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Knowledge is Power
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Foreword

We are glad to commence a Law Journal of our own. However, this can be regarded as a continuation of the DIU's practice of contributing to the knowledge cultivation and proliferation. This is our first issue to say the least. We do not focus on a given theme, rather our practice is to see law from diverse standpoints. As such, the contributors have looked at separate issues having implications for modern law and policy.

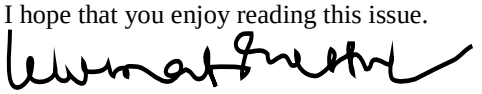
The law and legal institutions have taken an all-embracing phenomenon in our society. There is hardly an issue which goes without legal overtones. Starting from the consumer rights to climate change issues, the law travels from earth to sky, transcends from national boundary to international plane. Therefore, the necessity of making new laws, the implementation of existing laws, remodeling the legal system are highly pronounced jargons now-a-days. The learning from the best practices of the other jurisdictions is also exceedingly stressed upon. The globalization process has not only influenced our economy and culture, but also has redefined the political landscapes, the legal concepts and approaches. Moreover, the presence of media and the advent of technology have added new dimensions to legal understanding and functioning. In this connection, the necessity of legal scholarship can hardly be overlooked. I am happy that the law teachers of DIU and the other contributors, having taken this reality into account, have not only engaged in teaching but also dedicated themselves to researching.

It is said that law scholars are idle and they are very reluctant in pursuing serious type of research. We at DIU want to disbelieve this claim. We admit that we have limitations, but at the same time we profess the idea that legal researching can go a long way to reshape and refashion the legal education, idea of justice, rule of law and law making process. I am hopeful that the legal opinions published in this journal will help the policy makers developing our jurisprudence. Legal reform in a country like ours is a daunting task, however, law scholars tend to reduce the burden by their findings. Law researchers can say the *what, who, which, how*'s of legal problems.

Bangladesh is now placed at a fine crossroad. In the one hand, we have the claim of huge "development", on the other hand, we have the challenge that how that "development" can be turned into a "freedom mediated process", so that justice is not suffered—people's empowerment is ensured – the dream for an egalitarian society as replicated in our Constitution is materialized. I am sure our colleagues will look at the legal issues from this "people centric" approach in their future venture.

The hard work of everyone who has contributed to making this issue come to fruition must be acknowledged. I congratulate the authors of this first volume. A huge thank you goes to the members of the Editorial Board, who have all devoted substantial time and energy to reviewing and editing the articles. Further, the commitment and assistance of the Expert Members is greatly appreciated. Last but not the least, this issue could not have taken shape without the solid financial, academic and administrative support of the DIU Authority. We will be less than fair, if we do not record our thanks for the DIU mentor Barrister Shameem Haider Patwary, a law-maker of the *Jatiya Shangshad*, for his laudable contribution to law and legal education in Bangladesh.

I hope that you enjoy reading this issue.



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Legal Protection of Refugees under Bangladesh Laws

Dr. Md. Akhtaruzzaman*

Abstract: The movement of people between states, whether refugees or 'migrants', takes place in a context in which *sovereignty* remains important, and specifically that aspect of sovereign competence which entitles the state to exercise *prima facie* exclusive jurisdiction over its territory, and to decide who among non-citizens shall be allowed to enter and remain, and who shall be refused admission and required or compelled to leave. Like every sovereign power, this competence must be exercised within and according to law, and the state's right to control the admission of non-citizens is subject to certain well-defined exceptions in favour of those in search of refuge, among others. Moreover, the state which seeks to exercise migration controls *outside* its territory, for example, through the physical interception, 'interdiction', and return of asylum seekers and forced migrants, may also be liable for actions which breach those of its international obligations which apply extra-territorially. While the provision of material assistance—food, shelter, and medical care—is a critically important function of the international refugee regime, the notion of *legal protection* has a very particular focus. Protection in this sense means using the legal tools, including treaties and national laws, which prescribe or implement the obligations of states and which are intended to ensure that no refugee in search of asylum is penalized, expelled, or refouled, that every refugee enjoys the full complement of rights and benefits to which he or she is entitled *as a refugee*; and that the human rights of every refugee are guaranteed. The twenty-first century has seen the huge number of refugees rise to an unprecedented 65.6 million. Bangladesh is no stranger to this problem, being a country that witnessed its population become refugee during its inception. Besides, Bangladesh has also witnessed the influx of Rohingya refugees from Myanmar since the 1970s. Bangladesh is neither a party to the UN Convention Relating to the Status of Refugees, 1951 nor the Protocol of 1967. Nonetheless, Bangladesh is obligated to protect refugees under certain other international human rights instruments. There is no specific domestic law or national policy in the country regarding the issue of asylum seekers and refugees. But some of the provisions of the Constitution can be interpreted to include the scope of refugees. This article in this background has made an effort to deal with the rights relating to the refugees under the Constitution and laws of Bangladesh. In doing so, attempts will also be made to assess legal position of refugees under international law. In conclusion, some suggestions will be given about them and their security for the future.

Key words: International Law, Domestic law, Protection, Treaties, United Nation's High Commissioner for Refugees, Persecution, Asylum, Resettlement, Human Rights.

Introduction

Refugee movements had been an integral part of the state formation process in South Asia. In the last seven decades this region has been marked by a number of refugee movements. Millions of people crossed the newly created borders between India and Pakistan in 1947, and, likewise, the

creation of independent Bangladesh was also accompanied by forced migration of about 10 million refugees. In the 1980's more than 50,000 hill people of Bangladesh sought refuge in the eastern Indian States.[1] At present we are a host country of refugees. After independence, Bangladesh received three major refugee groups from Myanmar; first in 1978 when 2,80,000 Rohingyas sought asylum, second in 1991-92 when approximately some 2,50,000 Rohingyas crossed the boarder in the Cox's Bazar area[2] and again in 2017 about 7,50,000 Rohingyas entered in Bangladesh. The purpose of this piece of work is to deal with the rights relating to the refugees under the Constitution and laws of Bangladesh. In doing so, attempts will also be made to assess legal position of refugees under international law. In conclusion, some suggestions will be given about them and their security for the future.

Development of the Concept

Terminologically, the word refugee is connoted as a derivative of *'refuge'*. As such 'refugee' is considered to be a person taking refuge, especially in a foreign country from religious or political persecution or from war, manmade crisis or from natural calamities. In other words, a refugee is a person who is forced to leave his or her country, home etc. for political or religious reasons or because there is a war, shortage of food etc[3]. The term 'refugee' generally means a person who is in flight seeking escape conditions or personal circumstances found to be unendurable and this flight may be to freedom and safety or from oppression, threat to life or liberty or from persecution, deprivation, grinding poverty or from natural disasters, earthquake, flood, drought or famine or from war or civil strife[4]. A refugee is a person outside their country of origin who are unable or unwilling to return, owing to a well founded fear of persecution[5]. The Convention of 1951 covers only those persons, who have become refugees as a result of events occurring before 1 January, 1951. After adoption of the Convention new refugee situations have been arisen throughout the world and then needs elaboration of the definition. Subsequently, ***Protocol Relating to the Status of Refugees of 1957***[6] was adopted and by Article 1 the earlier definition was expanded. Though this definition has dominated the arena of refugee law for the last four decades in spite of that it was repeatedly criticized by the eminent jurists. It does not include people as refugees who are internally displaced persons (IDPs) or who are deported or expelled from their own countries and some of whom have been sent to undertake forced labour or persons who are unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence[7]. Famine, drought, war or civil strife also caused refugee problem and in the changed circumstances, the world

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[1] Abrar, Chowdhury R, *"State, Refugees and the Need for Legal Procedure"* in "Towards National Refugee Laws in South Asia", C.R. Abrar and Shahdeen Malik *(ed.)* Dhaka; Refugee and Migratory Movements Research Unit, 2000 p. 45;

[2] Attar, Dr. Saad Al, *The Status of Refugees in Human Rights and UNHCR Role in Bangladesh in* "Manual on Human Rights Law", Tuhin Malik *(ed.),* Dhaka; Bangladesh Bar Council.

[3] Rahman, Dr. M. Habibur, *Legal Regime of Refugees: Some Specifications,* 55 DLR 57

[4] Good Win-Gill-G.S., *The Refugee in International Law,* Oxford University Press, New York, 1998, p.2.

[5] Article 1(A), *Convention Relating to the Status of Refugees* of 28 July, 1951.

[6] The Protocol was signed by the President of the General Assembly and by the Secretary General on 31 January 1967.

[7] Solomon, K. *The Refugees in the Cold War: Toward a New International Refugee Regime in the Early Post War Era,* Lund University Press, Lund, Sweden, 1990.

community felt necessity of elaborating the earlier definition. Some regional arrangements have attempted to overcome the existing definition of refugee. The 1969 OAU Refugee Convention extended the definition of refugee to include "every person who owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refugee in another place outside his country of origin or nationality"[8]. The traditional definition of refugee is extended by the ***Cartagena Declaration on Refugees***[9] to include persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances, which have seriously disturbed public order[10]. ***The Asian-African Legal Consultative Committee*** defined a refugee in much the same terms as the 1951 Convention and the 1967 Protocol with the addition of "*colour*" as a condition on which a well founded fear of persecution could be based. The constitution committee recommended that the following class of persons should also be deemed to be refugees, that is, victims of force major, victims of external aggression or occupation, victims of generalized violence landing to a disturbance of public order and victims fleeing from massive violations of human rights[11].

From the above it reveals that all the regional instruments continue to reflect to approach in the 1951 Convention and the 1967 Protocol with its emphasis on the individual leaving his country of origin, nationality or habitual residence owing to a "*well founded fear of persecution,*" but in addition contains a list of situations or conditions under which a person may develop the well founded fear of being persecuted.

Causes of increasing refugees

Refugees are increasing in an alarming manner throughout the whole world due to catastrophe either man-made or natural but the major amount of refugees are borne out of unsystematic procedure took place wither in time of internal strife or external belligerence. The main causes in this regard, are mentioned below:

(a) *Man-Made:*

- Civil War
- International Armed Conflicts;
- Non-International Armed Conflicts;
- Breaches of International Humanitarian Law such as "**ethnic cleansing**" systematic rape, reprisal attacks, or destruction of essential civilian infrastructure, rather than violations of individual human rights;
- Lack of fulfillment of basic necessities *e.g.* shelter, medical, food and education;
- Lack of resources;

[8] *Article-1, Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.*
[9] The Declaration was adopted on November 22, 1984.
[10] *Ibid.* Article III, Para 3.
[11] Asian African Legal Consultative Committee, DOC. No. AALCC/XXIX/90/3 p. 40.

- Persecution based on race, religion, nationality, membership of special group, political opinion;
- Absence of legal protection;
- Lack of expertise to deal with situation;
- Sometimes forced recruitment as guerrilla etc.

(b) Natural

- Famine
- Drought
- Floods
- Tsunami
- Glacier and others.

It is well known that civilians, particularly women, children and elderly, make up the majority of causalities of internal armed conflicts. The carnage in the former Yugoslavia, Cambodia, Somalia and other internal conflicts provides graphic proof of war being waged against defenseless civilians. A further examination of the refugee figures given cause for serious concern. If the number of armed conflicts in the world is on the increase, the number of refugees and displaced people are bound to increase dramatically. There is likely to be a significant increase in internally displaced persons, relative to refugees. Most of those fleeing wars are victims or potential victims of breaches of humanitarian law.

Refugee rights under International Law

The world community is concern about the rights of the refugees. Many international instruments were passed in this regard. The Charter of the United Nations is the first international instrument in which the nations of the world community agreed to promote and observe human rights and fundamental freedoms for all on an international level. The ***Preamble*** of the Charter states:

> "We the People of the United Nations, determined... to reaffirm faith in fundamental human rights in the dignity and worth of human person, in the equal rights of man and women and of nations large and small...."

The UN Charter requests the Member States "To pledge themselves to take joint and separate action in co-operation with the organization"[12] in order to promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"[13]. Though the Charter contains no definition or catalogue of human rights and fundamental freedoms, yet it is the first international document which has internationalized human rights and acting as source of inspiration and subsequently so many international documents were adopted where refugee rights are also found. According to Article 2 of the Universal Declaration of Human Rights, 1948, everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national

[12] Art. 56, The Un Charter.
[13] Art. 55 (C), *ibid.*

or social origin, property, birth or other status. Under different international documents following are the inalienable rights of the refugees:

1. Right to life, liberty and security of person[14];
2. Right to equality[15];
3. Freedom from torture or cruel, inhuman or degrading treatment or punishment[16];
4. Right to recognition everywhere as a person before the law[17];
5. Right to an effective remedy by competent national tribunals[18];
6. Right not to be subjected to arbitrary arrest, detention or exile[19];
7. Right to fair trial[20];
8. Presumption of innocence and prohibition of retroactive criminal law[21];
9. Prohibition of arbitrary interference with privacy, family, home or correspondence[22];
10. Right to freedom of thought, conscience and religion[23];
11. Right to freedom of opinion and expression[24];
12. Freedom from slavery and servitude[25];
13. Right to social security[26];
14. Right to seek asylum[27];
15. Right to marry and found a family[28];
16. Right to education[29];
17. Right to nationality[30];
18. Right to freedom of peaceful assembly[31];
19. Right to own property[32];
20. Right to the child not to be discriminated and have a name and nationality[33];
21. Freedom of aliens from arbitrary expulsion[34];

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[14] Art. 3, UDHR, Art. 6/9, ICCPR.
[15] Art. 7, *Ibid;* Art. 14/26 *Ibid.*
[16] Art. 5, *Ibid;* Art. 7, *Ibid.*
[17] Art. 6, *Ibid;* Art. 16, *Ibid.*
[18] Art. 8, *Ibid;* Art. 14, *Ibid.*
[19] Art. 9, *Ibid;* Art. 9, *Ibid.*
[20] Art. 10, *Ibid;* Art. 14(1) *Ibid.*
[21] Art. 11, *Ibid;* Art. 14(2) *Ibid.*
[22] Art. 12, *Ibid;* Art. 17, *Ibid.*
[23] Art. 18, *Ibid;* Art. 17, *Ibid.*
[24] Art. 19, *Ibid;* Art. 19, *Ibid.*
[25] Art. 4, *Ibid;* Art. 8, *Ibid.*
[26] Art. 26, *Ibid;* Art. 23, *Ibid.*
[27] Art. 14, *Ibid;* Art. 12, *Ibid.*
[28] Art. 16, *Ibid;* Art. 23, *Ibid.*
[29] Art. 26, *Ibid;* Art. 19, *Ibid.*
[30] Art. 15, *Ibid;* Art. 12, *Ibid.*
[31] Art. 20, *Ibid;* Art. 21, *Ibid.*
[32] Art. 17, *Ibid.*
[33] Art. 7, CRC, Art. 24 ICCPR, Art. 15, UDHR.
[34] Art. 3, ICCPR, Art. 32, 1951 Refugee Convention.

22. Right of detained persons to be treated with humanity[35];
23. Artistic right and industrial property[36];
24. Access to courts[37];
25. Right to have ration[38];
26. Right to housing[39];
27. Right to have public relief[40];
28. Right to have identity papers and travel documents[41];
29. Right to transfer of assets[42];
30. Freedom from discriminatory fiscal charges[43];
31. Freedom from expulsion or refoulment[44]

On perusal of international documents it appears that the refugees are also entitled to those rights which have a universal application for all without discrimination of any kind and which imposes an obligation on the governments all the person in the territory under their jurisdiction.

The Constitution of Bangladesh and Rights of the Refugees

The Constitution of Bangladesh is a written and rigid constitution. It gives some justifiable fundamental human rights. These rights are enlisted in part III of the Constitution with a vision to ensure equality before law. We have as many as 18 fundamental rights from which some are applicable to non-citizens also. These includes –

(a) **Right to Protection of Law**: Article 31 of the Constitution of the People's Republic of Bangladesh clearly speaks that every citizen and every person in Bangladesh have an inalienable right to be treated in accordance with law[45]. Further no action detrimental to the life, liberty, body, reputation or property of any citizen or inhabitant of Bangladesh shall be taken except in accordance with law. In the case of ***Abdul Latif Mirza*** v. ***Bangladesh***[46], the hon'ble Appellate Division of the Supreme Court of Bangladesh explained the principles of Article 31. Brief facts leading to the case is that the petitioner was an active member of Jatiya Samajtantrik Dal and the Deputy Commissioner, Pabna by his order dated 22.4.74 detained the petitioner for a period of 30 days and thereafter the Government on 24.5.74 passed another order of detention until further orders, on the ground that it was satisfied that the order was necessary for the purpose of preventing him from doing any prejudicial act. After hearing of the petition the hon'ble High Court Division dismissed the case but

[35] Preamble, 1951 Refugee Convention.
[36] Art. 14, *Ibid.*
[37] Art. 16, *Ibid.*
[38] Art. 20, *Ibid.*
[39] Art, 21, *Ibid.*
[40] Art. 23, *Ibid.*
[41] Art. 27, 28, *Ibid.*
[42] Art. 30, *Ibid.*
[43] Art. 29, *Ibid.*
[44] Art. 33, *Ibid.*
[45] Art. 31, Constitution of Bangladesh.
[46] 31 DLR (AD) p.1.

subsequently it was allowed by the Appellate Division of the Supreme Court of Bangladesh. At paragraph 50 of the judgment the court observed:

> "...no person shall be deprived of life or personal liberty saves in accordance with law. The principle of natural justice is inherent in every society aspiring for a civilized living and according to the third paragraph of the Preamble of the Constitution; the fundamental aim of the State is a society in which the rule of law, the fundamental human right and freedom, equality and justice, political, economic and social shall be secured."

In the case of ***ETV Ltd.*** v. ***Dr. Chowdhury Mahood Hasan***[47] the hon'ble Court has interpreted the provision of Articles 31 and 32 of the Constitution and observed:

> "It is a simple case of investment and like every investment, the investment in ETV has its own risk. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantial legal principle in this regard is that every person is subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle."

From the above, it appears that Article 31 speaks of treatment to be accorded to persons who are citizens or who, though not citizens, are for time being is present in Bangladesh.[48]
Again this Article guarantees that an individual cannot be prejudicially affected unless there is contemporaneously in existence a legal provision to sustain the action.[49] Article 31 of the Constitution also ensures that an individual shall be dealt with in accordance with law.[50]

(b) **Protection of right to life and personal liberty**: No person shall be deprived of life or personal liberty saves in accordance with law. In this Article the expression 'in accordance with law' clearly indicates that deprivation of life or personal liberty is permissible on the ground of reasonableness.[51] A strict scrutiny of reasonableness can be investigated by the court to see the objective reasonable ground on the basis of which a man's life or personal liberty can be deprived.[52]
In the case of ***Anisul Islam Mahmood*** v. ***Bangladesh***[53] it was held:

> ".....To curtail fundamental rights of personal liberty enshrined in the Constitution it is essential that the detaining authority must have reports and materials, that is jurisdictional facts for exercising power to detain the detenu under the Special Powers Act."

We know that life is the most precious thing and nothing can be fundamental than preservation of life. So, from the above discussion it is evident that under Article 32 any law depriving a person, citizen or non-citizen, of personal liberty, must not be arbitrary and must be reasonable and fair.

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[47] 5 DLR (AD) p. 130
[48] *HFDM De Silva* v. *Bangladesh*, 2 BLC 179
[49] *Adamjee Jute Mills* v. *Controller of Importers*, 20 DLR 791
[50] *Faisal Mahtab* v. *Bangladesh*, 44 DLR 168
[51] Art. 32, Constitution of Bangladesh
[52] Rahman, Justice Latifur, "The Constitution of the People's Republic of Bangladesh with Comments and Case Laws", Dhaka: Mullick Brothers, 2005, p. 63.
[53] 44 DLR, p.1.

(c) **Safeguards as to arrest and detention**: The Constitution of Bangladesh provides for specific procedural safeguards against arbitrary arrest and detention[54]. In the case of ***Habiba Mahmud*** v. ***Bangladesh***[55] Mr. Justice M.H. Rahman observed:

> ".....the clear constitutional sanction provided in Article 33(5) a non-disclosure of fact that was considered to the prejudice of the detenu ought to be regarded as violation of basic principle of natural justice."

In the case of ***Professor Ghulam Azam*** v. ***Bangladesh***[56] the hon'ble High Court Division opined that the petitioner having been living in Bangladesh is entitled to the protection under Article 33(5) of the Constitution.

(d) **Prohibition of forced labour**:[57] It is stated in Article 34 that all forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. But at the same time it provides for compulsory labour in certain condition and circumstances, *viz.* undergoing punishment in criminal offence and required by any law for public purposes.

(e) **Protection in respect of trial and punishment:**[58] Article 35 provides for certain rights in respect of trial and punishment. These rights are- protection against *ex-post facts laws,* double jeopardy, holding of speedy and fair trial, granting of privilege against incrimination prohibits torture and cruel, in human or degrading punishment.[59]

In the case of ***Serajul Islam*** v. ***Director General of Food***[60], the petitioner challenged the drawing up of a departmental proceeding against him on the principle of 'double jeopardy' under Article 35 of the Constitution as already a charge sheet was submitted against him in a criminal proceeding. Shahafuddin Ahmed, C.J. while interpreting Article 35 of the Constitution held:

> ".....Protection in respect of trial and punishment, this is, bar to conviction and punishment more than once for the same offence as referred to in Article 35 related to criminal prosecution. 'Double Jeopardy'... means danger of being convicted and punishment more than once on same facts constituting offence in a criminal proceeding only."

(f) **Right to enforce fundamental rights[61]**: Any aggrieved person may file writ petitions before the High Court Division for enforcement of fundamental rights described in part III of the Constitution. By judicial interpretations of the Supreme Court of Bangladesh, the concept of *locus standi* i.e. "any persons aggrieved" has been gradually extended to other persons as well. For filing an application under Article 102 of the Constitution it is not necessary that the person must be

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[54] Art. 33, Constitution of Bangladesh
[55] 45 DLR (AD) p. 89
[56] 46 DLR, p. 29
[57] Art. 34, Constitution of Bangladesh
[58] Art. 35, Constitution of Bangladesh
[59] Justice Latifur Rahman, *op. cit.* p. 67
[60] 42 DLR (AD), p. 199
[61] Article 44, Constitution of Bangladesh.

personally aggrieved. Any person or group can issue relief in the interest of the general public or for the well being of the society and not for its own purpose. This idea has changed the traditional doctrine of **locus standi** and has opened the door of the Supreme Court even when the persons concerned has no personal interest in moving the application[62]. In the Case of ***Dr. Mohiuddin Farooque*** v. ***Bangladesh***[63], the hon'ble Appellate Division of the Supreme Court of Bangladesh in paragraph 97 of the judgment opined.

> ".....that the expression 'person aggrieved' means not only any person who is personally aggrieved but also one whose hearts bleeds for his less fortune fellow beings for a wrong done by the Government or a local authority is not fulfilling its constitutional or statutory obligations. It does not, however, extent to a persons who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries."

From the above discussion it reveals that any person can file petitions before the High Court Division if his/her fundamental rights any way be infringed. In the case of a non-citizen some rights can also be enforced by filing petitions by any person in the form of public interest litigation taking principles from Dr. Mohiuddin Farooque's case.

Management of Refugees under other Statutory Laws of Bangladesh

In Bangladesh, we have some statutory laws. To some extent, these laws are applicable to non-citizens also. The main statutory laws in this field are:

(a) **The Passport Act, 1920:** A passport is very strong piece of evidence. It contain a recognition by the officially authorized agencies of a State given to the nationality of a citizen of the State issuing the passport after the necessary declarations made by the holder of the passport[64]. According to section 2 of the Passport Act, "Passport" means a passport for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs", and "prescribed" means prescribed by rules made under this Act.

Section 3 of the Act prohibits a person to entry into Bangladesh without a passport. No person proceeding from any place outside Bangladesh shall enter Bangladesh by sea or by air or by land unless he is in possession of a passport[65]. So, it appears that a foreigner without having a passport cannot enter in Bangladesh.

In the case of ***Zamir Uddin Ahmed* v. *Government of Bangladesh***[66] the relevant provisions of the Passport Act, 1920 and Passport Rules of 1955 were discussed. In this case, Government refused

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[62] Justice Latifur Rahman, Op. cit. p. 137
[63] 49 DLR (AD), p.1
[64] Mashkurul Hasan v. Union of India, AIR 1967, All 565 at p. 567
[65] See Rule 3 of the Passport Rules, 1955
[66] 1981 BLD 304

former Air Vice Marshal M.G. Towab to re-enter Bangladesh. The petitioner of the case challenged the matter. In making the rule absolute, the Hon'ble Court opined:

> "On the allegation that Towab obtained the passport in question on suppression of material facts in a clandestine manner he may be appropriately dealt with in accordance with law but could not be refused entry into Bangladesh on such allegation."

(b) **The Naturalization Act, 1926:** The law relating to naturalization was consolidated by this Act and it extends to whole of Bangladesh by President's Order No. 48 of 1972. The Act amend the law relating to the naturalization in Bangladesh of aliens resident therein[67]. According to section 3 of the Act, Government may grant a certificate or naturalization to any person who makes an application in this behalf and satisfies the Government *inter alia* that he is neither a citizen of Bangladesh nor a subject of any State of which a citizen of Bangladesh is prevented by or under any law from becoming a subject by naturalization. After getting such certificate, the person be entitled to all the rights, privileges and capacities of a citizen of Bangladesh except such rights, privileges or capacities, if any, as may have been withheld from them respectively by the certificate[68].

(c) **The Registration of Foreigners Act, 1939:** This Act provides for the registration of foreigners entering, being present in, and departed from Bangladesh.

(d) **The Registration of Foreigners Rules, 1966:** This Rule was adopted under section 3 of the Registration of Foreigners Act, 1939 for proper management of foreigners in Bangladesh. In Rule 3 it is stated that every foreigner who enters or leaves Bangladesh by land shall furnish a true statement of particulars specified in this behalf to the Registration Officer.

(e) **The Bangladesh Control of Entry Act, 1952[69]:** This Act was passed to make better provision for controlling the entry of Indian citizens into Bangladesh. According to section 3 of the Act no Indian citizen shall enter any part of Bangladesh unless be is in possession of a passport with a visa authorizing the entry. But from a plain reading of this section it is evident that if Indian citizen entered into Bangladesh with a passport and visa, he may stay here if he obtained necessary permission from the proper authority. The matter of removal is laid down in section-7 of the Act.

(f) **The Citizenship Act, 1951[70]:** Section 6 of the Constitution of Bangladesh provides that the citizenship of Bangladesh shall be determined and regulated by law. The acquisition of the status of citizenship of Bangladesh is governed by two sets of provisions. The provisions of P.O. No 1449 of 1972[71] lay down the conditions for claiming citizenship of Bangladesh as on 15.12.1972 while the Citizenship Act, 1951[72] lays down the conditions for the acquisition of citizenship on or after

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[67] Preamble of the Naturalization Act, 1926
[68] Section 6, *Ibid.*
[69] Act LV of 1952
[70] Act II of 1951
[71] Bangladesh Citizenship (Temporary Provisions) Order, 1972
[72] This Act has been continued by the Laws Article 149 of the constitution. The Provisions of this Act relating to the status of person of the commencement of this Act is, how ever, not applicable and P.O. No. 149 of 1972 has made Provisions in this regard.

15.12.1972 by birth within Bangladesh by descent, by registration and by naturalization. According to Article 2 of P.O. No. 149 of 1972 (i) a person who or whose father or grandfather was born in the territory now comprising Bangladesh and was a permanent resident of Bangladesh on 25 March, 1971 and continued to be so resident, or (ii) a person who was a permanent resident of such territory on 25 March, 1971 and continued to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force, shall be deemed to be a citizen of Bangladesh. Therefore a person having domicile of origin or domicile of choice in Bangladesh will be a citizen of Bangladesh. The question of permanent residence is linked with domicile and by domicile we mean a permanent home.[73] When a person resides in a country with the intention to reside there permanently or for an indefinite period, he acquires domicile of that country. Nobody can be without a domicile and the law assigns a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother and to a founding the place where he is found[74].

Section 6 of this Act provides that any person on the basis of obtaining a migration certificate from the Government can register his as a citizen of the country. Similarly section 9 of the Act runs as:

> "The Government may, upon an application made to it in that behalf by any person who has been granted a certificate of naturalization under the Naturalization Act, 1926, register that person as a citizen.... by naturalization."

In exercise of the powers conferred by section 23 of the Citizenship Act, 1951 the Government framed the Citizenship Rules, 1952[75] for giving effect of the Act. In Rule 10 of the above Rule it is stated that any person claiming citizenship under section 6 and 9 of the Act shall apply in prescribed form and the Government after making necessary inquiries may grant a certificate of registration in this regard.

In the case of ***Abid Khan and others*** v. ***Government of Bangladesh and others[76],*** the relevant provisions of the Citizenship Act, 1951 and Bangladesh Citizenship (Temporary Provisions) Order[77] were challenged. The factual matrix of the case, briefly, is that all the ten petitioners claimed that they are Urdu speaking citizens of Bangladesh, permanent residents of the Mohammadpur area residing at the Geneva Camp and are fully qualified to be registered as voters under the laws of Bangladesh. But the electoral rolls prepared and published on 27.5.2001 by the Election Commission, their names were not included. So, they submitted separate applications in prescribed forms for enrolment as voters. They also personally approached respondent Nos. 2 and 4 who verbally informed that the Geneva Camp residents are not entitled to be voters. Being aggrieved by the aforesaid inactivity of the respondents resulting in deprivation of their right to be voters under the laws, the petitioners moved before the Court.

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[73] *Whicker* v. *Hume* (1858)7 HL case 77 at p. 79

[74] Cheshire North, *Private International Law*, 11th Edition, p. 143

[75] *See* Gazette of Pakistan, 6th February, 1952

[76] 55 DLR HCD p. 318

[77] P.O. 144 of 1972

While delivering the judgment at paragraph 19 the Hon'ble Court stated that only because of the concentration of Urdu speaking people, who were citizens of the erstwhile East Pakistan, the so called Geneva Camp has attained any special status so as to be excluded from the operation of the laws of the land attained any special status so as to be excluded from the operation of the laws of the land including the said President Order, the Electoral Rolls Ordinance, 1982 or the Citizenship Act, 1951. So, mere residence of the Geneva Camp cannot be termed as allegiance to another State by conduct. The hon'ble Judge further stated that the birth of the second group of the petitioners in Geneva Camp or their continued residence in Geneva Camp do not affect the citizenship by birth acquired under section 4 of the Act..... The petitioners are citizens of Bangladesh and their residence in the Geneva Camp, Mohammadpur is not a bar to be enrolled in the electoral roll and registered as voters if they are not otherwise disqualified to be included as such under section 7 of the Electoral Rolls Ordinance, 1982.

In the case of ***Angelina v. Joseph George***[78] it is decided that permission to reside in this country may be given expressly or may be impliedly from circumstances.

(g) **The Bangladesh Passport Order, 1973**[79]**:** The Hon'ble President of the Republic has promulgated this Order to provide for the issue of passports and travel documents to regulate, in the interest, the departure from Bangladesh of citizens of Bangladesh and other persons and for matters incidental or ancillary thereto.

In the case of ***Hussain Muhammad Ershad*** v. ***Bangladesh and others***[80] the Court held that in case of cancellation or refusal of passport, opportunity should be given to the person concerned to show cause against grounds for the action.

(h) **The Extradition Act, 1974**[81]: After the emergence of Bangladesh the Extradition, Act, 1974 has been passed for consolidation and amending the law relating to the examination of fugitive offender.

(i) **The Code of Civil Procedure, 1908**[82]**:** It is stated in section 83 of the Code that citizens of Bangladesh and alien friends can always sue in the courts of Bangladesh. An alien enemy residing in Bangladesh without the permission of the Government cannot file a suit in Bangladesh Court[83]. Where some persons, who became enemy aliens, after filing suit for partition impleading the Deputy Commissioner as one of the defendants and the Deputy Commissioner, being appointed Assistant Custodian of Enemy, Property prayed for transposition as a plaintiff, the bar of this section did not apply to him[84].

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[78] AIR 1917 All 374
[79] P.O. 9 of 1973
[80] 5 BLC 413
[81] Act LVIII of 1974
[82] Act V of 1908
[83] *Mansur Ali v. Ardhendu Sekhar,* PLD 1969 SC 37
[84] *Azizur Rahman* v. *Kailash Chandra,* 28 DLR (AD) 65

(j) **The Children Act, 2013:** This act is a unique legislation for the protection of children's rights. The U.N. has adopted the Convention on the Rights of Child in 1989 for the better protection and management of the children of this globe. So, this Act was passed to consolidate and amend the laws relating to the custody, protection and treatment of children and trial and punishment of youthful offenders. Taking the principles in mind our superior courts doing a fantastic job for the promotion and protection rights in the light of the Children Act.

In the case of ***State* v. *Deputy Commissioner, Satkhira***[85] the hon'ble High Court Division of the Supreme Court of Bangladesh observed:

> "Let a copy of this judgment be sent to the..... Prime Minister of Bangladesh and this court earnestly desires that she should personally consider and feel as to how an ordinary citizen of her country being a poor minor boy of 8 to 12 years has put to such unspeakable sufferings and inhuman torture for such a long period of 12 years, in fact, for no fault of his own, but because of malafide action of some interested persons and administrative negligence of different agencies of the Govt. while the Constitution of Bangladesh with all its fundamental rights to functioning, rule of law is being claimed to have been established in the country and democracy is marching forward with fame. ...The Secretary, Ministry of Home Affairs, shall also direct the Inspector General of Prisons, Bangladesh, to inquire and ascertain as to whether any other accused or persons like this wretched present detenu Md. Nazrul Islam has been suffering in any other jail in Bangladesh and take appropriate legal steps if any such persons is found in any jail in such manner."

Again in the case of ***BLAST*** v. ***Bangladesh***[86] the hon'ble Court held.

> "Let a copy of this judgment be sent to the learned Registrar, Supreme Court of Bangladesh and ask for an explanation form Mr. ....., District and Sessions Judge, the author of the impugned judgment and order convicting and sentencing the petitioner No. 2 of the writ petition, in case No. 4 of 1998 as Bicharak Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla as to how he could award sentence of imprisonment for life of juvenile offender and ignored the Children Act, and further to send a copy of this judgment and order to all Sessions Judges of the Country advising them to discuss on the Children Act, 1974 with judicial officials working under their respective judgeship."

From the above, two issues are clear –

(a) Children must not be in jail;
(b) Children must be tried to a Juvenile Court in accordance with the Children Act.

(k) Women and Children Anti-oppression Act, 2000[87]: It is already observed that in infringement of any civil rights, the refugees can get remedy from our civil courts. Side by side, in

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[85] 45 DLR 643
[86] 7 BLC HCD 85
[87] Act VIII of 2000

cause of any criminal offence, the refugees are also covered by the existing criminal laws of the land. It is noticed that a considerable portion of refugees are from amongst the women and children. If a refugee women or a girl child is raped or otherwise tortured, she could have legal protections under the provisions of this Act. Moreover, the Act also defined the terms 'Nari' and 'Shishu' specially from where the refugee women and children can get protection.

(l)The Birth and Death Registration Act, 2004[88]: Section 2(n) of this Act directly deals with refugees and section 5 provides compulsory registration of birth and death without distinction as to nationality, relation, race or sex. The refugees are facing enormous problems and one of the fundamental problems is lack of their internationally recognized travel documents. It is known to us that Fridtjof Nansen of Norway[89], the first High Commissioner of Refugees introduced **"Nansen Passport"**, the forerunner of today's convention travel document for refugees. Bearing this principle of international law, the above Act in section 18 provides for issuing of passports to determine the age of the persons concerned as mentioned in the Act.

(m) The Special Powers Act, 1974[90]: This Act was passed for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and to some extent also applicable to non-citizens.

(n) The Legal Aid Act, 2000[91]: The Government of Bangladesh in the year 2000 passed this Act to provide legal assistance to the poor litigants. As Chairman of the District Legal Aid Committee, the District and Sessions Judges are extending their co-operations to the poor litigants to ensure justice for them. As refugees are not well-off in economic condition, so they can take advantage of Government's legal aid scheme. It is to be mentioned here that in Cox's Bazar the refugees are getting free legal assistance from the District Legal Aid Committee. This indicates that the Government to some extent acknowledged legal rights of the refugees. It is further to be noted here that some of the NGO's, for example, Bangladesh Legal Aid and Services Trust (BLAST) are also giving legal aid to the persons of vulnerable groups.

The Role of the Judiciary

We have observed that in ***Abdul Latif Mirza's*** case, the hon'ble Appellate Division of the Supreme Court of Bangladesh decided that as per provision of Article 31 of the Constitution of Bangladesh protection of the law is not only offered to its citizens, but also foreigners (non-citizens), at the time they are in the country. The landmark judgment virtually indicated the inalienable rights of the refugees. Moreover, in ***ETV Ltd.'s case,*** the hon'ble Appellate Division stated that every person within the jurisdiction of Bangladesh are within Bangladesh rule of law. In ***Habiba Mahumd's case*** the Appellate Division put emphasis on the implementation of principles of natural justice for all. Finally, the Supreme Court of Bangladesh in ***Dr. Mohiuddin Farooque's case*** the burning question of *locus standi* was answered and it opened the venue of getting justice by any person. On the other hand,

[88] Act 29 of 2004
[89] Nansen was awarded a Noble Prize in 1922 for his work to look after the refugees.
[90] Act XIV of 1974
[91] Act 6 of 2000

the Supreme Court of India in the case of ***National Human Rights Commission*** v. ***State of Arunachal Pradesh and another***[92] had established the rights of the Chakma refugees. The factual matrix of the case may be referred to. A large number of Chakmas from erstwhile East Pakistan (now Bangladesh) were displaced by the Kaptai Hydel Power Project in 1964. They had taken shelter in Assam and Tripura. Most of them were settled in these states and became Indian citizens in due course of time. Since large number of refugees had taken shelter in Assam, the State Government had expressed its inability to rehabilitate all of them and requested assistance in this regard from certain other states. Thereafter, in consultation with the Arunachal Pradesh, about 4012 Chakmas were settled there. But subsequently, relations between citizens of Arunachal Pradesh and the Chakmas have deteriorated and the latter have complained that they are being subjected to repressive measures with a view to forcibly expelling them from the State of Arunachal Pradesh. The Supreme Court of India allowed the petition and directed the State of Arunachal Pradesh to protect the lives and personal liberty of the Chakmas. In delivering the judgment, the hon'ble Court opined:

> "We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise..."

The major international documents guaranteed that everyone has the right to seek asylum from persecution. The primary responsibility to ensure and protect human rights rests with the government. But sometimes judicial intervention is necessary. ***National Human Rights Commission's*** case is the best example in this regard. In the case of ***Bangladesh Society for Enforcement of Human Rights (BSEHR)*** v. ***Bangladesh and others***[93] the hon'ble High Court Division has made out a judicial intervention and directed the Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs, to allow convicts to stay where they are *i.e.* in the prison after the completion of their sentence as a measure of safe or protective custody till their application for political asylum are disposed of. At the time of discussing the relevant statutory laws, it is observed that the superior courts of our country are playing a vital role in upholding the rights of human beings. It is noticed that as per interpretations of the superior courts, there is no harm of giving permissions to reside a non-citizen in this country. It is also looked that the non-citizens *i.e.* the refuges are under the jurisdiction of civil and criminal courts of our country.

In 2004, Bangladesh Bar Council with the assistance of UNHCR has organized a day-long workshop on Refugee Law. During the seminar the then Chief Justice of Bangladesh Mr. Justice Syed J.R. Mudassir Husain said that there is no law in the country to protect the rights of the refugees and urged the adoption of the Refugee Law. The hon'ble Chief Justice said everyone on the earth wants a place to

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[92] (1996) SCC 742

[93] Writ petition No. 5558 of 2003, ***See*** *The Bangladesh Today*, Dhaka: January 31, 2004.

be called "home", but the today's world, the reality is that home is a distant dream for a large numbers of people[94]. Therefore, it can be said that the superior courts of our country is showing interest for adoption of a national legislation for the protection and management of asylum seekers and refugees so that the country can share its bear with other countries.

The Role of the UNHCR

The United Nations High Commissioner for Refugees, the UN Refugee Agency, is mandated by the UN to lead and co-ordinate international action for the worldwide protection of refugees. UNHCR's mandate is to ensure that international protection is provided to refugees, and durable solutions are found to ease their plight. In addition to the protection of refugees, UNHCR offers and conducts capacity building training and advocacy for accession to the Convention Relating to the Status of Refugees, promotion of Refugee Law and related activities.

Accession to the 1951 Convention and the need for Refugee Law in Bangladesh

Bangladesh is a major refugee receiving country. It has thrice experienced influx of Rohingya refugees from the adjoining Arakan State of Myanmar. They were given shelter in Bangladesh under administrative decision. There is no law to make such administrative decision. The bureaucrats at different levels dealing with refugees need a guideline. But sometimes it is misconstrued that such a law would invite more people to came to Bangladesh. It is known to all that asylum is not meant to be permanent. In managing the Rohingya refugees, in fact, we are following rules, regulations, law and customary rules of Refugee Law. Actually we are always hospitable to refugees and we are managing them on humanitarian considerations.

Many countries of the world (Approximately 140) are parties to the 1951 Convention and its Protocols of 1967. But none of the South Asian Countries acceded to the Convention or the Protocol. There is a fear that accession may put strain on limited resources of the country. It is also apprehended that economic migrants will abuse the system.

In Article 25 of the Constitution of Bangladesh one of the fundamental principles of State Policy, has given a greater scope to deal with the refugee matters in light of UN Charter and international laws. Bangladesh has always followed the principle of non-refoulment, protected and sheltered the refugees and has been consistently doing her job without having a law of her own to this accord, or acceding to any international instruments. During the War of Liberation, it had benefited for assistance to and protection of refugees in India.

Adoption of national law and accession to 1951 Convention and 1967 Protocol are inter related. Adoption of a good refugee law would definitely help-

> (a) to deal with the refugee problem in a systematic way, rather than in a haphazard and unsystematic manner;

[94] See *World Refugee Day,* A publication of UNHCR Bangladesh, June, 2005.

(b) to handle problem related to refugees and asylum seekers in a more humane and effective way and enhance the country's image in terms of implementation of its obligations in the different human rights instruments, of which Bangladesh is a signatory;

(c) to treating refugees in accordance with internationally recognized legal and humanitarian standards;

(d) to enhance the prestige of the country in international arena;

(e) to distinguish between a genuine asylum seekers and those who have crossed the border for other reasons including economic migrants;

(f) to strengthen the international regime of 1951 Convention and the Protocol.

(g) to make guidelines for the bureaucrats who are managing the refugees at different levels and different times;

(h) to enable the states to be more accountable in dealing with the refugees in a balanced way.

(i) to deal with refugees for the protection of legitimate interest of the State concerned.

Conclusion

Many countries of the present world have agreed to grant asylum to refugees. To grant asylum means to offer protection in a safe country to people who are in danger in their own country. This idea of giving protection to a asylum seekers by another country proved that as a human being refugees have some inalienable rights and they have right to enjoy such rights as a member of human community without any distinction as to race, sex, colour or nationality. The UN Charter is the first international document which has established the doctrine of non-discrimination and then this idea became shaped by the Universal Declaration of Human Rights on the 10th December, 1948 which provides a complete catalogue of human rights applicable to refugees also. ***The International Covenant on Civil and Political Rights (ICCPR),*** the ***Refugee Convention of 1951*** and the ***Cartagena Declaration on Refugees, 1984*** are dealing the refugee problems in a broader way in the changed circumstances.

No one likes or chooses to be a refugee. Being a refugee means more than just being a foreigner. It means living in exile and often depending on others for such basic needs like food, clothing and shelter. People become refugees when one or more of their basic human rights are abused. We were refugees in 1971 and at present we are a host country for refugees. We have a written Constitution and some statutory laws. The Constitution gives some basic rights to the refugees also. We have observed from our previous discussion that refugees can take shelter under the provisions of civil and criminal laws of our country. They can enforce their civil rights through court and at the same time they can be prosecuted. In spite of the study reveals that the refugees right to get justice is limited. We have no proper legislation to manage the refugees directly. So, there is a need for adoption of a national legislation for the protection of asylum seekers and refugees or accede to the 1951 Refugee Convention and the 1967 Protocol. This will enable the country to manage refugee problems and asylum seekers in a more humanly and burden sharing manner.

Judicial Education in Bangladesh: An Analysis

Ifat Mubina Eusuf*

Abstract: Judicial education is emerging as a potentially significant agent of leadership and change in the Rule of Law context in Asia, a role which is relatively new in both common law and civil systems of justice. The introduction of formalized judicial education in countries such as Bangladesh addresses the internal need to contribute to improving the professional performance of judges and, equally, the external need for the judiciary to become more accountable and to demonstrate its recognition of the need to be concerned with performance enhancement. Judicial education also plays a significant and dynamic role in social governance through the promotion of the Rule of Law: free and fair trial, the consolidation of judicial identity and independence, and the preservation of human rights. Judicial learning is a complex process. Judges, as both adults and professionals, exhibit characteristics, styles and practices as learners which are distinctive, and which have direct and important implications for educators. These learning characteristics arise from the process and criteria of judicial selection, the formative nature of the judicial role, doctrinal constraints relating to the imperative to preserve judicial independence, the environment surrounding judicial office, and the specific needs of judges. In addition, there is emerging evidence to suggest that judges, as professionals, exhibit preferred learning styles and utilize preferred learning practices developed over the course of their careers. This article in this background has made an effort to analyze the scenario of judicial education for the officers in Bangladesh judicial service. In addition, effort has been made to point out the prevailing innovative approaches and mechanisms adopted by different sectors including Judicial Administration Training Institute for all ranks of judicial officers.

Key words: Independence of Judiciary, Judicial Education, Judicial Service, Judicial Training, Separation of Judiciary

Introduction

In a democratic society, the role of Judiciary is indispensible as it is one of the organs of the State. The Judiciary of Bangladesh is divided into two segments, that is Superior Judiciary and Subordinate Judiciary. The permanent seat of Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint.[95] Subordinate judiciary extends all over the territory of our

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[95] Article 100 of The Constitution of People's Republic of Bangladesh

country in every district from Assistant Judge to District Judge. The primary objective of the Judiciary is dispensation of Justice to the litigant people so that rights of citizens of the State remain unaffected and protected. According to the mandate of our constitution, state is to ensure separation of Judiciary from the executive organs.[96] The Constitution of Bangladesh has entrusted independence over all the persons employed in the judicial service and magistrates in exercise of judicial functions.[97] In order to maintain the constitutional mandate and to strengthen and maintain the dignity, independence and efficacy and to uphold the separation of Judiciary from all other organs of the State, continuous judicial education is essential for judicial officers of all ranks. However, the judicial education has a substantial role to play in case of developing judicial capacity and creativity of newly appointed officers. The very aim of the training is to facilitate the transition from law graduates to adjudicators equipped with the techniques of administering law expeditiously and efficiently.

In this study, I have made an attempt to analyze the scenario of judicial education for the officers in Bangladesh judicial service. In addition, I will try to point out the prevailing innovative approaches and mechanisms adopted by different sectors including Judicial Administration Training Institute for all ranks of judicial officers.

Methodology

With a view to understand the topic and accumulate systematic knowledge about it, I have gone through the bare laws, especially, Bangladesh Judicial Service(Composition, appointment, temporary suspension, suspension and removal) Order, 2007 and Probationer Assistant Judge's Training and Departmental Examination Order, 2008, Judicial Administration Training Act, 1995 and relevant research articles, official websites. My personal experience as a judge and interview with few judges helped me to understand the scenario more vividly. In short, I have tried to draw a pen picture about basic education to judicial officers in Bangladesh and re-shape understanding into meaningful terms to arrive at concrete recommendations about the topic.

Judicial Education: Meaning

The judiciary is the system of courts that interprets and applies the law in the name of the State. The judicial service is constituted with persons appointed and working in Bangladesh Civil Service (Judicial) cadre before the year of 2007 and thereafter persons appointed and working in Bangladesh Judicial Service.[98] In Oxford Advanced Learners Dictionary Education is defined as 'a process of teaching, training and learning, especially in schools or colleges, to improve knowledge and develop skills. Education frequently takes place under the guidance of educators, but learners may also educate themselves.[99] The issue 'Judicial Education' has not only been surveyed, explored and

[96] Article 22 Ibid
[97] Article 116A Ibid
[98] Rule 3 of Bangladesh Judicial Service (Composition, appointment to the service post and temporary suspension, suspension and Removal) Rules, 2007
[99] *Dewey, John (1944) [1916]. Democracy and Education. The Free Press. pp. 1–4.* ISBN 0-684-83631-9.

explained in accordance to the perspective of different countries but also described by eminent judges, activist lawyers, outstanding scholars, journalists, social scientists .

Judicial education is a primary means of advancing judicial competency and building public trust and confidence in the judiciary.[100] Magistrate Edith Van Den Broeck, director of Judicial Training Institute of Belgium conceptualizes judicial training as 'driver for reform' in a constant search for improving efficiency and cost efficiency without compromising the quality of service.[101] The objective of judicial training is to locate, articulate, communicate and ultimately to apply the principles of rectitude to which our personal preferences, desires and emotions must be subordinated.[102] Actually judicial education is a process through which the judicial officers of all ranks adopt different types of independent dispute resolution mechanisms and develop an attitudinal change to improve judicial integrity.

Purpose of Judicial Education

Law is a practical social science. Therefore, both academic and practice oriented approach is very important for ensuring a realistic, fruitful and qualitative legal education. After completion of the higher education of law, the law graduates gain an overall idea about the different branches of law which comprises the very foundation of the legal knowledge. However, after attaining the position of serving as a judge, a newly appointed judicial officer needs to assume office with confidence to transform himself from a law graduate into an adjudicator. It is the fundamental quality of a judge to gain specialized knowledge to implement the law effectively so as to ensure justice to the litigant public. As regards the scenario of Bangladesh, a law graduate requires at least four years Honor's degree to appear in the examination held under Judicial Service Commission[103] to get appointed as the Assistant Judge. The Faculty of Law of some universities though has introduced clinical methodology of studying law, yet they are not so effective and practical for professional life of a judge. The teaching of the law schools are mainly based on theories without preparing the graduates for facing the field situation.[104] A Judge after his or her appointment, requires to gain knowledge, understanding and experience about the existing legal rules and principles governing the function of Judiciary, prosecutors, lawyers and litigant public. A newly appointed judge has to prepare himself to take the leadership over the matter of court administration[105] and case management[106] in a particular court.

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[100] *nvcourts.gov/AOC/Programs_and.../**Judicial_Education**/Overview/*

[101] Carmi, Amnon, Judicial Education and Training, Journal of the International Organization for Judicial Training, National Centre for State Courts, 300 Newport Avenue, Williumbarg P. 2

[102] The Chief Justice of the Republic of Trinidad and Tobago. Paper delivered at the conference of the International Organisation for Judicial Training held in Bordeaux, France, from 31 October to 3 November ,2011. Delivered in the Plenary session on Judicial Training, Confidence and Legitimacy.

[103] Rule 5 of Bangladesh Judicial Service (Composition, appointment to the service post and temporary suspension, suspension and Removal) Rules, 2007

[104] Akhtaruzzaman, Dr. Md. Case Management and Court Administration, Dec. 2014; p 185

[105] 'Court Administration is systematic filing of the cases and proper record keeping; subject wise classification of cases; good monitoring to classify the cases on the basis of the stages they have reached, clearing the docket of 'dead' or moot matters to prevent them from clogging of schedules ..... ` Akhtaruzzaman Dr. Md. 'Case Management and Court Administration' Aug. 2014, P. 1.

On the other hand, in course of time, a judicial officer acquires experience by conducting the day to day court function. However, to maintain the delivery of quality justice, the judicial officers throughout their career, have to keep themselves in pace with emerging legal, social and technological trends and methods. A judge in his service life time is required to hold different jurisdictions in terms of territory, pecuniary and legal and other phenomena. A prospective and effective judicial training to a newly recruited judge can constitute the very foundation of legal acumen for facing all the aforesaid challenges in the upcoming professional life of a judge.

Dr. Rashid Askari in the article 'Effects of legal congestion in Bangladesh' has cited that

> 'At a conservative estimate, Bangladesh currently has 2.8 million cases backlogged in different courts hindering millions of people from access to legal redress. According to a survey by UNDP, litigants have to visit the court on an average 63 times and the average duration of a civil case disposal is 5.3 years and that of a criminal case is 3.7 years. This backlog creates considerable pressure on the courts leading to increased difficulties for people to have access to justice.'[107]

Due to various reasons and situations, it becomes very much challenging to adjudicate the proceedings effectively. In the above mentioned circumstances, the continuous judicial education of the judges of all the ranks is a *sine qua non* to enrich the professional, ethical and inter-disciplinary competencies which may be obtained, maintained and developed only through attendance of various trainings. Effective and diversified training, especially the training to newly appointed judges develops the quality of judicial performance of the judges in order to fulfill the vision of increasing the professional skill and wisdom of judges.

Picture of Judicial Education in Foreign Countries

The need for judicial education is emerging around the globe. The International Organization for Judicial Training (IOJT) was established in the year of 2002 in order to promote the rule of law by supporting the work of judicial education institutions all over the world. The mission of the IOJT is realized through international and regional conferences and other exchanges that provide opportunities for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching

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[106] 'Case Management is detailed scheduling of the life and history of the case after written statement has been submitted, drawn by an early judicial intervention, i.e. sitting judges order, forcing active participation of parties and strict observance of the schedule easing the problem of delay and backlog. ` Ibid

[107] Available at dhakacourier www.dhakacourier.com.bd/effects-of-legal-congestion-...

methodology. The last conference was held in Recife, Brazil, from November 8-12, 2015. The National Centre for State Courts, USA, is one of the founding members of this international organization. Judicial Education and Development, New Jersy also works with the target of strengthening the judicial performance.[108] In 2006, Judicial Studies Board (JSB) (now known as the Judicial College) has developed a Framework of Judicial Abilities and Qualities based on an empirical study of the training needs of the English judiciary. Since 2008, this framework has been used as the basis for the development of all judicial training in England and Wales.[109] In Kosovo, the efforts to implement a judicial training that ensures the aimed values of international trainings are excellently achieved by Kosovo Judicial Institute (KJI).[110] In 2002 Delhi Judicial Academy was founded with a vision to imparting training to newly recruited judicial officers as well as for in service judges. This concept has grown vigorously but quite separately in one country to another in jurisdictional silos.

Judicial Education in Bangladesh

In comparison to the other countries, Bangladesh Judicial Service is also approaching towards the emerging needs judicial education of the judges. The training program of judicial officers in Bangladesh is developing with the pace of time. The first two years from the recruitment of a judge is regarded as the probation period and the confirmation of the service is subject to the satisfaction of the authority about the activities of the probationer during that time.[111] An apprentice judge is liable to furnish field level training under the authority of District Judge in the court of respective station. In addition, the appropriate authority in consultation with Supreme Court arranges basic trainings and it is obligatory for the apprentice judge to attend and complete the aforesaid basic courses. Judicial Administration Training Institute situated in 15 College Road Dhaka is the key institution to function as a 'centre of judicial education, research and training' for newly recruited judicial officers. Apart from this, other institutionalized training programs offered by other government training organizations to the judges of different tiers also contributes to strengthen their capacity.

Field Level Education

Relevant provision of law

In Bangladesh, judges are appointed as probationer up to 2 years of service from the date of appointment and the appropriate authority upon satisfaction about manners and performance of probationer assistant judge with consultation of Supreme Court of Bangladesh confirm the service of the officer.[112] The service of the probationer judge may be terminated by the appropriate authority in

[108] https://www.laws.ucl.ac.uk/research/real.../appointing-training-judges/
[109] https://en.wikipedia.org/wiki/Judicial_College
[110] Judicial Training A perspective from Kosovo, published by Kosovo Judicial Institute, 2015, p.7
[111] Section 6 of Bangladesh Judicial Service (Composition, appointment, temporary suspension, suspension and removal) Order, 2007.
[112] Ibid

case of his non-satisfactory performance.[113] A probationer judge is entitled to get the training in the respective station in which he or she is posted without holding any court. The government with consultation with Supreme Court of Bangladesh will appoint every probationer judge under the supervision of respective District Judge for the practical training about administering judicial activities, court and office management and other matters and the concerned District Judge, in appropriate cases, upon consultation with the Metropolitan Session's Judge of the particular station can arrange training in any Sessions Court.[114] The apprentice judge has to receive training with the particular rank of the judges, i.e, 4 months training under Assistant Judge, Senior Assistant Judge and Joint District Judge, 2 months training under Additional District and Session's Judge.[115] The District Judge is to settle the time limit of each training and he has to arrange one third of total time of training for the purpose of administrative function of the court.[116] However, at any time before completion of the said period, a probationer can be appointed as the presiding judge.[117]

In the above mentioned circumstances, a newly appointed apprentice judicial officer has the scope to receive at least 1 year judicial training in the field level. Though the authority has discretion to appoint the apprentice as the presiding judge of a court at any time, the relevant provisions of this law (Bangladesh Judicial Service composition, appointment, temporary suspension, suspension and removal Order, 2007) is a guideline to develop freshly recruited judicial officer with adequate judicial competency.

During probation period, the judge, at field level, has to perform some tasks and comply with the methodology prescribed in the relevant provision of law.[118] The methodology comprises day to day management of court and to find solutions under the guidance of judges of the respective stations. For example, he or she has to write the specific orders about civil and criminal matters specified by the authority, sit with the senior presiding judges in the court room and write down the court proceedings. Apprentice judge has to perform administrative jobs relating to the court proceeding for example, training about the registrars and forms of different courts, classification and management of records, preparing decree and sale certificates, inspections of different divisions of court, so on and so forth.[119] The District and Session's Judge can entrust the probationer judge in the office of collectorate for receiving training about the revenue matters and other procedures about the immovable property and this type of training is vital for a judge to understand and adjudicate the matters of a civil court.

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[113] Ibid
[114] Section 4 of Probationer Assistant Judge's Training and Departmental Examination Order, 2008
[115] Section 4(2), Ibid
[116] Section 4(3), Ibid
[117] Explanatory provision Section 4(2), Ibid
[118] Section 5, Ibid
[119] In Section 6 of Probationer Assistant Judge's Training and Departmental Examination Order, 2008 there is elaborate discussion about the training methodology.

The overall scenario

Due to the huge case backlogs and the low number of judges, a freshly recruited judicial officer has to hold the court within a very short time after his or her appointment. Once the apprentice judge hold the office as the presiding judge, he or she definitely pays much time and attention for disposal of cases rather than enriching his own faculty by studying, observing and performing all the tasks of field level training. At the time of recruitment of 3rd Bangladesh Judicial Service Examination, the number of 394 newly recruited officers obtained only 7 days field level training.[120] Due to judicial separation, there was a severe vacuum in every court and that is why, the newly appointed judicial officers at that time had to assume the responsibility of the presiding judge within a very short time. Apart from this, a number of officers were appointed as the judicial magistrates and many of them acquired no experience for adjudicating the matters of civil court during their probation period. Consequently, field level training about the matters of civil proceeding remained unavailable for them. Similarly, considerable number of newly appointed assistant judges never assumed the office of a judicial magistrate leading to the lack of experience in that particular field.

The judges appointed in 4th BJS in the year of 2010 acquired 1 month field level training which is obviously inadequate for gaining necessary knowledge for presiding the court administration effectively. The probationer judges at that time attached with for 15 days each with Judge Court and Magistrate Court, but performed no such kind of official tasks provided in section 5 of Probationer Assistant Judge Training and Departmental Examination, 2008.[121] In the 7th Bangladesh Judicial Service, the tenure of their training was 3 months.[122] In their gazette notification of appointment, 45 days, 30 days and 15 days were fixed for their training with Senior Assistant Judge, Joint District Judge and District Judge respectively. In a country with the huge backlog of proceeding in the courts, the tenure of 3 months field level training can be considered as acceptable. In 8th Bangladesh Judicial Service, the probationer Judges were provided 40 days, 5 days, 10 days, 20 days and 15 days, training in the Courts of Senior Assistant Judge, District Legal Aid office Joint District Judge Court, Chief Judicial Magistrate Court and District Judge Court, respectively in order to get acquinted with judicial proceeding and different aspects of legal Aid. In 9th and 10th BJS, the newly recruited Judges were accomodated with aforesaid training schedule. However, in order to make the field level education fruitful and effective, District judge and other judges of the station has a significant role to play for teaching the new judges about fundamentals of judicial and administrative works. The District and

[120] The author is herself a judicial officer recruited in 3rd BJS
[121] Personal interview with a judicial officer appointed at 4th BJS.
[122] Government Order bearing memo no 10.00.0000.125.011.002.14-696 dated 17/11/2014

Sessions Judge in every district has the primary duty to supervise and co-ordinate the training and send the report about completion of the training course to the appropriate authority.[123]

Apart from the above, the topics and methodology of the training at the field level cannot be accomplished successfully in case the span of training period is brief and short. At the beginning of the professional life, a judge has a very fresh mind to learn the matters relating to judicial and administrative activities. Especially, in the subordinate courts of different districts in Bangladesh has been overburdened with a big number of litigations involving numerous complexities relating to handling the interlocutory matters along with disposal of proceedings as well as managing lawyers and court staffs. If the freshly appointed judges are allotted with sufficient time with specific schedule for training in the station of their first posting, they can enrich themselves with knowledge, skill and experience through learning to tackle with the situation of our court proceeding effectively.

In many countries experience as a lawyer is mandatory for appointment of judge. However, in our country, that sort of experience is not compulsory for recruitment.[124] In the absence of such an experience, training in the field level is more necessary for a newly recruited judge to understand the tools and techniques for presiding over a court. Consequently, the basic or foundation skills of a judge can be developed in a far better way for building up the faculty as a judge and court administrator as well.

Departmental Examination

During probation period of a judicial officer, he or she is required attend and pass in the departmental examination organized by the Judicial Service Commission. Passing in departmental examination is the precondition for a probationer judge to get the confirmation of the service.[125] Every probationer judge has to study a good length topics included in the curriculum to qualify in the examination and in this way they come across different basic legal issues once again. The system can be considered as a part of the effective judicial education to the newly recruited judges.

Institutionalized Judicial Training in Bangladesh through Judicial Administration Training Institute

[123] Section 6 of Probationer Assistant Judge's Training and Departmental Examination Order, 2008
[124] This mechanism was introduced in 6th BJS but abolished later on.
[125] Section 7 to 19 of Probationer Assistant Judge's Training and Departmental Examination Order, 2008

Formation, aims and objectives

It was the growing demand of time to build up an institutional setup for imparting training systematically and profoundly to the judges. Under the purview of Judicial Administration Training Institute Act, 1995, Judicial Administration Training Institute has been established to conduct training program of the judicial officers of every ranks in the subordinate judiciary. The Management and Administration of JATI is functioning under the control and supervision of Management Board headed by Chief Justice of Bangladesh along with wide representation of judges of both higher and subordinate judiciary and officers of other sectors of the Government.[126] A person who is or has been qualified to be the judge of the Supreme Court is the Director General who shall be the full time executive officer of the Institute and responsible for implementation of the decisions of Management Board.[127] The Judicial officers are deputed here to conduct and manage the training programs to the judicial officers of different ranks including the foundation training for newly appointed judicial officers over a period of two months. For the purpose of confirmation of service, one has to successfully complete the foundation training course conducted by Judicial Administration Training Institute.[128] The Institute is responsible to organize the course curricula, methodology and other matters and send the report of the performance of the trainee to the appropriate authority for keeping the same in the dociare of the trainee judges.[129]

Activities for dispensing judicial knowledge to the newly recruited judicial officers

Judicial Administration Training Institute has a tradition of constant endeavor to achieve and maintain expeditious and efficient judicial administration through training programs to newly appointed officers. With a view to achieve this end, the officers are imparted with training on important areas i,e. Civil law, Criminal law, Constitutional law, Substantive and Procedural laws, Case Management and Court Administration, Law of Evidence Forensic Science, Service and Financial Rules, Skill Development, such as writing of judgments and judicial orders, computer literacy etc and many other cross cutting issues such as Public Interest Litigation, Human Rights and Good Governance etc. The training methodology comprises oral presentation about the solution of a legal problem, review of the specific statute, interactive workshops, mock trials, group discussions, etc. JATI arranges the training program with innovative lectures by judges of the Supreme Court, secretaries, senior judicial officers, university professors, reputed lawyers and subject-matter specialists who have proficiency in imparting judicial education to the judges. Weekly examination is taken upon the subject matters of the lectures, marks are distributed among them, and feedback classes are also held for pointing out the flaws of the trainee judges while exercising their judicial skills. Visiting programs to Ministry of Law, Justice and Parliamentary Affairs, Supreme Court of Bangladesh, Liberation War Museum and other places are initiated for developing the officers with new insights and knowledge. Training about basic computer

[126] Section 10 of Judicial Administration Training Act, 1995.
[127] Section 11, Ibid.
[128] Section 4(cha) of Training of Probationer Assistant Judges and Departmental Examination Order, 2008.
[129] Section 3 of Training of Probationer Assistant Judges and Departmental Examination Order, 2008.

literacy and E-communication along with modern library facility is a part of the total training course and there are sports facilities for ensuring the physical and mental fitness of the participants. The foundation training provided by JATI not only cover all the fields of justice, but also treat different aspects outside the legal sphere, with the purpose of professional enhancement and strengthening inter-disciplinary skills and qualities of the judges.

The Institute evaluates the overall performance of trainees on the basis on various activities, including a written examination, mock trial, an oral presentation on a legal problem, statute review, mock trial, attachment program, study tour, discipline, attendance and punctuality of the particular trainee. The examination paper is evaluated both by internal and external examiners. Evaluation processes are carried out in accordance with the *Training Evaluation Guidelines* of the Institute. After completion of a course, the Institute provides the trainee with their results (mark sheet and certificate) and communicates the results to supervising authorities, such as the Ministry of Law, Justice and Parliamentary Affairs and the Supreme Court. There is a grading system for evaluating the participants on the basis of their performances.[130] The trainee holding the first position is awarded with a trophy called Director General's Award in a program in the presence of Chief Justice of Bangladesh.

The trainees also evaluate the resource persons by filling up evaluation forms provided by the Institute. These evaluations are considered while selecting the resource persons for upcoming training programs. Participants are also provided with terminal evaluation about the overall training course for using the same as a guideline for improving the future foundation training programs.

Activities for upgrading the knowledge of judges of other tiers

Judicial Administration Training Institute organizes training programs and workshops for the judges of all tiers of subordinate judiciary. The Institute prepares calendar of different training programs for the levels of Senior Assistant Judges, Joint District Judges, Additional District Judges and District Judges in such way that officers of every tier gets at least one training during each level of their service tenure.[131] The curriculum and module of the training courses are arranged in such a way that those programs as far as possible befits with the professional requirement of the judges depending upon their particular rank. In the training programs, lecture sessions and participatory segments are arranged in order to make them up to date and well conversant with the existing laws and other matters relating to case management and court administration. Apart from the training programs to each particular tiers of judicial officers, the Institute organizes trainings focusing on specific cross cutting and important issues like alternative dispute resolution, public procurement, legal aid, innovation, case management and court administration etc. Through the receipt above topic oriented training programs, the judges of

[130] . The evaluation system of the participants is elaborately discussed in Training Evaluation Guidelines, 2015
[131] Section 7 of Judicial Administration Training Institute Act, 1995.

every tier can keep themselves well acquainted to the required judicial and administrative matters for developing their respective faculties.

Challenges and initiatives

From its inception Judicial Administration Training Institute has organized 37 Basic and Foundation training Courses involving a number of 125 newly recruited judges.[132] Due to the lack of proper infrastructural facilities, limited accommodation and few numbers of faculty members, more than one training program cannot be conducted at the same time. The institute organizes courses for judicial officers of all the ranks, Public Prosecutors and Court Support Staffs round the year as per the training calendar approved by the Management Board of JATI. A considerable portion of time is spent for completion of those training programs and as a result, normally 2, hardly 3 foundation training programs can be arranged in a year.

Unlike the foundation training courses, due to inadequate logistics and insufficient officials and staffs, the judges do not get the required number of trainings programs like 2 or 3 times in every tier.

It has already been said that Judicial Administration training Institute is with the process of introducing innovative approaches and mechanisms to develop the foundation training in a more fruitful and potential way. The Institute has undertaken Training about English communication skill in foundation training course has already been integrated. The Institute has undertaken exclusive English language course for developing communication skills of the newly appointed judges.[133] The significant initiatives that Institute has undertaken are allotment of 1.3180 acres of land and vertical extension of JATI complex which will definitely strengthen the infrastructure and accommodation of the Institute to run 2 training courses at a time. Recruitment of more officers and staffs and extension of the tenure of foundation course from 2 months to 4 months is also under the process with due authority. The class rooms along with other components of the Institute have already been digitalized to a considerable extent. The Institute has undertaken a draft Strategic Plan facilitated by faculty members and UNDP supported national consultants to bring dynamism of all the training programs including the foundation training courses.[134]

BPATC, Survey Settlement and other Training Programs Provided by Different Institutions to the Judges of All Ranks

[132] From the record preserved by the Institute.

[133] With the finance of UNDP(United Nations Development Program)-JSF (justice Sector Facility) project has arranged an English language training course about the communication skills for two weeks from December 17- December 28, 2015. The training program was conducted by British Council.

[134] Ministry of Law, Justice and Parliamentary Affairs, in collaboration with UNDP and UKAID, under Justice Sector Facility Project has initiated Strategic Planning for Justice Sector Institutions including JATI.

Scopes and Utilities

The overall control and direction of training to the new judges is generally in the hand of judiciary. However, a part of the training should be implemented by different entities like Land Ministry and Public Administration Ministry. Probationer Assistant Judges Training and Departmental Examination, 2008 has widened the scope for such kind of training. Survey Settlement Training is a very crucial and important for proper understanding and adjudicating the land disputes and litigations in our court system.[135] In addition to that, under the purview of Public Administration Training Policy and as per the curriculum prepared on the basis of the directions of appropriate authority, the judicial officers have the scope to participate in the foundation training of any training organization.[136] According to Probationer Assistant Judges Training and Departmental Examination, 2008 the survey settlement training and BPATC training are mandatory for all the judicial officers during their probation period. These training courses are effective both in terms of disseminating knowledge and discipline for all the officers of the Republic including the judicial officers as well. This training program is regarded to be a platform for interaction with the officers of different cadres and its attachment program in particular districts arranged by BPATC teaches the participant about many thing from various concepts and ideas.[137] The trainee officers are given exposure to problems of rural Bangladesh in a limited time Excursion so as to understand the social context in which particular laws/systems exist and operate

The overall scenario

The authority has time to time sent the judges for Survey settlement training to Savar Upazilla. On the date of 17th January 2016, the number of 10 judicial officers (Senior Assistant Judges and Senior Judicial Magistrates) participated in the Survey settlement training for 50 days.[138] A judicial officer below the rank of Joint District Judge usually participates in the training course for 6 months organized by Bangladesh Public Administration Training Centre in Savar. However, number of judicial officers that are sent for the training is not sufficient for providing all the officers with this training. On the last occasion, on 61st Foundation Training Course, 17 judicial officers were sent for training at BPATC.[139] However, in the 65th and 66th Foundation Training Course, no judge was chosen as the participant.[140]

In the 113 Survey and Settlement Training Course, a number of 20 judicial officers were selected as the trainee who are all in the rank of Senior Assistant Judges.[141] The judges were given training through BPATC before JATI was established and by receiving BPATC and BMA (Bangladesh Military Academy) training, judicial officials learn driving, physical exercise and discipline along with

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[135] Sub-section 4(7) of Probationer Assistant Judge Training and Departmental examination Order, 2008 mandated survey settlement training for probationer judges.

[136] Sub-section 5(7) of Probationer Assistant Judge Training and Departmental examination Order, 2008

[137] Personal interview with the judges who have received the training in BPATC.

[138] Gazette notification of Ministry of Law, Justice and Parliamentary Affairs, Law and Justice Division, section 3 bearing Memo no 10.125.025.02.00.001.2011-33 dated 13.01.2016.

[139] Gazette Notification from Ministry of Public Administration bearing Memo no 05.201.025.00.00.006.2013(angsha-1)-538 dated 17.11.2015.

[140] Government Order published by Ministry of Public Administration bearing memo number 05.201.25.0000.002. 2014-371 dated 4.12.2017

[141] Government Order published by Ministry of Public Administration bearing memo number 05.00.0000.201.025.007. 17.366 dated 23.11.2017

academic lessons.[142] The capability and efficiency of a judge now-a-days largely depends upon the interacting skill and awareness about socio economic situations at large. From that perspective, the new judges and also the judges of other should be involved in training programs at different organizations to educate them from every aspect.

Recommendations

Providing proper judicial education is a very wide idea and a matter of continuous development for keeping it in pace with time and demand of ever-changing social needs. Following observations may lead the path of education process more objective oriented and useful for the target groups:

1) The judicial education both in field level and institutions must be focused on developing core judicial skills of judgment/order writing, court administration, case management, handling witnesses, litigants, court staffs and the Bar.

2) In the field level judicial education, accountability of the District Judges should be ensured to facilitate the new judges with the knowledge of justice delivery system by strictly complying the provisions of Probationer Assistant Judges Training and Departmental Examination order, 2008. The concerned District judge should send report about the performance of probationer judge to the authority.

3) The authority should be concerned for extending the training period of new judges both the field level and other training organizations. Diversified trainings in different organizations like BMA (Bangladesh Military Academy), BPATC, Survey Settlement camp should be provided with every judicial officers. Likewise, the authority should promote foreign trainings to the officers as far as possible to make them well equipped with new pragmatic thoughts and approaches to handle the court proceedings.

4) There should be an initiative on the part of the authority to evaluate and acknowledge the performance of the probationer judges in the field level. First 10 or 15 probationer judges can be awarded as the best trainee during their probation period. Such effort on the part of the authority will also make the probationers accountable to discharge their duties at that period.

5) The authority should pay more attention and care for developing infrastructural and man power development of Judicial Administration Training Institute to utilize its potential to the fullest.

6) The course curricula and training methodology of JATI should always be maintained in such a way to integrate necessary knowledge and experience to the legal thinking of the newly appointed judges. As a part of this initiative, JATI has prepared module for foundation training to incorporate improved means of disseminating training to the newly appointed judges.

7) Identification of training needs is the basic requirement for improving the quality of foundation training course. New mechanisms for identification of training need, such as,

[142] *archive.thedailystar.net/new Design/news-details.php?nid=167071*

training assessment questionnaires after each training course, collecting the information from the field level, etc, should be implemented by JATI in a more useful way.

8) With constant collaboration with different donor agencies and other organizations JATI can promote a cross functional and multi skilled environment for dispersing training and workshops to the new judges from different sectors about various issues.

9) Taking into consideration of the necessity of time, the Institute has incorporated lessons about English language in its foundation course curriculum and the same should be arranged and extended in a more effective and prospective way.

10) The authority and the concerned body should take steps to ensure that every judicial officer after their appointment can attain training at other training organizations like BPATC.

11) In order to keep the acumen and quality of a newly appointed judge everlasting and developing, time to time training to the judge throughout his career is very much necessary. Apart from off-the-job training, JATI needs to establish IT based knowledge management system for online services to ensure distance learning. This online service may include developing highly communicable self learning materials, uploading websites and establishing software and hardware system for library facilities.

Conclusion

Learning is a life-long process and it is the primary job for every judicial officer. The judges of a country are endowed with the responsibility for providing justice to the people at large. For the newly appointed judicial officers, they with their fresh mind with lots of energy grasp the knowledge in a very profound way and effective judicial education can build up the very foundation of their extensive knowledge, firm character and judicious acumen. The young judicial officers who by dint of his/her brilliance, qualifies to be a member of the judicial system for imparting justice, needs to be guided vis-à-vis the functions of judicial system and the mannerism in which justice be done at the earliest. On the other hand, disbursing education to the judicial officers of all tiers develops their judicial understanding and attitude. Along with and apart from the authority, it is the solemn duty of the entire court system in the field level as well as the training institutions to strengthen the judicial training so as to enhance the capacity of judges in every sphere of their service life. JATI being the core actor for dispersing judicial education is ceaseless in its effort. The very objective of the judicial education is enhancing strength of the judges so as that they can perform their duties with utmost capability and wisdom. For this reason, judicial education of Bangladesh vows to develop judges with profound integrity, towering personality and above all a true learner of law so that they will be able to ensure proper dispensation of justice to the litigant public.

A Critical Analysis of UN Counter Terrorism Measures with Special Focus on Security Council's Anti-Terrorism Resolutions

Al Asad Md. Mahmudul Islam*

Abstract: After the end of the cold war, the trend in the type of conflicts has been changing drastically from that of state conducted conflicts to those of non-state actors being more involved in creating terror in the world today. The cause for various fractions adopting these means to enforce their beliefs vary in degree from religious to ethnic, economic, political and other vested interests to disrupt peace and stability in a state, region or even globally. The United States (US) and some other nations effected by this act of terror have together pledged to fight against terrorism .International committees like the United Nations (UN), that were formed after the end of the 2nd World War to resolve conflicts in the world did not have a mandate to be able to confront such type of emerging situations. Many violent activities effecting both nations and innocent civilians were becoming a major concern of the UN. The UN Security Council has taken important steps against terrorism since the attacks of September 11, 2001. Some of those steps build on previous Security Council counterterrorism efforts; others represent significant innovations. Therefore, it is important to study and analyze the role that the UN can play in the fight against global terrorism and suggest methods to maximize the UN potential to combat the menace of international terrorism. This article in this background seeks to answer whether the UN anti-terrorism measures are effective to deal with the pressing challenges of combating international terrorism or have those initiatives proved to be irrelevant and/or counter-productive in the context of the recent operational scheme of the international terrorist organisations.

Key words: Terrorism, anti- terrorism, United Nations, Security Council, Counter terrorism committee,

Introduction

The United Nations (UN) framework against terrorism can mostly be understood, explained and assessed by the historical context of its various anti-terrorism measures in which the decolonization and liberation movements of 1960-1980, the cold war situation in a bio-polar world till 1990 and the rise of Al-Qaida in the last decade of 20th century together with its devastating 9/11 attack in the

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United States have had great influence.[143] Consequently, the UN response to the international terrorism that took place before 1990 and that follows afterwards are categorically different from that of the post 9/11 incident. The striking feature of this aspect is that before 1990, the UN General Assembly was the main forum to address this issue of global concerns which was arrogated by the Security Council (SC) in 1992 when the SC adopted Resolution 731, in response to the bombing of Pan Am flight 103 (Lockerbie), affirming terrorism as 'threats to international peace and security'.[144] Thereafter, SC gradually assumed this legislative role to enact measures to combat international terrorism under Chapter VII of the UN Charter that binds all the UN member states. This legislative activity of the SC has aroused a great deal of controversy both among scholars and the States. It raised question as to the Security Council's mandate to adopt such resolution and authority to be a source of International Law which requires states' consent for its creation and enforcement.[145] In the same trail, SC adopted resolution 1269[146], resolution 1267[147], resolution 1373[148], resolution 1540[149] and resolution 1566[150]. The SC Resolution 1267 imposed financial and travel restrictions on the Taliban for their support on terrorism and accordingly directed the member states to adopt necessary measures for the realization of the sanction. Resolution 1267 also provides for the creation of Al-Qaida/Taliban Sanction Committee to monitor the implementation of the anti-terrorism measures by the member states within their respective jurisdiction. This Committee was later provided with the task of preparing and updating a 'terror list' for persons and entities associated with the Taliban and Al-Qaida.[151] But this listing process was severely criticized for its lack of transparency and due process safeguards and accordingly, called in question in so many judicial reviews.[152] Despite the failure of the 1267 sanction regime to prevent the 9/11 terrorist attack in United States, the Security Council adopted resolution 1373 aftermath 9/11 incident to take stern actions against terrorism by imposing similar obligations of enacting domestic anti-terrorism law and freezing assets of the all terrorists groups. It also created the Counter Terrorism Committee (CTC) to oversee the implementation of the resolution 1373 sanction regime.[153] But in the absence of any guideline as to the general definition of terrorism and necessary information and logistics support to enhance national anti-terrorism mechanism, many of the member states failed to comply with the provisions of the resolution and used the anti-terrorism measures to repress political opponent and dissident social group. Accordingly this sanction regime and the activities of the CTC raised human rights concerns since it

[143] Paul J Rabbat 'The role of the United Nations in the Prevention and Repression of Terrorism' in Marianne Wade and Almir Maljevic (eds), *A War on Terror? The European Stance on a new Threat, Changing Laws and Human Rights Implication*s (Spinger 2010) 82-87 ch 3.
[144] S/Res/731, 1992; Rabat (n 2) 86.
[145] Luis Miguel Hinojosa Martinez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57(2) International & Comparative Law Quarterly 333.
[146] S/Res/1269 (1999), 19 October 1999.
[147] S/Res/1267 (1999), 15 October 1999.
[148] S/Res/1373 (2001), 28 September 2001.
[149] S/Res/1540 (2004), 28 April 2004.
[150] S/Res/1566 (2004), 8 October 2004.
[151] S/Res/1390 (2002), Operative para 2.
[152] Rabat (n 2) 90.
[153] S/Res/1373 (2001), 28 September 2001.

did not recognise the human rights implications in the counter terrorism efforts.[154] Pursuant to the GA declaration to eliminate international terrorism in 1994,[155] the UN also adopted three conventions, namely, the International Convention for the Suppression of Terrorist Bombing 1997, the international Convention for the Suppression of the Financing of Terrorism 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005, none of which provided a comprehensive definition of terrorism.[156] Thus despite staggering attempts to combat with global terrorism, the UN failed to provide a consensus definition of the 'terrorism', the very act which it seeks to prevent and protect. In fact, the UN is yet to develop a whole-off and comprehensive set of measures aiming at fighting terrorism.[157] As a result, the controversies over the legal basis of the SC resolutions on terrorism and the human rights objection to the substantive laws and mandate of the committees established by the resolutions made many of the measures irrelevant. The use of anti-terrorism measures for repressing political opponent by many of the member states further aggravated the situation by making many of the measures as counter-productive too. Against the said backdrop, this essay seeks to answer whether the UN anti-terrorism measures are effective to deal with the pressing challenges of combating international terrorism or have those initiatives proved to be irrelevant and/or counter-productive in the context of the recent operational scheme of the international terrorist organisations?.

In order to answer the above question, this essay critically examines the UN anti-terrorism measures in the broader spectrum of human rights and Security Council's mandate to pass resolution under Chapter VII of the UN Charter. Accordingly, Part I of this essay focuses on the overview of the UN global anti-terrorism measures, especially Part I (A) sets out the early international actions against terrorism that covers the development of this field from 1960 to 1990. Part I (B) highlights the features of the post cold war UN anti-terrorism measures that took place until the 9/11 terrorist attack in USA and Part I (C) concentrates on the Post 9/11 UN initiative for combating the international terrorism.

Part II of this essay examines the efficacy of the overall UN anti-terrorism mechanisms in the light of human rights law. Especially, Part II (A) devoted to the critical examination of the early UN anti-terrorism measures, Part II (B) scrutinises the 1267 sanction regime against the Taliban and role played by the Al-Qaida/Taliban Sanction Committee. Part II (C) explores the overarching mandate of the Counter Terrorism Committee (CTC) and its impact on the domestic anti-terrorism mechanism of the member states. This part also exposes the lack of coherence and co-ordination of the

[154] Kent Roach, 'The United Nations Responds: Security Council Listing and Legislation' in Kent Roach (ed), *The 9/11 Effect Comparative Counter-Terrorism* (Cambridge 2011), 47 Ch 2.
[155] 'Declaration on Measures to Eliminate International Terrorism' Annexed to GA/Res/49/60 (1994) 9 December 1994.
[156] Rabat (n 2) 87.
[157] ibid 100.

administrative and legislative initiatives of the UN which can be seen very disappointing for the overall functioning of this legal regime.

Part III of the essay examines the legal and political aspects concerning SCs legislative role in adopting resolutions on anti-terrorism. It also exposes the counter-productive aspects of the UN anti-terrorism measures. As a result, the essay concludes that the United Nation anti-terrorism measures have failed to address the root cause of the terrorism which made the whole contribution irrelevant and in some cases counter-productive and, therefore, suggests few efforts towards a comprehensive global anti-terrorism mechanism within the UN framework for the 21st century.

Part I: Overview of the UN Global Anti-Terrorism Measures

The necessity to formulate a global anti-terrorism legal mechanism was first felt by the League of Nations in 1935 when it passed a resolution declaring that 'the rules on international law concerning the repressing of terrorist activity are not at present sufficiently precise to guarantee efficiently international cooperation'.[158] Accordingly, the first international instrument governing the terrorism came up with the adoption of the Convention for the Prevention and Punishment of Terrorism in 1935 under the auspices of the League of Nations.[159] Despite the fact that this convention never entered into force for insufficient ratifications by the member states of the League of Nations before its gradual demise in the events of Second World War, the provisions of this conventions had kernel influence in the later developments of this legal framework.[160]

A. Early UN actions against terrorism

After the advent of the United Nations in 1946, the international legal framework on terrorism has got momentum in 1960 when terrorism was perceived as a domestic law enforcement issue and it continued to be evolved through the strains and stresses of legal and political movements of 1970s and 1980s when the wars of decolonisation and independence in various parts of the globe attracted much attention and sympathy of many states.[161] The cold war events and continuous tensions between the two blocs of the powerful nations exacerbated the situation in which international community has failed to reach a consensus definition of terrorism while adopting few selective

[158] League of Nations, Committee for the International Repression of Terrorism (CIRT), Geneva, 10 April 1935. League of Nations Doc, CRTI; Ben Saul, 'The Legal Response of the League of Nations to Terrorism', (2006) 4 Journal of International Criminal Justice 78-102.
[159] Rabbat (n 2) 82.
[160] ibid 83.
[161] ibid 84.

international anti-terrorism measures in response to certain politically motivated violent acts, such as, hijacking, hostage taking, and terrorist bombing. They were also intended to the safety of the airport, airways and marine navigation as well as for the protection of the Internationally Protected Person, including Diplomatic Agents.[162] To be specific, in this period of UN history since 1963 until 1988, nine international conventions against terrorism were adopted.[163] It is worth to mention here that the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 is the first UN convention on anti-terrorism.

B. Post Cold War anti-terrorism measures

After the end of the gridlock of Cold War in 1990, the United Nations gradually became the centre of international legislation under which it took various measures to deal with the emerging forms of international terrorism ascertaining the same as a threat to international peace and security for which provisions of chapter VII of the UN Charter is accessible.[164] In this period SC resolution 731 declared Lockerbie bombing as a threat to international peace and security which was followed by UNSC resolution 1054, UNSC resolution 1189 and UNSC resolution 1267 before the 9/11 incidents. Security Council resolution 1267 imposed financial and travel ban, often called smart sanctions, on the Taliban and created the Al-Qaida/Taliban Sanction Committee with the task, *inter alia,* of listing individuals and entities on 'terror list' who provides financial or others supports to the Taliban. SC resolution 1269 also called upon States to take appropriate steps 'prevent and suppress in their territories through all lawful the preparation and financing of any acts of terrorism'.[165] The SC resolution 1267 required States to report on the implementation of the financial and travel sanctions to the Al-Qaida/Taliban Sanction Committee within 30 days and to make periodic report to the committee. The resolution also called on states to take proceeding against those who violated the prohibitions in the resolutions. In 2000, the Security Council extended the 1267 process from the Taliban to those associated with Bin Laden and Al-Qaida.[166] Following that the adoption of the International Convention for the Suppression of the Financing of Terrorism in 1999 criminalising the collection of any funds to be used for terrorist attack enhanced the global antiterrorism measures within the UN framework.[167] The impact of the creation and functioning of 1267 Committee has been scrutinised in Part II, whereas the legal authority of the Security Council to pass resolutions governing anti-terrorism measures under Chapter VII of the UN Charter has been examined in Part III of this essay.

[162] ibid 84.
[163] ibid 85.
[164] ibid 86.
[165] S/Res/1269 (1999), 19 October 1999.
[166] S/Res/1333 (2000), 19 December 2000.
[167] Rabat (n 1) 88.

C. Post 9/11 UN anti-terrorism measures

The devastating terrorist attack of 9/11 in USA was carried out in a time when terrorism, as an emerging global concern, was already one of the top agendas of the United Nations and very much within the existing normative principles and body of international law.[168] At that time the UN overcoming the cold war situation travelled quite far to be regarded and respected as the centre of addressing global concerns of the international community. On the basis of this organisational strength, the 9/11 attack was sharply responded by the adoption of Security Council Resolution 1368 that unequivocally condemned the terrorist attack and labelled such acts as a 'threat to international peace and security'. Furthermore, resolution 1368 expressed the Security Council's determination to combat 'by all means' threats to peace and security by terrorist acts and called on states to redouble their efforts to prevent and suppress terrorist acts. However, Resolution 1368 is of declaratory nature providing no specific measures for combating global terrorism rather than urging the member states in somewhat emotional note.[169] However, this resolution enabled USA to the invasion of Afghanistan in 2001 and Iraq in 2003 as right to self defence. It has given birth of a subsequent SC resolution 1546 that authorised power to the multinational forces to do all necessary measures for maintaining stability and security in Iraq.[170]

On September 28, 2001 Security Council adopted resolution 1373 imposing obligation to the member states to freeze terrorist funds and to take appropriate measures to bring terrorist to justice both in national and international arena.[171] All states are obliged to deny safe havens to terrorists and prevent their territories from being used for terrorist purposes. Resolution 1373 was the first legally binding Security Council resolution addressing international terrorism as a global phenomenon without referring to a particular state or region.[172] The member states were urged to intensify and facilitate the exchange of information on matters related to travel, communications, and arms trafficking among terrorists.[173] Further it was unparalleled in imposing new legal obligations on states and mobilizing the international community for a campaign of non-military cooperative law enforcement measures to combat global terrorism.[174] This resolution also provides for the creation of the Counter Terrorism Committee to monitor the resolution's enforcement by holding states to account, following up on their obligation to report concrete measures and assisting them in meeting

[168] Helen Duffy, *Responding to September 11: The Framework of International Law* (Legal director, Interights 2001).

[169] Nico Schriver, 'September 11 and Challenges to International Law' *Terrorism and the UN: Before and After September 11*, (Indiana University Press 2003) 74.

[170] Roach (n 13)30.

[171] S/res/1373 (2001), 28 September 2001.

[172] Schriver (n 28) 75.

[173] David Cortright, 'A Critical Evaluation of the UN Counter-Terrorism Program: Accomplishments and Challenges' Transnational Institute (TNI) April 2005. <http://www.tni.org/sites/www.tni.org/archives/crime-docs/cortright.pdf> accessed in 10 January 2014.

[174] Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11' (2002) 35 CORNELL ILJ, 482ff 475-490; David Cortright and George A. Lopez, *Sanctions and the Search for Security: Challenges to UN Action* (Lynne Rienner Publishers 2002) 126-130; Edward C. Luck, 'Tackling Terrorism' in David M. Malone (ed), *The United Nations Security Council* (Lynne Rienner Publishers 2004) 85-100.

the obligation of the resolution.[175] In November 2001, the Security Council adopted Resolution 1377, which encouraged the CTC to work with international, regional, and sub-regional organizations to explore ways in which states can receive technical, financial, regulatory, legislative, and other assistance to improve implementation of Resolution 1373.[176]

In March 2004 the Security Council created the Counter-Terrorism Executive Directorate (CTED) to serve as a professional secretariat for counter-terrorism implementation.[177] The Council also strengthened sanctions against Al-Qaida and the Taliban devising a special monitoring group to support sanctions enforcement by adopting resolution 1540.[178] The UN Office on Drugs and Crime and its Terrorism Prevention Branch (UNODC/TPB) also extended its endeavour to develop states' law enforcement capacity. These and related efforts placed counter-terrorism at the centre of the UNs political agenda.[179] The SC also adopted resolution 1566 calling upon states to cooperate fully with the Counter Terrorism Committee (CTC), Counter Terrorism Committee Executive Directorate (CTED), The Al-Qaida/Taliban Sanctions Committee and its Analytical Support and Sanctions Monitoring Team and committee established pursuant to resolution 1540 (2004). In this resolution the Security Council cautiously referred states' obligation to international law, human right, refugee and humanitarian law and their applicability while combating terrorism.[180] In order to streamline international efforts against terrorism and to adopt an overarching strategic framework against terrorism the United Nations also adopted Global Counter Terrorism Strategy in 2006 for facilitating the pre-existing de facto coordination within UN and with its affiliated bodies and other international organisations.[181]

Again, resolution 1624 adopted on September 14, 2005, called on states to enact offences against incitement of terrorism. It aimed to regulate speech and expression associated with terrorism. But it was not enacted under Chapter VII of the UN Charter. The CTC has paid more attention to international human rights in monitoring the response of countries to resolution 1624 than to resolution 1373. It has issued two reports on how states have complied with resolution 1624. Both reports have noted that a number of states have stressed concerns about freedom of expression, and a few even require some degree of probability that the incitement will result in a terrorist act.[182] Resolution 1624 endorses laws that incite terrorism, despite a lack of clarity about the effectiveness of such laws in preventing terrorism.[183]

[175] Rabat (n 2) 96.
[176] S/RES/1377 (2001) 12 November 2001.
[177] S/RES/1535 (2004), 26 March 2004.
[178] S/RES/1540 (2004), 28 April 2004.
[179] Cortright (n 32).

[180] S/RES/1566 (2004) 8 October 2004.
[181] The United Nations Global Counter-Terrorism Strategy, 6 September 2006, A/60/L.62
[182] Roach (n 13) 58.
[183] Roach (n 13) 59.

Part II: Efficacy of the UN Global Anti-Terrorism Measures

It is indeed a daunting task to provide an assessment of the overall UN anti-terrorism measures that essentially requires a full-fledged methodological research. It is outside the scope of this essay to embark on a methodological research for gauging the effectiveness of the UN anti-terrorism measures. Thus, this part of the essay endeavours to an objective analysis of the important UN antiterrorism measures vis-à-vis international law, human rights and due process provisions.

A. Efficacy of the early UN anti-terrorism mechanism

In the early UN anti-terrorism measures, we see that the UN deals with the terrorism in sectoral or piecemeal basis. The conventions adopted at this period of time defined certain acts as terrorist activities for the purpose of that very Convention. They took the specific approach of defining terrorism as against the generic approach. Thus in the absence of an accepted and general definition of terrorism those conventions attempted to combat terrorism in piecemeal basis by proscribing certain conducts as acts of terrorism and, therefore, requires the member to take steps for the prevention and repression of those certain acts within their respective jurisdiction.

B. Efficacy of the resolution 1267 regime and the Al-Qaida/Taliban Sanction Committee

The 1267 listing and asset freeze process as well as the provisions of the International Convention for the Suppression of Terrorism Financing predominantly emphasised on the financial network of the terrorist to prevent terrorism. But the resolution 1267 did not limit the meaning of 'association' with Al-Qaida until 2005. The other terms frequently used in the resolution e.g., financing, recruiting, supplying, arms were defined in such broad fashion that helped little in law enforcement. It also did not define the term 'terrorism'. Since resolution 1267 avoids a general definition of terrorism and also singles out Al-Qaida among other terrorist group, this resolution has been criticised as a form of enemy criminal law that focused on a named adversary without applying general and universal categories.[184] Again, the concept of association with Al-Qaida was more of intelligence concept than criminal concept that requires tangible evidence.[185] The listing process of the 1267 Committee has also been criticised for its dependency on intelligence based information and secrecy that is devoid of due process observations. Further, the 1267 listing process has been criticised because it's apparent result of declaring individuals or entities as outlaws by a legislative or executive process other than judicial act.[186] Accordingly, many states attempted to pass regulation under the United Nations Act for governing financial sanctions against individuals. In *Treasury V. Ahmed* the UK Supreme Court declared in 2010 that such regulation were ultra vires the United Kingdom's United Nations Act with the observation that parliament could not have intended in 1946 to authorise permanent and

[184] Roach (n 13) 27.
[185] ibid.
[186] David Dyzenhaus, 'The rule of (administrative) law in International law' (2005) 68 Law and Contemporary Problems 127.

powerful individual sanctions through a Security Council listing process that does not allow any judicial remedy.[187] Thus the absence of judicial body within the UN resulted in successful domestic due process challenges to the fairness of the listing process.[188] There are growing number of successful due process challenges to terrorist listings, including decisions by the European Court of Justice, the new UK Supreme Court and Canadian Courts.[189] In response to the growing criticism of 1267 listing process, SC adopted resolution 1735[190] requiring states to provide as much information as it can. It attempted to increase transparency, effectiveness, and fairness of the listing process. Resolution 1730[191] adopted a delisting procedure that created a focal point to receive request for delisting from the entities on consolidated list. But under this process, a listed person needs to approach to his state of citizenship which will hold a bilateral meeting with the state that has proposed his name in the list. Thus it provides for an intergovernmental mechanism for delisting.[192] In order to make it transparent Security Council resolution 1822 (2008)[193] was adopted directing the Committee to provide for a narrative summary of the reason for listing process. SC Resolution 1904 (2009)[194] also provides for the appointment of an ombudsperson in delisting process. But all those measures to make it transparent fall short of a judicial process for which a number of domestic courts continue to have problems with the fairness of 1267 listing process.[195] In *Kadi and Al Barakaat International Foundation V. Council of the EU and Commission of the EC*,[196] the European Court of Justice invalidated European Union regulations implementing a 1267 listing on the basis that at no time were the listed applicants informed 'of the evidence adduced against them that allegedly justified the inclusion of their names'[197] on a list that would freeze their assets and prevent their travel.[198] The listing process has given rise of many questions. Many innocent were inserted in the list. Richard Barrett, who serves as the coordinator of the 1267 monitoring team, has recently written that it is time to rethink terrorism financing scheme 'that took center stage after 9/1'.[199]

In absence of a judicial remedy against the listing or delisting process, the human rights costs of listings are being revealed by the growing numbers of domestic challenges. The effectiveness of listing and terrorism financing regulation in general are marred by its inability to inhibit faltering

[187] UKHL 2
[188] ibid 28
[189] Roach (n 13) 37.
[190] S/Res/1735 (2006), 22 December 2006.
[191] S/Res/1730 (2006), 19 December 2006.
[192] Roach (n 13) 60.
[193] S/Res/1822 (2008), 30 June 2008.
[194] S/Res/1904 (2009), 17 December 2009.
[195] Roach (n 13) 61.
[196] Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakat International Foundation V. Council of the EU and Commission of the EC (ECJ Judgment) September 3 2008.
[197] ibid, para 346.
[198] Roach (n 13) 61.
[199] Richard Barrett, 'Time to re-examine Regulation designed to counter the Financing of Terrorism' (2009) 41 Western Reserve Journal of International Law 7.

application. However this listing is now continuing as a symbolic gesture, even though it has failed to provide the listed outlaw with a judicial remedy.[200]

It is obvious that the UN antiterrorism measures enhanced the cooperation and coordination among the states in denying the financial transaction and travel facilities to the Taliban and Al-Qaeda as envisaged in the UNSC Resolution 1267 and 1373. Similarly a considerable amount of funds to be used for terrorist attack was frozen around the globe which destabilized terrorist network and base of the Al-Qaida and the Taliban.[201] But these have come at the cost of huge financial expenses by UN and its member states, derogation of human rights provisions and encroachment on the established principle of international law. Since these anti-terrorism measures have been taken on piece-meal basis and as a reaction of certain terrorist attack, the approach of these measures are deterrence and denial to the terrorism rather than to identify the cause and root of the terrorism for eradicating it from the base. Consequently, the trend of recent terrorist attack along with the ongoing post-war turmoil in Afghanistan and Iraq suggests that the outcome of the deterrence and denial UN anti-terrorism approach have become counter-productive in so many ways.

Accordingly, Security Council resolution 1269 was interpreted by the United Kingdom's highest court in 2007 as displacing the right to liberty protected under the European Convention on Human Rights when applied to a British citizen who had been subject to military detention for three years in Iraq without trial or judicial review.[202] The special rapporteur on the promotion of human rights while countering terrorism reached a similar conclusion in 2010.[203]

C. Efficacy of the resolution 1373 sanction regime and the Counter Terrorism Committee (CTC)

One of the remarkable effects of the 1373 reporting requirement was that it was responded with quick domestic anti-terrorism legislation from the member states. This quick legislation impacted on the effective operation of the anti-terrorism mechanism as it was made on the basis of the information available at that time. States have got little time to conduct necessary preparatory work or research on the legislation. However it did promote the financing convention as the ratification rate was increased after passing this resolution.[204] Like resolution 1267 sanction regime, resolution

[200] Roach (n 13) 63.

[201] United Nations Security Council, Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002) and 1455 (2003) on Sanctions Against Al-Qaida, the Taliban and Individuals and Entities Associated with them, S/2003/1070, New York, 2 December 2003.

[202] *R (Al Jedda) V. Secretary of State* (2007) UKHL 58.

[203] Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental freedoms While Countering Terrorism, A/65/258, August 6, 2010 at para 44.

[204] Roach (n 13) 34.

1373 also provided more importance in terrorism financing. It strengthened the previous anti-terrorism financing regime which has failed to prevent the 9/11 incident. The over emphasis on inflicting financial starvation to the terrorist undermines the other probable caused and mean of this form of international crime. Again, these financing restrictions did not address the money laundering process which is also one of the means of terrorist financing. The origins of the financing in many terrorist bombing remained unknown. The 9/11 commission expressed considerable skepticism about the ability of financing laws and practices of the type contemplated by resolution 1373 to prevent future acts of terrorism. It concluded that 'trying to starve the terrorist of money is like trying to catch one kind of fish by draining the ocean'.[205]

Resolution 1373 was also influential in drawing link between immigration and antiterrorism law by calling on all states to ensure refugee status was not abused by terrorist. It impacted on the enforcement of immigration and refugee laws of the member states. Thus the human rights of the migrant population and the refugees have become easy prey to the so called tough scrutiny and stringent compliance. But 9/11 commission found that the 9/11 hijackers were able to enter the United States in a variety of way, none of them claimed asylum.[206]

Again, the CTC's approach to human rights was controversial within the UN system. In 2001, the high commission for human rights called on the CTC to appoint human right experts. Despite these call, a human rights expert would not be added to CTC until 2005. But the inclusion of a human rights expert in a 25 member's body hardly amounts to making human rights a priority at the CTC.[207] Resolution 1373 did not provide any guidance about the proper definition of terrorism. This lack of guidance reflected to agree on a definition of terrorism. The financing convention's definition also been ignored for that lack of guidance.

Part IV: Legal Authority of the Security Council Resolution on Anti-Terrorism and the Counter-Productive Aspect of the Anti-Terrorism Measures

The Security Council is the 15 member political and executive body of the UN which has a permanent sit in the UN Headquarter. Its primary duty is to maintain international peace and security within the scheme of the UN Charter. The SC has broad mandate under the Chapter VII of the UN Charter to take necessary steps for international peace and security. However this broader mandate of SC has also its limits. Attention on the limits to the SC's exercise of its powers under Chapter VII has focused on the alleged encroachment on fundamental human rights brought about by sanctions. The detrimental effects on human rights entailed by SC anti-terrorism resolutions and smart sanctions

[205] ibid.
[206] ibid.
[207] ibid 49.

have come to the fore as potential threats to the fundamental human rights of targeted individuals and groups.[208] The explanation of the Article 24 (2) of the UN Charter suggests that the SC is bound to respect the Universal Declaration of Human Rights as well as the two 1966 Covenants.[209]

The second limit to its legislative power emanates from the legislative power of the General assembly under Article 13 (1) (a) of the UN Charter.[210] It implies that the SC lacks general competence for the codification and the progressive development of international law because that function is explicitly assigned to the GA. Moreover, the SC is only a 15 member body the consent of which cannot be consent of all sovereign member states.

However, it is often argued that the terrorism activities posed serious threat which creates a state of emergency that justifies SCs legislative role on antiterrorism resolutions. But a fundamental feature of state of emergency powers is the temporary character of the special measures that are adopted to face the exceptional situation. With the goal being to restore as soon as possible a state of normalcy, these measures can only be justified if they are strictly required by the exigencies of the situation. These requirements cannot be met by the SC's anti-terror-measures. They have been adopted for an indefinite time. Their implementation in domestic legal systems means that they cannot be easily removed, once the threat has been properly countered, if this is ever the case.[211]

Similarly a progressive interpretation of the UN Charter may lead to the argument that there are no express limitations on the SC's power to embark on a legislative role. The Charter can be interpreted in such a way that the SC is not prevented from adopting the normative measures necessary to confront the direct and concrete threats to international peace and security.[212] As a consequence of that, the adoption of normative Resolutions generates various dysfunctions in the UN system and attracts many criticisms.[213]

The Counter-Productive Approach

Apart from the procedural challenges the UN anti-terrorism measures have also been challenged by the governance and rights approach of the member states. The UN Secretary General Kofi Annan in his speech in the Madrid summit in March 2005 expressed regret that '[M]any measures which States

[208] Andrea Bianchi 'Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy and cohesion' (2006) 17(5) *European Journal of International Law* 881.
[209] ibid .
[210] Martinez (n 4).
[211] ibid.
[212] Martinez (n 4).
[213] ibid.

are currently adopting to counter terrorism are infringing on human rights and fundamental freedoms'.[214] Under this frame of reference, many individuals have been detained or subjected to financial restrictions without appeal or due processes by many of the states. States are using this as a shield for suppressing political opponents. The Russia's response to the tragic school massacre in Beslan in September 2004 by attempting to adopt sweeping restrictions on democracy and the US legislation of the Patriot Act in the wake of 9/11 threatening civil liberties by authorising detention of immigrants without due process are the glaring example of abusing the anti-terrorism measures. In order to enhance the anti-terrorism measures, many states have strengthened government surveillance, increased law enforcement, tighten border control which threatened basic liberties. Overly repressive measures could also exacerbate the conditions that give rise to political extremism. In an analysis, Alan B Krueger and Jitka Malesckova show that terrorist are most likely to come from countries that lack basic civil liberties.[215] Many other observers have found similar connections between the rise of terrorist movements and the denial of human rights and democratic expression.[216] UN declarations and resolutions have been unequivocal in urging strict adherence to human rights standards in the global fight against terrorism. Kofi Annan stated in September 2003:

> There is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights the deep respect for the dignity of each person is among our most powerful weapons against it. To compromise on the protection of human rights would hand terrorists a victory they cannot achieve on their own. The promotion and protection of human rights (...) should therefore be at the centre of anti-terrorism strategies.[217]

Thus the protecting human rights and strengthening democracy are essential over the long term to the fight against terrorism. Providing opportunity to express the dissenting views can help to prevent the rise of political extremism.[218] The most effective weapons in the fight against terrorism are persuasive not coercive. Guaranteeing political opportunity and democracy will do more to counter the threat from terrorism than strengthening protective and law enforcement measures.[219]

Conclusion

[214] United Nations, 'Secretary General Offers Global Strategy for Fighting Terrorism, in Address to Madrid Summit' SG/SM/9757, press release, 10 March 2005.
[215] Alan B. Krueger and Jitka Malesckova, 'Education, Poverty and Terrorism: Is There a Causal Connection?' (2003) 17(4) Journal of Economic Perspectives 142.
[216] Cortright (n 32) 18.
[217] Kofi Annan, 'Conference Report' (keynote address, Conference on 'Fighting Terrorism for Humanity' International Peace Academy, New York, 22 September 2003), 10.
[218] Alan Krueger, 'Economic Scene' New York Times, 29 May 2002.
[219] Cortright (n 32) 19.

In adopting resolutions on anti-terrorism, the Security Council has flexed its chapter VII muscle and bound the member states with the obligation to implement its prescribed anti-terrorism measures. It started with the asset freeze and travel ban of 1267 and continued to invest heavily in terrorism financing regulation even after the 1267 ban fails to prevent 9/11. The SC attempted to reform the 1267 listing process but failed to provide any judicial remedy within the system. Resolution 1373 paid scant attention to human rights and offered states no guidance about how to define terrorism or how to deal with suspected terrorists. Resolution 1373 encouraged to use immigration and refugee law as anti-terrorism law with a view to restrain the entrance of the terrorist by flouting provisions of those laws. Resolution 1540 used alternative strategy by focusing on nuclear, chemical and biological materials that could be used by terrorists. The emphasis in Resolution 1624 on speech and extremism reflects failure of past initiatives. Maximum of those resolutions were adopted hastily without much debate. There should also be judicial remedy within the UN system for the list entities in 1267 listing. The sanctions imposed under the resolution of 1267, 1373, 1540 are of permanent nature. It should stop in point of time.[220] In fact the Security Council lacks the power to legislate and it should have relied more on consensual treaty. Moreover, in some countries the antiterrorism measures have been used as a shield to repress the political opponents which become counterproductive as well. Thus it is evident from the above discussion that the failure to adopt a comprehensive definition of terrorism and a comprehensive anti-terrorism measures inflicted threat to the human rights that caused the whole system irrelevant and counterproductive in many ways.

[220] Roach (n 13) 64.

Witness Protection in India: Efforts, Issues and Prospects

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Abstract: One of the most quintessential constituents of any criminal justice system around the globe is the role of witnesses. Witnesses play the most pivotal role in shaping charges against the accused and aids in the flawless completion of a trial. The importance of witnesses have been recognized both in Hindu and Muslim mythology and has been in place since time immemorial. Halsbury's Laws of England has classified fourteen forms of witness in the modern day. This paper mainly aims at discussing the pertinent issues concerning the current law relating to the involvement of witnesses, their current status and protection. Protection of witness being of utmost importance and focus in this paper. With the advent of education and larger masses of people receiving formal education, there has been a positive approach as experienced in this regard. But in spite of these developments, we have still been privy to a number of high profile cases that have made way to the highest legal institution of the country and it has been discovered that witnesses have either turned hostile or have refrained from giving their testimony. As observed, there is also an absence of a proper codified law in lieu of assessing the various challenges faced by the witnesses and their protection in India. This paper therefore tries to gather through a doctrinal style of research the reasons for the aforesaid, along with discussing a plausible solution to these vices, which plague the criminal justice system as a result, delaying or sometimes paralyzing the delivery of justice to the rightful debtors. The concluding part of this paper shall contain certain recommendations aiming towards the development of this area by looking into the functioning of witness protection schemes of other jurisdictions.

Key Words: Witness, Criminal Justice, Protective Measures, Witness Protection Program, Hostile Witness, Legislative Reforms, Evidence Act

History of Witnesses in India

Witnesses since time immemorial have been playing the most pivotal role in the administration of the whole criminal justice system. It is the testimony of witnesses which have been used as a tool for convicting criminals against whom there were no other forms of witnesses. Till date eye witness testimony is considered as one of the most important and relevant form of direct evidence and so has it been considered in the yester years too.

Early Hindu Period

Kautilya's Arthashastra also contains the below mentioned paragraph

"The parties shall themselves produce who are witnesses and who are not far removed either by time or place. Witnesses who are far away or who will not stir out shall be made to present themselves by the order of the judge"[221].

So what can be understood by this statement is that it was a general practice and rule that people who had witnessed a crime would depose as witnesses for the aid of the judges to adjudicate the matter, until and unless they were not in a position to do so, due to not being present at that time or place.

The Ancient Hindu Dharma Shastras also contain law of evidence which was in operation during that time. Vasistha had recognized three kinds of evidence, viz., Lekhya (Document),

ii. Shakshi (Witness), iii. Bhukti (Possession). We shall discuss the second kind due to it's relevancy in the present context of discussion. Shakshi as mentioned in Dharma Shastras provided for the importance of oral evidence. The Shastras went on explaining as to what was the procedure for collection of evidence from the eye witnesses, the method of examination and usage of the said evidence, which the judges followed during the trials. There was a high level of qualification pertaining to the witnesses and no witness whose credibility could be of questionable nature was allowed to depose. The strictness was severe as compared to the present day law. The main aim being, flawless and unqualified testimonies which help in reaching the truth at the earliest.

Manusmriti, had the mention of various forms of formalities and rituals which were a prerequisite before the deposition by the witnesses. Religious emotions and ethics played an important role in the shaping of the witnesses mind for extracting the truth pertaining to the case. The practice was that the judge posed a question towards the witness and subsequently observed his countenance and other physical reactions like eye movement, body movement etc. which ultimately aided in understanding the sanctity of the deposition. Yajnavalkaya and Vishnu had also prescribed certain set of behaviours in their scriptures which aided the judges to reach towards the aforesaid understanding.

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[221] Kautilya, Arthasastra, Book. J, Chapter 11, Verse 50; Kangle, Kautilya Arthasastra (University Of Bombay) (1970) Part IInd, P. 230.

Even during the Muslim period, i.e. during the Rule of the Mughals Witnesses were give utmost importance and were examined by the king himself in multiple occasions. During this period there was also a classification made among the persons who could testify as witnesses, exclusions contained drunkards, mourners, infants, lunatics etc. so that there lied no ambiguity in testimonies and the truth could be availed and justice could be delivered.

British Period

The British rule in India marked the origin of the first formal legislature pertaining to evidence i.e. the Indian Evidence Act, 1872. This Act is in force in India till date and has a comprehensive explanation regarding witnesses and other objects of evidentiary importance' But even during the British period and before the enactment of the aforesaid Act, the law of Evidence was only present and operative to an institutional level through a series of Acts passed by the Indian Legislature during the years 1835 to 1853 which had nomenclatures such as Lord Denman's Act, Lord Brougham's Act etc. These envisaged various rules pertaining to witnesses at that time. In the Presidency towns which were only four in number, and sparing apart the presidency towns there were no formal law of evidence operative in the other states. However, the absence of any formal law of evidence did not have any adverse effect as customs and practices compensated it. The 1872 Act consolidated all aspects of evidence viz. Witnesses, Documents, Rules of Admissibility Testimonies etc' and removed all ambiguities, finally providing an exhaustive code on Evidence.

Since the time of Independence, there have been a few changes which have been brought, like the Criminal Amendment Act of 2005, but major changes have not been experienced in this regard as far as the Act is concerned, but as far as examination of witness and other investigative procedures are concerned there have been a lot of improvements the courtesy being of advancement of science and technology.

Major Issues Pertaining to Witnesses in India

In India though there have been sensational cases of murder and other grievous offences and multiple amendments have been witnessed in the various criminal laws but, there have been scarce amendments or it improvements in the field of witness protection. Under this head, we shall discuss certain major issues that are commonly faced by the witnesses in the everyday course of giving testimonies during trials.

I. Lack of Proper Support and Awareness

The Indian state and the judiciary have not, till date, taken any major steps to educate the public and create awareness about the importance of witness testimony in a criminal trial and also the procedures of recording statements in and outside the court to ensure proper submission of witness testimonies. owing to the lack of awareness and state support the common man feels extremely reluctant to come forward and testify in the court or before the law enforcement personnel despite knowing at times that his testimony may actually be a major factor in influencing the final outcome of the case and may also assist the judge an arriving at the final verdict.

2. Lack of Proper Infrastructure

There is also lack of proper infrastructure as far as treatment and protection of witnesses is concerned. For witnesses to depose honestly and correctly there is a requirement of a peaceful environment which is a *sine qua non* for the aforesaid. By proper infrastructure it is meant that there must be a list of procedures which shall enable the witnesses to be guided in the manner in which they are expected to conduct themselves, during the various stages of trial. The absence of proper infrastructure catalyzes the factor of losing out important witnesses thereby plaguing the smooth running of the trial and posing it impossible to deriver correct justice.

3. Coercion

This is one of the quintessential factors behind witnesses turning hostile or their nonappearance during the time of deposition. Generally, when we talk about coercion, it includes the high-profile cases only, where the chances of the witnesses of turning hostile are the highest in terms of probability. It has been witnessed in major criminal cases like ***Siddhartha Vashisth @ Manu Sharma*** V. ***State (NCT of Delhi)***[222]***,*** that individuals who had seen the accused murdering the victim Jessica Lal by their own eyes had later denied having seen any such thing, thereby turning hostile during the trial. There are various kinds of coercion that may give way to such disturbances in the trial.

i. Life threats or threat to cause injury

ii. Threat to cause damage to property (tangible or intangible)

iii. Kidnapping and abduction

[222] Criminal Appeal No. 179 of 2007 in the Supreme Court of India.

Therefore what could be crystallized from the aforesaid points is that lack of proper mechanisms to ensure safety of the witnesses becomes the root cause of more crimes, thereby delaying the process of justice substantially. There have been a number of instances which could be tailored into this head, in which it has been observed that coercion has played a bigger role in preventing the witnesses from deposing thereby resulting in the acquittal of the accused.

In one of the land mark cases known as the *Best Bakery Case*[223], in Gujarat where a group of people had been burnt inside the shop bearing the name "Best Bakery", during the Gujarat Riots. A family consisting of fourteen members had been burnt to death and the only person alive was the daughter of that family, named Zaheera Sheikh. The girl being the only eye witness had been called upon to the court to give witnesses against the accused. Every time she came to give evidence, she had a different version to say and her versions never matched with the previous versions of her testimony. Therefore the court not being satisfied with her testimony had acquitted 7 and convicted 10 out of 21 accused. But, later it was discovered from her that she was forced and threatened to refrain from deposing against the accused.

In yet another case, popularly known as the BMW Hit and Run case[224] where Sanjeev Nanda, grandson of the former Chief of Naval Staff and Arms Dealer Admiral S.L. Nanda had run over his BMW car over people sleeping on the pavement, thereby killing three people on the spot and leaving a few injured. The trial went on and subsequently many witness started turning hostile, the only survivor in that accident deposed saying that he was hit by a truck and not by a car. Therefore, the accused received bail as none of the witness supported the prosecution case.

The aforesaid cases are landmark cases to prove the story of hostile witnesses and how witnesses are coerced, to refrain from deposing the accused which in turn leaves the accused unpunished.

4. Fear of Administrative and Court Procedures

It has always been observed that the Hoi Polloi (common people) have since ages been fearing administrative and procedural aspects. And it is a general tendency among every common man in our country to avoid courts, police etc. In a country where people are afraid to help an accident victim by transporting him to the hospital due to the fear of adverse consequences, in such a country it is very much unlikely that people would be voluntarily willing to appear in courts duly and testify against the

[223] Zahira Habibulla Sheikh V. State of Gujrarat, 2004 (4) SCC 158.
[4] Sanjeev Nanda V. The State, Criminal Appeal No. 807/2008.

accused. It is a common observation that people who are even determined to testify or stand as witness, are prevented by their family members or relatives warning them of dire consequences which might ensue post the deposition.

5. Lack of Motivation

This is another major factor behind witnesses not deposing in a criminal trial. Firstly, there is always an added chance of fear regarding the consequences that may follow as a result of deposition. The causes of fear can be ranging from fear of death to that of damage to property. Secondly, there is not much motivation from the prosecution's side in pursuing the witness to testify. Motivation can be aroused in these kinds of cases through announcement of rewards or honouring the witnesses and giving them appraisals for their work.

6. Prolonged Trials and Lack of Knowledge of Fate

During the nineteenth century Henry Ward Beecher, American Congregationalist, clergyman, social reformer and speaker had said that "It usually takes 100 years to make a law, and then, after it has done its work, it usually takes 100 years to get rid of it. This statement makes the stance of the judiciary very clear and crystallizes the fact that there is always an indefinite delay that occurs in trials. In India this phenomenon has been witnessed on multiple occasions. Even for a simple consumer dispute case the average duration of the hearing usually ranges between 1-2 years. There have been cases in India which have taken years together to reach the final stage of hearing and still final judgments have not been pronounced. As a result of such indefinite delay the witnesses generally lose interest in deposing and it is also not possible for them to sacrifice their personal work perpetually for the purpose of appearance in the court.

Existing Jurisprudence Regarding Witness Protection in India

The Witness Protection Bill, 2015

Though a bill was tabled in the Indian Parliament pertaining to the protection of witnesses, it has not seen the light of day in the form of an enacted law. At this juncture a detailed discussion of the salient features of the bill would be most apt.

The first part of the Bill deals with the definition part, subsequently delving into other important facets of the bill.

The next part deals with the procedure for ensuring protection top a witness who is in a state of jeopardy.

Sec. 3 of the bill specifies the procedure that must be followed in the event of a witness requiring protection. It starts off by saying that the witness may apply for protection in the court in which the case is being heard or in any court within the jurisdiction of the police station he falls under.

An application from the witness regarding his protection might be given to the police station which shall have to be processed and produced in the court within forty eight hours of receipt of the same.

Next step shall be investigation of the threat by the police officer on the basis of the application and then subsequently produce that witness in the court along with a report of his investigation and recommendations to the court.

The police officer shall have to produce the person in front of the court, as required by law, without unnecessary delay.

After consideration of the application from the jeopardized witness the Court shall constitute a Witness Protection Cell with the aid of the state council, which shall consist of the station house officer of the appropriate police station, the Investigating officer and the Advocate for the witness, the judge and such other person as may be required.

The council shall take necessary decisions regarding the welfare of the witness and shall provide to the applicant all legal aid as may be required from time to time. According to Sec 4 of this bill, it has been prescribed that at three occasions the provision for witness protection must be warranted

i. During the process of Investigation and Enquiry

ii. During the continuance of the trial

iii. After completion of the trial

Sub-Section 4 of Sec. 5 of the bill prescribes the various methods herein below mentioned:

i. All trials attended by the witness/protectee shall be held in-camera in the presence of the judicial officer.

ii. The witness shall be able to exercise the option for requesting a change in his identity during the trial or permanently for a duration which may even exceed the time of the trial but shall not be permanent.

iii. The witness shall also be able to exercise the option for requesting a change in the place of residence during the trial or permanently for a duration exceeding the time of the trial but shall not be permanent.

iv. The judge shall also enjoy a power to maintain anonymity of the witness.

v. The witness shall have the right to request that his name and residential address may not be revealed in public and shall be maintained only in the official records.

vi. The judge may allow the witness to provide evidence and be cross examined by the defendants by a two-way camera[225]

The later part of this bill discusses about a National Council and State Councils that shall be formed for the welfare and legislation of the witness protection program, the qualifications of the members, tenures, remunerations and such other details are also mentioned. These councils have been vested with the power to perform a host of functions pertaining to the welfare and protection of the witnesses who are vulnerable.

[5] Witness Protection Bill 2015 available at http://164.100.47.4/billstext/LSBillTexts/AsIntroduced/3109LS.pdf (last visited on December 08, 2017)

The Malimath Committee Recommendations on Witness Protection[226]

The Malimath Committee has prescribed a number of recommendations for a number of facets in criminal law, starting from policing in India, rights of accused, arrears eradicating scheme etc. Likewise this report speaks about the need for witness protection and various measures that shall pose effective in doing so.

According to the committee report the main reason for failure of the criminal justice system is "False Witness testimony" or Perjury. The definition of Perjury as found in the online version of Black's Law Dictionary says the following, The wilful assertion as to a *matter of fact*. opinion, belief, or knowledge, made bv a witness in a *judicial proceeding* as port of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, .jury, or person holding the proceeding[227]. The discussion pertaining to perjury has been continued and certain amendments have also been recommended in the laws. After considering a number of factors the committee has come up with a host of recommendations the summary of which are mentioned below:

Firstly, the committee has highlighted the importance of treating the witnesses with dignity, by ensuring favourable behaviour on the part of the police authorities as well as the judges, conditions in the court room and as far as provision of basic amenities are concerned.

Secondly, it must be ensured that the witness is not subjected to any kind of harassments from the administrative authorities as well as from the accused.

Thirdly, Strict punishments should be awarded to those who give false witness and the judge should inform them with the quantum and kind of punishment which they might be subjected to in the event of giving false evidence.

Fourthly, it is also advised that the High Courts may impress upon the subordinate courts the need to curb the menace of perjury by providing proper training and calling for periodic reports[228].

Therefore, to sum up these are the recommendations that were provided by the Malimath Committee regarding the Protection of witnesses and making it more effective, in terms of preventing witnesses from turning hostile thereby enabling better delivery of justice.

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[6] http://www.pucl.org/Topics/Law/2003/malimath-recommendations.htm. Recommendations of Malimath Committee on Reforms of Criminal Justice System, Shanker Gopalkrishnan, People's Union for Civil Liberties.

[7] http://thelawdictionary.org/perjury/, The Law Dictionary, Featuring Black's Law Dictionary free online Legal Dictionary 2nd Rd. Last visited on 2nd December, 2017.

[8] http://www.puel.org/Topics/Law/2003/malimath-recommendations.htm Recommendations of the Malimath Committee on Reforms of Criminal Justice System, Lat visited on 5th December, 2017

The Law Commission Reports[229]

The law commission reports since the years have published in an exhaustive note, the need for a strong program that would enable the protection and safety of witnesses. 'The first talks of witness protection in the law commission reports started as early as 1958 in the **14th Law Commission Report**. This report recognized the fact that it was non obvious for the opposite party to invest tremendous efforts to dissuade the witness from giving his testimony. It spoke more on the inadequate arrangements in the court and said that if the treatment of the witness was not up to the mark, it could pose a threat to the upcoming justice that is required to be served to the aggrieved.

Then came the **154th Law Commission Report** dedicated to the facilities and protection given year 1996 and has an entire chapter dedicated to the facilities and protection given to the witnesses. This report spoke about monetary compensation that must be given to all witness and the authorities must also ensure by providing clue respect that there must be no feeling of anguish in the minds of the witnesses. However this report though was much more exhaustive than the previous report of 1958 but lacked in certain aspects, out of which the most important being the modus operandi of physically protecting the witnesses from the indignation of the accused[230].

Subsequently, came up the next report of the commission being the **178th Law Commission Report** in the year 2001. This report mainly concentrated on the vice of hostile witnesses and the appropriate precautionary measures to prevent the same. The recommendations said that the testimony of the witness has to be taken at the earliest opportunity by the police officials themselves, so that there cannot be any kind of denial on the part of the witness at the later stages of the trail, where the possibility of qualification of witnesses due to t-actors like coercion, gratification etc., crop up. The report further went on saying that if a witness differed from his previous version of testimony, it will be the discretion of the judge whether to accept it or not. Though this report came out with a number of new recommendations but failed in similar aspects like its predecessors in areas viz. the physical protection of witnesses and secrecy of identity.

Then came the Malimath Committee Report which came out with a plethora of recommendations pertaining to witness protection. The recommendations have already been discussed above in a

[9] http://lawcommissionofindia.nic.in/1-50/index 1-50.htm The Law Commission Reports, last visited on 11th December, 2017.

[10] http://lawcommissionofindia. nic.in/1-50/index 1-50.htm The Law Commission Reports, last visited on 15th December, 2017.

precise manner. But despite the recommendations, the government failed in taking proper steps to enforce the same which subsequently gave way to the 198th Law Commission Report in 2006 which provided for various procedural changes to be made with regard to the protection of witnesses in a multifaceted manner, it also tailored in, a number of internationally drafted laws on witness protection.

The Road Ahead: Developing the Witness Protection Scheme

l. Digitization of the Courts

By digitization of courts it is meant that the court procedures regarding the aforesaid activities should be digitized as opposed to the current procedure of appearing and deposing in person. The process should be similar to that of e-filing of certain suits which has become a regular practice in today's generation rather than the age-old system of filing physically.

Modern methods like video conferencing must be put in use to enable the witnesses to depose safely from a place of their choice, this shall also help in conserving and saving government resources which otherwise are required for transporting, safekeeping and providing for other needs of the witnesses. Additionally, this would add to reduced chances of harm that might be caused to the witness if he appeared physically.

Equivalently, there must be proper channelization and infrastructure which would make witness testimony to be recorded digitally. The systems should be properly encrypted with a view to prevent then from unauthorized access and for ensuring privity. Moreover, the judges and other officers of the court and administrative departments must also be imparted quality technical education pertaining to the technological aspects of recording, storing and managing data pertaining to the details of the witnesses and their testimonies. The government must also ensure proper protection and custody of the files which shall have to be stored under redefined vigilance which shall only be possible if the government creates a separate and dedicated ceil that shall address that shall take care of these aspects.

2. Accommodating the Witnesses in Safe Houses along with Relocation and Identity Change

The government must aim at coming up with proper infrastructure that shall enable the safe keeping of witnesses in safe houses, which shall, or only aid in protecting the witnesses from any harm to their person but also shall help prevention of highly sensitive information which if leaked would otherwise affect the merit of the trial. The safe houses must have proper amenities and there must

be police protection of these dwelling places round the clock. In India, the concept of safe houses has not come yet, but in countries like the US and the UK, this system is prevalent since 20,r, Century. Change of identity and provision for allowance of monetary benefit shall also have to be made mandatory as the witnesses will not be able to move or work freely in the society till the disposal of the case or till the time it is deemed fit to allow them to do so.

3. A Robust Witness Protection Program

A witness protection program shall mean a set of rules, regulations and guidelines by virtue of which the treatment, protection and safekeeping of the witnesses can be ensured. This was first introduced in the US, by the Attorney of the US Department of Justice, Gerald Shur and was known as 'The U.S. Marshall Service Witness Security Protection (WITSEC)[231]. Since then this program has successfully protected around 18,000 people. The WITSEC performs a plethora of activities ranging from relocation, change of identity, providing allowance in return for damnifying testimonies etc. It has been observed that the witnesses who have meticulously followed the guidelines of the WITSEC have never been killed. In India, we require a such a robust program aiming at people of all strata of the society as India has a diverse culture. This protection program shall also aid in better adjudication of the cases through regular attendance of witness, reduced threat to life or property etc. thereby resulting in swift disposal of cases.

4. Immediate Conversion of the Witness Protection Bill, 2015 into Law

The Witness Protection Bill of 2015 which is still lying in a dormant stare must immediately be enacted as a law. The bill has a number of developmental facets that are quintessential to the creation of a proper structure pertaining to witness protection in India. The bill speaks about a National Council, the composition, powers of it, which shall be responsible for framing rules and regulations with regard to various aspects related to the protection of witnesses as already discussed in thc previous portion of this paper.

5. **Educating citizens about the important of Witness Protection**

The Citizens of India must be Imparted proper education pertaining to the importance of witness protection' Proper awareness camps must be organized for the purpose of educating the common mass regarding the importance of witness protection an6 the plethora of benefits that can be reaped

[11] http://www.todayifoundout.com/index.php/2015/03/really-happens-someone-enters-witness-protection-program/, What really happens when someone enters the witness protection program, last visited on 12th of December, 2017.

out of it. The textbooks followed in the schools must also include chapters which would educate the students regarding this aspect. Most importantly, awareness camps should be held, in the same manner in which free legal aid camps are held. Citizen's awareness is a must for enabling better understanding of the issue of witness protection thus enabling better justice delivery.

The Central Government and the State Governments must allocate separate funds for the purpose of treatment and protection of the witnesses. This fund must come under the lists of the government, i.e. the Centre and the State lists. In the U.S. this system of allocating separate funds under the witness protection program is an existing one.

For an instance in the year 1978, The acting head of a crime syndicate in Los Angeles, who turned into a witness and testified against a gang of criminals thus ensuring two dozen arrests, was given a monetary allowance of $1,000,000 in a period of 10 years for his upkeep and expenses[232]. So similarly, in India too we need to have such monetary allowances that would not only enable witnesses to testify smoothly, by ensuring regular attendance but also bring in a motivating factor to do so.

Hence, it is the need of the hour that India must have a legislation that fits in well within the circumstances that are prevalent with respect to the jeopardy of witnesses. Justice fails to perform its' duty flawlessly as a result of such conduct of witnesses which generally evolves out of fear or other pertinent factors as discussed. The bill that had been placed in 2015 has to be given the shape of a codified law, only then can justice be ensured to the victims of crimes committed by the rich, powerful and the influential of the society.

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12 http://www.todayifoundout.com/index.php/2015/03/really-happens-someone-enters-witness-protection-program/, What really happens when someone enters the witness protection program, last visited on 12th of December, last visited on 14th of December, 2017.

Analyzing the Definition of Investor under International Investment Law and the Position of Bangladesh

Md. Raisul Islam Sourav*

Abstract: A well drafted precise definition of "investor" under any BIT is very crucial to avoid many complexities arising out of doubt relating to this term. The definition of investor is significant not only to determine the rights and responsibilities of contracting parties but also to ensure the jurisdiction of arbitral tribunal. In addition, a weak definition of investor may bring severe consequences for the host State even she may be obliged to compromise her sovereignty at some point as well. However, there are many instances where the concerned State parties ignored the significance of a well definition of the terminology investor which is also a neglected area in international investment law although one of the focus of international investment law is to protect the interest of private investor and host State. However, the foreignness of investment is mainly determined by the nationality of investor both for natural person investor or juridical person investor. Nevertheless, determining nationality is not easy due to multi nationality; changing strategies of business of corporate entities including registration in one country and operation of business in another country, question of control and management; treaty shopping etc in this present era. Consequently, arbitral tribunals took different approaches to address the issue depending upon the facts and circumstance of each case. There is also lack of consistency among the awards delivered by various arbitral tribunals. However, Bangladesh as a State party to many BITs shows inefficiency in drafting a precise definition of investor which may bring adverse consequences in future. Hence, Bangladesh should pay more attention to draft its future BITs carefully and negotiate with its counter parts strongly to avoid complicacy.

Key Words: Investor, BIT, Investment, Bangladesh, Tribunal, Natural Person, Juridical Person, Nationality.

Introduction

Addressing the question who should be treated as an investor is a crucial issue under the international investment law to determine the rights and responsibilities of an investor. In earlier days, international investment law was highly concentrated on the protection of investor only.

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However, the trend has been changed and now it tries to make a balance between the investor and contracting State party as well in terms of protecting their interests. Nevertheless, confirming the nationality of investor is still a key issue for many reasons particularly it is essential to settle the jurisdiction of arbitration tribunal.

The investor's nationality determines from which treaties it may benefit. If the investor wishes to rely on a Bilateral Investment Treaty (BIT), it must show that it has the nationality of one of the two State parties of that BIT. Because if the host State's consent to jurisdiction is given through a treaty, it will only apply to a national of a State that is party to that treaty.[233] Hence, nationality is very significant in determining who would be eligible to be an investor. However, the question of nationality invokes some more relevant questions like multi nationality; changing strategies of business of corporate entities including registration in one country and operation of business in another country, question of control and management; treaty shopping etc in this present era. Often the State party is trying to establish that the party who is claiming himself/herself/itself as an investor before the tribunal is not an investor under the purview of their concerned BIT. Hence one is not eligible to claim protection before the arbitral tribunal. There are many complex issues relating to determination of who should be an investor under a treaty; including but not limited to the nationality of the investor, dual nationality, third country connection, effective control etc.

However, tribunals are settling the dispute arising out of the question of who should be an investor in international investment law from different perspective and upon considering specific treaty, facts and circumstances. Nevertheless, awards from the tribunal are also failed to make conformity in defining the term "investor" under international investment law. Here the definition of investor delineates who has standing to bring a claim in arbitration. And that is a critical issue for not only for the respondent State, but also for the claimant/investor.

Bangladesh has already signed about 30 BITs with different countries. After doing a close scrutiny to these BITs it is evident from the text that in most of the case Bangladesh is failed to draft term "investor" sensibly. In majority of the cases for natural person it only says that natural persons having the nationality of a Contracting party according to its law would be treated as investor. This definition excludes citizenship and permanent residency and lacks the question of dual nationality and effective nationality as well. Because of this lacking a person having an effective nationality with a third State party which is not a contracting party would be eligible to take advantage of the BIT by merely showing that the person has nationality (which is not effective) with one of the contracting state party. Nevertheless, the recent BITs signed by Bangladesh showed more conscious in defining

[233] R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 46

juridical person investor than the natural person. It includes registered office together with substantial business activities in the territory of that contracting party.

However, this article will primarily focus light on the complex questions relating to investor like nationality, dual nationality, registration of company, seat and management, control etc and subsequently evaluate the assessment of tribunals in defining the terminology. Then it will scrutiny the definition of investor in recent and mentionable BITs signed by Bangladesh. In addition, it will articulate author's suggestion to frame a shape of a precise definition of investor at the end.

Definition of Investor in International Investment Law

It is the contracting State parties who have exclusive authority to determine who would be investor under their agreed Bilateral Investment Treaty.[234] However, each party has some obligation under the BIT and usually investors take the benefits of investment treaty between two contracting parties. Hence an investor can bring legal action to the arbitration tribunal if any of the obligations is breached by the host State party and vis-a-vis. Although it is purely a treaty between two State parties, but the key player in the treaty is the investor.[235] The State makes an easier way on behalf of the individual or corporate entity to invest in an another country. On the contrary, the host State invites individual or organization from her desired country to invest in her territory.

Therefore, to be an investor, the person or entity who wants to invest must possess the nationality/citizenship/permanent residency of one contracting party to invest in the sovereign territory of other contracting party. Thus nationality and issues relating to nationality are very significant to determine whether the investor can seek protection under the BIT. The importance has many angles i.e. from the perspective of capital exporting country, capital exporting country and from the perspective of investor ultimately.[236]

Investor can be either individual person or juridical person. The International Centre for Settlement of Investment Dispute (ICSID) Convention restricts its jurisdiction to settle any dispute between national of a contracting State with another State.[237] That mean it only allows national of a contracting party

[234] *Symposium Co-organized by ICSID, OECD & UNCTAD on Making the Most of International Investment Agreements: A Common Agenda, paper presented by Barton Legum on Defining Investment and Investor: Who is Entitled to Claim? (12 December 2015) Paris.*

[235] R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 47

[236] See n 2, p 5

[237] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25(1)

to bring legal action to it. Any person other than a national of any of the contracting party is not eligible to this forum. However, that person must be a national of that country either on the date of consent to arbitration or date of registration. Nevertheless, the ICSID Convention does not recognize dual nationality when one of the nationalities is the one of the contracting State.

On the contrary Art. 1(7) of the Energy Charter Treaty (ECT) defines investor as a natural person having the "Citizenship" or "Nationality of" or who is "Permanently Residing" in contracting party in accordance with its applicable law.[238] The definition of ECT is more liberal than the ICSID Convention. The ECT includes citizen and permanent resident as well apart from national. It elaborates the scope to be an investor by which a permanent resident may also become an investor under the treaty. The definition of ECT is more wider than the ICSID Convention while it considers permanent residency as well to be an investor. On the contrary, ICSID is too conventional in this regard and only permits citizen and national.

Examining the question of Sovereignty

Although the customary international law prefers to determine nationality of the investor by the national law of the State whose nationality is claimed but the ECT introduces acceptance of permanent residency to be an investor. That mean to claim the protection of the BIT one must have nationality or citizenship or if any BIT permits permanent residency to claim protection under that BIT except the nationality or citizenship or permanent residency of the host State or third State who are not State party to that BIT. However, the issue of nationality, citizenship and permanent residency are purely dealt by each sovereign country. Each country set up their own rules to deal with the matter and in some cases, it put restriction to acquire dual nationality and forfeit citizenship or permanent residency in certain circumstances. However, the question is whether or to what extent State can refuse to recognize the nationality of a claimant.[239]

Although it is dealt by the long-established principle of international law but what will happen if any party calls into question it before the tribunal. However, the tribunal has jurisdiction to determine the matter. In fact, they are empowered and bound to decide in another sense if it is challenged albeit the concerned BIT relies on the same principle of international law.[240]

[238] Entered into force in 1998

[239] *Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs (2008)*

[240] *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Award (7 July 2014) para. 55

Nevertheless, a tribunal also has jurisdiction to take a decision in contrary with the content of a certificate of nationality issued by a country.[241] Tribunal is highly empowered in this regard though the claimant can argue that the certificate is issued by the concerned authority of one's claiming State. However, the tribunal can consider the document as a prima facie evidence but at the end they can reverse the nationality. Nonetheless, this position of arbitration tribunal limits the authority of a sovereign country. They even can disregard the certificate issued by a competent authority and an investor may be deprived from investing if the tribunal promulgate that the certificate of nationality is no longer valid to prove his/her nationality in the eye of the tribunal. It is evident from this position that the sovereignty of a country is being compromised when she come to international arena especially in investment treaty.

The Dilemma of Dual Nationality

However, now-a-days many investors have dual or multi nationality due to many factors. It also raises some complex issues in settling who would be treated an investor under a BIT. Bilateral Investment Treaty is agreement between two specific States who want to limit the scope of treaty between them only.[242] Often investor from one State party has dual nationality and the other country is not a State party to that BIT. Even sometimes the investor has actual connection with his/her second country but want to take advantage of his/her dual nationality and invest to a State party of that BIT. When the host State opposes this stand of the investor and challenges his/her capability to take part under the BIT the tribunal only look into the effective nationality of the alleged person.

However, still one can invest if one has effective nationality with the contracting State party regardless of s/he maintains another nationality.[243] Consequently, the host State becomes lawfully bound to entertain the investor who is actually come from outside the treaty. The host State may not intend to invite that country and here by the intervention of the tribunal they lose their choice whom they invite to invest in their territory. Again, the question of sovereignty come into the spotlight but failed to maintain due the heavy influence of international law. Hence, there is every risk for capital importing country to lose their national interest and national security a well.

However, if an investor is being a national of both the contracting parties of a BIT then the question will come to light that what will happen if any conflict will arise between the investor and the host State. Will it be regarded as private matter between a State and its citizen? The answer to this question is clear from the Art. 25(2)(a) of the ICSID Convention. No investor is competent to take

[241] ibid, para 63
[242] R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 4
[243] *Eudoro Armando Olguin v Republic of Paraguay*, ICSID Case No ARB/98/5, Award (26 July 2001) para 61

shelter of a BIT of which s/he is a citizen of other party as well. The decision was also upheld in *Champion Trading v Egypt*.[244]

However, a NAFTA Tribunal took another view while deciding a matter between *Feldman v Mexico*[245] where they focused that an investor holding citizenship of the another contracting State party is made one eligible to invest in host States and it does not matter whether one has permanent residency in that host country. From the above case laws, it is evident that there is no scope of being an investor in own country albeit it is possible in exceptional circumstance when the investor holds the nationality of another contacting party.

Nevertheless, if anybody loses his/her nationality from any contracting State then they will no longer be regarded investor under that BIT regardless of their previous strong connection with any of the contracting States.[246]

The Position of Bangladesh in Defining Natural Person Investor

If we closely look into the BITs signed by Bangladesh, we found that none of the BITs signed from 2000 to 2012 include the issue of dual nationality or effective nationality.[247] Although some BITs like *Bangladesh-UAE*, *Bangladesh-Vietnam*, *Denmark-Bangladesh* accumulate the citizens and permanent resident also as natural person investor who would have right to invest in contracting state party.[248] Among them some gives explanation of citizenship and permanent residency which includes permanent resident of any contracting party or other country.[249]

However, *Bangladesh-Uzbekistan* BIT is very much straight forward in incorporating resident of other country within the scope of that BIT and there is no problem if someone outside from this contracting state comes to invest in any of the country as the state party agreed to welcome them in their territory. Nevertheless, question of jurisdiction and other complexity may arise where the issue is not clear by the text of the BIT. Whether a person having dual nationality of which the country of effective nationality is not the State party to the BIT would be eligible to invest or whether after investment that investor can claim any infringement of the BIT to the arbitration tribunal is not

[244] *Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt*, ICSID Case No ARB/02/9, Award (27 October 2006)
[245] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (11 January 2005)
[246] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Awar (1 January 2009) paras 156-159, 172
[247] During this time period Bangladesh has signed 11 BITs
[248] *Bangladesh-UAE* BIT has signed on 17/01/2011 and yet to be enforced; *Bangladesh-Vietnam* BIT has signed on 01/05/2005 and yet to be enforced and *Denmark-Bangladesh* has signed on 05/11/2009 and came into forced on 27/02/2013
[249] *Bangladesh-Uzbekistan* BIT, signed on 18/07/2000 and came into force on 24.01.2001

answered by the text of the concerned BITs. Hence, from the above case laws it is explicit that Bangladesh may be obliged to allow such a person as an investor who has no actual connection in terms of nationality with the contracting state party. Furthermore, the question of sovereignty will come again at this point as this issue is not carefully handled in the BIT.

Nationality of Legal Person: Legal or juridical person denotes legally incorporated entity and usually every legal entity need to be incorporated in contracting State to get involve with a BIT. Although there are some exceptions to this rule i.e. *Argentina-Germany* BIT allows any commercial association or a company whether legally registered or not to invest in their land. Hence it is the treaty makers who set up the rules to be an investor according to their agreement.

However, the issue of nationality is more complex in case of artificial person rather than natural person. Diversity in business and multinational operation gives the matter a different shape from a natural person. Determining nationality of a company is not always easy due to multi-layer shareholders come from both natural and juridical person, location of control in one country and registration in another places etc. However, the previous views of tribunals were normally looked into test of registration and seat instead of doing substantive investigation to determine control of the company.[250]

Nevertheless, nationality of juridical person is crucial in determining the rights and obligation under a BIT. Most widely accepted procedure to determine the nationality is the place of registration.[251] That mean in which territory the company is being registered to operate their business is holding the nationality of that country. According to the Energy Charter Treaty (ECT), investor includes a company or other organization organized in accordance with the law applicable in that contracting party.[252] It is the BIT which will ultimately fix the process of determining nationality.[253]

Many UK and USA bilateral treaties recognized the concept of place of registration. In those cases, the tribunals were reluctant to pierce the incorporation veil.[254] However, the company may be registered in one country and the majority of shareholders may come from another country. The tribunals' view in that type of case is whether the BIT focuses on the place of incorporation. If the

[250] *Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs* (2008) p 18
[251] M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Dispute (*M. Nijhoff 1993)
[252] The Energy Charter Treaty (Signed in December 1994, entered into force April 1998), (ECT), art 1(7)(a)(ii)
[253] *Tokios Tokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004) para 32
[254] Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012)

case is that then the nationality of majority of shareholders will be disregarded and the place of registration will be counted to continue their investment as an investor to another contracting party of the BIT.

The *Tokios Tokeles v Ukraine* is the best example of application of this rule where the Tribunal emphasized on the place of registration and compliance of the rules enumerated in the BIT instead of nationality of investors.[255] However, if any BIT covers the issue also then the Tribunal will has to follow the intention of the parties described in their agreement like the Ukraine-United States BIT empowered the parties to exclude a company controlled by the nationals of a third country from the purview of their BIT.

However, *Sedelmayer v Russia* is the first case in which an arbitral Tribunal has interpreted the notion of investor in a way that allowed the protection of an investment made by the intermediary of a company incorporated in a third State.[256] The Tribunal held that SGC international was a simple vehicle by which Mr. Sedelmayer has transferred his capital to Russia and that he was a *de facto* investor. Although the language of the treaty did not mention the element of control but only the elements of incorporation and siège social, the Tribunal accepted jurisdiction.

The ECT also has similar provisions to protect the interest of two contracting parties only.[257] However, if the contracting State parties do not insert any such obligation in their treaty then the tribunal does not have authority to go beyond the intention of the parties and refrain someone from taking part in that treaty. In *Tokios Tokeles v Ukraine* the Tribunal opined that in absence of any such provision in the text of the BIT, the Tribunal cannot impose any such restriction upon any third State controlled company.[258] They also declared that it is evident from the BIT that the State parties are deliberately chose not to exclude any such company and a Tribunal cannot go beyond the text of the BIT.

However, in *Saluka v Czech Republic* the Tribunal echoed the same notion although this time the Tribunal was sympathetic to the Respondent but cannot construe the text of BIT beyond the wish of the State parties.[259] In the mentioned case, the court recognized that the Claimant is merely a shell

[255] *Tokios Tokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004)
[256] Mr. Franz *Sedelmayer v The Russia Federation*, Judgment of the City Court of Stockholm, Award (18 December 2002)
[257] The Energy Charter Treaty, Annex 1 to the Final Act of European Energy Charter Conference at Art. 17(1), Dec 16-17, 1994, Lisbon, Portugal, available at www.encharter.org/upload/1/TreatyBook-en.pdf
[258] *Tokios Tokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004)
[259] *Saluka Investments B.V. v The Czech Republic* (partly awarded in 2006)

company which has its full control to a third country registered company but as it has its registration in Netherland and the BIT is not open any scope to the tribunal to add other requirements to refrain the company hence it upheld the claim of the Claimant regarding the question of nationality.[260]

Nevertheless, this method is no longer valid to determine the nationality because now-a-days companies are holding their central administration or control or main seat in a different country and even can operate business in an another country. Consequently, the texts of modern BITs broaden the scope of the nationality of juridical entity and include all these issues. Subsequently, tribunals are also considering all these relevant issues to settle the question of nationality. Hence the draftsmen are more conscious to deal with the new challenges now. Present treaties have imposed condition that the company must have incorporation under the law having force in the contracting State and effective control and seat must also be situated in the same territory simultaneously.

The principle is subsequently upheld by the tribunal in *Yaung Chi Oo v Myanmar* while the Tribunal closely looked into the effective management of the company from Singapore where it was also registered to operate business.[261] This new condition to the BITs limits the scope of the companies to take advantage of mere registration to be a part of a BIT without effective management there.

However, albeit tribunals are overcoming the challenges gradually but still there is no precise definition what does control of company mean? The *Draft 4th Edition of the OECD Benchmark Definition of Foreign Investment* consider the percentage of ownership or voting power in a company as the measure of control, constituting the quantitative approach.[262]

The Tribunal in the NAFTA case *Thunderbird* v *Mexico* gave the following interpretation of what might constitute control[263]:

> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control

[260] Saluka (n 23)
[261] *Yaung Chi Oo Trading Pte. Ltd. v Government of the Union of Myanmar*, ASEAN I.D. Case No ARB/01/1, Award (31 march 2003)
[262] *OECD Benchmark Definition of Foreign Investment* (Draft) – 4th Edition, DAF/INV/STAT(2006)2/REV. 3, 2007.

[263] *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award (19 November 2004)

can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, knowhow and authoritative reputation.[264]

However, in *Aguas Del Tunari v Bolivia* the Respondent argued that although the Claimant has a registration in one of the BIT country, but it is effectively controlled by an another country which is not a State party to the BIT.[265] The Tribunal found that the Claimant were more than just a corporate shell set up to obtain jurisdiction before the Tribunal and thus the Tribunal deem that the company fulfilled the BIT's nationality requirement.

The *Generation Ukraine* v *Ukraine* case also upheld the same principle while the Tribunal dealt with the question of jurisdiction whether the claimant is a national of the home State.[266] Although the Claimant established a subsidiary in Ukraine which was actually a company registered in the US. Ukraine wanted to take shelter of a clause of the BIT to refuse the Claimant the benefits of that BIT.[267] According to the BIT, the investor must have substantial business in the home State and they argued that the Claimant is essentially managed and controlled by Canadians and had no genuine business in the US.[268] Subsequently, the Tribunal promulgated that it had jurisdiction under Part V to determine the justifiability of the arisen claims by the Claimant as these were arisen before the time the investment was notified of the denial of benefits and under Article 17(1) of the BIT the home State can only deny the Part III investment Protection benefits prospectively.[269] As this was not happen in this case hence the Tribunal delivered its award in favour of Generation Ukraine.

Nevertheless, often host State like that investment be made through locally incorporated company. The problem to this choice of host State is that no locally incorporated entity is not entitled to take shelter if ICSID. However, Art. 25(2)(b) of the ICSID Convention confers right to come under the shadow of ICSID of a local company if that is actually controlled by the nationals of other countries provided that country is a State party to ICSID Convention.

However, in *Vacuum Salt v Ghana* the Tribunal found that the parties have an agreement between themselves that the investor will be treated as foreign nationals.[270] The Tribunal in this case held that

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[264] Ibid, para. 180.
[265] *Aguas Del Tunari v Bolivia v Republic of Bolivia*, ICSID Case No ARB/02/3, Award (29 August 2002)
[266] *Generation Ukraine Inc.* v *Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003)
[267] *Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs* (2008) p 32
[268] Article 1(2) of the *US-Ukraine BIT*
[269] *Generation Ukraine Inc.* v *Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 15.7, 15.9
[270] *Vacuum Salt Products ltd. v Republic of Ghana*, ICSID Case No ARB/92/1, Award (14 January 1993)

the existence of foreign control is a separate requirement under Art. 25(2)(b) which cannot be settled by mere paper agreement by the parties; there must be real existence of foreign control and as the party to this dispute is lacking that hence the Tribunal refused jurisdiction.

Whether investment is being effected directly or indirectly via a company which has effective control in a third-party State is not distinguished by the ICSID Convention.[271] Hence, the Tribunal delivered award based on this non distinction of ICSID Convention in the *Tza Yap Shum v. Peru* case and declared that when a company starts a claim against a State, the Tribunal shall only look into whether the company that is making the investment in the host country and has suffered injury regardless of its direct or indirect control or ownership whit the company which bring the claim before the Tribunal.[272]

In the *SOABI v Senegal* case, a question had been arisen whether the national of Panama have access to the arbitration centre as the claimant was incorporated in Panama and purely controlled by Belgian shareholders whereas Panama was not a signatory to the ICSID Convention.[273] Despite that, the Tribunal accepted jurisdiction and determine the case as the Claimant company was controlled indirectly by shareholders of a signatory State of the ICSID Convention.[274] Hence, in this case the Tribunal also recognized the notion of indirect control of shareholders to a company.

However, investment may take place in various ways which may call in question again about the nationality of investor. A company may be acquired by a group of shareholders who hold nationality of a different country. In that case a question may arise whether a shareholder pursue claim for damages do to the company. Nevertheless, I that circumstance the shareholder can proceed on the basis of its own nationality even if the company does not meet the nationality requirement under that treaty.[275] The International Court of Justice (ICJ) view on this is the exclusion of shareholders' rights against a host State inflicting damage on a company would not necessarily apply if the company in question is incorporated in the host State.[276]

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[271] Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012) p 19
[272] *Senor Tza Yap Shum v. IaRepublica Del Peru,* ICSID Case No ARB/07/6, Award (7 July 2011) para. 96
[273] *SOABI v Senegal*,AIU3/82/1
[274] Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012) p 19
[275] S A Alexandrov, 'The "Baby Boom" of Treat-Based Arbitrations and the Jurisdiction of the ICSID Tribunals: Shareholders as "Investor" under Investment Treaties' *(*2006) TDM 5
[276] *Barcelona Tracticon, Light and Power Co., Ltd. (Belgium v Spain)* [1970] ICJ Reports 1970 4

Position of Bangladesh in Defining Juridical Person Investor: From the above discussion, it is clear that the issue of juridical person is more vibrant than natural person as there is many considerations eg place of registration, seat of business, control, nationality of shareholders etc. However, interestingly Bangladesh also expressed more efficiency in dealing with this issue than the natural person issue. In some BITs it includes registered office together with substantial business activities in the territory of that contracting party.[277]

The *Bangladesh-Iran* BIT specified the issue more clearly as "legal persons of either contracting party which are established under the laws of that contracting party and their headquarters or their real economic activities are in the territory of that contracting party."[278] The headquarter or head office criterion therefore requires that, in order to acquire the nationality of a State, management or central administration of a company should effectively occur in the territory of that State. There is an example of this criterion in the *Germany–Bangladesh* BIT which stipulates that a national of the German Republic is considered to be "any juridical person (...) having its seat in the German area (...)."[279] The head office criterion has the advantage of establishing a stronger link between a company and a State and of reducing the risk of "mailbox" companies. However, there is a negative side when compared to incorporation, as companies are able to transfer their head offices to another State more easily.[280] Moreover, apart from actual economic activities and headquarter the *Switzerland-Bangladesh* BIT inserted the issue of seat in the text also.

However, still the definition is not flawless although Bangladesh was more diligent in drafting the definition of juridical person as an investor. Bangladesh repeatedly ignored the question of indirect control in all the above mentioned BITs. According to the above discussed case laws, in the resent context shareholders having direct connection with other country may get chance to be accommodate in the present BITs. Therefore, Bangladesh should pay more attention in drafting future BITs.

Conclusion

It is evident from the above discussion that although the tribunals give full effect to broad the definition of investor in BITs but it also highly concentrated on the language of BITs and intention of the parties. However, the tribunals are also reluctant to uplift the corporate veil whether the investor has nationality from home State or not except BITs insert automatic denial of benefit clause. Therefore, the State parties must pay closer attention while drafting BIT whether they welcome third country nation to them or not. In addition, with regard to natural person the BIT must put emphasize

[277] *Turkey-Bangladesh* BIT
[278] Art. 2(b) of the *Bangladesh-Iran* BIT
[279] Article 8.4.a of the *Germany–Bangladesh* BIT
[280] Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012) pp. 8-9

on dominant nationality to handle the issue of dual nationality to refrain someone from a third nation. With regard to artificial person, both the State parties may choice single criteria to define a company instead of define it separately. Moreover, a special focus on both registration and substantial business activity at the same country can refrain a State party from compromising sovereignty.

ADR under the Islamic Shariah Law and the Family Laws of Bangladesh: An Analysis

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Abstract: ADR is seemed to be a modern movement for access to justice by resolving dispute in easy, informal, amicable and speedy way. But it is a glorious part of Islamic legal system which has been practiced from the early period of Islamic history. It is a part and parcel of Islamic jurisprudence. Mainly five types of ADR process is practiced under Islamic Sharia Law emanated from the two main sources- the holy Quran and Sunnah. This article analyses these ADR processes vis-a-vis the ADR processes that have been introduced in the family laws of Bangladesh. It aims to analyze the ADR under the family laws of Bangladesh and Sharia based ADR with a view to finding out the nature and extent of ADR processes under the two systems.

Key words: Arbitration, Mediation, Conciliation, Non-binding ADR, Arbitration Council, Sulh, Takim, Medarb.

Introduction

Alternative dispute resolution (ADR) is a dispute resolution method without resorting to formal process. ADR, in its popular sense, connotes a mechanism to settle disputes without following the formal procedure of the Courts by the disagreeing parities at their choice and compromise. It is a way that gives the parties to avail of the opportunity to come to a mutual agreement by means of negotiation, mediation, conciliation, arbitration etc. Use of ADR is found as the most successful mechanism for resolving disputes regarding trade and commerce, family, consumer, banking, insurance and other such matters.

There has been a wide range of growth of ADR in recent times as its acceptance in both general and legal field is increasing rapidly. It is very popular now for resolving disputes relating to various civil cases like personal injuries, trade and commercial disputes, family disputes etc. Case load on the formal court system is a remarkable hindrance to access to justice that widens the recognition of ADR as a tool of speedy, informal, easy and less costly process of resolving differences amicably. It is evident that ADR has been an effective means of access to justice and a fundamental element of rule of law.

ADR is considered to be a new phenomenon in legal sphere originated in the Western countries, but actually, it is a common feature of Islamic law practiced from the very beginning of Islam. The old idea has been rediscovered by the Western countries in the forms of same processes that are well known in Islamic Jurisprudence, like Negotiation, Mediation, Arbitration, Expert -Determination, Ombudsman and Med-Arb. Concept of ADR was also practiced in ancient Chinese and Hindu legal systems.[281] In the teachings of Islam, amicable compromise is encouraged at every sphere of life and

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confrontation is discouraged, even abominated. There are many verses of the holy Qur'an and Hadith of the Prophet which are the evidences of amicable settlement of dispute through ADR process.[282] Under Islamic law disputes especially in respect of property and other similar private rights may be settled by arbitration.[283] Particularly family matters, the theory of Quran has ordained to resolve the disputes through the ADR process specifically and elaborately.

In the family laws of Bangladesh the process of ADR through arbitration has been first incorporated by the Family Laws Ordinance, 1961 in the light of the principles of Quran and Sunnah. Later, the Family Courts Ordinance, 1985 adopted the provision of ADR in family cases by means of mediation by the Courts.

ADR Processes in Islamic Law

'Islam' is from a neutral point of view, not only a religion consists of only religious practices and moral code of conduct but also a complete way of life; a religion and a legal system. The process of resolution of dispute in Islamic jurisprudence is a combination of regular courts and ADR mechanism in accordance with the religious values, customary practices of reconciliation and rules of harmonious existence emanated from its main sources; *Quran*, *Sunna*h, *Ijma* and *Quyas*. The idea of ADR is permitted in all dispute resolution except when it makes a thing *haram*(prohibited) as *halal*(legal) and *halal* as *haram*. The famous letter written by the second caliph of Islam Umar bi Khattab to Abu Musa Al-Ash'ari after appointing him as a qadi (judge) contained provision of resolving dispute amicably as he wrote- "*All types of compromise and conciliation among Muslums are permissible except those which make haram (unlawful) anything which is halal (lawful), and a halal as haram*."[284] Islamic law contains the following ADR processes:

1) **Sulh;** (negotiation, mediation/conciliation, compromise of action);
2) **Tahkim**; (arbitration);
3) **Med-arb**; (a combination ofsulhandtahkim);
4) **Muhtasib;** (ombudsman);
5) **Informal justice by the wali al-mazalim or chancellor**; and
6) **Fatwa of muftis** (expert determination).

1. Sulh

The literal meaning of *sulh* is to finish a dispute, to cut off a dispute, ending a dispute. *Sulh* is an early method of resolving dispute in Islamic jurisprudence the purpose of which is to settle the dispute and

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[281] Rashid, Syed Khalid, *Alternative Dispute Resolution In the Context of Islamic Law*, The Vindobona Journal of International Commercial Law and Arbitration, Vol. 8, Issue. 1 (2004).

[282] In this article many of these evidences will be cited.

[283] Rahim, Abdur, *The principles of Muhammedan Jurisprudence,* Published by PLD Publisher, Lahore, P. 373.

[284] Syed Khalid Rashid, *Peculiarities and Religious Underlining of ADR in Islamic Law*, paper presented in a seminar organized by Asia Pacific Mediation Forum, Australia, 16-18 june, 2008, Venue: IIUM, Kuala Lumpur.The letter is still preserved.

hostility among believers so that they can live a peaceful life in harmonious relation in the society.[285] The nature of Sulh is that it is private settlement conducted by the parties with or without interference by a third party. It includes negotiation, mediation or conciliation.[286] The basis of sulh is emanated from the verses of the Holy Quran: *'the believers are but a single brotherhood, so make peace (sulh) between two (contending) brothers; and fear Allah, that ye may receive mercy'*.[287] *If two parties among the believers fall into a quarrel make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair and just.*[288] Both the above verses emphasize on the peaceful settlement of dispute in a fair manner and promise divine blessings to believers who perform it. Another verse of the Quran permits the secret meeting for the sake of conciliation, which is otherwise prohibited. It says, '*in most of their secret talks there is no good: but if one exhorts to a deed of charity or justice or conciliation between men (secrecy is permissible): to him who does this seeking the good pleasure of Allah We shall soon give a reward of the highest (value). '*[289]

The Prophet in his various Hadiths advocated and encouraged the amicable settlement of disputes through 'sulh'. Its greatest importance is found where telling lie is permitted for the sake of making peace between two parties (Sulh) which is otherwise declared a great sin. The Prophet said in this regard, '*He who makes Peace (**Sulh)** between the people by inventing good information or saying good things, is not lair*".[290] The Prophet declared reward for those who make 'sulh'. *"There is a Sadaqa to be given for every joint of the human body; and for every day on which the sun rises there is a reward of a Sadaqa (i.e. charitable gift) for the one who establishes justice among people.*[291]

There is no formality and fixed rule of mediation and conciliation in Islamic concept as is the ever increasing modern institutional mediations. Many countries now conduct mediation without following any formal rules.[292] The only rule governing Sulh is that it cannot make anything haram (prohibited) which is halal (permitted) and a halal which is haram.

2. Tahkin (Arbitration)

Arbitration as a method of dispute settlement was practiced in pre-Islamic Arabia to settle various civil and commercial disputes. Islam has given approval to the system directly by the Quran and Sunnah. Islamic law allowed its follower to resolve dispute through arbitration if they are unable to settle their private dispute amicably.[293] It has been in practice since more than a thousand and four hundred years,

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[285]Mahamad Arifin, Norliah Ibrahim, and Mwinyi Talib,*The Role of Sulh Towards the Process of Reducing the Rate of Divorce in the Kadhis' Courts in Zanzibar: Following the Malaysian Model*, Australian Journal of Basic and Applied Sciences, 6(11): 166-178, 2012, ISSN 1991-8178

[286] Dr. Vandana Singh, ILI Law Review, Summer Issue, 2017, Vol. 1 P.142.
[287] Surah Al-Hujurat (49): 10 (English translation by Yusuf Ali).
[288]Surah al-Hujurat (49):9
[289] Surahal-Nisa (4):114.
[290] Sahih Bukhari, Hadith no. 2692
[291] Sahih Bbukhari, Hadith no. 2707
[292] Supra Note 1
[293]Supra Note 3

before the adoption of French law or UNCITRAL model law.[294] However, there are different views among schools of Islamic law regarding the binding nature of arbitral award. Hanafi school hold the view that arbitration is close to compromise and is binding only when the parities agree. Once arbitral award is filed in the Court of qadi, it becomes binding, the qadi finds no fault in it.[295] Arbitration in Islamic law extends to economic, social, religious, political and private disputes except awarding any physical punishment or any kind of retribution. It has been shown in most of the countries mediation is more practiced than arbitration to settle family dispute.[296] The procedure of Tahkim is less technical, informal, cost-effective and expeditious in comparison to general law of arbitration.[297] Following verses of the Quran provides for the provision of Tahkim or arbitration directly: '*If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things'*.[298] This verse of encourages the arbitration in case of dispute between husband and wife and recognizes that arbitration is well practice in Islam. '*Allah doth commad you to render back your trust to those to whom they are due; and when ye judge between man and man that ye judge with justice; verily how excellent is the teaching which he giveth you. For Allah is he who heareth and seeth all things.*[299]

In the light of the Quran the Prophet recognized arbitration, accepted arbitral decisions of others, conducted arbitration as arbitrator and appointed arbitrator in several occasions.

3. Med-Arb

Med-Arb is a unique system which is a combination of mediation and arbitration the basis of which verse no. 35 of the Sura al-nisa.[300] It is expected from arbitrator to work as mediator and in failing to resolve the dispute he should proceed for arbitration. Thus the procedure has two stages, first is mediation as primary approach and second is arbitration as a final stage.

The combination of mediation and conciliation is now universally accepted. Many countries, for example, China, Japan, Korea, Vietnam and Malaysia adopted the ADR process in combination mediation and arbitration.[301] In Bangladesh provisions of ADR in different laws have been adopted in combination of both.

4. Muhtasib

In Islamic legal system the post of Muhtasib is very useful institution for dispute resolution. Muhtasib in Islamic law is equivalent to ombudsman of western system which emerged in Sweden in 1809. England created the post of ombudsman under the Parliamentary Commission Act, 1967. It has been

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[294] Supra Note 6

[295] Supra Note 1

[296] Sukhsimranjit Singh, Religious Arbitration and its Sruggles with Amercan Law & Judicial Review, 16 Pepperdine Dispute Resolution Law Journal 160 (2016)

[297] Supra Note 6

[298] *Surahal-Nisa (4):35*.

[299] Sura al-Nisa (4): 58

[300] '*If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things'.*

[301] Supra Note 1

practiced by Muslims since more than fourteen hundred years ago with the advent of Islam and revelation of the Quran. The primary basis of appointing ombudsman is the Quran and the Prophet practiced it in his regime. The Quran says, '*let there arise out of a band of people inviting to all that is good enjoining what is right and forbidding that what is wrong; they are the ones to attain felicity.'*[302] The prophet appointed Saad Ibn Al Aas and Umar Ibn Al Khattab as the Muhtasib of Mecca and Medina respectively. During the regime of Umar Ibn Al Khattab Abdulla Ibn Uthba was the ombudsman of Medina. [303] Function of the Muhtasib is multifarious which includes taking account (hisab), religious activities, maintenance of mosque, market dealing market, matters relating to weight and measures, municipal affairs, community interests etc. With the development of Islamic legal system the institution of Muhtasib or ombudsman has become an indispensable part of administration of justice for dispute resolution.

5. Informal justice by the wali al-mazalim or chancellor

Wali-al-mazalim is an officer appointed by the head of the state to act as a judge and ombudsman which is closed to the early office of the Chancellor in England. His status is in the middle of the judge and ombudsman. His function is to settle different types of disputes in informal manner to bring about justice quickly and cheaply with less complexity. This differs from ordinary Court in many ways regarding its procedure and jurisdiction. The rules of evidence are not incumbent upon him; he may rely on personal knowledge, may compel the parties to arbitrate on any matter and dispense away the strict proof of evidence which is required in formal Court of justice. Cases which may be under the jurisdiction of Wali al-mazalim are, for example, misappropriation of property; complaints lodged by stipend holder; irregularities in administering land of public or private endowment; indiscretion in public records kept by registrars; accountants and clerks; the corruption of government etc.[304] Thus wali al-mazalim is an effective method of resolving different public and private disputes in informal and flexible manner.

6. Fatwa of Muftis (expert determination)

Fatwa or scholarly opinion about any matter on the basis of Islamic law is considered to be Islamic religious ruling. Mufti or expert may act as an impartial third party chosen by the parties to make a non-binding evaluation assessment on a dispute based on merit and on his own expertise.[305] In practice fatwa of Muftis has an effective rule in solving dispute between the parties. In the history of Islam numerous examples are found where muftis conducted peaceful dispute resolutions through their scholarly knowledge and expertise.

ADR under the Muslim Family Laws of Bangladesh.

In Bangladesh there two statutes where provisions for alternative dispute resolution regarding family disputes have been adopted. One is the Muslim Family Laws Ordinance, 1961(MFLO) and the other is the Family Courts Ordinance, 1985.

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[302] Surah Al-Imran (3): 104

[303] Supra Note 4

[304] Md. Zahidul Islam, *Provision of Alternative Dispute Resolution Process in Islam*; IOSR Journal of Business and Management (IOSR-JBM) ISSN: 2278-487X. Volume 6. Issue 3 (2012) pp. 35

[305] Ibid

Nature of ADR under family laws of Bangladesh

Most of the provisions MFLO were adopted on the basis of principles of the Quran and Sunnah. It provides for the quasi-formal ADR locally before filing suits in ordinary Courts.[306] Though the Ordinance used the term 'Arbitration Council' to resolve dispute through reconciliation, but from the given procedure it is clear that the aim of the Ordinance is to resolve dispute through arbitration.[307] But the nature of arbitration is different in its operation regarding bindingness. In case of divorce it is non-binding arbitration or it is more likely to say conciliation. Non-binding arbitration is similar to expert opinion, but the role of the Arbitration Council under section 7 is not similar toan expert opinion. According to this section, the Arbitration Council shall take all steps necessary to bring about such reconciliation and if the attempt for reconciliation fails, divorce shall be effective on expiration of ninety days. However, the ADR in case of polygamy under section 6 and maintenance under section 9 is binding arbitration; only a revision may be filed by any party.

ADR under the Family Court Ordinance, 1985 is a judicial ADR in the form of mediation, where the Court itself acts as a mediator.

ADR under the Muslim Family Laws Ordinance, 1961

The Muslim Family Laws Ordinance, 1961 provided for alternative dispute resolution through the Arbitration Council formed under the Ordinace in following three cases:[308]

a. Polygamy;
b. Talaq;
c. Maintenance.

Arbitration Council

According to section 2 (a) "Arbitration Council" means, a body consisting of the Chairman and a representative of each of the parties. Where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council. Section 2 (b) defines Chairman as: the Chairman of the Union Parishad; the Chairman of the Paurashava; the Mayor or Administrator of the Municipal Corporation; the person appointed by the Government in the Cantonment areas to discharge the functions of Chairman under this Ordinance.

Rule 5 of the Muslim Family Laws Ordinance states, the Chairman shall conduct the proceedings of an Arbitration Council as expeditiously as possible and such proceeding shall not be vitiated by reasons of a vacancy in the Arbitration Council. It also provided that a person who is a party to the proceeding cannot be a member of the Arbitration Council. All decisions of the Arbitration Council shall be taken by majority in and if not possible the decision of the Chairman shall be final.

[306] Dr. Jamila A. Chowdhury, ADR Theories and Practices, 2nd Edition (2018), PP. 196
[307] Ibid
[308] Section 6-9, the Muslim Family Laws Ordinance, 1961

Polygamy

It is mandatory, according to section 6, for a husband to obtain permission in writing of the Arbitration Council to contract another marriage and violation of this provision is an offence which is punishable with imprisonment which may extend to one year and fine up to ten thousand taka.

Procedure of dispute resolution

According to section 6 an application for permission shall be submitted to the Chairman, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto. On receipt of the application, the chairman shall within seven days ask the applicant and his existing wife/wives each to nominate a representative, and within seven days of the receiving order each party shall nominate in writing a representative and deliver the nomination to the Chairman or send it to him by registered post. The arbitration council so constituted may, if satisfied that the proposed marriage is necessary, and just grant, subject to such conditions if any, the permission applied for.

In deciding the application the arbitration council shall record its reasons for the decision. Any party not satisfied with the judgment may, in the prescribed manner within the prescribed time period and on payment of prescribed fee, prefer an application for revision to the Assistant Judge and his decision shall be final, and shall not be put in question in any court.

Talaq

Section 7 provides for the procedure of talaq which is based on the Qur'anic verse: "*If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things".*[309] The verse seems to suggest that the attempt at reconciliation should be made before there be an actual separation by pronouncement of talaq and it aims at an intervention at the pr-divorce stage. Different procedure for reconciliation in post divorce stage has been addressed by the Quran.

Procedure of reconciliation

Persons willing to divorce his wife shall as soon as may be after pronouncement of talaq (divorce) in any form give the chairman notice in writing of his having done so, and shall supply a copy of the notice to the wife. A talaq unless revoked earlier shall not be effective until the expiration of ninety days from the day on which notice is delivered to the chairman. On receipt of the notice, chairman shall constitute an arbitration council within thirty days for the purpose of bringing about reconciliation between the parties, and shall take all steps necessary to bring about such reconciliation. If the wife is pregnant at the time of pronouncement of talaq, talaq shall not be effective until the expiration of 90 days or the end of the pregnancy period, whichever is later. The Arbitration Council shall send letters to the husband and wife for reconciliation and fix a date for such reconciliation. If both the parties

[309] *Surahal-Nisa (4):35.*

appear and reconciliation takes place, talaq will not be effective and the marital tie between the husband and wife will continue. If reconciliation fails or one or both the parties do not appear, talaq will become effective of the expiry of ninety days.[310] Whoever contravenes the provisions shall be punishable with simple imprisonment for a period not exceeding one year or with fine which may extend to ten thousand taka, or with both.[311]

Talaq by tafweez and judicial separation

Section 8 of the Ordinance made the provisions of section 7 mandatory in case of talaq by the wife in exercise of the right delegated to her by her husband which is called talaq by tafweez and in judicial separation. According to the provision of the Family Court Ordinance, 1985 the Family Court can pass a decree for dissolution of marriage. In such case the Court shall send a certified copy of the decree of dissolution of marriage to the Chairman within seven days after the passing of the decree. After receipt of such a certified copy of the decree the Chairman shall take step as provided by section 7 and the decree will not be effective until the expiry of ninety days from the receipt of the notice by the Chairman.[312] The attempt of the Arbitration Council in such cases is the third step of ADR, as the Court has to try twice before it. In case of a successful reconciliation the decree shall be deemed to have been abandoned by the wife and shall have no effect.

Maintenance

If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the chairman. The chairman shall constitute arbitration council to determine the matter, and the arbitration council may issue a certificate specifying the amount, which shall be paid as maintenance by the husband. Person aggrieved may, in prescribed manner, within thirty days, and on payment of the prescribed fee, prefer an application for revision of the certificate to the Assistant Judge concerned, and his decision shall be final and shall not be called in question in any court.[313]

ADR under the Family Court Ordinance, 1985

Family Court Ordinance, 1985 has adopted a conciliation method to resolve family disputes over which it has jurisdiction informally and the Family Court plays an important role in reconciliation as

[310] Section 7 read with rule 6 of the Muslim Family Rules, 1961
[311] Section 7 (2)
[312] Section 23 (2), The Family Courts Ordinance, 1985
[313] Section 9, the Muslim Family Laws Ordinance, 1961

mediator. It is the discretion of the Court to allow lawyers of penal mediators as there is no provision in the Ordinance in this regard.[314]

The Ordinance provides for reconciliation proceedings in two stages of the proceedings of a family suit:

i. Reconciliation in pre-trial proceeding under section 10 and
ii. Reconciliation in post-trial proceeding under section 13.

Section 10 (3) provides for attempting reconciliation and compromise after filling the written statement and examining the plaint, written statement and documents filed by the parties and also hearing parties if necessary.

Section 13 made another stage for reconciliation and compromise between the parties before pronouncement of judgment on conclusion of the trial. The judge shall ask the parities to resolve their dispute through mediation. A compromise decree shall be passed by the Court if the dispute is settled by compromise or conciliation under section 14. The step for mediation provided for the both the stages are mandatory for the Court.

Conclusion

Islamic ADR system is a unique process which covers almost all kinds of disputes settlement system in alternative methods. It is an important tradition of Islamic legal history in the forms of sulh, tahkim, med-arb, muhtasib, informal justice by the wali-al-mazalim or chancellor; and Fatwa of muftis (expert determination).These six kinds of ADR methods played a remarkable role in different periods of Islamic legal system. Islamic ADR process is very close to Modern ADR system and in many ways it is more successful in resolving civil and criminal disputes.

In Islamic legal system ADR is not only recognized but also encouraged, especially in family matters. Conflict between husband and wife is one of the cases to which ADR is the best solution through mediation. Quran describes its process in details and encourages reconciliation in the verse no. 35 of the Sura-Al-Nisa. Other verses also advocate the outside-court resolution of disputes by different ways through amicable and peaceful process. Two highest sources of Islamic legal system- Quran and Hadith contain numerous statements mentioning the concept of ADR in dispute resolution. Special

[314] Supra note 26, pp. 145

focus has been given on family disputes in the form of mediation and arbitration. The Muslim Family Laws Ordinance, 1961 has been designed on the basis of Quranic injunction of ADR. The Family Court Ordinance, 1985 is another enactment that provides for ADR in Family dispute which is a judicial ADR in the form of mediation in which Judge himself is a mediator. Different types of Islamic ADR, especially Tahkim and Med-arb have been enshrined in both the laws with some distinguishing characteristics. However some inadequacies have also been found in these laws regarding ADR process which have lessened its effectiveness to some extent. In can be made more effective and easy by incorporating Islamic ADR system into the family laws. Specially the 'Sulh', 'Tahkim' and 'Mid-arb' may be important methods of ADR in resolving family disputes.

The Politics of Partition: Making of Enclaves in South Asia

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Abstract: Former enclaves were the artificial historic-crisis in South Asia. Enclaves were the results of the faulty partition policy and hasty procedure of dividing India. The consequence of partition was reluctantly been assessed as a forgotten part to concentrate. A large number of people in both India and Bangladesh had lost their state entity and sovereign security. The people had neither achieved fundamental rights, nor human rights. People of these lands had to live like living in a cage. After exchange program, a chance to explore a new horizon of hope, aspiration, possibilities and rights for the residents of these areas has been created. The author posits that the enclave problem might have been avoided if the ground policy would have been properly analyzed.

Key words: Enclaves, Partition, Statelessness, Citizenship, Colonization, Hindu Mahasobha.

Introduction

"The people of Punjab and Bengal were the mere pawns in the endgame of the empire".[315] The Indian Sub Continent was partitioned in a hasty and reckless adamantine behavior merely to console and divide it among the claimant political parties and politicians.[316] The social and cultural construction of the region was not considered at all.[317] The vital two Nations theory was a temporary solution of the region and was not beyond question.[318] Since the political leaders of the region were very much reluctant with their plans, targets and pragmatic farsightedness of a transformed circumstance, they probably failed to recognize their failure to inculcate the essence of partition.[319] On contrary, the level of hatred on the colonial power was growing in a geometric method due to their oppression and monetary lust.[320] One side wanted to get rid of torture, racial differences, communal hatred and other to shift the power to some other else spoiling the solidarity, unity and collective strength of the people of Indian sub Continent.[321] Finally, India was partitioned in 1947, with historic decolonization program though Mr. Lord Mount Batten was throned on the power of independent India while Mr. Jinnah took

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315 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967*, (New York: Cambridge Press, 2007), p. 20.

316 *Ibid.*, pp. 14 – 16.

317 *Ibid.*, p. 15.

318 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947*, (New Delhi: AnVi Composers, 2002), pp. 220 – 227.

319 *Ibid., p.*

320 Joya Chatterji, The Spoils of Partition: Bengal and India, 1947- 1967, (New York: Cambridge Press, 2007), pp. 18 – 19.

321 Joya Chatterji, Bengal Divided: Hindu Communalism and Partition, 1932 – 1947, (New Delhi: AnVi Composers, 2002), pp. 21 – 24.

the opposite. The sky level high expectation of the residents crashed down in some places. People of different places involved in communal collision and threatened the minority segment of the society to show obedience to their choice. In this work, it will be tried to find out the answers of the following questions; (i) why and how did the question of enclaves come out? (ii) What was the justification of rampant partition program in India and (iii) how did the enclaves finally disappear from the world history? In finding the answers of the questions, the qualitative method has been followed. Besides primary data, emphasize on the daily news papers and victims opinion has been given.

Communal Riot and Partition

The partition of Indian Sub Continent eventually shifted to a religious issue.[322] The first partition of Bengal was held in 1905 in the period of Lord Curzon. At that time the elite politicians of the sub continent had lost their rationality and consideration. [323] The people from Hindu community vivaciously raised questions against the partition.[324] By this time, two gentle men group was emerged, Bhadralok and Babu. Truly to explain, this Bhadralok and Babu administered bangla for a long period of time. [325] The word Bhadralok used to mean a person having land and wealth.[326] The title Babu was a badge of Bhadralok status; factually it was a practice among Hindu society.[327] The use of such title was to pronounce the highness of a person in the society. The caste system was rampantly prevailing in the social culture of India.[328] The Bhadralok politics reacted negatively due to a series of challenges like fall of imperial patron, decision of the All India Congress to empower lower caste Hindus, political turmoil etc.[329] The people of the sub continent were remaining in discrimination regarding livelihood, education, cultural affair and finally participation in political activities. Another component of partition was learning English by the Muslim community. Since the Muslim community was far from state privileges due to contempt English language, the English men wanted to grip the Muslim community with extra benefits. The rest of the communities colored it as biasness. In all the places mistrust and crisis was gradually increasing.[330] In 1940s, Viceroy Linlithgow pronounced that no political concession would be given to India until and unless the main two communities would agree on the way forward.[331]

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322 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), p. 1.

323 *Ibid.*

324 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), pp. 4 – 5.

325 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967,* (New York: Cambridge Press, 2007), p. 2.

326 *Ibid., Bengal Divided: Hindu communalism and partition 1932 to 1947,* (New Delhi: AnVi Composers, 2002), p. 5.

327 *Ibid., p. 5.*

328 *Ibid., p. 5.*

329 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967,* (New York: Cambridge Press, 2007), p. 12.

330 *Ibid.,*, pp. 10-12.

331 *Ibid., pp. 13.*

On March 8, 1947 the Congress Working Committee announced that if India would have to be partitioned, the provinces of Bengal and Punjab would also have to be divided.[332] 'Attlee's statement of June 3 heralded success for the coalition of Bengal's Hindu leaders who, in the last years of Raj, had campaigned so vigorously for the partition of their province. By decisions taken in London and in Delhi, they had won for themselves a Hindu state in inside India which would be in place before the end of monsoon'.[333] It was beyond question that the partition took place in huge chaos and political uncertainty. The leadership of Bengal congress and All India Congress became feeble rump of an old factory, long excluded actor from governance while showed few partial control in provincial administration and was claiming for a new state.[334]

Since the pronouncement of Lahore Resolution in 1940, the British decided to hand over power though they were looking for a good ally to protect and nurture the economic interest in the eastern Suez Channel.[335] It was the crystallized form of the concerns of the Indian politician for giving guarantee of proper and just rights to the Indian Muslims though the propaganda was circulated only to bring a solace in the society.[336] The electoral result of 1945-46 and mandate given to the All India Muslim League by the Muslim voters, made it impossible for London and Delhi to ignore Mohammad Ali Jinnah and the Muslim League in the meeting of negotiations at the center regarding transfer of power and partition of India.[337] In 1945, at the first Simla Conference, Muhammad Ali Jinnah insisted that he should be recognized as the 'sole spokesman' of Muslims and that Muslims, as a separate nation should be given a parity of representation in any proposed federal government.[338] On the contrary the all India Congress and politicians reiterated that they used to speak for the state as a whole including Muslims.[339] The all India Congress, Provincial Congress and the Hindu Mahasabha leaders cried and argued for a Hindu state in India and claimed partition. [340] In contrary Muslim League leaders did not clarify the process and nature of independence like the Hindus. They wanted a week federal state in which the interest of all provinces might be protected properly and in no case favor and fascination of central government would fell impact or barrier over there in the administration of the provincial governments.[341] Due to ill treatment to the Muslims in the social, religious, and political life by the Hindu political, social, and religious leaders, there was a grievance among the Muslims against the Hindu community.[342] Moreover, when congress took support on behalf of the majority men support (Hindu Community), the Muslim became motivated that they were not going to be entitled with the

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332 *Ibid., p. 15.*
333 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967,* (New York: Cambridge Press, 2007), p. 19.
334 *Ibid., p. 22.*
335 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), p. 221.
336 Willem Van Schendel, *A History of Bangladesh,* (New Delhi: Cambridge University Press, 2009), p. 88.
337 *Ibid.*
338 *Ibid., pp. 223-224.*
339 *Ibid.*
340 *Ibid., p. 227.*
341 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), p. 226.
342 Willem Van Schendel, *A History of Bangladesh,* (New Delhi: Cambridge University Press, 2009), pp. 88- 89.

legal treatment from the state and rights as well.[343] The dire consequence of the famine of 1940s, the Muslims vividly became to know that they were far from the state concentration and care which was another cause to be fascinated with communal affection.[344] Jinnah kept a vagueness regarding the idea of Pakistan but the movement began with quit India, inevitably led both the Hindu and Muslim community in reverse point.[345] The interim government was dominated by the congressmen.[346] The process of partition was going with the instruction of the All India Congress and the instructions of the Hindu Mahasobha. Jawaharlal Nehru arose complain that it had become impossible to run the governmental activities while in the government one party plays the role of opposition.[347] It was reported that at that time Jawaharlal Nehru was the Prime Minister, Sarder Patel was the Home Minister while Liaqat Ali was for the ministry of Finance.[348] Sarder Patel also alleged Lord Wavell to over evaluate Muslim League.[349] In August, 1947, the Sub Continent was asunder into India and Pakistan. The shock of partition among the memories of Bangladeshis is not easy forgettable matter.[350]

Impact of Partition

The partition of India was a geographical resolution of a political fiasco, writing the endnote of a long colonial empire of the British.[351] The knife of partition was run on the maps of Assam, Bengal and Punjab. [352] These three states inherited social segregation, economic facts, historical myths and political mindsets.[353] Creation of new nation causes mass migration. It was also not new for the India and Pakistan after partition. The partition was effected on the basis of religious aspect.[354] The minorities always want to feel stronger in a new place. Due to those feelings, after partition as much as 30 million Hindu and Muslim crossed the Eastern and Western border of India and Pakistan.[355] After two decades, about one and half million people have left west Bengal to enter into Bangladesh from Bihar, Assam, and Tippera.[356] The partition was vitally occurred on the basis of the proportion of religious followers with a comparison to total number of population. A cause of mass influx was for religious persecution.[357] In Calcutta, riot took the nature of murder as spoke eye witnesses, in Punjab it took the color of genocide which formerly expanded to Tippera and Noakhali. In the western border

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343 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), pp. 226-227.

344 Willem Van Schendel, *Ibid.,* pp. 96-97.

345 Joya Chatterji, *Bengal Divided: Hindu Communalism and Partition, 1932 – 1947,* (New Delhi: AnVi Composers, 2002), p. 226.

346 *Ibid.,* p. 225.

347 *Ibid., p. 225*

348 *Ibid*., pp. 225-226.

349 *Ibid.p.225*

350 Willem Van Schendel, *Ibid.,* pp. 96 - 97.

351 Willem Van Schendel, *A History of Bangladesh,* (New Delhi: Cambridge University Press, 2009), p. 96.

352 *Ibid., p. 96.*

353 *Ibid*.

354 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967,* (New York: Cambridge Press, 2007), p. 105.

355 *Ibid.,* p. 105.

356 *Ibid.,* p. 106.

357 Gill and Goodwin, International Refugee Law

riot took place in Kashmir.[358] With the continuation the relation between India and Pakistan worsened. India took the princely states of Hyderabad and Cooch Behar in 1949.[359] The princely states of Hyderabad did not create any further problem while the princely states of Cooch Behar made it international problem.[360] The exclaves of India was encircled in Sovereign Bangladesh (East Pakistan) on the contrary, the exclaves of Bangladesh (East Pakistan) was stranded in India. Both the mother country had lost its authority to have effective relation with the land. There were almost two hundred enclaves in the Indo Bangla Border land from either of the country.[361] Since the inception of enclaves, both the state wanted to worsen the situation and refused to let each other officials cross their territory to reach the enclaves. These lands became fully stranded and abandoned.[362]

The Merger Agreement of Cooch Behar

In 1949, on August 28 the merger agreement was signed to be merged with India. It was pronounced that for the best interest of Cooch Behar and the willingness of Indian dominion to provide administration to Cooch Behar, the agreement was signed.[363] The Maharaja of Cooch Behar surrendered the administration to the Dominion of India and in return, was given the same personal rights, privileges, dignities and titles as well as 1550000/- taka per annum as remuneration.[364] It was guaranteed that all the private properties of the Moharaja of Cooch Behar should be enjoyed. State would not have any right to confiscate the property of the Maharaja.[365] The family members of the Maharaja was allowed same dignity and highness what they would have been enjoyed earlier.[366] The dominion government also guaranteed that the succession of inheritable rights of the Maharaja would remain as usual. Against the Maharaja no civil suit or criminal case would have been maintained in Cooch Behar or in India.[367] The government of India also guaranteed that all the servants of the raj would be salaried and pensioned as usually.[368] In response, dominion of India would get all the land, wealth, laws, tax rules, and treasury of Cooch Behar which she won before the partition of 1947.

Making Enclaves and Impact

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358 Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947- 1967*, (New York: Cambridge Press, 2007), pp. 108-111.

359 *Ibid.*, p. 111.

360 Willem Van Schendel, *A History of Bangladesh*, (New Delhi: Cambridge University Press, 2009), p. 97.

361 *Ibid.*

362 Willem Van Schendel, *A History of Bangladesh*, (New Delhi: Cambridge University Press, 2009), pp. 97-98.

363 *The Cooch Behar Merger Agreement*, 1949.

364 *Ibid., ss. 2-3.*

365 *Ibid., s. 4.*

366 *Ibid., s. 5.*

367 *Ibid., ss. 6-7.*

368 *Ibid., s 8.*

The political poker game between the leaders of the Indian nationalist movement and the British authorities ended in the decision of decolonization of India.[369] There were as much as 565 princely states in the Indian sub continent. These states had not been given independence in 1947. Either those small territories would join with India or with Pakistan[370] Cooch Behar was one of such princely state or native state.[371] When the English colonial government determined to leave India, Cooch Behar lay wedged between Pakistan and India. One hundred and thirty Cooch Behar enclaves were located in India while fifty one Bangladeshi enclaves were located in India.[372] The boundary between India and East Pakistan (Bangladesh) owed little to the modern perception of spatial rationality. In southern area of Bangladesh India border did not take any straight line; it snaked through the countryside in an irregular zigzag pattern[373] Neither the West Bengal nor the Eastern one, Bangladesh occupied a strong position in national and international politics. Kolkata once had huge control over the politics of large India. At the same time, being a small and culturally fragmented state Bangladesh contributes and out sources little to the international politics.[374] Enclaves were the signs of negligence of the Radcliffe Commission. The partition committee created more than 200 former enclaves casting huge number of people in uncertainty and abandonment.[375]

In the administration of colonial power, there was no state border barrier in the Indian Sub Continent. People of one place bought land of other or in another places like the adjacent places and districts. The Permanent Settlement also encouraged the moneyed Jamindars to by lands far from their own territory or residential area.[376] The Mughals wanted to expand their lands in Cooch Behar but they failed.[377] The powerful landlords managed their possession of lands in Mughal states. On the contrary, the lands of Mughal were kept safe in the estate of Cooch Behar. Before Independence, there was no problem.[378] These detached territories were positioned in one state while they used to pay taxes to a secondary state. After independence, these states were divided into different sovereign states. Then these segregated lands stranded in two different sovereign countries and the exclave-enclave problem used to arise.[379] The home country and host country theory came out after the merger program of Cooch Behar with the dominion of India in 1949.[380] According to the law, the home country could demand sovereignty over the lands. Due to the modern political sovereign state entity, the host country had no

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369 Willem Van Schendel, Statelessness in South Asia: The Making of the India – Bangladesh Enclaves, *The Journal of Asian Studies,* Vol. 61 No 1, (Feb 2002), pp. 115 – 147. P. 119.

370 *Ibid., p. 119.*

371 *Ibid.*

372 *Ibid.*

373 *Ibid., p. 120*

374 Sudhir Mukharjee, A student of History in Kolkata University, interview was taken on September 22, 2018.

375 Rafiq Uddin, A Student of Patgram Government College, Lalmonirhat, interviewed on July 12, 2017.

376 Joya Chatterji, The fashioning of a Frontier: The Radcliffe Line and Benga'sl Border landscape, 1947 – 52, *The journal of Modern Assisan Studies,* 33 (1) , pp. 185 – 242, pp. 198- 202.

377 Hunter, 1876, vol. 8, p. 316-317.

378 Willem Van Schendel, Statelessness in South Asia: The Making of the India – Bangladesh Enclaves, *The Journal of Asian Studies,* Vol. 61 No 1, (Feb 2002), pp. 115 – 147. P. 119..

379 Reece Jones, Sovereignty and Statelessness in the Border enclaves of India and Bangladesh, Journal of Political Geography, ELSEVIER, Vol. 28 (2009), p. 373- 381. P. 373.

380 *Ibid.*

proper control over her detached lands.[381] The people had to beg mercy or necessary things to the host country.[382]

Miserable Lives in those former Enclaves

The residents of former Indian enclave in Bangladesh told the researcher in 213 that the Islamic State of Pakistan discriminated them showing finger that they were Indian Muslims.[383] The government of East Pakistan thought them Indians while the Government of India sighted them with speculation.[384] The enclave people previously could sell their labor to the contiguous places. Now they could not do work in all the places because they were placed outsider or intruder in the area.[385] They might enter into the host country for work, the border safety force or police would arrest them with an allegation of spying or trespasser.[386] The home country cannot provide state services due to lack of proper entry policy and permission.[387] The people did not have any right to ownership. There was no police station to take care of the people.[388] There was no school, community medical service provider, NGO activities, roads, sanitation facilities, opportunity of earning livelihoods etc.[389] They were not entitled to adult franchise.[390] The politicians of neither county cared them due to lack of voting importance. They had to live in continuous threat and uncertainty without having any identity.[391]

Present Situation

On August 31, 2015 the history of enclaves was disappeared from the history of the Indian Sub continent.[392] India ratified the historic land boundary agreement. It was expected that all the disruptions might be disappeared.[393] The people of the former enclaves got the citizenship status and started to enjoy the state privileges.[394] They got new life in lieu of abandoned and cursed life.[395] They

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381 *Ibid., p. 374.*

382 *Ibid.*

383 Ramij Uddin, a resident of Garati, an Indian Enclave in Bangladesh, interviewed on April, 2013.

384 Willem Van Schendel, Statelessness in South Asia: The Making of the India – Bangladesh Enclaves, *The Journal of Asian Studies*, Vol. 61 No 1, (Feb 2002), pp. 115 – 147. P. 128.

385 Somrat Bepari, a resident of Bangladeshi enclave in India, interviewed on

386 Willem Van Schendel, i*bid*., P. 128.

387 *Ibid.*

388 A. N. M. Arifur Rahman, State of Human Rights of Enclave Dwellers: An Appraisal, Stamford Journal of Law, Vol. 4 (2014), p. 51.

389 *Ibid., p.*

390 *Ibid., p. 48.*

391 *Ibid.*

392 Sreeparna Banarjee, Ambalika Guha and Anasua Basu Ray Chowdhury, The 2015 India Bangladesh Land Boundary Agreement; Identifying the Constraints and Exploring the Possibilities in Cooch Behar, ORF Occasional Working Paper, No. 117, New Delhi, 2017, p. 2.

393 Dr. Sreeradha Datta, *Paper Presentation*, (Singapore National University; 2016), p. 10.

394 *Ibid., p. 11.*

395 A. N. M. Arifur Rahman, The Enclave Politics and India Bangladesh Relations, Sazzad Hossain eds. *Stamford Journal of Law*, vol. 5, (2018), p. 95.

became capable of having the right to ownership and medical facilities. Instantaneously after exchange, the Prime Minister of Bangladesh visited the long ignored area and triggered the hope and aspiration of the people of the region.[396] In the changed circumstance, a number of problems have been identified as the problem in transition.[397] The life leading manner, economical behavior and role of local administration specifically need concentration.[398]

Tracing Further Problem in the Former Enclaves

The governments of both Bangladesh and India are passing a transition period. They have taken a number of initiatives to merge the former enclave people and lands with the mainstream either of the states.[399] Now it is expected to implement everything properly. In transition, there are severe problems like land settlement issues, originality of the documents of record of rights, addressing the educational certificate issues, development issues, insufficient security management, lack of micro-credit efforts, controlled sovereignty in Angarpota and Dohogram, Condition of statelessness, fake address and abuse of enclave benefit, communication to educational institutions, social clash with mainland people and the chit land people pointing at the special benefits, using the fake permanent address complexities etc.[400] On the other hand, people retained their Indian nationality, went from Bangladesh used to live in resettlement camp like the incarceration with large wire fenced.[401] The government of India offered studio flat for every resettled nationals from Indian exclaves but till today they did not get such assured rights.[402] The people started hunger strike before the office of the district administrator of Mekhligonj.[403] One of the residents compared them with football.[404] The resettlers yet were given the Adhar card (National ID Card of India) like the National Identity Card of Bangladesh. Information was gathered that the home ministry of India was working with those 987 people who kept their old nationality of India and left for India from the enclaves within Bangladesh.[405] It is to mention that the former Bangladeshi enclave people got Adhar card and ration though dissatisfaction was seen at their opinion.[406] The camp dwellers in Dinhata were suffering from shabby environment, lack of sanitation, work, money, food as well as medicine and treatment.[407] These are the problems in the period of transition. It could be argued that the above mentions transitional problems should be addressed properly otherwise long expected solution of suffering may not be disappeared.[408]

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396 *Ibid., pp. 95-96.*
397 Dr. Sreeradha Datta, *ibid., pp. 12-15.*
398 *Ibid.*
399 Dr. Salena Akter, personal interview on 12 December, 2017.
400 Arifur Rahman, (2018), pp. 94-95.
401 Sarita Santoshini, Hope for Better Life on the India Bangladesh Border, Environmental Studies, University of Melbourne, January 15, 2016.
402 Daily Prothom Alo, August 01, 2017.
403 *Ibid.*
404 Vairab Borman, interviewed on November 22, 2017.
405 Suvijit Bagchi, *ibid.*
406 Daily Kaler Kantha, July 31, 2017.
407 Daily Observer. July 32, 2017.
408 Dr. Sreeradha Datta, Paper Presentation (Singapore National University, 2016), No. 219, pp.10-11.

The Partition Commission worked with aberrant intolerance. The members became baffled either to identify the enclave-exclave problem, or could take necessary stride out tenacity of such artificial dilemma. Three years have passed since the exchange of former enclaves. Most of the interim difficulties have been categorized. By 2020, the problems may be reconsidered by both the states. The concerned government officer should take necessary action to resolve the international issues. The residents who were excluded from the head computation list of 2011, in Bangladesh they may easily become enlisted in the voter list with fake addresses of the mainland in few cases, but in India it is more than impossible. So, it would be a matter of great misfortune if the question of statelessness comes back again. The local leaders of political parties should come forward not to increase social discrimination. Some families have been fragmented due to retaining and changing the citizenship question. They may be given another opportunity to reconcile with their families. The government of India should take some initiatives to rehabilitate the camp dwellers in Dinhata and Haldibari. Internal affairs of the states might be resolved with expert opinion and government surveillance.

Conclusion

The Prime Minister Norendra Modi rightfully addressed the exchange of enclaves with the dismantling of Berlin Wall.[409] This was completely a political problem of modern state sovereignty. The enclave problem was an artificial problem which came out from the partition of India. Neither the Radcliffe commission, nor the newly independent states took necessary action to level the enclave problems. It is to mention that the speedy partition activities, the consequence were not properly addressed. Due to quit India movement, British government was in a hurry to declare the independence of India. Lastly, 68 years later, the stranded people got their legal entity in a state. The unmaking of enclaves has become successful. The residents of these scattered areas have been entitled to state rights and facilities. They are now the citizens of independent states and can move to and fro as well as abroad for self development. Since the partition, for the first time they have cast vote both in Bangladesh and in India. Now they are getting the taste of independence.

409 The Economist, *Bangladesh India Mapped Out; A Cerographic Anomaly is resolves*, June 13, 2015.

Mediation: Evaluation of MLAA Initiated Mediation in Mitigating Court Cases in Madaripur District

Mahua Gulfam*

Sharmin Sultana**

Abstract: Right to protection of law has been guaranteed as the fundamental right under the Constitution of the People's Republic of Bangladesh. But in the most of the cases indigent and disadvantaged people cannot get this right. Our judicial system has a rich tradition but too much formal and time consuming. In recent years, its demerits are ruling over the merits, creating backlogs and delays. In this circumstance, Madaripur Model of Mediation (MMM) program can be the exemplary process to mitigate court cases. Mediation is voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a mutually acceptable settlement. This process is preferred due to its advantages which include speedy resolution of disputes, flexibility, less technicalities, cost effectiveness, ability to involve experts, privacy, saving on courts time etc. This study highlights the necessity of implementing the Madaripur Model of Mediation Program in all districts of Bangladesh. The purpose of this study to focus the role of Madaripur Model of Mediation Program in reducing court cases.

Keywords: Mediation, MMM, Mitigate, Dispute, MLAA, Court, *Shalish,* Settlement, Facilitating.

Introduction

Each person has right to access to justice. Equality before the law is one of the most important rights. To enforce the rights for better access to justice from the grass root level to the national level, it needs to create opportunity of access to justice for all. Like many other countries, the legal system of Bangladesh is extremely formal, complex, time consuming, urban based and financially draining. For these reasons, many people particularly disadvantaged people cannot enforce their rights. They cannot access the formal justice system on the equal level. Consequently, many suffer injustice in

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silence. Dispute is a regular and continuous process in our life. One is resolved and another is emerged. Dispute cannot be excluded forever from our lives but it can be diminished. Dispute resolution is the process of resolving disputes between two or more parties or groups. In other word, dispute resolution means a set of actions used by an authority to solve disagreements. Law is the reflection of the aspiration through which a notion passes. With the changing of society its legal system changes. Mediation procedure is incorporated as dispute resolving process with the advancement of society. It is recommended as a potential solution under the ADR. In Bangladesh, several Non-Government Organizations introduce mediation and provide mediation service for bring relief to the parties. MLAA is one of the

famous NGO that introduce Madaripur Model of Mediation program to increase access to justice for disadvantaged rural groups, especially women.

Research Methodology

The general methodological approach of this study is grounded on practical approach based on data and information systematically gathered and analyzed. This study is based on primary data as well as secondary data collected from law reports, manuals, text books, case study, published articles, web-sites and other available resources explored on this issue.

Concept of Mediation

Mediation is the process of solving civil and commercial disputes through a third party who is not a party to the dispute and works impartially to help the parties reach a conclusive and mutually satisfactory agreement.[410]

Mediation is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties.[411] Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects.[412] The term "mediation" broadly refers to any instance in which a third party helps others to reach an agreement.

[410] Salam, Khandker Dider Us, 'Mediation, not litigation', Dhaka Tribune, Dhaka, 21/01/2015, (https:// www.dhakatribune.com/ uncategorized), accessed-03.05.2019
[411] Ibid.
[412] Akhtaruzzaman, Dr. Md., "Concept and Laws on Alternative Dispute Resolution and Legal Aid", Sixth edition, Shabdakoli Printers, Dhaka, 2015, p-64.

More specifically, mediation has a structure, time able, and dynamics that "ordinary" negotiation lacks. The process is private and confidential. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is more becoming a more peaceful and internationally accepted solution in order to end conflict. Mediation can be used to resolve disputes of any agreement. Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement.

Purpose of Mediation

Mediation process is designed to meet a wide variety of different purposes. Some of these are directly related to improving the administration of justice and rule of law. Some are related to other development objectives.

The main purpose of mediation as a dispute resolution process is to diagnose the root causes of disputes. It transforms actual and potential disputes into peaceful and positive processes.[413] Mediation process supports and complements court reform. This process increases people's satisfaction with dispute resolution and access to justice for disadvantaged groups. It also reduces delay and the cost in the resolution of disputes. It improves the quality of the dispute resolution process. It is very important to create a lively, congenial environment.

Overall, the main focus is to provide access to justice for the poor and women as well as more effective justice for them. Mediation process can be particularly useful when parties have a relationship they want to preserve. But it cannot be effective if one of the parties is unwilling to compromise. In other word, it may not be a good choice if the parties have a history of abuse or victimization.

Madaripur Legal Aid Association (MLAA)

The Madaripur Legal Aid Association (MLAA) is a pioneer non-governmental organization (NGO) in the legal sector of Bangladesh, with a vision for establishing peace, justice and harmony in the community. After the liberation war, significant deterioration in the rule of law and the human rights situation has been apparent in our country. Seeking justice becomes particularly difficult for the poor and disadvantaged people, especially women. A small group of dedicated lawyers and social workers

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4. Samad, Md. Atickus,"A Text Book on ADR and Legal Aid", First Edition, National Law Publications, Dhaka, 2013, p-05.

took initiative to offer free legal assistance to the indigent in the formal judicial courts. Their efforts proved successful and led the group to formally float the Madaripur Legal Aid Association (MLAA) in March, 1978. It was established as a Legal Aid Foundation. After two years it began to work as the association.

The **Primary beneficiaries of this organization are** disadvantage and poor people, particularly of the rural area and especially of female and children stratum are the primary beneficiaries.

Secondary beneficiaries of MLAA are UP representatives, students, teachers, village elites, women leaders, rural civil society members, journalists, lawyers, judicial officials, law enforcing agencies and NGO activists.[414]

MLAA has set the goal of improving the quality of life of the disadvantaged people through the exercise of their human and legal rights for peaceful coexistence. In pursuit of this goal, the MLAA objectives are to make local and traditional justice system more effective and to ensure access to formal judicial system for disadvantaged people. It institutionalizes and modernizes the traditional mediation system and contributes in the establishment of the rule of law and promotes human rights culture by raising awareness of people. This institute pursues advocacy activities for law reform and strengthens the institutional capacity of MLAA.

MLAA created opportunities for disadvantaged people. People received counseling from MLAA on different legal issues and have become more aware of the legal and social systems.[415]

Activities of MLAA

The major activities of MLAA are the followings-

Free Legal Aid: MLAA provides free legal aid services to the disadvantaged who are victims of human rights abuses, who are on trial or in custody, and cannot afford a lawyer to defend them or are deprived of access to justice,

[414] Mediation, MLAA, 2016, https://mlaabd.org/mlaa-profile. Accessed- 03/04/2019.
[415] Ibid.

Dispute Resolution through Mediation and activation of UP judicial system: MLAA facilitates and resolves disputes locally through mediation, and through the Village Court & Arbitration Council of Union Parishad, as an alternative to the formal justice system,

Human Rights Education: MLAA provides human rights education to strengthen the knowledge and skills of human rights activists to promote and protect human rights,

Advocacy and Networking: MLAA advocates for law and policy reforms to make justice accessible for the poor and the disadvantaged.[416]

To activate the local justice system MLAA provide training and technical support to the UP representatives to run the Village Courts effectively. Organize workshop, meeting, courtyard meeting with local UP representatives and local elites to make them aware about the Arbitration Council (AC) / Village Court (VC) functions. To aware the village people sometimes they play drama.

Mediation process initiated by MLAA

MLAA started the legal aid service as its initial program to help people, particularly women, exercise their legal rights in order to change their socio-economic status. They started to resolve dispute by "*Shalish*".

Shalish is an age-old, traditionally based system of mediation and dispute resolution in rural area in which disputants, community members, and village elders gather locally to mediate a conflict and arrive at a resolution agreeable to all involved parties. Originally, *shalish* was an effective means of resolving local disputes in an amicable, cost –effective manner whereby fractured relationship were restored.

However, gradually the *shalish* system was subject to exploitation at the hands of the powerful elite who used their positions to enforce discriminatory practices to maintain the status and local patronage system. Shalishkars imposed decisions rather than negotiated agreements between disputants. People were subsequently left with two options using the expensive and time-consuming courts or to putting up with their grievances. In, 1981 MLAA began filling cases on behalf of their clients. The founder was not satisfied with either the treatment or the results that the poor received in court. Based on its experience, MLAA sees the existing judicial system as hierarchical, non-gender

[416] Advocacy and Networking, MLAA, 2016, Asian Forum for Human Rights and Development, (https:// www.forum-asia.org) accessed- 09/05/2019.

friendly, expensive, complex, time-consuming and difficult for the disadvantaged people to access. In comparison with this formal judicial system MLAA realize mediation as capable of achieving settlement of different disputes locally, involving minimum cost and providing maximum satisfaction to the disputing parties. Therefore, in 1988, MLAA began to focus on mediation in the name of Madaripur Model of Mediation (MMM) as a means of addressing client needs. MMM has been largely effective in securing access to equitable justice by the disadvantaged people.

The process is quite straightforward. A poor person usually seeks help from the mediation worker with regard to his/her dispute. The mediation worker will usually ask the assistance seeker to fill up a form which includes personal information and information regarding education, income and dispute. After initial recording of the complaints by the mediation worker issued a notice via general post to the alleged respondent. The notice details the complaints and invites the respondent to the attend a mediation session to settle the dispute on a specific date and time. The aggrieved party and mediator are also informed accordingly. If the respondent does not attend mediation on the date and time specified, mediation worker send a second or third notice as required. If the respondent fails to respond, a final notice is sent to him via registered post notifying him of a last chance to resolve the dispute through mediation.[417] Once mediation begins, the mediation worker will explain the process to the parties. A major focus of the mediation process is allowing the clients to share their stories. The mediation committee members do lots of inquiry. The whole mediation process generally takes at least three months to resolve a land dispute and approximately one month to resolve a family problem.

Findings and Implementing the Solution

The MLAA was established in 1978 to provide legal aid to the rural people who were unable to access the formal system of justice. In seeking a more sustainable and cost-effective approach, the organization focused on the development of mediation process that would assist the poor and those most vulnerable to abuse and exploitation to secure justice for themselves. In order to make mediation a success, rural people had to be convinced of the value and effectiveness of a revitalized mediation model. In utilizing local people, MLAA gained the confidence of communities by encouraging local contact persons to disseminate information on mediation as a viable auxiliary to the court system and through the gradual formation of locally based mediation committees whose members attended courses on human rights and the law.

[417] Chowdhury, Dr. Jamila A,"ADR Theories and practices", First edition, London College of Legal Studies (south), Dhaka, 2013, p-212.

The organizational structure of Mediation model program by the MLAA is a multi-tier structure. It has the head office, office at district level, thana office, union office and village level mediation committee.

Within each district there are some Thana offices. The district offices have small staffs of 3-5 people. Thana level offices are staffed by 2-3 people who are the direct supervisors of the mediation workers at village levels. These supervisors are required to spend 16 days in the field every month. The MLAA has formed central mediation committees in each union comprised of 10-12 members selected from the MLAA village committees. The central mediation committee members receive a three days training in mediation. Mediation workers of each union receive approximately ten days training from head office. Within each village in the Union an MLAA mediation committee of 8-10 people is established. The MLAA village mediation committee members are generally present at each mediation due to work and family obligations. Mediation workers are responsible to receive application for mediation, send letters to the involved parties, arrange mediation sessions, supervise mediation sessions, follow-up and monitor the solution agreed at and report to head office.

Research cell of MLAA maintains updated information on mediation procedures and data on sessions and outcomes.

Monitoring System

To ensure the transparency, accountability and efficiency of mediation activists, the MLAA organized a system of supervision, monitoring and evaluation under a monitoring and evaluation cell.

The cell continues it works at the mentioned levels-Monitoring through random sample review of mediation workers and supervisors monthly activity reports.

Specific monitoring and evaluation of committees recognized as requiring additional support and assistance. The cell is required to produce report to the management.[418]

[418] Ibid.

In brief, the whole procedure is like this-the mediation workers send monthly reports to their respective mediation committee. Thana level supervisors review and evaluate the reports and submit to the mediation co-ordinate. The mediation coordinator observes the activities of all mediation committees and sends report to the chief coordinator. The chief coordinator identifies the weaknesses of mediation committees and takes initiative to remove those. He/ she may also request the monitoring and evaluation cell to conduct an assessment of the committee or procedure in question with recommendations for action or follow-up.

Case Study

Mediation

Nature of the Suit

Rinku Pal (25) and Sunder Pal (35) were passing their marital life happily. However, inconsistency arouse when she, Rinku Pal, was not welcomed by her mother-in-law. This disharmony continued for several years and, finally, they chose separation as ultimate resolution.

In their family, Rinku Pal, daughter of Shyam Sunder Bir of Village and Union Mohishar of Vedorganj upazila of Shariatpur district, witnessed stern poverty from her childhood. She was the eldest of her three sisters and had two other brothers. Her education stopped at class-X. At that age she was got married to Sunder Pal, son of Shohodev Pal of Tekerhut under Khoajpur Union. Sunder also studied up to class – X and a goldsmith by profession although their family earns from pottery made out of clay.

Summary of the fact

Rinku often had to tolerate bitter treatment and bullying from her mother-in-law. The in-law rebuked Rinku at any silly excuse and denounced uncompromisingly for her (Rinku) father's financial deficiency. Sunder lived in Dhaka. While he came home, the in-law resisted them to stay even speak together. Moreover, if any guest visited the house, she introduced Rinku as their maid. Her husband, Sunder, tortured her if she raised her voice against those. In the meantime, Rinku's husband planned to expand his business and forced Rinku to bring BDT. 5,00,000/- from her father. She gave details to her father and left her husband's house. Days passed but she received no response from her in-laws house.

Resolution Date

Mr. Nurul Islam Sarder, a Union Parishad (UP) member of Mohishar advised her to make a complaint against them to the Union Organizer, Hosne Ara, of Madaripur Legal Aid Association. On 24 December 2014 she filed a complaint against the Pals which bore Regis. No. 43/07.

Types of Resolution

The date 04/01/2015 was set for mediation. The parties, social elites, Community Based Organization (CBO) members were invited and requested to be present in time. That day Mr. Nurul Islam Sarder, UP member of Ward No. 01, presided over the mediation session. After a prolonged discussion it appeared that Rinku Pal was not eager to continue the family life with Sunder Pal any more considering the past inconsistency in their relationship.

Condition

The parties agreed in the conditions that, the respondents would pay BDT-3, 75,000/- to Rinku; they would end up their marital relationship and would not claim anything in future.[419]

All victims expressed their gratitude to Madaripur Legal Aid Association after resolve the dispute.

Success of Mediation Process Initiated by MLAA

Madaripur Legal Aid Association is in the first legal aid and human rights organization in Bangladesh. This organization believes in integrity, justice and accountability in the way it works with oppressed, vulnerable and deprived people. For the past 40 years MLAA has developed sustainable programs that address the greatest challenges with formal and informal justice system in Bangladesh. Starting its activities with free legal aid program, MLAA has flourished in mediation by MMM program which has great influence to reduce case backlogs. To run the program, MLAA gave importance in both quantitive and qualitative aspects.

In the year of 2015-2016, MLAA resolves 3040 disputes through mediation. A total amount of tk.125, 985,500/= is recovered as maintenance and denmohor (dower), recovery of money and compensation against injuries and land. The report shows that the success rate of mediation by the year 2016 is at 80 percentage.[420] As the report of the year 2014-2015 of MLAA resolves 3461 disputes through mediation and a total of tk.204,248,400/= was recovered. The success rate is very high. Each year, through MMM program up to 4000 local disputes are resolved through mediation.[421] As per the

[419]. Annual Report, Mediation, Case Study, 2015, (http://mlaabd.org/annual-reports,), Accessed 03/05/2019.

[420] Annual Reports: MLAA, 2015-2016, http://mlaabd.org/wp-content/uploads/2016/10/Annul-Reports-2015-2016, accessed: 03/04/2019.

[421] Annual Reports: MLAA, 2014-2015, http://mlaabd.org/wp-content/uploads/2016/12/annual reports. Accessed: 03/04/2019

statement of the UP representatives of Madaripur district, people of this district very often go to the court only for the activities of MLAA. That means the application of this program reduces the number of cases in this district.

Statistics shows that in 2013, total 10,470 disputes resolved outside the court while total 17,666 disputes resolved in 2016. It is an evidence of the success of alternative resolution process.

The impact of accessible justice on people's lives has been positive. People recognize the benefit of approaching the MLAA to resolve their disputes through the MMM. The poor and powerless are able to obtain redress through mediation and restore their rights. Disputants usually prefer this method for conflict resolution and the success of the MMM is allowing the parties to address and work through the root cause of their problems. It does not replace the courts and can never be considered as a substitute to the formal system. As the objective is to secure equal access to the rule of law, mediation must serve as an auxiliary to the formal justice system to remove the burden of court. The MMM provides the poor and marginalized with a viable cost-effective opportunity to access justice. In fine, MLAA is strict in its commitment and dedication to the targeted people. Time has come to show respect to the rights of human beings; and the society will come under desired stability where everyone will be sensible to others.

Major Recommendations

Exploring and using option for diversion before and after cases are filed should be considered as one of the immediate measure to remove case backlogs. Mediation model is to be considered as that diversion which is introduced by MLAA. It creates scope for reducing case backlogs and harassment of disadvantaged people. To make the MMM program more effective, extensive and pro-active co-ordination is needed. Other initiatives which can be taken into consideration are creating awareness about advantages of mediation; spreading the success story of MMM program; providing sufficient training for mediation workers and mediators; financial incentives should be increased; train more lawyers on mediation techniques for greater success; grass root mediation committee should be more active; Government should encourage the MLAA's efforts and more initiatives to be taken to reform the laws.

After all, to make the MMM program more fruitful, an awareness scheme must be initiated for the disputants, lawyers and members of the judiciary. And scope must be created for continuing this program without unreasonable interruption.

Conclusion

The increasing trend in case backlogs create challenge for governance, judicial effectiveness, access to justice, rule of law and citizen rights. The strategy for ensuring good governance aims at strengthening the judiciary. It especially focuses on reduction of court cases. Madaripur Model of Mediation can be the process by that cases can be mitigated. Moreover, mediation eschews the negative impacts of litigation in cases of minor disputes and makes use of the participatory roles to solve problems which ensures social harmony and enhanced confidence of the parties. Resources and time saved by rural people through mediation are utilized to better their economic conditions. In fact, MLAA has succeeded in penetrating the corrupt and imbalanced rural power dynamics through facilitating spontaneous participation of the rural people by the MMM program.

A Critical Analysis of Private Trial in Different Courts of Bangladesh

MD. Mashiur Rahman*

Abstract: Publicity is the authentic hallmark of Judicial as distinct from administrative procedure, so every court of justice is to remain open for all citizens. The right to public hearing and fair trial has been constitutionally guaranteed in Article 35(3) of the Constitution of the People's Republic of Bangladesh. But public hearing regarding any personal matter is a clear violation of right to privacy and article 43 of the Constitution of Bangladesh expressly declares that every citizen shall have the right to privacy of his correspondence. So ideal blending of two conflicting claims (Public trial and Private trial) is essential. The provisions relating to private trial under different laws of Bangladesh aim at such blending. They have been enacted with a view to protecting the interest of the litigants without jeopardizing the objectives of open trial. This article with this background makes an effort to examine the present legislations and contemporary decisions of the Supreme Court relating to private trial under different laws of Bangladesh with their major loopholes and lastly recommends to avoid prejudice of public hearing and to ensure the right to privacy of the contesting parties.

Key words: Right to Privacy, Public trial, Private trial, *suo-moto*, Supreme Court, ADR.

Introduction

'Injustice anywhere is a threat to justice everywhere' -**Martin Luther King Jr.**[422]

The modern legal system has launched camera trail with a great motive to protect the right to privacy of the parties relating to the cause of action.[423] If any trial is operated in front of the general public and media, the parties can face the undesirable increasing stress, the seizure and invasion of their secrecy and privacy, the violation and damage of their character and reputations, which give them a

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[422] U.S. Minister, Civil Rights Activist - Biography.com

[423] 'Cause of action' is a set of facts sufficient to justify a right to sue to obtain any interest or the enforcement of a right against another party.

feeling that court proceeding is actually suppressing them and diminishing their status in front of the world. Under such circumstances, everyone wishes the trial to be conducted privately behind close door.[424]

Therefore, the laws of private trial attempt to devise such a system and to operate it in such a manner as to enable it to protect the privacy rights of the parties without endangering the objectives of the public trial.

Considering the perspective, the legislature has been given some precise directions for making private trial. Where the legislature confers discretion in making such decisions, the discretion is to be exercised according to the guidelines provided by law; in addition the courts have evolved certain norms for the proper exercise of the discretion.

In considering the above matter, initially this paper will analyze the legal ambit of private trial, review of the existing laws on private trial of Bangladesh and focus on the possible way out to upgrade these paramount issues for ensuring public interest.

The Right of Privacy: Basis of Private Trial

The right of privacy is the Pandora's Box in jurisprudence of law.[425] The word Privacy is very unclear character in the sense of its feeling as well as its definition. To know a common meaning of privacy *Gillian Black* proposes that, "privacy is a desire of an individual to be free of intrusion."[426] In the Harvard Law Review, *Justice Louis Brandeis* said, "privacy is the right to be let alone".[427] *Justice Cory* says, "free from interference is a key elements of privacy."[428] *Justice Dickson* said, "Privacy may be a right of the individual to determine when, how and to what extent he or she will release personal information."[429] In one form to another, the term 'privacy' has taken the normative phrase in the "right to privacy".[430] In the contemporary world of law the right to privacy is being recognized in

[424] Jacob, Sir Jack I. H., 'The Fabric of English Civil Justice' - Eastern Law House Private Ltd., New Delhi, 1987, p-22.
[425] Pandora's Box means a process that once begun and generates many complicated situations.
[426] Black, G. - "Publicity Rights and Image, Oxford: Hart Publishing (2011). pp. 61-62.
[427] Warren and Brandeis -*"The Right to Privacy"*, The Harvard Law Review (1890), P-193.
[428] *R v Edwards (1996) 1 SCR 128*
[429] *R v Duarte (1990) 1 SCR 39*
[430] *Daniel J. Solove,* 'Conceptualizing Privacy, *California Law Review'* vol. 90, 1087 (2002), ("Philosophers, legal theorists, and jurists have lamented the great difficulty in reaching a satisfying conception of privacy."); *James Michael*, Privacy and Human Rights 1 (UNESCO 1994) ("Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define, yet there is no single definition or analysis or meaning of the term").

almost all modern legal system[431] as well as in many international instruments.[432] The Constitution of the People's Republic of Bangladesh has also recognized the right to privacy under Articles 31, 32 & 43.[433]

With the light of this 'right to privacy' a new phenomena has arrived in our modern trial system in the name of *"Camera trial".* In early English legal history[434] the king had a body of learned men to aid him in answering questions of law and to formulate legislative policy. This body was known as the King's Council. When the Council sat as a judicial body it came to be known as the Court of the 'Star Chamber' (in Latin: *Camera stellata*).[435] The Star Chamber has been historically associated with the *in camera* proceeding to protect the interest of king and kingdom.[436]

In-camera (Latin: "in a chamber")[437] is a legal term that means *in private*.[438] The same meaning is sometimes expressed in the English equivalent: *in chambers*. Generally, *in camera* describes court cases, parts of it, or process where the public and press are not allowed to observe the procedure or process.[439] Usually only the presiding officer, parties, their respective Advocates and witnesses are allowed in the closed door court room or in the chamber of the judge to protect the interest, privacy or secrecy of the litigants.[440] These types of trial are often called private trial, chamber trial, closed door trial or closed court trial and most commonly 'in-camera trial'.

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[431] Over 150 national constitutions mention the right to privacy including UK, USA (through the judgment), Constitution of Japan, Constitution of India, Constitution of Australia etc.

[432] A right to privacy is explicitly stated under *Article 12* of *UDHR.* Article – 14 & 17 of *the ICCPR,* Article –16, 40 of *the Covenant on the Rights of the Child (CRC),* Article – 14 of *the International covenant on The Protection of the Rights of All Migrant Workers and Members of their Families*, Article –22 of *the Covenant on the Rights of Persons with Disabilities*, Article – 4 of *the African Charter on Human and Peoples' Rights*.

[433] The Journal of Asian and African Social Science and Humanities, Vol.1, No. 1, 2015, *"Right to privacy: Is it a fundamental right in Bangladesh Constitution?"* Md. Zahidul Islam. pp. 1-7.

[434] From the late 15th century to the mid-17th century, in 1641
[435] A History of the English Courts, Carter (5th ed.1927), pp.79, 80

[436] This concept of the Star Chamber's secret procedure is reflected in some of the modern cases. See *Davis v. United States, 247 F.2d 394 (8th Cir. 1917).*

[437] "Glossary of Legal Terms," US courts.gov;
[438] *Ehrlich, Eugene, Amo, Amas, Amat and More, p. 151, ISBN 0-06-272017-1,*

[439] *United States vs. The Progressive*-a case where two trials were held simultaneously, one *in-camera* and one public,

[440] Shivraj Patil, B.S.L.LLB. Law & Asian School of Cyber Laws, Modern Law College, Pune.

But '*secret trial'* is not consistent with the meaning of camera trial. A secret trial is also a trial that is not open to the public or not generally reported in the news but in the secret trial no official record of the case or the verdict is made available.[441] The *R v Incedal and Rarmoul-Bouhadjar* (2014)[442] was to be the first British trial to be held entirely in secret and the Court of Appeal blocked full secrecy.[443] The secret trials were usually used to protect national security but secret trials also have taken place in modern so-called democratic countries to suppress political dissent or eliminate the enemies of the regime.[444]

Any cases may be triad in camera where the national security are involved or to protect trade security or where questions arise regarding privileged communications.[445] It is more important to protect confidentiality in certain criminal cases, especially in sexual abuse cases and also where a child is a victim or accused.[446] The trial in-camera may be held for the expediency of circumstances or the choice may be due to requirement of national laws or simply judge's discretion to do so.[447] The presiding judge must take notice to the nature, gravity and sensitivity of the case before granting a petition for camera trial. The age and gender of the parties play a significant role to grant any proceeding in-camera.[448]

Private Trial in Matrimonial Matters

Under the existing law of Bangladesh, private trial or in-camera trial are most commonly seen in matrimonial cases.[449] The suits regarding Judicial separation, restitution of conjugal rights and

[441] *"Secret trial plan for English court", BBC News, 4 June 2014*

[442] Royal Courts of Justice Strand, London, WC2A 2LL, Case No: 2014/02393C1 of EWCA Crim 2367; [*2014*] 1 Cr App *R* 26. On 12 June 2014, *Lord Justice Peter Gross*, *Mr. Justice Simon* and *Mr. Justice Burnett* issued a ruling overturning the order with respect to the anonymity of the defendants and limiting the degree to which the trial could be heard in private. The ruling stated: *"We express grave concern as to the cumulative effects of holding a criminal trial in camera and anonymising the defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified. Suffice to say, we are not persuaded of any such justification in the present case."*

[443] 'Fully secret terror trial blocked by Court of Appeal' - *BBC News.*12 June 2014

[444] *Ibid*.

[445] *Russell V Russell* (1976) 134 CLR 495,520

[446] Chandrika, Dr. M.P., "The Open Justice v/s In Camera; Indian Scenario". International Journal of International Law: ISSN: 2394-2622 (Volume 1 Issue 2)

[447] Pudaite, Peter; 'Walked the path from software system engineer to CTO'. Published on- Jan 31, 2013.

[448] Monir, M Shahnewas, Judicial Magistrate, Comilla, Bangladesh. The Statement was given in the time of interview taken by author at the personal chamber of Magistrate in the Comilla Judge Court on 24th December, 2017.

[449] According to the Section -5 of the Family court Ordinance- 1985, the Family Court shall have exclusive jurisdiction to entertain, try and dispose of the matters relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children.

divorce-the common grounds pleaded are cruelty, desertion, impotency, adultery, virulent and incurable form of leprosy, communicable form of venereal disease etc.[450] Cruelty may include physical or mental shock, excessive sexual intercourse or refusal to sexual intercourse. It may also include physical assault, molestation, sodomy and bestiality.[451] On such grounds a woman married according to the Muslim law shall be entitled to obtain a decree for the dissolution of her marriage under *section- 2* of *the Dissolution of Muslim Marriages Act, 1939*.[452] Nearly the same grounds are also mentioned in section- 15 and 16 of *the Special Marriages Act 1872,*[453] sections- 10 and 18 of *the Divorce Act 1869,*[454] and other like Acts also recognized the said grounds.

The Above mentioned grounds are directly connected with the reputation of parties. Such as, in the suit of divorce under *section-18 & 19* of *the Divorce Act, 1869*[455] a husband may have to prove that his wife is leading a life of prostitute and if he is required to prove such matter before the court in front of public or if such matter is published by the media then definitely it is a serious abuse of the process of the court[456] and beyond any reasonable doubt it will deter him from seeking relief to the court. Under such circumstances, we have some special treatments of law for such victims.

According to the *section 53* of *the Divorce Act, 1869,*[457] "the whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors *(in-camera).*" Under *section 11* of *the Family Court Ordinance; 1985*[458] states that, "Family Court may, if it so deems fit, hold the whole or any part of the proceedings under this Ordinance in camera. Where both the parties to the suit request the Court to hold the proceedings in camera, the Court shall do so." *Rule-17* of *the Muslim Family Laws Rules, 1961*[459] states that, "All proceeding before an Arbitration Council shall be held in camera unless the chairman otherwise directs." Section -23 of the *Family Violence (Prevention*

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[450] *Supra* note 25.

[451] Azizur Rahman, Add, Dist. Judge, Farrukhabad, India. 'Proceedings-in-Camera', *Judicial Training & Research Institute Journal*, December, 2012. P. 1

[452] (Act No. VIII of 1939)

[453] (Act no. III of 1872) the Bangladesh Laws (Revision And Declaration) Act, 1973(Act No. VIII of 1973)

[454] (Act no. IV of 1869) the Bangladesh Laws (Revision and Declaration) Act, 1973.

[455] *Ibid.*

[456] Under section -151 of the Code of Civil Procedure- 1908, "Court has inherent power to prevent the abuse of the process of the court."

[457] (Act no. IV of 1869)

[458] (Ordinance no. XVIII OF 1985)

[459] These Rules were published in the Dacca Gazette on July 11, 1961. In the exercise of the powers conferred by section 11 of the MFLO, 1961(VIII of 1961)

and Protection) Act, 2010[460] states that, 'Proceedings to be held in camera. - The Court, either on the consent of the concern parties or its own motion deem necessary, it may conduct the proceedings under this Act in camera.' Whereas, *The Code of Civil Procedure-1908*[461] has no express provisions regarding to hold a proceeding in camera, therefore the court has jurisdiction to apply his exclusive inherent power under section -151 in this regard. It was held in '*Sultan Mia vs. Haji Usuf*[462]*'* that "Inherent power must be exercised if there is no specific provision which would meet the necessities of the case." According to the judgment of '*Makbul Ahmed vs. Mahammadullah'*[463] "it's well established principle that every court has inherent power to prevent abuse of the process of the court."The court can exercise the power either on application by a party or suo-moto.[464] In *Ram Krishan Nath vs. State,*[465] *"*the inherent power is the extra-ordinary jurisdiction of the High Court Division to prevent abuse of the process of the court in both civil and criminal cases."

Private Trial in Criminal Matters

In the matter of criminal cases, the camera trial are mostly common in sexual harass cases relating to the woman and child.[466] Under Section –20(6) of *'The Nari-o-Shishu Nirjaton Daman Ain-2000'*[467], states that- "In case of adjudication of any offence under section-9 (rape, etc)[468] the tribunal, on an application or by *suo-moto*, can examine, if thinks fit, in a closed door room." This law also prohibits media publication by the provision of section-14 which states that, "Any news, information or name & address or any other information regarding any offence, under this Act, committed or any legal proceeding thereof, of which a woman or a child is the victim, shall be published or presented as such that the acquaintance of the woman or the child shall be undisclosed. In case, where the provision is infringed, the person or persons shall be punished with imprisonment, which may extend to two years or with fine not exceeding one lac taka or both." According to the proviso to section 352 of *the Code of Criminal Procedure 1898,*[469] states as follow- 'Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court'. The court can issue injunction against public and lawyers (except parties and their lawyers)

[46o] (Act No, 58 of 2010)
[461] (Act No. V of 1908)
[462] 53 DLR 555, It was also stated in *Dudu Mia vs. Sikandar*, 1994 BLD 228.
[463] 2002 BLD 120
[464] *Shahidul Haque vs. Rahiman Bibi 32 DLR (AD) 52*
[465] 60 DLR (2008) 266, it was also stated *in 'A.T. Mridha vs. State'*23 DLR 335

[466] *Supra Note 24.*
[467] In English the Act is called '*The Nari-o-Shishu Nirjaton Daman Ain-2000'* Act No VIII of 2000, approved by the President on 14 February 2000(2 Falgun 1406)

[468] Section – 9 of the *The Nari-o-Shishu Nirjaton Daman Ain-2000* deals with Punishment for rape or death in consequence of rape.

[469] (Act No. V of 1898)

from accessing in court room for a certain case to serve the purpose of section 352 0f the CrPC.[470] A trial is not illegal when it is held in the Magistrate's private room without objection of the parties.[471] This is totally depends on the discretion of the Judges to hold a proceeding to any other place without court room.[472] The evidence of 'Pardanashin woman' or 'Ghoshawoman' should be taken behind pardah at a private place where she can come in the presence of the accused only, the Judge taking such precaution as she can secure her identity.[473] The court holds the power to order anyone from entering in court room without permission, although the current proceeding was not in-camera.[474]

So, the above mentioned provisions and circumstances are clearly providing direction to the courts as well as to the parties that private trial is also available in criminal cases under Bangladeshi law and we should be aware that, dirty or vulgar facts of the case must not be published in front of the media or public to save our younger from knowing ugly matters and from poisoning their minds to commit new offences.

Private Trial in Juvenile Justice System

Private proceedings of trial are also very common where young offenders are involved. The Constitution of Bangladesh confers the first protection for the children under Article- 28(4), which states that, 'Nothing in this article shall prevent the State from making special provision in favour of women or children.' With the light of this constitutional direction the Republic has passed '*The Children Act- 2013'.*[475] Under the *section – 17 & 19* of the said Act, which states that, 'no child shall be charged with, or tried for, any offence together with an adult'.[476] In the trial of case in which a child is charged with an offence a court shall, sit in a building or room different from that in which the ordinary sitting of the court are held, or on different days or at different times from those at which the ordinary sittings of the court are held.[477] *Section -25* states that, 'if at any stage during the hearing of a case or proceeding, the court consider it expedient in the interest of the child to direct any person, including parent, guardian or the spouse of the child, or the child himself to withdraw, the court may give such direction and thereupon such person shall withdraw.'[478] Under *section- 28* of the said Act states, 'All news, information or name & address or any other information regarding any offence, committed or any legal proceeding thereof, of which a child is the victim or accused, shall not be published without prior permission of the court.' Hence, though the law does not state the proceedings are to be in-camera, but the flavor of the law stating that, the trial will not be run in normal court; court room will be different from the regular court; judges are holding powers to

[470] 18 DLR WP 154
[471] (3 Cr. L J 443)
[472] *Rashid Ahmed vs. State (H. Rahman, C.J)21 DLR (SC) 1969*
[473] (2 Weir 432)
[474] *Supra note* 48.
[475] The Shishu Ain, 2013 (Act No. XXIV of 2013)
[476] *Baktiar Hossain vs. State, 47 DLR 542*
[477] *Munna and others vs. State 7 BLC 409*
[478] *Ibid.*

remove anyone from proceeding and also holding the power to prevent publication in media, which means *the Children Act* is well decorated to hold a trial in private or indirectly in-camera.

Public Trial *vs.* Private Trial

To operate a private trial in public court we have to face a challenge of law regarding open court principle. Because the regular rule is that the trial should be conducted in open court. Open justice means where public and press may sit and report the proceedings to the public.[479] Open trial maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially.[480] This rule equally applied to all courts, tribunals and boards.[481] It is immaterial whether the public were present at the hearing or not but the trial should be conducted in open court.[482] Because the closed trials can breed suspicion of prejudice and arbitrariness, it can turn to the disrespect for law.[483] Public criticism shall send a message to the courts that the justice was not properly delivered.[484] The *Jeremy Bentham* perfectly said, 'Publicity is the very soul of justice. It keeps the judge, while trying, under trial.'[485]

In this regard, the constitution of Bangladesh also guarantees the public trial under *Article-35(3)* which states that, 'Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law.' The *Code of Criminal Procedure-1898,*[486] also ensuring the open trial facilities (with exception) under section-352 which states that, 'the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them'. In the *Code of Civil Procedure,*[487] we can see a provision regarding merely hearing of the suit and examination of witness under order 18 Rule 4 which proves thus, 'the evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the judge.'

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[479] Joseph Jaconelli, '*Open Justice'*, Oxford University Press, New York, 2002, p. 5.
[480] *Terry vs. Persons Unknown* [2010] EWHC 119 (QB)

[481] *Storer vs. British Gas Plc* [2000] 2 All ER 440

[482] *McPherson vs. McPherson* [1936] AC 177

[483] *Richmond Newspapers vs. Virginia,* 1980, 448 U.S. 555

[484] *Tukaram vs. State of Maharashtra*, 1979 AIR SC 185

[485] J. Bentham, 'Rationale of Judicial Evidence', J Bowring (ed.), The Works of J. Bentham, vol.VI, (1843), p. 355.
[486] *Supra Note 47.*
[487] *Supra Note 39.*

Hence, we are facing a conflict of Laws like '*Public trial vs. Private trial*' as well as the rights of the public to know and have access to court *versus* the right to privacy of the victim and his family. In this instance, all courts are required to balance two competing rights.[488] The court usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted counterbalancing interest in confidentiality and the standard balance depends on the source of the right.[489] On the other hand, all the provisions regarding open trial are general provisions of law and private trial relating provisions are belonging to the special and exceptional provisions. So, special provisions will apply in special circumstances. It was held in *Abdur Rashid vs. State,*[490] that 'although the law provides for public trial but this does not mean that the court cannot restrict the admission into the court room of person not connected with the trial where the necessity to do so arises.' In fact the law confers discretion on the court to restrict admission or hold the trial in private if the necessity arises.[491] The requirement of public hearing in a court for a fair trial is, however, subject to the need of the proceeding being held in camera to the extent necessary in the public interest and to avoid prejudice to the accused.[492] In *Ujjam Bai* v. *State of U.P.*[493] it was held that, 'any law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech (media publication)'. While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it.[494] In the end of this conflict we can find that, private trial is an exceptional procedure of public trial therefore an exception can only be justified if it is necessary in the interest of the proper administration of justice.

Private Trial is not a Right but Discretion of Courts

If we meet with a question that, whether private trial or in-camera trial is a right of the litigants or not to established their right to privacy? In this regard we get a negative answer that, no law expresses any such provision to hold a proceeding in-camera as a right of the litigants but many law imposing duties over the presiding judge to consider the matter seriously. Under the existing law of Bangladesh, most of the law directed this matter as discretion[495] of the court by using the word '*if*

[488] *Estate Corporation Limited and Ors*. vs. *Securities and Exchange Board of India and Anr*, (2012) 10 SCC 603.
[489] *Supra Note 24.*
[490] (1969) 18 DLR (wp) 154
[491] *Nadira vs. State*, *2 DLR 80*
[492] *Vinnet Narain vs. India , 1998 AIR SC 88*
[493] *Naresh Shridhar Mirajkar and Ors vs. State Of Maharashtra and Anr*, 1967 AIR SC 1.
[494] *Superintendent & Remembrancer of legal affairs, west Bengal vs. Satyen Bhowmick and Ors*, *1981 AIR SC 917.*
[495] *Osborn V. Bank of the United States*, 22 U. S. 738 (1824), state that, 'Judicial discretion is the power of the judiciary to make some legal decisions according to their discretion. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.'

court thinks fit'.[496] On the other hand, this duty of the court is also not mandatory because there is another common provision in every concerning law that *'Presiding Judge or Magistrate may'*.[497] Therefore, litigants are not able to claim in-camera proceeding as a right but it is open for them to establish such circumstance before the court that, without private trial, their right to privacy will be destroyed which can empower the judges to think fit to operate a proceeding in-camera.

Camera Trial and ADR

The procedure of in-camera trial is very similar with the procedure of Alternative Dispute Resolution (ADR). Most precisely in-camera proceeding is very close with formal or Judicial ADR. The eminent author perfectly stated in his ADR book that,[498] 'formal or judicial ADR is that where a court, by adjourning the hearing, voluntarily or by the application of contesting parties, order to settle the dispute and refer the dispute to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000[499] or to the engaged pleaders of the parties, or to a mediator from the panel as may be prepared by the District Judge, for undertaking efforts to settlement through ADR.' As for example of formal ADR proceeding we can mention section-89(A), 89 (B), 89(C) of the Code of Civil Procedure-1908. If we search the consistency between ADR and camera trial we can find the following arguments -

- Both procedures can be used voluntarily. Either parties can apply or the court can offer to the parties. [500]
- Both proceedings are to be held privately and in confidential manner where other public and media usually have no access.[501]
- Both proceedings can run with flexible and comfortable manner as parties so required.
- Both procedures are able to provide quick relief, whereas they can avoid the formalities of court, uncertainty of time, stress of going to court and also they can fix the date according to the desire of the parties.
- Each party shall have the opportunity to present evidence and make arguments before both proceedings.

[496] Section- 2 of the Dissolution of Muslim Marriages Act, 1939, section- 15 and 16 of the Special Marriages Act 1872, sections-10 and 18 of the Divorce Act 1869, section 11 of the Family Court Ordinance- 1985, Rule-17 of the Muslim Family Laws Rules, 1961, Section -23 of the Family Violence (Prevention and Protection) Act, 2010, Section – 20(6) of 'The Nari-o-Shishu Nirjaton Daman Ain-2000, section -17 & 19 The Children Act- 2013, order-18 rule 4 of The Code of Civil Procedure-1908 and section-352 of the Code of Criminal Procedure- 1898 commonly states that, "Court may, if it so think or deems fit."

[497] *Ibid*.

[498] Akhtaruzzaman, Dr. Md., '*Bikolpo Birod Nishpottir Dharona - 0- Ain ebong Aingotosohaiota prodan Ain*'- Third edition-2010. Chapter-03. P-62

[499] (Act No. 6 of 2000)

[500] Under the civil & criminal laws the court can operate camera trial or offer ADR if court thinks fit, *Supra note-73*

[501] To some extent in ADR the concerning parties can allow media or newspaper publications.

- Both proceedings are applicable in civil as well as in criminal cases.

On the contrary, if we search the inconsistency between ADR and camera trial we can find the following arguments, that-

- In camera trial there is no any other extra cost but in ADR to some extent arbitrator or mediator can charge cost.
- In camera trial the presiding judge shall operate proceeding but in ADR parties can chose the arbitrator or mediator.
- In camera trial the decision of the court is binding over the parties but in ADR the award can be nonbinding and parties still have the right to a trial.
- It is totally depends on the circumstances to operate a proceeding in camera but ADR depends on the mutual contract of the parties.
- In camera trial only one party can take the verdict in his favour but in ADR the result can be in a win-win solution.

In the pros and cons of ADR vs. In-camera trial, the reality is that, both processes are speedy trial mechanism. Both are able to provide relief privately and also able to protect interest of the parties from different angle. But camera trials are usually used in matrimonial cases and criminal cases when any question raise regarding privacy or secrecy of the litigants. In camera trial mainly Judges have to play the vital role to settle dispute but in ADR usually any other person have to play the role of judges. So the judges can feel more comfort by sending a dispute to ADR whereto he is not taking part.[502]

Present Scenario of Bangladesh

According to the present scenario of Bangladeshi court, near about 65% lawyers are familiar with the meaning of camera trial.[503] But all the judges are amicable with the proceeding. If the parties and their pleaders don't ask for camera trial naturally the court will not show interest to hold a proceeding in camera. The court can refuse the petition of camera trial if the matter in dispute is not sensitive in nature or if both the parties are major and male or if the camera trial is likely to reduce the dignity or confidence of public over the court.[504] In the camera trial there is another problem that public may not produce additional witness.[505] Generally public shows more interest to that very cases where pubic are prohibited. In camera trial it is difficult to maintain public's confidence in the administration of justice whereas Judiciary is not beyond the corruption.[506]

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[502] Section -89(A) of the Code of Civil Procedure- 1908 states, Presiding Judge may himself be a mediator.

[503] A survey was conducted by Adv. Shahriar Hossain and Adv. Arif Hasan over hundred practicing lawyers from Dhaka and Gazipur Judge Court. Among them 30 % Advocates are above 50 years, rest 30% advocate are about 30 to 40 years and other 40 % Advocates are fresher. Most of the aged lawyers were able to provide answer regarding camera trial. The survey was held on *12-11-2017* to *16-11-2017*.

[504] *Supra Note 26.*

[505] *Supra Note 62.*

[506] *Supra Note 58.*

But the scenario of Bangladesh Judiciary is quite different. The parties who have entertained by camera trial in matrimonial case are very satisfied by the behavior of the court. The plaintiff of a divorce suit Ms. Santa Rahman stated with satisfaction in our survey[507] that, 'no one knows why I am divorcing my husband except the judge, my previous husband and our lawyers'. The complainant of a rape case in 'Nari-o-Shishu Nirjaton Damon Tribunal Dhaka' stated that, 'this is more flexible for me to explain real fact before the court if there is no unnecessary person in court room.'[508] But we also observed that some people have tendency to file case against innocent people to bring him in the court room and hardly tried to insult him in front of the public by disclosing his personal life. Therefore, it is very important to operate a careful inquiry before starting public trial or private trial.

[507] *Supra Note 82.*
[508] *Ibid.*

Recommendations and Conclusion

In the aftermath of this rules, policy and reality we can easily presume that, people can get numerous benefits by using the provisions of private trial. The existing laws are worthy enough to protect the rights of the people but the peoples are not worthy to claim such rights and we should not forget that, *'Equity aids the vigilant, not the indolent'*[509] therefore we have to take some necessary steps for the protection of our own rights to operate a private trial in public court-

(1) Digital justice system can be much more effective for speedy, swift and sure justice to ensure rights of privacy. In digital justice system, Judges can operate their trial through any electronic device where it's not required for the parties to have the body before the court as like e-medical service.[510] The vision of Digital Justice is to reduce manual processes and inefficiencies from start to finish.[511] The United State of America, United Kingdom,[512] Australia and the Government of Scotland[513] are moving towards the Digital Justice system within the year of 2018 although it's controversial. Bangladesh judiciary should also walk with the modern justice system.

(2) According to our survey,[514] sometime courts presume that, when a person knocks the door of the court, he leaves his privacy at his home. The judges are conscious about the privacy only if the parties are high profiles, models, actors or politicians and the judges are highly absent-minded regarding privacy if the parties are poor or ordinary people. Whoever the person in this regard, the court should keep the 'equality before law' and respect for the privacy of parties.

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[509] Also mentioned in the Canadian judgment from the *'Blundon et al. v. Storm'* [1972] S.C.R. 135 [1972]

[510] Gunter, Tracy D; Terry, Nicolas P (2005) "The Emergence of National Electronic Health Record Architectures in the United States and Australia: Models, Costs, and Questions". *Journal of Medical Internet Research*- '*It can also include health applications and links where doctors provide prescription for the patients through android mobile phones or other device, referred to as mHealth or m-Health.'*

[511] Digital Justice- transforming the end to end criminal justice system, Arif Harbott; April 18, 2016

[512] Mapping new ideas for the digital justice system Government of UK, Mike Bracken, Posted on:18 August 2015

[513] Scottish Governments Digital Justice strategy 2018, https://digitaljustice.holyrood.com

[514] *Supra Note 82.*

(3) For better understanding and proper communications, most of the women victims in *'The Nari-o-Shishu Nirjaton Daman Tribunal'*[515] claim female judges to try their matters and the Government should not ignore their claim.

(4) In some matrimonial cases parties argue that, assistant judge is too young to understand the reality of marriage life,[516] even the parties feel humiliation to share dispute of their marriage life to any judge who is younger then the parties. If the presiding judge is not married in the suit of restitution of conjugal rights or divorce, the parties may face some problem to clarify the fact before the court. The Government should take this matter in his concern.

(5) The media publication is prohibited in camera trial, but this is not perpetual.[517] Anything important may be published after the case or by the announcing verdict without addressing the information of parties.

(6) In ADR, the Government has imposed a mandatory duty over the courts, to offer mediation for the parties by using word 'Shall' in section -89(A) of the CPC[518]. The Government may also impose another duty over the courts to offer private trial where privacy is required.

(7) There is no subject or any relevant topic for private trial in the syllabus of Advocate enrollment exam under Bangladesh Bar Council. As a result most of the new comer advocates are not concerned regarding the laws and rules of camera trial. Therefore, the Bar Council should take necessary steps to include such important topic in the syllabus.[519]

(8) The lawyers or the pleaders have the main duties to protect the privacy rights of their parties. Therefore, lawyers must be more conscious and knowledgeable in this regard.

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[515] The tribunal established under 'The Prevention of Oppression against Women and Children Act 2000'**.** Act No VIII of 2000, approved by the President on 14 February 2000(2 Falgun 1406)

[516] *Supra Note 83.* Information was collected from some parties relating to the suit of restitution of conjugal rights through the survey.

[517] *Naresh v. State of Maharashtra (1966) 3scr74,* have held that prohibition to publication of such proceeding cannot be in perpetuity.

[518] The section-(89A) of the CPC states that, except in a suit under the [Artha Rin Adalat Ain, 2003 (Act No. 8 of 2003)], after filing of written statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, *{ the Court shall },* by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000 (Act No. 6 of 2000), or to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator from the panel as may be prepared by the District Judge under sub-section (10), for undertaking efforts for settlement through mediation.

[519] In the syllabus of Bangladesh judicial service exam, it is specifically mentioned that, in-camera trail is a subject for exam.

Now-a-days, private trial can play a significant role to protect the interest of the parties, national securities as well as the interest of judiciary from abusing its proceeding by open trial. Because we should not forget that, Judiciary has established to protect the interest of the parties who bring their case before the court[520] and injustice to anyone is injustice to everyone.[521]

[520] *Scott vs. Scott: HL 5 May 1913, [1913] AC 417, 29 TLR 520, [1911-13] All ER 1, [1913] UKHL*
[521] Martin Luther King Jr. - Minister, Civil Rights Activist - Biography.com

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Statute

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