her complaint of unfair termination at the CMA. The CMA indeed determined the complaint which revolved around unfair termination of the employment in both substantive and procedural. The CMA found the applicant termination was fair both substantively and procedurally. Being dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application for revision:

> In the result, I find that the Arbitrator incorrectly found that the termination of the respondents were substantively fair. I find the applicant's termination was substantively unfair and procedurally fair. Section 40 of the Act provides clearly the remedy once the termination of employment adjudged unfair among others order for reinstatement, re-engagement or compensation and other entitlements… In that regard I order the applicant be reinstated according to Section 40 (1) (a) of the Act without loss of remuneration from the date of termination to the date of reinstatement.

Re-engagement

The High Court Labour Division or court if it finds that an employee has been unfairly dismisses, the employee may be reinstated from a date not earlier than the date of dismissal or the court may order the employer to re-employ the employee back to the position occupied at the time of his or her dismissal or any other reasonably suitable work on any terms and from any date not earlier the date of dismissal. Re-employment means that the employment contract ended at the date of dismissal and resumed on the date of re-employment, re-employment is usually offered as alternative to dismissal to cater for forms of dismissal in which the employment relationship had terminated before the dismissal that is, where the employee was a victim of selective non-re-employment or where the employer refused to renew a seasonal contract.[34]

The term re-engagement was defined by this court in *Michael Kirobe Mwita's v AAA Drilling Manager*,[35] as follows:

> Re-engagement means that a new relationship had begun; this relationship of employment may be different from the old one. The employee may also be given the old job but without the rights which he used to enjoy in the old job.

If an employment tribunal finds that the employee has been unfairly dismissed, it shall explain to him that it has the power to make an order that may be reinstated or re-engaged, and shall ask him if he wishes the tribunal to make such an order. If he expresses such a wish the tribunal may make the

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[34] Kanego Ndobela and Kola Odeku (n 28) 516.

[35] Revision No. 194/ 2013, DSM

necessary order. The requirement for the tribunal to explain its powers to award reinstatement or reengagement is mandatory. However, if there is a failure to do so (and in practice many tribunals do so fail) this will not render any other award made nullity.[36]

Compensation

The position of compensation as remedy of unfair termination in South Africa, In South Africa the Constitution entrenches several fundamental rights concerning labour relations, the Constitutional rights to fair labour practices include the right not to be unfairly dismissed. Article 39(1) of South African Constitution,[37] requires the courts or arbitration tribunals to consider international law when interpreting the provisions of the Bill of Rights. The court have had recourse to the ILO, Termination of Employment Convention, 1982 (No.158), and Recommendation, 1982(No.166), when interpreting the right not to unfairly dismissed.[38]

The Constitutional right not to be unfairly dismissed is given effect to by South African Labour Relations Act, which under Chapter VIII provides a remedy for unfair dismissal.

Section 193 of the LRA determines: If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- order the employer to reinstate the employee from any date not earlier than the date of dismissal; order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or order the employer to pay compensation to the employee.[39]

The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless, the employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal is unfair only because the employer did not follow a fair procedure.[40] If a dismissal is found to have been unfair, unless the affected employee does not wish to continue working for that employer; the employment relationship had deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for

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36 Norman Selwyn, *Law of Employment* (13th edn, Lexis Nexis 2004) 424.

37 ibid 425.

38 Dhlamini, L, *Termination of Employment Legislation Digest* (ILO 2007) 1.

39 J Geldenhuys, 'The Reinstatement and Compensation Conundrum in South African Labour Law' (2016) 11(7) PER / PELJ 7-17.

40 ibid

the employee to return to the position that he or she had previously filled, or if the dismissal was found to have been procedurally unfair only. Compensation should, only in these instances be awarded. However, the failings of reinstatement as a primary remedy are evident from the scarcity of orders made to this effect. Awards for the payment of compensation are far more common, although this trend clearly contrasts with the policy considerations behind the enactment of the statutory remedies.[41]

The decision in *SBV Services (Pty) Ltd v CCMA*,[42] in attempts to bring more clarity regarding what the interpretation is that should be afforded to sections 193 and 194 of the LRA, in particular in the case of dismissals that are found to have been affected for an unacceptable reason (those that are substantively unfair).

"Even if the employee in the case did not wish to be reinstated, or in actual fact made no mistake when electing compensation, he would now be allowed to claim reinstatement with back-pay resulting in an order extending beyond the statutory compensation limits. The employee could then resign. Otherwise, the employee could return to work for the employer and to earn a salary, and if the working situation was - as he predicted - intolerable because of the serious allegations that had been made against him previously, he could even refer another dispute to the CCMA. It has long been accepted that employers are required to protect employees from physical and psychological harm. If an employee can prove that the employer had failed to take reasonable steps to prevent harm to his or her dignity, a claim based on constructive dismissal could ensue. Should this claim succeed, the cycle could continue."

The right to Work and Compensation as Remedy for Unfair Termination in Tanzania

The right to work has two aspects; first the right to work may entail a right against the state to maintain employment policies and to promote vocation training, so that unemployed can find suitable employment. Secondly, there is broad sense, regarding the right to work that represents the right of worker against a possible employer to be employed and to job security. Going by the wording to the right to work and the right to earn just remuneration in Article 22 and 23 of the Constitution, it is apparent that the said provision does not express a positive duty on the state to fulfil them.[43]

In contrast, South African Constitution as pointed above apart from providing for the right to work as it does the Constitution of the United Republic of

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41 ibid 2.

42 2013, 34 ILJ 996.

43 Clement Mashamba, 'The Promotion of Basic Employee Rights in Tanzania' (2007) 7(4) African Human Rights Law Journal 476-485.

Tanzania under Article 22, Constitution of South Africa it goes further and explicitly provides for the right to an employee not to be unfairly dismissed from employment as per Article 29(1) of the Constitution.[44]

By plain interpretations of Articles 22 and 23 of the Constitution of the United Republic of Tanzania, it is apparent that the Constitution guarantees for the right to work and a right to receive remuneration equivalent to the work done. However the same constitution does not offer passable protection to employee against unfair termination as it does the South African Constitution for employee against unfair labour practice particularly unfair termination done the employer. In this regard the Constitution of the United Republic of Tanzania, it offers less or no protection at all to the employee against unfair termination of employment. It follows therefore that, having the right to work as a Constitution rights and without undue regard to the right not to be terminated unfairly is like the right is given in one hand and taken away by another hand.[45]

It has long been accepted that, in Tanzania despite the fact that the right to work it is Constitutional one, it is apparent that failure for our Constitution to entrench the right not to be unfairly terminated from employment it is of fatally important. This is evident that currently an employee may be terminated from employment by employer without undue regard of both substantive and procedural fairness, but the option will still be at the disposal whether to compensate the terminated employee or to see other available remedies aforementioned above. This is true even where a lawful order has made by the court or tribunal to reinstate or re-engage the employee still the law provides room for the employer to object the lawful order of court in Tanzania.

If an arbitrator or Labour Court finds a termination is unfair the arbitrator or Court may order the employer-to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or to re-engage the employee on any terms that the arbitrator or Court may decide; or to pay compensation to the employee of not less than twelve months' remuneration.

"Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

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44 ibid

45 Mashamba (n 43).

From the outset, a clear examination of case law before this one in question would demonstrate the judicial opinions have always been that compensation be a primary remedy where there the employer decides not to reinstate or re-engage the employee the employer shall pay compensation of twelve months wages *TTCL v Switbertus Rutahuga*,[46] The brief facts of this case were, the respondent was an employee of the applicant since 18/6/1983. He was terminated by the applicant in 2010. He referred the matter to CMA for unfair termination and claimed to be reinstated. The CMA decided in favour of the respondent and ordered the respondent to be reinstated to his position and payment of arrears of salaries from the date of termination to the date which he will return to work. The applicant then decided to file the present application.

> "Basing on the provision of the law, I am of the view that, if the applicant does not wish to reinstate the respondent as ordered by the arbitrator, the order which this court confirms, then they should opt the remedy provided under section 40 (3)."

Similar interpretation of section 40(3) has also been considered by the court in *Tarcis Kakwesigaho v North Mara Gold Mine Ltd*,[47] In short the facts of the case are that Applicant was employed by Respondent since 22/07/2005 in the position of Land Officer up to 16/03/2012 when his employment was terminated on ground of breach of organization rules and policy. The Applicant being dissatisfied with the decision by the Respondent filed labour dispute against employer's decision at the CMA. The labour dispute reference no. CMA/TRM/30/2012 was determined and the award was delivered on 10th April 2013. Applicant being aggrieved by award of the CMA has preferred this application for revision on grounds that it was wrongly procured.

> "There is no doubt that termination was substantively and procedurally unfair. The proper exercise of discretion to justify remedy is provided under Section 40(1)(c) of the Employment and Labour Relations Act No. 6 of 2004, where the Arbitrator or Labour Court finds termination is unfair the Arbitrator or Labour Court may order compensation to the employee of not less than twelve months' remuneration."

Additionally the court took the same spirit in *Azizi Ally Aidha Adam v Chai Bora Ltd*,[48] The background of this case was the ruling is pursuant to two applications for revision emanating from the CMA award which was procured by the Commission for Mediation and Arbitration (CMA) on 08/04/2011. Both parties applied for revision. Applicant's application was registered as Revision No. 5/2011; whereas the Respondent's application was registered as Revision No. 4.2011. The court consolidated the two Revision Applications;

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46 Lab. Div., DSM, Revision No. 2 of 2011, 12/7/13.

47 Lab. Div., MSM, Revision No. 6 of 2014, 16/03/15.

48 Lab. Div., IRNG, Rev. No. 4 of 2011, 16/11/2011.

hence one Revision application remains that is No. 4/2011. Where Moshi, J. said that:

> "Under law, substantive unfairness may attract a reinstatement order, and failure to obey such order attracts a mandatory payment of "compensation of twelve months wages" under S.40 (3) of the Employment and Labour Relations Act 6/2004 Act."

From the above pointed cases, it is evident that the Employment and Labour Relations Act, particularly section 40(3), it is clearly dispense with the right to work to an employee who has been unfairly terminated from his employment contract. This is true because the wording of that provision clearly reflects the legislative intent that the right to work in Tanzania be at a stake for unfair practices of the employer against an innocent employee. With due regard to the welfare of the employees in Tanzania, probably this is the most offending provision and more certainly it is as it clearly contravenes with the right to work of which is a basis for human survival and dully guaranteed by the Constitution of the United Republic of Tanzania under Article 22.

The right to work is very important to very survival of the individual human being and the society in general.[49] This fundamental right has well been articulated by late Justice Mwalusanya as he then was in *Augustine Masatu v Mwanza Textiles Ltd*,[50] where he had this to comment:

> The right to work is the important…right in the labour law of countries…Its ideological basis is the need and necessity of the working class. It aims of securing the possibility of continued employment. It is not an empty slogan but a survival for existence. For this right to exist in any real sense, it is necessary that the economic, political and legal orders of the society assure everybody who is capable of working of the possibility of participating in building of his society through work in accordance with his capacity and education and the right to earn an income proportional to the quantum of his work. And so job security is the hall-mark of the whole system.

As it stands provision of section 40 (3) of ELRA, apart from being contrary to the Constitution particularly to the right to work and the right to receive remuneration proportional to the work done, this provision it also goes contrary to Article 4 of International Labour Organisation and section 37(2) of ELRA of which they require termination of employment only based on valid reasons and fair procedure. It follows therefore that, it is not a legislative intent for the employer to terminate an employee from his employment at his own wishes or choices rather the termination should be such that based on both substantive and fair procedure. The motive behind Article of ILO and

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[49] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rüdiger Köppe 1997) 169.

[50] High Court of Tanzania of Mwanza, Civil Case no 3 of 1986 (unreported).

Section 37(2) of ELRA, is well articulated in the case of *Tarcis Kakwesigaho v North Mara Gold Mine Ltd*,[51] where the judge said:

> It is the established principle that termination of employment is based on valid reasons and fair procedure, See Section 37 (2) of the Employment and Labour Relations Act, No. 6 of 2004. The law requires the employer to terminate an employee only with valid reasons and not at own choice. This position is also recognized by the International Instruments under the International Labour Organization Convention (ILO) 158 of 1984 under Article 4.

With the above spirits of ILO, ELRA, and the decision of a case, it is un disputed fact that, section 40(3) of ELRA, by giving the choice to the employer to decide whether to reinstatement, re-engage or to pay compensation to an innocent employee who may at times even be terminated for both substantively and procedurally unfair, this goes contrary to Article 4 of ILO Convention C185 and section, 37(2) of ELRA. Thus, it is clear that this is a loophole in labour law regime of which the richest employer may use it as a valve to terminate poor employees even where there is no a valid reasons for doing so.

Additionally, another turmoil which may be brought about by section 40 (3), of ELRLA, is that if we go by plain meaning of that provision, without a shadow of doubt it is as if the said provision empowers the employer stand above the law, this very true because the legislature intentionally vested the employer with a power to have an option on whether or not to enforce a legitimate order made by the competent court or labour tribunal. The aforementioned provision it gives discretion at the employer disposal to decide whether or not to reinstate, re-engage or to pay compensation the unfairly terminated employee. With this regard the provision of section 40(3) it is clearly ouster the courts' jurisdiction at the employer's disposal. Thus from reading of aforementioned section as a whole, it is clear that the said section does not assist in realization of the constitutional guarantee of a right to work, instead it complicates the situation and it renders the whole objectives of Employment and Labour Relations Act proved completely futile and illusory.

Conclusion

Reinstatement and re-engagement though as are primary remedies, is still a problematic in number of respects as show this article shown. There has been variety of contentious decisions over the years involving reinstatement and re-engagement as primary remedies for unfair termination, but what remains clear from the assessment done by this article is that, section 40(3) of Employment and Labour Relations Act, 2004, has been one of the stumbling

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[51] Lab. Div., DSM, Revision No. 2 of 2011, 12/7/13.

block as it disposes the legitimate order of the court or tribunal at the employers whims to the detriment of innocent employees whose contract has been unfairly terminated by the employers. Plainly the wording of the said section it reveals a clear legislative intent that the life of innocent employees would at stake at all time in a working place, as it reads "*where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage then employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment*." Thus it is our considered opinion that, reinstatement and re-engagement be a paramount consideration for unfair dismissal or unfair labour practices as it ensures and maintains the right to work, the right to receive remuneration as well as job security. It follows therefore that, the remedy of compensation should only be limited when the employee does not wish to be reinstated or re-engaged back to work; or where the relationship between the two has been irreparably broken down and there is no possibility that two may again work together.

Recommendations

Although the legislative intent seems quite clear under section 40(3) of ERLA, to give a freedom of contract to the employer to terminate the employment contract without undue regard of law and procedure. In some instances as shown by majority of cases in this article employee have been prejudiced by unfair termination of an employer and yet employees ended being compensated because the employer does not wish to reinstate or re-engage the terminated employee. Thus, first and foremost, section 40(3) of ERLA, as the most offending provision to the employees and which paves the way for employers to terminated employment contract unfairly with impunity should be amended by the parliament. Secondly, the courts and tribunals in Tanzania are trying their best by meticulously applying the labour laws in a view to protect the right of employees against unfair termination, however, lack of Constitutional right in to fair labour practices particularly the right not to be unfairly dismissed as the case of South African under Article 39(1) it has also been as a stabling block, it follows therefore that there a need to entrench this fundamental right in the coming Constitution. Finally, statutory compensation remedy lacks clout and fails to provide sufficient protection to employees. This is true even if a maximum compensation is awarded , the employee could still not recover the loss that they actually suffered from resulting from unfair termination, thus the remedy of compensation should only be ordered in a limited circumstances unless the employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued relationship would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal is unfair only because only the employer did not follow a fair procure.

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