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# Dumping and Anti-Dumping Laws and Practices in International Trade: An Analytical Study with Special Reference to Bangladesh

**Dr. Md. Sahal Uddin***

## Abstract

This article is an effort to understand the current laws and practices related to dumping and anti-dumping with repercussions on international trade and connectivity with that of Bangladesh. As per the rules of WTO, dumping is legal until and unless a particular country demonstrates the adverse effects that one exporting country has caused to its domestic producers. A large number of obscurities contained in the dumping and ant-dumping provisions, certain inadvertence and technical commissions, and the low translucent of the implementation of the mechanism create serious awkwardness. In particular, lower-middle-income countries may wrestle to cope. Bangladesh also faces towering difficulties in this regard.

**Keywords**: Dumping, Anti-Dumping, Subsidy, Countervailing Measures, Product

## 1. Introduction

The term 'Dumping' is frequently used in international trade.[1] In economics, it is a kind of damaging price. Sometimes, dumping used as a form of unfair competition.[2] Primarily, importing country in general and purchaser in particular benefit from lower prices, transfer of assets and market efficiency through increased competition, thereby enhancing international trade and welfare.[3] Exporting products of a

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1 International Trade is the exchange of capital, goods, and services across international borders or territories. In most countries such trade represents a significant share of gross domestic product.

2 Bryan T. Johnson, A guide to Antidumping Laws : America's Unfair Trade Practice

3 C Conard, 'Dumping and Anti–dumping Measures from a Competition and Allocation perspective (2002)35(3) *Journal of World Trade* 563

similar nature at low prices can put manufacturers of the same or similar products at a disadvantage in the importing country. This business practice is generally a spinoff of excess industrial capacity which, in the long run, can destroy the industrial framework of the importing country. Laws related to dumping and anti-dumping in international trade are mainly related to the World Trade Organization.[4] Members of the WTO have their own laws to regulate their separate practices. Bangladesh also has its own anti-dumping legislation. As an active member of the WTO, Bangladesh is subject to international trade with many countries. As a developing country, Bangladeshi products sometimes face various unfair trade practices, such as dumping and antitrust issues.There are several methods to measure dumping. Among them three methods are used for calculating the usual value of a product. One is based on the price in the exporter's home market. The second is the price charged by the exporter in other countries and the third is the calculation based on the exporter's production costs, other expenses and normal profit margins. Anti-dumping measures can only be applied if the dumping is damaging the industry of the importing country. And as such, tariffs, quotas, or subsidies are quite different from antidumping. Tariffs, quotas, and subsidies have their separate meanings and implications in various trade theories.

## 2. Historical Nexus of Dumping &Anti Dumping

From a historical point of view, dumping has been connected to various anti-dumping governing regimes that affected to a series of international negotiations and agreements from the emergence of international trade. In the contemporary world, under widespread trade policy, the Charter of the International Trade Organization (Havana Charter) is being considered as the current anti-dumping disposition. The General Agreement on Trade and Tariff [5] did not specifically incorporate dumping laws. GATT Article VI on anti-dumping and countervailing duties aimed at focusing damage suffered by internal damage and restricting the use of anti-dumping measures

[4] Hereinafter called as WTO
[5] Hereinafter called as GATT

by importing countries. Antithetical interpretations and flexibilities in the text of GATT Article VI allowed GATT State parties to adopt somewhat different viewpoints in their anti-dumping laws, many of which were thought as a conflict with the said Article and the rules thereunder. As such, it can be said that there are indiscriminate regulations or there is no uniform regulation around the world that relates to dumping and anti-dumping.

## 3. Types of Dumping

On the basis of insinuation from state government's part dumping can be classified into following categories-

### Sporadic Dumping

Sporadic dumping is an intermittent sale of a commodity at below cost in order to unload an unpredicted and interim surplus of a commodity. In this dumping, a producer with dissuaded catalogue avoids starting a price war in the domestic market to conserve his ruthless position. Over supplies are demolished. In another method the surfeit supply dumped in overseas market where the product is usually not sold. In this way, sporadic dumping is aimed at eliminating excess stocks that may arise from time to time.[6]

### Predatory Dumping

Predatory dumping is the exercise of international beat down by an exporter with the intention or result of handling domestic producers in the intended export market out of business. Manufacturers apply sporadic dumping to avoid excess commodities. Predatory dumping is perpetual in nature.[7] This type of dumping also includes the sale of goods in overseas market at a price lower than the home market. The purpose of this type of dumping is to gain access to the foreign market and to marginalize competition. It's a factor for emerging monopoly in the market.

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[6] www.corporatefinanceinstitute.com>dumping, retrieved on August23, 2020

[7] *ibid.*

**Persistent Dumping**

Persistent dumping is occurred when a country successively sells products through lower price in the foreign market compared to the domestic prices. Sustained demand for the product in the foreign market causes persistent dumping.[8] In persistent dumping, a seller interminably sells a portion of his commodity at a high price in the domestic market and the continuing out-turns at a low price in the overseas market.

**Reverse Dumping**

Reverse dumping occurs when the demand for the product in the foreign market is less flexible. It means that changes in price do not influence demand.[9] Therefore, the company can alter a towering price in the foreign market and a lower price in the local market.

## 4. Benefits of Dumping

In commercial dumping exporters may offer the producer a subsidy to offset compensation when suffered products are sold below their manufacturing cost. The exporter gets subsidies from his government to sell to consumers in the importer's country so that they can achieve access to commodities at lower prices abroad.[10] Exporter's country has an opportunity to create employment and become industry leaders through dumping. Dumping also creates an opportunity for the consumers in the importer's country to get inferior products at a lower price for the time being.

## 5. Drawbacks of Dumping

Subsidies can become severe in dumping which is very harmful for the economy of a country. Trading partners may impose restrictions on the goods, which could result in larger costs of exporting to the affected country. A direct consequence of dumping may lead to limitations imposed by government or trade partners on the quantity of products that a country wants to import. Dumping is expensive and as such it will take years for the exporter to sell at lower price and drive contestants out of business. This can result in job losses and large

[8] www.investopedia.com retrieved on October 2, 2020

[9] www.accountlearning.com retrieved on October 3, 2020

[10] www.corporatefinanceinstitute.com>dumping , retrieved on October 3, 2020

unemployment. The target company may fight back, which can create a trade war. The debt of the exporting country will extend due to the subsidies granted to sell at lower prices abroad. As a consequence of dumping, industries or companies in the importing country's markets become more frangible.

## 6. Laws and Practices of WTO on Anti Dumping

Significant rules for the definition and scope of dumping, methods of calculating the dumping edge by using the encumbered average of a product's usual value and the encumbered average of prices of all approximate export transactions are the antecedents of dumping.[11] The WTO has a vital role in formulating anti-dumping laws. The WTO agreement [12] is often called the 'Anti-Dumping Agreement'. The amount of anti-dumping duty shall not outstrip the edge of dumping as established under Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.[13] The WTO agreement allows state governments to act against dumping when there is a bonafide injury to the contending domestic industry. To do so, the government must be able to corroborate that dumping is occurring, calculate the extent of dumping, that is, how much lower the export price is juxtaposed to the exporter's domestic market price, and demonstrate that the dumping is causing injury or threat to the domestic market.

### Anti-Dumping Actions of WTO

Before starting on an anti-dumping action, a three-tiered test must be satisfied. Those tires are i) a dumped import, b) actual or potential threat of material injury to the competing domestic industry and iii) a causal link between dumping and material injury.[14] The calculation of dumping edges is difficult, and as such, the state authorities would

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[11] Article 2 of the WTO agreement on Anti-Dumping Measures

[12] The WTO agreements cover goods, services and intellectual property. It also includes individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries.

[13] Article 9.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994

[14] M Rafiqul Islam, *International Trade Law of the WTO*, Oxford University Press, (2006) p.198

evidently choose their best performance period and selected sales to legitimize the use of overemphasized profit figures to obtain aerated dumping margins.[15] Branded and unbranded products are often treated equally, regardless of the different qualities or values that consumers ascribe to the products which affects the prices of such products and creates anomaly in the market.[16]

To find out the footprint of the dumped imports in a domestic industry, contemplation must be given to all relevant economic indexes relating to that industry. Injury may be caused by components such as domestic competition, price variations occurring in the course of normal business, currency emaciated, structural change, recession and internal industry mismanagement. National government may retreat to anti-dumping measures. And as such many dumping issues did not held water for want of proven injury.[17]

**WTO's Role on Subsidies and Countervailing Measures**

The subsidy is the government's remission to manufacturers who try to lower the price of the product and increase the quantity produced. In the context of international trade, the subsidy is granted to national producers to increase their competitivity.[18] WTO agreement on Subsidies and Countervailing Measures[19] deals with two things. One is the use of subsidies and the other is the regulatory actions which countries can adopt to thwart the effects of subsidies. One country can set in motion its own investigation and eventually impose extra duty[20] on subsidized imports that are found to be incapacitating domestic producers. The agreement defines two categories of subsidies: prohibited and actionable. It originally clutched a third category: non-actionable subsidies.[21]

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15 R Bhala, 'Rethinking Ant-Dumping Law' (1995)29 *George Washington Journal of International Law and Economics* 87

16 K Adamantopoulus and D DeNotrais, "The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective"(2000) 24 *Fordham International Law Journal* 36.

17 G David, 'Dumping on Your Mates: A Trans-Tasman Experience' (1998) *Australian International Law Journal* 143

18 http://ibeconomist.com/revision/3-1, retrieved on October 1, 2020

19 Hereinafter regarded as SCM Agreement

20 Popularly known as countervailing duty

21 For more details see WTO Agreement on Subsidies and Countervailing Measures

**Prohibited Subsidies**

It is a type of subsidy that requires beneficiaries to meet definite export targets or to use domestic goods instead of imported goods. Prohibited subsidies mainly cover export subsidies and subsidies conditional on the use of domestic products on material.[22] These types of subsidies are prohibited because they are particularly designed to crumple international trade. These are very much harmful to the trade of other countries. Prohibited subsidies can be challenged in the WTO dispute settlement procedure. If the prohibited subsidies are substantiated then it must be introverted immediately. Otherwise, the complaining country may take counter action. When the producers of a particular country are hampered by imports of subsidized products, the concerned country may impose countervailing duties.

**Actionable Subsidies**

In case of actionable subsidies, the affected country has to show that the subsidy has a destructive effect on its interests. If the said country has failed to show then the grant is allowed. A WTO member government provides an actionable subsidy if it hurts the domestic industry of another country or if it causes serious harm to the interests of another country. If it is determined by the appropriate authority that the subsidy has an adverse effect then the subsidy must be introverted. Otherwise, its detrimental effects must be eliminated. In the economy of a developing country subsidy has great importance. Market system of developing countries are also extensively influenced by subsidies.

**Non Actionable Subsidies**

It is a subsidy on which the WTO does not allow a member state to impose countervailing duties. Most of the times, a country can inflict countervailing duties on an import if the exporting country has subsidized it to make it much less costly than domestically produced products. Non actionable subsidies are also known as third class grants. These types of subsidies are often regarded as non-specific grants or specific grants.

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[22] *What's a stake for LDCs, now that the Uruguay round talks have been suspended*? www.thefreelibrary.com, retrieved on October 10, 2020

**Safeguard Actions of WTO**

WTO member states can impose limitations upon the imports of a product. Member States can also take safeguard actions if it seems to them that their internal industry is harmed or threatened with injury caused by a flow in imports. In this case, the injury must have to be substantial. As per the regulations of GATT safeguards actions are always available.[23] Some countries preferred to protect their national industries by 'grey area'[24] measures.

An import 'surge'[25] justifying the safeguard action can be a real increase in imports that is an absolute increase; or it may be an increase in the share of imports in a contracting market, even if the import bunch has not increased that is relative increase. Industries or companies may request safeguard actions by their government.[26]

The mercantile right on resources is based on the very existence of "damage" to the domestic industry.[27] This agreement establishes the criteria to evaluate whether "serious injury" is being caused or threatened and the factors that must be considered to determine the impact of imports on the domestic industry.

Dumping and subsidies - together with anti-dumping duty[28] measures and countervailing duties[29] share a number of empathy. Many countries drive both under a single law, apply a similar process to deal with them, and give a single authority leadership for investigations. The WTO's Safeguards Committee is responsible for the surveillance of members' commitments regarding these issues.

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[23] See for details, Article 19 of the GATT Agreement

[24] Grey area is an ill-defined situation or area of activity not readily conforming to a category or set of rules. In geography, grey area indicates intermediate between two mutually exclusive states or categories, where the border between the two is fuzzy.

[25] Import surge is a situation where import cause serious injury to the domestic industry that produces the like or directly competitive products

[26] Decision comes from 'Bali Package' – a series of decisions aimed at streamlining trade which was taken in 9th WTO Ministerial Conference , Bali, Indonesia, December, 2013

[27] Nedumpara, James J. *Injury and Causation in Trade Remedy Law,* A Study of WTO Law and Country Practices (2016),ISBN: 978-981-10-2197-8, 2

[28] Hereinafter called as ADD

[29] Hereinafter called as CVD

## 7. Critical Appraisal on Dumping

The concept of globalization, the increasing flows of goods and services in international market, the problem of profits and trade deficits are the causes of attrition in international trade. The operational problem of trade balance has increasingly attracted the attention of various national governments and has become a hot investigation topic.[30] Economic globalization along with a globally unequal distribution of resources compel the nations to understand how to deal with dumping complexity and how to implement different anti-dumping tools successfully.[31]

Even today, dumping and anti-dumping issues are some of the most contentious and minimal appreciated topics in the field of world trade.[32] Although dumping is a prejudiced ruthless practice, it is not prohibited by WTO rules. Most of the nations of the World are dissatisfied with dumping. To prevent dumping and to keep domestic industries from exploitative pricing, many countries use tariffs and quotas. If dumping causes significant delay in the establishment of an industry in the domestic market then dumping is also prohibited.

Almost all trade agreements encompass limitations on commercial dumping. Contravention of those agreements can be hard to prove. Application of such agreements can be prohibitive. If a trade agreement is not in force in between two countries then there is no particular prohibition on trade dumping between them.

### Duty against Dumping

Duty against dumping is regarded as Anti - dumping duty. This duty is treated as a nationalist tariff. When a country believes that prices of import products are below the fair market value then the concerned government imposes this tariff on such foreign imports.[33] Most

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[30] Oliveira, G.A.S (2014) Industrial Determinants of Anti- Dumping in Brazil- Protection, Competition and Performance: An Analysis with Binary Dependant Variable and Panel Data. *Economia* 15, 206-227

[31] Dinlersoz, E. and Dogan, C (2010) Tariffs vs. Anti-Dumping Duties. *International Review of Economics & Finance*, 19, 436-451

[32] Kerr, W.A. (2001) Dumping- One of Those Economic Myths, *The Estry Centre Journal of International Law and Trade Policy,* 2, 211-220

[33] www.investopedia.com>terms , retrieved on October 7, 2020

countries also impose this type of duties on their own products to keep their economy free from any harm. These tariffs can also increase the price rate for native consumers. The main objective of these tariffs is to save domestic jobs.

Duties against dumping can lessen international rivalry from companies within a country that produce the same products. As an international organization WTO formulates a set of international trade rules covering the duties against dumping and anti-dumping measures.

## 8. Dumping and Anti-Dumping Regulatory Laws and Practices in Bangladesh

Bangladesh has incorporated adequate provisions to implement the WTO rules on anti-dumping under section 18B, 18C, and 18D of the Customs Act, 1969.[34] To outline detailed rules and procedures for the identification of dumped goods, assessment and collection of anti-dumping duties and determination of injury an SRO[35] has been issued by the Bangladesh National Board of Revenue.[36] Bangladesh Trade & Tariff Commission has been nominated as the Designated authority for this purpose.[37] The Commission provides the necessary assistance to the Government in the negotiation and implementation of international, bilateral, regional and multilateral trade agreements.

### Threats of Remedial Measures to Bangladesh Exports

Duties against dumping, duties relating to countervailing measures and safeguard measures are jointly considered as remedial measures against dumping. Anti-dumping duties are imposed due to price differences in different markets. Countervailing duties are imposed to counteract the negative effects of import subsidies in order to protect domestic producers. Safeguard measures are like emergency measures taken by affected countries against particular exported products to protect a national industry & economy. Bangladesh does not apply

[34] For more details see The Customs Act, 1969
[35] SRO stands for Statutory Rules and Order
[36] SRO no. 209-Law/1995/1642/Cus
[37] SRO no. 210-Law/1995/1643/Cus

these trade remedy measures. Rather, some export items from Bangladesh have faced anti-dumping duties in some countries.[38]

## 9. Recommendations for the Improvement of Bangladesh Situation

To date, Bangladesh was unable to initiate a single investigation to address unfair trade practices.[39] On the other hand, some countries have taken several anti dumping measures against Bangladesh.[40] Even, to date Bangladesh did not make any response to all the allegations brought against it. It has to take serious measures to enhance its capability to bring out the best possible alternatives. The following recommendations can be seriously considered for Bangladesh to take appropriate trade remedial measures:

i. Internal business policies and practices must be updated according to the market of competing countries.

ii. As a least developed country, Bangladesh can be supported by the WTO Legal Advice Center in Geneva. Bangladesh should seek this support to obtain redress for unholy practices in international trade.

iii. Bangladesh should have to create a methodological research group to know the current rules and regulations and their gaps in foreign trade management.

iv. To employ various commercial remedial measures, an independent regulatory body such as the Directorate General for Commercial Resources (DGTR) may be established under the Ministry of Commerce.

V. To continue with the WTO processes, it is necessary to find logical arguments after reviewing the documents from the previous hearing.

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38 The Financial Express, December 29, 2018

39 Ahmed, R 'Bangladesh could not impose Anti Dumping Duties' *The Daily Crime Patrol News*, March 4,2017

40 WTO Statistics 'Anti dumping Initiations Reporting Members Vs. Exporting Country ' at<https://www.wto.org/english/tratop_e/adp_e/Ad_Initiations Rep MemVsExpcty.pdf last visited on December 17, 2020

vi. Existing regulatory bodies like NBR and BTTC need to be updated and improved. These agencies may have an investigation wing to impose anti-dumping measures for each imported product. A coordination cell can be created to address the problem between NBR and BTTC

vii. Bangladesh should formulate a policy guideline based on reasonable explanations, proper legal and factual analysis and cumulative assessment.

viii. Finally, Bangladesh has to enact stricter laws to regulate the entire world trading system that connects to Bangladesh.

## 10. Conclusion

Laws and practices regarding dumping and anti-dumping in international trade are complex, contrived, and to some extent overlapping. Although WTO has an Anti-Dumping Agreement, WTO member states are not strictly bound by it. Member States have their own legislation and policies in this regard. Trade remedies require further scrutiny for many reasons, including the ambiguity of the definition, the fragility of the economic justification, the increasing importance of the investigations carried out; the spectacular recent proliferation of the mechanism among WTO members and certain operational deficiencies. And as such, at the implementation level, there is no uniformity among member states to impose anti-dumping provisions. As a third world country, Bangladesh has to deal tremendously with this troublesome situation. To get rid of this, Bangladesh must pay close attention to the problem. Good mastery and analysis of some anti-dumping issues will help Bangladesh to cope successfully. These, among others, involve examining the methodology to determine the dumping margin, the alteration of the domestic market in the importing country, the effect on employment, and finally, procedural issues. Bangladesh needs a core group of experts to continue to participate in analyzing complicated problems and discovering a way to protect exports from undesirable situations.

# The Implications and Impacts of Environmental Justice in Developing Countries: Economic and Legal Analysis

**Md. Shahriar Parvez***

## Abstract

Environmental justice, unlike other traditional and mainstream justice concepts such as civil and criminal justice, has a different and unique base of rights which is of recent origin emerging through the long lasting environmental movement across the world due to the increasing rate of environment pollution and rise of global temperature in the last century. The industrially backward countries' or developing countries' peoples and governments in spite of their less carbon consuming, are suffering much more than those of the developed areas and they are less aware of the fact that they have to raise voice against the environmental inequity and injustice. Environmental justice being an international issue has to be established by enacting globally effective laws, treaty, pacts and accords. The capitalist mode of production does not give importance on the guaranty of environmental justice and it influences thought process of mass people. For this reason the people of the developing countries have almost no concern or little concern about environment related issues. By their inactive participation in environmental justice movement the law makers of those countries also give less initiative in enacting and enforcing laws in national level on these issues.

**Keywords:** Decolonization, Environmental Justice, Sustainable Development, Environmental Disorders

## 1. Introduction

Since the industrial revolution in England during the 17th and 18th centuries, the production of commodities and trend to produce commodities increased to high level. For some obvious historic reasons, private enterprises and state authorities were not much

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concerned about the environment in which *Homo sapiens* originated and still survive. Environment made the fundamental mandatory condition for human for their survival. Colonization, a contemporary phenomenon of industrial revolution presented a picture of unconsciousness about the environment. All over the world, major legal systems did not emphasize enough or much on environmental questions. So, environment remained as unmentioned legal topic during the overwhelming appraisal of industrial revolution by the state authorities and law-makers. Like the colonial powers, in the vast colonized areas of Asia, Africa and Latin America, environment was not discussed and emphasized as an integral part of legal arena. For the purpose of infrastructural development vast areas of Greenland, swampland and arable land were taken in the name of acquisition in those periods. After decolonization almost all the post-colonial independent nations fell victim to impoverishment with having huge natural resources and began searching way to development. These states, since their independence, has been striving to get rid of poverty and other economic crisis by way of hussy tendency of development without paying heed to environmental disorder or with a little heed to environment. Moreover, the huge development initiatives and activities of the industrially developed states has been creating vast, massive and destructive effects on the environment of the industrially undeveloped states, which is evidently come to light for last few decades by various international organizations, e.g. UNEP (United Nations Environment Programme), OECD (Organization for Economic Co-operation and Development), IUCN (International Union for Conservation of Nature), IUBN (International Union for Botanical Nomenclature) etc.

Various international organizations have defined and categorized the countries into 'developed economies', 'developing economies', 'least developed countries' etc. According to the classification of the United Nations there are 112 countries which have developing economies.[1] Bangladesh, India, Iran, Nepal, Pakistan and Sri Lanka are classified as developing countries from South Asian region. Most of the countries of

[1] https://www.un.org/en/development/desa/policy/wesp/wesp_current/2013country_class.pdf

developing economies situate in Asia and Africa. The important thing is that majority number of these countries experienced 'colonial regime'. The peoples of the developing countries have a little sense of environment and environmental justice. The ongoing environmental disorder and degradation is going to be subversive to the people of these countries as it will make or is making the environment inhabitable. The potential economic and social impacts of environmental degradation are particularly serious for developing countries given their dependence on natural resources for economic growth and their vulnerability to energy, food, water security, climate change and extreme weather risks.[2]. The peoples have not raised their voices for environmental justice and the policy-makers are not taking initiatives for ensuring environmental justice.

## 2. Environmental Justice: A New Dimension in Justice Discourse

Justice in the realm of political and legal discourse has been almost exclusively concerned with the question of the distribution of social rights and goods. The laws making authorities and justice ensuring mechanism of the state have held the view for many years that the humankind is the sole creature of this planet who are to enjoy all the worldly things and benefits. Accordingly, they have built their legal infrastructures. They did not think that even the environment might have interests in the legal arena; environment might participate though not like the human being, in the judicial administration system. Rather the theorists, academicians and law making authorities only recognized right of man over man or society or state. This is called 'anthropocentric philosophy of law'. In this regard Rawls observes,

"On what grounds…..do we distinguish between mankind and other living things and regard the constraint of justice as holding only in our relations to human beings. The natural answer seems to be that it is precisely the moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first, they are capable of having (and are assumed to have) a conception of their good (as

[2] OECD; *Green Growth and developing Countries: A summary for policy makers*, June, 2012, at p.9

expressed by a rational plan for life); and second, they are capable of having (and are assumed to acquire) a sense of justice.[3]

Most of the jurists, philosophers and academicians have advocated for human rights in the light only of human beings and human society. They remained silent for a comparatively long time regarding environment let alone environmental justice. Unlike the traditional concept of justice, environmental justice was originated from a flow of movement. Administration of justice has been a part of state mechanism since the origin of state. But environmental justice arose out of movement – out of the demand for an environment friendly society or state. Later, it is seen that, a global buzzword 'sustainable development' has found and strengthened its base on the proposition that man has the right to live in a sound and healthy environment.

Environmental justice movement sprung out from the movement of the African-American peoples of the USA who protested against the dumping of toxic wastes in their residential area. The call for environmental justice can be heard from the ghettos of Southside Chicago to the Soweto Township.[4] This area was dumped with toxic wastes by the local authority. As a result the African-American town dwellers protested against it. Bullard called it the impetus of environmental justice movement.

From 90s decades of the late 20th century, Jurists, theorists and academicians began speaking on environmental justice and since then many significant definitions of it have been being produced. But most of the definitions are given on objective-based approach. Many definitions are given to identify what environmental justice is, but all of them are to fulfill the end of the defining authority. Regarding this Gordon Walker states,

"Looking across academic, activists and policy literature environment justice is most often defined in terms of objectives something that is sought after and for which certain conditions are specified. The act of producing and publicizing an objective based

[3] John Rawls, *A theory of justice*, Oxford University Press, Oxford, 1973, at p.505

[4] Robert D. Bullard, *Environment and Morality: Environment Confronting Environmental Racism in the United States*, United Nations Research Institute for Social Development, 2004, at p.4

definition is a key part of constructing a politically powerful environmental justice frame around which people are to be recruited and mobilized."[5]

According to the observation of Gordon Walker, defining environmental justice is not an imperative task, as it has been seen from the present scenario that individual academicians and institutions have defined environmental justice according to their own objectives. Even the outlook towards environmental justice varies from person to person, from institution to institution, and even from country to country. Various prominent international and regional institutions and organizations as well as jurists and academicians defined and characterized environmental justice.

Environment, at first, was treated as an essential condition for human survival and human health irrespective of their color, sex, tribe, religion and ethnicity etc. In this sense, right to environment is regarded as third generation human right which creates responsibility upon the states to create a sound environment. The American Convention Human Rights, 1969, in its Additional Protocol of 1988 describes, "Everyone shall have the right to live in a healthy environment. The state parties shall promote the protections, preservation and improvement of the environment." According to another international declaration,

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."[6]

These declarations or/and principles cannot be said to have covered the idea of environmental justice, but forwarding steps towards an environment friendly world. Protected, improved or sound

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[5] Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics*, Routledge, Oxon, 2012, at p.8

[6] Principle 1, Declaration of the United Nations Conference on the Human Environment, 1972.

environment is one of the aspects of environmental justice. Environmental justice is more than this. It includes diminishing inequality and sharing fair distribution of environmental hazards. In other words environmental justice encompasses the idea of right to get relief in case of environmental injustice. Bunyan Bryant defines and characterizes as,

"Environmental justice refers to those cultural norms, values, rules, regulations, behaviors, policies and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing and productive. Environmental justice is served when people can realize their highest potential, without experiencing the 'isms'. Environmental justice is supported by decent paying and safe jobs, quality schools and recreation; decent housing and adequate health care; democratic decision making and personal empowerment; and communities free of violence, drugs and poverty."[7]

The definition given by Bryant is an inclusive one which encompasses almost all the human activities and participation regarding environment. But one of the defects of this definition is the absence of a specialized treatment towards the people who are becoming victims of economic inequality- both wealth and income equality and goods and services inequality. From 1900 to 1980, 70-80 percent of the global production of goods and services was concentrated in Europe and America, which incontestably dominated the rest of the world.[8] At the same time, people of the rest world faced more critical environmental hazards than the western people where capitalist mode of production remained continuously increasing without paying heed to the environment. In late 20th and present 21st centuries, world has become a place where commodities are being produced in the developing countries and consumed by the developed countries. For example, the garment industry of Bangladesh produced huge amount of toxic and polluting ingredients in producing garments but the garment users of America, Canada and Europe don't have to face the dangers of

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7 Bunyan Bryant, *Environmental Justice: Issues, Policies and Solutions*, Island Press, Covello CA, 1995, at p.6, cited in Gordon Walker, Supra note 4, at p.9

8 Thomas Piketty, *Capital in the Twenty-First Century*, trns. By Arthur Goldhammer, The Belknap Press of Harvard University Press, London, 2014, at p.39

environmental disorders and imbalances. Bryant's definition failed to address this problem.

Stephens, Bullock and Scott opine, "Environmental justice means that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life; that responsibilities are on this current generation to ensure a healthy environment exists for future generation, and on countries, organizations and individuals in this generation to ensure that development does not create environmental problems or distribute resources in ways in which damage other people's health.[9]

Environmental justice is one kind of social justice which demands to eradicate social and economic inequality. Indian Supreme Court, in this regard, observes,

"Public nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better facilities cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.[10]

Indian Supreme Court's observation emphasizes on the responsibility of the local governing body who are to dispense the functions relating to environmental issues and to look after that the subaltern strata of the society can enjoy the benefits of public health and get better facilities regarding living standards. Ensuring environmental justice is a complex and inter-winged matter which needs special attention and mechanism. It needs initiatives to be implemented by applying 'top to

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[9] C. Stephens, S. Bullock and Alistair Scott , *Environmental Justice: Rights and Means to a Healthy Environment for All.*, (Swindon: ESRC Global Environment Change Programme, 2001), at p.3

[10] *Ratlam Municipality* v. *Vardihichand*, AIR 1980 SC 1622

bottom' and 'bottom to top' policies. If the supreme authority or lower authority is the sole agent of ensuring environmental justice, the benefits of it may be trickled down to the impoverished people or they may not enjoy the benefits of environmental justice.

Considering definitions given by prominent jurists, academicians and organizations, environmental justice may be said to have encompassed the following area-

a. It ensures a healthy environment for all persons irrespective of their race, sex, color, cast, religion etc.
b. It eradicates or diminishes the economic disparity among the people.
c. It ensures sustainable economic development, i.e. ensures economic growth through protecting and preserving the environment.
d. It demands special and distinct attitudes and treatment of the environmentally vulnerable people or area.

## 3. Environment and Economic Development

The Commission on Pollution and Health- an initiative of globally famous medical journal 'Lancet' in its published report of 2017, estimated the annual cost of pollution worldwide to be US$ 4.6 trillion, or around 6% of the global GDP (slightly more than the GDP of Japan).[11] The fact is, most of the victims of the world environment pollution live in those areas which are called developing countries. Like India, China, Bangladesh, Brazil, Indonesia etc., have over 3 billion populations. In these countries, economic development activities make the environment deteriorated besides the global effect of climate change.

The developing countries' one of the most important goals is to achieve and maintain economic growth by which they aspire to eradicate poverty and other problems. For this, they mainly give emphasis on

[11] P. J. Landigan, The Lancet Commission on Pollution and Health, The Lancet 391:10119, cit. in WTO& UN Environment, *Making Trade Work for the Environment and Resilience,* 2018, at p.17; available at www.wto.org/english/res_e/publications_e/unereport2018_e.htm, accessed on 27-08-2020

material and infrastructural development which costs the environmental degradation severely and make the people perceive that the environmental imbalance costs a little than the economic development which increases the life standard of them. There are various ways in which the environment of the developing countries is polluted and degraded. By observing the recent tendency of development it can be said that man has made a new empire over the environment and ecology.

### 3.1 Agricultural Development and the Environment

Even in the mid of the twentieth century, European and North-American countries while started using chemicals and pesticides, faced problems of water pollution, air pollution which ultimately led to hazards in public health. The same or more agonizing complexities, the developing countries are facing in the 21st century. For example, Bangladesh has to feed over 160 million populations, where the per capita amount of land is very low. Once farmers are supplied with credits to buy powerful machinery, chemical inputs and so on, the longer-term sustainability of the areas in question tends to be destroyed. [12] The demand of producing more food for growing population binds the people to cut down trees which ultimately lead to deforestation in developing countries. Excessive use of arable lands to produce crops, grains make the lands infertile and barren. The demand and tendency to produce do not only create environmental disorder but also natural resource scarcity as this planate has limited natural resources. OECD fears,

"Natural resource deterioration caused by over-production to meet the growing demand from forests, fisheries and agricultural land threatens future income and wealth in developing countries, in particular for those with the least resources to adapt to a changing climate. Climate change will affect developing countries disproportionately through higher and more variable temperatures, changes in precipitation

[12] Anna Lousisa de Osario de Almeida, *The Civilization of the Amazon*, Texas University Press, 1991, cit. in Wilfred Beckerman, "*Economic Development and the Environment: Conflict or Complementarity?"* World Bank, 1992, at p.14

patterns, and increased occurrences of extreme weather events such as droughts and floods."[13]

The developing countries as well as the developed countries should reconsider the way of economic development which will not destroy the environment.

### 3.2 Industrialization, Urbanization and the Environment

The developing countries like Bangladesh, India and Pakistan etc. have taken initiatives to flourish industrialization program to achieve economic prosperity. A few decades ago, the developing countries had agriculture centric economy by which it was very difficult to boost up their economic status and living standard of the people. Trade, capital flows, foreign aid, technological improvements, and idea-sharing across international borders have enhanced human development and economic prospects in many developing countries.[14] So the developing countries have emphasized on exporting products, establishing heavy industries and special economic zone, export processing zone etc. Where in most of the cases environmental issues are continuously being neglected, though the member states are bound to follow the SDGs rule to maintain a sustainable development. The reality is that the developing states are not paying much attention about the sustainable development policies. For example, a survey of the World Bank shows,

"only 1% of total still mills, 1% of total brick kilns, 3% of banned polythene factories/stockpiling companies, 5% of paper mills, 30% of dyeing factories and 38% of total washing factories are subject to and under the supervision of Department of Environment of Bangladesh. Most of the industries and factories are out of control of the Department of Environment of Bangladesh."[15]

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13 *Supra* note 1, at p.22

14 International Peace Institute, "*Underdevelopment, Resource Scarcity, and Environmental Degradation*," IPI Blue Paper No. 1, Task Forces on Strengthening Multilateral Security Capacity, New York, 2009, at p.3

15 World Bank, *Enhancing Opportunities for Clean and Resilient Growth in Urban Bangladesh*, 2018, at p.26

Same picture can be seen in most of the developing countries. Bangladesh as well as other developing countries has environmental laws and policies, but those are not applied properly in those countries or applied to such an extent which is not effective enough to reduce environmental degradation. Besides, only laws and policies are not enough mechanisms by applying which a country can protect its environment. Rather, a deep sense of environmental justice as a sort of social justice can be used to protect the environment by considering the relation between human being and nature in a dialectical way of thinking.

Development activities need raw materials and other resources most of which are collected from natural resources and other chemical materials are also collected by exploiting the natural resources. Though the United Nations is calling for using renewable and sustainable resources but development activities of the countries don't produce evidence in favor of this call. As a devastating consequence of using non-renewable and unsustainable resources, the global public health is going to face early and untimely death and other fatal diseases. International Peace Institute observes,

"The rapid increases in the global population and the acceleration of global economic activity have increased the demand for both renewable and finite natural resources. Unsustainable resource use has serious consequences for the environment, which in turn has implications for human development outcomes for health, hunger, and education. Indeed, more than 85 percent of major global diseases are partly caused by exposure to environmental risk factors such as poor sanitation, air pollution, and a lack of access to clean water."[16]

The need to boost up economic growth may make the people of a country hopeful for leading happy and prosperous life. But ultimately the unplanned and unsustainable economic development may turn into a devastative one. For example, of the 843,000 cause-attributable deaths estimated for Bangladesh in 2015, some 234,000 were due to environmental pollution and other environmental health risks—more than 10 times the number of deaths from road injuries/traffic accidents (21,286).[17]

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16 *Supra note* 13, at p.9

17 *Supra* note 14, at p.8

Desire to rapid economic growth tends to centralization of capital which ultimately results in unplanned and hasty urbanization in developing countries where urban environment becomes unlivable. By 2030, it is estimated that urbanization in poor countries will result in more than 60 million new urban inhabitants annually.[18] Dhaka and New Delhi, capitals of Bangladesh and India are one of the most polluted cities in the world, where fumes and smog, lead, hazardous particles etc. pollute the air, chemical contaminates the water and mismanagement of wastes make the city unlivable. Regarding the impacts of rapid urbanization Wilfred Beckerman observes, "The effects of rapid urbanization take many form. In most countries they include poor housing conditions, the inability to handle waste disposal, contaminated water supplies, and other effects particular to individual cities."[19] Besides, there are other occasional pollutants which also cause various fatal health problems to the city inhabitants such as sulfuric acid, cadmium, asbestos, benzene etc.

## 4. Legal Framework for Ensuring Environmental Justice

In the colonial period, Indian sub-continent faced simultaneously infrastructural development and environmental degradation. Africa, Latin and North America were also encountered the same experience by the British Empire. The forests of Indian sub-continent were destructed in constructing the railroads of India. British Empire and East India Company did not estimate the loss and environmental degradation. The construction and operation of railways which was primarily designed to enable efficient resource extraction from India, itself depleted the natural resources of India.[20] In 1927, the Government of India for the first time enacted a law to regulate forestation in India. To protect the beneficial wild animals of Africa, a convention was signed by the European colonial powers in London named as, 'The Convention on the Preservation of Wild Animals,

[18] Poverty-Environment Partnership Joint Agency Paper, *Poverty, Health, & Environment: Placing Environment on Countries Development Agendas*, 2008, at p.13

[19] *Supra* note 11, at p.15

[20] Pallavi Das, *Colonialism and the Environment in India: Railways and Deforestation in 19th Century Punjab*, Journal of Asian and African Studies 46(1),(2010), at pp.38–53, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.835.1545&rep=rep1&type=pdf, accessed on 13-01-2021

Birds, and Fish in Africa, 1900'. It is popularly known as 'London Convention'. Before the Stockholm Convention of 1972, very few laws were enacted to address the aggregate environmental degradation and dilemma individual state.

Environment needs legal instruments and mechanisms to be protected, though having strong sense of environmental justice and obeying it are the preconditions to ensure environmental justice. If the concept of protection and preservation of the environment is guaranteed by statutes of a state, it creates bindings on the citizens and states to follow acts, rules, regulations, pacts, accords etc. in domestic and international level respectively. In domestic level, constitution is the highest law of a land. So, if environmental protection is guaranteed in the constitution, it would, probably, achieve utmost attention. Many developing countries' constitution has recognized right to and of the environment. The constitution of Brazil declares, "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."[21] This provision doesn't only bind the state but also the community to preserve and protect environment. It also recognizes inter-generation environment right. The Constitution of India has inserted a principle of protecting the environment by declaring that, "The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country."[22] Again it has created moral binding on the citizen of India by announcing, "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures." [23] Bangladesh initially has no provision regarding protection and reservation of the environment. In 2011 by The Constitution (Fifteenth Amendment) Act, Bangladesh has made a provision regarding protection of the environment and biodiversity. The concerned provision reads as, "The State shall endeavour to protect and improve

[21] Article 225, The Constitution of Brazil
[22] Article 48A, The Constitution of India
[23] *Ibid*, Article 51A(g),

the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wildlife for the present and future generation."[24] But this principle cannot be enforced in court of law as it is a part of fundamental principle of State policy.

It is Argentina who declared that right to live in a healthy and balanced environment is a fundamental right. In *Irazu Margaritav. Copetro S.A., Camara Civil y Commercial de la Plata*, Ruling of 10 May 1993[25] the court said:

"The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person."[26]

Among international instruments the Stockholm Declaration recognized the right to live in a sound and healthy environment. Since then many international institution and organization took steps to make the world bound at large to protect the environment, biological diversity and climate. The Rio Declaration has announced, "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[27]

But Rio declaration has not proposed any mechanism to implement this principle which sounds best and effective. In domestic level, most of the states, including the developing countries, have enacted

[24] Art. 18A, The Constitution of Bangladesh

[25] Available at www.eldial.com accessed on 13-01-2021

[26] Cited in Dinah Shelton & Alexandre Kiss, *Judicial Handbook on Environmental Law*, Nairobi, UNEP, 2005, at p.7

[27] Principle 10, Rio Declaration on Environment and Development,1992.

environmental laws and ordinances. For example, Bangladesh has enacted a law on environment protection named as 'The Bangladesh Environment Conservation Act, 1995.' Other countries have also enactments like Bangladesh, some of which are mentioned[28]-

- Law on the Protection of the Environment of Russia, 2001;
- National Environmental Act of Sri Lanka, 1980;
- National Environmental Policy Act of the U.S.A.1969;
- Environment (Protection) Act of India, 1986;
- Environmental Management Act of Trinidad & Tobago, 2000;
- Environment Protection Act of Nepal, 1997;
- Environmental Protection Act of Pakistan, 1997;
- Environmental Law of Bulgaria, 1991; and
- General Law for Ecological Equilibrium and Environmental Protection of Mexico, 1988.

Though Bangladesh along with other developing countries has laws on environment, death rate and economic loss do not give any evidence that these laws are being implemented properly. Bangladesh could avoid 10,000 deaths and save between 200 and 500 million dollars a year if indoor air pollution in four major cities can be reduced to acceptable limits.[29] The total number of death due to environmental pollution shows that most of the death occurs in the developing countries. Pollution is a leading cause of premature death in many smaller low- and middle-income countries where the death rates per 100,000 people are much higher than those in more populous, high-income nations.[30] The developing countries are the vulnerable countries where the laws and rules regarding environment and its protection are not and cannot be implemented due to the undexterous and corrupted mechanism.

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28 *Supra* note 23, at p.8

29 G. M. Jahangir Alam, *Environmental Pollution of Bangladesh – It's Effect and Control*, Proceedings of the International Conference on Mechanical Engineering 2009 (ICME2009),26-28 December 2009, at p.4 Dhaka, Bangladesh, https://me.buet.ac.bd/icme/icme2009/Proceedings/PDF/ICME09-RT-19.pdf, accessed on 13-01-2021

30 Global Alliance on Health and Pollution, *Pollution and Health Metrics: Global, Regional and Country analysis,* 2019, at p.2, https://gahp.net/wp-content/uploads/2019/12/PollutionandHealthMetrics-final-12_18_2019.pdf, accessed on 13-01-2021

## 4. Conclusions

Environmental justice is a new sort of justice which needs special mechanism to be ensured. Though it has some resemblances with the traditional administration of justice system, it has some distinct features for which it demands more deliberation and discussion. In civil administration of justice, the aggrieved person(s) can institute a suit for legal relief, in criminal administration of justice, the victim or in necessary case other person or state can complain against a criminal act. But in environmental justice, there may not be immediate aggrieved party. So, the question arises who can file a case or suit for the protection of environment or who can file a case or suit for legal relief for wrongs or crimes committed due to environmental devastation. In the world of much consciousness about environment and climate people from various strata are discussing and environmental activists are demanding for establishing specialized courts and tribunals for protection of environment. Continuous calling for establishing specialized court or tribunal has been materialized in some countries, like Bangladesh has enacted a law by which distinct court can be established. 'The Environment Court Act, 2010' of Bangladesh is a glaring example of introducing new sort of court for ensuring environmental justice. At present most of the countries of the world have laws relating to conservation and protection of environment. But in practice, these courts and tribunals don't seem effective enough to ensure environmental justice for some intrinsic loopholes and limitations of the provisions of the Acts, Rules, Regulations and Ordinances etc.

To ensure environmental justice the following proposals can be implemented in the developed countries' legal and judicial systems-

a. Besides polluter-pay principle, 'compensational wastes management' principle should be introduced where the private corporations are made bound to manage and recycle the wastes produced from their commodities. Various beverage and other companies and corporations produce millions of tons of plastic bottles and non-disposable packets which pollute not only the land area but also the oceans.

b. One or more 'International Environmental Courts and Tribunals' should be established in global level in which individual persons, communities and States can have easy access to get redress regarding global environmental and climate disorder and imbalance. This type of specialized institutions are already in vogue in trade and commercial area- World Bank has established International Centre for Settlement of Investment Disputes (ICSID) where trade related disputes are settled.

c. Environmental cases or suits should be made court-fees free and cost free for easy access to ensure environmental justice.

d. Environment related cases and suits should be of such character where the State stands in favor of environmental rights and employ lawyer or attorney to provide legal aid.

By applying the above mentioned proposals along with other proposals from different institutions, organizations and think tanks etc. can have positive impacts on environmental justice to be ensured.

# The Scope of the Contemporary Legal Regime to Protect the Climate and Armed Conflict Refugees

**KMS Tareq***

## Abstract

The recent aspects of climate change, international and non-international armed conflicts, the economic recession, political disturbance, family life, illness or disability are the new dimensions of the conventional causes of refugee crisis. Traditionally, a person becomes a refugee being persecuted for his/her race, creed, nationality, political opinion and membership to a particular social group. Sometimes it is claimed that the contemporary refugee law has failed to protect vulnerabilities of people since the mechanism could not recognise many other kinds of refugees. This paper has contended that climate and armed conflict refugees possess the essences to be protected even under the present regime of the international refugee law. Hence, the meaning of 'persecution' and 'membership to a particular social group' are evaluated in the light of existing literatures and decisions of courts to interpret them liberally. The research approach adopted in this present paper is the study of pertinent journal articles, decisions of courts, and the websites of various international organisations. The study finally suggests that there is a scope to stretch the legal definition of refugees to protect the rights of climate and armed conflict refugees under the current framework for the refuge law.

**Keywords:** Climate Refugees, Limitations of State Regimes, Particular Social Group, Persecution and Refugees

## 1. Introduction

Traditionally, a person becomes a refugee being persecuted for his/her race, creed, nationality, political opinion and membership to a

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particular social group.[1] However, the recent aspects of international and non—international armed conflicts, climate change, the economic recession, family life, illness or disability are the new dimensions of the conventional causes of refugee crisis.[2] Hundreds and thousands of people are therefore lacking the recognition under the refugee law. Some researchers allege the current refugee regime has failed to recognise the millions of refugees[3] whereas others argue that there is a scope to protect the numerous refugees under the present framework of refugee law.[4] Since the present instruments of the international refugee law (hereinafter called IRL) has existed for almost seventy years, it requires a reinterpretation following the Vienna Convention on the Law of Treaties (VCLT) which confirms that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'[5] to address the new types of refugees. In particular, the purpose of this paper is to examine the extent of the legal scope of the current mechanisms of the IRL to assess whether climate and armed conflict refugees are protected under the contemporary refugee regime. Thus, the article will justify the arguments of the persons displaced from their country of nationality or residence to be considered refugees. The black letter law research is

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1 Art. 1A of Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention or Convention).

2 Isa Ibrahim Berchin and others, 'Climate change and forced migrations: An effort towards recognising climate refugees' (2017) 84 Geoforum 147.

3 Angela Williams, 'Turning the tide: Recognising climate change refugees in international law' (2008) 30(4) Law & Policy 502, 510; Frank Biermann and Ingrid Boas, 'Preparing for warmer world: Towards a global governance system to protect climate refugees' (2010) 10(1) GloEnvt'l Pol 60, 74; Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 HarvEnvtl L Rev 349; Michel Prieur, 'Draft convention on the international status of environmentally-displaced persons' (2010) Urban Lawyer 247, 253.

4 Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 NYU Envtl LJ 480.; Joan Fitzpatrick, 'Revitalising the 1951 Refugee Convention' (1996) 9 Harvard Human Rights Journal 229.; L W Marshal, 'Toward a new definition of 'refugee': is the 1951 convention out of date?' (2011) 37(1) European journal of trauma and emergency surgery 61

5 Art. 31(1), 1969 Vienna Convention on the Law of Treaties: UN doc. A/CONF.39/27.

used in this study and it is principally based on secondary data. The primary sources including various Conventions, Protocols and case laws are thoroughly referred in the study. A number of secondary legal sources either as hardcopies or electronic materials are also evaluated in the research.

This article comprises two sections. The first section sets the scene describing the meaning and scope of the contemporary refugee regime. The second section underlines the existing IRL has the scope and limitations to address the vulnerabilities of refugees. Although there are a range of causes of refugee crises, this paper focuses specifically on climate and armed conflict refugees. Consequently, the paper tends to deal with the issues concerning the requirements for being recognised as a refugee under the contemporary framework of the IRL.

## 2. Contemporary Refugee Regime: Setting the Scene

The international refugee law regulates the status, rights and protection of refugees and it is based on the instruments and the customary international law centring on the 1951 Convention, and the 1967 Protocol.[6] It is albeit true that there is an independent discipline namely IRL in the arena of international law, it maintains a close relationship with international human rights law (IHRL) and also with international humanitarian law (IHL).

Historically, the development of IRL owes to the Second World War as millions of people of Europe were crossing border as a result of conflicts and persecutions.[7] After the embellishment of the United Nations (UN), the Convention for the Protection of Refugees was signed in 1951 which was hugely qualified by temporal and territorial limitations since only the refugees of Europe before 1 January 1951 could avail protection under the Convention. To remove these limitations, the 1967 Protocol was signed under the Convention.[8] At

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6 Alice Edwards, 'International Refugee Law' in D Moeckli and others (eds), *International Human Rights Law* (OUP 2018).

7 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007).

8 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol or Protocol).

the same time the UN established United Nations High Commission for Refugees (UNHCR) in 1951. The 1951 Convention, 1967 Protocol and the statute of UNHCR consist the core instruments of IRL in the international level. In respect of the scope of IRL, the refugees can be protected as Convention Refugee and Mandate Refugee.[9] The person who gets protection under the 1951 Convention and 1967 Protocol are termed as Convention Refugee and conversely, other victims are called Mandate Refugee as they seek protection under the mandate of UNHCR.[10]

Besides, there are some regional arrangements including the Organisation of African Unity (OAU) Convention Governing the Specific Problems of Refugees in Africa (1969),[11] the Cartagena Declaration for Latin American Countries (1984)[12] and the European Union (EU) Qualification Directives (2011)[13] which are dealing with the protection of refugees' rights in the respective territories. In many ways, these regional instruments have expanded the definition of a refugee. In particular, they extend the scope of persecution which is assessed in the later part of this paper.

In summary, the current framework for the IRL enters the realm of international law specifically during the post-Second World War period, and therefore, the 1951 Convention and the 1967 Protocol are the core instruments of it. Again, there are some regional mechanisms about the recognition of vulnerabilities of refugees across the world. However, thousands of people dislocated for various reasons are struggling to be protected as refugees and consequently, it is necessary to analyse the scope of the existing framework of IRL to find the answer of the question whether the IRL has failed to protect the vulnerabilities of climate and armed conflict refugees.

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9 *ibid*.

10 *ibid*.

11 OAU Convention governing the specific Aspects of Refugee Problems in Africa 1969 (OAU Convention).

12 Cartagena Declaration on Refugees 1984 (Cartagena Declaration).

13 EU Qualification Directives 2011.

## 3. Scope of the Refugee Regime to Address the Vulnerabilities of Refugees

The Refugee Convention and the UNHCR statute accept almost the same wording to define refugees.[14] Analysing the definition, the four elements are found; namely (1) the person is out of his/her country of residence or nationality; (2) he/she leaves the country under the well-founded fear of persecution; (3) it is because for his/her race, religion, political ideology, member of a particular social group; and (4) she/he is unable or unwilling to return to his home country.[15] It is argued that the climate and armed conflict refugees cannot be treated as refugees since they are neither persecuted nor fall under any group mentioned in the Refugee Convention. However, this section will demonstrate that the so-called definition of persecution does no longer hold the ground and these persons also fall within 'particular social group'. The following two parts respectively focus on the aspects of climate and armed conflict refugees and the applicability of the refugee regime.

### *3.1. Recognition of Climate Refugees*

The UNHCR shows in a report of 2020 that 79.5 million people are displaced across the globe and out of which 26 million have crossed international frontiers in 2019.[16] Although the report has not mentioned the statistics of climate change displacement separately, other reports suggest that people are being dislocated for climate change and at the same time, more people are at risk of future displacement.[17] Thus, it is necessary to assess the applicability of the IRL for the recognition of climate refugees.

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[14] Marshal (n 4) 61.

[15] Art. 1A (n 1).

[16] UN High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2018' (19 June 2020) <https://www.unhcr.org/5ee200e37.pdf> accessed 25 Jan 2021.

[17] Migration Data Portal, Environmental Migration: Recent Trends <https://migrationdataportal.org/themes/environmental_migration> (10 June 2020) Accessed 20 June 2020; IDMC, Global Report on Internal Displacement (GRID) 2020 <https://www.internal-displacement.org/global-report/grid2020/> (April 2020) accessed 05 June 2020.

In 1970, Lester Brown coined "environmental refugees" and later the United Nations Environmental Programme (UNEP) defines them to mean those persons who forcibly leave their habitat for environmental disruption.[18] Basically, there are three types of environmentally displaced persons: temporarily displaced persons due to temporary environmental stress, permanently displaced persons due to 'anthropogenic disturbance to environment and climate' and those persons who migrate for better livelihood because of environmental disturbance.[19] However, due to the limitations of the scope of this study, the Internally Displaced Persons (IDPs) and economic migrants are out of the purview of the meaning of climate refugees. That is to say that in respect of crossing international frontiers, climate refugees are classified as internally and internationally displaced persons. Since the current study argues for recognition of climate refugees under the modern regime of IRL, the analysis is limited to cross-border climate refugees.

By 2050, around 100 to 250 million people will be displaced internally or internationally for the consequence of environmental uncertainty and disturbance.[20] According to the International Federation of Red Cross, the events of displacement caused by climate change is by far bigger than the war in the present world.[21] In the near future, the world is going to experience more influx of people crossing borders because of climate change. At least 26 million people of Bangladesh alone are going to be displaced due to the growing submerge of their habitat under sea water by middle of this century.[22] The problem is more acute in Kiribati, Tuvalu and the Maldives as these countries are often termed as on the league of "disappearing states".[23]

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18 Berchin and others (n 2) 148.

19 *ibid*.

20 Eike Albrecht and Malte Paul Plewa, 'International recognition of environmental refugees' (2015) 45 EnvtlPol'y& L 78.

21 Reliefweb, *Natural Disasters Contribute to Rise in Population Displacement* (20 June2008) <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentD=538&ArticleID=5842&I=en> accessed 2 December 2019.

22 Reazul Ahsan, Jon Kellet and Sadasivam Karuppannan, 'Climate Induced Migration: Lessons from Bangladesh' (2014) (Doctoral Dissertation, Common Ground Publishing).

23 Albrecht and Plewa (n 20).

It is claimed that the definition of a refugee under the 1951 Convention or under the statute of the UNHCR is claimed to be too narrow to cover climate refugees.[24] This is because the instruments categorise refugees as persons who are outside the border of their respective countries of nationality or formal habitual residence under a well-founded fear of persecution on the basis of five specific grounds.[25] Among the four elements of determining refugee status under the Convention, the criteria of persecution and basis of such persecution are the key hurdles for a climate refugee to seek protection under the traditional scope of the IRL. Conventionally, persecution is interpreted as a political action performed by the governmental agencies of a country.[26] The proponents of this opinion claim that the adverse effect of climate change cannot be treated as persecution from the part of any government as it is not manmade.[27] It is further argued that the persons displaced for climate change do not fall in any of the five categories – race, religion, nationality, member of particular social group or political opinion.[28] Thus it is concluded that these persons cannot invoke the protection as refugee under the existing regime of the IRL.

Despite such claims, there are some strong arguments which contend that the persons who become the victim of adverse effects of climate change and consequently, cross the border can be termed as refugee, and they are equally entitled to get protection under IRL.[29] Fritzpatrick points out the notion of persecution has undergone a huge evolution parallel with the evolution of the concept of state and politics.[30] She further suggests that the concept of 'persecution' is elastic and it should adapt the nature and motivations of persecutors.[31] Unfortunately though this elasticity of defining refugee rests upon the

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24 Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012).

25 James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2005).

26 Cooper (n 4) 481.

27 Rafiqul Islam, 'Climate Refugees and International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Brill 2014), 215.

28 Cooper (n 4).

29 Islam (n 27).

30 Fitzpatrick (n 4) 229.

31 *ibid* 239.

whim of political leaderships of the concerned countries.[32] To interpret 'persecution' more liberally another point is that climate refugees can be treated as 'being persecuted' since both civil and political freedoms, and serious social and economic consequences can be encompassed under persecution.[33] Besides, it is contended that a person is said to be persecuted under the 1951 Convention when he faces a real risk of starvation for want of sufficient food since it ultimately breaches his right to life and thus it recognises that the socio-economic rights might trigger persecution.[34]

In addition, climate refugees fall within a specific category of 'members of particular social group'.[35] The US Court of Appeal decided "attractive young women who risks for being kidnapped and are forced into prostitution"[36] or "women who fear prostitution" as members of particular social group.[37] Some scholars emphasise that the climate refugees are persecuted as a specific group of people since the so called black and brown people from the global south are the main victim of the crisis.[38] Finally, the suggestion to establish climate change as a natural act does no longer hold the ground as the Global North, i.e. the countries geographically situated in the northern part of the universe, is mainly responsible for this crisis. Besides, the typical promise to reduce $2^0$C temperature under Paris Agreement would cause the loss of life and habitats of millions of black and brown people mostly from the of political map of the world.[39]

The extended definition as incorporated in the Convention Concerning the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration on Refugees of 1984 entail those as refugees

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32 *ibid*.

33 Bruce Burson, Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition in Tamer Afifi and JilJäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010).

34 The Refugee Status Appeal Authority (RSAA) of New Zealand Refugee Apeal Nos 75221 and 75225 (23 September 2005) Paras 79, 112.

35 Islam n (27).

36 Rreshpja v Gonzales 420 F.3d 551 (6th Circuit 2005).

37 Cece v Holder 733 F.3d 662 (7th Circuit 2013.

38 Naomi Klein, On Fire: The (Burning) Case for a Green New Deal (Simon and Schuster 2019).

39 *ibid*.

who flee their country because their lives, safety and freedom are threatened for the reason of disruption to public order. Besides, the UNICEF incorporates those as refugee who leave their country for natural disaster like earthquakes and floods.[40] Hence the climate refugees may fall in this category because the mass fleeing for the negative of climate impact can be equalised with the disruption of public order.[41] These protections are, however, highly qualified by time, territory and concepts as well. On the above, the contemporary legal regime of IRL need to be interpreted to accommodate the plight of climate refugees to give effect the rule of purposive interpretation of international treaty.[42]

Summing up, climate refugees signifying those who cross an international frontier due to adverse effects of climate change can be considered refugees under the purview of the IRL since they are being discriminated by the world orders seen by powerful and weak governments alike. The recognition of climate refugees is also acknowledged in the regional instruments including the OAU Convention and the Cartagena Declaration. In addition to climate refugees, the recognition of armed conflict refugees is also a vibrant issue under international law which is scrutinised in the following part.

### 3.2. Recognition of Armed Conflict Refugees

It is undisputed that the Refugee Convention was drafted to recognise the vulnerabilities of the victims of post-Second World War. However, the nature of armed conflicts has undergone a considerable change in the present days, and therefore, the question of the recognition of armed conflict refugees arise under the contemporary mechanism of IRL.

As it is mentioned earlier, the four thresholds to be met by refugees are the alienage, well-founded fear of persecution on the basis of race,

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40 UNICEF New Zealand, *Who Is A Refugee?* <http://www.unicef.org.nz/page/168/Whoisarefugee.htm> referred in L W Marshal, 'Toward a new definition of 'refugee': is the 1951 convention out of date?' (2011) *37*(1) European journal of trauma and emergency surgery 61.

41 Islam (n 27).

42 VCLT (n 5).

religion, nationality, political opinion or particular social group and their unwillingness or inability to return to their country.[43] In the case of victims of armed conflicts, they are able to satisfy the first two elements, but the main challenges for them are to clarify the nature of persecution and the basis for such persecution.

Both international and non-international armed conflicts contribute to displacing people within or outside of their countries.[44] However, the persons who are forced to flee their country of nationality are not explicitly addressed as refugees under the 1951 Convention. The Convention does not mention the 'fear of indiscriminate effects from armed conflicts or situations seriously affecting public order as a reason to claim refugee status when crossing a border'.[45] Although the Convention is silent concerning the position of persons being persecuted in armed conflicts who seek refugee status, the UNHCR Handbook categorically underscores that 'persons compelled to leave their country of origin as a result of international or national armed conflicts are not *normally* considered refugees under the 1951 Convention or 1967 Protocol'.[46] The Courts of various countries including Canada and the UK have delivered judgments in line with this suggestion as they perceived that many armed conflicts these days are based on race, religion or political opinion and thus granting these persons refugee status would open the floodgates as it might qualify all individuals on either side of a conflict.[47]

The UNHCR Handbook, however, states *normally* these persons are not considered to be refugees. The Handbook also definitely spells out that if the person could show that he/she is under a well-founded fear of persecution facing a 'greater risk' or 'over and above' the risk of his fellow countrymen, and a lack of protection, then he/she would be

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43 Art 1A (n 1).

44 V Seshaiah Shastri, 'Armed Conflicts and Protection of Refugees' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Brill 2014), 164.

45 *ibid*.

46 UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UNHCR Handbook) UN doc HCR/1P/4/ENG/REV.3 (4thedn 2019) para 164 (emphasis added).

47 Isa v secretary of State Canada 1995 28 Imm LR (2nd) 68 Para 8; Adan v Secretary of State of Home Department 1998 2WLR702 HL.

successful to his/her claim of refuge.[48] For the sake of more clarity, the UNHCR reiterates 'in many situations, persons fleeing conflicts may also be fleeing a well-founded fear of persecution for Convention reasons.'[49] On the above, becoming a victim of armed conflicts is not a blanket restriction for granting the refugee status. Hence, the victims of armed conflicts who are compelled to leave their country being attacked directly by the belligerents or being deprived of their rights upon their property, house, land and so forth for the natural consequences of the deadly violence are persecuted either for their race, religion, political opinion or membership to a particular social group.[50]

In comparison with international legal frameworks for protecting armed conflict refugees, the regional mechanisms are much more progressive. To illustrate, the OAU Convention Governing the Specific Problems of Refugees in Africa of 1969 adopts a broader clause encompassing persons fleeing their country for external aggression, occupation, foreign dominion or events seriously disturbing public order as refugee.[51] Besides, for the countries of Latin America, the Cartagena Declaration of 1984 accepts the similar definition granting the refugee status to people who desert their country forcefully for the reason of external aggression, occupation or disturbing public order.[52]The EU in its Directives of 2004, amended in 2011, attributes refugee status to an individual upon a number of grounds including serious and individual threat to a person arising from a situation of armed conflict.[53] Finally, the 1951 Convention aimed to protect the victims of second world war and thus, an attempt to apply the Refugee Convention for the victims of armed conflicts is nothing but the 'natural extension of the Convention's original purpose'.[54]

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48 UNHCR Handbook (n 41) para 165.

49 UNHCR, Executive Committee of the High Commissioner's Programme, Note on International Protection: International Protection in Mass Influx, 8 UN Soc. A/AC. 96/850 (1995).

50 Shasthri (n 44).

51 Art 1(2) (n 1).

52 Cartagena Declaration (n 12).

53 Helene Lambert and Theo Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22(2) International Journal of Refugee Law 237.

54 *ibid*.

Analysing the concerned provisions of the UNHCR Handbook, and the other regional instruments, it is submitted that armed conflicts refugees possess the requirements to be recognised as refugees under the current framework of the IRL.

## 4. Conclusions

The study argues the definition of persecution as an act of a government upon individuals demands a re-interpretation in the light of the objective of refugee laws to protect the vulnerabilities of climate and armed conflict refugees since along with traditional causes of refugee crises, the adverse effects linked to climate change and armed conflicts contribute to increasing the number of refugees across the globe. This research agrees with the idea that the concept of persecution should evolve according to the nature and motivations of persecutors.[55] Thus, victims of climate change and armed conflicts who are compelled to leave their country are argued to be persecuted. In addition, the notion of 'membership to a social group' is the heart of the Refugee Convention that keeps the Convention as an effective instrument. Various courts expand the notion of the membership to a social group in a wide manner.[56] Consequently, both climate and armed conflict refugees can satisfy the threshold of refugee status since there is a scope to stretch the legal definition of refugees to protect the rights of these persons as refugees under the current framework of refugee law.[57] It is worth noting that the present study focuses only with the cross-border displacement as it highlights the recognition of climate refugees under the contemporary framework of IRL which is exclusively limited to internationally displaced persons. Since thousands of people are internally displaced due to climate change and armed conflicts, further study is needed to determine the recognition of the Internally Displaced Persons (IDPs) under the refugee framework or under other mechanisms. Although the UN Guiding Principles on Internally Displaced Persons was drafted in 1998, it is a non-binding instrument and it can be hardly argued as successful to recognise the vulnerabilities of IDPs.

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[55] Fitzpatrick (n 4) 229.
[56] Rreshpja( n 36); Cece (n 37).
[57] Isa (n 47).

# Recycling of Ships in Bangladesh: Legal Norms and Practices

**Md. Raisul Islam**[*]
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## Abstract

The recycling of ships epitomises both the potentialities and hazards of a surging global economy. The sector was not formally announced as an industry in Bangladesh until 2006, even though the country has been contributing to the largest share of global ship recycling production over the past five decades. The sector has significantly flourished in Bangladesh using the beaching approach which results in significant environmental disruption and extreme labour abuse. The present study examines the general and practical issues concerning ship recycling practices and workers' safety in Bangladesh. It also assesses the existing national and international laws, principles, rules, regulations and recommendations associated with the ship recycling process. The focus is on how ship scrapping can be further improved to ensure environmental sustainability and workers' safety. The analysis of the global trends in ship recycling methods indicates the severe need for a drastic shift in the way ships are recycled. The paper suggests that the dry-docking approach should be espoused as the most viable solution for recycling ships in Bangladesh.

**Keywords:** Recycling of ships, ship breaking and recycling industry (SBRI), beaching, dry-docking, hazardous wastes, environmental pollution

## 1. Introduction

Bangladesh is expected to transform itself into a middle-income country by 2021 and a developed one by 2041, by crossing the list of

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least developed countries (LDCs).[1] Meanwhile, the country must sustain development. However, Bangladesh retains a predominantly agro-based economy with an insignificant industrial infrastructure,[2] whereas industrialisation is an indispensable criterion for sustainable economic growth and social transformation. Due to the availability of cheap labour force, Bangladesh has the potentiality to structure a diverse range of industries. One of such industrial sectors is the ship breaking and recycling industry (SBRI).The SBRI is indeed a labour-intensive industry which is tremendously an imperative source of manufacturing steel at a comparable price. The domestic steel manufacturing companies and ship recycling merchants of Bangladesh assemble metals from the local scrapyards, of which 50% to 60% are reutilised in re-rolling facilities of Bangladesh and the rests are re-soldlocally or exported.[3] Yet the fact remains that the scrapping of ships is potentially detrimental to the environment and public health. The vast majority of the global ship scrapping activities take place in South Asian scrapyards and they are carried out using the beaching approach which almost has no technological facilities and where environmental issues are mostly the secondary concern. It is indeed a matter of a staggering concern since the South Asian nations, especially Bangladesh, India and Pakistan, are responsible for 90% of the gross tonnage scrapped all over the world.[4]

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1 Paul BP. 2017. Becoming a Developed Country by 2041.*The Daily Star*. Last Updated on 17 May 2017.[Online].Available at <https://www.thedailystar.net/opinion/open-sky-0/becoming-developed-country-2041-1398349>.Accessed on 19.09.2020.

2 Nakandala D & Malik A. 2015. South Asia. Chapter 21.*In: UNESCO Science Report: Towards 2030*. 566-597, at p. 583. [Online].Available at <https://en.unesco.org/sites/default/files/usr15_south_asia.pdf>.Accessed on 16.08.2020.

3 Ahammad H & Sujauddin M. 2017.*Contributions of Ship Recycling in Bangladesh: An Economic Assessment*. Final Report for the IMO-NORAD SENSREC Project. London, UK: International Maritime Organization (IMO). At p. 52.

4 NGO Ship-breaking Platform (NSP). 2020. *Platform Publishes List of Ships Dismantled Worldwide In 2019*. Press Release. 04 February 2020. [Online].Available at <https://ship-breakingplatform.org/platform-publishes-list-2019/>.Accessed on 07.10.2020.

By and large, the recycling of ships is typically the procedure of dismantling an obsolete vessel[5] and a ship denotes to moderately a large vessel of over 5000 tonnes which can navigate in the high sea.[6]In the 19th century, the disposal of an obsolete vessel was literally termed as 'ship scrapping' or 'ship demolition'.[7] Both the terms indicate the ship which has already exceeded the final stage of its economic life[8] and is no longer economically worthwhile to the owner. However, the ship epitomises a significant value in spite of having surpassed its economic life, such as the hull, propeller and main engine of the ships are dismantled as scrap metals to use for some other applications. With the emergence of the industry, several scholars have cited ship disposal as 'ship-breaking'. The term 'ship-breaking' was used as a popular expression as long as this industry was viewed as a less regulated sector in the world. When the international community and the environmental organisations set out to explore the safety measures of ship dismantling, the industries were promoted under a different moniker 'ship recycling' which includes all the accompanying operations, such as mooring, demolition, material restoration and reprocessing. In reality, ships are never disposed of but recycled and everything on the ships gets a new identity.[9]

The study attempts to explore the general and practical aspects concerning ship recycling practices and workers' safety in Bangladesh.

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5 Saha RK, Islam MS & Rahman MM. 2013. Safety Management for Bangladeshi Ship Breaking Industries Perspective. *Global Journal of Researches*.13(5): 9-13, at p. 9. [Online].Available at <https://globaljournals.org/GJRE_Volume13/2-Safety-Management.pdf>.Accessed on 15.09.2020.

6 Tridib.2011. Ship breaking Activities in Bangladesh and Collision of Marine Biodiversity. *Ship Recycling*.[Blog]. 21 February 2011. Available at <http://recyclingships.blogspot.com/2011/02/>.Accessed on 05.10.2020.

7 Sinha S. 1998. Ship Scrapping and the Environment - The Buck Should Stop! *Maritime Pollution Management*. 25(4): 397-403, at p. 397. [Online]. Available at <https://doi.org/10.1080/03088839800000062>.Accessed on 22.09.2020.

8 Typically, a term of 20 years is the lifespan of a vessel. Regardless of any conversion or extension, it cannot be expanded over 25 years. However, the International Maritime Organisation (IMO) has set the life of a ship for 25 years but the insurance firms reluctant to provide insurance coverage on a ship above the age of 20.

9 Motor Ship 1999. IMO Consider Ship Scrapping. *The Motor Ship*.Updated on 1 September 1999.[Online].Available at <https://www.motorship.com/news101/industry-news/imo-consider-ship-scrapping2>.Accessed on 11.10.2020.

The emphasis is how ship recycling can be further improved in such a way to ensure environmental sustainability and workers' safety. The study also aims to collate relevant national and international laws, principles, rules, regulations and recommendations concerned with ship recycling activities. By and large, the purpose of the study is to suggest a sustainable approach for recycling ships in Bangladesh. The qualitative approach was used as a method of the study. In order to meet the objectives of the study, the study examines the general and practical aspects concerning ship recycling practices and workers' safety in Bangladesh. It also assesses the existing national and international laws, principles, rules, regulations and recommendations associated with the ship recycling process. The safety implications of humans and the environment during the process of scrapping ships are also taken into consideration. Priority was provided to primary sources but data were also accumulated from secondary sources. A comprehensive collection of reference books, research journals, articles, various census reports, survey reports, newspapers, statistical handbooks, theses and relevant legislations with reported and unreported cases are examined and analysed to gather the data for the factual description of the study.

## 3. The Ship-Recycling Dilemma: General Practices in the Yards

The recycling of ships at Chattogram coast in Bangladesh started spontaneously when a Greek giant vessel 'MD Alpine' was driven on the shore of Sitakund, the northern part of Chattogram city, by the devastating cyclone of 1960.[10] Chittagong Steel House purchased that ship in 1965 and had it dismantled. Ship recycling as a business started in this area in 1972.[11] 'Al-Abbas', a Pakistani ship was devastated by

[10] Rabbi HR & Rahman A. 2017. Ship Breaking and Recycling Industry of Bangladesh: Issues and Challenges. *Procedia Engineering*. 194: 254-259, at p. 254. [Online]. Available at <DOI: 10.1016/j.proeng.2017.08.143>. Accessed on 24.09.2020.

[11] Hossain MM & Islam MM. 2006.*Ship Breaking Activities and its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Management*. Chittagong, Bangladesh: Young Power in Social Action (YPSA). At p. 5.

bombing during the Liberation War of 1971.[12] It was subsequently salvaged by a Soviet squad operating at the port of Chattogram and the ship was taken to the seashore of Fauzdarhat. Karnafully Metal Works Ltd., a local firm of Bangladesh, purchased the ship in 1974 to scrap and launch the commercial scrapping of vessels.[13] The sector was predominantly centred in developed countries. From the 1980s onward, the enrichment of regulations along with other aspects of 'ecological modernisation' and labour rivalry triggered the transition of such a dirty and hazardous practice to South Asian region.[14]Bangladesh ranked at number two in the entire world in terms of tonnage scrapped by the middle of 1990s.[15] Even then, suchan activity was not formally announced as an industry in Bangladesh until 2006. There are reportedlyaround150 ship-breaking yardsin Bangladesh but purportedly a number of 70-80 shipping companies are directly involved in the dismantling of ships in Chattogram.[16]The yards are often referred to as ship graveyards because so many ships are broken up in these yards. Notably, all the shipyards are situated on the Bay of Bengal beachin Sitakund (Bhatiary to Barwalia) and ship-breaking, scraping and scrap handling are done simultaneously in these open yards almost all the year-round.

Approximately, a number of 700 ships from around 45,000 ocean-going ships all over the world are being taken out every year for

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12 Hossain K A. 2015. Overview of Ship Recycling Industry of Bangladesh. *Journal of Environmental & Analytical Toxicology*. 05(05): 1-7, at p.7. [Online]. Available at <DOI: 10.4172/2161-0525.1000312>. Accessed on 04.10.2020.

13 *Supra* note 11, at p. 5.

14 Frey RS. 2015. Breaking Ships in the World-system: An Analysis of Two Ship Breaking Capitals, Alang-Sosiya, India and Chittagong, Bangladesh. *Journal of World-Systems Research*. 21(1): 25-49, at p. 29. [Online].Available at <http://jwsr.pitt.edu/ojs/jwsr/article/view/529/541>.Accessed on 27.09.2020.

15 International Federation for Human Rights (FIDH). 2002.*Where do the floating dustbins end up? Labour Rights in Ship-breaking Yards in South Asia: The cases of Chittagong (Bangladesh) and Alang (India). n° 348/2*. Report, December 2002. Paris, France: International Federation for Human Rights (FIDH). At p. 7.[Online].Available at <https://www.refworld.org/docid/46f1461e0.html>.Accessed on 02.09.2020.

16 Hassan M & Tabassum R. 2020. Ship-Breaking Industry: Emerging Sector of Economy. *The Daily Observer*. 4 March 2020.

dismantling.[17] In 2019, 674 ocean-going merchant ships and offshore units were sold to global scrapyards, of which 479 ships were wrecked at just three beaches in Bangladesh, India and Pakistan, representing nearly 90% of the overall tonnage scrapped globally.[18] In the first quarter of 2020, a total of 166 ships were sold to global scrapyards, of which 126 ships were sold to South Asian scrapyards. Bangladesh and India correspondingly brought 54 and 63 ships for dismantling during the first quarter of 2020.[19] In the second quarter of 2020,a total of 98 ships were sold to global scrapyards, of which 60 ships were sold to the beaches of South Asia.[20] Bangladesh brought 20 ships for dismantling during the second quarter of 2020.[21] Notably, in Bangladesh, 221 ships were dismantled in 2015, whereas 250 in 2016, 214 in 2017, 196 in 2018 and 236 in 2019.[22] Ship dismantling in Bangladesh dropped in the second quarter of 2020 by more than 71%due to the emerging coronavirus pandemic.[23] The scrapping activities involve nearly 50,000 direct [24] and between 100,000 and 200,000 indirect workers in Bangladesh.[25] Around 300-500 workers are frequently employed to break down a ship.[26] In addition, many more workers are employed in downstream activities to extract all sorts of materials from the ship.

All the ship-breaking yards, particularly the South Asian scrapyards, have the same overarching scenarios. They are not structured in scientific or technical aspects and the management is primitive and

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17 *Supra* note 15, at p. 7.

18 *Supra* note 4.

19 Munni M. 2020. Ship Dismantling Drops 71pc in Q2 on Pandemic. *The Financial Express*. 13 July 2020.

20 NGO Ship-breaking Platform (NSP). 2020a. *Platform Publishes South Asia Quarterly Update* #22. 09 July 2020. [Online]. Available at <https://shipbreakingplatform.org/platform-publishes-south-asia-quarterly-update-22/>. Accessed on 03.10.2020.

21 *Supra* note 19.

22 *Supra* note 16.

23 *Supra* note 20.

24 *Supra* note 16.

25 International Federation for Human Rights (FIDH), Young Power in Social Action (YPSA) & NGO Ship-breaking Platform (NSP). 2008. *Child breaking Yards: Child Labour in the Ship Recycling Industry in Bangladesh*. Paris, France: International Federation for Human Rights (FIDH). At p. 5.[Online].Available at <https://www.fidh.org/IMG/pdf/bgukreport.pdf>.Accessed on 07.09.2020.

26 *Supra* note 16.

inefficient as well. These scrapyards are affecting flora and fauna adjacent to the seashore as well as are posing a significant danger to the coastal and marine ecosystem and public health. The workforce of Bangladesh employed in this sector comes from the poverty-stricken regions, particularly from the North Bengal.[27] Workers, including children, spend 10-12 hours per day at the scrapyards, usually from 7 am or 8 am. Some of them work perhaps more, up to 14 hours per day.[28] Child workers are frequently employed at the scrapyards as cutter helpers whose fundamental task is to assist the cutter-master in splitting iron sheets into small parts. In addition, they are not professionally trained to scrape before joining the scrapyard. As a result, child workers have to rely on the experienced staff who instruct them all the basics of "do and don't" while at work.[29] The wages of workers are measured on a daily hour basis and charged fortnightly. The gross monthly wages of child workers vary from $70 to $100 and the daily wages range from $3 to $5.[30] A Gazette notification released on 11 February 2018 classifies the workers of the SBRI in Bangladesh into four grades.[31] Under the gazette notification of 2018, the minimum monthly wages have been fixed amounting to ৳31,750 in total for grade-1, ৳24,250 in total for grade-2, ৳21,250 in total for grade-3 and Tk 16,000 in total for grade-4 workers and employees of SBRI.[32] In addition, for a term of six months, an apprentice worker will obtain per month amounting to ৳8,000 in total under the scale of the minimum wages.[33] Regrettably, scrapyards are not complying with the gazette notification released on 11 February 2018. Child workers are usually paid much less than the adults even though they work effectively

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27 Young Power in Social Action (YPSA). 2005. *Workers in Ship-breaking Industries: A baseline survey of Chittagong (Bangladesh).* Chittagong, Bangladesh: Young Power in Social Action (YPSA). At p. 30.[Online].Available at <http://www.ypsa.org/publications/shipbreaking_baseline_survey.pdf>.Accessed on 21.09.2020.

28 Chowdhury MS. 2019. *Child Labour in the Ship breaking Sector in Bangladesh.* Project Report. 19 June 2019. At p. 21.

29 *Supra* note 25, at p. 18.

30 *Supra* note 28, at p. 21.

31 Bangladesh Government Press (BG Press). 2018. *Extraordinary Gazette of February 2018*: *SRO No. 52-Ain/2018.*

32 *Ibid*.

33 Hussain A. 2019. Ship-Breaking Industry: Minimum Wage Still A Far Cry. *The Dhaka Tribune*.

almost the same hours. The overtime wage rates remain extremely low and it is a gross violation of the Labour Act 2006. Moreover, the amount of the annual festival bonus to the workers is entirely unknown; hardly ever workers are provided quite a nominal amount as a charity that varies from $6 to $12.[34] However, *the Labour Act 2006* allows workers to receive two annual festival bonuses equivalent to the basic wages of two months.

The basic labour rights and ship-breaking regulations are frequently violated, such as ship-breaking workers are deprived of a letter of appointment, an identity card, nominal wages, compensation and other benefits, bonuses, insurance, proper working hours, paid leave, holidays and a stable place of work.

Ships are wrecked in vast open spaces at the scrapyards of Bangladesh. Cranes, motorised pulleys and lifting machineries are rarely tested and monitored.[35] Ropes and chains collected from the wrecked ships are frequently reused at the scrapyards without measuring and verifying their reliability of strength.[36] The metal sheets are scraped almost around the clock by gas-cutters and their assistants without their eye protection which makes them more prone to welding impact.[37] Workers are also found reluctant to wear the uniform and use boots and gloves. The ignorant and insensitive workers often carry a huge piece of iron sheets on their shoulders without considering the aggregated weight of the sheets and the employers also deliberately disregard the legal weight limits.[38]

Scrapyards are filled with contaminants, hazardous substances and tiny pieces of sharp and pointed iron splinters pasted on the surface of the beach, triggering the individuals to be injured. Hazardous substances that continuously come with the ships include asbestos, PCBs (Polychlorinated Biphenyls), lead, arsenic, TBT (Tributyltin),

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34 *Supra* note 28, at p. 21.

35 *Supra* note 11, at p. 12.

36 Vidal J. 2012. Bangladeshi workers risk lives in ship breaking yards. *The Guardian*. 05 May 2012. [Online].Available at <https://www.theguardian.com/world/2012/may/05/bangladesh-workers-asia-ship breaking>.Accessed on 10.09.2020.

37 *Supra* note 28, at p. 16.

38 *Supra* note 11, at p. 12.

PAHs (Polycyclic Aromatic Hydrocarbons), chromates, mercury and slag oil.[39] Such substances directly interact with the natural environment and cause soil degradation, contamination of the marine water and disruption to natural ecosystems.[40] Simultaneously, it renders an atmospheric crisis in the vicinity of Sitakunda Upazila, such as the abandoned black oil available in the abandoned ships is being used in the brick kilns to manufacture bricks that pollute the quality of the air. The scrapping of ship striggers welding and cutting fumes, radiation, noise, and vibration which result in a significant disruption to the survival of the local residents. The workers are prone to numerous infectious diseases from the exposure of hazardous substances including chemicals. Exposure to asbestos generates an imminent threat and a high cancer risk.[41]Exposure to fumes, such as dust, gas components, dioxins, isocyanates and sulphur, causes bronchitis and lung cancer.[42]

Ships are not cleaned entirely prior to dismantle it. A hocus-pocus inspection is recurrently put through to certify that the ship is free from toxic substances and emissions. Often the ship contains explosive or flammable gases on its hatches and pockets. The cutters utilise obsolete and risky technology, such as drilling tiny holes to unleash fumes or gases, if they are conscious of their experience. Quite often, such forms of rudimentary approaches trigger hazardous explosions. Regrettably, the employers are not concerned for providing adequate safety and precautionary facilities, although ship-breaking is a perilous practice

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[39] Rahman MR. 2013. Environmental Menace of Ship Breaking Industry and National Legal Response: South Asia Perspective. In: *The National Conference on Law and Justice - 2013*. AURO University, Surat, Gujarat, India. 14-15 September 2013. At p. 348.

[40] Alam I, Barua S, Ishii K, Mizutani S, Hossain MM, Rahman IM & Hasegawa H. 2019. Assessment of Health Risks Associated with Potentially Toxic Element Contamination of Soil by End-Of-Life Ship Dismantling in Bangladesh. *Environmental Science and Pollution*. 26(23): 24162-24175, at p. 24162. [Online]. Available at <DOI: 10.1007/s11356-019-05608-x>. Accessed on 07.10.2020.

[41] *Supra* note 39, at p. 348.

[42] Rodríguez E et al. 2014. Lifetime Occupational Exposure to Dusts, Gases and Fumes Is Associated with Bronchitis Symptoms and Higher Diffusion Capacity in COPD patients. *PLoS One*. 9(2): e88426. [Online]. Available at <DOI: 10.1371/journal. pone.0088426>.Accessed on 02.09.2020.

and poses life risks due to fatal accidents and severe occupational diseases. Even a first-aid box is rarely maintained. If any worker is significantly affected by occupational hazards, no one else gives him any work. There is not even a single day without injury, disease or death in the scrapyards. Figure 1 depicts the annual deaths at the scrapyards in Bangladesh from 2005 to July 2020.The number of deaths could be higher than the demonstrated figure, as concealing details about the deaths of workers due to occupational casualties is a pervasive trend of the employers. In the vast majority of scenarios, employers do not even notify the close relatives and acquaintances of the deceased one.

| Years | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Up to July 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Numbers of Deaths** | **8** | **10** | **8** | **14** | **20** | **12** | **15** | **21** | **11** | **9** | **16** | **17** | **15** | **18** | **24** | **5** |

**Figure 1: Annual Deaths at the Scrapyards in Bangladesh**[43]

Since the 1980s, more than 1,000 workers have died in brutal means at the scrapyards in Bangladesh.[44] A hefty portion of the injured workers has been disabled. Inadequate protection structures, the use of an obsolete method in cutting gigantic ships and the lack of precautionary gears are recurrently accountable for explosions. Only in a few cases, disabled workers are offered reimbursement to begin a new subsistence, while injured workers are plunged into extreme poverty most frequently.[45]

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[43] Young Power in Social Action (YPSA). 2012. *Death Trap! A list of dead workers from the year of 2005 to 2012 (September).* October 2012. [Online].Available at <https://shipbreakingbd.info/death_trap.html>.Accessed on 13.09.2020.Illius S. 2020. Green Ship-Breaking Yards Still A Far Cry. *The Business Standards*.[Online]. Available at <https://tbsnews.net/economy/industry/green-ship-breaking-yards-still-far-cry-120394#:>.Accessed on 10.10.2020.

[44] NGO Ship-breaking Platform (NSP). 2020b. *The Human Costs*. 17 September 2020. [Online]. Available at <https://shipbreakingplatform.org/our-work/the-problem/human-costs/>.Accessed on 12.09.2020.

[45] *Ibid*.

## 5. International Legal Instruments Relating To Ship Recycling

There is no globally enforceable legal instrument that exclusively deals with the SBRI. The concerns regarding the transportation of hazardous wastes from developed states to less developed ones have gained renewed impetus as a contemporary issue. South Asian countries have been delayed largely in response to such a matter due to their concern for independence or post-independence reconciliation. This section briefly discusses the existing international instruments related to the SBRI applicable to Bangladesh.

### 5.1 *The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal 1989 (The Basel Convention)*

*The Basel Convention* remains the dominant international law for the regulation of the SBRI with particular significance for the ship break operations. On 22 March 1989, the convention was adopted in Basel, Switzerland and came into effect on 5 May 1992.[46] According to the convention, states parties are required to minimisetrans boundary hazardous waste transportation seeking prior consent for all recycling shipments and ensure environmentally safe handling of interstate vessels. In addition, the convention restraints the export of hazardous wastes from an OECD[47] country to a non-OECD country. *The Basel Ban Amendment*, after its commencement on 5 December 2019, is legally enforceable on parties to *the Basel Convention* who have provided their consent expressly to be bound by it.[48] The key objectives of *the Basel Convention* are to make sure that state parties assume their own

[46] Rahman MA, Akter M and Sheikh W. 2019.A National and International Regulatory Framework for Establishing Sustainable Ship-breaking Industry in Bangladesh. *Bangladesh Maritime Journal (BMJ)*. 3(1): 87-108, at p. 93. [Online].Available at <https://bsmrmu.edu.bd/public/files/econtents/5eb7a6c0bb673bmj-03-01-06.pdf>.Accessed on 16.09.2020.

[47] OECD is the Organisation for Economic Cooperation and Development and includes 36 countries with a high-income economy.

[48] In 1995, a group of delegates from developing countries, who were disappointed with the lack of meaningful enforcement of *the Basel Convention*, created the *Ban Amendment*. *The Basel Ban Amendment* was adopted at the third meeting of the CoP and it establishes a total ban on exports of hazardous wastes from OECD and EC countries to developing countries.

responsibility for hazardous wastes promoting the disposal and recycling facilities of hazardous wastes within their respective territory so that the hazards and damage to public health and the environment are not transmitted to other states.[49] In most scenarios, ships exported for recycling depict an explicit breach of such objectives.

*The Basel Convention* specifies illegal trafficking of hazardous wastes as an offence. The convention contains some discrepancies. Articles 4(1) and 4(6) of the convention explicitly state that there should be no transportation of wastes without notice and approval from all concerned states. Such a prerequisite is often used fraudulently by the corrupt shipping merchants, such as the merchants may declare a ship as a 'waste' immediately after entering into the international waters or after reaching the state wherever the ship might be recycled.[50] The procedure for 'prior consent' requires a comprehensive explanation of the transportation including the quantity and quality of the wastes from the exporting state as well as written consent from the importing state. Infringements have notified that the exporting states frequently misinterpret the factual quality and quantity of the concerned wastes. It was observed in the case of Abidjan disaster where the wastes in question were mentioned as 'routine slops' but in reality, the dirty liquid of naval tank was discovered that contained a complex mixture of gasoline, caustic soda and more than two tonnes of hydrogen sulphide.[51] Such technical incapability denotes that importing states are frequently reluctant or unable to assess the accuracy of provided information. As the dealings of wastes-trading proffer a significant amount of foreign direct investments to the poor states, opportunities

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[49] Choksi S. 2001. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation. *Ecology Law Quarterly*. 28: 509-540, at p. 516.[Online]. Available at <https://www.jstor.org/stable/24114136>.Accessed on 17.09.2020.

[50] Basel Action Network (Ban) & Greenpeace International. 2002. *A Report on Ship breaking and the Legal Obligations under the Basel Convention*. Report submitted to the 4th Session of the Legal Working Group of the Basel Convention. 10 January 2002. Seattle, Basel Action Network.

[51] Leigh D & Hirsch A. 2009. Papers Prove Trafigura Ship Dumped Toxic Waste in Ivory Coast. *The Guardian*. London, 14 May 2009. [Online].Available at <https://www.theguardian.com/environment/2009/may/13/trafigura-ivory-coast-documents-toxic-waste>.Accessed on 18.09.2020.

to assess the accuracy of provided information by the exporting states persistently turn a blind eye. As a result, the self-certification method under *the Basel Convention* is going to be inefficient.

Another thorny issue is concerned with Article 4 of the convention. In accordance with Article 4(8) of the convention, the parties must ensure that hazardous wastes would be handled in an eco-friendly manner within the context of cross-border movement irrespective of its place of disposal. It is surprising that Article 4(10) of the convention explicitly prohibits transportation in any circumstances. By definition, the responsibility is delegated to the hazardous waste generating states to ensure eco-friendly management. In compliance with Article 4(2)(e), the exporting states may not consider the export of hazardous wastes if they have enough reason to assume that the eco-friendly management and disposal would not be maintained sufficiently in the prospective importing state. The convention does not specify how or in what degree this is to be confirmed by the exporting state. Furthermore, under Article 4(2)(g) of the convention, the prospective importing state is obliged in parallel to restrict the hazardous wastes into its territory when it has enough reason to assume that the eco-friendly management and disposal would not be adequately maintained.

There has been another flaw in the concept of 'wastes' by the convention. Article 2(1) of *the Basel Convention* restricts the concept of 'wastes' to "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law". These wastes are indeed for disposal in accordance with the convention but most wastes are arguably claimed for recycling or reusing or refurbishment at the time of transportation.[52] Since *the Basel Convention* refers to 'hazardous wastes' and 'other wastes', as described in Articles 1(1) and 1(2) of the convention, it is crucial to assess when and how the end-of-life vessel destined for disposal converts hazardous wastes. It should be noted that the 7th Conference of *the Basel Convention* acknowledged that end-of-life vessels comprising

[52] Basel Action Network. 2013. Hazardous Waste Recycling: No Justification for Toxic Trade. *Briefing Paper* 7: 1–2. Seattle, Basel Action Network. [Online]. Available at <http://wiki.ban.org/images/7/7f/Briefing_Paper_-7-_Hazardous_Waste_Recycling-_No_Justification_for_Toxic_Trade_-_April_2013.pdf>.Accessed on 19.09.2020.

heavy metals, asbestos, PCBs, and other dangerous substances should be legally expressed as hazardous wastes in pursuant to international law. Therefore, ships carrying certain hazardous substances and destined for scrapping should be identified as hazardous wastes. It represents a significant reform of *the Basel Convention*.[53]

### *5.2 The United Nations Convention on the Law of the Sea (UNCLOS)1982*

T*he United Nations Convention on the Law of the Sea (UNCLOS) 1982* is one of the most influential and extensive environmental treaties in ocean regulation all over the world, often referred to as "the constitution for oceans". All the South Asian countries are the parties to the convention and Bangladesh ratified it in 2001.[54] In response to ship recycling issues, *the UNCLOS 1982* acknowledges the distinct role of the flag states and the port states. Article 192 of *the UNCLOS 1982* specifies states' obligation to secure and conserve the marine environment.[55] Article 194 of *the UNCLOS 1982*encouragesstates for taking initiatives to prevent, mitigate, and control contamination of the marine environment.[56] As *the UNCLOS 1982* is a framework convention, all other international conventions are usually read subject to it.

### *5.3 International Maritime Organisation (IMO) Guidelines*

The International Maritime Organisation (IMO), an entity of the United Nations, is directly accountable for synchronising monitoring issues during the design, construction and service of vessels. The IMO can significantly influence the preparatory procedures over the vessels,

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[53] Center for International Environmental Law (CIEL). 2011. *Ship breaking and the Basel Convention: Analysis of The Level of Control Established under The Hong Kong Convention*. Washington: Center for International Environmental Law. April 2011. At p. 57.[Online].Available at <https://www.ciel.org/Publications/ Ship breaking_22Apr 11.pdf>.Accessed on 21.09.2020.

[54] United Nations (UN). 2020. *The United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter*. Updated on 12 February 2020. [Online].Available at <https://www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.Accessed on 08.10.2020.

[55] *Ibid*, at p. 98.

[56] *Ibid*, at p. 98.

especially before its voyage for dismantling. The first series of guidelines introduced by the IMO on the recycling of vessels were adopted by Resolution A.962(23) at the 23rd regular session of the IMO General Assembly in 2003.[57] Subsequently, it was amended by Resolution A.980(24) in 2005.[58] The guidelines elucidate the procedures for promoting recycling when a new ship is manufactured considering the entire life cycle of a vessel. The guidelines are relatively silent concerning the universally accepted concept of *polluter pays principle*. The guidelines are merely prescribed in nature and require the owners of ships to adopt them voluntarily. As the IMO is not an enforcing agency, it cannot regulate seemingly typical commercial practices engaged in by many shippers or compel countries to comply with the international environmental standards. Moreover, the IMO has not been able to embrace the contemporary requirements of *the Basel Convention 1989* in dealing with the exportation of harmful wastes.

### *5.4 The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (The Hong Kong Convention 2009)*

In December 2005, the IMO granted urgent attention to a legally enforceable instrument to recycle ships. As a result, *the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009* was adopted to ensure that ships are recycled so that they would not endanger the lives or safety of humans and the environment. To be implemented, *the Hong Kong Convention* requires two years from the ratification by at least 15 major flag and recycling countries accounting for 40% of the global shipping merchant by overall tonnage and on an average 3% of recycling tonnage in the past ten years. However, not all the criteria of *the Hong Kong Convention*

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[57] International Maritime Organisation (IMO).2003. IMO GUIDELINES ON SHIP RECYCLING. Resolution A.962(23). Adopted on 5 December 2003.[Online]. Available at <http://rise.odessa.ua/texts/A962_23e.php3>. Accessed on 17.10.2020.

[58] International Maritime Organisation (IMO). 2005. Amendments to the IMO Guidelines on Ship Recycling (Resolution A.962(23)). Resolution A.980(24). Adopted on 1 December 2005. [Online]. Available at <https://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/DocumentsA.980(24).pdf>. Accessed on 17.10.2020.

have been met till date, although it has been ratified by 15 countries as of September 2020[59] and complied with by a few scrapyards.[60] On 24 July 2020, an agreement to promote Phase III of the SENSREC project[61] in Bangladesh was signed between the IMO Secretary-General and Government of Norway(IMO 2020). It may lay the foundation for Bangladesh towards becoming a ratifying state to *the Hong Kong Convention 2009*.

### *5.5 The European Union (EU) Ship Recycling Regulation*

On 1 February 1993, the European Union (EU) adopted *Regulation No. 259* to monitor and regulate waste shipments inside and outside the EU Community. Subsequently, the European Parliament banned the export of hazardous wastes to countries outside the OECD with *Regulation No. 1013 of 2006*, usually referred to as *the European Waste Shipment Regulation (EWSR) 2006*. Following *the Hong Kong Convention 2009*, the EU determined not to delay enforcing *the 2009 Convention*. As a result, the European Parliament grafted a significant portion of *the Hong Kong Convention* into EU law in 2013 with the enactment of *the EU Ship Recycling Regulation (ESRR) 2013*.[62] Although the EU regulations are not global, they bear significance because Europe is globally the second-largest ship owning sector after China.[63]

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[59] As of September 2020, Norway, Congo, France, Belgium, Panama, Denmark, Turkey, Netherland, Serbia, Japan, Estonia, Malta, Germany, Ghana and India have ratified to *the Hong Kong Convention*.

[60] Class NK. 2020. *Ship Recycling Convention (The Hong Kong Convention)*. Updated March, 2020.[Online].Available at <https://www.classnk.or.jp/hp/en/activities/statutory/ship recycle/index.html>.Accessed on 11.10.2020.

[61] A project on Safe and Environmentally Sound Ship Recycling in Bangladesh (SENSREC).

[62] *The Regulation No. 1257 of 2013.*

[63] China had previously been a top choice for 'green' ship recycling as the ships were dismantled in dock rather than beached. According to data by the NGO Ship-breaking Platform, China was fourth in the world in 2017 in terms of ship-breaking volumes, after Bangladesh, India and Pakistan. The country is no longer an option for non-Chinese ships needing to be recycled. The country issued an edict in early 2018 that banned the import of ships and offshore units for recycling as part of a wider ban on importing a total of 32 different types of wastes materials. The regulation was effective from 31 December 2018.

### *5.6 International Labour Organization (ILO) Guidelines*

Several *ILO Conventions* are pertinent for working conditions on ship recycling facilities because ship recycling countries are obliged to include *ILO Guidelines* for workers engaged in scrapyards. [64] Remarkably, Bangladesh has substantially ratified 35 *ILO Conventions*, including 7 fundamental conventions, as stipulated in *the ILO Declaration*.[65] *The ILO Guidelines for Asian Countries and Turkey 2004*[66] suggests the subsequent measures for environmentally sound management of hazardous substances through an assessment of common occupational hazards in scrapyards:

i. The employer must ensure that each ship scheduled for dismantling is in a safe condition for scraping in compliance with the national and international standards and has the required licences and certificates.

ii. The employer should outline a list of hazardous and toxic wastes mostly on the ship to be dismantled.

iii. After evaluating the workplace environment, the employer must ensure that the workers would not be exposed to toxic substances.

iv. The workplace of ship recycling should be inspected on a regular basis and information should be gathered on present and potentially hazardous practices and operations.

### *5.7 Other International Instruments*

*The Universal Declaration of Human Rights* (UDHR) adopted in 1948

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[64] Rousmaniere P & Nikhil R. 2007. Ship breaking in the developing world: problems and prospects. *International Journal of Occupational and Environmental Health*. 13(4): 359–368. [Online].Available at <doi:10.1179/oeh.2007.13.4.359>. Accessed on 12.10.2020

[65] International Labour Organisation (ILO). 2020. *Ratifications for Bangladesh*. [Online]. Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103500>. Accessed on 12.10.2020

[66] International Labour Organisation (ILO). 2004. Safety and health in ship breaking: Guidelines for Asian countries and Turkey. [Online].Available at <https://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/meshs-1.pdf>.Accessed on 11.10.2020.

guarantees in Articles 20, 22, 23, 24 and 25 the right to a standard living, sound health and well-being. In conjunction with these articles and responding to *the 1972 Stockholm Declaration* and *the 1992 Rio Declaration*, a United Nations Human Rights Commission was constituted in 1995. The Commission approved a resolution regarding the detrimental effects of dumping hazardous wastes. In addition, the international community has taken a range of efforts to confront the ship-source marine pollution shortly after the advent of the United Nations (UN). Of these, *the Convention for the Prevention of Pollution from Ships 1973 (the MARPOL Convention 1973)*, *the Rotterdam Convention 1998* and *the International Convention on the Control of Harmful Anti Fouling Systems on Ships 2001* have significant relevance to the ship recycling.

## 6. National Laws Of Bangladesh Concerning Ship Recycling

The laws and regulations in Bangladesh relating to the recycling of ship stake into account the environmental and labour issues as well. Several government entities are involved with ship-breaking issues in Bangladesh, such as the Ministry of Industries, the Ministry of Environment and Forest (the Department of Environment (DoE)), the Ministry of Health and Family Welfare, the Ministry of Labour Employment (the Department of Inspection for Factories and Establishments), the Ministry of Energy and Mineral Resources (the Department of Explosives) and the Chittagong Port Authority.[67] (EJ Atlas 2016). Article 18A of the Constitution of the People's Republic of Bangladesh outlines that the state shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wildlife for the present and future citizens.[68] In fact, *the Ship-breaking and Recycling Rules2011*, *the Hazardous Waste and Ship-breaking Waste Management Rules2011*,*the Wildlife (Conservation and Security) Act 2012*, *the Bangladesh Biodiversity*

[67] Environmental Justice Atlas (EJ Atlas). 2016. *Dirty and Dangerous Ship-Breaking in Chittagong*. Updated on 07 November 2016.[Online].Available at <https://ejatlas.org/conflict/dirty-and-dangerous-shipbreaking-in-chittagong>. Accessed on 13.10.2020

[68] Article 18A was inserted by the *Constitution (Fifteenth Amendment) Act 2011(Act XIV of 2011)*,Section 12.

*Act 2017* and *the National Environment Policy 2018* were adopted considering Article 18A of the Constitution. In 2010, *the Bangladesh Environment Conservation Act 1995* was amended restricting pollutions through ship-breaking. In addition, *the Environment Court Act 2010*[69] can perform a significant role by exercising its authority on environmental issues. All such legislative developments have been made consistently for providing an integral legal basis on environmental issues at the national level.

### *6.1 The Bangladesh Environment Conservation Act 1995*

*The Bangladesh Environment Conservation Act 1995*[70] was adopted in 1995 and subsequently, amended in 2010 [71] to restraint environmental pollution in Bangladesh by preserving and improving environmental standards. According to Section 6(D) of the Act, every ship owner, importer and user of the scrapyard must ensure that no contamination or health hazards would occur in the event of dismantling or cutting any ship. Again, in accordance with Section 12 of this Act, an Environmental Clearance Certificate (ECC) is mandatory for all industries including ship recycling industries.

### *6.2 The Environment Conservation Rules 1997*

*The Environment Conservation Rules 1997* was adopted in pursuance of Section 20 of *the Environment Conservation Act 1995*. Considering the site and environment impact assessment (EIA), Rule 7(1) classifies the industrial units and projects into four categories to issue the ECC, such as Green, Orange-A, Orange-B and Red. The SBRI of Bangladesh is categorised as Orange B but they should be literally categorised as Red.

### *6.3 The Ship-breaking and Recycling Rules 2011*

*The Ship-breaking and Recycling Rules 2011*was formulated in compliance with the judgment in writ petition No. 7260 of 2008, dated 24 May 2011.[72] In accordance with Rule 3, the Ship Building and Ship Recycling

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69 *Act No. LVI of 2010.*

70 *Act No. I of 1995.*

71 *Act No. L of* 2010.

72 Ministry of Industries, Government of the People's Republic of Bangladesh (MoI). 2020. *Rules & Regulations*. Updated on 27 October, 2020.[Online].Available at

Board (SBSRB) has been formed under the authority of the Ministry of Industry with the competence to issue a No Objection Certificate (NOC) for permitting the importation of ships for recycling under a letter of credit (LC). Under Rule 9, the recycler is required to provide documents as referred in Annexure-II and the certificates or documents received from the SBSRB to the Port Authority for attaining an authorisation to the beach a ship.[73] The SSRB officials and the members of other affiliated agencies can inspect the ship physically after it is anchored. According to Rule 13, if, after attaining the authorisation to the beach a ship, it is discovered that the specified ship has not been recycled but is functioning domestically or at high sea as a cargo ship, it would be considered an offence by the scrapyard owner or the company to whom such authorisation was granted.[74] A certificate on 'Gas-free and fit for hot work' is also required from the Department of Explosives under Rule 3.[75] Rule 18 instructs that ship recyclers must have rigorous environmental safeguards in compliance with the sea, water and air under the Environment Conservation Act 1995 and other relevant national environmental laws. These rules are therefore quite significant for the regulation of the SBRI in Bangladesh.

### *6.4 The Hazardous Wastes and Ship-breaking Waste Management Rules 2011*

*The Hazardous Wastes and Ship-breaking Waste Management Rules 2011*was adopted in pursuance to Section 20 of the Environment Conservation Act 1995. Any dismantling ship must possess clearance in compliance with Rule 19(1) and Rule 19(2) which ensure that no ships can be dismantled without such authorisation. To obtain such a clearance, potential applicants are required to expose information concerning dismantling hazardous substances. Detailed waste management procedure is also to be reported.

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<https://moind.gov.bd/site/view/legislative_information/Rules-&-Regulation>.Accessed on 15.10.2020.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

### *6.5 The Bangladesh Ship Recycling Act 2018*

Section 7 of *the Bangladesh Ship Recycling Act 2018*[76] specifies that this Act was enacted to put into effect the requirements of *the Hong Kong Convention 2009*. Section 4 of the Act referred to the formation of a ship recycling zone and Section 25 stipulates that if anyone operates any scrapyard without authorisation, the punishment for such an offence is imprisonment for a term not exceeding 2 years or with a fine extending up to Tk 10 lac to 30 lac or with both. Section 8 of the Act was envisioned to initiate a new authority titled 'Bangladesh Ship Recycling Board (BSRB)' to monitor and control the SBRI. Section 26 of the Act states the punishment for importing a ship without NOC provided by the Shipping Ministry which is imprisonment for a term not exceeding 2 years or a fine extending up to Tk 10lac to 30 lac or with both. If anybody brings a ship ashore and recycles that without NOC, the punishment is imprisonment for a term not exceeding 2 years or a fine extending up to Tk 10lac to 30 lac or with both under Section 27 of the Act. Section 28 of the Act specifies the punishment for availing the facility through a fake certificate, which is a fine extending up to Tk 5 lac to 20 lac. In case of setting up yards outside the zone, the punishment is imprisonment of either description for a term not exceeding 2 years or a fine extending up to Tk 10lac to 30 lac or with both under Section 29 of the Act.

The Act includes a chapter titled "Protection of Environment and Workers' Safety and Security". The chapter points only to the training centre to be set up for the workers within 5 years but does not address any effective measure to be taken for the safety and protection of the workers. Moreover, the Act does not impose any penalties for failing to procure the insurance fund or failing to provide safety manuals to the workers.

### *6.6 The Bangladesh Labour Act 2006*

*The Bangladesh Labour Act 2006* [77] was introduced in 2006 and subsequently revised in 2013 in order to enhance the rights and set standards for occupational safety of workers. The SBRI has been

[76] *Act No. VIII of 2018.*
[77] *Act No. XLII of 2006.*

recognised as an industry by Section 2 of the Act. Section 3 of the Act ensures that every establishment may possess its own service rules and regulations but those would not be less favourable to any worker in that establishment and Section 10 of the Act guarantees the leave of absence of every worker. Section 54 of the Act directs every institution to take adequate measures for the treatment of and effluents due to the production process. Section 100 of the Act specifies that adult worker will typically work or be permitted to work for not more than 8 hours per day in an establishment provided that such a worker can, however, work up to 10 hours per day in that establishment, in compliance with the Section 108 (extra-allowance for overtime). Section 150(1) of the Act bounds the employer or authority to pay adequate compensation when any worker is seriously injured by accident at work. However, for the compliance of any right granted by this Act, any worker of the establishment has the option to move to the Labour Court established in accordance with Section 214 of the Act.

### *6.7 The Fatal Accidents Act 1855*

*The Fatal Accidents Act 1855*[78] was adopted to compensate the legal heirs for the suffering of loss caused by the death of an individual due to actionable wrong. The party responsible for such death or injury may be sued for damages for the benefit of the spouse, parent and children of the deceased or injured person. The provisions can also be applied for the ship recycling sector directly or indirectly benefiting the workers.

## 7. Judicial Response in Regulating the SBRI of Bangladesh

The Bangladesh Environmental Lawyers Association (BELA) lodged a writ petition[79] in 2006 before the High Court Division (HCD) of the Supreme Court of Bangladesh challenging the legitimacy of the entry into the territorial sea of Bangladesh for dismantling of the MT Alfa ship which was listed as one of the fifty hazardous vessels by Greenpeace (Daily Star 2006). The HCD directed the concerned authorities of Bangladesh not to permit the alleged vessel within

[78] *Act No. XII of 1855.*

[79] Writ Petition No.3916 of 2006.

internal waters of Bangladesh. In response, the government restricted the vessel from entering into its internal waters.

Again, on 17 March 2009, the HCD in a verdict, following a writ petition[80] lodged by BELA in 2008, instructed the government to quit operations of all the scrapyards in Bangladesh without environmental clearance certificate (ECC).The HCD ruled that scrapyards must follow the applicable international norms and every single ship ought to be pre-cleaned of hazardous substances prior to its imminent entrance in Bangladesh. On 24 March 2009, the Appellate Division of the Supreme Court of Bangladesh stayed the HCD verdict on the closing operation of scrapyards following a petition lodged by the Bangladesh Ship Breaking Association (BSBA). Strangely, other enforceable portions of the verdict were violated consistently by ship-breakers and government agencies and therefore, on 11 April 2016, the HCD ruled in contempt against 14 government officials, ministries and ship breakers for the non-compliance with the HCD verdict of 17 March of 2009.[81]

In response to public interest litigation[82] filed by BELA challenging the importing and dismantling of MT Producer, a toxic ship similar to J Nat, the HCD held that "the circumstances of the import of the alleged vessel into Bangladesh is, hereby, declared to constitute illegal traffic of a toxic ship into our territory."[83]

The verdict of the Writ Petition No. 8466 of 2017 is noteworthy in that the import, beaching and breaking permits of a toxic vessel have been expressly declared as illegal and for the first time any breaking operation has been put off. It is very significant because it has bound the government to intervene in the suspicious functions of the cash purchasers and correspondingly restricted importing vessels from the

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80 Writ Petition No. 7260 of 2008.

81 Daily Star. 2016. 14 Govt High Officials Face Contempt Rule. *The Daily Star*. Updated on 12 April 2016.[Online].Available at <https://www.thedailystar.net/ backpage/14-govt-high-officials-face-contempt-rule-1208011>. Accessed on 16.10.2020

82 Writ Petition No. 8466 of 2017.

83 Environmental Justice Atlas (EJ Atlas). 2018. *North Sea Producer Ship Breaking, Bangladesh*. Updated on 27 December 2018.[Online].Available at <https://ejatlas.org/conflict/ dumping-of-radiated-ship#>.Accessed on 14.10.2020.

blacklisted flag records. By and large, the verdict would certainly make it strenuous for unscrupulous shipping merchants to perceive Bangladesh as just a dumping ground. Thus, the judicial pronouncements of Bangladesh have steadily supported the implementation of legal and regulatory mechanisms in line with the international standards of shipping industries to protect environmental and human rights.

## 8. A Way Forward

i. Beaching is the only method for dismantling ships in Bangladesh and it is by far the most predominant form of ship recycling approach in South Asia as well because of its low costs.[84] In the beaching process, the ship is required to be operational to fight against the tides which indicate that the hazardous substances of the ship cannot be pre-cleaned. As a result, the recycling countries, rather than the polluter countries, typically manage waste at the beach which is a severe violation of *the Basel Convention 1989*.[85] An analysis of the global trends in ship recycling methods indicates the intense need for a drastic shift in the way ships are recycled. The paper suggests that the dry-docking approach should be espoused as the most viable solution for recycling ships in Bangladesh.

The dry-dock approach, also referred to as 'docking' or 'dry-dock recycling', places the ship on a dock, drains water and dismantles the ship part by part.[86] Dry-docking is considered safer than beaching. The risks of spillage and contamination are

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[84] World Bank (WB). 2010. *Ship Breaking and Recycling Industry in Bangladesh and Pakistan 2010*. The World Bank Report No 58275-SAS. At p. 1.[Online].Available at <https://openknowledge.worldbank.org/handle/10986/2968>.Accessed on 16.10.2020.

[85] Bhattacharjee S. 2009. From Hong Kong to Basel: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back. *Trade, Law & Development*. 1(2): 193-230, at p. 239.[Online]. Available at <https://openknowledge.worldbank.org/handle/10986/2968>.Accessed on 17.10.2020.

[86] International Law and Policy Institute (ILPI).2016. *Ship breaking Practices in Bangladesh, India and Pakistan.*Vika, Norway: International Law and Policy Institute (ILPI). At p. 7.[Online].Available at <https://openknowledge.worldbank.org/handle/10986/2968>.Accessed on 17.10.2020.

insignificant as the sites are enclosed.[87]Moreover, the dry dock in a stable structure makes it easy to regulate the ship recycling activities.[88] The key advantage of the approach is that waste-materials can be processed and routinely cleaned up at individual docks.[89] In dry-docking, since ships are broken down in a confined area using mechanised means and need not be operational at the time of dismantling which promotes ships to be pre-cleaned prior to the arrival into internal waters of the importing country.[90] In such manners, dry-docking, while meeting the standards of international conventions, can reduce the overall hazards confronted by the recycling countries.

ii. It is evident that the applicable national and international laws concerning the recycling of ships are either overlooked or reluctant to implement in Bangladesh. Therefore, Bangladesh should immediately develop a proper authorisation and inspection framework in this regard to ensure appropriate management of hazardous substances, environmental conservation and reporting procedures.

iii. The power to regulate the ship-breaking and scrapyard issues is vested in different government entities under various laws of Bangladesh. It is, perhaps, impossible to coordinate among numbers of ministries and other government offices because of their bureaucratic competition. Such deficiencies in the compliance machinery need to be addressed and resolved promptly and adequately.

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87 Khasnabis S. 2020. Understanding Ship Stability During Dry Dock. *Marine Insight*. 10 April 2020. [Online].Available at <https://www.marineinsight.com/naval-architecture/understanding-ship-stability-dry-dock/>. Accessed on 19.10.2020

88 Wankhede A. 2020. Dry Dock, Types of Dry Docks & Requirements for Dry Dock. *Marine Insight*. 3 July 2020. [Online]. Available at<https://www.marineinsight.com/guidelines/dry-dock-types-of-dry-docks-requirements-for-dry-dock/>. Accessed on 18.10.2020.

89 *Supra* note 87, at p. 7.

90 Poddar P & Sood S. 2015. Revisiting the Ship breaking Industry in India: Axing Out Environmental Damage, Labour Rights' Violation and Economic Myopia. *NUJS Law Review*. 8(3-4): 245-279, at p. 266. [Online].Available at <http://nujslawreview.org/wp-ontent/uploads/2016/12/Paridhi-Poddar-Sarthak-Sood.pdf>. Accessed on 18.10.2020

iv. The government and the employers should broaden the scope of the training programmes for ship recycling workers on managing accidents and taking effective occupational safety initiatives.

v. Alongside with all other certificates that are binding under national statutory laws of Bangladesh, every scrapyard should have following four certificates:

   a. ISO 9001:2008 (For ensuring quality)
   b. ISO 14001:2004 EMS (Environment Management System)
   c. ISO 18001:2007 OHSAS (Occupational Health Safety Assessment System)
   d. ISO 30000:2009 SSESSR (Standard for Safe and Environmentally Sound Ship Recycling)

vi. As marine pollution is almost always transboundary, South Asian countries should effectively strengthen comprehensive regional integration to deal with ship recycling issues and marine environmental hazards.

## 9. Conclusion

The Recycling of ships is an uninterrupted part of the maintenance and management of the life-cycle of ships. A ship ought to be recycled efficiently and sustainably after exceeding the final stage of its economic life. But common forms of economic expansion in South Asian countries do not encourage the adoption and integration of expensive, energy-consuming highly automated means of ship dismantling facilities. The same factors are hindering the expansion of modern infrastructure facilities as well. Even then, the preventing vessels from being scrapped in Bangladesh or eliminating the SBRI from the specific region of Bangladesh is not a pragmatic solution to the issue, as 80-90% of the overall demand for steel in Bangladesh comes from the end-of-life ships. Instead, it is crucial to enhance scrapping facility standards in Bangladesh. It would be prudent to step rapidly towards dry docking approach for recycling ships in terms of future aspirations and present benefits.

# Through the Westminster Lens: A Critical Reflection on the Legislative Procedure of Bangladesh

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## Abstract

Parliamentary offices, rules and procedures in Bangladesh are broadly designed in Westminsterial norms and process. With full recognition of the government's right to govern and legislate, a Westminster styled parliament exists more as an institution of restraint than as one of obstruction. Parliamentary consideration of and deliberation on legislative proposals are meant to legitimize rather than prevent. Of course, the parliamentary opposition and government backbenchers must be given a right of reasonable debate and critique before they are asked to legitimize. The UK House of Commons has adopted several pro-opposition procedural devices to maximize the restraint aspect of law making. Central argument of this paper is that missing those pro-opposition and backbench devices, the legislative procedure of Bangladesh constitutes a mere legitimation tool for the executive branch.

**Keywords:** Rules of Procedure, Parliamentary Opposition, Backbenchers, Committee Stage, Deliberation Stage

## 1. Introduction

The Westminster Parliamentary System, named after the United Kingdom (UK) Parliament sitting in the Palace of Westminster in London, is a system based on a series of conventions and procedures – written and unwritten. It places the head of state (the Crown) "above politics" with mostly ceremonial roles. Head of the state formally

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appoints the Head of the government and summons the Legislature. Apart from the symbolic Crown above, the Westminster Parliament has some other internal organisational aspects.[1]

The head of the Government and his team of Ministers is drawn from the majority party in legislature. The government is assisted by a civil service responsible to the government primarily. Legislature holds the government and the civil service accountable through devices like legislative scrutiny, budgetary control and collective and individual ministerial responsibility. A hall mark of the Westminster Parliamentary System is the presence of a constitutional opposition in the legislature. Its rights of participation in the legislative process and opposition to the policies and proposals of the government are encouraged and constitutionally protected. The Speaker represents the legislature with a non-partisan posture. Though drawn upon from a political party in parliament, the Speaker is conventionally impartial in conducting the legislature. S/he refrains from taking part in the affairs of his or her party. Apart from maintaining the order of the House and regulating the floor, Speaker is empowered to interpret and apply authoritatively the rules and conventions of parliamentary process.

A Westminster Parliament is primarily responsible for legislating. Before finding their place in statute book, laws go through pre-legislative and legislative stages. Parliament, as the supreme law-making body of the land, also has a review authority on laws made by the executive bodies in exercise of their delegated power. Legislative process in a typical Westminster Parliament is designed to the advantage of the government's legislative programs. Procedural tenets at the Westminster make sure that government bills sail smoothly through the House. At the same time, it tries to ensure the widest possible debate and contestation through parliamentary opposition and government backbenchers. While the opposition is not expected to obstruct or foil the government's legislative proposals in toto, its participation in the process enlightens public awareness *about* the pros and cons of the government attempt and thereby improve the quality of the laws passed in parliament.

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[1] Alan Trench, 'Wales and the Westminster Model' (2010) 63(1) Parliamentary Affairs 117, 118.

Typical of a Westminster Parliament, the Parliament of Bangladesh is dominated by the executive branch *i.e.,* the Cabinet. It is called into session by the President[2] upon written advice of the Prime Minister.[3] President has the right to address the parliament at the first session following a general election as well the first session of every year.[4] He may also send messages or address parliament on any other occasion as well.[5] Parliament must discuss the address and messages sent by the President.[6] By convention and constitutional provision, the address and messages of the President are drafted by the government of the day. The Prime Minister and other ministers also have a "right" to speak in and take part in the parliamentary business. As an institution of restraint, parliament ensures governmental accountability through procedural restraints on law making and enforcement of Ministerial Responsibility through debate in the floor and scrutiny in the Committees.

This paper aims at critically reflecting on the legislative procedure in Bangladesh. Based on a comparative study with the UK House of Commons, the study seeks to pinpoint the lacunas and drawbacks in the Rules of Procedure of Bangladesh Parliament that are preventing effective participation of, and meaningful contribution from, the government backbench and parliamentary opposition in the law-making process.

## 2. Pre-Legislative Stage: How laws are conceived and drafted

Legislative proposals arise from cluster of sources like the government's electoral manifesto, demands from executive departments, judicial directives, law commission report and public demands crystalized through mass media, civil society and professional bodies etc. In the UK, governments publish White Paper ahead of each parliamentary session that explains its legislative program for the session. The British government proposes around 25 laws in average in each annual session. A Cabinet committee works on

2 The Constitution of Bangladesh, art.72(1).
3 *Ibid*, art. 72(1) further proviso.
4 *Ibid*, art. 73(2).
5 *Ibid*, art. 73(1).
6 *Ibid*, art. 73(3).

the package with the Parliamentary Business and Legislative Committee which comprises the top government leaderships in parliament. The plan is then included in the Queen's Annual Speech that is debated in both Houses.

The Select Committee System of the UK takes the pre-legislative scrutiny there from. Compared to the *ad hoc* Public Bill Committees (PBCs) which do the parliamentary stage of legislative scrutiny, the select committees have permanent membership that allows both expertise and non-partisan approach in their works. Select committee engagement with legislative process can go as far as forcing the government to consider their pre-legislative reports. On many occasions, select committees criticized the government position and managed very surprising modification in the government's legislative agenda.[7] A defiant government is more likely to face stiff opposition during the passage of a Bill. Select committee reports can generate huge amount of opinion force behind its position by gathering public testimonies and reflecting on it on a cross- party basis. This extra-legal pre-emption of legislative scrutiny by the departmental select committees is supported by a tradition and a rule. As mentioned earlier, by tradition, the British Government has to publish its annual legislative agenda in the form of a White Paper or in the Queen's Speech. This gives the select committees very meaningful signals to start their pre-legislative studies. By law, the government must respond to all select committee reports which forces the government to anticipate "how the committees will react" to particular legislative policy.[8]

Like that of the British Queen, annual parliamentary speech of the President of Bangladesh might include some hints on the legislative program of the government for the year. That however is very glossy. Apart from parroting the government's political and administrative policies and actions, presidential speech rarely contains a comprehensive legislative agenda of the government. We therefore completely miss the scope of debating the government's legislative

[7] Megg Russel and D Gover, *Legislation at Westminster* (Oxford: Oxford University Press, 2017) 212.

[8] *Ibid*, 228-230.

program, if there be any, at its root.[9] The government rather initiates legislations on as-the-idea-comes-in basis. The relevant ministries, Legislative Drafting Wing of the Ministry of Law, Justice and Parliamentary Affairs and the Finance Ministry (if the Bill involves expenditure from public fund) and the Cabinet Division work together to finalize a public bill intended to be tabled before the House.[10] Within the governmental channel, a legislative proposal may originate from the Cabinet or a from a sponsoring Ministry. Either way, the draft travels back and forth within the Legislative Drafting Wing and the ministry or ministries concerned. Once final, it is placed for final approval by the Prime Minister presiding over the Cabinet.[11] Outside stakeholders like Law Commission, Professional Groups, Experts in the area concerned and Attorney General Office, etc are consulted occasionally.

After the Cabinet approves a draft bill, the concerned ministry starts the process to table the bill in the floor of Parliament.[12] Individual private members, on the other hand, act on their own in drafting the law s/he proposes. Research and logistics support for individual members however are so inadequate as to allow them to produce any quality legislative draft.

## 3. Legislative Stages: Consideration, debate and changes

During the legislative phase, a bill goes through first reading(reading the title of a bill and tabling it in the floor),second reading(discussion on the principles of the bills, committee stages, clause by clause reading and amendment proposals) and the third reading(motion to pass the bill). Involvement of the parliamentary committees in the legislative process is recognized with importance in the Constitution

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9 R. Jahan and I. Amundsen, *The Parliament of Bangladesh: Representation and Accountability* (Dhaka: CPD-CMI 2012) <http://www.cpd.org.bd/pub_attach/CPD_CMI_WP2.pdf> accessed on 01 March 2021.

10 Administration of the Government of Bangladesh runs under the Rules of Business 1996 (as amended up to date) and the Allocation of Business among the Different Ministries and Divisions (Schedule I to the Rules of Business, 1996) (Article 55(6) of the Constitution).

11 The Rules of Business 1996, Rule 4(ii).

12 Md A. Saleh, 'Law Making Process in Bangladesh Parliament' (2013) 6 Jahangirnagar *Journal of Administrative Studies* 143, 249-151.

and the Rules of Procedure[13]. Vigorous involvement of the committee in legislative process, however, started only after the Seventh Parliament (1996-2001) set up a select committee to review the Bills tabled in the House.[14] Prior to that, Bills would have been referred to the standing committees on relevant ministry which interestingly was headed until recently by the minister-in-charge of the concerned Bill.[15]

Minister-in-Charge, or any Member-in-Charge of a Private Member Bill tables it through a seven or fifteen days' notice respectively with the parliament secretariat.[16] In cases of Government Bill, the Speaker may allow the motion at a shorter notice.[17] The notice is accompanied by an explanatory statement of objectives and reasons and recommendation of the President if it is a Money or Finance Bill.[18]

**First Reading -** Like the British House of Commons, Bangladesh Parliament also allocates government business days and private member business days separately.[19] While the Thursday is reserved for Private Member Businesses, Government Bills may be tabled and considered all other days. Once a motion for leave to introduce the bill is tabled, any member may oppose it. Speaker allows the opposing member a brief explanatory statement and the member in charge will have a chance to reply. The Speaker may then, without further debate, put the question to the vote of the House to decide the leave. If the leave is granted, the bill stands introduced and first reading stage ends there.

**Second Reading (Discussion of General Principles) –** Once introduced, the bill is published in the Official Gazette. At the second reading stage, the member-in-charge of the bill may propose to take it

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13 The Rules of Procedure of Parliament of the People's Republic of Bangladesh was later adopted by the First Parliament of Bangladesh in 1973, <http://www.parliament.gov.bd/index.php/en/parliamentary-business/procedure/rules-of-procedure-english> accessed on June 12, 2021.

14 Nizam Ahmed, *The Parliament of Bangladesh* (Aldershot: Ashgate Publishers, 2002).

15 Nizam Ahmed, 'Parliamentary committees and parliamentary government in Bangladesh' (2001) 10(1) Contemporary South Asia 11, 24.

16 The Rules of Procedure, Parliament of Bangladesh, r. 72, 74.

17 *Ibid*, r. 75.

18 n 15.

19 *Ibid*, r. 74, 75.

straight for consideration of the floor, or refer it to a relevant standing committee or a select committee, or circulate it for eliciting public opinion. Other members may oppose any of the proposals and propose alternatives between consideration in the floor, committees, or circulation for public opinion. At this stage, no amendment to the bill is moved. Only the principles or the general provisions of the bill are discussed. Details are not touched upon except to elaborate the principles.[20] Once the appropriate course is determined, next stage of the second reading begins.

**Committee Stage Amendments and Clause by Clause Discussion -** When it comes to scrutiny of legislative proposals, the UK Public Bill Committees (hereinafter PBCs) are curtailed by partisan committee appointments and strict pre-programming of the committee work by the House. PBCs are relatively small and formed on *ad hoc* basis to consider particular bills. They sit "off the floor" of the chamber and in a separate committee room. Had there been any bill of constitutional importance or urgency, "committee of the whole house" would sit in the floor of the Commons. PBC stage usually starts around one week after the second reading of the bill in the House. A Program Motion adopted by the House would determine how much time the PBCs would get to accomplish their task. Being a partisan committee, government whips and departmental officials have a disproportionately influential role in PBCs' work.[21]Influence of PBCs in law making are sometimes described as "ritualised".[22] It has been claimed that PBCs work to preserve the executive's perception of parliament as mere "legislative machine"[23] through which bills must be

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[20] *Ibid*, r. 78.

[21] J. Levy, 'Public Bill Committees: An Assessment Scrutiny Sought; Scrutiny Gained' (2010) 63(3) Parliamentary Affairs 534, 542.

[22] S. A. Walkl and, 'Government Legislation in the House of Commons' in S. A. Walkland, (ed), *The House of Commons in the Twentieth Century: Essays by Members of the Study of Parliament Group* (Oxford: Clarendon Press, 1979) 247, 251.

[23] A, Kelso, *Parliamentary Reform at Westminster* (Manchester: Manchester University Press, 2009) 36.

driven through as quickly as possible.[24] The most significant change to PBCs was suggested by the Modernisation Committee of 2006 through its report titled *The Legislative Process*. Accordingly, the House approved changes to UK Parliamentary Standing Orders allowing the PBCs a power to "send for persons, papers and records" in the manner of a select committee. This has permitted the PBCs to call for experts, citizen groups and outsiders to contribute to the legislative process. As their participation grows, the scope of consensual approach to legislative scrutiny grows with it.[25] This single device has later helped the members gain more expertise, socialisation and interest in committee works.[26] Though there is still lot of powerlessness in selecting the witnesses and timetabling the scrutiny work,[27] PBCs devote substantial time in questioning the Minister in charge of a bill and any relevant departmental officials. In recent days PBCs are rolling out more number of government and non-government amendments to the bills.[28] Though much of the government amendments are mere clerical corrections and also though the opposition amendments are most likely to be ignored, there is a growing influence of the PBCs in the report stage debate in the House. Additionally, ministers in charge of bills are usually persuaded, and sometimes forced, to undertake and assure the PBCs about bringing amendments at the report stage.[29] The impact of Bill committees has also been demonstrated during the passage of bills through the House of Lords.[30]

In Bangladesh, if a bill is not initially accepted for consideration in the floor and it is sent to Select Committee or Standing Committee, such

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24 L. Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' (2013) 66 Parliamentary Affairs 459, 472.

25 Levy (n 21)539.

26 L. Thompson, 'Debunking the Myths of Bill Committees in the British House of Commons' (2016) 36(1) Politics36, 45.

27 Levy (n 21)540.

28 Thompson (n 24)470.

29 Thompson (n 24).

30 S. Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 Parliamentary Affairs 694.

committee may return the bill with or without amendments.[31] The member-in-charge may then move for considering the bill along with the report of the Committee.[32] Once taken for consideration, Speaker fixes a day for clause by clause reading and discussion of the bill. Decisions on amendment proposals are taken by vote.

**Third Reading -** This stage involves a motion for passing the bill as presented or amended in the second reading stage or by the committee. Speaker usually puts the motion to a vote without additional debate. Debate, if there be any, concerns on whether the bill as a whole should be passed or rejected. Details of the bill is not touched upon again at this stage.[33]

**Passage and Presidential Assent -** Bills considered and passed by the Parliament are sent to the President for assent.[34] President's option is very limited. S/he either assents to the bill within 15 days or send it for reconsideration of the parliament.[35] If parliament passes the bill again with or without modification, President will have to assent within seven days of presentment before him.[36] In case of Money Bills President's power to send back is further curtailed. S/he must assent the bill as sent along with a certificate from the Speaker - which would certify it as a Money Bill, within fifteen days.[37] Otherwise the bill is considered automatically passed.[38] There is no Veto power vested in the President.

## Questioning the Quality of Backbench and Opposition Participation and Debate

The question of participation and opposition input in the legislative program becomes acutely important during the second reading stage.

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31 Rules of Procedure (n 16) r. 80, 81.

32 *Ibid*, r. 81-88.

33 *Ibid*, r. 91.

34 Constitution (n 2) art.80(2).

35 *Ibid*, art. 80(3).

36 *Ibid*, art. 80(4).

37 President Justice Shahbuddin Ahmed famously sent a controversial bill titled the Public Safety Act 2000 back to the parliament. The government however argued that the Bill was a Money Bill and hence the President was not entitled to return it.

38 Constitution (n 2), art.80(3).

In the UK, there are two devices that help the smooth passage of government bills - "Usual Channel" and "Pairing System".[39]

"Usual channel" is maintained by the private secretary to the government Chief Whip who negotiates and reaches agreement with opposition party leaders and whips on timetabling the debate around a week in advance. It is done outside the chamber and in private parliamentary offices. This extra parliamentary process gives the opposition parties and backbenchers an important voice over government law making. The other extra parliamentary device known as "pairing system" is a gentlemen's agreement among individual members from opposing parties. If one of them tells the other that he/she will be unable to attend Westminster to vote on a bill or important motion, the other will also refrain from voting. This makes sure that government's proportionate majority in the parliament is maintained even when some of its members may be absent.

While the opposition and backbench is usually afforded a full-scale opportunity to debate and question the government proposal, in cases of extreme disagreement between the government and the opposition on a law, opposition may attempt to dislodge the government's legislative program by filibustering[40] or withdrawing from the pairing agreement. The government in its turn has devices like Closure Motion, Guillotine Motion and Programming Motion to tackle the opposition obstructionism.

In a Closure, the government moves a motion named "That the question now be put". This means that parliament would now end discussion and proceed to vote. The Speaker of the House of

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[39] R. Balckburn, 'The Politics of Parliamentary Procedure at Westminster' (2017) 4 Journal of International & Comparative Law279.

[40] Filibustering as a tool of minority obstruction to the majority's legislative agenda is quite popular in the U.S. Congress. Basic idea of the tradition is to use the unlimited time of deliberation in the floor of the Senate unless and until a Closure Motion is tabled and passed by a super-majority of the House. This devise has been considered a powerful tool in the hands of the Opposition parties who might otherwise be excluded and marginalised from the legislative business. For a general idea about Filibustering please see: Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: The University of Chicago Press, 2010).

Commons, who is institutionally and habitually party-neutral, would allow the motion only when he is sure that the Closure is not being invoked to infringe the rights of the House minority. This traditional neutrality of the Speaker constitutes an important safety valve for the parliamentary minorities. A Closure Motion passes if at least 100 members of parliament votes in its support.

Government may also resort to "guillotine" - a time allocation motion. If a guillotine motion passes, the debate must end, and voting be arranged within three hours of the passage of the motion. Interestingly, governments in the UK prefer a third device known as "programming motion" instead. Initiated since 2003-04 session of House of Commons, programming motions are usually proposed and carried immediately after the initial second reading stage. This would specify the time allowed for completion of each stage of the bill. While the programming motion primarily works to the government's advantage, the opposition and backbenchers are more likely to concede to such a time structed formula instead of being subject to more uncertain closure or guillotine motion. Closure or guillotine motions might put the opposition and backbencher in a sudden unpreparedness rendering opposition on many important points impossible. A time structured programming motion would rather allow the opposition and critiques a calculated planning of debate and opposition at the floor and the committees.

In Bangladesh, legislative proposals are conceived, intuited and sponsored through the parliament at the sole discretion of the government. While the second reading stage should have manifested the most exciting and vigorous debate on the bill, the parliament routinely experiences a near abdication of meaningful debate in the floor and the committee concerned. Backbenchers play limited role in law making process and they are more likely to propose amendments, if there be any, in the committee rather than in the floor. Though article 70 of the Constitution does not apply to committee proceedings, the government backbenchers usually take strict party line there as well.[41] When they hold chairmanship or any position of influence in a

[41] Nizam Ahmed, 'From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001)' (2003) 76(1) Pacific Affairs 55, 65.

committee, backbenchers may attempt to play a role. That however does not translate into significant change in the original government proposal unless exceptionally supported by the premier. Amendments allowed occasionally concern minor issues like date, punctuation and linguistic issues.

While the opposition members may try both the floor and the committee, those proposals are likely to be voted down without serious consideration by the government. Unlike the UK House of Commons, there aren't any tradition of extra-parliamentary or out of the chamber negotiation between the government and opposition on the possibility of a mutually agreed legislative programing in Bangladesh. There is a Business Advisory Committee headed by the Speaker that looks into timetabling the various stages of a bill.[42] Though the Business Advisory Committee has representation from the opposition, the numerical strength of the government party in the committee, chairmanship of a partisan Speaker and an express requirement for the Speaker to consult the Leader of the House would prevent any meaningful consideration of the time-table proposed by the opposition.[43]

At the committee stage, the opposition and backbench members should ideally have greater chance of debating and proposing amendments. Though the Rules of Procedure requires the recording of minutes of dissents by individual members,[44] overall quality of the deliberation at the committee stage remains disappointing. Subject to a few and rare exceptions, members from the government backbench and opposition alike have traditionally failed to utilize the select committee on Bills to the fullest. Select committee's power to take public evidence from representatives of special interest groups[45] also has not been widely resorted to.

In the floor of the House, Bangladesh government has, like the British government, a right to invoke Closure of debates which the opposition might seek to stretch. Closure motion as explained in the Rules of Procedure of Bangladesh is a closure straight and it, if passed, would

42 Rules of Procedure (n 16), r. 219.
43 *Ibid*, r. 220.
44 *Ibid*, r. 228(5).
45 *Ibid*, r. 227.

halt the debate and put the question to voting then and there.[46] Though the Speaker is given a discretion to consider whether "the motion is an abuse of these rules or an infringement of the right of reasonable debate",[47] so far no infringement of the right of reasonable debate has been officially recorded by any Speaker. The crude partisanship of the speakers might be a reason behind this. Apart from the government motion of closure, the Speaker is personally allowed a power to take the sense of House and accordingly time table the "discussion on any stage of the Bill"[48] at the end of which s/he will "forthwith" put the question to dispose of the matter.[49] Like the Speaker of the House of Commons, the Speaker of Bangladesh is allowed the power to select and order the amendment proposals to be put in the House.[50] Faced with reservation from the ruling party, successive Speakers of Bangladesh tended to ignore opposition amendments in general.[51]

## 4. Making of the Budget and Appropriation Laws

As a matter of constitutional principle, the executive is not entitled to raise tax except by or under the authority of parliament.[52] All sorts of custody, payment into or withdrawal from public funds must be regulated by laws of parliament. The President is authorized to make rules only when there is absence of laws passed by parliament.[53]

**Money Bill, Consolidated Fund and Public Accounts -** Taxes are levied through Money Bills. A Money Bill is a bill that typically involves taxation, borrowing power of the government, charge upon or receipt from consolidated fund and public accounts.[54] Specialty of Money Bill or "Bills involving expenditure from public moneys" –

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46 *Ibid*, r. 290(2).
47 *Ibid*, r. 290(1).
48 *Ibid*, r. 291(1).
49 *Ibid*, r. 291(2).
50 *Ibid*, r. 286, 287.
51 Nizam Ahmed, 'Development and working of parliaments in South Asia' (2001) 9(1) Asian Journal of Political Science 18, 29.
52 Constitution (n 2), art. 83.
53 *Ibid*, art. 85.
54 *Ibid*, art. 81(1).

conventionally known as Finance Bill[55] is that it requires presidential authorization before it is laid on the floor.[56] Additionally, after its passing in the floor, it shall bear a certification from the Speaker as regards its Money Bill nature.[57] President will be bound to assent to it within fifteen days of presentment.

**Annual Financial Statement or Budget-**Annual financial statement, popularly known as budget, is laid on the floor by the government each year.[58] The annual financial statement shows the charges and expenditures proposed to be made from the Consolidated Fund. Proposed revenue expenditure and other expenditures from Public Accounts are also shown in the financial statement.[59]

Consolidated Fund is constituted by the revenues and loans raised by the government.[60] Public Account, on the other hand, comprises all other public money received by or on behalf of the government.[61] All money received by or deposited with any public servant or in connection with affairs of the Republic or any court to the credit of any cause, matter, account or persons go to the Public Account.[62]

Charges upon the Consolidated Fund are basically the remuneration payable to the President and his office, speaker, deputy speaker, judges of the supreme court, comptroller and auditor general, election commissioners and members of the public service commission and administrative expenses associated with those offices.[63] Specialty of the charges upon consolidated fund is that those mentioned in the annual financial statement may be discussed in the House but those may not be put into vote.[64]

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55 Gavin Murphy, 'How Legislation is Drafted and Enacted in Bangladesh' (2006) 27(3) Statute Law Review133.
56 Constitution (n 2), art. 82.
57 *Ibid*, art. 81(3).
58 *Ibid*, art. 87(1).
59 *Ibid*, art. 87(2).
60 *Ibid*, art. 84(1).
61 *Ibid*, art. 84(2).
62 *Ibid*, art. 86.
63 *Ibid*, art. 88.
64 *Ibid*, art. 89(1).

All other proposals of expenditure are placed as Demand for Grant. Parliament reserves the power to discuss, vote, modify, approve or reject the demands.[65] Demands being Money Bills, they require prior presidential recommendation for placement in the floor.[66]

**Appropriation Act -** Once the financial statement is discussed and grants are made, the government tables a separate Appropriation Bill that seeks authorization for appropriation out of the Consolidated Fund to meet the grants already made and charges discussed.[67] At this stage, no amendment proposal can be made to vary the amount of grants made or charges discussed.[68]

A separate supplementary financial statement may be laid before the parliament in relation to any excess amount spent or required in any financial year.[69] Same procedure applies here as it applies to the Annual Financial Statement.[70]

**Clog on parliamentary control of purse**

Though parliament reserves the right to approve or reject government's fiscal proposals, two important weapons at the hand of the executive would tarnish the parliamentary control over the purse of the republic - Votes on Accounts and Votes of Credit. Votes of Accounts are the advanced and temporary grants made by the parliament pending the final approval of the budget. Pending the passing of Appropriation Act, parliament may grant partial grants or additional grants not mentioned in the annual financial statement and exceptional grants and authorize partial withdrawal from the Consolidated Fund.[71] A Vote of Credit is a privilege granted to the executive facing an adversarial parliament. If parliament fails to pass appropriation law or make grants before the start of the financial year, or before the expiry of the provisional grants made pending the approval of appropriate law, the President may authorize withdrawal of money from the Consolidated Fund for a period not exceeding sixty

65 *Ibid*, art. 89(2).
66 *Ibid*, art. 89(3).
67 *Ibid*, art. 90(1).
68 *Ibid*, art. 90(2).
69 *Ibid*, art. 91(a)(b).
70 *Ibid*, art. 91(Proviso).
71 *Ibid*, art. 92(1).

days in that year.[72] President may authorize the withdrawal from the consolidated fund through Ordinance when parliament is not in session as well. [73] Such Ordinance shall have to be approved through the same legislative process as applies to annual financial statement and Appropriation Act.[74]

## 5. Inefficiency of the Private Member Business days

In the Westminster, the Standing Order 14 of the House of Commons allots 13 Fridays of each annual session for private member bills. Additionally, opposition parties combined are allowed 20 days of exclusive opposition businesses. Out of the 20, the leader of the principal opposition party would determine the House agenda for 17 days while the leader of the second largest opposition would determine the rest of the 3 days agenda. Apart from these, 35 more days are allotted for debates chosen by ruling party and opposition backbenchers. A dedicated Backbench Business Committee chooses from topics suggested by the MPs. While the government, does not have any control over the agenda for those assigned days, it may choose the dates to be assigned for the 35 backbench and 20 opposition days. Government may avoid, delay or time engineer an embarrassing move by non-government or opposition MPs.

In Bangladesh, weekly dates assigned for consideration of private member bills has failed to create a congenial environment for legislative exercise by individual MPs. Though there is a separate committee on private member bills and resolutions to timetable the private member businesses,[75] that only 7 private member Bills has been passed so far in Bangladesh represents the fact that except ascending to the government proposals backbenchers play a very limited role in law making. Individual members invariably lack the skill, resource, expertise and interest in drafting legislations.[76]

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72 *Ibid*, art. 92(3).

73 *Ibid*, art. 93(3).

74 *Ibid*, art. 93(4).

75 Rules of Procedure (n 16), r. 222-24.

76 Abdul Latif Mondol, "What will happen to the bills?" *The Daily Star* (Dhaka, 14 September 2009). <https://www.thedailystar.net/news-detail-105810> accessed 12 June 2021.

While there are no designated Opposition Days in Bangladesh, members of the opposition could use the private member business days. Oppositions in Bangladesh however historically preferred the streets over parliament. Opposition absenteeism in the seventh, eighth and ninth parliaments were 43%, 60% and 75% respectively.[77] Tenth and the current Eleventh parliaments have no opposition in the rightful sense of the term. Therefore, legislative Bills in Bangladesh rarely gets input from the Opposition. There are so many cases of passing Bills and, even Constitutional amendments (13th amendment in sixth parliament and 15th amendment in ninth parliament) without any input whatever from the Opposition.

## 6. Limited control over Executive Law Making/Ordinance Power

Unlike the UK, the President and thereby the executive enjoy a conditional law-making authority under Article 93 of the Constitution. Under the cloak of the Ordinance Power of the President, the government promulgates laws in cases of immediate necessity when parliament is dissolved or not in session.[78] From a substantial point of view, the President's ordinance power is limited in three specific ways. First, constitution could not be amended by Ordinance. Secondly, an Ordinance would not be made to continue an earlier ordinance in force as a way to by-pass parliamentary approval.[79] Thirdly, Ordinance making power does not extend beyond the ordinary law-making power of the parliament.[80] Procedural limitations on the ordinance power are two-fold. Firstly, ordinances need presentment before the parliament. It must approve the Ordinance once it comes to the session. If not approved within the 30 days of the Parliament's coming into session or within six months of the its original promulgation by the government, whichever is earlier, an Ordinance loses the force of law.[81] Secondly, like an Act of Parliament, Ordinances may be challenged before the court under its judicial review power.

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77 Jahan and Amundsen (n 9).
78 *Supra* note 2, Article 93(1).
79 *Ibid*, Article 93(1) proviso.
80 *Ibid*, Article 93(1)(i).
81 *Ibid*, Article 93(2).

Though the frequency of ordinances has been reduced in the recent history of parliament,[82] there have been concerns over the very nominal review done by parliament over ordinances placed on the table. Ordinances placed for parliamentary approval usually escapes scrutiny in the floor and committee. Parliament has never travelled beyond simple approval of what is placed in the table.

## 7. Extra-parliamentary avenues of control for the Opposition

While the weaker position of the opposition and upper hand of the government in Westminster parliamentary process is an admitted phenomenon, the British House of Commons seeks to remedy the gap by facilitating scopes for private member business, backbench business and opposition days. Bangladesh unfortunately lacks those mechanisms. Therefore, it will be interesting for opposition and backbenchers to look for the possibility of extra-parliamentary avenues to challenge government's legislative programs.

The German model of parliamentary opposition allows any group of one-third of Bundestag[83] members to challenge a law with the Constitutional Court.[84] This procedure known as 'abstract norm control',[85] though missing in the UK, is present in Bangladesh. Scope of judicial review of parliamentary laws on the ground of inconsistency with the constitution is an important avenue that could be travelled through by the members of parliament very frequently. Except in the case of *Abdus Samad Azad v. Bangladesh* 44 DLR 354 where some

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82 N. Ahmed, "Parliamentary Opposition in Bangladesh: A Study of its Role in the Fifth Parliament" 3:2 (1997) *Party Politics*, pp.147-168 at p. 162.

83 The German Federal Parliament has two houses- Bundetag and Bundesrat. Directly elected by the people across the Federal Germany, the Bundestag is comparable to the lower houses of other traditional bicameral houses. It elects the government and holds the power of budget. Bundesrat on the other hand is comparable to the upper houses of traditional bicameral parliaments. It is constituted by the representatives of individual states of Germany.

84 German Constitutional Court works not as part of the regular judicial hierarchy. It is rather entrusted by the German Basic Law (*Grundgesetz*) to deal with judicial review of laws and inter-institutional relationship of different branches within the constitutional framework. The German Constitutional Court is considered one of the most interventionist constitutional courts in the world.

85 H Ludger, 'Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies' (2004) 39(1) Government and Politics 22, 31.

opposition MPs in the fifth parliament unsuccessfully challenged the President's Election Act 1991, opposition parties did not invoke the Supreme Court jurisdiction frequently.

Another extra-parliamentary tools that might interest the parliamentary opposition is the scope to appeal for popular verdict over the government's controversial legislative moves. Switzerland presents a model of parliamentary consociationalism where coalition governments are norms and official opposition is absent. Yet, Switzerland presents 'a direct democratic model of political opposition'[86] where minor and out of the coalition oppositions may threat to resort to optional referendum against a legislative move. Under optional referendum system, the petitioners would need to gather 50000 signatures within 90 days of parliament passing a bill. Though the Rules of Procedure of Bangladesh allow the individual MPs to table a motion to circulate a given Bill to solicit public opinion thereon,[87] this is ingrained within the parliamentary process and not a direct democracy device as understood in the Swiss sense of the term. Motions for soliciting public opinion on Bills are frequently voted down.

## 8. Conclusion

Though Bangladesh claims to be a Westminster parliamentary system, it is persistently failing to keep up with the trends and development there. It is not denied that the executive-legislature relation in respect of law-making in the Westminster is essentially that of a dominant-dormant one.[88] Yet the comparative study attempted in this paper reveals that significant safety valves and protections the parliamentary opposition is offered in the Westminster is ironically missing in Bangladesh. While the powers of the Speaker grew at par with the extension of executive control over parliamentary process at Westminster,[89] it is not the case in Bangladesh. While a Westminster

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86 *Ibid* 45.

87 Rules of Procedure (n 16), r. 78-80, 282.

88 M. M. Khan, *Dominant Executive and Dormant Legislature: Executive-Legislature Relations in Bangladesh* (New Delhi: South Asian Publishers India, 2006).

89 Philip Norton, 'Playing by the Rules: The Constraining Hand of Parliamentary Procedure' (2011) 7(3) Journal of Legislative Studies 13, 15.

parliament is not designed to obstruct the government's legislative program, parliamentary procedure is verily expected to play a preventive role that would make the government anticipate the possible parliamentary and popular reaction to its legislative move.[90]Government's legislative proposals are thereby shaped long before it comes to the House. Even a scanty overview of the Rules of Procedure of Bangladesh suggests that the process prescribed here is barely capable of generating any fear of anticipated reaction in the floor and elsewhere. Bangladesh parliament's agenda setting power being remarkably low, legislative procedure here crudely facilitates rather than check the executive.

[90] Megg Russell, D. Gover and Kristina Wollter, 'Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt' (2016) 69 Parliamentary Affairs 286, 301.

# Delay in Disposal of Criminal Cases in Bangladesh: A Legal Analysis

**Dr. Md Abdur Rahim Mia***

## Abstract

In Bangladesh, a criminal case usually takes several years to be disposed of. Delay in criminal proceedings creates a kind of jam of cases for indefinite period. The international mandate for ensuring speedy trial has been reflected in the Constitution as well as statutory laws of Bangladesh. In spite of having laws for reducing time and sufferings of litigants, these laws halt quick service because of having loopholes and shortcomings therein. Bangladesh also lacks some important legal instruments which creates bottlenecks to the speedy disposal of criminal cases. This article is an attempt to identify legal reasons responsible for causing delay in the disposal of criminal cases and suggest some amendments of laws for ameliorating the situation.

**Keywords**: Delay, Speedy trial, Backlog of cases, Criminal proceeding, Court, Judgment

## 1. Introduction

The courts of Bangladesh usually take several years to resolve criminal cases.[1] The delay in the judicial process causes an accumulation of cases. Growing backlog of cases prolongs criminal proceedings and puts enormous pressure on current cases. A long-running criminal dispute leads to unnecessary harassment for litigants. Crime increases

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[1] Md. Nur Islam, 'Justice Delivery System**:** Internal Component for Delay Should be Eliminated', *The Daily Star*, 1 July 2003, p.22; Z Hossain, 'One and a Half Thousand Forgotten Detainees in Dhaka Jail', *The Daily Prothom Alo*, Dhaka, 3 February 2002; *State vs. Deputy Commissioner of Shatkhira*, 45 DLR (1993) 643

when justice is delayed or does not take place.[2] Rapid closure of criminal proceedings is necessary to gain public confidence in the judiciary. It is not possible to make the judicial system meaningful and credible for the people without ensuring a swift and equitable distribution of justice. Although speedy trials and disposals of criminal cases are recognized by Bangladesh laws, the real problem is, how they can be carried out in practice, where 3.3 million cases are pending before the higher and subordinate courts.[3] Bangladesh's existing laws cannot deny responsibility if justice does not alleviate the misery of the people due to delayed proceedings. With other contributing factors[4] weaknesses and ineffectiveness of existing laws are also remarkable causes for prolonging criminal proceedings. The provisions relating to time limit for investigation and trial, transfer of cases, postponement or adjournment of proceedings, *naraji* petition, order of re-investigation, process of summons and warrant, framing of charge in presence of both parties, summary trial etc. under the Code of Criminal Procedure (CrPC)[5], 1898 have some weaknesses and shortcomings which contribute to backlog of criminal cases as well as delay the criminal proceedings. This Code also fails to provide a specific mechanism for prompt disposal of cases.[6] There are few special laws in Bangladesh, such as the Speedy Trial Act, 2002, Prevention of Women and Children Repression Act (PWCRA)[7], 2000, etc., which specifically mention the time frame of the trial, but other laws of Bangladesh do not provide an exact time frame, where a lawsuit is to be concluded. The Limitation

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2 Sultan Mohammad Wohid, 'Justice Delayed is Justice Denied', *The Daily Star*, 01 July 2008, p.23; Muhammad Yeasin, 'Case Backlog Hits Land Tribunals', *The Daily Independent*, 2 August 2016, p.7

3 Dr. Rashid Askari, 'Effects of Legal Congestion in Bangladesh', *The Dhaka Couriar*, 29 October 2015

4 Non-attendance of witnesses or parties on the date of the hearing, unnecessary adjournment, delays in completing investigations, tendency of lawyers and parties to delay trials, lack of vigilance on the part of Judges and magistrates, absence of prosecutor and defence lawyer, and the indictment of prison authorities are also noteworthy factors that prevent cases from being resolved quickly.

5 *The Code of Criminal Procedure* of 1898 may be mentioned as 'CrPC' throughout the study.

6 Section 67, *the Code of Criminal Procedure, 1898*

7 *The Prevention of Women and Children Repression Act*, 2000 may be mentioned as 'PWCRA' throughout the study.

Act, 1908 and the Village Courts Act, 2006 were adopted to reduce the burden of criminal courts, but these laws do not provide an effective result due to some legal reasons. Bangladesh's judicial system also lacks some essential legal instruments such as laws relating to victims and witnesses' protection, plea bargaining etc., which too create bottlenecks to the speedy disposal of cases. This article is analytical in nature. It is an attempt to portray the weaknesses and shortcomings of the laws prevalent in Bangladesh that create havoc in speedy solution in cases and suggest reform overcoming loopholes that spare head tortoise speed in criminal justice system of Bangladesh and bring pace in disposing justice thereby.

## 2. Constitutional Mandate of Speedy Disposal of Criminal Cases

According to the Constitution of Bangladesh, every accused of a crime has the right to a fair and expeditious trial before a neutral and independent tribunal or court.[8] This means that it guarantees the complainant's rights and obliges the authorities to take action in accordance with this spirit by removing obstacles from the vicinity.[9]Therefore speedy disposal of criminal cases is a constitutional obligation for the criminal justice administration of Bangladesh. In this context, the Supreme Court is supposed to take all necessary measures to secure the rights of the litigants. The Constitution of Bangladesh also states that the High Court Division (HCD)[10] may withdraw any case from the subordinate court to decide on its own whether the case can be referred to another subordinate court for a speedy decision if the case raises a question of law related to the explanation of the Constitution, or interest of general people.[11] In order to fulfill the obligations of the Constitution, the government of Bangladesh has adopted the Speedy Trial Tribunal Act, 2002 for the speedy disposal of cases which the government handed over to the tribunal.

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8 Article 35(3), *the Constitution of Bangladesh*

9 Tapos Kumar Das, 'Delay in Dispensation of Justice', available at *www.thedailystar.net,* accessed on 28 August 2012

10 The High Court Division, the lower branch of the Supreme Court of Bangladesh, may be called as 'HCD' throughout the study

11 Article 110, *the Constitution of Bangladesh*

## 3. Provisions of the CrPC responsible for Delay in Disposal of Cases

There are many provisions in the CrPC which gives opportunity to delay the criminal proceedings, such as absence of specified time limit for adjudication,[12] transfer of cases on request of defendant,[13] cases transferred by judges,[14] postponement for issue of process,[15] transfer of cases to the Court of Sessions,[16] stay of proceedings,[17] power to stop proceedings, [18] power to postpone or adjourn proceedings, [19] adjournment of inquiry or trial,[20] transfer of criminal cases,[21] transfer of public prosecutor[22] etc. These specific provisions are discussed below:

### *3.1 Time Limit for Investigation and Trial*

Failure to comply with the deadlines prescribed by the CrPC and PWCRA[23] for procedures and the disposal of claims at different levels is an important factor for delay in disposal of criminal cases. The CrPC does not prescribe any specific time frame for completing investigation. Section 167 of the CrPC provides only a legal reference to the fact that investigation must be concluded within one day. According to this section the investigator can request the court to extend the time when the investigation is not concluded within the period determined by the court. The CrPC also authorizes the acquaintance to ask a Magistrate or trial Judge to give the accused bail if an investigation is not concluded within one hundred twenty days or one hundred eighty days, respectively.[24]The Police Regulation of Bengal states that though a Judge is empowered to extend the investigation period in case of

12 Section 167, *the Code of Criminal Procedures*, 1898
13 Section 191, *Ibid*
14 Section 192, *Ibid*
15 Section 202, *Ibid*
16 Section 205 (c), *Ibid*
17 Section 230, *Ibid*
18 Section 249, *Ibid*
19 Section 344, *Ibid*
20 Section 508, *Ibid*
21 Sections 525 to 528, *Ibid*
22 Sections 492-495, *Ibid*
23 Sections 339 (C) and 167, *the Code of Criminal Procedure, 1898*; Section 20, *the Prevention of Women and Children Repression Act,* 2000
24 Section 167(5), *the Code of Criminal Procedure, 1898*

serious nature of crime, the investigation officer (IO) is not allowed to take more than fifteen days after starting the investigation.[25] In practice, the above time limit for concluding the investigation seems to be a simple catalog[26] and gives the police opportunity to extend the time of investigation. The CrPC also states that Magistrates are to conclude trial of a case within 180 days from the date of getting the case for trial and the Courts of Sessions are to conclude a trial within 360 days from the date of getting the case records for trial.[27] The PWCRA requires the case to be completed within 90 days. But both the two laws don't prescribe any provision if any court is not able to conclude the case within the said time. This flaw of law gives opportunity to the courts to delay the disposal of cases. An example can be noted here that more than 18 years were taken by the courts to conclude the Shazneen murder case.

**Shazneen Murder case at a glance**

Shazneen, a class IX student, was raped and murdered on 23 April 1998 in her home in Gulshan, Dhaka. His father lodged a complaint to the Gulshan Police Station on 24 April 1998. The PWCR Tribunal of Dhaka framed murder and rape charges against all accused on 13 April 1999.The HCD upheld the death sentence of five of the six convicts on 10 July 2006. The Appellate Division (AD) granted the defendant's applications for leave to appeal on 26 April 2009. The AD started hearing the appeals of five convicts on 29 March 2015 and ended the hearing on 11 April 2016.All the accused except Shahidul Islam were acquitted by the AD on 2 August 2016. Shahidul Islam was hanged on 29 November 2017 in Kashimpur Prison of Gazipur District.[28]

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25 Regulation 261, *the Police Regulation of Bengal , 1943*

26 *Alhaj Mamtaj Meah vs. State* 38 DLR (HCD) 152; Ridwanul Haque, 'Criminal Law and Constitution: The Relationship Revisited', *Bangladesh Journal of Law*, Special Issue, Bangladesh Institute of Law and International Affairs, Dhaka, 2007, p. 45.

27 Section 339 (C), *the Code of Criminal Procedure*, 1898; Md. Abdul Halim, *Text Book on the Code of Criminal Procedure,* CCB Foundation, Dhaka, 2006, p.423.

28 See, *https://en.wikipedia.org/wiki/Shazneen_tasnim_rahman_murder,* last accessed on 05 January 2021; 'Defence arguments end in Shazneen case', *the Dhaka Tribune*, 26 February 2017; 'Shazneen murder case, long legal battle', *the Daily Star*, 26

This means that it took approximately 20.2 times longer than the expected period to close the case. The situation is more appalling for the cases where no time limit is fixed to finalize. While the HCD has instructed the subordinate courts to resolve cases in chronological order no binding guidelines are found for adhering to a schedule for each chronological step.[29] By taking advantage of the absence of compulsion on the part of either party a case that reaches the mandatory hearing after a long journey can be returned to the primary stage.[30] The slowness of the judiciary has allowed more than 30,000 cases to be tried for years before the Metropolitan Court of Sessions of Dhaka.[31] As mentioned earlier, there are a number of 3,156,878 cases pending for trial in various courts of Bangladesh at the end of 2016.[32] If cases are resolved at the current rate it will be going to take 35 million years.[33] According to section 442 (A) of the CrPC appeal and revision must be completed within 90 days. But this section does not prescribe any provision when courts fail to comply with the obligation. This flaw of law also gives opportunity to the courts to delay the criminal proceedings. Thus there is no binding time limit fixed either by any Act or Code within which the cases must be decided. Therefore, the judges, lawyers and even the litigants often do not show their urgency to finish the case. The cases drag on for years together.

### *3.2 Transfer of Criminal Cases*

Criminal cases are transferred from court to court under sections 191, 192, 205, 525, 526 and 528 of the CrPC.[34] The need for the transfer of a

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February 2017, 'Shazneen murder: Top court confirms death sentence for one, acquits four others',availableat *bdnews24.com*, last accessed on 26 February 2017; 'SC verdict any day', *the Daily Star, 12 May 2016*; 'Shazneen rape, murder case', *the Daily Star, 3 August 2016*; 'Shazneen murder appeal verdict soon', *the Dhaka Tribune,* 26 February 2017; 'SC upholds death of 1 in Shazneen murder case', *the Daily Star, 2 August 2016*, 'Shazneen Murder: One convict hanged after 19 years', *the Daily Star, 30 November 2017*

29 Ikteder Ahmed, 'Delay in Case Disposal: Problems and Solutions',*the Daily New Age*, 3 February 2012

30 *Ibid.*

31 *The Daily Sangbad*, 9 August, 2013

32 Annual Report 2016, *the Supreme Court of Bangladesh.*

33 *The Daily ProthomAlo*, 24 July 2017

34 According to section 191 of the CrPC, a Magistrate can send a case to the Courts of Session (CS) or transfers it to a Magistrate court for trial. In accordance with the

case arises mainly on the basis of jurisdiction or a fair trial or litigant's benefit or the involvement of a legal issue or for the purposes of justice. The power to transfer a case is the discretion of the court. A criminal case usually is transferred from one court to another at the request of the accused. The HCD is also empowered to send a criminal case *suo-moto* from one subordinate court to another subordinate court.[35] If a defendant in a criminal case requests the HCD to stay the case the court of first instance cannot make any order if the request is definitively rejected by the HCD and, if the request is accepted by the HCD, the proceedings to be conducted by the first court will be redone after the information provided to him, at the discretion of the defendant.[36] So, it is mandatory to suspend the hearing for a request under section 528 of the CrPC and this application of transfer must be processed promptly in accordance with this section. This application can be rejected during hearing, and the rejection order can then be appealed. Sometimes hearing takes time. If any higher court issues a transfer order, time is also wasted because the transfer order is received by a trial court after a delay and in most cases the higher court does not send the order on time. As there are no guidelines or strict provisions of law regarding the timeframe for the transfer of cases, slow process of the cases are being continued. According to a research study, it takes 1-3 months when a case is transferred from one district court to another district court, 3-4 months from district court to High Court, 10-20 days from one court to another court in a district

section 192 of the CrPC, a Chief Judicial Magistrate (CJM) or Chief Metropolitan Magistrate (CMM) may refer cases to Magistrates subordinate to him. Section 205 of the CrPC provides that a Magistrate can send a case to the CS or CMM or CJM. According to section 525 of the CrPC, the AD can order the transfer of a case or appeal from one Bench to another Bench of the HCD or from any district court to another district court. On the same ground, section 525 of the CrPC empowers HCD to transfer any appeal or case from one subordinate court to another court. According to section 526 of the CrPC a CS can transfer any case to any court subordinate to him. Section 528 of the CrPC also states that any SC can recall or withdraw cases from Joint Session Judge Court. According to sections 528 (2) and 528 (3), the CMM or CJM can recall a case or withdraw it from any Magistrate subordinate to him.

35 Section 526 (1) (3), *the Code of Criminal Procedure,* 1898

36 Section 526(8), *Ibid*

level. [37] Therefore it is necessary to insert a provision of specific timeframe relating to transfer of criminal cases in the CrPC.

### *3.3 Postponement or Adjournment of Proceedings*

Delays in the criminal proceedings are often caused by multiple adjournments.[38] The court's liberal stance in granting a postponement is a major cause of undue delay as each postponement takes together for months. From the reading of the sections 344 and 229 of the CrPC[39]it is clear that if the court thinks it may fit, by a written order, stating the reason from time to time, postpone or stay the procedure for a definite reasonable time. The words 'any other reasonable cause' and 'for as long as it deems reasonable' are important in the sections. The significant clause in these two sections limits the court's powers to keep the case pending without approving a stay order or adjourning the cases indefinitely. The court can postpone the trial for good reasons, but for a reasonable time. There is no impediment to grant adjournment from time to time, but it may not be granted at the same time. As the CrPC does not define a 'reasonable cause' and does not mention the 'time limit' for adjournment, section 344 allows judges to

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[37] Md Abdur Rahim Mia, *Backlog of Cases in the Criminal Justice System of Bangladesh: Causes and Solutions*, An unpublished Research Report submitted under UGC Research Project, 2018, UGC, Dhaka, 2018, p.26

[38] Lawyers often request adjournment because they have not reviewed the cases, otherwise are ill-prepared or have a scheduling conflict. Sometimes prosecutors are reluctant to provide complete information about the evidence to defense opposition, which prompts them to request adjournment. Prosecutors often are understaffed, with one prosecutor representing several separate cases simultaneously. Judges can initiate postponements; for example, an uncomfortable or unprepared judge may decide to postpone a hearing. Lawyers, witnesses or parties often keep absent from the court, that invites adjournment. Sometimes cases can be transferred from one lawyer to another or one judge to another.

[39] Under section 344 of the CrPC the court may postpone or adjourn any investigation or trial for such period as it deems reasonable due to the absence of witnesses or the removal of the accused or any other reasonable cause. Section 508 of the CrPC states that if a commission is issued in a case, the trial or investigation can be delayed for conducting its job. Section 229 of the CrPC also provides that if a new or amended charge is of such a nature that the immediate continuation of the trial in accordance with the court's opinion is likely to prejudice the state lawyers or suspect, the court can retry the hearing for any period that may be necessary.

adjourn cases indefinitely for any reason as they deem appropriate. The word 'on such terms as it thinks fit' compels criminal courts to grant a conditional adjournment. The word 'absence of a witness' does not mean the absence of the person trying to escape or escape justice. It is established by law that a fugitive loses some of his normal rights granted by procedural and substantive laws.[40] A research study of 2018 conducted under the University Grant Commission (UGC)stated that:

> 'the absence of a witness is not a cheap cause and is neither necessary nor desirable to stay the case indefinitely. If such a practice is inspired, no case would see the radius of the decision.'[41]

On the other hand, if the adjournment is randomly granted by the court, the litigant who appears in court on several dates with a number of witnesses will not be able to receive his witnesses in the future due to unforeseen adjournment. Under the above arguments, it can be summarized that provisions of the CrPC relating to postponement or adjournment of proceedings are ambiguous and does not mention specific guidelines to stop unnecessary postponement or adjournment.

### *3.4 Naraji Petition and Order of Re-investigation*

*Naraji* petition[42] is nothing more than a complaint petition under section 200 of the CrPC. After careful scrutinisation of a *Naraji* request the Magistrate may accept or reject the final report or indictment submitted by the police. Upon rejection of the final report the Magistrate may order further investigation or he may take the case for judicial inquiry and after examination of the fact of the case, if satisfied, he can ascertain the matter. In the case of *Nasir Uddin vs. State*[43] it was observed that the police submitted a report stating that no *prima facie* case had been identified against the accused. A protest request was lodged with the court against the report. Upon receipt of the file the court examined the indictment, the police report and the *Naraji* petition

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40 *Muhammad Sadiq vs. Sadiq and others*, PLD 1985, Supreme Court 182

41 Md Abdur Rahim Mia (2018), *Op.cit*, p.27

42 When the Magistrate accepts the investigation report, the complainant may file a *Naraji* petition against the report if he believes the report was not adequately prepared..

43 51 DLR (1999) 125

and took the cognizance of the offence. *Naraji* petition makes further delay in a criminal proceeding. In the case of *Mahbubur Rahman vs. State*[44] it was found that the IO submitted his report on the basis of an inadequate examination of the persons concerned and a document relating to the two essential matters. Due to this reason further investigation was directed by the HCD for securing the end of justice. Negligence in investigation or faulty investigation report may invite further investigation which always delays proceedings. Also in case of *Pannu Mia vs. State*[45] the HCD stated that, if it appears that further investigation is needed to gather further evidence, the case may be sent for further investigation. It is sometimes observed that repeated *Naraji* petitions are submitted by the complainant due to his dissatisfaction with the police report.[46] It is the right of the aggrieved complainants to take legal action against the investigation report. But sometimes it is also found that accused parties appear before the HCD from the cognizance court to determine the legality of the further indictment containing further police investigation based on *Naraji* petitions and the fate of such cases becomes oscillating and uncertain.[47] Further police investigation also takes more time and delays the proceedings. Therefore a section should be inserted into the CrPC that court must examine the reasonableness of *Naraji* petition through judicial inquiry and can frame charge against the accused by its discretionary power without sending the case for further investigation.

### *3.5 Process of Summons and Warrant*

There is no specific time limit for processing summons and warrant in the laws of Bangladesh. When there is a sufficient ground to issue a summons a Magistrate can do so under section 204 of the CrPC. In the event of a warrant case, a Magistrate can invoke a summons or warrant whatever he deems appropriate. One of the reasons of delays at the start of criminal proceedings is the delivery of summons to the accused and witnesses or the execution of an arrest warrant. In a complaint registered (CR) case at least 3 to 4 months is required to send summons

44 64 DLR (2012) 265

45 67 DLR (2015) 18

46 ABM Waliur Rahman, 'Delay in Disposal of Criminal Cases', *58 DLR 2006*, Dhaka, Journal page 24.

47 *Ibid*

to a witness or defendant.[48] When the accused intends to avoid the summons he willfully prolongs the case by keeping the dates and does not appear long in the case to avoid the summons.[49] An intelligent accused can easily keep distance from summons by managing the process-server of the court. Due to absence of any punishment provision regarding the failure to serve summons in time, the process-server often does not serve summons timely. Current Bangladeshi law does not provide a management and control system for the work of the process-server. This encourages the process-server to avoid his work. As a result summons with 'party not found', or 'address not known' endorsements are returned in most of the cases and most of the endorsements remain fake and unauthentic. The bench clerk (Peshkar) and *nezarat* section[50] cannot deny the responsibilities of the allegations of such unfair practices but existing laws do not provide any penal provision against these unfair practices. Therefore, the need to change the current system is obvious and a new provision can be incorporated in law for service of summons. The country's postal system is not efficient enough to provide its service on time. According to section 68 of the CrPCa police officer or a court's official or any government official can serve the summons to the accused or witnesses. Unfortunately the rules so far have not been developed to allow services other than police officers. Though the CrPC allows using registered post as a means of summons for witnesses it does not allow registered post as a means of summons for defendants.[51]Therefore, section 68 of the CrPC needs to be amended.

### *3.6 Framing of Charge in Presence of Both Parties to a Case*

After getting charge sheet[52] or examining the complainant in CR cases, the Magistrate if considers that there is a sufficient reason to proceed, may, in the first instance issue a summons or issue warrant for the

48 Md Abdur Rahim Mia (2018), *Op.cit*, p.28

49 *Ibid.*

50 It is an administrative office of a district court which deals with service of summons, warrants etc.

51 Sections 485 A and 509(2), *the Code of Criminal Procedure*, 1898

52 According to the section 173 of the CrPC, when the police issue a police report for prosecution, this report is treated as charge sheet.

attendance of the accused.[53] According to the CrPC if all defendants attend or are brought before the court on a fixed day the Magistrate refers the case to the appropriate court for trial.[54] The Magistrate does not have the opportunity to send the charge sheet to the right court unless all the accused appear. It means framing of charge or trial cannot be started without appearing or producing all accused before the court. According to the CrPC[55] when the suspects attend or are brought in front of concerned Magistrate or Sessions Judge, the Magistrate or Judge can frame charge against the accused.[56] The main purpose of framing charge is to uncover the main facts that the prosecution intends to present in order to indict the accused at home so that he can defend himself. From the above discussion it is clear that during the time of framing a charge, presence of the accused is necessary. According to section 11 of the *Speedy Trial Act,* 2002 and according to sections 87 and 88 of the CrPC a trial in absentia can be arranged if the court has reason to believe that even after meeting all the requirements, an accused has escaped and is hidden and cannot be arrested and brought to trial.[57] Most often this process before the *absentia* trial takes much time. A criminal trial begins with the formulation of a charge against the suspect. When there are many defendants in a case they are all supposed to appear before the court or appear during the framing of charges.[58] If they all are not present, a Magistrate or Judge fixes another date. It is the duty of the Public Prosecutor to initiate hearing for framing of a charge. Due to absence of

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53 Section 192, 200, 202 and 204, *the Code of Criminal Procedure*, 1898

54 Section 173 and 205, *Ibid*

55 Section 241, 242 and 265, *Ibid*

56 The purpose of an indictment is to inform a suspect as accurately and concisely as possible about the case in which he is charged and to inform him with appropriate explanation about what the accusation intends to prove against him.

57 Pursuant to sections 87 and 88 of the CrPC the court may issue a written proclamation compelling it to present in a fixed time and place within at least 30 days from the date of issuing the proclamation. In order to compel a defendant to appear in court, the court can also order to seize immovable or movable property of the defendant. If the arrangements laid down in these sections forcing defendants to appear fail the charges can be framed and the trial can be continued in *absentia*.

58 Sections 205 (C), 241 (A), 265 (B) (D), *the Code of Criminal Procedure*, 1898

legal provision to bind the Public Prosecutor to be responsible he may sometimes try to waste time in doing this. Most of the time warrant of arrest is not executed properly and there is no penal provision for the police who are responsible to execute warrant timely and properly. Without ensuring the presence of all the accused, the Magistrate or Judge does not frame charge and fixes date one after another. [59] Backlogs are being continued. How many times the Magistrate or Judge needs to wait for framing of charge is not mentioned in the CrPC. Therefore a guideline is needed in this regard.

### *3.7 Summary Trial*

According to the CrPC any Magistrate of the first class can try some offences by summary ways which does not prescribe death penalty or imprisonment for more than 2 years as a punishment.[60] Sections 260 and 262 of the CrPC indicate some limited offences for summary trial. Since summary proceeding is a very effective method of resolving ongoing cases it would be useful to compile a comprehensive list of cases that can be tried under this procedure. There are many other crimes with a maximum penalty of two years into the Penal Code. Therefore sections 260 and 262 of the CrPC invite amendment to extend the jurisdiction of the Magistrate for trial of summary cases. Furthermore, the said Magistrate may be given discretionary power to decide whether a case should be tried summarily. In such summary trials, the maximum penalty may be extended upto three years.

## 4. Role of the Speedy Trial Act, 2002 in Quick Disposal of Cases

In 2002 the Government of Bangladesh passed the Law and Order Disruption (Speedy Trial) Act for two years. The tenure of law was later

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[59] Muhammad Sazzad Hossain and Mohammad Imam Hossain, 'Causes of Delay in the Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective', *ASA University Review*, Vol. 6, No.2, Dhaka, 2012, p.37

[60] Sections 260 and 262, *the Code of Criminal Procedure*, 1898 mentions some sections of the Penal Code and the offences under these sections can be tried by summary ways. These sections are: 264, 265, 266, 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 380, 381, 403, 411, 414, 426, 427, 447, 448, 451, 453, 454, 456, 457, 504, 506, 509, 510 etc.

extended several times. Later, the Cabinet approved the draft of 'the Law and Order Disruption (Speedy Trial) (Amendment) Act, 2017' that increases the sentence of imprisonment from 5 to 7 years. Muhammad Saiful Alam, the Cabinet Secretary of Bangladesh informed reporters after a meeting in Bangladesh Secretariat that the amendment was made in section 4(1) of the existing Act to increase the sentence after a wide range of discussions with concerned stakeholders.[61] Trials against certain offenses, such as intentional manipulation, assaults, threats, vandalism, interruption of transport services extortion, terrorism of persons and vandalism of public and real estate etc., have not been included within the scope of the amended law as in the existing law.[62] The speedy trial under the Speedy Trial Tribunal constituted under the law seemed to be a very effective tool for ensuring justice, but it could not bring qualitative change in the long run. The Speedy Trial Tribunal relies on numerous support services to run smoothly and quickly. These are discussed below:

Criminal investigations are the most important part of the entire criminal process. Unfortunately the police department does not have enough trained officials to carry out investigations nor does it have necessary equipment and resources in this regard. In accordance with the provisions of the Speedy Trial Act, 2002 an IO must submit investigation report within 7 days from the incident. A research study showed that the majority of investigation reports were not submitted to the court within 7days.[63] The lawyers believe that the investigation cannot be carried out correctly or neutrally in almost half of the cases.[64] They don't think the problem is the short time of 7 days. According to their views, most of the IOs keep busy with other duties rather than investigation.[65] As a result an IO needs to work in hurry and thus cannot prepare reports quickly and accurately. Instead of passing new laws the government should address the problems of the entire police

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61 Mohammad Mizanur Rahman Chowdhury, 'A Study on Delay in the Disposal of Civil Litigation: Bangladesh Perspectives', *The International Journal of Social Science*, Vol.14, no.1, 2013, available at *www.tijoss.com*, last accessed on 15 August 2017

62 Lavina Ambreen Ahmed, Mustafa Zaman and Shamim Ahsan, 'A Quick Fix to Delayed Justice', *The Daily Star*, 7 March 2003; *The Daily Rising*, Dhaka, 5 June 2017

63 Md Abdur Rahim Mia (2018), *Op.cit*, p.37

64 *Ibid.*

65 *Ibid.*

department. A competent police force with sufficient skill, competence and resources may certainly contribute to proper implementation of existing laws. There is only one laboratory in the country with very limited personnel and outdated testing equipment and facilities to prepare viscera reports.[66] This lab has to deal with hundreds of cases reported to them from across the country. In addition the testator is required to testify in person for confirming his report before the trial court. This process wastes time. The Speedy Trial Act does not address such problems. The law does not impose sanctions against the investigators for serious non-compliance. All criminals convicted under the Speedy Trial Act have the right to appeal to higher courts and most of the appeals are not disposed of quickly. Many convicted criminals take bail from the higher courts, and continue such bail for several years putting the case unsettled in such courts. Therefore, expedited court proceedings need to be ensured in case of appeal and provisions must be included in the Speedy Trial Act in this regard.

## 5. Role of the Village Court Act, 2006 in Quick Disposal of Cases

The large number of ongoing cases in the Supreme Court and district courts has created fertile ground for demanding a functional rural justice system. The Village Court (VC)[67] was established in 2006 under the Village Court Act (VCA)[68] to confirm access to justice for the people living in rural areas. The purpose of the VC was to resolve disputes locally and outside of the formalities of the governmental agencies and court-room process of the judiciary. The concept of VC was to relieve the parties to dispute of the cumbersome process under the judiciary in order to save time and money and thus enable better access to justice.[69] The VCA is undoubtedly a good initiative by the legislators and has the ability to reduce pressure on the district courts, but there are loopholes in the laws that prevent the VC from doing work at the right

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66 *Ibid*

67 The Village Court may be called as 'VC' throughout the study.

68 *The Village Court Act* of 2006 may be used as 'VCA' throughout the study.

69 Abul Barkat, *Review of Social Barrier and Limitation of Village Courts*, Local Government Division (LGD), Ministry of Local Government, Rural Development and Cooperatives, Government of Bangladesh under Activating Village Courts in Bangladesh Project, LGD, Dhaka, 2012, p.20

time and correctly. The financial jurisdiction of the VC is not sufficient. A research study focused on the fact that a major portion of disputes in the VCs are related to marital deception, violence against children and women, the abandonment of wife by husband, polygamy by a husband without the consent of the previous wife/wives, etc. and are not maintainable under Part I and Part II of the Schedule to the VCA.[70] As a result these disputes are referred to formal courts which create backlog of cases as well as delay in the proceedings of the formal courts. A workshop[71] held with a number of Judicial Magistrates advised to insert the compoundable offences which are stated in the CrPC into Part I of the Schedule to the VCA. According to their views such amendment would certainly decrease the number of cases of the district courts and the empowerment of the VC would pave the way for access to justice for rural people at a very low price.[72]

According to the VCA the VC has to settle every dispute or conclude the trial process within one hundred and twenty days from the date of filing of the application; after the expiry of the said period the court will be automatically dissolved.[73] This provision gives opportunity to the accused and also to the Chairman to delay the process. If the defendant keeps absent or does not respond properly during a hearing the case gets postponed and delayed. There is no penal provision in the VCA against the Chairman if he delays the process intentionally or does not co-operate for a fruitful solution. The members of the VC do not get allowance or remuneration for their judicial functions. Therefore they do not want to show interest in holding trial. It is also true that there is a shortage of special courtrooms, chairs, pens, tables,

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70 Md Abdur Rahim Mia, *An Evaluation of the Village Courts in Bangladesh,* A Final Report Submitted on RU Research Project 2019, Faculty of Law, Rajshahi University, April 2020

71 The workshop titled, 'The Criminal Trial at VC and the Role of Judicial Magistracy' held on 23 December 2010 at Bhandaria, Pirojpur; Md. Mahboob Murshed, *Review Report on Village Courts Legal Framework*, Activating Village Courts in Bangladesh Project, Local Government Division, Ministry of Local Government of the People's Republic of Bangladesh Dhaka, 2012

72 Md. Mahboob Murshed, *Ibid*

73 Section 6 (B), *the Village Courts Act*, 2006;MdAbdur Rahim Mia (2020), *Op.cit.*

papers, bulletin boards etc. in every *Union Parishad* of Bangladesh.[74] These instruments are essential to activate the VC.[75] The Chairman of the VC issues summons with the help of the village policeman. No specific rules and directions regarding issue of summons have been prescribed by the VCA. It also does not prescribe punishment in case of failure of serving summons. Sometimes Judges or a Magistrates transfer cases to the VC if they are within the jurisdiction of the VC. However, the cost of resolving the dispute is not mentioned in any law. If the above mentioned weaknesses of the VC are removed, it can be an easy alternative to an expensive and lengthy formal court for the rural people. Resultantly the backlog of the formal courts can be reduced.

## 6. Role of the Limitation Act, 1908 in Disposal of Cases

According to the Limitation Act (LA)[76], a convicted person can appeal within thirty days of a judgment. The question of whether an appeal is obsolete or whether it has been prevented for good and reasonable ground from appealing in due time is a subject of the court to decide. In case of absentia, a trial can be taken place without the defendant under the CrPC,[77] but there is no special limitation for the appeal of the judgment of absentia trial has been provided by the LA. In such an appeal, the time limit runs from the date on which the appellant becomes aware of the judgment as in section 18 of the LA.[78] The HCD, in the case of *Jamal Ahmed vs. State*,[79] held that

> '---In the case of a trial in absentia, the limitation period is calculated from the date of notification of the sentence and not from the date of the sentence.'

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74 M Asaduzzaman Sarder, 'Village Courts in Bangladesh: A Form of Restorative Justice', available at *www.academia.edu,* last accessed on 12 July 2017

75 *Ibid*

76 *The Limitation Act* of 1908 may be used as 'LA' throughout the study

77 Sections 87 and 88, *the Code of Criminal Procedure*, 1898

78 *Shomurunnesa vs. Md Musa Miah* , 58 DLR (2006) 228

79 58 DLR (2006) 219

Courts generally consider a 60 days limitation period for filing a criminal revision.[80] In spite of this, the HCD, in *Khadem Ali vs. State*,[81] held that

'—nothing prevents the court from considering a review request submitted for more than 60 days, when the applicant can convince the court that any sufficient cause has been prevented from submitting the review earlier.'

The Limitation Act creates opportunity to delay the judicial proceeding because it allows delay in accordance with the provision of section 5. According to section 3 of the LA any trial that is processed, appeal hearings are taken place and the application is granted, after the limitation period, will be dismissed, even if a restriction has not been set as a defense. It should be noted here that section 5 of the LA does not apply in the institution of a case. Tolerance for delay is mainly granted for 'sufficient cause'. The term 'sufficient cause' may include many factors which have not been covered by the LA. Therefore 'sufficient cause' should be clarified into the Act.

## 7. Absence of Sufficient Law on Protection of Victims and Witnesses

The lack of sufficient legal provisions to protect victims and witnesses is a serious obstacle to a smooth procedure of litigation in Bangladesh.[82]The protection of victims and witnesses[83] is an essential mechanism in criminal proceedings that can help the State to bring criminals to justice and judiciary to reduce the number of cases. Victim's testimony is very important in criminal cases. In Bangladesh victims and witnesses are often threatened, intimidated and prosecuted

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[80] Courts follows here the rule prescribed in Article 155 of the First Schedule of *the Limitation Act.*

[81] 52 DLR (2000) 566

[82] Dr. M. Shah Alam, 'Problems of Delay and Backlog Cases', *the Daily Star,* 25 February 2010, p.9

[83] A 'witness' is a person who is aware about the offence and must appear in any investigation or trial in connection with the commission of an offence. On the other hand, victims are the most important eye witnesses to a crime.

by defendants to prevent them from testifying during trial.[84]The need for protection is essential for children and women victims in cases of organized crimes in which they are intimidated for not producing evidence.[85] It is a well recognized principle that justice cannot be ensured properly in a timely manner without proper acknowledgement of the rights of witnesses and victims. Victims are often afraid of coming forward to make their statements at the time of the investigation, although the investigation of such crimes without their active participation cannot reach a decisive end. In Bangladesh, victims of crime are sometimes subjected to 'secondary victimization'[86] by the criminal justice system. Therefore, victims and witnesses sometimes do not want to go to court as witnesses, and such a reluctance delay the process. It is a matter of sorrow that no specific law has been enacted in Bangladesh to protect witnesses and victims. Section 506 of the Penal Code provides for the sanction on criminal intimidation but is inadequate to protect the victims and witnesses. Sections 151 and 152 of the Evidence Act 1872 place limited restrictions on the submission of offensive questions to the witnesses. In the case of *Tayazuddin and another vs. the State*, the HCD stated that,

> '—it is the duty of the state to protect and safeguard the rights of its citizens, including victims and witnesses, to equality before the law, equal protection of law and the right to life and personal liberty, to which corresponds a right to protection of those concerned.'[87]

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[84] Ashabur Turan, 'Need for Witness Protection Law', *the Daily Star,* 2 February 2016, p.7

[85] Dr. Abdullah Al Faruque and Md. Sazzatur Rahaman, 'Victim Protection in Bangladesh: A Critical Appraisal of Legal and Institutional Framework', available at *www.biliabd.org*, last accessed on 15 July 2017

[86] Secondary victimization' can happen due to the police's indifference to the victim, by discreet, embarrassing and unfavorable questions from police and lawyers and by providing an unsafe or hostile environment in courts and *thanas*. See also, Arafat Ameen, 'Victims and Witness Protection: In Search of a Legal Regime in Bangladesh', *the Daily Star*, 1 October 2005

[87] *Tayazuddin and Another vs. The State* ,21 (2001) BLD (HCD) 503; Dr. Abdullah Al Faruque and Md. Sazzatur Rahaman, *Op.cit*, p 27

Recently, when a bail application was heard on 7 December 2015, a Bench of the HCD of Bangladesh ordered the government authority for taking appropriate measures to introduce a witness security law which may ensure protection for witnesses and victims.[88] Till now the concerned authority has not taken any necessary steps to comply the order of the HCD. Bangladesh Law Commission prepared a final report in 2007, along with a bill on the payment of compensation and other assistance to crime victims, as well as a final report in 2011 along with a bill relating to victim protection and witness in serious crimes which is till now pending for the consideration of the Government.[89]

## 8. Absence of Plea of Bargaining (PB) Mechanism

Plea of Bargaining (PB)[90] is a process in which the prosecutor and the accused negotiate a settlement in which the accused identifies his guilt in the crime or a special charge for pardon from a particular prosecutor, such as a mild punishment or the postponement of other allegations.[91] PB is a tool for criminal proceedings that reduces the cost of litigation and enables the prosecutor to get involved in other valuable cases. In Bangladesh, most of the accused are offered a claim because it allows criminals to reduce the punishment by honestly accepting their own guilt.[92] There is no direct provision in Bangladesh criminal justice relating to PB. Article 345 of the CrPC allows certain forms of composition with the permission of the court and there are other limited cases where composition without the permission of the

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88 Ashabur Turan (2016), '*Op.cit*'

89 Barrister Mustasim Tanzir, 'Law Relating to Protection of Witnesses and Victims in Bangladesh', *The Daily New Nation*, 10 October 2015; Barrister M. Aftab Uddin, 'Protection of Victim of Crime and Witness: State Responsibility', *Bangladesh Law Journal*, Vol. 2, Dhaka, 2015

90 Plea of Bargaining may be used as PB throughout the study.

91 Md. Zakir Hossain, 'Synopsis of Criminal Litigation', *the Northern University Journal of Law*, Volume IV, Dhaka, 2013, p.49; Nadia Shabnam, 'Plea Bargaining: An Analysis of Its Prospects in the Criminal Justice Administration of Bangladesh' *UITS Journal*, UITS, Volume: 1, Issue: 2, Dhaka, 2016, p.137;Md. Alamin, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview', *Journal of Research in Humanities and Social Science* , Volume 3, Issue 11, Dhaka, 2015, pp. 68-82

92 Md. Zakir Hossain, 'One and a Half Thousand Forgotten Detainees in Dhaka Jail', *the Daily Prothom Alo*, Dhaka, 3 February 2002.

court is allowed.[93] This means that criminal proceeding of Bangladesh encourages compromise on criminal disputes. As the current criminal justice mechanism in Bangladesh suffers from many loopholes and therefore aggravates the system and delays the case,[94] it is the demand of time to set up a new method that gives real rhythm to human existence by consent and reduces pressure of the formal courts. The category of compoundable offences should be expanded by changing law. The offences under sections 143, 279, 304A, 304B, 325, 326, 326, 382, 384, 385, 399, 402, 412, 436, 449, 457, 462A, 462B, 465,468 and 510 of the Penal Code can be made compoundable under section 345 of the CrPC. The backlog of criminal cases must be reduced, if these crimes are aggravated. Furthermore, the system of PB can be introduced in Bangladesh for non-compoundable offences which have been introduced by India in their CrPC. In India a new chapter has been introduced in the CrPC, namely Chapter XXIA on PB.[95]The launch of PB is likely to reduce the pressure of the cases pending, as the launch of PB in India has been successful. To eliminate the delay in justice PB can certainly be a welcome inclusion.

## 9. Suggestions

According to the findings of this article, the researcher suggests the following amendments of laws to ameliorate the situation:

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[93] Section 345 of the CrPC prescribes some offences mentioned in the Penal Code (PC) which are compoundable without permission of the court. These offences are mentioned in sections 298, 323, 334, 341, 342, 352, 355, 358, 374, 426, 427, 447, 448, 490, 491, 492, 500, 501, 502, 504, 506, and 508 of the PC. There are also some offences as indicated in section 345 of the CrPC which are compoundable with the permission of the courts. These offences are mentioned in sections 147, 148, 324, 335, 336, 337, 338, 343, 344, 346, 347, 348, 354, 356, 357, 379, 380, 381, 403, 406, 407, 408, 411, 414, 417, 418, 419, 420, 421, 422, 423, 424, 428, 429, 430, 451, 482, 483, 486,493, 494, 509, and 511 of the PC

[94] *Md Joynal and Others vs. Rustam Ali Miah and Others* 36 DLR (AD) 240; *Abdus Satter and Others vs. the State and Other*, 38 DLR (AD) 38, 40; M Zahir, *Delay in Courts and Court Management*, Bangladesh Institute of Law and International Affairs (BILIA), Dhaka, 1998, pp.8-9; Md. Alamin (2015), *Op.cit.*

[95] PB system was introduced in India by the Criminal Code (Amendment) Act of 2005. See for more details: Md. Abdul Halim, *ADR in Bangladesh: Issues and Challenges*, 3rd ed., CCB Foundation, Dhaka, 2013, P 196; KaziEbadulHaque, 'Plea Bargaining and Criminal Workload,' *Bangladesh Journal of Law,* Volume-VII, Dhaka, 2003

(i) To reduce backlog of criminal cases and to ensure speedy disposal of cases a unique timeframe should be provided for the completion of criminal proceedings in all laws including the CrPC. The guidelines in section 167 of the CrPC should be made mandatory to follow and this section should have a specific provision on judicial misconduct.

(ii) Section 344 of the CrPC should contain specific guidelines to limit the discretion of judges on granting postponement or adjournment.

(iii) A provision should be included in section 68 of the CrPC which will allow registered mail or email service for summons. If any endorsement of postman indicates that the summons has been 'rejected' it should be considered sufficient notice and a warrant may be issued in this case. A section may be inserted in the CrPC to the effect that if the accused does not appear in court after an arrest warrant issued or is not found within two months, the Magistrate or Judge may *suo moto* frame charge against the accused under sections 87 and 88 of the CrPC. Modern communication systems, such as cell phones and SMS, may be used to inform citizens about summons.

(iv) Section 68 of the CrPC needs to be amended to allow service of summons by registered mail for defendants or e-mail with receipt facilities where internet services are available.

(v) Since summary trial is a very effective way of resolving pending cases it would be useful to have a complete list of cases that can be tried in this process. Maximum three month imprisonment may be allowed to be imposed by summary trial. In order to gear up the process all cases where the sentence is maximums three years imprisonment should be grouped together. Powers of the summary trials should be given to all the judicial Magistrates.

(vi) The Crime of Disruption of Law and Order Situation(Speedy Trial Act), 2002 must be made permanent. Speedy trials must also be guaranteed before the courts of appeal. This Act must also include a penalty provision against investigating officers who do not complete the investigation timely under this Act.

(vii) The jurisdiction of the VC should be extended by amending VCA. Provision should be inserted into the VCR mentioning the allowances of the Chairman and members specifically.

(viii) 'Sufficient cause' under section 5 of the LA must be clarified, specified and extended to the appropriate time.

(ix) The government should approve and immediately activate a victim and witness protection law.

(x) The system of PB should be introduced in Bangladesh immediately. A new chapter can be inserted in the CrPC.

(xi) A penal provision should be inserted in the CrPC for witnesses who present false evidence or intentionally mislead the courts.

## 10. Conclusion

Delay in proceedings means creating backlog of cases and it is the major challenge for the judiciary of Bangladesh. If there is a delay in criminal proceedings fair and impartial criminal justice becomes questionable. Due to legal flaws mentioned in this article, the criminal proceedings are delayed and litigants often are deprived of getting justice in Bangladesh. Therefore, legal weaknesses which have been focused in this article should be taken into consideration. Though the speedy disposal of criminal cases is a constitutional mandate, the lengthy investigation and trial procedures take a long time and, therefore, effective steps must be taken to resolve the cases especially in investigation and trial phase. Delay in criminal proceedings entails a large expense for the justice seekers. To resolve this protracted legal crisis in Bangladesh a concerted effort by the three pillars of the state i.e the legislature, the judiciary and the executive, and the support of civil society are required. The delay in disposing justice as well as backlog of cases is a knotty problem, but it is not impossible to solve. If the aforesaid suggestions are implemented it is hoped that speedy justice under criminal process will be ensured.

# Implementation of the United Nations Convention Against Torture in Bangladesh

**Md. Shibly Islam***

## Abstract

This article examines the Laws and legal procedures of Bangladesh and compares them to the provisions of the United Nations Convention against Torture and other international standards, concluding that the existing laws of Bangladesh are deficient in their wording, nature, coverage, and basic strategy. Bangladesh signed and ratified the Convention, but it continued to violate international standards of the Convention, and to date no domestic legislation has been passed in this regard. The article provides a frame work to incorporate the said Convention more effectively in Bangladesh to reduce the incidence of torture. The article concludes with an optimistic reflection as well as the suggestions to assist the government in enacting the law to meet the Convention standard.

**Keywords:** Torture, Human Rights, Remand, Implementation

## 1. Introduction

In Bangladesh, the investigation of crime and torture has become the two sides of a coin. Torture has close association with police corruption and with the political control of the police by whatever party is in power at the time.

Torture by law enforcing agencies has been established for years, in Bangladesh since independence in 1971, as a part of Pakistan from 1947 to 1971, as a part of British India from the 1600s to the 1900s, as part of the Mogul Empire from the 1500s to the 1800s and probably before that as well.[1]

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[1] Anupama R., (2001). Problems of Violence, States of Terror: Torture In Colonial India, Interventions, 3;(2): 186-205, DOI: 10.1080/13698010120059609 and also see Anshul G., (2016). "The Brutal Way In Which Mughals Killed This Sikh Warrior Of Punjab Will Make You Rethink Cruelty," www.mensxp.com (MensXP.com),

Torture is forbidden by the Constitution of Bangladesh.[2] There is a law against it.[3] Bangladesh is a party to an international Convention that prohibits it.[4] No one is making – or could make–any reasonable legal argument that torture is legal in Bangladesh. Yet torture continues in Bangladesh.[5] The United Nations Special Rapporteur on Torture has complained about the prevalence of torture in Bangladesh.[6] It took more than six years to get the first enforcement of the anti-torture statute (Torture and Custodial Death Prevention Act, 2013) on 9 September 2020, where three police officers got life imprisonment.[7]

This article focuses on the difference between clear domestic and applicable international law in Bangladesh, strictly prohibiting torture

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https://www.mensxp.com/special-features/today/31179-the-brutal-way-in-which-mughals-killed-this-sikh-warrior-of-punjab-will-make-you-rethink-cruelty.html. and https://www.refworld.org/pdfid/4bf3a6e92.pdf, Last accessed on 13.12.2020

2 Article 35, Constitution of Bangladesh

3 Torture and Custodial Death (Prohibition) Act, 2013

4 United Nations Convention Against Torture

5 See overview in Amnesty International, Bangladesh: Torture and Impunity, AI Index: ASA: 13/07/00, November 2000, pp. 1-2, http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA130072000 ENGLISH/$File/ ASA1300700.pdf.; Human Momtaz S. (2013). Rights violations in Bangladesh: A study of the violations by the law enforcing agencies. *Mediterranean Journal of Social*, 7;4(13):101; "Creating Panic" Bangladesh Election Crackdown on Political Opponents and Critics, https://www.hrw.org/report /2018/12/22/creating-panic/bangladesh-election-crackdown-political-opponents-and-critics; Abdullah Al-Faruque, and Bari, Fazlul Hussain M., 2019. Arbitrary Arrest and Detention in Bangladesh., Australian Journal of Asian Law, 19; (2): 10, Available at SSRN: https://ssrn.com/abstract=3396356; Hasan, Monjur M., & Arifuzzaman, M., & Rahaman, M., (2017). Torture in Lawful Custody: Violation of United Nations Convention against Torture in Criminal Justice System in Bangladesh. Beijing Law Review. 08. 397-422; Human Rights Report Bangladesh , Country Reports on Human Rights Practices for 2019 United States Department of State • Bureau of Democracy, Human Rights and Labor, https://www.state.gov/wp-content /uploads /2020/02/ bangladesh-2019-human-rights-report-1.pdf.

6 See UN Docs. E/CN.4/1999/61, 12 January 1999, paras.79 et seq.; E/CN.4/2000/9, 2 February 2000, paras.116 et seq.; E/CN.4/20001/66, 25 January 2001, paras.140 et seq. and E/CN.4/2003/68/Add.1, 27 February 2003, para.169

7 Daily Dhaka Tribune, Wednesday, January 13,2021https://www.dhakatribune.com/bangladesh/court/2020/09/09/first-ever-verdict-over-custodial-death-former-si-2-others-sentenced-to-life, Last accessed on 13.10.2020

in every case, and the continued practice of torture in country in the country. Then, on the basis of its analysis of the failures of Bangladesh law on torture in practice, this article proposes amendments of the anti-torture law such as Torture and Custodial Death Prevention Act, 2013 along with Criminal Procedure code.

## 2. Bangladesh's Obligations to Eliminate Torture under the UN Convention and Other International Laws

Bangladesh has responsibilities under international law to provide protection against torture. These include the United Nations Convention Against Torture (hereinafter "the Convention") the International Covenant on Civil and Political Rights Article 7, the Rome Statute of the International Criminal Court Article 7(1)(f) and 8(2)(a)(ii) & (c)(i), the Four Geneva Conventions on the Protection of Victims of Armed Conflicts (Common Article 3 and the grave breaches provisions).

### *The Impact of International Law*

The Convention can assist Bangladesh by providing international monitoring of torture in Bangladesh. The Convention includes an international supervisory board, called the Committee against Torture or the "Committee," consisting of "ten high-quality, recognized experts on human rights", elected by the Convention's member states.[8] State Parties are expected to report on the steps they take to comply with the requirements of the Convention. The Committee can make certain comments or recommendations on the report as deemed necessary by the Committee.[9] Under Article 20 of the Convention, the Committee may jointly, with the State concerned, conduct an inquiry where an infringement of the Convention is alleged by "reliable sources".[10]

However, Bangladesh never officially and directly reported to the Committee under the United Nations Convention Against Torture from ratification, in 1998, to 2019. The National Human Rights Commission published its 2015 report as 'JAMAKON Report to the UN

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8 Article 19 of CAT

9 *Id.*

10 Vreeland, James Raymond. "CAT selection: Why governments enter into the UN convention against torture." *Ms., UCLA International Institute* (2003).

Committee against Torture', which means that it did not qualify as a State party report under the Convention.[11] Bangladesh submitted its initial State party report to the Committee against Torture in 2019, but it had been due since the year after ratification, in 1999. Five quadrennial reports, in 2003, 2009, 2014 and 2019, respectively, are still missing.

In Bangladesh's initial report, at para 5, the State informed the Committee that, in the absence of domestic legislation, the courts can still apply the principles of international instruments like the Convention on Torture. They cited the decision by the Bangladeshi apex court in the case of the State vs. the Commissioner of Metropolitan Police stated that if domestic law in this issue is insufficiently clear, the national courts should use the principles included in the international instruments.[12]

The Supreme Court has laid out a virtual code to prevent torture in *BLAST vs. Bangladesh* (2003)[13] and *Saifuzzaman vs. State* (2004)[14]. If that were followed by law enforcers, it would probably stop torture. Yet it does not seem to be followed in practice.[15] If Bangladesh would merely use the Convention's Committee, such international monitoring would create pressure to follow the Convention in a way court decisions cannot.

### *Law of Bangladesh in Comparison with the United Nations Convention*

According to Section 2 (6) of the Torture and Custodial Death (Prevention) Act, 2013 torture means any physical or psychological torture that hurts and then deems certain acts as being included. The statutory concept of torture restricts the meaning of torture to mere physical or mental pain in order to obtain knowledge or confession.

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[11] Daily Star,Saturday, "May 4, 2019https://www.thedailystar.net/law-our-rights/news/overdue-state-party-report-bangladesh-the-uncat-1684297 Last accessed on 11.12.2020

[12] https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BGD/CAT_C_BGD_1_ 583 8_E.pdf, para 5, page 2. Last accessed on 13.12.2020

[13] 55 DLR 363 (2003) (HC).

[14] 56 DLR 324 (2004) (HC).

[15] *See n. 5 supra.*

The Convention against Torture includes "mental torture". Nigel Rodley, the former United Nations Special Rapporteur on torture, pointed out that the torture ban applies not only to actions causing physical pain, but also to acts that cause suffering to the victim including bullying and other types of threats. Likewise, Theo van Boven, a former United Nations Special Rapporteur on Torture, claims that lengthy isolation can be mental torture. Mental torture may include the fear of physical torture.[16]

The 2013 Custodial Death Prevention Act does not comply with the international standard on the definition of torture set out in Article 1 of the Convention. The Convention definition of torture focuses on extreme pain or suffering, physical, as well as emotional or psychological.

Medical examination, as soon as possible after a claim of torture, is required by Article 11 of the Convention against Torture. Medical examination of torture victims has produced many allegations of doctors' participation in torture in other countries. Rasmussen (1990)[4] found that 41 of the 200 examined torture victims reported doctors' involvement (20%). Such medical examinations are not provided for in Bangladeshi law.

Article 10 of the Convention against Torture requires training of medical, law enforcement, civil or military personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to torture is fully covered by education and information relating to the prohibition against torture. Bangladesh is not conducting such training.

Article 12 of the Convention provides for prompt and unbiased inquiry where there is reason to suspect that there has been torture or cruel or inhuman or degrading treatment or retribution. Bangladesh does so but only where the victim (or his/her family) makes a formal complaint, which is a very small percentage of torture occurrences.

The Custodial Deaths Prevention Act 2013 trusts on the police for registering complaints and investigating cases of torture. According to

[16] Tobin, J., and Hobbs. H., O., (2019). "Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty." In *The UN Convention on the Rights of the Child: A Commentary*. Oxford University.

section 6(1) of the Torture and Custodial Death (Prevention) Act 2013, ''the police will conduct the investigation of alleged offences under this Act.'' Yet the impartiality of such an investigation will be very much questionable where police are the accused and letting police investigate police is a clear violation of due process or the principles of natural justice.

Each State Party shall safeguard, pursuant to Article 13 of the Convention, any person who claims to have been subjected to torture in any territory under [the] jurisdiction of [a State Party] shall have the right to lodge a complaint and to have his case investigated promptly and impartially by the competent authorities thereof. This means that any person claiming to have been subjected to torture in any territory under its jurisdiction is entitled to a neutral examination by its competent authorities. The provision for judicial investigation, rather than police investigation, is laid down in the Act, although it is not made mandatory. As the Supreme Court of India explained in *UP v Ram Sagar Yadav*,[17] the police are a kind of brotherhood in which officers often cover up one another's mistakes. Article 12 of the Convention requires States Parties to investigate claims of torture promptly and impartially. A police investigation, the usual procedure, does not meet Convention requirements.

In the case of custodial death, the 2013 Act does not provide any specific procedural guidelines or precautions for post mortem examinations and the process of collecting and filing the post mortem report from the forensic experts. Again, the Act primarily entrusts the investigation of the crimes of torture and custodial death to the police.

The 2013 Act fails to provide necessary instructions for the completion of investigation if the limit of 120[18] working days is exceeded without the investigation being completed. The law only stipulates that the trial must be completed within 180 days, with a "possible" extension of 30 days. However, the Act is silent on how the court should proceed if the trial is not completed within the given timeframe.

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[17] AIR 1985 S.C. 416

[18] An investigation of any offence under this Act must be completed within 90 working days from the date of recording of the first complaint. The court shall hear the victim(s)/aggrieved person(s) statement within 30 days to settle the matter relating to seeking extension of time.

Furthermore, the law offers a meager amount of compensation, which leaves no room for redress, reparation, and rehabilitation. The 2013 Act prescribes inadequate punishment (five years' imprisonment or 100,000 Taka fine, or both) for the convicted. The law does not bar convicted perpetrators of torture or custodial death from seeking jobs in the public and private sectors.[19] Lastly, the Act fails to prescribe any sanctions for those who fail to comply with its provisions.

The Supreme Court in *Bangladesh v BLAST*[20] set out some other procedural requirements which are missing in Bangladesh law enforcement to prevent torture, which would help to comply with the Convention's Article 12-13 requirement of an impartial investigation of torture:

(a) If so ordered, the arrestee should also be examined at the time of his arrest and major and minor injuries, if any, present on his or her body, must be reported at that time. The "Inspection Memo" must be signed by the arrested person and the police officer affected by the detention, and a copy must be given to the arrested person.

(b) An arrested person should be medically examined by a qualified doctor every 48 hours during his stay in custody, who will be on the panel of approved doctors appointed by the Director of the State Health Service. A panel should be prepared for this purpose for all tehsils and districts by the Director, Health Services.

(c) Copies of all records, including the memo of detention, shall be submitted for record to the Magistrate.

No action was taken by the Government on those recommendations. They could have saved several victims in police custody from torture.

Witnesses and victims of torture fear for their lives as much as any victims or witnesses of any violent crimes. Although in Bangladesh

[19] Asian Legal Resource Centre's Written Statement to 37th Session of United Nations Human Rights Council, Bangladesh: Law on Torture is useless in a broken justice mechanism, available at: http://alrc.asia/bangladesh-law-on-torture-is-useless-in-a-broken-justice-mechanism/

[20] Bangladesh &ors Vs. Blast & others ,8 SCOB [2016] AD Para 50 and 51

there are many statutes and regulations for the protection of victims of crime, there is currently no law on the protection of witnesses to crime. Even the Code of Criminal Procedure and the Evidence Act are totally silent on the issue of witness protection except that Section 506 of the Penal Code provides for punishment for committing criminal intimidation but it is rarely used in torture cases.

To meet the standards of the United Nations Convention Against Torture in Bangladesh, rights, rewards and protection for witnesses of torture and other violent crimes should be supported through accommodation with secure housing; relocation; shifting identity by counselling and financial support; travel facilities; subsistence allowance; medical care. The immediate family of the witness or an individual connected with the testimonial should also be covered.

We can see from these many substandard provisions why torture continues in Bangladesh despite prohibitions in the United Nations Convention, the Constitution and the 2013 Act. To solve this, the first step is upgrading the standards of Bangladesh law against torture to the international standard.

## 3. Use of the Convention and International Monitoring and Investigations

Bangladesh should comply with all requirements of the Convention, which it has not done, and sign the Protocol allowing individual complaints to the Committee. The Government should monitor compliance with Supreme Court guidelines and punish deviations consistently.

### *Repeal the Climate of Impunity*

Although the Constitution prohibits torture and other cruel, inhuman, or degrading treatment or punishment, security forces, including the Rapid Action Battalion ("RAB", a paramilitary force within the police) and the police, frequently employ torture and severe physical and psychological abuse during arrests and interrogations in recent years. Abuse consists of threats, beatings, and the use of electric shock. The Government have rarely charged, convicted, or punished those responsible. So there is a climate of impunity that encourages such

abuses by the RAB and police to continue.[21] Adding to the climate of impunity is section 132 of the Code of Criminal Procedure, which requires the consent of the Government to prosecute a State official, including a policeman. This may be modified to ensure that the State officer involved in the practice of torture is prosecuted.

The climate of impunity is problematic under Article 12 of the Convention, which requires States Parties to investigate claims of torture promptly and impartially. It is also a breach of Article 13, which states that any person who claims to have been subjected to torture in any territory under [the] jurisdiction of [a State Party] shall have the right to lodge a complaint and to have his case investigated promptly and impartially by the competent authorities thereof. Police generally misuse sections 54, 167 and 344 of the Code of Criminal Procedure and section 3 of the Special Powers Act 1974.

***Guidelines Needed***

There must be a guideline that states how much psychological pain should be endurable and how much amounts to torture. Accused persons should be examined by a psychiatrist before and after their placement in police custody. The psychiatrist's report should be brought before the court in cases where torture is alleged. Moreover, gender-based violence including rape, sexual harassment or abuse as a form of torture is should be included in the Custodial Deaths Prevention Act 2013.

***Strict Liability***

The Supreme Court of India determined that the handmaidens of the law, like the police, must not use their position to oppress innocent citizens who look to them for protection. Most importantly here, the court noted with regret that the police officers are bound by the ties of a kind of brotherhood and often prefer to remain silent in such a situation, if not pervert the truth, to protect their uniformed brethren. The court emphasized the extremely peculiar character of a situation where a police officer alone and none else can give evidence regarding the circumstances of a torture case. The

[21] US Department of States, Annual Human Rights Reports 2010, Bangladesh Chapter, see https://www.refworld.org/publisher, USDOS,,BGD,4da56de78c, 0.html , Last accessed on 17.12.2020

result is that persons against whom atrocities are perpetrated in the police station are left without any evidence to prove who the offenders are and what they really did.[22] The remedy adopted by the Indian Law Commission after Y*adav's case* is a strict liability provision.

Considering the remarks of the Supreme Court in Yadav's Case, the Law Commission of India, in its 113th [23] Report, made a recommendation to amend the Indian Evidence Act, 1872 to give power to the court to presume that, where bodily injuries are caused to a person while he is in police custody, those injuries were caused by the police officer having custody of that person during the period in which he was injured.

Bangladesh should amend the Evidence Act 1872 in same way and allow the court to make the same presumption. Suppose an accused is gang raped in police custody: it would be next to impossible for her to produce evidence against the perpetrators, as there might be no one to witness who was not a participant in the offence. In such a case, only such a presumption would make any relief or compensation, let alone penalty for the guilty, at all possible.

Seema Chowdhury, of Chittagong, was the victim of a gang rape by 4 policemen. Her death occurred in security custody during the period of her investigation by police in 1996. Four policemen, who were involved in the rape, were acquitted by the court because of insufficient evidence. The police had investigated the case and reported the facts to the court.[24] It seems like almost the same facts as in Yadav's Case with the same result, suggesting a need for the same remedy: worse, because in Chowdhury's Case, the guilty received no penalty at all.

A police officer thus is given a duty that a person in his/her custody will not wind up tortured or killed by anyone, by any means, for any reason. The accused can always count on a list of

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22 *Cit. at n. 17 supra.*

23 Abdul Hannan M., (2009). *Human Rights of the Accused in the Criminal Process*. p.79.

24 Abdul Hannan M., (2009).*Human Rights of the Accused in the Criminal Process*.p. 79. andAli Khan A. (2014). "Violence against women in Bangladesh-laws and reality." *World Vision* 8; (1): 116-126.

witnesses, constituting every officer of the police station, to deny his/her guilt. Yet the poor victim is guaranteed that there will never be one witness to offer to rebut the rebuttal, because the crime is, by nature, committed in secret. Such a provision should be added to the Custodial Deaths Prevention Act 2013.

***Rehabilitation of Victims***

Bangladesh government could set up rehabilitation centres specifically built for torture victims of law enforcement agencies. The day-to-day work of the centres with victims of torture will provide useful information about all facets of torture. Medical doctors working in hospitals, the police, the army and refugee centres may be a special focus group for recovery centres training and prevention efforts. A standard medical examination will not always pinpoint evidence of torture unless it is especially egregious and the doctor knows what to look for and what questions to ask.

## 4. Judicial Investigation of Complaints

According to section 6(1) of the Torture and Custodial Death (Prevention) Act 2013, ''the police will conduct the investigation of alleged offences under this Act.'' Yet the impartiality of such an investigation will be very much questionable where police are the accused and letting police investigate police is a clear violation of due process or the principles of natural justice.

Each State Party shall ensure, pursuant to Article 13 of the Convention, that any person claiming to have been subjected to torture in any territory under its jurisdiction is entitled to a neutral examination by its competent authorities. Steps needed to be taken to confirm that the accuser and witnesses are protected from any abuse or intimidation as a result of their complaint or as a result of any evidence provided

In every case where the defendant is a police officer, judicial enquiry could be the norm for the sake of impartial investigation required under the Convention. Judicial enquiry is thought to be impartial and is well-accepted in Bangladesh as the most transparent and accountable form of inquiry. There is a lack of confidence in the police regarding the transparency and accountability of their investigations. For example, the court's actions are appealable but there is no appeal

from an action by the police except a Writ Petition for denial of a constitutional right. On the other hand, the judges are trained to find facts and determine responsibility, not to investigate crimes. So, JATI (Judicial Administration Training Institute) has to come forward to organize and schedule appropriate training regarding modern methods of criminal investigation in Bangladesh and abroad. JATI can thus train judicial magistrates to do torture investigations.

***Compensating the Victim***

The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [25] have already established an international standard in the assessment of compensation. Compensation should be provided for any economically assessable damage resulting from gross violations of international human rights law and serious violations of international humanitarian law, as appropriate and proportionate to the gravity of the violation and the circumstances of each case, such as:

(a) Physical or psychological harm;

(b) Opportunities missed, including employment, education and social benefits;

(c) Significant harm and loss of income, including loss of earning potential;

(d) Moral harm;

(e) Expenses needed for legal or technical aid, medical and medical care, psychological and social services.[26]

Although this may be considered less favorable to the victim because the evaluation is left to the discretion of the courts, the low level of compensation in the Custodial Deaths Prevention Act 2013 is unacceptable under Article 14 of the Convention. That Act should be amended to follow the guidelines set out above, empowering the court which finds a person guilty under the Act to fix compensation to

[25] United Nations General Assembly Resolution 60/147 (16 December 2005).

[26] United Nations General Assembly Resolution 60/147 (16 December 2005), *id*., Guideline 20.

his/her victim as provided there under. Compensation should be sourced first from the guilty person's assets and the remainder from the State.

***Presumption of Innocence***

Article 13 of the Convention requires States to ensure protection for both complainant and witness against all ill-treatment or intimidation. Section 11 of the Torture and Custodial Death (Prevention) Act, 2013 provides for the security of any plaintiff who is entitled to file a petition with the Session Judge's Court requesting protection against the defendant. The complainant may file a 'petition' against the accused for protection under section 11 (1) of the Act. Under section 11(4), the Court can, in the circumstances referred to above, issue an order to hold the defendant for duration of at least seven days, which may be extended intermittently.

This section need to be amended because it has been made discretionary whether the judge will afford protection. It should be mandatory to grant protection when a petition has been made under section 11(1). Moreover, intimidating the victim is not considered to be a separate offence against this Act. If the accused violates a prohibition order by entering into the specified area as mentioned in section 11(6), what would be the consequences for the accused? This question is not answered in the statute. These offences, each with additional penalty, should be clearly specified in the Act:

(1) intimidating or harassing, or attempting to intimidate or harass, directly or through intimidating or harassing any relative, a petitioner or witness in any trial of any petition under section 11(1);

(2) Contravening any order of any court made under this Act.

Furthermore, there is no provision for the protection of witnesses. The offences of torture and death in police custody are serious offences and those who observe such torture would be at high risk of elimination by the accused to avoid conviction and imprisonment.

The Law Commission of Bangladesh examined the issue in its 74th report and considered the problem of witness protection carefully. Also, in its 108th report, the Commission discussed the matter. The

Commission suggested draft legislation in the light of the Acts of some pioneer countries and recommendations of learned researchers in those reports. In that draft, the definitions of witness and other necessary definitions are clearly stated for the purpose of protection. But no Bill to enact such legislation has been initiated.

***Arrest as Torture***

Article 1 of the United Nations Convention Against Torture describes torture as 'any deliberate act causing extreme pain or distress, whether physical or mental, carried out for a prohibited purpose by a person in an official capacity or with official consent, which is not merely incidental to the lawful punishment of a person guilty. Examples of forbidden uses are:

(a) the gaining of information or a confession;
(b) punishing him for an act committed or suspected of having been committed by him or a third person; or
(c) to bully or coerce him or a third party, or for any excuse based on any kind of discrimination."

It is therefore submitted that merely arresting or detaining any innocent person is torture under the definition in Article 1. Such a person, isolated, in the hands of and dependent upon the police, who are adversarial to him/her and could do anything to him/her in secret, undergoes severe mental pain and suffering, at least from fear.

Hence, it is submitted that no law should contain any provision which provides the police unlimited power to arrest or detain any person without a warrant issued by a magistrate on proof of the probability that the subject has committed a cognizable offence. Such a law, allowing arrest without warrant, is prohibited by the United Nations Convention on Torture.

***Remand***

The submission that arrest or detention without proof of guilt contravenes the Convention on Torture, because it is torture under the Convention in Article 1, begs the question of remand in the Bangladesh legal system. Remand time for the detention and investigation of persons who remain innocent until proven guilty are too long and unsupervised. Thus too commonly an opportunity for torture and

extortion by the police. Remand should be sharply circumscribed in time and incidence and torture of remandees should be sought out. When it occurs, the torturers should face criminal sanctions.

***The Judiciary Must Be Independent***

To assure the independence of the judiciary needed for the proper implementation of the United Nations Convention against Torture, the judiciary needs to be fully independent and unable to be influenced by the Government, their policy or the police. The best method of doing this would be to get the Government totally out of the assignment of judges by having transfer files prepared by the Supreme Court's Secretariat and not by any Ministry.

***Constitutional Cross-Purposes***

The Bangladesh Constitution is unclear with respect to torture. Article 35 forbids torture. Nevertheless, Article 46 allows the Parliament to pass legislation to free any person in the service of the Republic, or any other person, of any act he has committed in connection with the preservation or restoration or order in any region of Bangladesh, or to justify any penalty, punishment, forfeiture or other act carried out in any such area.

## 5. Conclusion

Returning to the questions at the start of this paper, they are now easy to answer. Why is there torture in Bangladesh, even though illegal? The answer is that the laws and legal procedures of Bangladesh do not rise to the standards prescribed by the Convention. That creates a climate of impunity which actually subsidizes and encourages law breaking by law enforcement torturers. Does the law matter? Yes, but only in a negative sense. If the laws are not written properly, they will encourage torture and have no hope of stopping or reducing it.

Amendment is expected to Section 2 (6) of the Torture and Custodial Death (Prevention) Act, 2013 to bring it into closer compliance with Article 1 of the CAT's definition of torture. Section 4 calls for a clarification of the expression "The Court having jurisdiction". Section 5 of the Act should be strengthened to provide for an independent review of law enforcement agencies rather than a police and prosecutorial one under the authority of law enforcement agencies. The

Act does not contain a word for the absence of uncertainty in interpretation of such sections such as Articles 6(1), 7(1), 8(3) and 13(1), (2) of the Act. The Act should therefore provide a description in Section 13(1) of the word "individual" meaning a public official or a person who is acting officially in accordance with the CAT. Provision for reasonable reimbursement of the torture victims should be inserted in section 15 of the Torture and Custodial Death (Prevention) Act, 2013. The compensation sum should be paid directly to the victims or aggrieved parties of torture and incarceration death. This Act should include the aggrieved individual, who includes family members and legal successors and assure the safety of those who make a complaint against a member of the law enforcement community. This Act does not address the gender problem. Female suspects, for example, should be captured and dealt with by female officers rather than male officers. The law fails to provide necessary instructions for the completion of investigation if the limit of 120[27] working days is exceeded without the investigation being completed. The law only stipulates that the trial must be completed within 180 days, with a "possible" extension of 30 days. So there should be a clear guideline in this regard.

Parliament should amend sections 54, 167, 344 of the Code of Criminal Procedure, on the initiative of the Ministry of law, Justice and Parliamentary Affairs, in accordance with the guidance set out in the case of BLAST[28] by the Supreme Court. The High Court Division's guidelines and instructions for arrest, investigation and detention should be followed closely according to *Saifuzzaman* case[29].

Bangladesh has yet to ratify the Optional Protocol to the Convention against Torture, which lays down a visiting mechanism for torture prevention. Bangladesh did not acknowledge the ability of either the Committee against Torture or the Human Rights Committee to obtain individual torture reports. In the absence of a global mechanism, persons who have suffered torture have resorted only to national

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[27] An investigation of any offence under this Act must be completed within 90 working days from the date of recording of the first complaint. The court shall hear the victim(s)/aggrieved person(s) statement within 30 days to settle the matter relating to seeking extension of time.

[28] *Bangladesh & others vs. Blast & others* ,8 SCOB [2016] AD Para 50 and 51

[29] 56 DLR 324 (2004) (HC).

remedies and international bodies have limited study of Bangladesh's compliance with its international obligations. The optional protocol must be ratified by Bangladesh. As required by the treaty, Bangladesh should send a report to the UN Committee on Torture on a timely basis. Another effective way to avoid torture was to publicize torture charges. Only when hidden torture remains may it continue. It continually raises public awareness, police awareness and government awareness and slowly, over time, makes continuing torture less and less sustainable. So, more torture incidents could be documented by the National Human Rights Commission so that people are aware of the situation.

# Composition of *ad hoc* Committee for annulling ICSID Arbitral Award: Appraising the Participation of Parties and Contracting States

**Sekander Zulker Nayeen***

## Abstract

The International Centre for Settlement of Investment Dispute (ICSID) provides a delocalized system for reviewing an arbitral award passed by its original tribunal. In this system, review against any arbitral decision is heard and decided by an 'ad hoc Committee' composed by the Chairman of the Administrative Council of ICSID. Some commentators criticize that the present Committee-composition system confines the party-autonomy and effective participation of ICSID Contracting States in the process. Consequently, some stipulations regarding the qualifications of the arbitrators are not being fully sustained, and the parties are not getting their disputes resolved by the arbitrators they desire. The present study approaches to the ways of ensuring party-autonomy, the participation of the parties and Contracting States in the composition of the ad hoc Committee. In doing so, the compositions of World Trade Organization (WTO) Appellate Body and the International Court of Justice (ICJ)have been discussed to entice an analogy with that of ICSID ad hoc Committee.

**Keywords:** Composition of ad hoc Committee, Discretion of the Chairman, Party autonomy, Qualification and experience of arbitrators, WTO Appellate Body

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## 1. Introduction

The *ad hoc* Committee[1] (annulment Committee) is a superior authority in ICSID system established to review an award passed by ICSID tribunal. The composition of this Committee is considerably different from other arbitral regimes and even largely different from the composition of arbitral tribunal under the ICSID Convention itself.[2] It is composed of three members selected by the Chairman of the Administrative Council of ICSID (hereinafter as the Chairman) on receipt of request from the Secretary General upon registration of an application for annulment.[3] This procedure of constituting *ad hoc* Committee broaches some debates, such as, it gives unhindered discretion to the Chairman in composing the Committee which affects the principle of party autonomy especially the parties' participation in selecting and constituting the Committee; it only leaves limited or indirect scope of participation for Contracting States to form the Committee. Given the situations, part-II of this study analyzes-how the composition of *ad hoc* Committee undermines party-autonomy to the extent of appointment of arbitrators. Part-III analyzes- how the greater participation of the parties and Contracting States could minimize the problems arose in part-II. The scope of this paper is strictly confined within some narrower, but significant arbitration principles- such as, party-autonomy and party-participation in the composition of the ICSID arbitral review forum. In theorizing these principles into the ICSID review regime a qualitative research has been carried out throughout the paper.

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1 In this study, it would, sometimes, be called as 'annulment Committee' or simply 'Committee'.

2 Generally, the primary arbitral tribunal under ICSID Convention consists of an uneven number of arbitrators. Each party appoints one arbitrator, and the arbitrators attempt to agree on the third arbitrator, the President of the Tribunal. If the party-appointed arbitrators fail to agree, the Secretary-General (or the Chairman of the Administrative Council) of ICSID appoints the President. In appointing their arbitrators the parties enjoy unhindered party-autonomy because they are not bound to select them from the Panel of Arbitrators of ICSID. The system is almost same in case of other arbitral regimes.

3 ICSID Convention art 52(3) and Arbitration Rules rule 52

## 2. Party autonomy and the composition of *ad hoc* Committee

The procedure for composing *ad hoc* Committee seems contrary to the principle of party autonomy. Generally, party autonomy in its absolute sense means that the parties will have control in all aspects of the proceedings including the composition of the arbitral tribunal and the rules governing the proceedings.[4] The party autonomy especially parities' participation in appointing arbitrators[5] is historically recognized in investment arbitration.[6] Under this principle, investment arbitration provides the parties some privileges of constituting the tribunal and choosing suitable laws. ICSID system also recognizes party autonomy in constituting the original arbitral tribunal.[7] Party autonomy in ICSID is so wide that it does not limit the party to appoint an arbitrator even out of the panel of ICSID-arbitrators.[8]However, the scenario is radically reverse for the composition of annulment Committee. It deprives the parties from a fundamental privilege of choosing international arbitration i.e. the party-appointment.[9] The first deprivation starts with the restriction upon selecting members of *ad hoc* Committee from the ICSID's panel of arbitrators only. It ultimately restricts the parties' expectation to get the dispute resolved by a qualified arbitrator of their choice. The second deprivation starts with the parties' non-participation and the Chairman's discretion in constituting the Committee. These two matters will be discussed elaborately in the following paragraphs.

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4 Anoosha Boralessa, 'Limitations of Party Autonomy in ICSIS Arbitration' (2004) 15 *The American Review of International Arbitration* 253, 266

5 Julian D. M. Lew , Loukas A. Mistel is , et al., *Comparative International Commercial Arbitration*, (© Kluwer Law International; Kluwer Law International 2003) para 10-4

6 Joseph M. Matthews, 'Difficult Transitions Do Not Always Require Major Adjustment- It's Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration' (2010) 25 ICSID Rev. Foreign Investment Law Journal 356, 359.

7 Boralessa (n 4) 253

8 Juan Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26(1) *ICSID Review* 128, 134

9 Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2013) 35(2) *University of Pennsylvania Journal of Law* 431, 437

### A. The question of qualifications of the panel members

Since there is no party-appointment, the annulment Committee is supposed to be composed of renowned experts in the field of investment arbitration with a view to satisfying the parties about the standard of the decision. Some commentators claimed that the members of the *ad hoc* Committees are usually experts in investment arbitration.[10] But how a party would be assured about the expertise of such a member? It may be argued that the parties' satisfaction on ICSID-arbitrator's qualifications should be assessed following the terms and conditions ICSID sets for selecting the arbitrators. At the moment of agreeing to arbitrate before ICSID tribunal, the parties give up their right to get preferred arbitrators during annulment because, they believe, ICSID provisions ensure the appointment of experts in annulment Committee. Therefore, the ICSID provisions requiring the qualifications of the arbitrators can be considered as a substitution to the arbitrators' qualifications. Hence, it is necessary to see at first how ICSID prepares the panel of qualified arbitrators.

In preparing this panel of arbitrators, ICSID invites each Contracting States to designate four qualified persons to this panel.[11] The Chairman may, additionally, designate up to ten persons to this panel.[12] This provision invokes the Contracting State to forward only 'qualified persons'. The Convention stipulates three main qualifications for designating persons to the panel- such as they must be (i) persons of high moral character, (ii) recognized for competence in the fields of law, commerce, industry or finance, (iii) competent to exercise independent judgment.[13] In addition, the designated person's competence in the field of law shall be of particular importance.[14] Apart from the qualification 'high moral character', the Convention requires arbitrators' expertise in four major fields e.g. law, commerce, industry, finance. The ICSID system divided these major fields in 11

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10 Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) *Journal of International Arbitration* 621, 633

11 ICSID Convention, art 13(1)

12 ICSID Convention, art 13(2)

13 ICSID Convention, art 14(1)

14 ICSID Convention, art 14(1)

'economic sectors'[15] and 12 specific 'subject of dispute'.[16] The basic qualifications, economic sectors and subject of dispute represent the diversity of ICSID arbitral regime. This diversity demands the panel members' expertise and experience in diversified areas of investment. Some other attributes such as- knowledge of and experience with international investment law, public international law and international arbitration are also necessary for being the panel member.[17] In short, these stipulations forward three major demands before designating an arbitrator to the panel- one, the arbitrators must have expertise in any one or more of the major fields or economic sectors specified in the Convention; two, they must be capable of independent judgment; three, they must have prior experience of conducting arbitration. If we theoretically consider the stipulated qualifications mentioned above, we must admit that the panel of arbitrators are rich enough to deal the review regime. But, there have been complaints in the past that not all members of the panel had the necessary qualifications.[18] In the following paragraphs, some recent data will be analyzed to search the substance of such allegation.

In 2015, the Chairman constituted 13 annulment Committees[19] wherein 25[20] persons were appointed from the panel of arbitrators. By perusing

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15 International Centre for Settlement of Investment Dispute, <https://icsid.worldbank.org/apps/icsidweb/cases/pagesadvancedsearch.aspx> accessed 27 July 2016 [The 'economic sectors are: (i) agriculture, fishing & forestry, (ii) construction, (iii) electric power & other energy, (iv) finance, (v) information & communication, (vi) oil, gas & mining, (vii) other industry, (viii) services & trade, (ix) tourism, (x) transportation and (xi) water, sanitation and flood protection.]

16 *Ibid* [The 'subject of dispute' are: (i) banking enterprise, (ii) cement production enterprise, (iii) debt instruments, (iv) food products enterprise, (v) hydrocarbon concession, (vi) mining concession, (vii) renewable energy generation enterprise, (viii) telecommunication enterprise, (ix) waste disposal enterprise, (x) waste management services, (xi) water and sewer services concession agreement, (xii) water services concession]

17 International Centre for Settlement of Investment Dispute, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Qualifications-for-the-Panels.aspx> accessed 29 July 2016.

18 Georges Delaume, Le Centre International pour le reglement des Differendsrelatifs aux Investissements (CIRDI), (1982) 109 *J. DROIT INT'L (CLUNET)* 775, 820-1

19 <https://icsid.worldbank.org/apps/icsidweb/cases/pages advancedsearch.aspx?gE=s&trbFdt=01%2F01%2F2015&trbTdt=12%2F31%2F2015

their Curriculum Vitae (CV),[21] it appears that everyone possesses a range of expertise in international arbitration and participated in different arbitrations under ICSID, International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL) Model Law and others. However, the range of their professions does not give the impression that the panel of arbitrators covers the diversified areas of investment knowledge. All the 25 arbitrators are from legal discipline e.g. professors in law, legal practitioners, and judges. Only two arbitrators have the experiences of working in banking sector. The professional backgrounds of these arbitrators appointed in the annulment Committees do not express the true representation of all the major fields in the panel of arbitrators. There are some risks of not appointing arbitrators from other technical fields. Consequently, other professionals, for example, engineers, bankers, government high officials, agriculturist etc should be included in the panel since the ICSID deals economic sectors concerned with them.

Again, the arbitrators are required to be capable of delivering independent judgment. But ICSID does not have any mechanism to assess the independent judgment-delivering quality of a designee. For example, there is no formal body or mechanism in the ICSID that can call for and assess the designees' prior relevant work records or track records to evaluate their capability of delivering independent judgment. The designation of individuals is mostly within the discretion of States that may not select the designees through a competition. Furthermore, their designation is not subject to any challenge or scrutiny.[22] Consequently, a person having limited quality of delivering independent judgment can likely be designated. This is not a problem during selecting arbitrators for original tribunal because, before appointing the arbitrators, the parties scrutinize the

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&apprl=CD20,CD18&typ=CD12> accessed 30 July 2016, 12 *ad hoc* Committees were constituted and one was reconstituted.

[20] *Ibid*. Some of the panel members were appointed for more than one *ad hoc* Committee.

[21] ICSID, 'Arbitrators, Conciliators and Ad Hoc Committee Members' <https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx> CVs are available on ICSID official website.

[22] Boralessa (n 4) 288

qualifications of arbitrators whereby they could avoid appointing anyone who does not satisfy the parties' desired qualifications.[23] Problem occurs when the Chairman appoints the members for annulment Committee as the parties do not have any opportunity to forward a choice. However, it is expected that the Chairman will appoint such member who has prior experience of conducting ICSID tribunal because, firstly, working within the ICSID system enables the Chairman to assess individual-arbitrator's competence of delivering independent judgment and, secondly, it equips the arbitrator with the ICSID arbitration experience. It has been observed that the Chairman constituted 13 annulments Committee in 2015 appointing 25 persons from the panel.[24] Some members served in more than one Committee.[25] At least seven Committee members out of them did not have any prior experience of conducting ICSID original arbitration.[26] Some of them had only conducted one annulment proceedings ever and one member, despite having no experience in ICSID original arbitration conducted seven annulment proceedings.[27] The fact forwards a question that how the Chairman assessed the competence and experience of the Committee members regarding their capability of delivering independent judgment. Therefore, the above analyses posed three major problems regarding the qualifications of annulment Committee members- one, failure to ensure the representation from other major disciplines; two, non-availability of the mechanism to assess the independent judgment quality of the designees; three, limited scope to appoint experienced arbitrators. The Chairman's wide discretion of constituting the Committee is one of the contributing factors for these problems.

### B. The question of party-participation and the Chairman's discretion

During the selection of an arbitrator, usually, the parties and their counsels spend substantial time and resources for searching efficient arbitrator.[28] In ICSID, the parties do not have any freedom to appoint

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[23] Carlos Alberto Matheus López, 'Practical Criteria for Selecting International Arbitrators' (2014) 31(6) *Journal of International Arbitration* 795 - 806

[24] ICSID (n 19)

[25] *Ibid*.

[26] ICSID, 'Arbitrators, Conciliators and Ad Hoc Committee Members' (n 21)

[27] *Ibid*.

[28] Giorgetti (n 9) 445

or even select a member of annulment Committee because the Chairman appoints three persons from the panel of arbitrators.[29] As mentioned earlier, this panel would be constituted with the persons designated by both the Chairman and Contracting States. During such designation the Chairman, in addition, pays due regard to the importance of assuring representation from the principal legal systems of the world and the main forms of economic activity.[30]

However, in principle, the Chairman's discretion regarding the Committee-composition is subjected to two nominal restrictions: one, the member must be taken from the panel of arbitrators; and two, those members must not be connected with any of the parties through nationality or any prior arbitration, conciliation etc.[31] These rules indicate the formation of such an annulment Committee independent from the parties' control. This may be for gaining more trust and confident on the unbiased constitution of the Committee. But this system diverts the whole process to unhindered discretion of the Chairman prioritizing his discretion over the parties' expectation and, even, minimizing the ICSID Member States' participation in constituting the Committee. David Collins termed this discretion of the Chairman, who is also the President of World Bank, as autocratic.[32] The unhindered discretion of the Chairman has driven three major debates in the process of composing annulment Committee. *First*, since the Chairman has wide discretion of designating persons to the panel of arbitrators, does he ensure representation from the principal legal system and main forms of economic activity? *Second*, in absence of party-appointment, does he show any bias appointing his own designees in the annulment Committee? *Third*, do the Contracting States have any role in the appointment of annulment Committee?

*First,* the Chairman has an obligation to designate persons to the panel of arbitrators ensuring representation from all of the principal legal systems and main forms of economic activity. The phrase 'principal

[29] ICSID Convention, art 52(3)

[30] ICSID Convention, art 14(2)

[31] ICSID Convention art 52(3)

[32] David Collins, ICSID Annulment Committee Appointments: Too Much Discretions for the Chairman (2013) 30 (4) *Journal of International Arbitration* 333, 339

legal systems' is similar to the practice of International Court of Justice (ICJ) and refers to the various groups of the prevailing legal systems.[33] Since the concept 'principal legal systems' has been borrowed from the ICJ practice, an alike representation can be brought into ICSID system. Today this distribution in ICJ is as follows: Africa 3, Latin America and the Caribbean 2, Asia 3, Western Europe and other States 5, Eastern Europe 2.[34] Rules may be framed providing a proportionate and reasonable distribution so that representation from all major legal systems can be ensured. Now, what is the meaning of the second phrase 'main forms of economic activity'? During the adoption of ICSID Convention it was said that 'the expression the main forms of economic activity in Section 15(2) covered such sectors of the economy as banking, industry, agriculture and the like'.[35] The ICSID system clarifies these major fields specifying 11 'economic sectors' in dispute which can be described as the major technical sectors in investment area. However, after examining the biographies[36] of the present designees, it is evident that they do not represent professionals from some main economic forms such as – agriculture, business, banking etc. All of the designees except one[37] are legal experts especially professors in law and arbitration practitioners. Professor David Collins posed confusion that there is no indication as to the criteria of designating these members by the Chairman.[38] This question has some substance because any document published from ICSID does not disclose any information regarding such designation. Such designation should be regulated by a set of rule ensuring the representation from major legal systems and economic sectors.

*Second*, the Chairman is designating persons to the panel of arbitrators and again selecting members of annulment Committee from the same panel. Since there is no rule as to how the Committee members would be selected, it seems absolute discretion of the Chairman. In this

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33 ICSID Secretariat, *History of the ICSID Convention Vol-II-2*, 728

34 International Court of Justice, Members of the Court <www.icj-cij.org/court/?p1=1&p2=2> accessed 3 August 2016

35 ICSID Secretariat, *History of the ICSID Convention* Vol – II-1, 487

36 https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/Biographical%20Notes_Arbitrators_FINAL accessed 1 August 2016.

37 One designee is engineer having a Law degree.

38 Collins (n 32) 337

backdrop, the Chairman is likely to exercise his wide discretion to appoint his designees to the Committee. Practically, there may have some other presumptions behind this exercise of power. One, as the designees from the Contracting States usually enters into the panel without any scrutiny; the Chairman might not find enough qualified arbitrators among them. Two, the Chairman, being the President of the World Bank, could not provide enough attention for searching qualified arbitrators from the long panel. Third, the Chairman knows well the qualifications of his designees which prompted their nominations to annulment Committees. These all are the consequences of non-participation of the parties and wide discretion of the Chairman in appointing the annulment Committee members. So, a mechanism for fair and unbiased procedure of appointment in the Committee is necessary.

*Third*, the Chairman's discretion in constituting the annulment Committee turned into absolute arrangement excluding the participation of Contracting States. It can be claimed that the Contracting States have indirect participation in composing the Committee as they designate the members of panel. So, they exercise a limited and indirect influence on the composition of Committees due to the fact that appointments are made from the panel of arbitrators.[39] But it is the ultimate discretion of the Chairman whether any members designated by the Contracting States would be appointed for annulment Committee. Since the State parties' designation does not undergo any scrutiny, there have been complaints that not all members of the panels had the necessary qualifications or were available for appointments.[40] In this backdrop, the Chairman may prefer to rely upon his personally acquainted panel members or his designees for annulment Committees. This is because there is no democratic mechanism whereby Contracting States may participate in selecting the Committee members.

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[39] Christoph H. Schreuer, With Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1029.

[40] Paulsson, J., ICSID's Achievements and Prospects, 6 ICSID Review – FILJ 380, 394 (1991); ICSID Twelfth Annual Report 4 (1977/78) cited in Schreuer (n 39) 50

The discussion in this part puts forward some debates regarding the composition of *ad hoc* Committee members. Such as- (i) ICSID system affects party autonomy especially party appointment; (ii) it cannot always appoint the members with desired qualifications and experiences in investment-arbitration; (iii) it cannot prepare a panel of arbitrators representing the major economic sectors; (iv) it cannot ensure the equal selection of the States' designated arbitrators to the Committees in comparison with the Chairman's designees ; (v) it does not provide a mechanism ensuring the Contracting States' participation in the composition of *ad hoc* Committees.

## 3. Reformation to ensure party-appointment and Contracting States' participation

A limited modification into the ICSID annulment system may solve the problem of party-appointment. ICSID may maintain two panels of arbitrators- one for the original arbitration and another for annulment wherefrom parties to the dispute may nominate their arbitrators in each proceeding. Some commentators urged for enlarging the pool of arbitrators as a better solutions.[41]It does not seem better because it still suggests selection of arbitrators from the common pool where each arbitrator is professionally connected with others. It, rather, would create professional conflict among them. Question may arise, would a separate panel of arbitrators solve the debates as exposed in earlier part.

*First*, both the States and Chairman would ensure the qualifications of their designees to the panel. It is interesting that the rules of quality-designation are provided in the existing regulations of ICSID. Regulation 21(2) of the Administrative and Financial Regulations stipulates that the Contracting State must indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance. This obligation seems not respected properly by the Contracting States because, on a search into

[41] Giorgetti (n 9) 437

the ICSID data,[42] it is found that most of their designees' profiles do not contain the stipulated descriptions. Such a panel of arbitrators would lead the Chairman to appoint Committee members from a narrow list of his acquainted persons. Therefore, the designation, be it either by the Contracting States or Chairman, must include a detail description specifying the designee's area of expertise and experience in arbitration. During the designation they must forward some other professionals, not only legal experts, to be included in their lists. The Chairman has two additional duties at the time of designation, such as ensuring the representation from- principal legal systems and main economic activity. The Chairman should designate more members from technical fields, e.g., engineering, agriculture etc.

*Second*, the present system has centered all powers of constituting *ad hoc* Committee into the functions of Chairman denying greater participation of the Contracting States. But such participation is necessary for the development of the ICSID annulment mechanism. As Professor David Collins commented-

'[S]ubstantive improvements to the annulment procedure's mandate, keeping within the bounds of its discretion to assess the correctness of the procedure adopted by tribunals in rendering an award, could be achieved by ensuring greater ICSID member participation in the appointment of the annulment committees'.[43]

For ensuring such participation, he referred the composition of the WTO's Appellate Body.[44]This Appellate Body is a standing body of seven persons that hears appeals from reports issued by panels deciding the disputes brought by WTO Members.[45] Unlike the ICSID, the appointment of particular individuals to this Body are made by a committee within the WTO's Dispute Settlement Body (DSB) which itself represents the Member States of the WTO.[46] The decision of WTO

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42 <https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx?gE=pnltype&pnltype=ARB> accessed 01 August 2016.

43 Collins (n 32) 339

44 *Ibid*. 340

45 www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm accessed 02 August 2016.

46 Collins (n 32) 340

Appellate Body member-appointment is taken on the recommendation of a Selection Committee, composed of various representatives from WTO committees, as well as the WTO Director General.[47] This process is addressed as more transparent and participatory than that of the ICSID annulment committee appointment.[48] David Collins supported a separate panel of arbitrators for annulment Committees following WTO model.[49] He urged to complement the role of the Chairman in annulment Committee appointment with the Administrative Council of ICSID (hereinafter as Administrative Council) since it is comprised of one representative of each of the Member States of ICSID, with each member having one vote.[50] He further suggested that the Administrative Council or a Committee under it should have some vetting power on the appointment of annulment Committee members by the Chairman.[51] These suggestions stressed on the democratic participation of Contracting States and curbing unhindered discretion of the Chairman. But he did not suggest the way of ensuring party-appointment from this separate panel.

For party-appointment, the panel of arbitrators for annulment Committee can be prepared following the steps discussed hereafter. Like the existing regulation,[52] the Secretary-General, at first step, will convene the Contracting States and then the Chairman to designate persons to the panel of arbitrators specifying their expertise in particular economic sector and experiences in conducting arbitration. However, a format of arbitrators' CV should be designed by ICSID to this effect. Upon receiving the designations, either the Administrative Council or a small Committee under it will scrutinize the competence of the designated persons in conducting arbitration. Interestingly, Mr. Kpognon, an expert to the Consultative Meeting of ICSID Convention,

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47 *Ibid*. 341; See also Understanding on Rules and Procedures Governing the Settlement of Disputes, art 2.4 [Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus]

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 ICSID Administrative and Financial Regulations, reg 21(1)

during drafting the Convention, also proposed such a screening test by the ICSID[53] though his proposal was not succeeded in vote.[54] However, the Administrative Council or a Committee will finalize the panel of arbitrators with those designated persons whom they will find qualified. If they find any designee disqualified for the panel, they will drop him from the list and may convene the concerned State to forward another name. Like the selection of members for WTO Appellate Body, they along with the Chairman will prepare, at the same time, a panel of arbitrators for annulment Committee with those designees whom they will find experienced in investment arbitration. ICSID has records of making several appointments in annulment Committees from a small pool of highly experienced arbitrators.[55]This attempt reflects the ICSID's realization to preparing separate panel of arbitrators for annulment. In doing so, they must apply their mind in incorporating into both panels the experts from diversified professional backgrounds. This system of paneling will ensure the quality and responsible selection of the arbitrators into ICSID system in one hand. On the other hand, it will ensure the greater participation of Contracting States in the whole selection process. At the last step, like the appointment of members in original ICSID arbitration, the parties will be given autonomy to appoint their arbitrators from the annulment panel when they proceed for annulment of any arbitral decision. In case of their failure, the Chairman will exercise his power of appointing the members of annulment Committee. Such system would address the concerns regarding party-appointment and arbitrator's experience.

However, as against the concept of party-appointment in ICSID annulment, some commentators[56] argued that the Convention curtailed party-appointment because it wants to establish ultimate objectivity through an unbiased forum of annulment. Since party appoints its

53 History Vol-II-1 (n 33) 253

54 Schreuer (n 39) 49

55 Lucy Reed, Jan Paulsson , et al., *Guide to ICSID Arbitration*, (Kluwer Law International 2010) 174

56 Fernández-Armesto (n 8) 128; Schreuer (n 39) 1029

arbitrator after having some communications- like interview, the arbitrator may show biasness to his appointing parties.[57] To address this apprehension, party-appointment can be curtailed to 'party-consultation' or 'party preference'. There are some examples of consulting with the parties in appointing members of annulment Committees.[58] Under the 'party-preference' system, the parties may send a confidential letter of preference mentioning three arbitrators from the separate panel of arbitrators for annulment to the Chairman who may appoint any one out of the three. It will satisfy the parties regarding the qualifications and experiences of the arbitrators. In addition, it will help ICSID to constitute an *ad hoc* Committee with some unbiased arbitrators who would have no correspondences with the parties to the dispute.

[57] Doak Bishop, Lucy Reed, 'Practical Guidelines For Interviewing, Selecting And Challenging Party-Appointed Arbitrators In International Commercial Arbitration' (1998) 14(4) Arbitration International 395

[58] For example, in *Industria Nacional de Alimentos, S.A. and IndalsaPerú, S.A v. the Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 24 it is mentioned that, 'after consultation with the parties, ICSID appointed Sir Franklin Berman, Justice Hans Danelius and Professor Andrea Giardina to serve on the Ad hoc Committee set up for the annulment proceedings'.

# Business on Virtual Platform in Bangladesh: Lacunae in the Existing Laws

**Dr. Sayeeda Anju***

## Abstract[1]

E -business covers all the component of sale contract but is not recognized in the statutory context of the country. Therefore, victims of breach of such contracts are looking for remedy. Sometimes the laws are applied impliedly and often several scattered regulations or guidelines are issued to provide remedy. The study intents to explore the existing scenario of legal system applicable for mitigating e-business related disputes. It suggests that all the concerned stakeholders need to put their heads together to find out ways for speedy disposal of disputes arising out of digital commerce operations, with more emphasis on the redressal of victims of online fraud through adequate compensation. It is also submitted that, for timely disposal of commercial disputes, enactment of codified legislation with provisions for establishment of separate judicial platform is a crying need in the country.

**Keywords:** E-Business, Online, Digital, Cyber, Guideline

## 1. Introduction

Businesses in virtual platform are accelerating in digital Bangladesh but legal protection or remedy is lagging behind. Instances are many which show that a significant proportion of online purchasers are dissatisfied with the services of online business entrepreneur. In fact, a

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1 Gist of this article have been published in *Law and Our Rights, The Daily Star*, as two separate write-ups titled 'Business through Internet: A Quest for Legal Frame work' and 'E-Business in Bangladesh: Need for a Legal Framework' on 24.8.2021 and 20.7.2021 respectively. This article is the elaborate form of presentation with full references.

number of instances of breach of contract for the sale of goods have been reported in online business.[2] Both buyers and sellers are having issues as a result of those instances of breach of contract. Deficiency of statutory laws allows the virtual platforms to open a business easily without any memorandum or terms and conditions. Most of the e-corporate rules are made with administrative regulations either by Regulation of Ministry of Commerce [3] or by the Guidelines of Bangladesh Bank.[4] The aim of the study is to explore the lacunae of legal framework in Bangladesh and suggest reform to regulate the e-commerce system both to comply with the contractual obligations and to establish harmony in the society.

This research is qualitative, doctrinal and based on both primary and secondary sources.[5] The prime focus of the study is trading through Facebook page. Data was collected from internet resources from renowned databases and website. Most of the information for this research were obtained from materials of Bangladesh Bank Regulations available in official website database. Vital information is obtained from Guidelines of Ministry of Commerce of Bangladesh. Other information on conducting e-commerce in Bangladesh are accessed from vising of Facebook, WhatsApp etc. pages. It also involved the use of data collected from oral conversation with Assistant director Directorate of National Consumer Rights Protection, Ministry of Commerce of Bangladesh.[6] Specifically, to focus on the vulnerability of the sellers of online marketplace the researcher made some informal discussion with a few online startups. The study mostly focused on

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2 *ProthomAlo* July 08, 2021 Thursday, also see, 24 August 2020 Saturday page 1-2-

3 2065-Comerce-04 July 2021(11245-11252).pdf available at: https://mincom.gov.bd/site/notices/371031ac-1c83-40b4-9db0-8a9c03f6b2e7 accessed on 05.07.2021

4 Bangladesh Electronic Funds Transfer Network (BEFTN) operating rules V 2.0 Open pdf file (bb.org.bd)*https://www.bb.org.bd/aboutus/regulationguideline/guidelist.php accessed on 30.05.2020*

5 The author wishes to acknowledge the valuable opinions and suggestions of Asaduzzaman, Assistant Judge at Bangladesh Judicial Service regarding both content and language

6 The author had oral conversations with Md. Hasan Maruf, Assistant Director at Directorate of National Consumer Rights Protection, Rajshahi, under Ministry of Commerce of Bangladesh, date- 27.06.2021

trading through Facebook pages and business through other APPS (applications) and the traders who have both online and offline programs– like Daraz etc. are beyond the arena of discussion. The study refers to the Indian legislations regarding operation of distance business by using digital device in the area of Consumer Rights Protection and Payment system.

## 2. Features of E- Businesses in Bangladesh

In Bangladesh an individual can start his/her internet business with personal user profiles on social media networks like Facebook, Instagram or by using other created Apps. As a result, individual traders can sell varieties of goods via online platform without making necessary formalities- like trade license. They attain this by employing various features of social media platforms through their personal accounts. In Facebook, individual traders utilize Facebook groups and pages to showcase their goods as offer of sale contract to the users. Additionally, sellers list their goods on online forums, online stores, classified advertisement websites, and personal websites in order to attract customers. Often, they use the respective Facebook pages for offering products in live sessions and those offers are also available in the related pages. It is an easy process to invite people to join the group or page and buyers also eagerly accept the digital offer to visit the page. Hence among all the other virtual business platform, Facebook Pages are mostly admired by the sale contract parties.[7]

## 3. Status of Online Consumers in Bangladesh

In Bangladesh rapidly growing popularity of online business can also occasionally be damaging to the consumers' interests for at least two reasons. Firstly, one individual can create multiple Facebook Pages with alternative names to promote his/her business and boost sells. Secondly, these Facebook pages can serve as a veil for individual traders, allowing them to do business without disclosing their true identities. As a result, certain dishonest businessmen are prompted to

[7] Bangladesh-eCommerce(trade.gov) *https://www.trade.gov/country-commercial-guides/bangladesh-ecommerce* accessed on 15.07.2021

deceive their customers by misrepresenting themselves and violating the terms and conditions of their contracts. It's pertinent to mention here that for creating a Facebook page, it is not essential to explore or upload the documents like National Identity Number (NID) or any other vital document which truly helps to recognize the admin or operator of the page. Therefore, offences like fraud or incidents like breach of contract are often common in the country.

Additionally, it is necessary for individuals conducting business in public internet areas to have their identities authenticated to the degree of accountability to government authorities. Because without a means for verifying user information, anyone with fake information can easily create a Facebook account and page. Additionally, social media platforms do not require submission of a municipal trade license or electronic business identification number (e-BIN) to create an account or page for doing online business, anyone can create an account or page for conducting online trade with fake or untrue information. As a result, the government loses revenue from municipal taxes. On the other hand, stakeholders in the e-commerce system are increasingly exposed to the danger of unresolved contract breaches. Generally, the purpose of seeking a trade license is to get permission to commence a business at a particular address or location. In case of e-business since it is not mandatory; the situation of getting license has deteriorated to the point that those who need 0 money to continue business from banks only have trade license. It is necessary to show trade license to get loan from a bank as an entrepreneur. Consequently, those who are not interested to borrow money from bank for running online business remain uninterested in applying for or renewing commercial licenses. As a result, when customers' rights are violated or instances of fraud occur, consumer protection organizations often have difficulties locating the trader's address.[8] That's how stakeholders in the e-commerce system are increasingly exposed to the danger of unresolved contract breaches. It is mentionable that the 'Digital Commerce Operation Guidelines', 2021 (hereinafter will be termed as Guideline)[9]

[8] *Supa* 6.

[9] Available at-mincom.gov.bd,2065-Comerce-04 July 2021(11245-11252) (1).pdf accessed on July 2021

introduces Unique Business Identification Number (UBIN) for organizations but it should be also for individual start-ups using Facebook apps.

It is also to be mentioned that the consumers not only suffer losses for the fraudulent act of the service providers but also in many cases they themselves are to be blamed for such losses. General people's perceptions regarding e-commerce are not adequate. Often people have to suffer due to such a lack of knowledge about this platform. Therefore, through establishing legal framework for e-commerce, the government must formulate rules to make sure that individuals conducting online business have to have their identities authenticated by the concerned authorities. The government should also make sure that online business enterprises are made accountable to their customers and to the government also.

## 4. Situation of Online Sellers in Bangladesh

Sellers of online enterprises, on the other hand, have numerous concerns for shortage of a mechanism for controlling e-business in Bangladesh. For instance, in the case of cash on delivery, deliveryman typically have trouble of locating consumers. At times, buyers cannot be reached due to inaccurate or switched-off phone numbers. Additionally, incorrect addresses frequently result in unsuccessful product delivery scenarios.[10] All of these issues result in the return of the items to the seller. The seller incurs additional costs for return and delivery as a result of these instances of unsuccessful delivery. On the other side, those wishing to conduct lawful business on the Internet, face difficulties as a result of false orders and counterfeit negative reviews from unidentified user accounts. Introducing a legal framework is urgent that governs the entire e-commerce for ensuring the security of buyer and sellers.

[10] The observation is the outcome of the oral conversations between author and some sellers using Facebook platform. The online seller with whom the author had oral conversation in between March to June are mostly home-made item seller like- boutique and homemade food.

## 5. Legality of Online Contracts in Bangladesh

It is needed to point out here that the elements of an offline contract that is an offer, acceptance, and consideration are identical to those of a contract for the sale of goods in the online market.[11] For instance, a post on a Facebook page may be interpreted as an offer to sell a specific item. If a customer wishes to purchase that item, he or she may do so by clicking the Purchase button and completing the transaction on Facebook Marketplace, or by sending the seller a text message. But in today's Bangladesh, both sellers and buyers are vulnerable in the e-commerce space, with no Acts or laws specifically mentioning online business. The Sale of Goods Act, 1930 (hereinafter referred to as SGA, 1930), now superseded by other special laws,[12] is the law to protect buyers and sellers' legal rights. Prior to 1930, contracts for the sale of goods were governed by the Contract Act of 1872. The laws governing the sale of goods were separated in 1930 to emphasize their status as a distinct body of law, and the SGA 1930, was enacted as a special law. Specifically, the SGA, 1930 is only a relevant one for protecting sellers' rights but never been used. The law by its nature is back dated, no amendment so far has been taken to make it fit for modern era and there is no remarkable mentionable judicial development. Paradoxically, the law is completely silent about online offers or online descriptions or samples of a product or its similar acceptance. Therefore, it is hard to file a case to claim compensation by using this statutory provision.

Section 5 of the SGA defines the formation of sale contract. It reads as follows -

> Sec-5. ***Contract of sale how made-*** (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the

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[11] Dr. Niranjan Parida, 'Online contract laws in India and other developed countries in contemporary scenario' *International Journal of Law*, Volume 6; Issue 1; January 2020; Page No. 237[ISSN: 2455-2194; Impact Factor: RJIF 5.12] www.lawjournals.org, accessed on 30.06.2021

[12] The Consumers' Right Protection Act, 2009, Food Safety Act, 2013, "Breast-milk Substitutes, Infant Foods, Commercially Manufactured Complementary Foods and the Accessories Thereof (Regulation of Marketing), Act 2013 etc.

goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

The study suggests that the SGA 1930 section 5 may inserted the provision of 'online contract' to control the civil wrong.

It is critical to ensure that both buyers and sellers have the ability to seek redress if a distance sale contract, done through online is breached; or warranty or condition is affected. A contract of sale 'through online or offline' may be appropriate to insert in the Act in section 5 to make it operable for online sale. Selling goods through device in digital platform may be a part of discussion under this law. It should contribute to the protection of both buyers' and sellers' rights on online platforms. Therefore, the SGA, 1930 must be amended to reflect Bangladesh's current trading environment.

## 6. Protection of Consumer Rights in Bangladesh

The Consumer Rights Protection Act 2009, (hereinafter referred to as the CRPA, 2009) which supplements the SGA, 1930, is the most desirable enactment in Bangladesh. Surprisingly, in comparison to the SGA, 1930 the authorities of CRPA, 2009 receives a disproportionately large number of complaints. The CRPA, 2009 is entirely silent on online business competition and online services. While the law may be impliedly relevant to those transactions, no specific provisions addressing online transactions exist.

The CRPA, 2009 entrusted the Director General, appointed under the provisions of this Act, with the duty of receiving and disposal of complaints made by the consumers. When it comes to dealing with consumer's complaint arising out of online business and transaction, the complainant hardly has any chance for remedy as online sales and purchases are beyond the scope of the CRPA, 2009. Consumers are deprived in the absence of the term "online," in the CRPA, 2009 since

the CRP authority is devoid of legal sanction to take any action against the alleged sellers. It is submitted here that if section 45 of Bangladesh's CRPA 2009 incorporates the phrase "online service," it will be easier for concerned authorities to make a stride ahead to achieve the goal; the protection of the rights of the offline and online consumers.

From the discussion made above, one thing is to be noted here that although online enterprises are sprouting up and gaining much popularity day by day in digital Bangladesh, comprehensive legal framework for the protection of interests of both the online traders and buyers is yet to be put into place. In this connection, it can be added here that India, a country of this subcontinent has, for the protection of the consumers' interests, enacted a new Act titled Consumer Protection Act, 2019 which replaced the earlier Act of 1986. This new Act came into force on July 20, 2020. The term "online" has found its place in this new legislation in Explanation (b) of Section 2(7) of the Consumer Protection Act, 2019. It denotes that, "The expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing."

## 7. Online Payment Anomaly

In Bangladesh while conducting e-businesses through Facebook most of the payment are done through bKash or Rocket or any other general mobile financial services.[13] These payment Gateways are permitted to operate under the Bangladesh Bank Regulations.[14] People use e-commerce transactions indiscriminately like other personal transactions. It is alleged that most of the bKash or Rocket accounts are opened through fake ID.[15] In case of dispute arising due to payment anomaly, the law enforcing agencies cannot trace them out, for which people cannot have complete faith in those online payment systems.

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[13] bKash is a subsidiary of BRAC Bank LTD., whereas Rocket is a subsidiary of Dutch-Bangla Bank LTD.

[14] Regulatory Guidelines for Mobile Financial Services (MFS ... https://www.thedailystar.net/round-tables/...

[15] *Prothom Alo* 25 July 2015 Saturday page 1-2

However multiple payment methods are available in Facebook purchasing; cash-on-delivery or delivering product by receiving payment. Most of the consumers preferred cash-on-delivery process which is however comparatively secured.[16] Cash on delivery may be made by liquid cash or by using Gateways.

Whatever may be the payment Gateway preferred by the buyers or sellers; all those payment Gateway platforms are established through Bangladesh Bank Regulations. Bangladesh Bank are assigned to adopt regulations to safeguard payment anomaly.[17] Online cheque processing structure [18] those make the drawer of a cheque to withdraw money from any of the branch of the country are started by Bangladesh Bank regulation. [19] These modern systems are being implemented under the "Remittance and Payments Partnership" (RPP) project of Bangladesh Bank and expected to speed up the adoption of e-banking inside the country. [20] This paperless payment system has brought significant change in the interbank fund transfer mechanism of the country that will translate into increased efficiency to manage paying system.

In Bangladesh, 'Bangladesh Payment and Settlement Systems Regulations'[21] exist but in India the Payment and Settlement Act, 2007

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16 Bangladesh-eCommerce (trade.gov)https://www.trade.gov/country-commercial-guides/bangladesh-ecommerce

17 For example- Bangladesh Payment and Settlement Systems Regulations, 2009

18 See section 6 Bangladesh Payment and Settlement Systems Regulations, Payment Systems Division Department of Currency Management and Payment Systems Bangladesh Bank

19 Bangladesh Electronic Funds Transfer Network introduced to facilitate interbank payments since Feb 28, 2011. Central bank sorts the transactions sent by the originating banks and passes the information to the receiving banks. Receiving banks credit the beneficiary's account accordingly upon receiving net settlement report from the central bank.

20 Bangladesh Automated Cheque Processing System (BACPS) Operating Rules and Procedures, Payment Systems Division, Department of Currency Management and Payment Systems, Bangladesh Bank, 11 January, 2010 http://www.sonalibank.com.bd/PDF_file/BACPS_Operating_Rules.pdf accessed on 10.03.2015

21 Payment Systems Division Department of Currency Management and Payment Systems Bangladesh Bank

prevails which is updated by further amendments. On the other hand, in Bangladesh, regulations of Bangladesh Bank are the law to apply for controlling payment procedure. It seems that only administrative regulations are the basis of controlling of the e-banking sectors in Bangladesh.

## 8. Initiative taken by Government to Regulate E- commerce in the Country

In Bangladesh administrative actions are taken instead of framing legal phenomena. All transactions related rules applicable in the country are starting their operation either from Bangladesh Bank Guidelines or from Guidelines of Ministry of Commerce. On 4 July 2021 a guideline issued in Bangladesh to establish parity in e-commerce sector specially to recognize some code of conduct to continue business in e-platform.[22] The Guidelines specifically touched the seller's obligation regarding transparency of terms and conditions as well as strictly warned to sell prohibited items. To attract consumers any type of promotional offer such as lottery or raffle draw is discouraged.[23] The entire guideline is related to seller's obligation including safe and timely delivery and restriction on payment process.

According to the Guideline all the existing laws of the country shall be applied to operate digital commerce.[24] Generally, the Penal Code, 1860, the Money Laundering Prevention Act, 2012 and the Digital Security Act, 2018 are the relevant legislations to settle E-business related disputes in Bangladesh.

Cases in which an online consumer is defrauded with an item of much lower price than the one displayed online with a higher price, the consumer who is the victim may file a case in civil court or lodge an

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22 Pursuant to the National Digital Commerce Policy, 2018 (amended in 2020)

23 An overview of the Digital Commerce Operation Guidelines 2021, *The Daily Star*, Law and Our Rights, Tue July 13, 2021

24 Chapter 3 of the Digital Commerce Operation Guidelines', 2021 (mincom.gov.bd) 2065-Comerce-04 July 2021(11245-11252) (1).pdf, clause 3.1.1.-All the relevant laws of the country will be applicable for operating digital commerce [Translated from Bangla to English by the author]

FIR in a police station. The police may record the case as a criminal breach of trust or cheating under section 406 or 420 of the Penal Code 1860 respectively. Generally online fraudulent trading is recorded as cheating cases. The Penal Code has not been amended to accommodate e-business offences.

In the context of Bangladesh, the concept of soft copies as evidence is not so popular among the legal practitioners or judges. It is very hard to collect soft copies for the purpose of proving a case by submitting them as evidence before the court. All of these factors hinder to framing a charge against breach of trust or cheating. Furthermore, since cheating in Penal Code is a bailable offence, it is time-consuming remedy for general people. Along with other punishments more importance should be given to redress the victims through compensation.

In true sense, in the context of our country, it is hard to stop offenders of payment gateway operators under any law except the Money Laundering Prevention Act, 2012. But the application of this Act to stop the fraudulent activities in e-commerce is also very difficult. Just like the Penal Code, to prove money laundering several conditions are needed to be ascertained. These conditions are eventually making things complex to take action against the offenders.

On the other hand, just like many developed countries in the world, the country has Information and Communication Technology Act 2006 and a Digital Security Act, 2018 that allows many e-business related offences to be tried in cyber tribunals. According to section 23 of the Digital Security Act, 2018 fake ID related offences are to be tried in concerned tribunals. The first Cyber Tribunal in Bangladesh was established in 2013,[25] which was named Cyber Tribunal, Dhaka. Subsequently, in 2021, 7 more cyber tribunals were formed with judges appointed in April of the same year.[26]

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[25] Bangladesh forms tribunal to try cyber criminals (phys.org), Feb.7 2013 accessed on 10. 10. 2020

[26] Microsoft Word - 6360 (lawjusticediv.gov.bd) old.lawjusticediv.gov.bd/static/ news. php, Gazette Notification, Law and Justice Division Peoples Republic of Bangladesh, 4 April 2021,

Generally, if a person is deceived digitally or suffers any loss, then s/he has to make a general diary (GD) at the police station. A copy of the GD is later on sent to the police cyber unit. Based on the adequacy of the information provided, the concerned unit initiates an investigation. If sufficient information is not available from the GD, the necessary information is obtained by questioning the victim. Officer of the rank of not less than sub-inspector of police may be appointed as an investigation officer. Authorities find out the real owner of the ID by the help of Facebook or Bangladesh Telecommunication Regulatory Commission (BTRC) or other intermediaries as part of the investigation. After reviewing their information, if the offense is cognizable, it takes cognizance. After framing of charge sheet the case record is transferred to the Cyber Tribunal, registered and numbered as cybercrime. Once the trial starts the State becomes the complainant and the original complainant becomes the witness of the case. The overall process mentioned here is lengthy and time consuming. Before April 2021, the reports of assigned cyber units of every district used to send to Cyber Tribunal, Dhaka. At present divisional Tribunals are empowered to hear a trial of such an offence of its respective districts.

Although a Cyber Tribunal has been set up in Divisional level to deal with the need for quick and timely disposal of digital offences but the law has not yet been updated to deal with e-business related disputes separately. The entire mechanism is to punish those who cheat through digital devices, media or social media but nowhere is it clear how to conduct business using digital media or what the code of conduct will be.

Therefore, its necessary to find out ways for speedy disposal of disputes arising out of digital commerce operations by using Cyber Tribunals.

From the above discussion it can be said that the recent Guideline, 2021 although assigns the prevailing laws to deal with the crisis[27] but the prevailing laws are not ready to accept the challenge until reformed. Therefore, the said Guideline failed to provide a proper legal

[27] *Supra* 24

framework to operate digital commerce. To meet up the e- business crisis in Bangladesh changes should be brought in the judicial proceedings. There is no recommendation made in the Guideline to establish any specialized Court to settle commercial disputes separately.

Many entrepreneurs invest their time and money in these businesses without knowing the risk factors. As a result, instead of making profit they incur losses. There must be a contract with risk handling agencies like insurance companies to compensate the consumers as well as to bear the business loss of their own. [28] In the current scenario of the country, the importance of an acceptable framework to regulate e-business through social media is very urgent.

Commerce Ministry provides the Guidelines as security measures but buyer, seller, police even advocates are not aware about those rules of the Guidelines. That's why most of the disputes are subject to be solved outside court as a general contract. [29] Basic amendment in the Digital Security Act does not seen to protect business- fraud or corruption and criminal activities relating to Fake business ID or page related offences. The Government of Bangladesh is going to introduce a new regulation [30] to discipline the online payment sector; all advance payments must be deposited with payment Gateways until the confirmation of the delivery is received. It is mentionable that several Bangladesh Bank regulations are existing in the country to control payment system but these laws are administrative regulations and have no implication as an Act of the Parliament of the country.

## 9. Findings and Observation

Online businesses have increased tremendously in the country and in the name of e-commerce, a culture of selling products through various

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[28] Recommended in,' E-Commerce Policy Framework for Bangladesh Version - 0.01 (Draft) Submitted to (Information and Communication Technology Division)' Prepared by E-Commerce Association of Bangladesh (e-CAB) www.e-cab.net p.12

[29] The researcher has visited police station.

[30] Zisan Bin Liaquat, 'Bangladesh Bank won't clear payments until delivery of e-commerce products' *Dhaka Tribune* June 24 2021

social media platforms including Facebook is increasing rapidly. Due to such growth of unregulated business through social media platforms the risk of consumer loss is even higher than the offline or traditional business.

Till date, there is hardly any proper legal framework available in the country to control the overall breaches of e-contractual obligation. Those wishing to deal legitimate online dealings both as a buyer or seller are faced with difficulties as a result of lacuna in the present laws. The sufferings could have been remedied by appropriate updated statutory laws.

In Bangladesh, e-commerce or online-based business has started its journey without any statutory framework. The SGA, 1930, the relevant prevailing law does not identify internet transactions as contracts for the sale of goods, consequently online contracts for the sale of goods has become difficult to be enforced under this Act.

The CRPA, 2009 does not recognize 'online' word in its texts. As a result, online contracts for sell or service are now rendered to be not expressly enforceable under the existing provision of this Act.

After huge anomaly reported in the country the Ministry of Commerce of Bangladesh prescribed a 2021 Guideline that only protects the rights of the buyers. The Guidelines provides that all the existing concerned laws of the country will apply to the digital commerce operations. That's why it seems that the government has no plan to enact a separate statute soon to regulate digital commerce operations. The fact is that criminal justice system in Bangladesh is a time-consuming, lengthy and tiresome process which often frustrates the victims of online fraud. This coupled with the difficulty of proving online fraud before court eventually demoralizes a victim to file a case against the offender or persuades him to opt in for alternative measures e.g. out-of-court settlement with the offender or defaulter, wherever possible.

## 10. Suggestion

Acts like SGA, 1930, CRPA, 2009 and obviously Penal Code, 1860 need to be amended until there is a separate law to regulate e-business in

Bangladesh. It is submitted that if essential amendments are made to the relevant mentioned Acts with a view to inserting new provisions for accommodation and regulation of online transactions, the existing laws may make a significant contribution to the protection of rights of both the online sellers and buyers. It may contribute to the protection of both buyers and sellers' rights in online platform. Therefore, the concerned laws must be updated to control anomalies in trading fields. Overall, including "Online" as a component in the relevant laws can help to alleviate people's suffering in this online world.

Apart from traders, the law enforcing agencies like police officers and cyber agents and people in general should be aware about the consequences of breach of contract in online platforms. Government should take initiative to aware citizen. In fine, it is suggested that all Facebook business Pages that deal with online selling be verified with the national IDs of their admins and owners. Furthermore, government regulatory authorities such as the BTRC should collaborate with online e-commerce platforms to preserve the information of online business entities and their owners. A verification mechanism for the online business owner's identities should be in place, so that only actual people can create online business accounts.

Moreover, in addition to ensuring punishment for online trade related offence, the government should, it is submitted, put more emphasis on the redressal of victims of online fraud through adequate compensation. It is also submitted that for timely disposal of commercial disputes, the government may mull over enactment of separate legislation compiling all phenomenon and set-up of a specialized court in this respect in the country.

## 11. Conclusion

In fine, it transpires that the law makers are not interested to spend time over the issue of e-business. Therefore, without a statutory law, it is hard to file a suit for remedy. Mere administrative regulations of Bangladesh Bank and Commerce Ministry Guidelines are the basis of conducting virtual business. A Court cannot provide remedy on the basis of Guidelines and the law enforcing agencies are not aware of the

Guidelines, and to sum up the Guidelines are not alternative to statutory laws.

This is why, for governing the entire e-commerce system, establishing a legal framework for the protection of interests of both the online buyers and traders is an urgent necessity now. Last but not the least, the online customers should be made aware that purchase from untrustworthy online merchants may result in cases of fraud, misrepresentation, and breach of contract. These recommendations, once implemented, can go a long way to bring, so far unregulated e-business in Bangladesh, under discipline and thus can make significant contribution to alleviate people's suffering and harassment in their dealings in online sales and purchases.

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# Cross-border Human Trafficking in Bangladesh with special reference to Pandemic Situation

**Mst. Rezwana Karim***

## Abstract

Based on secondary data, this study intends to depict the scenario of cross-border human trafficking from Bangladesh with a focus on the COVID-19 pandemic. The COVID-19-shaken economy coupled with various steps taken to curb the pandemic by major destination countries of the Bangladesh labor force has worsened cross-border human trafficking. The country's unprotected border with India and the Bay-of-Bengal has also exacerbated the crime. A very low rate of conviction in human trafficking cases is a major loophole of the justice system and is encouraging for the traffickers. Enactment of the Prevention and Suppression of Human Trafficking Act of 2012, the establishment of seven anti-trafficking tribunals, and framing the national plan of action 2018-22 are praiseworthy initiatives by the Bangladesh Government for preventing human trafficking. In spite of these initiatives, the country is far away from meeting the standard for the elimination of human trafficking. It is emphasized that the formulation of a long-term national strategy to combat human trafficking through a balanced and victim-centered approach is required from the government of Bangladesh.

**Keywords:** Human trafficking, COVID-19, Human rights, Cross-border crime

## 1. Introduction

Although the Coronavirus (COVID-19) was first identified in the Wuhan city of China during the last quarter of 2019, the World Health Organization officially declared the outbreak as a pandemic on 11 March

2020 because of its global spread and severity.[1] The cyclic effect of the pandemic has drastically reduced most production activities, caused the tourism industry near to death, affected airways and other travel and transport agencies, reduced consumption of most products, and halted economic activities to a significant extent. All these have hampered the creation of new jobs, caused drastic job cuts of huge numbers of employees, and enhanced the rate of unemployment globally. According to the estimation of the International Labour Organization, the lockdowns of the 2020 pandemic have affected 2.7 billion workers constituting 81% of the world's workforce.[2]

Similar to all other parts of the globe, the pandemic has harshly affected Bangladesh – the world's 8th most populous country. Although there are many drivers of economic growth, it is recognized that remittance sent by workers abroad and the export of Readymade Garments (RMG) are the key drivers for Bangladesh's recent promotion to a lower-middle-income country. The exporting manpower from Bangladesh has started in 1976and gained momentum over RMG export in recent years. The number of immigrant workers in 160 countries from Bangladesh increased to 10 million.[3] From April to November 2020, a total of 0.33 million immigrant workers have returned to Bangladesh.[4] Further,

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1 Ömer AÇIKGÖZ and Asli GÜNAY. 'The Early Impact of the Covid-19 Pandemic on the Global and Turkish Economy,' *Turkish Journal of Medical Sciences* 50 (2020): 520-526, available athttps://dergipark.org.tr/tr/download/article-file/1064185, last accessed on December 10, 2020.

2 International Labor Organization (ILO), ILO Monitor: COVID-19 and the world of work, Second edition, April 7, 2020, available at, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf, last accessed on December 12, 2020.

3 Ministry of Expatriates' Welfare & Overseas Employment, GOB, List of the Renewed Recruiting Agencies (up to May 2019), available at https://probashi.gov.bd, last accessed on December 16, 2020.

4 3,26,758 migrant workers return home in eight months, '*The Financial Express*, December 18,2020, available at https://thefinancialexpress.com.bd/economy/bangladesh/326758-migrant-workers-return-home-in-eight-months-1608299419, last accessed on January 12, 2021.

during the early wave of the pandemic more than 70,000 RMG workers have lost their jobs because of orders canceled by big brands.[5]

A higher rate of unemployment has been a common problem in Bangladesh and the problem has become acute during the COVID-19 pandemic. To ensure bread and butter for their families, people (workers) are ready to go abroad selling their homestead and borrowing from village-merchants at a higher interest rate. Even several incidents prove that they are ready to go abroad crossing the ocean by risking their lives. Taking this desperate attitude of workers as an opportunity, criminals have become more active in cross-border human trafficking.

Bangladesh has recently been shaken by several human trafficking scandals in the international arena. In one of those cases, a lawmaker was found involved in trafficking individuals to Kuwait. In another case, a network illegally sent workers to Vietnam with the false promise of well-paid jobs.[6] However, the Libyan tragedy, where 30 workers including 26 Bangladesh citizens were brutally killed on 28 May 2020, has brought the cross-border human trafficking issue into the limelight.[7]

Human trafficking, also known as trafficking in persons, generally covers facilitated and voluntary migration, sexual abuse, and mobilization of people from one place to another influenced by threat and force with exploitation motive.[8] With the continual changes of

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[5] Naimul Karim, 'Twice trafficked? COVID-19 fuels fears for survivors in Bangladesh,' *Thomson Reuters Foundation,* December 8, 2020, available athttps://www.reuters.com/article/bangladesh-coronavirus-humantrafficking/feature-twice-trafficked-covid-19-fuels-fears-for-survivors-in-bangladesh-idINL8N2IH2U4?edition-redirect=in, last accessed on December 20, 2020.

[6] Nagib Bahar, 'How 26 Bangladeshis were killed in Libya?' *BBC Bangla,* Dhaka, May 29, 2020, available athttps://www.bbc.com/bengali/news-52846385, last accessed on December 19, 2020.

[7] *Ibid.*

[8] Ruh Afza Ruhi, 'Human Trafficking in Bangladesh: An Overview,' *Asian Affairs* 25, no. 4 (2003):45-56, available athttps://citeseerx.ist.psu.eduviewdoc/download?doi=10.1.1.474.4696&rep=rep1&type=pdf, last accessed on December 27, 2020.

political, economic, and social conditions, the model of human trafficking is changing with time, place and environment. The new perceptions of trafficking are extracted from the assessment of the present situations of trafficked persons with emphasis on the protection and promotion of their human rights.[9]

In other words, human trafficking means the recruitment, transportation, or harboring of persons for exploitation - sexual or forced labor. [10] It is a far-reaching crime that exploits human vulnerabilities arising from poverty, sexism, racism, inequality of wage, and a lack of education, social safety net, and employment opportunities.[11] Section 3 of the Prevention and Suppression of Human Trafficking Act (PSHTA), 2012 of Bangladesh states –

> *Human trafficking means the selling or buying, recruiting or receiving, deporting or transferring, sending or confining or harbouring either inside or outside of the territory of Bangladesh of any person for the purpose of sexual exploitation or oppression, labor exploitation or any other form of exploitation or oppression by means of (a) threat or use of force; (b) deception, or abuse of his or her socio-economic or environmental or other types of vulnerability; or (c) Giving or receiving money or benefit to procure the consent of a person having control over him.*

During the period, when so many are encountering the consequences of COVID-19 and its dire economic effects, it is critical that fighting against human trafficking remains a focus of governments, law enforcing agencies, philanthropists, NGOs, and the private sector. There are plenty of research studies on the socio-economic and health effects of the virus all over the world; but there is a dearth of studies addressing the effect of the pandemic upon human trafficking from the context of Bangladesh – one of the top countries vulnerable to cross-border human trafficking. In the aforesaid backdrop, this study aims to draw the picture of cross-border human trafficking in Bangladesh with a focus on the COVID-19 pandemic. The study also attempts to examine the existing national

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9 *Ibid.*

10 Government of Canada, National Strategy to Combat Human Trafficking 2019-2024, available at,https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2019-ntnl-strtgy-hmnn-trffc/index-en.aspx, last accessed on December 25, 2020.

11 *Supra* note 10.

and international laws and policies concerning human trafficking, identify the driving factors for human trafficking, and unveil the challenges concerning human trafficking triggered by the pandemic.

This qualitative study is mainly based on the secondary data collected from diversified sources, such as journal articles, newspapers, reports of national and international agencies, and other online portals; the relevant Acts and the provisions of the Constitution of Bangladesh have been evaluated as primary source; measures and guidelines incorporated in different international conventions have also been examined. Furthermore, in search of existing cases and insights regarding human trafficking issues, the discussion was made with judges, academics, police officers, advocates, workers residing abroad, and officials of Government-sponsored safe-homes.

## 2. The COVID-19 Pandemic and Cross-border Human Trafficking in Bangladesh

Since the effects of the COVID-19 and the Governments' measures to curb it differ across the world, the effects of such measures on human trafficking are likely to vary from region to region and country to country. Global measures are taken to curb the pandemic, for example, restriction on movement, which has worsened the human trafficking situation.[12] Human traffickers are using misinformation to convince desperate people to use their services at higher personal and financial costs because of increased journey difficulties caused by travel restrictions. [13] Although there are many dimensions of human trafficking, this section has emphasized the cross-border human trafficking of Bangladesh citizens.

Bangladeshis who willingly migrate to the countries of the Middle East, Southeast Asia, South Asia in particular, India, Africa, and

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[12] UN News, More uprooted, fewer return, pushing forcibly displaced above 80 million, December 9, 2020, available athttps://news.un.org/en/story/2020/12/1079642, last accessed on November 29, 2020.

[13] Tasneem Tayeb, 'How do We Address Human Trafficking During a Pandemic?' *The Daily Star,* July 30, 2020, available at https://www.thedailystar.net/ opinion/closer-look/news/how-do-we-address-human-trafficking-during-pandemic-193, last accessed on December 29, 2020.

Europe are usually trapped by the traffickers and exploited through forced labor.[14] Those who migrate for work through illegal channels become the main target of traffickers. They are exploited through recruitment fraud, where victims are offered jobs at attractive salaries but engaged in sex trafficking upon arrival.[15] Recently, officials have received many complaints of non-payment and contact switching from 30,000 migrant Bangladesh workers in Brunei. Further, around 69,000 of the 234,000 Bangladeshis working in the Maldives have been found undocumented and are being exploited through non-payment, underpayment, or fraudulent recruitment.[16]

Bangladesh shares a 4,096-kilometer-long international border with India touching all the divisions of Bangladesh except Dhaka and Barisal.[17] This border is the 5th longest international land border that consists of 90% of Bangladesh's total border of 4,413 kilometers. This border is used as the most common human trafficking from Bangladesh and thus, a major concern for the authorities of both countries. The Border Security Force (BSF) of India has arrested a total of 915 women across this border during seven-and-a-half months up to the mid of August 2020 compared to a total of 936 in 2019.[18] It is crystal clear that the number of trafficked women in the pandemic year of 2020 is near to double the number of 2019. Thus, the number indicates the seriousness of the financial need of women during the pandemic as a substantial number of women are enticed to a change in life though the hidden agenda was trafficking. Moreover, there might be a significant number of trafficked persons who escaped the eyes of security forces. Referring to anonymous officials posted on the Indo-Bangla border, most of the women trafficked from Bangladesh into India are sold for sex rackets.

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14 United States Department of State (USDS), 2020 Trafficking in Persons Report: Bangladesh, June 2020, available athttps://www.state.gov/reports/2020-trafficking-in-persons-report/bangladesh/,last accessed on December 15, 2020.

15 *Ibid*.

16 *Ibid.*

17 N. S. Jamwal, 'Border management: Dilemma of guarding the India-Bangladesh border,' *Strategic Analysis* 28, no. 1 (2004): 5-36. DOI: 10.1080/09700160408450116

18 '915 Women Caught Crossing India- Bangladesh Border in 2020,'the Sentinel (e-paper), August 23, 2020, available athttps://www.sentinelassam.com/national-news/915-women-caught-crossing-india-bangladesh-border-in-2020-496831?infinitescroll=1, last accessed on January 12, 2021.

This indicates the severity and growing trend of human trafficking through the Indo-Bangla border during the COVID-19 pandemic. It was noticed that traffickers push the poor and vulnerable people, especially women across the border by enticing them through attractive job offers in Indian cities, such as Kolkata, Guwahati, and even as far as Delhi and Mumbai.[19] Loss of jobs or fewer job opportunities caused by the pandemic might lure gullible people to be victims of human trafficking across the border.

Attempts were made to search and analyze relevant human trafficking cases filed during the COVID-19 pandemic. Accordingly, eight cases have been found as shown in table 1:

**Table 1: Cross-border Human Trafficking Cases during COVID-19 Pandemic**

| S.L. | Case | Reference | Case Filed | Status |
|---|---|---|---|---|
| 01. | *Mst. NargisKhatunvs. Md. Alif and Md. Mojnu* | FIR no 26/235, Godagari Thana, Rajshahi | June 16,2020 | Under Investigation |
| 02. | *Md. Shamim Mia vs. M N H KhademDulal* | FIR No 56/437, Paltan Thana, Dhaka Metropoliton Police | September 24, 2020 | Under Investigation |
| 03. | *Md. Hafizul Islam vs.KaziMaruf Hossain Sajib, Md. Kazi Omar Faruk and Others* | FIR no 3/291, Banani Thana, Dhaka Metropolitan Police | October 01,2020 | Under Investigation |
| 04. | *SI Md. Abdul Mojidvs. Sri Sujon Chandra Das, Md. Shohag, Mst. Sonia Akter and Others* | FIR no 6/248, Puthia THANA, Rajshahi | October 07,2020 | Under Investigation |
| 05. | *MehediSarkarvs. Md. Mahmudul Hasan,* | FIR no 53/508, Paltan Thana, | October 31,2020 | Under Investigation |

[19] 'BSF alerts units along Bangladesh border against spurt in human trafficking during COVID-19, 'The Hindu, July 05, 2020, available at https://www.thehindu.com/news/national/bsf-alerts-units-along-bangladesh-border-against-spurt-in-human-trafficking-during-covid-19/article31993867.ece#, last accessed on January 12, 2021.

| S.L. | Case | Reference | Case Filed | Status |
|---|---|---|---|---|
| | *Mojibur Rahman, Md. DelowerHossen and Others* | Dhaka Metropolitan Police | | |
| 06. | *Md. SelimSarkarvs. Md. Habiul Islam Hablu, Mst. Marium Begum, and Bablu* | FIR no 25/302, Charghat Thana, Rajshahi | November 24, 2020 | Under Investigation |
| 07. | *Al Azad Riazvs.Shapan, Md. Muslim, Md. Mustafizur Rahman and Others* | FIR no 73/583, Paltan Thana, Dhaka Metropolitan Police | November 24, 2020 | Under Investigation |
| 08. | *Md. Morchalin Mia vs.Masa, Atiqur Rahman, NasrinAkter, Saiful and others* | FIR no 2/604, Paltan Thana, Dhaka Metropolitan Police | December 01, 2020 | Under Investigation |

Source: Fieldwork[20]

It is evident from the above table that cross-border human trafficking cases are being filed almost every month during the pandemic. These cases might be a slight portion of total trafficking that occurred during the period. The majority of such incidents are not reported or prosecuted because of the unwillingness of the victims or their families. The exact number of cases might not be found because of the limited access to the required information by the researcher. It is not possible to draw any conclusion from the cases filed as trafficking until a final decision is made but the filing of such cases reveals the gravity of the situation even during the days of the pandemic. The above cross-border cases have been filed during the pandemic, none of the cases has been disposed of with no arrest of the accused. This is an indication of the sluggishness of the prosecution process of human trafficking cases especially the cross-border ones. Although the number of

[20] Pandemic severity has brought life to such a degree of stagnancy that even the Monitoring Cell for Anti-Trafficking could not update its monthly cases after February 2019. Thus, the cases have been collected through fieldwork.

reported cases is few, it is evident that cross-border human trafficking is continuing even during the pandemic.

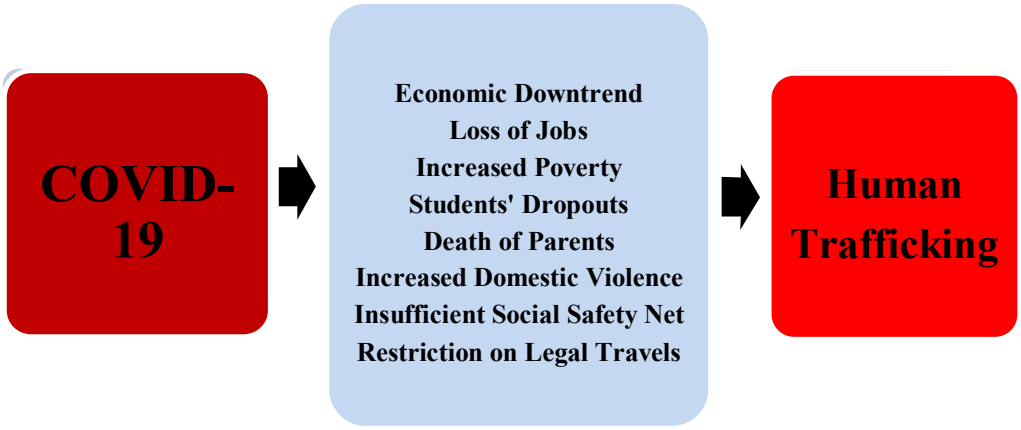


*Figure 1:* **Effect of COVID-19 on Human Trafficking**

It appears that the state of affairs due to COVID-19 has led to financial hardship and loss of jobs ensuing increased poverty; the pandemic has led to domestic violence; the overwhelming situation of the pandemic has failed to give social or financial protection to a large group of beneficiaries; social distancing has disrupted; death toll has risen; restriction has been imposed on travel. All these and many more are the effects of the pandemic causing unprecedented crisis. The racketeers have taken all the opportunity to exploit such a situation for illegal gain and they are so much desperate that they remain indifferent to the pandemic situation which may exterminate even their own life.

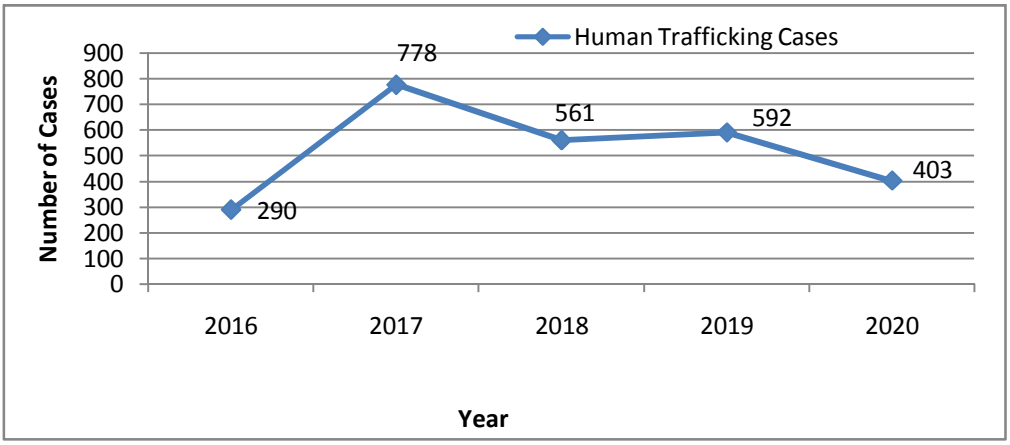


***Figure 2*: Growth of Human Trafficking Cases in Bangladesh**[21]

As shown in figure 2, it is a matter of concern that when the rate of human trafficking continues to grow, the number of case files each year follows a decreasing trend. The investigation of this study has explored that the causes of the decreased number of cases include lack of mental and social support, insecurity and repatriation facilities to victims, and the unwillingness of filing cases by families fearing damage of social status. Another cause of unwillingness to file cases is the lengthy procedure of trial. The provision of law is that a human trafficking case should be completed within 180 days; but a case usually takes several years to solve.[22]

It has been evident in a report that compared to the total number of pending cases, the rate of disposal is merely 4.5%; among the cases disposed of, the rate of conviction is 22%.[23] This indicates the sluggishness in the trial process of human trafficking cases. This study has also found that lack of coordination among the bench, bar and law enforcing agencies, improper investigation of cases, corruption, insecurity and negligence of witnesses, the political affiliation of traffickers, and an insufficient number of tribunals are the main causes

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21 *Supra note* 14.

22 Section 24, the Prevention and Suppression of Human Trafficking Act, 2012.

23 Md. Sanaul Islam Tipu, 'Human Traffickers Go Unpunished as Cases Pile Up at: Tribunals,' *Dhaka Tribune*, June 10, 2020, available at: https://www.dhakatribune.com/bangladesh/2020/06/10/human-traffickers-go-unpunished-as-cases-pile-up-at-tribunals, last accessed on December 25, 2020.

of such low conviction and disposal rate. Some cases have been transferred to the newly established tribunals for human trafficking cases to expedite the trial process, till June 2020[24]those cases are yet to be disposed off.

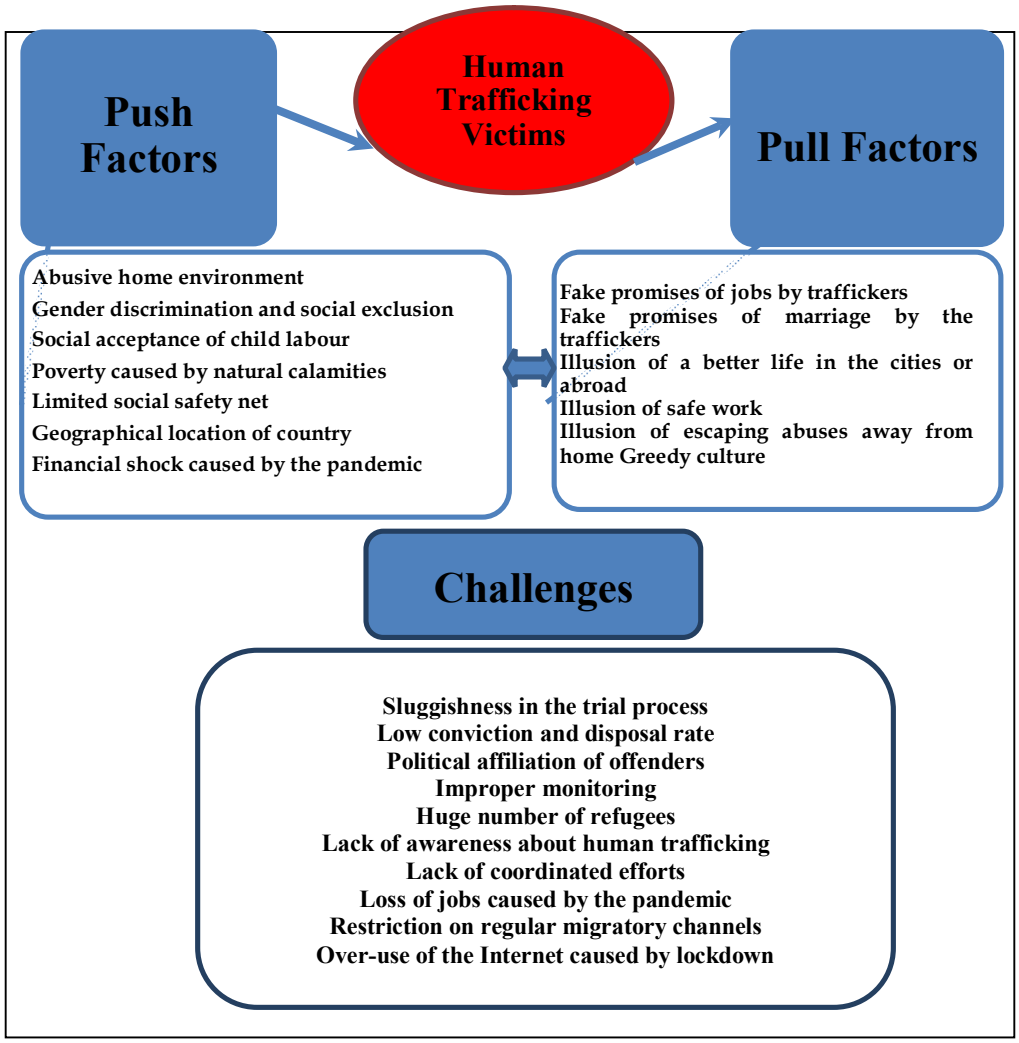


***Figure 3*: Factors behind Human Trafficking and the Challenges[25]**

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24 *Ibid*.

25 Modified from NCIDIN. "Rapid Assessment on Trafficking in Children for Exploitative Employment in Bangladesh." (2002), available at: https://www.ilo.org/ipec/Information resources/WCMS_IPEC_PUB_772/lang--en/index.htm last accessed on December 5, 2020.

There are hundreds of factors behind human trafficking, the major factors relevant to Bangladesh in general behind human trafficking have been pointed out in figure 3. The situation has aggravated in the pandemic period as mentioned in the previous section. The lockdown and other measures against the COVID-19 pandemic have reduced some traditional crimes, such as murder, theft, burglaries; but it has enhanced domestic abuses and various forms of trafficking. Domestic violence has increased globally by 30% during the COVID-19 pandemic.[26] Domestic violence – a proven push factor of human trafficking – is caused by gender inequality, institutional failure, and insufficient victim protection. As one crime exacerbate another crime, accelerated domestic violence caused by the COVID-19 pandemic might increase the risk of human trafficking in Bangladesh. Moreover, the new financial shock caused by COVID-19 may influence children and adults to accept risky job offers, which could further increase their exploitation and trafficking.

From the social viewpoint, the majority of the people who primarily went abroad from Bangladesh for work were from needy families. Within a few years of going abroad, the economic condition of most workers' families drastically improved. Upon observing the economic uplift of those families, a wave of working-abroad tendencies has grown among the young generations of poor and middle-income families during the last three decades. This indicates a culture in Bangladesh's society of becoming wealthier shortly that fosters the creation of a human trafficking environment. In contrast, there is a lack of accountability in the actions of private agencies that send a majority of laborers abroad every year. This is another reason behind the high growth of human trafficking in the Bangladesh.

## 3. Laws and Policies to Combat Human Trafficking

Thousands of people and their families become victims of human trafficking within countries and across borders every year. The severity

[26] Valiant Richey, 'Invisible crimes like human trafficking rise during COVID-19,' *Thomson Reuters Foundation News,* December16, 2020, available athttps://news.trust.org/item/20201216122708-84btm, last accessed on December 20, 2020.

of human trafficking crimes and issues have attracted the attention of communities nationally and globally. Consequently, international and national bodies have employed their efforts from various angles to curb and eliminate crime. They have formulated different international conventions and laws at national levels. As a state party of international conventions, Bangladesh has a responsibility to adopt the rules stated under international laws and conventions. The following subsections summarize existing laws and policies related to combating human trafficking.

### *3.1 International Laws*

The state parties of different international treaties relating to human trafficking are obliged to take measures to combat human trafficking. The obligations may be enforceable in international courts and tribunals, such as the International Court of Justice (ICJ), the International Criminal Court (ICC), the European Court of Human Rights (ECHR), and may also be enforceable under domestic laws. Human trafficking is related to several international treaties covering the issues, such as slavery, child labor, forced labor, rights of women and children, rights of migrant workers, and disabled persons. Human trafficking issues are also related to some general treaties covering economic, political, civil, cultural, and social rights. Treaties and other instruments particularly relevant to human trafficking are: United Nations Convention against Transnational Organized Crime of 2000 with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000; Convention on the Elimination of All Forms of Discrimination against Women, 1979; Convention on the Rights of the Child, 1989; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002; Council of Europe, Convention on Action against Trafficking in Human Beings (European

Trafficking Convention), 2005; Charter of Fundamental Rights in the European Union, 2000; article 5, and Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims, 2011. All the above instruments have been ratified or accessed by Bangladesh except for the last two.

Basic crime control treaties, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption accessed by Bangladesh in 2019 and 2007 respectively are also relevant to human trafficking. Besides, customs, general principles, and judgments of international tribunals can be considered references in determining the state's responsibilities to combat human trafficking. There are several guiding instruments related to human trafficking which are not considered equivalent to law and include suggested principles and guidelines on human rights and trafficking, guidelines on child trafficking, guidelines on trafficking and asylum, and non-treaty agreements between countries on repatriation and reintegration of human trafficking victims.[27]

### *3.2 National Laws*

Bangladesh has records of offences related to human trafficking where a majority of the victims are rural women and children. Traffickers forcefully engage the victims in brothels, hazardous industries, domestic service, begging, organ trading, and so forth. To tackle human trafficking, the Government of Bangladesh and many other NGOs are working actively. The enactment of PSHTA, 2012 is one of the praiseworthy outcomes of such endeavors.[28] The legal framework on anti-trafficking in Bangladesh consists of the constitutional provisions, statutes with direct implications to trafficking, and certain complementary laws. Laws that have a direct and indirect bearing on the discourse of human trafficking in Bangladesh are as under:

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[27] The Report, Human Rights and Human Trafficking, Fact Sheet No 36, United Nations, New York and Geneva, 2014, available athttps://www.ohchr.org/documents/publications/fs36_en.pdf, last accessed on December 31, 2020.

[28] Jobaira Khan, 'A General Overview of the Human Trafficking Act,' *Law Help BD*, February 1, 2019, available athttps://lawhelpbd.com/special-law/human-trafficking, last accessed on December 22, 2020.

### *3.2.1 Constitutional Provisions*

In the Constitution of Bangladesh, there is no definition of human trafficking or trafficking in persons. Even the term has not been mentioned anywhere in the Constitution. The Constitution has identified prostitution, which is one of the main causes of human trafficking, as an anti-social act and provided that the state shall adopt effective measures to prevent it.[29] Since gender discrimination and violence against women is one of the reasons for human trafficking, Article 19 of the Constitution declares that the state shall endeavor to ensure equality of opportunity for all citizens. Moreover, by inserting the provision of necessities of life[30] and guarantee of employment[31], the Constitution has addressed the poverty issue which is considered one of the root causes of trafficking.

Several counter-trafficking studies have identified lack of education as also one of the reasons behind human trafficking. To ensure basic education, the Constitution authorizes the state to adopt effective measures for free and compulsory education to all children as determined by law.[32] Article 31 of the Constitution guarantees the right to protection of law to every citizen wherever he may be. The provision relating to the protection of life and liberty of all persons in the Constitution has been the basic guiding principle to combat human trafficking.[33] The Constitution guarantees the repatriation of trafficked victims. In the case of *Abdul Gafur vs. Secretary, Ministry of Foreign Affair, Govt. of Bangladesh and Another*,[34] the High Court Division held that repatriation of trafficked victims suffering on foreign soil is a fundamental right under the Constitution of Bangladesh.

To outline the fundamental rights, the Constitution has forbidden all sorts of forced labor[35] and guaranteed freedom of profession and

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29 Article 18, The Constitution of the People's Republic of Bangladesh, 1972.
30 *Ibid*, Article 15.
31 *Ibid*, Article 29.
32 *Ibid*, Article 17.
33 *Ibid*, Article 32.
34 *17 BLD (1997) HCD 560*.
35 Article 34, The Constitution of the People's Republic of Bangladesh, 1972.

occupation.[36] Engaging any person in a profession against his will – one of the objectives of human trafficking– is a violation of fundamental rights. Although the Constitution does not provide direct guidance to combat human trafficking, the above-discussed articles can be considered as provisions against human trafficking.

### *3.2.2 General Laws Related to Counter-trafficking*

The Penal Code of 1860 has provisions relating to the punishment of crimes, such as wrongful confinement, kidnapping, slavery, forced labor, rape, trade of minors for prostitution, and other offences.[37] As most of these crimes are related to human trafficking, the Penal Code is considered a legal document to combat the crime. The Children Act, 2013 has provisions related to custody and protection of children along with punishment of offenders who victimize children. The Act of 2013, has also provisions related to the prevention of human trafficking offences, such as employing children in begging, using them to transport toxic liquor or dangerous drugs, engaging them in a brothel. The Overseas Employment and Migration Act, 2013 deals with different provisions relating to overseas workers, migration procedures, and recruiting agency issues. Creating overseas employment opportunities, introducing safe and fair immigration, ensuring the rights and welfare of all migrant workers and their family members are the main concern of this Act.

### *3.2.3 Complimentary Anti-Trafficking Laws in Bangladesh*

The Extradition Act of 1974 deals with the provisions concerning the extradition of fugitive criminals committing the crimes, such as rape, procuring or trafficking in women or young persons for immoral purposes, kidnapping, abduction or dealing in slaves, stealing, abandoning, exposing, or unlawfully detaining a child, and aiding and abetting any person in this regard. Most of these offences are treated as human trafficking. The Dowry Prohibition Act, 2018 can be considered as a complementary law relating to the anti-trafficking legal regime in

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[36] *Ibid*, Article 40.

[37] S.357-374, The Penal Code, 1860.

Bangladesh in the sense that dowry is the reason for domestic violence —a reason for human trafficking. The Labour Code of 2006 has replaced many labor laws that were related to labor and child welfare having bearing on anti-trafficking measures. The Labour Code, 2006, comprehensively covers most of the aspects of labor laws, prohibits the employment of children and young persons.[38]

### *3.2.4 The Prevention and Suppression of Human Trafficking Act (PSHTA), 2012*

The PSHTA of 2012 is a law dedicated to preventing human trafficking in Bangladesh. Considering the maliciousness of the human trafficking offence against humanity and its alarming rate of increment, the PSHTA was enacted to: (1) restrain and suppress the crime, (2) protect the victims and survivors of the offence, and (3) ensure the safe migration of victims. According to the PSHTA, in the case of any human trafficking offence, anybody can file a complaint to the police station or tribunal with the provision of concealing the identity of the victim for security concerns. The provisions of this Act are also applicable beyond Bangladesh, if the offence concerning human trafficking is committed by a person staying outside the country, or onboard an aircraft or a ship. According to this Act, there will be a tribunal named the Anti-Human Trafficking Offence Tribunal to deal with human trafficking cases.[39] The Act has empowered the Tribunal to issue an order for the protection of victims or direct any person or institution for submitting any document, report, or register to the Tribunal.[40] To ensure a swift trial or the security of victims and witnesses, the Tribunal may accept any statement or documentary evidence directly or via any electronic means. Section 22(3) of this Act has given eminent power to the Tribunal. To ensure the protection of the victim, the Tribunal may also send him to any public or private protection home or under the custody of any competent person or

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[38] The Lawyers and Jurists, 'Legal Framework on Anti-trafficking in Bangladesh,' available at https://www.lawyersnjurists.com/article/legal-framework-on-anti-trafficking-in-bangladesh, last accessed on December 20, 2020.

[39] Section 21, The Prevention and Suppression of Human Trafficking Act, 2012.

[40] *Ibid*, Section 22.

organization during the trial or before the prosecution. Considering the safety and security of women and children victims, an arrangement of camera trial is permitted in the Act.[41]

### *3.3 National Plan of Action (NPA) for Prevention and Suppression of Human Trafficking 2018-22*

The Ministry of Home Affairs has launched a five-year national plan to fight against human trafficking in the country with a focus on capacity building of administration and ensuring a strong economic and social safety net for victims and vulnerable people.[42]Objectives of this plan provide the provision relating to– strengthening and diversifying the measures to prevent trafficking in persons; improving the quality of protection and assistance provided to victims of trafficking for their social reintegration; developing the capacity to investigate crimes of trafficking in persons and minors; increasing the quality of disseminated information on the phenomenon of trafficking in persons; developing and extending the cooperation process between the relevant national and international actors as well as strengthening the diplomatic efforts to prevent and combat human trafficking.

### *3.4 General Instructions for People Going Abroad*

The Ministry of Expatriates' Welfare and Overseas Employment has issued a list of instructions for the protection of labor from trafficking and ensure the safety of workers going abroad. Those instructions include–decide to go abroad in a legal and secured way; analyze cost-benefit before deciding for going abroad; register the database name into the related demo; learn the language of the intended country and take training on the relevant job; go abroad via the government approved recruiting agency; keep one's own passport; collect and check visa; put signature on the contract after reading and proper understanding; have medical check-up from the approved medical center; provide fingerprint at related demo; participate in the 3-day

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41 *Ibid*, Section 25.

42 Kamrul Hasan, 'Five year NPA for fighting human trafficking launched,' *Dhaka Tribune*, December 3, 2018, available athttps://www.dhakatribune.com/bangladesh/event/2018/12/03/five-year-npa-for-fighting-human-trafficking launched, last accessed on December 31, 2020.

pre-exit training before going abroad; preserve three sets of all documents before going abroad; and collect the smart card from the Bureau of Manpower, Employment, and Training. All these instructions, if properly followed, might be very helpful in preventing cross-border human trafficking to a significant extent.

## 4. Challenges Concerning Human Trafficking

When the economy of the whole world along with educational, social, and cultural activities is harshly affected by the COVID-19 pandemic, the illegal business of human trafficking is growing tremendously. Combating human trafficking is a great challenge for the civil world, the specific challenges to combat the crime can be outlined under four internationally recognized pillars – prosecution, protection, prevention, and partnerships.


**Figure: The 4 Pillars (4Ps) to Combat Human Trafficking**

### *5.1 Challenges regarding Prosecution*

- Bangladesh Government has enacted the PSHTA, 2012 to combat human trafficking. This Act provides provisions regarding different issues of human trafficking but there are many gaps in enforcing the legislation. Every year many cases are filed but the rate of conviction and disposal is remarkably low.
- Reservation by Bangladesh on paragraph 2 of Article 35 of the United Nations Convention against Transnational Organized Crime, 2000 is a major obstacle to settle disputes between states.

This reservation does not create any obligation to Bangladesh concerning the settlement of disputes arising in the interpretation and application of this convention.

- In most of the cases filed in the court, the law enforcing agencies cannot reach human traffickers because of their insufficient economic, technical, and manpower support. Moreover, using the loopholes of existing laws, some dishonest officials try to show a human trafficking case as illegal migration, illegal border crossing, and human smuggling so that the criminals can get an advantage from the loopholes of laws.
- Though there are provisions for the protection of victims under the PSHTA of 2012, victims do not get the protection due to improper management and monitoring system. Therefore, victims may be re-victimized during the prosecution, and some witnesses may turn hostile.
- According to the provisions relating to common intention to commit an offence, criminal conspiracy, and abetment under the Penal Code of 1860, human trafficking should be considered an organized crime. However, it is not often seen as an organized crime in Bangladesh, and thus, provisions relevant to organized crime are not applied in such cases.
- The lockdowns caused by COVID-19 have severely affected the activities of courts. Although virtual sessions have been introduced at a limited scale, it is not sufficient to deal with a huge number of cases including human trafficking. Thus, stagnation of cases is one of the major impediments to combat human trafficking during the pandemic.

### *5.2 Challenges regarding Protection*

- The state is obliged to provide sufficient shelters or rehabilitation to rescued victims of trafficking.[43] The economic downtrend caused by the COVID-19 pandemic might create a shortage of

[43] Sections 32- 40, the Prevention and Suppression of Human Trafficking Act (PSHTA), 2012.

government budget required for taking protective measures for human trafficking victims and survivors.[44]

- The ratio of men to total victims of trafficking is not negligible yet, the focus is on the trafficking of women and children and sexual exploitation with inadequate protection for men.[45] Consequently, shelter service is not provided to male victims on the part of either the government or NGO.
- Protection for human trafficking victims from Bangladesh identified abroad is still inadequate.[46]Restriction on cross-border travel caused by COVID-19 may further hamper the safe return of human trafficking victims and deteriorate their protection measures.

### *5.3 Challenges regarding Prevention*

- The unemployment problem is a major challenge for Bangladesh in preventing human trafficking. The problem has become more acute due to millions of job cuts, the return of workers abroad, and the overall economic downtrend caused by COVID-19. People living in poverty are willing to take any job opportunities they can find. This has created a golden opportunity for human traffickers, who promise job seekers a good career abroad. These desperate people become the victim of human trafficking in the form of unpaid or low-paid jobs and exploitation.
- Logistics of the Bangladesh police force and Bangladesh coast guard are not sufficient. Law enforcing agencies cannot ensure proper supervision over human trafficking, especially in

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44 Fabrizio Sarrica, Claire Healy, Giulia Serio, and Jesper Samson, 'How COVID-19 Restrictions And The Economic Consequences Are Likely To Impact Migrant Smuggling And Cross-Border Trafficking In Persons To Europe And North America,' United Nations Office on Drugs and Crimes (UNODC), available at https://www.unodc.org/documents/data-and-analysis/covid/Covid-related-impact-on-SoM-TiP-web3.pdf, last accessed on January 12, 2021.

45 *Supra note* 14.

46 *Ibid*.

unprotected border areas.[47] There is lack of proper training at regular intervals[48] for personnel at different levels.

- To prevent an organized crime like human trafficking, a comprehensive and orchestrated awareness program among mass people is needed. There is a lack of mass-campaign to create awareness about human trafficking at the root level that gives rise to increased vulnerability to trafficking.
- The recruiting agencies in Bangladesh are not properly monitored. It gives rise to the supply of manpower by many agencies violating the laws and policies concerning the prevention of human trafficking. In the absence of proper monitoring, unlicensed and risky agencies are collecting people from the root level with the help of social media during the pandemic when people are more active online than ever.
- Bangladesh is located beside the Bay of Bengal, which is also connected to the Gulf region and other South Asian countries. The country is considered geographically advantaged for cross-border human trafficking. Traffickers can easily use the sea route to transport victims on boats within the country and also outside the border.
- Many people are desperate to go abroad to get relieved of the economic crisis exacerbated by the COVID-19 pandemic. On the other hand, most countries have made legal transit and asylum policies stricter than ever to combat the pandemic. This situation has helped traffickers to mislead the people and victimize them.

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47 Jahirul Islam and Md Zahir Ahmed, 'Recent Human Trafficking Crisis and Policy Implementation in Bangladesh,' *The Journal for Social Advancement* 3 (2018): 275-291, available at file:///C:/Users/Rex%20Technology/Downloads/Recent HumanTraffickingCrisisandPolicyImplementationinBangladesh%20(1).pdf,last accessed on January 10, 2021.

48 Dr. Sarasu Esther Thomas, 'Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka, Legal and Policy Review,' *United Nations Office on Drugs and Crime (*2011), available at https://www.unodc.org/documents/human-trafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf, last accessed on December 27, 2020.

- Lack of education among general people is another challenge to combat human trafficking. Most rural parents are illiterate and they are not concerned about their children's education. They want to keep them occupied so that they can earn money. This situation helps flourish the business of human trafficking. Further, the closure of schools and colleges for an indefinite period due to COVID-19 has made students vulnerable to human trafficking.[49]

### *5.4 Challenges regarding Partnership*

- Partners in the private sector play a vital role in preventing, identifying, and reporting human trafficking. Priorities have been given on three pillars, such as prosecution, protection, and prevention issues concerning human trafficking. However, working in partnerships, especially with the private sector – the fourth pillar – has remained less focused in Bangladesh.
- During the COVID-19 pandemic, improving partnership and collaboration with NGOs and civil society in both the national and international arena is badly needed to make anti-trafficking efforts effective. However, Bangladesh is lagging to engage itself in such a partnership.

## 5. Concluding Remarks

Human trafficking has been a tricky business of modern slavery and its magnitude is spreading rapidly in overpopulated Bangladesh and other parts of the world. The COVID-19 pandemic has dramatically changed the world and made the situation more critical. When people are dying, healthcare systems are failing, economies are drastically shrinking, and the future is blinking in most parts of the world, one global industry is resistant to the COVID-19 crisis. It is human trafficking– that destroys families and communities, violates the rule of law, and robs human dignity of millions. As part of different initiatives to prevent human trafficking problem, the Government has enacted

[49] *Kat Fries, '10 Facts About Human Trafficking in Bangladesh,' the Borgen Project, October 19,2019, available at https://borgenproject.org/10-facts-about-human-trafficking-in-bangladesh/, last accessed on December 15, 2020.*

several laws; side by side national and international NGOs have also approached and advocated several procedures. All their efforts are insufficient to prevent human trafficking and protect the victims as is evident from the increased number of reported trafficking cases and a few cases collected from fieldwork.

The government has undertaken several praiseworthy initiatives, very poor rates of conviction and delay in the prosecution process have made those initiatives malfunctioning. In summary, Bangladesh is far away from properly addressing human trafficking crimes. In these circumstances, the current study suggests the following:

- To fight against the challenges concerning human trafficking, the Government, NGOs, law enforcing agencies, judiciary, and media should perform in an orchestrated manner with a view to the proper execution of existing laws. Initiatives should be taken to create mass awareness among general people concerning the symptoms of human trafficking and its prevention. The cooperation of international agencies is also essential to identify and dismantle cross-border trafficking networks. Bangladesh embassies in different countries should play a proactive role in human trafficking issues.
- It is proved that the COVID-19 pandemic has increased people's vulnerability to trafficking. The priority should be the eradication of the root causes especially the economic triggers that drive people to be victims of human trafficking. The government should play a proactive role in the creation of sustainable employment opportunities for the livelihood of people affected by this pandemic.
- The government needs to strengthen monitoring mechanisms to ensure that individuals involved in human trafficking are apprehended and brought to justice irrespective of their position in the socio-political ladder or financial muscle. Steps should be taken to ensure the accountability of recruiting agencies and eliminate high recruitment fees charged to workers by them.
- Along with short and medium-term planning, a long-term detailed national strategy should urgently be formulated for the prevention of

human trafficking. The strategy should be aligned with internationally recognized pillars for combating human trafficking. It should incorporate ways to increase public awareness; education about trafficking; capacity-building for preventing and identifying trafficking; protecting victims; and improving the criminal justice system.

- Steps should be taken for efficient settlement of cases ensuring justice. The judiciary should be stricter regarding the frequent absence of witnesses during the trial and the law enforcing agencies should not be allowed to avoid their responsibilities.
- Since human trafficking victims are huge in number, a separate support and service center could be introduced for the victims and survivors of human trafficking on an urgent basis. It would help them regain control and independence. The center could be equipped with a Hotline for easy access to the services and supports.
- During the COVID-19 pandemic, emphasis should be given to proper support to trafficking survivors, who require essential medical and mental health services. One-stop services should be extended to human trafficking victims, especially adult male victims and victims exploited abroad. Allowing NGOs to provide services to trafficking victims in government shelters may improve the service quality.
- Formulation of the 2018-20 National Plan of Action and establishment of anti-trafficking tribunals are not enough, full implementation of the plan and proper functioning of the tribunal is of utmost importance. Enhanced training for concerned officers from law enforcing agencies, labor inspectors, and immigration officers on human trafficking issues might be helpful in this regard.

Human trafficking crimes are among the most alarming issues in Bangladesh, it is a matter of hope that the country has improved its position to combat the crime and promoted itself from Tier 2 Watch List to Tier 2. The majority of the persons working abroad are not encountering human trafficking problems. Many of them are living

happily, helping their families, and contributing to the foreign currency reserve and economic growth of the country.

This study will help readers understand the condition of human trafficking from Bangladesh's perspective, especially cross-border trafficking. It will help the government, NGOs, law-enforcing agencies, judiciary, and civil society revisiting their respective roles. The study findings might provide valuable pointers to academics and social scientists and could be a valuable addition to the existing stock of knowledge. Qualitative studies may be carried out by incorporating the in-depth interview of human trafficking victims at home and abroad.

# মুসলিম উত্তরাধিকার আইন অনুযায়ী সম্পত্তি বণ্টনে পুত্র-কন্যা সন্তানের অংশ প্রাপ্তির প্রকৃতি ও সচেতনতা: বাংলাদেশের বাস্তবতা

মোহাম্মদ হেদায়েত উল্লাহ*

## Abstract

Islamic inheritance law describes the various classes of heirs and the rights of all persons associated with the deceased. In Bangladesh, due to various reasons, the daughter does not get the property according to the Quranic description compared to the son. According to the Muslim Inheritance Law in Bangladesh as opposed to Islamic inheritance law, there is a need to investigate the nature and reality of receiving the share of daughters in the process of distribution of property. The purpose of this study is to investigate the type and nature of inheritance of a daughter and son under the Muslim Inheritance Law in Bangladesh. This research work will assist in creating public awareness to establish the rights of daughters and proper implementation of the same.

**Keywords:** Muslim Inheritance Law, Daughters Rights'

## ১. ভূমিকা

ইসলামী উত্তরাধিকার আইন মহান আল্লাহ প্রদত্ত এক শাশ্বত বিধান। আলকুরআনে মৃত ব্যক্তির পরিত্যক্ত সম্পত্তি বণ্টন প্রক্রিয়ায় পুত্র-কন্যা সন্তানের জন্য সুনির্দিষ্ট অংশ বর্ণিত হয়েছে। ইসলামী উত্তরাধিকার আইনের অজ্ঞতা, ঐতিহাসিকভাবে সম্পত্তিতে নারীর অধিকার দীর্ঘদিন থেকে প্রতিষ্ঠিত না হওয়া এবং সম্পত্তির প্রতি মানুষের দুর্নিবার আকর্ষণের ফলে বাংলাদেশে মুসলিম উত্তরাধিকার আইন অনুযায়ী পুত্র ও কন্যা সন্তানের ইসলামে বর্ণিত মীরাসী সম্পত্তির সুনির্দিষ্ট অংশ প্রাপ্তিতে পার্থক্য পরিলক্ষিত হয়। বাংলাদেশে কন্যা সন্তানের মীরাসী সম্পত্তির নির্ধারিত অংশ প্রাপ্তিতে এক হতাশাজনক অবস্থা বিরাজ করছে। ইসলামী শরীয়ায় বিভিন্ন প্রক্রিয়ায় মৃতের সম্পত্তিতে পুত্র-কন্যা সন্তান উভয়েরই সুনির্দিষ্ট অধিকার

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আছে। পুত্র ও কন্যা সন্তানের মীরাসী সম্পত্তি প্রদানের ক্ষেত্রে অভিভাবকরা ভিন্ন দৃষ্টি বিবেচনায় নিয়ে সম্পত্তি বণ্টন করার ফলে পুত্র ও কন্যা সন্তানের মাঝে বিস্তর ব্যবধান তৈরী হয়। কুরআনিক বণ্টনের আলোকে কন্যা সন্তান তাদের নির্ধারিত হিস্যা সঠিকভাবে পায় না। নারীর প্রতি বৈষম্য ও কন্যা সন্তানের সামাজিক অবস্থান ও মূল্যায়ন নারীর বা কন্যা সন্তানের মীরাসী সম্পত্তি ঠিকভাবে না পাওয়ার অন্যতম কারণ। বাংলাদেশে মুসলিম উত্তরাধিকার আইন অনুসারে কন্যাদের সম্পত্তি পাওয়ার ধরণ বহুমাত্রিক, বণ্টনের প্রক্রিয়া বিচিত্রময় এবং সম্পত্তির অংশ পাওয়ার চিত্র হতাশাজনক। সম্পত্তি বণ্টনের প্রভাব কন্যাদের জীবনে চরম মানসিক যাতনা হিসেবে দেখা দেয়; ভাই-বোনের জন্মগত গভীর সম্পর্কে ফাটল ধরে। উত্তরাধিকার সম্পত্তির অধিকার বাস্তবায়নের জন্য সামগ্রিক জনসচেতনতা ও জনগনকে সম্পৃক্তকরণ প্রক্রিয়াও আশাব্যঞ্জক নয়। এ গবেষণায় সাহিত্য পর্যালোচনাসহ বিশেষজ্ঞদের মতামত, ফোকাস গ্রুপ ডিসকাশন,বিশদ সাক্ষাৎকার ও কেইস স্টাডির মাধ্যমে প্রাপ্ত তথ্য-উপাত্ত বিশ্লেষণক্রমে বাংলাদেশের প্রেক্ষাপটে মুসলিম উত্তরাধিকার আইন অনুযায়ী পুত্র-কন্যা সন্তানের সম্পত্তি লাভের প্রকৃতি ও সচেতনতার সামগ্রিক একটি চিত্র ফুটে উঠেছে। আশা করা যায় ইসলামী উত্তরাধিকার আইন বাস্তবায়নের মাধ্যমে পুত্র-কন্যা সকলের অধিকার প্রাপ্তিতে এই গবেষণা সচেতনতা তৈরীতে ভূমিকা রাখবে।

## ২. গবেষণা পদ্ধতি

এটি একটি গুণগত (Qualatitive) গবেষণা। প্রাথমিক উৎস (Primary Source) হিসেবে আলকুরআন, আলহাদিস এবং বিজ্ঞ মুখ্য ১৪ জন তথ্য দাতাদের (KII) সাক্ষাৎকার থেকে প্রাপ্ত তথ্য-উপাত্তসহ তিনটি কেইস স্টাডি (Case Study) গবেষণাকর্মের যথাস্থানে ব্যবহৃত হয়েছে। বিশদ সাক্ষাৎকার (Indepth Interview) চারজন নারী-পুরুষদের থেকে নেওয়া হয়েছে। চারটি ফোকাস গ্রুপ ডিসকাশন (Focus Group Discussions) করা হয়েছে।[১] গবেষণার সাথে সম্পর্কিত বিভিন্ন পুস্তক, গবেষণা প্রবন্ধ, অভিসন্দর্ভ, প্রতিবেদন, জাতীয় দৈনিক ও ওয়েবসাইটে প্রকাশিত বিভিন্ন তথ্য সহায়ক উপাত্ত (Secondary Source) হিসেবে ব্যবহৃত হয়েছে। এই গবেষণা পদ্ধতির মাধ্যমে মুসলিম উত্তরাধিকার আইনে বর্ণিত হিস্যা অনুযায়ী পুত্র ও কন্যা সন্তানের সম্পত্তি প্রাপ্তির ধরণ ও প্রকৃতি তুলে ধরা হয়েছে এবং এর মাধ্যমে বাংলাদেশে মীরাসী আইন বাস্তবায়নে সচেতনতার রূপ ফুটে উঠেছে। এ গবেষণায় আলকুরআনে বর্ণিত একই শ্রেণির পুরুষ-নারীর দ্বিগুন সম্পত্তি পাওয়ার বিষয়টি পর্যালোচনা করা হয়নি বরং বাংলাদেশের সমাজ ব্যবস্থায় মীরাসী আইনে বর্ণিত পুত্র-কন্যার হিস্যার অনুশীলন কিভাবে হচ্ছে তা অনুসন্ধান করে উপস্থাপন করা হয়েছে।

[১] ঢাকা, কুমিল্লা, পঞ্চগড় ও কুষ্টিয়ায় মোট চারটি এফজিডি করা হয়। উত্তরাধিকার সম্পত্তি বণ্টন ব্যবস্থাপনার সাথে সম্পৃক্ত সর্বমোট ৩২ জন বিভিন্ন শ্রেণি-পেশার মানুষ এ ডিসকাশনে উপস্থিত থাকেন।

## ৩. মুসলিম উত্তরাধিকার আইনে পুত্র সন্তানের অধিকার

বাংলাদেশে মুসলিম উত্তরাধিকার আইনের আলোকে একজন পুত্র সন্তান পিতা-মাতার পরিত্যক্ত সম্পত্তির দুই কন্যা সন্তানের সমান হিস্যা পায়। এই প্রসঙ্গে আল্লাহ তায়ালা বলেন, يُوصِيكُمُ اللهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنثَيَيْنِ অর্থাৎ 'আল্লাহ তোমাদেরকে তোমাদের সন্তানদের সম্পর্কে আদেশ করেনঃ একজন পুরুষের অংশ দুইজন নারীর অংশের সমান'।[২] বাংলাদেশের মুসলিম সমাজে পুত্র ও কন্যা সন্তানের মীরাসী সম্পত্তি প্রাপ্তির পরিমান এই নির্দেশের আওতায় থাকাই ইসলামী নির্দেশনা। আল্লাহ তায়ালা উত্তরাধিকার সম্পত্তি বণ্টনের এ বিধান পরিপূর্ণরূপে বাস্তবায়নের বাধ্যবাধকতা এবং এ বিধান পালনে অনিয়ম করলে চরম শাস্তির হুঁশিয়ারী আলকুরআনে বর্ণনা করেছেন।[৩] তিনি পিতামাতা ও আত্মীয়-স্বজনদের পরিত্যক্ত সম্পত্তি হতে পুরুষ এবং নারী সকলের জন্য মীরাসী সম্পত্তির অংশ সুনির্দিষ্ট করে দিয়েছেন।[৪] বাংলাদেশের সমাজ জীবনে পুত্র-কন্যার মীরাসী সম্পত্তি প্রাপ্তির অংশ ও পরিমান কুরআনিক এ নির্দেশনার আওতায় থাকে না। বিভিন্ন কারনে মহান আল্লাহ প্রদত্ত এই সুনির্দিষ্ট বণ্টন ব্যবস্থাপনার ব্যত্যয় ঘটে থাকে। উত্তরাধিকার সম্পত্তি দীর্ঘ সময় ধরে পুরুষ অভিভাবক বা পুত্র সন্তানের নিয়ন্ত্রনে থাকে। সম্পত্তি বণ্টনের সুনির্দিষ্ট কোন সময় নির্ধারিত নেই এবং প্রাপকদের নিকট পরিত্যক্ত সম্পত্তি হস্তান্তরের বাধ্যবাধকতা সংক্রান্ত কোন বিধি বিধানও বাংলাদেশে কার্যকর নেই। ফলে জনসাধারনের মাঝে সম্পত্তি বণ্টনে ইসলামী অনুশাসনের চর্চা কম। অধিকাংশ ক্ষেত্রে মৃতের পরিত্যক্ত সম্পত্তি আলকুরআনে বর্ণিত নির্ধারিত হিস্যার চেয়ে বেশী অংশ তার পুত্র সন্তানই ভোগ করে থাকে।

## ৪. মুসলিমউত্তরাধিকার আইনে কন্যা সন্তানের অধিকার

বাংলাদেশের বিদ্যমান মুসলিম উত্তরাধিকার আইনে মা-বাবার রেখে যাওয়া সম্পত্তির ওয়ারিস হওয়ার ক্ষেত্রে কন্যাদের তিন অবস্থা:

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[২] আলকুরআন, ৪:১১।

[৩] تِلْكَ حُدُودُ اللهِ وَمَن يُطِعِ اللهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِن تَحْتِهَا الأَنْهَارُ خَالِدِينَ فِيهَا وَذَلِكَ الْفَوْزُ الْعَظِيمُ এগুলো আল্লাহর নির্ধারিত সীমা। যে কেউ আল্লাহ ও রসূলের আদেশমত চলে, তিনি তাকে জান্নাত সমূহে প্রবেশ করাবেন, যেগুলোর তলদেশ দিয়েস্রোতস্বিনী প্রবাহিত হবে। তারা সেখানে চিরকাল থাকবে। এ হল বিরাট সাফল্য।' [সুরা নিসা - ৪:১৩] وَمَن يَعْصِ اللهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُّهِينٌ যে কেউ আল্লাহ ও রাসূলের অবাধ্যতা করে এবং তার সীমা অতিক্রম করে তিনি তাকে আগুনে প্রবেশ করাবেন। সে সেখানে চিরকাল থাকবে। তার জন্যে রয়েছে অপমানজনক শাস্তি। [সুরা নিসা - ৪:১৪]

[৪] لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالأَقْرَبُونَ وَلِلنِّسَاء نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا 'পিতা-মাতা ও আত্মীয়-স্বজনদের পরিত্যক্ত সম্পত্তিতে পুরুষদেরও অংশ আছে এবং পিতা-মাতা ও আত্মীয়-স্বজনদের পরিত্যক্ত সম্পত্তিতে নারীদেরও অংশ আছে; অল্প হোক কিংবা বেশী। এ অংশ নির্ধারিত।' [সুরা নিসা, ৪:৭]

এক. যদি কন্যা একজন হয় এবং কোনো পুত্র সন্তান না থাকে, তাহলে সে কন্যা মোট সম্পত্তির অর্ধেক অংশিদার হিসেবে পায়। এ প্রসঙ্গে আল্লাহ তায়ালা বলেন, وَإِن كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ 'যদি একজনই হয়, তবে তার জন্যে অর্ধেক।।[৫]

দুই. যদি দুই বা ততোধিক কন্যা থাকে এবং কোনো পুত্র সন্তান না থাকে, তাহলে তারা সবাই মিলে মোট সম্পত্তির অংশিদার হিসেবে তিনভাগের দুইভাগ পায়। এ প্রসঙ্গে আল্লাহ তায়ালা বলেন, فَإِن كُنَّ نِسَاء فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ 'অতঃপর যদি শুধু নারীই হয় দুই জনের অধিক, তবে তাদের জন্যে ঐ মালের তিন ভাগের দুই ভাগ।'[৬]

তিন. যদি মৃত ব্যক্তির (এক বা একাধিক) পুত্র সন্তান থাকে, তবে কন্যারা সকলেই পুত্রদের সঙ্গে 'আসাবাহ' বা অবশিষ্টভোগী হিসেবে পরিত্যক্ত সম্পত্তির অংশিদার হবে এবং কন্যারা পুত্রদের অর্ধেক পাবে। এ প্রসঙ্গে আল্লাহ তায়ালা বলেন, 'আল্লাহ তায়ালা তোমাদের সন্তানদের ব্যাপারে নির্দেশ দিচ্ছেন যে, একজন পুরুষের অংশ দুইজন নারীর অংশের সমান।'[৭]উত্তরাধিকার সম্পত্তি বণ্টনের এই ঘোষনা আল্লাহ তায়ালা প্রদত্ত। মীরাসী সম্পত্তির এ বণ্টনে পরিবর্তন আনা মুসলিমদের পক্ষে সম্ভব নয়। উত্তরাধিকার সম্পত্তি বণ্টনের বিধান প্রবর্তন সংক্রান্ত আয়াতের সর্বশেষে তিনি নিজেই এই বিষয়ে ইঙ্গিত দিয়ে বলেছেন, তোমাদের পিতা ও সন্তানদের মধ্যে উপকারে কে তোমাদের নিকটতর তা তোমরা অবগত নও। নিশ্চয়ই এটি আল্লাহর বিধান; আল্লাহ সর্বজ্ঞ, প্রজ্ঞাময়।[৮] প্রকৃতপক্ষে বিভিন্ন কারণে কন্যা সন্তান কুরআনিক এ বণ্টন নির্দেশা অনুযায়ী মীরাসী সম্পত্তির অংশ কমই পেয়ে থাকেন। পিতা-মাতার সম্পত্তি থেকে অধিকাংশ কন্যা সন্তানেরা তার ভাই বা ভাইয়ের সন্তানদের সাথে সম্পর্ক বিনষ্ট হওয়ার আশঙ্কায় তাদের প্রদত্ত অধিকার যথাযথ ভোগ থেকে বিরত থাকে।[৯]

অধিকাংশ ক্ষেত্রে নারী বা কন্যা সন্তানেরা তাদের অধিকার সম্পর্কে ওয়াকিফহাল না হওয়ার সুযোগে সম্পত্তির সাথে সম্পৃক্ত পুরুষ ব্যক্তিরা কন্যা সন্তানকে তাদের ন্যায্য সম্পত্তির অধিকার থেকে বঞ্চিত করে। বিষয়টি ইসলামী আইনের সরাসরি লংঘন এবংমানবিকতার দৃষ্টিতে ঘোরতর অন্যায়; ক্ষেত্র বিশেষে শাস্তিযোগ্য অপরাধ। এ বিষয়ে মহানবী সা. কঠোর বাণী প্রদান করেছেন।[১০]

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[৫] আলকুরআন ৪:১১।

[৬] তদেব।

[৭] يُوصِيكُمُ اللهُ فِي أَوْلاَدِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنثَيَيْنِ আল কুরআন ৪:১১।

[৮] আলকুরআন ৪:১১, لاَ تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفْعاً فَرِيضَةً مِّنَ اللهِ إِنَّ اللهَ كَانَ عَلِيما حَكِيمًا

[৯] *Women's Inheritance Rights to Land and Property in South Asia: A Study of Afghanistan, Bangladesh, India, Nepal, Pakistan, and Srilanka,* A report by The Rural Development Institute (RDI), for the World Justice Project, December-2009.

[১০] ধর্মীয় দৃষ্টিতে উত্তরাধিকার সম্পত্তি থেকে বঞ্চিতকারীরা পরকালে জান্নাত থেকে অনেক দূরে অবস্থান করবে। রাসূল সা. বলেছেন, "যে লোক তার কোনো উত্তরাধিকারীর অধিকারকে ছিন্ন করার জন্য দূরে কোথাও পালিয়ে

## ৫. বাংলাদেশে পুত্র ও কন্যা সন্তানের মীরাসী সম্পত্তি প্রাপ্তির প্রকৃতি

ইসলামী উত্তরাধিকার আইনে পুত্র ও কন্যা সন্তানের ২:১ ভিত্তিতে মীরাসী সম্পত্তি বণ্টনের বিধান থাকলেও বাংলাদেশের সমাজ ব্যবস্থায় তা অধিকাংশ ক্ষেত্রে বাস্তবায়ন হচ্ছে না। পুত্র সন্তান মীরাসী সম্পত্তি কুরআনিক প্রদত্ত নির্ধারিতঅংশের চেয়ে বেশী এবং ক্ষেত্র বিশেষে পিতা-মাতার পরিত্যক্ত সম্পদের সবটুকু একা নিজেই ভোগ করছে। বাংলাদেশে মীরাসী সম্পত্তি বণ্টন ব্যবস্থাপনায় এক বিশৃঙ্খল ও অরাজক পরিস্থিতি বিরাজ করছে। এখানে পুরুষতান্ত্রিক চেতনার আধিক্যতায় কন্যা সন্তান মীরাসী সম্পত্তির অধিকার থেকে বিভিন্নভাবে বঞ্চিত হয়। রাষ্ট্রের কাছ থেকে নাগকিরা কী কী পেতে পারে সে সম্পর্কে সংবিধানে একটি দিক নির্দেশনা থাকলেও অনেক ক্ষেত্রে নারী আইনী বৈষম্যের শিকার ঠিকই হচ্ছে। বিশেষ করে পারিবারিক ক্ষেত্রে, তথা উত্তরাধিকার, সন্তানের অভিভাবকত্ব, বিবাহে অসম অধিকারের ক্ষেত্রে।[১১]

পিতা-মাতার মৃত্যুর পর মীরাসী সম্পত্তি বণ্টনে পারস্পরিক সমঝোতা হয় ও দেশে গ্রাম্য সালিশের তীব্র প্রভাব রয়েছে। এ সালিশ সংস্কৃতি প্রত্যক্ষ ও পরোক্ষভাবে কন্যা সন্তানকে তার ন্যায্য মীরাসী সম্পত্তি থেকে বঞ্চিত করে থাকে। তবে উত্তরাধিকার সম্পত্তি বণ্টনে এ বৈষম্য অন্যান্য বৈষম্যের চেয়ে অনেকগুন বেশি। এ অনিয়ম ও বৈষম্যের ধরণ প্রক্রিয়া ও এর অন্তর্নিহিত ব্যঞ্জনার বৈচিত্রতাও অন্য বিষয়গুলোর চেয়ে অনেক আলাদা। ইসলামী উত্তরাধিকার আইন অনুসারে কন্যাসন্তানকে সম্পত্তির অংশ দেওয়ার নির্দেশনা থাকলেও বাস্তবে তারা এর সুফল পায় না।[১২] দেশের প্রায় সবখানেই কন্যাসন্তানদের উত্তরাধিকার সম্পত্তি থেকে বঞ্চিত করার একটি প্রথা তৈরী হয়ে আছে দীর্ঘকাল ধরে। কোনো কোনো সমাজে উত্তরাধিকার সম্পত্তি বণ্টনের সময় নিয়মানুসারে নারীকে তার অংশ দেওয়া হয়; কিন্তু নারী তার সম্পত্তি গ্রহণ না করে ভাইদের জন্য তার নিজের অংশটুকু ছেড়ে দেন এই ভয়ে যে, পিতার সম্পত্তির অংশ গ্রহণ করলে ভাইদের কাছে ভবিষ্যতে বোনদের আর কোনো দাবি-দাওয়া থাকবে না।[১৩] অধিকাংশ সময়ে বিভিন্ন সমস্যার কারণে কন্যা সন্তান তাদের মীরাসী সম্পত্তির ন্যায্য হিস্যার অধিকার ও দাবী থেকে নিজে নিজেই সরে আসে। বাংলাদেশের কোথাও কোথাও সমাজে এ কথা প্রচলিত আছে যে, 'মেয়েরা সম্পদ নেয় না বা

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যাবে, আল্লাহ তায়ালা তার জান্নাতের অধিকারকে ছিন্ন করবেন।" সুনানে ইবনে মাজাহ, হাদীস নং- ২৭০৩, (ঢাকা: তাওহীদ পাবলিকেশন্স, ২০১৪), পৃ. ৫১৬।

[১১] সেলিনা হোসেন ও অন্যান্য, *সংগ্রামী নারী যুগে যুগে* (ঢাকা: বাংলাদেশ নারী প্রগতি সংঘ, ১৯৯৯), পৃ. ১৬৫।

[১২] N. Keddie, `Introduction'in N. Keddie and B.Baron (eds), *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender,* Yale University Press, p. 6.

[১৩] L.P. Freedman, *Women and law in Asia and the Near East, `Draft Paper,* Development Law and Policy Program, Columbia UniversitySchool of Public Heath, p.24-25.

নিতে আগ্রহী হয় না কারন সম্পত্তি নিলে ভাইয়ের বাড়িতে আর যেতে পারবে না। বাবার বাড়ি বেড়াতে গেলে ভাবী আগের মতো আর যত্ন ও আন্তরিকতা দেখাবে না।'[১৪] কখনো কখনো কন্যা সন্তান স্বামীর ঘরের স্থায়িত্ব ও স্বামী গৃহে স্বাভাবিক সংসার জীবন পার করার আশঙ্কার কারনে অথবা পিতা বা ভাইয়ের দ্বারস্থ হওয়ার সম্ভাবনার কারনে তারা নিজেরাই সম্পত্তির অংশ নিতে মানসিকভাবে রাজি থাকেন না। নারী নিজেই ইচ্ছাকৃতভাবে সম্পত্তির অধিকার আদায়ের প্রক্রিয়া হতে যোজন যোজন দূরে থাকেন। অন্য দিকে ভাইয়ের অবস্থা অত্যধিক খারাপ হলে বা নিজের কারনে সম্পত্তি পূর্বেই বিক্রি হয়ে থাকলে তখনও কন্যা সন্তান নিজের প্রাপ্য মীরাসী সম্পত্তির দাবী করা থেকে নিজেকে বিরত রাখেন।

আবার কন্যা সন্তান নিজের সম্পত্তির দাবী থেকে দূরে সরে আসার অন্যতম কারন হলো ভাইদের প্রতি সীমাহীন মমতা ও ভালবাসা। কন্যা নিজে যদি স্বাবলম্বী হয় বা স্বামী সন্তান নিয়ে বেশ সুখে শান্তিতে স্বাচ্ছন্দে জীবন-যাপন করে এবং ভাইয়ের অবস্থা অপেক্ষাকৃত খারাপ হলে সম্পত্তির দাবী থেকে সরে আসে। নাসিমা আক্তার জলি এ প্রসঙ্গে বলেন, ভাইদের প্রতি অতিরিক্ত স্নেহ ও ভালবাসার কারণে বাংলাদেশের মেয়েরা ভাইদেরকে সম্পত্তি ছেড়ে দিয়ে আসে।[১৫]দুলাল শেখ বলেন, আমাদের বোনরা ঠিকভাবে সম্পদ বণ্টনের মাধ্যমে মীরাসী সম্পত্তির হিস্যা পেয়েছে; তবে তারা নেয় নি। আমাদের কাছে সম্পদ রেখেছে; কারণ তারা মাঝে মাঝে বেড়াতে আসবে।[১৬] আসলে বাবার বাড়িতে কন্যা সন্তানের গমনাগমন নিষ্কন্টক ও মসৃন রাখতে তীব্রভাবে কামনা করেন বলেই কন্যা সন্তান মীরাসী সম্পত্তির ন্যায্য হিস্যা ছেড়ে আসে। সম্পত্তি কম হলে বা মামলা করে উদ্ধার করার মত তেমন টাকা বা ক্ষমতা না থাকলেও কন্যা সন্তান সম্পত্তির দাবী থেকে সরে আসে। জনাব আব্দুল হামিদের বোনদের মাঝে সম্পদ এখনো বণ্টন হয়নি কারণ তারা নিজেরাই নিতে আগ্রহী নয়। তাদের প্রতিবেশী নারী সদস্যরা তাদের উত্তরাধিকারী সম্পত্তি নেওয়ার পর আর কখনও বাপের বাড়িতে আসতে পারেনি; এই আতঙ্ক হয়তোবা তাদের মনে কাজ করছে।[১৭] মীরাসী সম্পত্তি নেওয়ার কারণে বোনদের সাথে ভাইয়েরা আর সম্পর্ক রাখে না। ফলে তারা আসতে পারে না বা তাদের আর সম্পত্তি নেওয়ার পর বাপের বাড়ি আসা হয় না। এ জন্য নারীদের মাঝে এক ধরণের ভয় কাজ করে; ফলশ্রুতিতে নিজেদের অধিকার ও সম্পত্তির হিস্যার দাবী না করেই কন্যা সন্তান মারা যায়। হকদারদের মৃত্যুর পর তাদের সন্তানদের কোন অভাবে বা মৃত ব্যক্তির পুত্রদের কোন প্রয়োজনে সম্পত্তির কিছু অংশ বা তার সামান্য মূল্য নারীর বংশধরদের মাঝে বণ্টিত হয়।

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[১৪] কে আই আই- ০৩, প্রফেসর ড. মো: ইকবাল হোসেন, দাওয়া এন্ড ইসলামিক স্টাডিজ বিভাগ, ইসলামী বিশ্ববিদ্যালয়, কুষ্টিয়া। সাক্ষাৎকারের তারিখ- ১০.১০.২০২০।

[১৫] কে আই আই- ১৪, নাসিমা আক্তার জলি, সেক্রেটারী, বাংলাদেশ গার্ল চাইল্ড এডভোকেসী ফোরাম, ঢাকা।

[১৬] ইনডেপ্থ ইন্টারভিউ- ০১, জনাব দুলাল শেখ (৪৮), গ্রাম: রশিদপূর, উপজেলা: সালঙ্গা, জেলা: সিরাজগঞ্জ। তারিখ ১৮.১১.২০২০।

[১৭] এফ জি ডি- ০৩।

বাংলাদেশের গ্রামীণ কর্মজীবি নারীদের অধিকার ও সচেতনতা নিয়ে এক গবেষণায় জুলিয়া মঈন দেখিয়েছেন, কর্মজীবি নারীদের মধ্যে মাত্র ১৮% উত্তরাধিকার সূত্রে সম্পত্তি পেয়েছে এবং এদের মধ্যে কম সংখ্যকই (৭.৩৬%) তাদের প্রাপ্ত সম্পত্তিতে নিজেদের নিয়ন্ত্রণ প্রতিষ্ঠা করতে সক্ষম হয়েছে। বাকী ১১.৫৮% তাদের প্রাপ্ত সম্পত্তি তাদের বাবা, ভাই অথবা স্বামী এমনকি মেয়ের জামাই এর তত্ত্বাবধানে রেখেছে। কারণ হিসেবে জানা গেছে শুধুমাত্র তাদের সাথে সুসম্পর্ক বজায় রাখতে, প্রয়োজনের সময় তাদের আর্থিক সাহায্য পেতে।[১৮] কোনো অঞ্চলে আবার কন্যাসন্তানদের বঞ্চিত করা হয় ভিন্ন কৌশলের মাধ্যমে। এ ক্ষেত্রে উত্তরাধিকার সম্পত্তি হস্তান্তর না করে নামেমাত্র মূল্য হিসেবে কিছু টাকা দিয়ে বিদায় করে দেওয়া হয় নারীদের।[১৯] যা সম্পূর্ণরূপে অন্যায় এবং ইসলামী নীতি ও আদর্শবিরোধী কাজ। ড. আবুল বারকাত Accessing Inheritance Law and Their Impact on Rural Women in Bangladesh' শীর্ষক এক গবেষণা প্রতিবেদনে মুসলিম গ্রামীণ নারীর মধ্যে মাত্র ৪৩ দশমিক ২ শতাংশ নারী উত্তরাধিকার সম্পত্তির ভাগ পাওয়ার কথা ফুটে উঠে।[২০]

বাংলাদেশে বর্তমানে নারীদের শিক্ষার হার বাড়ার ফলে অধিকার সচেতনতার হারও আগের তুলনায় অনেকগুন বেড়েছে। শহরে এবং শিক্ষিত পরিমণ্ডলে উত্তরাধিকার সম্পত্তি লাভের সচেতনতায় বর্তমানে কন্যা সন্তান অনেক এগিয়ে আছে। পক্ষান্তরে গ্রামীণ জীবনে এ সচেতনতা এখনো সে ভাবে তৈরী হয়নি। ফলে মীরাসী সম্পত্তির হিস্যা লাভের অধিকার যে কন্যা সন্তানের জন্মগত অধিকার; এ বোধ, চেতনা ও শক্তিশালী বিশ্বাসই কন্যা সন্তানের মাঝে আদৌ গড়ে উঠেনি। ফলে সে নিজের অধিকার বাস্তবায়নে অনেকটা ব্যর্থ হচ্ছে। হারুন ইসহাকের বক্তব্য হল,

> মীরাসী সম্পত্তির ১৬ আনাই কন্যা সন্তান তাদের প্রাপ্য উত্তরাধিকার থেকে *মাহরুম* হচ্ছে। দয়া করে, *নামকে ওয়াস্তে* কেউ কেউ কিছু দেয়। মহিলা শক্ত হলে বা ক্ষমতা থাকলে আদায় করে নিতে পারে। অভিভাবকেরা চাপের মুখে কিছু দেয়। তাও ডাকাতি করে নেওয়ার মত অবস্থা। বুজুর্গ, বড়-ছোট ও শিক্ষিত-অশিক্ষিত কেউই প্রকৃত পক্ষে উত্তরাধিকার সম্পত্তি ঠিকভাবে মেয়েদের দেয়না; দিতে চায়না। আর মেয়েরাও অধিকার সচেতন না।[২১]

বাংলাদেশের সামগ্রিক চিত্র হলো– কন্যা সন্তানকে তার ন্যায্য মীরাসী অংশ প্রদানে সাধারন লোকদের মাঝে এখনো তেমন কোন আগ্রহ ও সচেতনতা তৈরা হয়নি। তবে ইদানিং শিক্ষিত

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[১৮] জুলিয়া মইন, *বাংলাদেশে গ্রামীন কর্মজীবি নারীদের অধিকার ও সচেতনতা*, ইনস্টিটিউট অব বাংলাদেশ স্টাডিজ জার্ণাল, সংখ্যা, ৭ (১৪০৬ বঙ্গাব্দ), পৃ. ১০২।

[১৯] প্রাপ্য সম্পত্তি থেকেও বঞ্চিত নারীরা, http://www.dailyislambd.com, Accessed on July 12, 2019.

[২০] https://samakal.com/todays-print-edition/tp, Accessed on July 12, 2019.

[২১] কে আই আই- ০৪, শায়েখ মাওলানা হারুন ইসহাক, পরিচালক, জামিয়াতুল হুদা, মহিপাল, ফেনী।সাক্ষাৎকারের তারিখ, ১৫.১০.২০।

সমাজে কিছুটা পরিলক্ষিত হচ্ছে; তবে তা তুলনামূলকভাবে খুবই নগণ্য।[২২] আমাদের দেশে নারীদের সম্পত্তি দেওয়ার ব্যাপারে সাধারন মানুষের কোন আগ্রহ নেই বললেই চলে।[২৩] সম্পত্তি না দেওয়ার প্রবণতা বেশি; 'অংশ ধ্বংস আনে'–গ্রামীণ জীবনের কিছু কিছু মানুষএখনো এ বিশ্বাস করে। এই জন্য সাধারন মানুষ মনে করে অংশ আনা যাবে না; নিজেদের মীরাসী সম্পত্তির হিস্যা আনতে ভয় পায় নারীরা। এতে যদি ভাই-বোনের সম্পর্ক খারাপ হয়! আনলে যদি ক্ষতি হয়? আবার ভাইয়েরা সম্পত্তি দিতেও চায় না। ইসলামের অন্যতম গুরুত্বপূর্ণ বিধান হওয়া সত্ত্বেও মীরাসী সম্পত্তির বণ্টন একটি গুরুত্বহীন ব্যাপার হয়ে দাঁড়িয়েছে আমাদের সমাজে; সকলে এ ব্যাপারে উদাসীন।[২৪] আ. খ. ম আবু বকর সিদ্দীক বলেন,

> বাংলাদেশে মীরাসী সম্পত্তিতে কন্যা সন্তানের নিজের অধিকার প্রতিষ্ঠার চিত্র হতাশাজনক। পিতা-মাতার উত্তরাধিকার সম্পত্তিতেও তাদের ভোগ দখলের চিত্র সন্তোষজনক নয়। পিতারা তাদের বঞ্চিত করে; আবার কন্যারা ইচ্ছা করে নিজেরাও ভাইদের নিজের অংশ দিয়ে আসে।[২৫]

উত্তরাধিকার সম্পত্তিতে কন্যাদের অধিকার প্রসঙ্গে জনাব আব্দুল্লাহ'র বক্তব্য হলো– 'মেয়েরা কিছু সম্পত্তি নেয়; তাদেরকে কিছু দিতে হয়। বাকী অংশ তারা তাদের ভাইদের জন্য দিয়ে যায়।'[২৬] এ বক্তব্যে উত্তরাধিকার আইনে নারীর সম্পত্তি প্রাপ্তির হতাশাজনক অবস্থার প্রকাশ ঘটেছে। মূলত উত্তরাধিকার সম্পত্তিতে পুত্রের মতো নারীর অধিকার প্রতিষ্ঠা এখনো হয়নি। নিজের প্রাপ্য অংশের উপর নিজের মালিকানা প্রতিষ্ঠা ও ভোগ দখলের সক্ষমতা অর্জনে কন্যা সন্তান এখনো অনেক পিছিয়ে আছে। অধিকাংশ ক্ষেত্রে কন্যা সন্তান সংখ্যায় বেশি ও পুত্র সন্তান কম হলে অভিভাবকরা বিশেষ করে বাবা তার মৃত্যুর পর পুত্রের সম্পত্তির হিস্যা নিয়ে উদ্বিগ্ন থাকেন। পুত্রকে কিভাবে বেশি দেওয়া যায় এ নিয়ে বিভিন্ন অপকৌশল গ্রহণ করে থাকেন। ইসলামী উত্তরাধিকার আইন অনুযায়ী মৃতের সকল সম্পদ ঠিকভাবে হিসেব করে হকদারদের মাঝে যথাযথ উপায়ে প্রদান করাই ইসলামী শরীয়াতের অত্যন্ত গুরুত্বপূর্ণ নির্দেশনা। বিশেষ কোন সন্তানের উপর বেশি ভালবাসায় সম্পত্তি ঠিকভাবে বণ্টনের ক্ষেত্রে কোনভাবেই এ নীতির ব্যত্যয় ঘটবেনা। একজনের প্রতি বেশি ভালবাসার কারনে কুরআনিক আইন অনুযায়ী মীরাসী সম্পত্তি বণ্টনের বিচিত্র অনুশীলনের কথা ধর্মীয়ভাবে কোথাও বলা

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[২২] কে আই আই-৬, সেলিনা হোসেন, বিশিষ্ট লেখক ও গবেষক, ঢাকা। সাক্ষাৎকার গ্রহণের তারিখ, ১৪,১০,২০।

[২৩] কে আই আই- ০১, ড. মাঞ্জুরে ইলাহী, সহযোগী অধ্যাপক, জাতীয় বিশ্ববিদ্যালয়, গাজীপুর। সাক্ষাৎকারের তারিখ- ১১.১০.২০২০।

[২৪] এফ জি ডি- ০১।

[২৫] কে আই আই- ৯, আ. খ. ম আবু বকর সিদ্দীক, অধ্যক্ষ, দারুন্নাজাত সিদ্দীকিয়া কামিল মাদ্রাসা, ডেমরা, ঢাকা। সাক্ষাৎকার গ্রহণের তারিখ-১২.১১.২০২০

[২৬] ইনডেপ্থ ইন্টারভিউ- ০৩, জনাব মোঃ আব্দুল্লাহ (৬২), ব্যবসায়ী, গ্রাম: বড় দরগা, উপজেলা: পীরগঞ্জ, জেলা: রংপুর। তারিখ-৬.১১.২০২০।

নেই; বরং তা করতে রাসূল সাঃ কঠোরভাবে নিষেধ করেছেন।[২৭] অথচ বাংলাদেশের মুসলিম সমাজে বিচিত্র ও বহুমাত্রিক পদ্ধতিতে পুত্র-কন্যার মীরাসী সম্পত্তি বণ্টিত হয়।

**কেস স্টাডিঃ ১ বাবা জীবদ্দশায় পুত্রকে অগ্রিম প্রদান।**

*নওগা জেলার পোরশা উপজেলার শাহ বংশের লোক হলেন সহকারী পুলিশ কমিশনার শাহ আব্দুর রহিম চৌধুরী। তাঁর বাবার পাকিস্তান আমলে ১০০ বিঘার উপরে সম্পত্তি ছিল। বিভিন্ন সরকারের জমিতে সিলিং প্রথা জারির ফলে কিছু সম্পদ স্থানীয় মাদ্রাসায় তাঁর বাবা দান করেন। তিনি বলেন, আমরা দুই ভাই ৫ বোন। আমি সকলের ছোট হওয়ায় বাবা আমাকে জীবদ্দশায় ১০ বিঘা সম্পত্তি কবলা করে দিয়ে যান। বাবার মৃত্যুর পর বাকী সম্পত্তি ফরায়েজ মত বণ্টন হয়। আমাকে বাবার সম্পত্তি বেশি দেওয়া নিয়ে আমার ভাই ও বোনদের মাঝে কোর ধরণের অসন্তুষ্টি ছিল না। বাবার সিদ্ধান্তের প্রতি সকলের ভক্তি ছিল।' অভাব অনটনে থাকলে বা সম্পত্তি বণ্টনে হিস্যা কম পড়লে এসব নিয়ে কথা বলতো হয়ত কেউ কেউ। কেন তাঁর বাবা অগ্রিম তাঁকে সম্পত্তি ১০ বিঘা বেশি দিল?– এ প্রশ্নের জবাবে তিনি বলেন, 'আমি বাবার ৬০ বছর বয়সে জন্ম গ্রহণ করেছি। তাই তিনি খুব খুশি হয়ে এ কাজ করেছেন।' সাক্ষাৎকার গ্রহণে– গবেষক, পোরশা, নওগা, ২০ অক্টোবর, ২০২০।*

ড. আ.ফ.ম খালেদ হোসেন বলেন,

> আমার পরিচিত এক লোক তার নিজের বাড়ির জমি বিক্রি করে শহরে নিউমার্কেটে দুই ছেলের নামে দুইটি দোকান কিনেছে; মেয়েদের নামে কিছুই কিনে নি। লোকটি মারা গেলে সম্পত্তি নিয়ে ভাই-বোনদের মাঝে দ্বন্দ্ব শুরু হয়। ভাইয়েরা বলতে থাকে দোকান তাদের নামে কেনা হয়েছিল তাই এটিতে বোনরা অংশ পাবে না। আসলে উত্তরাধিকার সম্পত্তি থেকে নারীদের বঞ্চিত করার কতো ফন্দি ফিকির যে মানুষ করে![২৮]

জনাব এনামূল হক বলেন, আমার নানা ছোট হওয়ায় এবং তার বড় ভাইদের আগে মারা যাওয়ায় অর্ধেক সম্পত্তি বড় ভাইয়েরা নিয়ে গেছে। বাকী সম্পত্তির কিছু মা পেয়েছে। মায়ের জেঠাতো এক ভাই খালাকে বিয়ে করে বাকী অবশিষ্ট অংশটুকুও দখলে নিয়েছে।[২৯] পুত্র

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[২৭] নোমান বিন বশিরের স্ত্রী রাসূলের নিকট এসে তার স্বামী কর্তৃক গোলাম দানের বিষয়ে রাসূল সা. কে সাক্ষ্য থাকার প্রস্তাব করলে রাসূল বলেল, সে কি অন্য স্ত্রীদেরকেও গোলাম দিয়েছে? তার স্ত্রী বললেন, না। রাসূল সা. বললেন, না আমি এর সাক্ষ্য হবো না। তাকে বলো অন্য স্ত্রীদেরকেউ গোলাম দিতে। বুখারীর হাদীস। এ হাদীস থেকে বুঝা যায়, জীবদ্দশায় দান করলে সমান সমান হিসেব করে দিতে হয়।

[২৮] কে আই আই- ০৫, প্রফেসর ড. আ.ফ.ম খালেদ হোসেন, সাবেক বিভাগীয় প্রধান, ইসলামের ইতিহাস ও সংস্কৃতি বিভাগ, ওমর গণি কলেজ, চট্টগ্রাম ও মুহাদ্দীষ, জিরি মাদ্রাসা, চট্টগ্রাম।সাক্ষাৎকারের তারিখ-১৬.১০.২০২০।

[২৯] ইনডেপ্থ ইন্টাভিউ- ০২, জনাব ইনামুল হক, কাশিনগর ডিগ্রী কলেজ শিক্ষক, গ্রাম: পড়াগ্রাম, উপজেলা: চৌদ্দগ্রাম, জেলা: কুমিল্লা।সাক্ষাৎকার গ্রহণের তারিখ-১.১১.২০২০।

সন্তানের চেয়ে কন্যা সন্তানকে মীরাসী সম্পত্তি প্রদানে মানুষ বিভিন্নভাবে ঠকায় ও বঞ্চিত করে। মানুষ উত্তরাধিকার সম্পত্তি বণ্টনের সময় হিসেব যেভাবেই করুক; নারীকে অপেক্ষাকৃত নীরস বা নিম্ন মানের জমি প্রদানে পুরুষরা বেশি তৎপর থাকেন। এ প্রসঙ্গে জনাব বরকত করিম জানান–

> আমার স্ত্রী মীরাসী সম্পত্তি হিসেবে তার ভাইদের কাছ থেকে সামান্য কিছু জমি পেয়েছে এবং তাও অপেক্ষাকৃত দুর্বল ও অনুর্বর জমি; যেখানে ফসল হয়না বললেই চলে; ঐ জমিতে বালির পরিমাণ কিছুটা বেশি হওয়ায় অনেক খরচ করতে হয়। ফলে মাঝে মাঝে কোন চাষাবাদই করি না।[৩০]

সম্পত্তি বণ্টনে এমনভাবে মেয়েদের অংশ নির্ধারণ করা হয় যা বিক্রি হয়না; বা খুবই কম মূল্য হয়ে থাকে।[৩১] একমাত্র কন্যা সন্তান যখন উত্তরাধিকারী হয়ে থাকে তখন অধিকাংশ বাবা-মায়েরা তাদের অবর্তমানে সন্তানদের সম্পত্তি নিয়ে উদ্বিগ্ন থাকেন। বিদ্যমান মুসলিম উত্তরাধিকার আইন অনুযায়ী মৃতের ভাই-বোন সম্পত্তির কিছু অংশ পেয়ে যায়; তা থেকে রক্ষা পাওয়ার জন্য অভিভাবকরা কন্যা সন্তানদের নামে জীবদ্দশায় সম্পত্তি লিখে দেন। জীবদ্দশায় ব্যক্তির সম্পত্তি কাউকে প্রদানে আইনী কোন বাধা না থাকলেও বিষয়টি নিয়ে ইসলামিক স্কলারগনের মাঝে বিরোধপূর্ণ মতামত লক্ষ করা যায়। জীবদ্দশায় সম্পত্তি লিখে দেওয়া ঠিক হবে কিনা এ প্রসঙ্গে ড. আবু ইউসুফ খান মনে করেন–

> পিতা জীবদ্দশায় শুধু খরচ দিতে পারবে। কোনভাবেই সম্পদ বণ্টন করলে হবে না; আর পুত্র-কন্যার মাঝে সমান সমান দেওয়ার প্রশ্নই আসেনা; এটা কোনভাবেই জায়েয হবে না। কারণ সূরায় নিসায় ২:১ এর কথা সরাসরি বলা হয়েছে। পিতা সুস্থ অবস্থায় বণ্টন সংক্রান্ত নির্দেশনা দিতে পারবেন কিন্তু অসুস্থ অবস্থায় তা পারবে না; এভাবে নির্দেশনা দেওয়া ঠিকও হবে না। এতে মীরাসী আইনের ব্যত্যয় ঘটার সম্ভাবনা দেখা দিতে পারে।[৩২]

ড. মাঞ্জুরে ইলাহী বলেন, জীবদ্দশায় সন্তানদের মাঝে মীরাসী সম্পদ বণ্টন করা সম্পূর্ণরূপে হারাম। মীরাসী সম্পত্তি বণ্টনের প্রসঙ্গটি আসবে ব্যক্তির মৃত্যুর পর। এতে পিতা-মাতা অর্থনৈতিক নিরাপত্তাহীনতায় পড়ার সম্ভাবনা তৈরী হয়। তাই এ বণ্টন শরীয়াতের বরখেলাপ এবং তা পরিত্যাজ্য।[৩৩] আ. খ. ম আবুবকর সিদ্দীকের মতে–

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[৩০] ইনডেপ্থ ইন্টারভিউ- ০৪, জনাব বরকত করিম (৪৮), কৃষক, উপজেলা: চিলমারী, জেলা: কুড়িগ্রাম।সাক্ষাৎকার গ্রহণের তারিখ-৮.১১.২০২০।

[৩১] কে আই আই- ০৭, মাওলানা আলআমিন, ইমাম ও ইসলামিক স্কলার ।সাক্ষাৎকার গ্রহণের তারিখ-১৩.১০.২০২০।

[৩২] কে আই আই- ১০, ড. আবু ইউসুফ খান, অধ্যক্ষ, তামিরুল মিল্লাত কামিল মাদ্রাসা। সাক্ষাৎকার গ্রহণের তারিখ-১১.১০.২০২০।

[৩৩] কে আই আই- ০১, ড. মাঞ্জুরে ইলাহী, সহযোগী অধ্যাপক, জাতীয় বিশ্ববিদ্যালয়, গাজীপুর। সাক্ষাৎকার গ্রহণের তারিখ- ১১.১০.২০২০।

> আমাদের সমাজে শুধু কন্যা সন্তান থাকাবস্থায় মৃতের ভাতিজাদের বঞ্চিত করার প্রবণতা দেখা যায় বেশি। কন্যাদের সকল সম্পত্তি লিখে দেওয়া হয়; যাতে মৃতের ভাই বা ভাতিজারা কোন ভাবেই সম্পত্তি না পায়; এটা ঠিক নয়। আবার ভাতিজারা *ইসলামী শরীয়া* অনুযায়ী কিছু প্রাপ্য হওয়ার ক্ষেত্রে মৃত ব্যক্তি যদি তার কন্যাদের বা নিজের স্ত্রীকে জীবদ্দশায় বিশেষ বিবেচনায় কিছু অংশ বেশি দেওয়ার নির্দেশনা প্রদান করে; এ ক্ষেত্রেও ভাতিজাদের ক্ষুব্ধ হওয়া উচিত নয়।[৩৪]

ড. আবু বকর মোঃ জাকারিয়া[৩৫] বলেন, জীবদ্দশায় পিতা-মাতার সন্তানদের মাঝে সম্পদ বণ্টন করা হারাম। তিনি আলকুরআনের সুরা বাক্বারার 'নিজেরা নিজেদেরকে ধ্বংসের মুখে ঠেলে দিওনা'[৩৬] আয়াতকে প্রমাণ হিসেবে উল্লেখ করেন। উত্তরাধিকার সম্পত্তি বণ্টনে ঠিকভাবে ন্যায্যতা ও সমতা রক্ষা হয় না। অভিভাবকরা নারীদের বসতভিটায় তাদের ন্যায্য হিস্যা দিতে চায়না। মনে করা হয় বাড়ির জায়গা ছেলেদের হক বেশি। আবার অনেক সময় মেয়েরা নিজেরাও বাড়ির জায়গা নিতে চায় না; ভাইদের দিয়ে দেয়।[৩৭]

উত্তরাধিকার সম্পত্তি বণ্টনের ক্ষেত্রে বাংলাদেশের মানুষের ইসলামী নির্দেশনার চেয়ে নিজস্ব চিন্ত-চেতনার প্রতিফলন বেশি ঘটে থাকে। সে বিবেচনায় কন্যা সন্তানের চেয়ে পুত্র সন্তান অভিভাবকদের কাছে থাকে এবং সংসারের দায়িত্ব পালন করে; সে জন্য সমাজ জীবনে মীরাসী সম্পত্তি পুত্রকে বেশি দেওয়ার রেওয়াজ রয়েছে। জনাব মোঃ এনাম বলেন, আমার বাবা আমার এক সৎ ভাইকে তিন কানির মত সম্পত্তি বেশি দিয়েছেন; তিনি এক সময়ে সংসারে টাকা দিয়েছেন এ বিবেচনা করে।[৩৮] জনাব আব্দুল্লার[৩৯] বক্তব্য হলো- 'বাড়িতে মেয়েরা সম্পত্তি নেয় না। তারাতো বাড়িতে পরে আবার বেড়াতে আসবে। 'সাধারনত বসতভিটা ও তৎসংলগ্ন আঙ্গিনা দেওয়া হয় না। ইদানীং আবার কেউ কেউ জমির দাম বাড়ায় ভিটা ও বসত বাড়িরও হক চেয়ে বসছে; না দিলে মামলা পর্যন্ত গড়াচ্ছে। ফলে ভাই-বোনের সম্পর্ক খারাপ হচ্ছে।[৪০] বাস্তবিক কথা হলো এ ধরনের কোন নির্দেশনা ইসলামী উত্তরাধিকার আইনে নেই যে বাড়ি পুত্র সন্তানের জন্য; কন্যাসন্তান এখানে সম্পত্তির অংশ পাবে না। বাংলাদেশের সামগ্রিক চিত্র হলো উত্তরাধিকার সম্পত্তি বণ্টন ব্যবস্থাপনায়

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[৩৪] কে আই, আই- ০৯, আ. খ. ম আবু বকর সিদ্দীক, অধ্যক্ষ, দারুন্নাজাত সিদ্দীকিয়া কামিল মাদ্রাসা, ডেমরা, ঢাকা। সাক্ষাৎকার গ্রহণের তারিখ-১২.১১.২০২০

[৩৫] কে আই, আই- ০২, প্রফেসর ড. আবু বকর মোঃ জাকারিয়া, ফিকহ ও লিগ্যাল স্টাডিজ, ইসলামী বিশ্ববিদ্যালয়, কুষ্টিয়া। সাক্ষাৎকার গ্রহণের তারিখ- ১১.১০.২০২০।

[৩৬] **وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ ۛ وَأَحْسِنُوا ۛ إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ** 'তবে নিজের জীবনকে ধ্বংসের সম্মুখীন করো না। আর মানুষের প্রতি অনুগ্রহ কর। আল্লাহ অনুগ্রহকারীদেরকে ভালবাসেন। 'আলকুরআন, ২:১৯৫।

[৩৭] কে আই আই- ০৮, আল্লামা মাওলানা শামসুদ্দীন জিয়া, সদস্য, শরীয়া বোর্ড, ইসলামী ব্যাংক বাংলাদেশ লিমিটেড ও শাইখুল হাদীস, জামেয়া ইসলামিয়া, পটিয়া, চট্টগ্রাম। সাক্ষাৎকার গ্রহণের তারিখ-১৭.১০.২০২০।

[৩৮] এফ জি ডি- ০২।

[৩৯] ইনডেপ্থ ইন্টারভিউ- ০৩, জনাব মোঃ আব্দুল্লাহ (৬২), ব্যবসায়ী, গ্রাম: বড় দরগা, উপজেলা: পীরগঞ্জ, জেলা: রংপুর। সাক্ষাৎকার গ্রহণের তারিখ-৬.১১.২০২০।

[৪০] এফ জি ডি- ০৪।

অভিভাবকরা তাদের কন্যা সন্তানের চেয়ে পুত্র সন্তানকে মীরাসী সম্পত্তি কুরআনিক বণ্টনেরও বেশি দিয়ে থাকে। পুত্র সন্তান বংশ ধরে রাখবে বা পুত্র সন্তানের মাঝে তারা নির্ভরশীলতা খুঁজে পায়। অধিকাংশ মানুষের ধারনা হলো পুত্র পিতা-মাতাকে বৃদ্ধ বয়সে দেখাশুনা করবে, সেবা-যত্ন করবে; তখন পুত্র সন্তানই পিতা-মাতার একমাত্র আশ্রয়স্থল হবে। যেমন রাজশাহী বুধপাড়ার একটি ঘটনা– মা সন্তানকে সম্পত্তি দান করে দেওয়ার পর মা নিজেই দানপত্র বাতিল চেয়ে আদালতে পুনরায় সম্পত্তি ফেরত নেওয়ার জন্য মামলা করেন। এর কারণ ও নেপথ্যে কী ঘটনা আছে এ প্রশ্নের উত্তরে এডভোকেট বলেন-'কন্যাদের না দিয়ে মা পুত্রকে পুরো সম্পত্তি দানপত্র করে দিয়েছেন; বৃদ্ধ বয়সে যেন পুত্র মায়ের ভালোভাবে দেখা শোনা করে। কিন্তু জমি দান করার দুই বছরের মাথায় পুত্রের মনোভাব পরিবর্তন হয়ে যায়। এখন সে আর মাকে খাওয়াচ্ছে না দেখে মা আদালতে আসতে বাধ্য হয়েছেন। অবশেষে মা মামলায় জিতে সম্পদের মালিক হয়ে বাড়ি ফিরে গেছেন।'[৪১] এ মামলায় এডভোকেটের নৈতিক সমর্থন মানবিক কারণে নিজ মক্কেলের চেয়ে মায়ের পক্ষেই বেশী ছিল বলে জানান।

## ৬. বাংলাদেশে পুত্র-কন্যা সন্তানের মীরাসী সম্পত্তির অংশ প্রাপ্তি

বাংলাদেশের প্রেক্ষাপটে বিভিন্ন কারনে পুত্র-কন্যা সন্তানের উত্তরাধিকার সম্পত্তি বণ্টনে ও নির্ধারিত অংশ প্রাপ্তিতে অনিয়ম রয়েছে। মীরাসী সম্পত্তির ইসলামী শরীয়া নির্ধরিত অংশের চেয়ে কন্যা সন্তান কম পেয়ে থাকে এবং ক্ষেত্র বিশেষে ন্যায্য অধিকার থেকে পুরোই বঞ্চিত হয়। পিতা-মাতার সম্পত্তি বণ্টন প্রক্রিয়ায় পুত্র ও কন্যা সন্তানের মীরাসী হিস্যার শরয়ী বণ্টনের চেয়ে বেশী বা কম পাওয়ার ধরণ ও কারণ আলোচনা করা হলো।

### *৬.১ সম্পদ বণ্টনে সামাজিক রীতি-নীতির প্রভাব*

বাংলাদেশে বিভিন্ন প্রক্রিয়ায় উত্তরাধিকার সম্পত্তি বণ্টিত হয়। মানুষ নিজের মতামতকে ইসলামী শরীয়ার উপরে স্থান দেয়। পিতা-মাতার মীরাসী সম্পত্তির ইসলামে বর্ণিত সুনির্দিষ্ট অংশ পুত্র সন্তানের চেয়ে কন্যা সন্তান তুলনামূলকভাবে কম পাওয়ার অন্যতম কারণ সামাজিক রীতি-নীতির প্রভাব। শত বছর থেকে সম্পত্তিতে নারীর অধিকার প্রতিষ্ঠিত না হওয়া এবং অর্থনৈতিক ব্যবস্থাপনায় সিদ্ধান্ত গ্রহনে নারীর অনুপস্থিতি সামাজিকভাবে কন্যা সন্তানকেও সম্পদে নিয়ন্ত্রণ ও অধিকার প্রতিষ্ঠা করতে দেয়নি। ঐতিহ্যগতভাবে যে মানুষ যে সমাজে বেড়ে উঠে, সে সমাজের রীতি-নীতি, আচার-অনুষ্ঠান, নিয়ম ও সংস্কৃতিকে ধারণ করে সে মানুষ জীবন পরিচালনা করে। শিক্ষার কারণে কিছুটা পরিবর্তন-পরিবর্ধন সাধন হলেও মজ্জাগত স্বভাবের বাহিরে সম্পূর্ণরূপে সে বেরিয়ে আসতে পারে না। সমাজ, আত্মীয় স্বজন ও প্রতিবেশীদের ঐতিহ্যগত নিয়ম চর্চার ধারাবাহিকতায় বাংলাদেশের কন্যা সন্তান সম্পত্তির নির্ধারিত হিস্যা যথাযথভাবে পান না। নিম্নের কেইস স্টাডিতে বিষয়টা ফুটে উঠেছে।

[৪১] কে আই আই- ১২, এডভোকেট মোঃ খোরশেদ আলম সিদ্দীকী, সিনিয়র আইনজীবি, রাজশাহী কোর্ট, রাজশাহী। সাক্ষাৎকার গ্রহণের তারিখ, ৩০.১০.২০২০।

**কেইস স্টাডিঃ ২ ভাইয়েরা ঐতিহ্য হিসেবে বোনদের বঞ্চিত করে সম্পদ কবলা করে নিয়েছে।**

*বাবা দুই বিয়ে করেন। প্রথম ঘরে আমার এক ভাই ও দুই বোন হওয়ার পর মা মারা গেলে তিনি আবার বিয়ে করেন এবং আমাদের দুই ভাই ও চারবোনের জন্ম হয়। আগের ঘরের বড় ভাই যখন মারা যান তখন পরের ঘরের আমার ছোট ভাইটির বয়স ছিল মাত্র ২ বছর। বাবা তার শেষ জীবনে এ ছোট ভাইসহ মোট তিন ভাইয়ের জন্য তার মোট সম্পত্তির চার ভাগের তিন ভাগ কবলা করে দিয়ে যান। বাবার মৃত্যু হলে অবশিষ্ট চার ভাগের এক ভাগ সম্পত্তি আবার ভাই ও ছয় বোনের মাঝে বণ্টিত হয়। এখানে বোনরা তাদের হিস্যা অনুযায়ী সম্পত্তি পায়। আমাদের এলাকায় এ রেওয়াজ চালু আছে। যেমন আমার এক ভাইয়ের শ্বশুরের তিন ছেলে তিন মেয়ে। গত মাসে তিনি শুধু ছেলেদের নামে সম্পত্তি কবলা করে দিয়ে দিয়েছেন। এটা তিনি না জেনে করেছেন এমনটা নয়; তিনি কিন্তু স্থানীয় প্রাইমারী স্কুলের শিক্ষক। বাংলাদেশে শতকরা ১% কন্যারাও ইসলামী শরীয়া অনুযায়ী সম্পত্তি পায় না। আমাদের এখানে অহরহ ঘরে ঘরে এ ধরনের ঘটনা আছে। ঐতিহ্যগতভাবে আগে থেকেই ছেলেদেরকে সম্পত্তি প্রদানের রীতি চলে আসছে। আমরা তো পরের বণ্টনে কিছু দিয়েছি। অন্য প্রভাবশালী হলে একটুও দিতো না। মোঃ রফিকুল ইসলাম (৬০), ওলিপুর, কুড়িগ্রাম। গবেষকের সাথে সাক্ষাৎকার, ০৭ অক্টোবর, ২০২০।*

### *৬.২ অভিভাবকের সম্মতি না নিয়ে কন্যাদের বিয়ে করার ফলে পুত্রের চেয়ে কন্যাদের সম্পত্তি কম পাওয়া*

পুত্রের মতো কন্যা সন্তান পিতা-মাতার মীরাসী সম্পত্তির হিস্যা পাওয়া তার জন্মগত ও আইনগত অধিকার; এ অধিকারের সাথে তার বিয়ের অনুমতি নেওয়া বা অভিভাবকের অনুমতি নিয়ে বিয়ে করা বা না করা সম্পর্কযুক্ত নয়। গ্রামীণ জীবনে অধিকাংশ ক্ষেত্রে কন্যা সন্তান পালিয়ে বিয়ে করলে অভিভাবকরা প্রাথমিক পর্যায়ে অনেক কষ্ট পেয়ে থাকেন এবং অসন্তুষ্ট থাকেন। ধীরে ধীরে কারো সম্পর্ক স্বাভাবিক হয়ে যায়; কারো সম্পর্ক আর স্বাভাবিক হয় না; বরং চিরতরে খারাপ হয়ে যায়। ব্যক্তিগত পছন্দে বিয়ে করা এবং বিয়ের অনুমতির সাথে উত্তরাধিকার সম্পত্তিরমূলে সম্পত্তি প্রাপ্তি কোনভাবেই সম্পর্কিত না হলেও আমাদের দেশের কিছু কিছু স্থানে দেখা যায় যে, পালিয়ে বা অভিভাবকের অনুমতি ব্যতীত বিয়ে করার কারনটি কন্যা সন্তান কর্তৃক উত্তরাধিকার মূলে সম্পত্তি প্রাপ্তির একমাত্র প্রধান অন্তরায়।

### *৬.৩ পুরুষের সম্পত্তি প্রদানে গড়িমসি*

বাংলাদেশে মীরাসী সম্পত্তি যথাযথভাবে ও যথাসময়ে বণ্টনের ক্ষেত্রে সম্পদের সাথে সংশিষ্ট পুরুষ সদস্যদের অনীহা লক্ষ্য করা যায়। মৃতের দাফন, ঋন পরিশোধ ও ওয়াসিয়াত (থাকলে) পালনের পরপরই ইসলামী উত্তরাধিকার আইন অনুযায়ী সম্পত্তি বণ্টন করা ইসলামী শরীয়াতের বিধান। বাংলাদেশের সমাজ ব্যবস্থায় মৃতের সম্পত্তি ঠিক সময় বণ্টিত

না হয়ে বছরের পর বছর পুরুষ সদস্যদের নিয়ন্ত্রণে থাকে। তারা দীর্ঘ সময় ধরে সম্পত্তির সুবিধা গ্রহণ করে। ফলে সম্পত্তি বণ্টনের দীর্ঘসূত্রিতা ও প্রাপকদের ঠিকভাবে প্রদানে মনোজগতে এক ধরনের নেতিবাচক মনোভাব তৈরী হয়। সম্পত্তি বণ্টন ব্যবস্থাপনায় অবহেলা ও গড়িমসি করার পাশাপাশি সম্পত্তিকে নিজের মনে করতে থাকে। এ ভাবে কন্যা সন্তানকে সম্পত্তির সুবিধা গ্রহণ থেকে বঞ্চিত করে। 'আলকুরআন, আলহাদীস, ইসলামী শরীয়া, মানবতা ও ইনসাফ– এক জিনিস মানুষের মাঝে এ ক্ষেত্রে দেখা যায় না বলেলই চলে।'[৪২] ভাইয়েরা বাপের ভিটামাটি দিতে চায় না। বাবা মরে যাওয়ার পর খাওয়াইছে-পড়াইছে, মেলা টাকা যৌতুক দিয়ে বিয়ে দিছে– এসব বলে।[৪৩] জনাব আবু ইউসুফ খানের স্ত্রী পিতার-মাতার অংশ থেকে মাত্র পাঁচ লাখ টাকা পেয়েছেন; ভাই এ টাকা দিয়ে পুরো সম্পদ তার চার বোন থেকে নিয়ে নিয়েছে। মুখে মুখে ভাই তাদেরকে বলে, যা তোমরা পাইবা ; নিবা, অসুবিধা নেই। আবার পিছনে পিছনে বলে বেড়ায়; বোনরা কি সম্পদ সব নেয় নাকি?[৪৪] মোট কথা হলো, সমাজের সর্বত্র সবধরনের লোকদের মাঝে ওয়ারিশদের সম্পত্তি প্রদানে গড়িমসি করার প্রবণতা রয়েছে।

ইসলাম ধর্মের সর্বশেষ প্রত্যাদেশ হিসেবে মহানবী সা. এর কাছে আলকুরআন অবতীর্ণ হয়। মুসলিমদের জীবন পরিচালনায় কুরআনিক বিধানের বাধ্যবাধকতা রয়েছে। এর প্রতিটি বিধান শাশ্বত চিরন্তর ও পরিপূর্ণ।[৪৫] আলকুরআনের মৌলিক বিধানে কোন ধরনের পরিবর্তন করা যায় না।[৪৬] ইসলামী উত্তরাধিকার আইনে পুত্র-কন্যা সন্তানের বর্ণিত সম্পত্তির অংশ প্রদানে মানুষ ধর্মীয় অনুশাসন মানে না। বরং নিজেদের খেয়াল-খুশি অনুযায়ী মীরাসী সম্পত্তি বণ্টন করে থাকে। যেমন জনাব মোঃ জহুরুল হকের বোনরা পিতা-মাতার সব সম্পদ দুই ভাইয়ের নামে লিখে দিয়েছে। কিছুই তারা নেয়নি। তার দুই ভাই সাত বোনকে দেখাশুনা করে। তাদের না দাবী দেওয়া উত্তরাধিকার সম্পদের চেয়েও বেশি পরিমাণ তারা বোনদের দিয়ে থাকেন।[৪৭] বোনদের জন্য বেশী কিছু দান করার সাথে কুরআনিক বণ্টন ব্যবস্থাপনার কোন সম্পর্ক না থাকলেও মানুষ মীরাসী সম্পত্তি বণ্টনের ক্ষেত্রে নিজের মতামতকে বা খেয়াল-খুশিকে প্রাধান্য দেয়। এ প্রসঙ্গে মাওলানা তারেক মনোওয়ার বলেন,মানুষ নিজের ইচ্ছা ও খেয়ালখুশি মতো উত্তরাধিকার সম্পত্তি বণ্টন করে থাকে। ভাইদের ধারণা হলো– মেয়েরা

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[৪২] কে আই আই- ০৭, মাওলানা কারী মো: আল আমীন, বিশিষ্ট ইসলামিক স্কলার ও মিডিয়া ব্যক্তিত্ব। সাক্ষাৎকার গ্রহণের তারিখ-১৩.১০.২০২০।

[৪৩] এফ জি ডি- ০৪।

[৪৪] কে আই আই-১০, ড. আবু ইউসুফ খান, অধ্যক্ষ, তামিরুল মিল্লাত কামিল মাদ্রাসা। সাক্ষাৎকার গ্রহণের তারিখ-১১.১০.২০২০।

[৪৫] আলকুরআন- ১৬:৮৯।

[৪৬] আলকুরআন- ৪৮:২৩; ৩৩:৬২;৩৩:৩৮; ৪৮:২৩।

[৪৭] কে আই আই- ১১, মো: জহুরুল ইসলাম, সাবেক ঢাকা মহানগর মুখ্য হাকিম, ঢাকা (২১ আগস্ট গ্রেনেড হামলা মামলা ও বিডিআর হত্যা মামলার বিচারক)। সাক্ষাৎকার গ্রহণের তারিখ, ১৩.১০.২০২০।

জায়গা দিয়ে করবে কি? মূলত ইসলামী কোন ধ্যান-ধারণা এ ক্ষেত্রে কারো মাঝে নেই।[৪৮] কন্যার উত্তরাধিকার সম্পত্তি বণ্টনে পুরুষদের নিজেদের ইচ্ছা ও খেয়াল-খুশির চর্চা বাংলাদেশে সীমাহীনভাবে রয়েছে।

### *৬.৪ যৌতুকের প্রভাব*

বাংলাদেশের সমাজ ব্যবস্থায় এখনো যৌতুক প্রথা বিদ্যমান রয়েছে। সমাজে বিদ্যমান যৌতুক প্রথাও কন্যা সন্তানের মীরাসী সম্পত্তির ন্যায্য অংশ প্রাপ্তির অন্তরায়।[৪৯] বোনদের বিয়ে দেওয়ার সময় যৌতুক হিসেবে অনেক কিছু দিতে হয়; অনেক টাকা খরচের ব্যাপার থাকে। ফলশ্রুতিতে উত্তরাধিকার সম্পত্তি বণ্টনের প্রসঙ্গ আসলে তখন অতীতের সেই যৌতুক বাবৎ খরচের হিসাব সামনে আসে। ফলে কন্যারা তাদের ন্যায্য অংশের অধিকার থেকে সরে আসতে বাধ্য হয়। জনাব বরকত করিমের বক্তব্য হলো– যৌতুক না থাকলে মেয়েরা আরো বেশি হিস্যা উত্তরাধিকার সম্পত্তি থেকে পেত। কিন্তু যৌতুক ছাড়া কি বিয়ে হয়?'[৫০] কোন মেয়েকে বিয়ের সময় যৌতুক হিসেবে সাত বা আট লাখ টাকা দিলে আবার উত্তরাধিকার সম্পত্তি বণ্টনে কি করে সে তার নির্ধারিত হিস্যার দাবী করবে? যৌতুক আমাদের এ দিনাজপুর এলাকায় একটা বড় ধরনের সমস্যা।[৫১] সমাজের নিম্ন শ্রেণি ও উচ্চমধ্য শ্রেণির সাথে সাথে কিছু কিছু শ্রেণির সন্তানদের বিয়েতে যৌতুকের চর্চা সীমাহীনভাবে লক্ষ করা যায়। ফলে কন্যা সন্তান কর্তৃক বিয়ে পরবর্তী পিতা-মাতার সম্পত্তির হিস্যা নেওয়ার প্রসঙ্গ আসলে নিজেই তার নির্ধরিত অংশের দাবী থেকে কখনো কখনো সরে আসে; আবার কখনো ভাইয়েরা তার মীরাসী সম্পত্তির হিসাবের সাথে তার বিয়ের সময় প্রদত্ত যৌতুকের খরচও সমন্বয় করে দেয়। যৌতুকের সাথে মীরাসী সম্পত্তির সমন্বয় বা যৌতুকের কারনে মীরাসী অংশ কম পাওয়ার রেওয়াজ সমাজের নিম্ন ও নিম্ন মধ্যবিত্ত শ্রেণিতে বেশী লক্ষ করা যায়। এ ক্ষেত্রে মীরাসী সম্পত্তি থেকে কখনও সামান্য কিছু পায়; আবার কখনও কিছুই পায় না।

### *৬.৫ ইসলামী উত্তরাধিকার আইনের গুরুত্ব অনুধাবনে ব্যর্থতা*

বাংলাদেশের সমাজ জীবনে মানুষের ধর্মচর্চার রেওয়াজ অনেকটা ভালভাবে থাকলেও জনসাধারনের মাঝে প্রাসঙ্গিক ইসলামী জ্ঞানের যথেষ্ট অভাব রয়েছে। সে হিসেবে ইসলামী উত্তরাধিকার আইনের জ্ঞানের অভাব আরো ব্যাপক ও বিস্তৃত। ইসলামী উত্তরাধিকার আইন অনুযায়ী সঠিকভাবে মীরাসী সম্পত্তি বণ্টনের বহুমাত্রিক ইতিবাচক প্রভাব যেমন রয়েছে

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[৪৮] কে আই আই- ১৩, মাওলানা তারেক মনোওয়ার, বিশিষ্ট ইসলামিক স্কলার ও মিডিয়া ব্যক্তিত্ব। সাক্ষাৎকার গ্রহণের তারিখ-১৩.১০.২০২০।

[৪৯] দৈনিক ইত্তেফাক, (২২ বছরেও সম্পত্তিতে নারীর সম-অধিকার প্রতিষ্ঠিত হয়নি), রবিবার, ২৭ ডিসেম্বর ২০২০।

[৫০] ইনডেপ্থ ইন্টারভিউ- ০৪, জনাব বরকত করিম (৪৮), কৃষক, উপজেলা: চিলমারী, জেলা: কুড়িগ্রাম। সাক্ষাৎকার গ্রহণের তারিখ-৮.১১.২০২০।

[৫১] এফ জি ডি- ০৪।

পাশাপাশি এই বিধানের গুরুত্ব অনুধাবনের ব্যর্থতাবোধের ফলে পরিবর্তিত সামাজিক অস্থিরতা ইসলামের বিভিন্ন অনুশাসনকে প্রশ্নবিদ্ধ করে তোলে। আইন সম্পর্কে ধারণা থাকলে অনেক মানুষের পক্ষেই সে অনুযায়ী বণ্টন ও প্রাপকের নিকট তার প্রাপ্য হিস্যা প্রদান সহজ হয়। যদিও সব মানুষকে আইন সম্পর্কে জ্ঞানলাভ জরুরী নয়, তারপরও ইসলামের মৌলিক বিধান হিসেবে সম্পত্তি বণ্টন সংক্রান্ত প্রয়োজনীয় জ্ঞান লাভ অত্যন্ত প্রয়োজন। কারন রাসূল সা. বিভিন্ন হাদীসে মীরাসের জ্ঞানার্জনের বাধ্যবাধকতাকে গুরুত্বের সাথে বর্ণনা করেছেন।[৫২] নিম্মের কেইস স্টাডি আইন সম্পর্কে সঠিক ধারণা থাকার গুরুত্বকেই তুলে ধরছে।

**কেইস স্টাডিঃ ৩ পিতা-মাতার সম্পত্তি নেওয়ার কন্যাদের আদৌ প্রয়োজন নেই।**

*পাবনা সুজানগরের পারুল অক্তার বিয়ে করে পঁয়ত্রিশ বছর নাটোরে আছেন। তিনি ২০১৫ সালে স্বামী মারা যাওয়ার পর থেকে তিন মেয়েকে নিয়ে বসবাস করছেন। তার মায়ের উত্তরাধিকার সম্পত্তি থেকে কিছুই পাননি। তার নানিও কিছুই পাননি। এ সম্পত্তির প্রতি তাদের কোন আগ্রহ নেই। তার বক্তব্য হলো মেয়েরা সম্পত্তি দিয়ে কী করবে? পিতা-মাতার সম্পত্তি মেয়েদের আনার কী দরকার? মেয়েরা পিতার সম্পত্তি সামান্য কিছু পায়; মায়েরটা মেয়েরা বেশি পায়। শুধু শুধু এ সকল সম্পত্তি নিয়ে ঝামেলা করার মেয়েদের কোন দরকার নেই। তার তিন মেয়ে সম্পত্তির বিদ্যমান মুসলিম উত্তরাধিকার আইন অনুযায়ী তিন ভাগের দুই তৃতীয়াংশ পাবে; বাকীটা মেয়েদের চাচারা পাবে– এ ব্যাপারে তার বক্তব্য জানতে চাইলে তিনি বলেন, 'এটা ঠিক নয়। সরকার ২০০৮ সালে ছেলে-মেয়েদের জন্য সমান ভাগ করতে বলেছে; আর শুধু কন্যা থাকলে তারা সব পাবে।' পারুল আক্তারের সাথে গবেষকের সাক্ষাৎকার। বনপাড়া, নাটোর। ০৫ অক্টোবর, ২০২০।*

উপর্যুক্ত কেইস স্টাডিতে আলোচিত তথ্যদাতার মীরাসী আইন সম্পর্কে ভুল ধারণাও বাংলাদেশের বিদ্যমান উত্তরাধিকার আইন সম্পর্কে অস্পষ্টতাই প্রমান করেবাংলাদেশে সঠিকভাবে মীরাসী সম্পত্তি বণ্টন হয় না। মানুষও তার ন্যায্য অধিকার সম্পর্কে সচেতন নয়। ফলে সুবিধাবাদী শ্রেণি মীরাসী সম্পত্তির সাথে সংশ্লিষ্ট ব্যক্তিদেরকে তাদের প্রাপ্য অধিকার থেকে বঞ্চিত করছে। ফলে পুত্র-কন্যা সন্তানের মীরাসী সম্পত্তি কুরআনিক নির্ধারিত হিস্যা অনুযায়ী বণ্টন খুব কমই হয়।

### *৬.৬ উত্তরাধিকার সম্পত্তি বণ্টনের বৈচিত্র্য ও বহুবিধ প্রাসঙ্গিকতা*

বাংলাদেশের মুসলিম জনগণের ইসলামের প্রতি সীমাহীন আবেগ রয়েছে এবং জীবন-যাপন প্রক্রিয়ায় ধর্মীয় অনুশাসন অনেকেই মেনে চলেন। উত্তরাধিকার সম্পত্তির হিস্যা তার প্রাপকদের প্রদান করার ক্ষেত্রে যথেষ্ট পরিমাণ অনিয়ম, বাড়াবাড়ি, গড়িমসি ও ইসলামী আইন-কানুন অবজ্ঞা করার বহুমাত্রিক প্রকৃতি এখানের সমাজ জীবনের বিভিন্ন স্তরে রয়েছে।

[৫২] মহানবী স. আবূ হুরায়রাহ রা. কে উদ্দেশ্য করে বলেন: 'হে আবূ হুরায়রাহ। 'ফারাইয' শিক্ষা করো এবং তা শিক্ষা দাও। কেননা তা জ্ঞানের অর্ধেক। নিশ্চয়ই তা ভুলে যাওয়া হবে এবং আমার উম্মাত থেকে সর্বপ্রথম এটিই উঠিয়ে নেওয়া হবে। মুহাম্মদ ইবনে আব্দুল্লাহ, *আল হাকেম*, পৃ. ৫৫।

এর ফলে উত্তরাধিকার সম্পত্তি বণ্টনের বৈচিত্র্য ও বহুবিধ ধরন-প্রকরন তৈরী হতে দেখা যায়। জনাব মনিরুজ্জামান বলেন,

> আমার মা একমাত্র সন্তান হিসেবে নানা-নানীর পরিত্যক্ত সম্পদের উত্তরাধিকারী ছিল। নানাবাড়িতে নানার ভাইয়ের পুত্র-কন্যাদের সাথে ছোট বেলায় বেড়ে উঠেন আমার মা। তাদের সাথে মায়ের পারস্পরিক সুনিবিড় সম্পর্ক গড়ে উঠে। নানা তার জীবদ্দশায় অধিকাংশ সম্পত্তি বিক্রি করে দেন। আমার মা নিজেই ৭০' এর দশকে নানা-নানীর মৃত্যুর অনেক বছর পর বাকী সম্পত্তি চাচাতো মামাদের কবলা করে দেন। তারাই মায়ের আপন জনের মত ছিল। মায়ের এ সিদ্ধান্তে আমাদের কারো কোন অসন্তুষ্টি ছিল না।[৫৩]

অন্য দিকে জনাব আব্দুল হামিদ তার পিতা-মাতা ২০০৮ সালে মারা যাওয়ার পর তাদের পাঁচ ভাই ও তিন বোনের মাঝে সম্পত্তি বণ্টন না করে শুধু তাদের বড় ভাই ও তৃতীয় নম্বর ভাইয়ের মাঝে কিছু সম্পদ বণ্টন করেন। বড় ভাইকে ১০ শতক জমি সবাই সন্তুষ্ট চিত্তে অগ্রিম বেশি প্রদান করে। কারণ তিনি এক সময় ছোট ভাই-বোন সকলের পড়াশুনার খরচ দিয়েছেন ও পরিবারে সবচেয়ে বেশি অবদান রেখেছেন।[৫৪]মুফতি মাওলানা হারুন ইজহার বলেন,স্বচ্ছলরা অপেক্ষাকৃত অসহায়দের সম্পদ ছেড়ে দেওয়া দোষের কিছু নয়।[৫৫] কে আই আই- ০৫ নিজেইতার তিন পুত্র ও তিন কন্যার মাঝে সম্পত্তি বণ্টনে কিছুটা বেশ-কম করবেন; কারণ এক কন্যাকে এমবিসিএস পড়িয়েছেন প্রাইভেট মেডিক্যালে এবং এক পুত্রকে মালয়েশিয়া পড়িয়েছেন টাকা খরচ করে। এ জন্য তারা বাকীদের তুলনায় কিছুটা সম্পত্তি কম পাবেন। এক সন্তানের জন্য টাকা খুব কম খরচ হয়েছে; তাকে তিনি কিছু টাকা বেশি দিয়ে ব্যবসা ধরিয়ে দিতে চান। তার এ বণ্টনে সন্তানদের কোন আপত্তি নেই।[৫৬] জনাব ডালিয়া আজহারের মায়ের ১০ বিঘা সম্পত্তি তার চাচাতো ভাই-বোন ভোগ দখল করছে। কারণ তার মামা-খালা কেউই না থাকায় এবং মায়ের চাচাতো ভাই-বোনেরা আন্তরিকতার সাথে মায়ের দেখাশুনা করার কারনে; মা আর তার সম্পত্তি তাদের কবল থেকে নিতে চায় নি। মা যেহেতু তার সম্পত্তি চাচ্ছেন না, জনাব ডালিয়া আজহারের স্বাবলম্বী ভাই-বোনেরাও এ সম্পত্তির প্রতি তাদের কোন দৃষ্টি নেই।[৫৭]

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[৫৩] ইনডেপ্থ ইন্টারভিউ- ০১, জনাব মনিরুজ্জামান (৪৮), প্রিন্সিপ্যাল অফিসার, ইউনাইটেড কমার্শিয়াল ব্যাংক লি. বনানী শাখা, গ্রাম: মোকসুদপূর, কাশিয়ানি, গোপালগঞ্জ। সাক্ষাৎকার গ্রহণে গবেষক, ৩ অক্টোবর, ২০২০।

[৫৪] এফ জি ডি-০৩।

[৫৫] কে আই আই- ০৬, মুফতি মাওলানা হারুন ইজহার, উপমহাপরিচালক, জামেয়া ইসলামিয়া, লালখান বাজার, চট্টগ্রাম।সাক্ষাৎকার গ্রহণের তারিখ- ১৬.১০.২০।

[৫৬] কে আই আই- ০৫, প্রফেসর ড. আ.ফ.ম খালেদ হোসেন, সাবেক বিভাগীয় প্রধান, ইসলামের ইতিহাস ও সংস্কৃতি বিভাগ, ওমর গণি কলেজ, চট্টগ্রাম ও মুহাদ্দীষ, জিরি মাদ্রাসা, চট্টগ্রাম।সাক্ষাৎকার গ্রহণের তারিখ- ১৬.১০.২০২০।

[৫৭] ইনডেপ্থ ইন্টারভিউ- ০৪, জনাব বরকত করিম (৪৮), কৃষক, উপজেলা: চিলমারী, জেলা: কুড়িগ্রাম। সাক্ষাৎকার গ্রহণের তারিখ-৮.১১.২০২০।

## ৭. *উত্তরাধিকার সম্পত্তির অধিকার বাস্তবায়নের বাস্তবতা*

বাংলাদেশের সমাজ বাস্তবতায় ইসলামী উত্তরাধিকার আইন বাস্তবায়নের চিত্র হতাশাজনক। মীরাসী সম্পত্তি বণ্টনের মত গুরুত্বপূর্ণ বিষয়টি বাস্তবায়নের জন্য যে ধরনের উদ্যোগ গ্রহণ করা দরকার ছিল তা আমাদের মুসলিম সমাজে লক্ষ করা যায় না। শিক্ষা ব্যবস্থার পাঠ্যক্রমে গুরুত্ব বিবেচনায় যেভাবে এ বিষয়টি থাকার কথা ছিল; সে হিসেবে নেই বললেই চলে। আবার কন্যা সন্তানের সম্পত্তিতে অধিকারের বিষয়টি পুরো শিক্ষা ব্যবস্থায় অনেকটাই অনুপস্থিত। বাংলাদেশে উত্তরাধিকার সম্পত্তির অধিকার বাস্তবায়নে সচেতনতা তৈরীর প্রকৃতি ও ধরণ নিম্নে আলোচিত হলো–

### ৭.১ *পাঠ্য বইয়ে উত্তরাধিকার বিষয়ক পাঠদানের চিত্র*

বাংলাদেশে বহুমাত্রিক শিক্ষা ব্যবস্থা চালু রয়েছে। বিশ্ববিদ্যালয়ে কেবল আইন বিভাগে '*মুসলিম ল অফ সাকসেশন*'নামে একটি কোর্স এবং মাদ্রাসা শিক্ষা ব্যবস্থায় উচ্চমাধ্যমিক পর্যায়ে *ইলমুল মীরাস*এর (*সীরাজী* নামে)একটি বই পড়ানো হয়ে থাকে। দেশের প্রচলিত শিক্ষা ব্যবস্থার কারিকুলাম ও পাঠ্যসূচিতে উত্তরাধিকার সম্পত্তি বণ্টন ব্যবস্থাপনা, এর গুরুত্ব ও যথাসময়ে পিতা-মাতার পরিত্যক্ত সম্পদ বণ্টনের প্রয়োজনীয়তা ও গুরুত্ব নিয়ে আর কোন পর্যায়ে আলোচনা নেই। অথচ ইসলামী শরীয়াতে এ শিক্ষাকে জ্ঞানের অর্ধেক বলে ঘোষনা করা হয়েছে।[৫৮] এ মীরাসী সম্পত্তির যথাযথ বণ্টন না করার কারনে সমাজে আত্মীয়তার সম্পর্ক অধিকাংশ ক্ষেত্রে নষ্ট হয়।

### ৭.২ *ওয়াজ মাহফিলের আলোচনায় উত্তরাধিকার সম্পত্তি প্রসঙ্গ*

আমাদের দেশে বিশেষ করে শীতকালে প্রচুর পরিমাণ ওয়াজ মাহফিল অনুষ্ঠিত হয়ে থাকে। যেখানে আলকুরআন ও হাদীস থেকে বিভিন্ন বিষয়ে ইসলামী বয়ান করা হয়ে থাকে। এ সকল ওয়াজে বিশিষ্ট ধর্মীয় স্কলারগণ জীবনঘনিষ্ঠ অনেক বিষয়ই আলোচনা করলেও পুত্র-কন্যা সন্তানের উত্তরাধিকার সম্পত্তি নিয়ে কোন আলোচনা করেন না। মেয়েদের পর্দার ওয়াজ খুব হলেও অর্থনৈতিকভাবে কন্যা সন্তানের স্বাবলম্বী হওয়ার ধারণা প্রদান প্রায়ই অনুপস্থিত থাকে। এ ব্যাপারে জনাব মাওলানা মোঃ তৈয়্যব বলেন–

> গত ছয় বছর থেকে আমি ওয়াজ করি ও মসজিদে শুক্রবারে খুৎবা প্রদান করি। আমি আসলে এ দীর্ঘ ছয় বছরে আলোচনায় একবারও উত্তরাধিকার সম্পত্তি বণ্টন সংক্রান্ত আলোচনা করেনি। বিষয়টি খুবই গুরুত্বপূর্ণ আমি মনে করি; তবে আমি মেয়েদের পর্দা-পুশিদায় থাকা ও হিজাব পরার ব্যাপারে সচেতনামূলক বক্তব্য অনেক রেখেছি।[৫৯]

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[৫৮] عن أبي هريرة رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: (تعلموا الفرائض وعلموها الناس فإنها نصف العلم وهو ينسى، وهو أول شيء ينزع من أمتي) رواه ابن ماجه والدارقطني

[৫৯] ইনডেফথ ইন্টারভিউ- ০২, জনাব ইনামুল হক, কাশিনগর ডিগ্রী কলেজ শিক্ষক, গ্রাম: পড়াগ্রাম, উপজেলা: চৌদ্দগ্রাম, জেলা: কুমিল্লা। সাক্ষাৎকার গ্রহণের তারিখ-১.১১.২০২০।

### *৭.৩ জুমুআর খুৎবায় উত্তরাধিকার বিষয়ক আলোচনার চিত্র*

ইসলামী শরীয়াতের দৃষ্টিতে শুক্রবার অত্যন্ত গুরুত্বপূর্ণ ও তাৎপর্যপূর্ণ দিন। এ দিনে সাধারণ মানুষ এলাকার মসজিদে নামাজের পূর্বে মসজিদের ইমাম থেকে বিশেষ ইসলামী বক্তৃতা তথা খুৎবা শুনে থাকে। এ খুৎবা বা বক্তৃতার সমাজ জীবনে বহুমাত্রিক প্রভাব ফেলে। মসজিদের ইমামগণ সমকালীন বিভিন্ন গুরুত্বপূর্ণ বিষয়ে বক্তব্য দিয়ে থাকেন। তাদের এ বক্তব্য প্রদান প্রক্রিয়ায় বৈচিত্রতা রয়েছে। জ্ঞানীরা বাংলা ভাষায় সমকালীন গুরুত্বপূর্ণ বক্তব্য রাখলেও অপেক্ষাকৃত কম জ্ঞানীগণ লিখিত বহু পুরোনো আরবী বই থেকে দেখে দেখে পাঠ করেন; যার সাথে বাস্তবতার অনেকাংশেই কোন মিল থাকে না; সাধারন লোকজনও আরবী বক্তৃতা বুঝে না। এ আলোচনায় নারীদের পর্দা, স্বামীর আদেশ পালনসহ অনেক প্রসঙ্গ আসলেও নারীর অর্থনৈতিক স্বাবলম্বী হওয়ার ব্যাপারটি সেভাবে আসে না। মীরাসী সম্পদ বণ্টন ব্যবস্থাপনার গুরুত্ব নিয়ে কোন আলোচনা হয় না; অথচ এটি ইসলামের অন্যতম গুরুত্বপূর্ণ নির্দেশনা; ফরজ ইবাদত। শিরক ও মানব হত্যার মতো মীরাসী সম্পত্তি ঠিকভাবে অনাদায়ে চিরস্থায়ী জাহান্নামের ঘোষণা এসেছে মহাগ্রন্থ আলকুরআনে।[৬০] ইসলামী শরীয়াতে অন্য কোন বিধান অমান্য করার বিষয়ে এতো কঠোর সতর্কবাণী ও চিরস্থায়ীভাবে জাহান্নামে থাকার মত শাস্তির কথা বলা হয়নি।

### *৭.৪ নারী অধিকার বিষয়ক বই, পত্র-পত্রিকা ও সমায়িকীতে আলোচনার চিত্র*

বাংলাদেশের পুত্র-কন্যা সন্তানের মীরাসী সম্পত্তি বণ্টনে বৈষম্য, কন্যা সন্তানের সম্পত্তিতে অধিকার প্রতিষ্ঠার দাবী, যৌক্তিকতা, প্রয়োজনীয়তা এবং নারীর অর্থনৈতিক ক্ষমতায়নের মীরাসী সম্পত্তি গুরুত্বপূর্ণ অনুষঙ্গ হিসেবে নারী অধিকার বিষয়ক বই-পুস্তক, পত্র-পত্রিকা বা জার্ণালে উপস্থাপিত বা চিত্রিত হয়নি। জনাব সেলিনা হোসেন[৬১] তার বিভিন্ন গল্পে, উপন্যাসে নারী বিষয়ক প্রচুর লেখালেখি করলেও উত্তরাধিকার সম্পত্তিতে নারীর অধিকার সংক্রান্ত বিষয়ে তেমন কিছু লেখেননি। এ প্রসঙ্গে তিনি বলেন, 'আমার কোন লেখায় এ বিষয়টি আসে নি। তবে এখন থেকে আমি এ বিষয়টি লেখব। কারণ এই সম্পত্তির মাধ্যমে নারীরা তাদের স্বাবলম্বী করতে পারে।' নারীর অর্থনৈতিক ক্ষমতায়নে গুরুত্বপূর্ণ অনুষঙ্গ হিসেবে এটি কাজ করবে বলে তিনি মনে করেন।

### *৭.৫ নারী অধিকার নিয়ে কাজ করা সংগঠনগুলোর কার্যক্রমে উত্তরাধিকার প্রসঙ্গ*

নারী অধিকার প্রতিষ্ঠার চেতনায় গড়ে উঠা বাংলাদেশে অনেকগুলো সংগঠন রয়েছে এবং তারা নারীর ক্ষমতায়ন বা উন্নয়ন ধারনাকে সামনে রেখে তাদের বিভিন্ন কার্যক্রম চালাচ্ছে।

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[৬০] 'আর কেউ আল্লাহ ও তার রাসূলের অবাধ্য হলে এবং তাঁর নির্ধারিত সীমালংঘন করলে তিনি তাকে দোযখে নিক্ষেপ করবেন; সেখানে স্থায়ী হবে এবং তার জন্য লাঞ্ছনাদায়ক শাস্তি রয়েছে।' وَمَن يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُّهِينٌ আলকুরআন, ৪:১৪।

[৬১] কে আই আই- ৬, সেলিনা হোসেন, বিশিষ্ট লেখক ও গবেষক, ঢাকা।সাক্ষাৎকার গ্রহণের তারিখ, ১৪,১০,২০।

নারীর বিভিন্ন অধিকার আদায়ে জনসচেতনতা ও জনসম্পৃক্তা প্রতিষ্ঠায় তারা গুরুত্বপূর্ণ ভূমিকা পালনে কাজ করছে। তাদের এ সকল কার্যক্রমে পুত্র-কন্যার মীরাসী অংশের বিষয়টি অধরাই পড়ে আছে। তারা কেবল নারী-পুরুষের মাঝে সম্পত্তি বণ্টনে সমতা রক্ষার বিষয়টি নিয়েই আলোচনা করে।[৬২] আল্লাহ তায়ালা প্রদত্ত মীরাসী আইন অনুযায়ী পুত্র-কন্যা সন্তানের বর্ণিত হিস্যা অনুযায়ী সম্পত্তি বণ্টনে বাংলাদেশে সচেতনতা তৈরী ও মীরাসী আইন বাস্তবায়নের ব্যাপারে তাদের কোন কার্যক্রম নেই। ফলে এ বিষয়ে সামগ্রিক জনসচেতনা গড়ে উঠছে না।

### *৭.৬ নারীর ক্ষমতায়নে কাজ করা জাতীয় মহিলা সংস্থা ও এনজিওগুলোর কার্যক্রমে উত্তরাধিকার প্রসঙ্গ*

সমাজে নারীর আর্থ সামাজিক অবস্থার উন্নয়নের লক্ষ্যে জাতীয় মহিলা সংস্থা ১৯৭৬ সালে কার্যক্রম শুরু করে। সংস্থাটি বাংলাদেশের সকল জেলায় কাজ করে। এর প্রধান কাজগুলো হচ্ছে–মহিলাদের মধ্যে সচেতনতা সৃষ্টি, আয় সৃষ্টির লক্ষ্যে প্রশিক্ষণ প্রদান এবং ঋণ সুবিধা প্রদানের মাধ্যমে অর্থনৈতিক স্বনির্ভরতা অর্জনে মহিলাদেরকে সহায়তা করা, ক্ষুদ্রাকৃতির কুটির শিল্প ও সমবায় প্রতিষ্ঠায় সহায়তা করা, সরকারি ও বেসরকারি সাহায্য সংস্থার মধ্যে সংযোগ স্থাপন করা এবং খেলাধুলা ও সাংস্কৃতিক কর্মকাণ্ডে নারীদের সহায়তা প্রদান করা।[৬৩] তারা তাদের কার্যক্রমের কোথাও কন্যা সন্তানের মীরাসী সম্পত্তির অংশ আদায়ে বা জনসচেতনতা সৃষ্টিতে ভূমিকা রাখার মতো কোন ***এজেন্ডা*** বা কর্মসূচী রাখেনি। বরং পুরুষ-নারীর মীরাসী সম্পত্তিতে সমান ভাগ দেওয়ার পক্ষে তারা তাদের কার্যক্রম পরিচালনা করে। যা কোনভাবেই কুরআনিক নির্দেশনার সাথে সঙ্গতিপূর্ণ নয়।

হাজার হাজার এনজিও বাংলাদেশে বিভিন্ন কর্মসূচীকে সামনে রেখে কাজ করছে। তারা বিভিন্ন ভাবে দাতা গোষ্ঠী বা সরকারের সাথে নানা উন্নয়ন কার্যক্রমে অংশ নিয়ে থাকে। বহুমাত্রিক কার্যক্রমে বাংলাদেশের সামগ্রিক উন্নয়নে তাদের অবদান কম নয়। তাদের কার্যক্রম ও বিভিন্ন কর্মসূচিতে মীরাসী আইন অনুযায়ী পুত্র-কন্যা সন্তানের মাঝে সম্পত্তির নির্ধারিত অংশ ঠিকভাবে বণ্টনে তারা সচেতনতা তৈরীতে কিছু কর্মসূচী নিতে পরতো। সন্তানের মীরাসী সম্পত্তির হিস্যা প্রদানে জনগণের মাঝে সচেতনতা ও সম্পৃক্তকরণে কার্যকর কর্মসূচী প্রনয়ন ও বাস্তবায়নে তাদের কোন কার্যক্রম নেই।

### *৭.৭ বাংলাদেশে নারী উন্নয়নের সীমাবদ্ধতার চিত্র ও উত্তরাধিকার প্রসঙ্গ*

বাংলাদেশ সরকার নারীর ক্ষমতায়নে বহুবিধ কার্যক্রম পরিচালনা করছে। সরকার বিভিন্ন সময়ে বহুবিধ কর্মসূচি যেমন নারী ও কন্যা সন্তানের শিক্ষা সচেতনতা, পুনর্বাসন, অর্থনৈতিক

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[৬২] কে আই আই-১৪, নাসিমা আক্তার জলি, সেক্রেটারী, বাংলাদেশ গার্ল চাইল্ড এডভোকেসী ফোরাম, ঢাকা। সাক্ষাৎকার গ্রহণের তারিখ, ১৪.১০.২০।

[৬৩] আলেয়া পারভীন, *নারী ও রাজনীতি*, (ঢাকা: মনন পাবলিকেশন্স, ২০১১), পৃ. ৪৭১।

ক্ষমতায়ন সংক্রান্ত কার্যক্রম গ্রহণ করেছে; তবে নারীদের বিশেষ করে কন্যা সন্তানের পিতা-মাতার মীরাসী সম্পত্তির হিস্যা আদায়, সচেতনতা তৈরী, এবং এ সংক্রান্ত আইন প্রণয়নের কোন উদ্যোগ নেই। নারী নীতি এখনো আলোর মুখ দেখেনি। ফলে বিভিন্ন ক্ষেত্রে কন্যা সন্তানের অগ্রগতি সাধিত হলেও এ ক্ষেত্রে এখনো বিশেষ কোন অগ্রগতি পরিলক্ষিত হচ্ছে না। সামগ্রিক জনসচেতনতা বৃদ্ধির ফলে শিক্ষিত পরিবারে কিছু কিছু জায়গায় কন্যা সন্তানরা কিছু পরিমানে মীরাসী সম্পত্তি পাচ্ছে; তবে তা খুবই নগণ্য।

বাংলাদেশ ১৯৭১ সালের ডিসেম্বর মাসে মহান মুক্তিযুদ্ধে বিজয় লাভ করে। স্বাধীনতা যুদ্ধে জয়লাভের পর হতে অদ্যাবধি পর্যন্ত সরকার নারী সমাজের উন্নয়নের জন্য বিভিন্নমুখী পদক্ষেপ গ্রহণ করেছে। শুরুতেই গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানে নারীর সমান অধিকার ঘোষণা করেছে। 'সকল নাগরিক আইনের দৃষ্টিতে সমান ও আইনেও সমান আশ্রয় লাভের অধিকারী',[৬৪] 'কেবল ধর্ম, গোষ্ঠী, বর্ণ, নারী-পুরুষ ভেদ বা জন্মস্থানের কারণে কোন নাগরিকের প্রতি রাষ্ট্র বৈষম্য প্রদর্শন করিবে না।'[৬৫] রাষ্ট্র গণজীবনের সর্বস্তরে নারী-পুরুষের সমান অধিকার লাভ করবে।'[৬৬] কেবল ধর্ম, গোষ্ঠী, বর্ণ, নারী-পুরুষভেদ বা জন্ম স্থানের কারণে জনসাধারণের কোন বিনোদন বা বিশ্রামের স্থানে প্রবেশের কিংবা কোন শিক্ষা প্রতিষ্ঠানে ভর্তির বিষয়ে কোন নাগরিক কে কোনরূপ অক্ষমতা, বাধ্যবাধকতা, বাধা বা শর্তের অধীন করা যাইবে না।'[৬৭] কেবল ধর্ম, গোষ্ঠী, বর্ণ, নারী-পুরুষ ভেদ বা জন্ম স্থানের কারণে কোন নাগরিক প্রজাতন্ত্রেও কর্মে নিয়োগ বা পদলাভের অযোগ্য হইবে না কিংবা সেই ক্ষেত্রে তাহার প্রতি বৈষম্য প্রদর্শন করা যাইবে না।'[৬৮] এ ছাড়াও সংবিধানের ৬৫(৩) অনুচ্ছেদে নারীর জন্য জাতীয় সংসদে আসন সংরক্ষিত রাখা হয়েছে এবং এ ধারার অধীনে স্থানীয় শাসন সংক্রান্ত প্রতিষ্ঠানসমূহে নারীর প্রতিনিধিত্ব নিশ্চিত করা হয়েছে।'[৬৯] এখানে আইনী কাঠামোতে নারীর সমতা বিধানের সাংবিধানিক স্বীকৃতির পরিচয় ফুটে উঠেছে। উত্তরাধিকার সম্পত্তি ইসলামী নিয়ম অনুযায়ী বণ্টনের প্রশ্নে কোনক্রমেই নারী পুরুষের অংশের সমতা নিশ্চিত করা সম্ভব না হলেও বিদ্যমান আইন কাঠামোর অধীনে-নারী-পুরুষের সমতা নিশ্চিতের স্বীকৃতি রয়েছে।

নারী উন্নয়নের লক্ষ্যে গণপ্রজাতন্ত্রী বাংলাদেশ সরকার ১৯৭৮ সালে মহিলা বিষয়ক মন্ত্রণালয় গঠন করেন। এ মন্ত্রণালয়টির কার্যাবলী ও দায়িত্ব পূণর্বন্টন করে ১৯৯৪ সালে মহিলা ও শিশু বিষয়ক মন্ত্রণালয় হিসেবে এটিকে নামকরণ করেন। বর্তমানে মহিলা ও শিশু বিষয়ক

[৬৪] বাংলাদেশ সংবিধান, অনুচ্ছেদ-২৭
[৬৫] বাংলাদেশ সংবিধান, অনুচ্ছেদ-২৮(১)
[৬৬] বাংলাদেশ সংবিধান, অনুচ্ছেদ-২৮(২)
[৬৭] বাংলাদেশ সংবিধান, অনুচ্ছেদ ২৮(৩)
[৬৮] বাংলাদেশ সংবিধান, অনুচ্ছেদ ২৯(২)।
[৬৯] আলেয়া পারভীন, *নারী ও রাজনীতি*, তদেব, পৃ. ৪৬৭।

মন্ত্রণালয় মহিলা বিষয়ক বিভাগ, জাতীয় মহিলা সংস্থা ও বাংলাদেশ শিশু একাডেমীর মাধ্যমে বিভিন্ন কর্মসূচি বাস্তবায়ন করে থাকে। মহিলা ও শিশু বিষয়ক মন্ত্রণালয় মহিলাদের কে উন্নয়ন প্রক্রিয়ার মূলধারার সাথে সম্পৃক্তকরণ ও সমাজে তাদের মর্যাদা উন্নয়নকরণ এবং শিশু অধিকার সম্পর্কে সচেতনতা বৃদ্ধিকরণ এবং তাদের সুপ্ত প্রতিভার বিকাশ সাধনে সচেষ্ট রয়েছে। মহিলা ও শিশু মন্ত্রণালয় জেন্ডার ইস্যু, নারীর ক্ষমতায়ন ও শিশু অধিকার নিশ্চিতকরণে নেতৃত্বের ভূমিকা পালন করে। প্রধানতম ভূমিকা ও দায়িত্ব হচ্ছে– নীতি প্রণয়ন ও বাস্তবায়ন, প্রকল্প প্রণয়ন, বাস্তবায়ন ও *মনিটরিং*, আইনি সহায়তা প্রদান, সমাজে মহিলা ও শিশুদের মর্যাদা বৃদ্ধির জন্য অন্যান্য মন্ত্রণালয়কে নির্দেশ প্রদান এবং মহিলা ও শিশুদের মর্যাদা উন্নয়নের লক্ষ্যে বিভিন্ন আন্তর্জাতিক ফোরামে সরকার কর্তৃক প্রদত্ত প্রতিশ্রুতি বাস্তবায়নের জন্য সহায়তা প্রদান। এসব কার্যক্রমের ফলে আইনী কাঠামো তৈরী হলেও বাস্তবিক পক্ষে নারী এখনো সমাজে পশ্চাৎপদই রয়ে গেছে। আর উত্তরাধিকার সম্পত্তিতে চরম নৈরাজ্যকর অবস্থায় নারী এখনো মুখোমুখি দাঁড়িয়ে। পুত্র সন্তানের মত কন্যা সন্তানের অধিকার ভোগের সমতা আজো কল্পনায় রয়ে গেছে।

## ৮. উপসংহার

বাংলাদেশের মানুষ ইসলামী উত্তরাধিকার আইনের বিধান নিজেদের জীবনে বাস্তবায়নে অনেক বেশী অনাগ্রহী। ফলে কন্যা সন্তান পিতা-মাতার মীরাসী সম্পত্তি থেকে প্রতিনিয়ত বঞ্চিত হচ্ছে। শতবছরের নেতিবাচক চর্চার ধারাবাহিকতায় ও সামাজিক বঞ্চনায় নারীর অধিকার ভূলুণ্ঠিত। সামাজিক কাঠামোগত দূর্বলতার কারণে কন্যা সন্তান নীতি নির্ধারণ এবং সিদ্ধান্ত গ্রহণের ক্ষেত্রে পুরুষের তুলনায় অনেক বেশী পিছিয়ে আছে। পিতা-মাতার মৃত্যুর পর মীরাসী সম্পত্তি বণ্টনে পারস্পরিক সমঝোতা হয় ও দেশে গ্রাম্য সালিশের তীব্র প্রভাব রয়েছে। এ সালিশ সংস্কৃতি প্রত্যক্ষ ও পরোক্ষভাবে কন্যা সন্তানকে তার ন্যায্য মীরাসী সম্পত্তি থেকে বঞ্চিত করে থাকে। গ্রামীণ জনজীবনের চেয়ে শহরের জনগণের মাঝে পুত্র-কন্যা নির্বিশেষে সন্তান হিসেবে উভয়ের প্রতি সমতা ভিত্তিক চেতনার প্রসার ঘটায় মীরাসী সম্পত্তিতে কন্যাদের সম্পত্তি প্রাপ্তির হার কিছুটা বেড়েছে। সারা দেশে কন্যা সন্তানের মীরাসী সম্পত্তির অধিকার প্রদানে অধিকাংশ মানুষের মনোভাবই নেতিবাচক। বঞ্চিত শ্রেণি রাগে ক্ষোভে বা অধিকার আদায়ের মানসিকতায় আদালতের দ্বারস্থ হয়। মীরাসী সম্পত্তির হিস্যা প্রদানে বহুমাত্রিক আয়োজন লক্ষ করা যায়। একমাত্র কন্যা উত্তরাধিকার থাকাবস্থায় অভিভাবক কর্তৃক তার জীবদ্দশায় সম্পত্তি লিখে দেওয়ার রেওয়াজ লক্ষণীয়। পুত্র সন্তানের উপর নির্ভরশীলতার কারণে কন্যা সন্তানকে ঠকানো হয়। সামগ্রিকভাবে কন্যা সন্তানের উত্তরাধিকার সম্পত্তির অধিকার সচেতনতা তৈরীতে উল্লেখযোগ্য কোন উদ্যোগ নেই। ইসলামী উত্তরাধিকার আইন অনুযায়ী দেশে কন্যা সন্তানের সম্পত্তিলাভের চিত্র চরম হতাশাজনক। এর জন্য রাষ্ট্রীয় উদ্যোগে ও শক্তিশালী আইনী কাঠামো তৈরী হওয়া প্রয়োজন।