ISSN 2413-2780

JAGANNATH UNIVERSITY JOURNAL OF LAW

Volume IV 2022

FACULTY OF LAW
Jagannath University

ISSN 2413-2780

Jagannath University Journal of Law

Volume IV **2022**

Faculty of Law
Jagannath University
Dhaka

Jagannath University Journal of Law

Volume IV: 2022

This journal is an official publication of the Faculty of Law, Jagannath University, Dhaka. Opinions expressed in the articles, however, are those of the authors and do not necessarily reflect the views of the Editorial Board.

ISSN: 2413-2780

Published by

Faculty of Law
Jagannath University, Dhaka, Bangladesh

Published on 01 January 2023

Printed by
Momin Offset Press, Dhaka-1205

Price: BDT. 400 ☐ USD $4

Jagannath University Journal of Law
Volume IV: 2022

Editorial Board

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Delving into Safeguards and Impediments of Justice through Administrative Tribunals: Bangladesh Perspective*

Sharmin Aktar**

Abstract: The present article is devoted entirely to the adjudication of Administrative Tribunals, as prevalent in Bangladesh, and not to any phase of departmental proceedings as practiced in departments under relevant legislation. While focusing on safeguards of justice, it never takes note of constitutional measures rather reliance is placed on decisive scholastic doctrines, namely, Natural Justice and Legitimate Expectation, and on the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982. It is revealed that the mode of appointment of members of administrative tribunals, their terms and conditions of service, procedures of administrative tribunals, etc. are required to be specially addressed for securing justice through this alternative dispute resolution mechanism and shortcomings surrounding those issues need to be removed. In particular, the article endeavors to focus on what point it is linked to literature and to present above all on what point it needs improvement.

1. Introduction

Undoubtedly, the main reason for creating separate Tribunals for dealing with special subjects is to bring into existence a body or bodies that will deal with disputes relating to those subjects speedily, efficiently, and with concentrated attention, though there has long been ambivalence in attitudes towards the relationship between courts and tribunals.[1] In fact, a tribunal is a very efficacious instrumentality, which from a functional point of view is somewhere between a court and the government department exercising adjudicatory power.[2] However, the Administrative Tribunal is expected to take the load off the shoulders of not only ordinary Courts but of superior courts.[3] With the increase of various kinds of litigations, it has been increasingly felt the need to provide service holders quicker and cheaper justice. Excessive delay in settlement of their service matters not only affects individual morale but saps the vitality of the system as a whole in the long run. Administrative Tribunals are particularly designed to guard against such delays in dispensing justice while keeping intact its spirit and quality. There is no doubt that these Tribunals will make for a more contended and efficient governmental machinery.

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* The article is based on author's Ph.D. thesis, titled, "Efficacy of Administrative Tribunals in Bangladesh: Jurisdictional, Procedural and Structural Issues".

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[1] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010) 266.

[2] I. P. Massey, *Administrative Law* (10th edn, Eastern Book Company 2022) 181.

[3] ibid 618.

All over the world Tribunals are functioning side by side with the ordinary courts of law because of some advantages it provides to justice seekers and administrators of justice. The social legislation of the twentieth century demanded Tribunals for purely administrative reasons: they could offer speedier, cheaper, and more accessible justice and are essential for the administration of welfare schemes involving large numbers of small claims, whereas the process of courts of law is elaborate, slow, and costly.[4] It is necessary to point out here that disputes and difficulties arising between public authorities and citizens are either settled by Administrative Tribunals or by ordinary courts.[5] In some countries, there are no Administrative Tribunals and so administrative trials are brought before ordinary courts and settled by them in accordance with the provisions of administrative law,[6] whereas in other countries some administrative cases are brought before ordinary courts and others before Administrative Tribunals.[7]

Bangladesh has adopted the second alternative. Parallel to twentieth-century demand, Administrative Tribunals in Bangladesh are trying to maintain a balance between the behavior of executive entities and their discretionary power under article 117 of the Constitution of the People's Republic of Bangladesh, the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982. Indeed, Administrative Tribunals of Bangladesh have failed to achieve desired goals to a great extent and the messy framework for the Administrative Tribunals evades the attention of researchers and policymakers for many years.

However, by this study efforts have been made to maintain a balance between the accountability of public officials as well as citizens' rights under article 117 of the Bangladesh Constitution, the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982 with a view of providing adequate protection to civil servants. Side-by-side Endeavor has been made to regulate discretionary power if it is not as per law. In this way, the study is dedicated to protecting the rights of civil servants regarding their terms and conditions of service and in doing this, it conceptualizes the spectrum of justice in Administrative Tribunals from three protection mechanisms and these now appear exposed to critical questioning. Indeed, the study is limited to analyses of safeguards for civil servants after completion of departmental proceedings under article 117 of the Bangladesh Constitution along with the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982. Departmental proceeding or inquiry is not the focal point here. There are different government departments and statutory public authorities and different legislations are working for them. This article is not concerned with those legislations.

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4 S. W. Wade and C. Forsyth, *Administrative Law* (7th edn, Oxford University Press 2003) 886.

5 C. A. Colliard, *Comparison between English and French Administrative Law* (Cambridge University Press 1939) 120.

6 ibid.

7 ibid.

2. Conceptualization of Certain Terms

Article 117 of the Constitution, the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982 expressly declare that Administrative Tribunals have exclusive jurisdiction over matters relating to or arising out of terms and conditions of service of persons who are in the service of the Republic or statutory public authority. It is astonishing that none of the above-noted laws clarify the terms 'civil servants' or 'departmental proceedings. The present section attempts to clarify these terms. Side by side it puts earnest effort into computing the period of completion of the departmental proceeding.

2.1. Civil Servants

The present civil service in Bangladesh has a long history and in British India, it was the product of an evolutionary process. The terms 'civil service' and 'civil Servant' are ambiguous not only in Bangladesh but also in other countries. The term 'civil service' in the Indian sub-continent was first used in 1785 to refer to the non-military staff of the British East India Company. The distinction between civil administration and military administration then gained solid ground in the 18th century under the colonial regime in British India. Personnel employed in civil administration were called civil servants. However, there is no parameter that will divide strictly the public who are within civil services from those who are not. The term 'civil' meaning 'non-military' continued through the early part of the nineteenth century in the context of the British civil service.[8] It is, however, later displaced to convey the distinction between holders of permanent posts and those holding temporary posts whose jobs changed hands with every change.[9] The Tomlin Commission says:

> Civil Service means servants of the Crown, other than holders of political or judicial officers, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of the money voted by the Parliament.[10]

Besides, Morgan and Perry defined civil service as a system of mediating institutions for mobilizing human resources in the service of the affairs of the state in a given territory.[11] On the other hand, Bekke, Perry, and Toonen differentiated civil service from elected political officials and the military.[12] Therefore, civil servants working at all levels of government are recognized as civil servants, though the term civil servant is used narrowly in Bangladesh as it indicates a particular class or classes of services and management processes. However, the appellation 'civil service' disappears to

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[8] Nuzhat Yasmin, 'Quota System in Bangladesh Civil Service: An Appraisal' [2022] MAGD <https://dspace.bracu.ac.bd/xmlui/bitstream/handle/10361/2085/Quota%20System%20in%20Bangladesh%20Civil%20Service%20An.pdf?sequence=1&isAllowed=y> accessed 22 December 2022.

[9] ibid.

[10] ibid.

[11] Edward P. Morgan and James L. Perry, 'Re-orienting the Comparative Study of Civil Service Systems' (1998) 8 ROPPA 84.

[12] Hans A Bekke, and others, *Civil Service Systems in Comparative Perspective* (Indiana University Press 1996) 98.

make room for a much wider meaning through the use of such terms as public servants or government servants depending on the areas of the management process.[13] There are different laws for different services in our country. Nevertheless, the Bangladesh Civil Service (Age, Qualification, and Examination for Direct Recruitment) Rules, 2014, the Bangladesh Civil Service Recruitment Rules, 1981, the Bangladesh Civil Service (Examination for Promotion) Rules, 1986, and the Bangladesh Civil Service Seniority Rules, 1983 did not define the term 'civil servant', though the definition of government servant or public servant is wide according to section 21 of the Penal Code of 1860. So, it is a popular term used in conversation only. It appears after analyzing the definition delivered by the above section that civil service of a country generally includes all permanent functionaries of government which distinctly excludes defense service, although some civil servants work in the defense ministry and its various departments. A member of civil service is also not a holder of political or judicial office. Civil servants of a state are collectively called civil service or public service. Legislations surrounding civil or public servants do not emphatically differentiate civil servants from those of persons who are in the service of the Republic rather let them mingled together opening space for the jurisdiction of Administrative Tribunals.

2.2. Departmental Proceedings

An application can be made to an Administrative Tribunal, if he is aggrieved by any order or decision of the higher authority in respect of terms and conditions of service.[14] It appears that the person affected by the decision of authority concerned has to approach at first the higher authority before proceeding to Administrative Tribunal and must make an application to it as per the law in force in this regard.[15] The application before Administrative Tribunal undoubtedly reveals the dissatisfaction of the person concerned over departmental proceedings and this pushes us to put full concentration on different stages of a proceeding followed during inquiry. Any violation of the principle of Natural Justice during this proceeding is seen as a failure of justice, which makes the incident fit for the Tribunal subject to satisfaction of conditions as enshrined in section 4 of the Act of 1980. However, departmental proceeding against a public servant is initiated, ended up and penalty is imposed accordingly under the Government Employees (Discipline and Appeal) Rules, 2018.[16]

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[13] Yasmin (n 8) 9.

[14] The Administrative Tribunals Act 1980, s 4 (2).

[15] M. Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (2nd edn, Sun Shine Books 2014) 540.

[16] The Government Employees (Discipline and Appeal) Rules 2018 is a piece of legislation which has been promulgated by the President with the consultation of the Public Service Commission with the object to regulate the conditions of service, pay, allowances, pensions, discipline and conduct of public servants and statutory corporations.

No definition of Departmental Proceeding is found from any of our jurisprudential discourses, either from the aforementioned Rules of 2018 or from case law. The term 'Departmental Proceeding' has been reiterated a number of times in several decisions instead of Proceeding of Inquiry and thereafter its result.[17] Therefore, an inquiry conducted under the Government Employees (Discipline and Appeal) Rules of 2018 is considered as Departmental or Disciplinary Proceeding according to case law. The inquiry and the imposition of punishment are two stages of a Departmental Proceeding.[18] Both the stages are indivisible, just one continuous proceeding and are equally judicial.[19] In the Rules of 2018, grounds for penalty are mentioned elaborately,[20] and penalties, major or minor,[21] will be imposed on the government servant according to rule 3.

Prior to the imposition of penalties, inquiry procedure has to be followed in accordance with rules 5, 6 and 7, which provide procedure for different misdeeds.[22] While dealing with allegations calling for major or minor penalties or in case of subversion, it is incumbent on the disciplinary authority to comply with the provisions of rule 10. There are two circumstances wherein rule 6 or 7 does not apply. It happens in one case when dismissal or removal from service or reduction in rank on the ground of conduct which lead to a conviction of a criminal charge.[23] In another case, the authority was empowered not to give the accused an opportunity of showing cause after recording reasons in writing.[24]

A government servant against whom action is proposed to be taken under relevant rules may be placed under suspension under rule 12.[25] If the authority thinks fit, then he may also be forced to go to leave subject to the entitlement of leave. This power of suspension shall not be used lightly; the authorities must form a definite opinion as to whether suspension is indispensably necessary and formation for that opinion must be on definite allegations.[26] The competent authority can re-instate the employee, if he is not dismissed, removed, reduced in rank or compulsorily retired, but re-instatement after suspension remains used under the Bangladesh Service Rules. Rigidity is rarely resorted to by authorities while acting on the basis of rule 13. It suffices to mention here one helding, which is: "In the absence of a clear bar against reinstatement, the competent authority cannot be said to be devoid of power to

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[17] [1961] 40 AIR (Cal); [1964] 1854 AIR (SC); [1976] 2037 AIR (SC); [1969] 362 SLR (Mys) (HC); [1997] 214 BLD (AD); [1988] 84 BLD (AD).

[18] [1963] 395 AIR (SC).

[19] ibid.

[20] The Government Employees (Discipline and Appeal) Rules 2018, r 3.

[21] ibid, r 4.

[22] The Government Employees (Discipline and Appeal) Rules 2018, r 5 deals with inquiry procedure in case of subversion whereas rule 6 deals with inquiry procedure in cases calling for minor penalties.

[23] The Government Employees (Discipline and Appeal) Rules 2018, r 8.

[24] ibid.

[25] *Anwarul Haque Khan v Government of Bangladesh* [1979] 30 DLR 22.

[26] ibid.

reinstate an employee who resigned from his service but being repented sincerely craves for withdrawing his resignation".[27] After the completion of departmental proceeding, there is a scope to make a departmental appeal, which is provided for in rule 16 of the Rules of 2018. The proceedings before an appellate authority are continuation of the proceedings before the Enquiry Officer and both these proceedings taken together point to the conclusion.[28] A Government servant may appeal within the period of 3 months from the date on which the appellant was informed of the order appealed against any departmental order imposing penalty, major or minor, to the authority to which the authority making the order is immediately subordinate or where the order is made by an authority subordinate, to the appointing authority.[29] An appeal may be admitted after the expiry of three months on the satisfaction of sufficient causes. Thereafter, the employee has choices to proceed review or revision within specific time frame and subject to some conditions enunciated in rules 22 and 23 respectively.[30]

2.3. Completion of Departmental Proceedings

After the end of departmental proceeding as well as departmental appeal under the Government Employees (Discipline and Appeal) Rules, 2018, scope is available to make an application to Administrative Tribunals. The difficulty here lies in a provision, which provides that no application can be made to Administrative Tribunal until such higher authority has taken a decision on the matter.[31] It appears that the aggrieved employee has to wait for the decision of the higher authority and this raises a question as to how long he will spend. This provision has been extended later on by way of an amendment in 1997 through section 2 of the Act No. XXIV. At present, a decision on an application or appeal is to be made within the period of two months from the date on which an application or an appeal was preferred, otherwise, it shall, on the expiry of such period, be deemed that the application or appeal has been disallowed.[32] That means, after the end of two months, an aggrieved civil servant is allowed to proceed Administrative Tribunals, and alternatively, a case is

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[27] *Mohboob Murshed v Bangladesh* [1980] 32 DLR 77.

[28] [1969] 66 SLR.

[29] GER 2018, r 17 and 18.

[30] GER 2018, r 22 provides two procedural pre-conditions for entertaining an application for review: Firstly, the application is to be submitted within three months of the date on which the applicant was informed of the order by which he is aggrieved; the period can be extended on the satisfaction of sufficient causes. Secondly, the application for review shall be submitted to the President through the Head of the office in which the applicant serves or if he is not in service, the Head of the office in which he served last. Similarly, rule 23 observes the fulfillment of two conditions prior to the acceptance of an application for revision. One is that the President may revise any order passed in appeal or any order which is appealable but against which no appeal has been preferred. Other is that the order is to be revised within one year of the date on which the order was passed.

[31] ATA 1980, s 4 (2) First proviso.

[32] ibid, s 4 (2) second proviso states that "where the higher administrative authority has not taken a decision on an application or appeal within the period of two months from the date on which an application or an appeal was preferred, it shall, on the expiry of such period, be deemed that such higher authority has disallowed the application or appeal".

not maintainable before the expiry of two months. An application can be admitted by the Tribunals without insisting on exhaustion of departmental remedies. Two matters concern us here. Firstly, the use of the clause 'deemed to be' is debated irrespective of its advantages, as illustrated later on and a recommendation is advised accordingly, which spreads over in the same section. Secondly, in relation to exhaustion of remedies, either departmental redress or review before the President, within the period of maximum two months pursuant to second proviso to section 4, case laws need assessment. Review concerning the matter before the President was first raised and clarified in a case.[33]

Thus, it appears that the person affected can avail of the scope of an application for review before the President or approach directly Administrative Tribunals after the end of a maximum of two months spent for the purpose of inquiry proceedings held in the concerned department.

3. Doctrines Protecting Rights of Civil Servants

Demanding citizens, aggressive legislators, rent seeking interest groups and a nosy mass media have the combined effect of transforming the insulated bureaucratic organization into a fishbowl. For upholding the dignity of civil service and protecting government servants from being suffered, two doctrines, namely, Natural Justice and Legitimate Expectation evolve. All these concepts have been presented below one after another, demonstrating that there is a strong nexus between administrative arbitrariness and its accountability, trying to portray that these administrative arbitrariness and accountability can be mingled through checks and balances and by the use of the technique 'ultra vires', remaining conscious of the safeguards public servants' resort to keep themselves away from autocratic and tyrannical regimes.

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[33] *Government of Bangladesh, represented by the Secretary, Ministry of Shipping, Bangladesh Secretariat, Dhaka and Others v Dr. Md. Tofajjal Hossain* (2012) 17 MLR59-61. The case is related to dismissal from service. Dr. Md. Tofajjal Hossain instituted a suit before the Administrative Tribunal at Dhaka for setting aside the order of dismissal from service. The order of dismissal from service was set aside by the Administrative Tribunal and thereafter, Administrative Appellate Tribunal Appeal No. 43 of 1990 was filed. Appeal was allowed as the case was not maintainable before the Administrative Tribunal due to non-fulfillment of the second proviso to sub-section 2 of section 4 of the Administrative Tribunals Act. Afterwards, Appeal No. 584 of 2001 was filed before the Appellate Division of the Supreme Court and the petition was dismissed on 10.11.2003 as the case was maintainable. Actually, the second proviso to sub-section 2 of section 4 of the Administrative Tribunals Act came into force on 19.11.1997 whereas the case was filed by the respondent before the Administrative Tribunal on 28.09.1997. So, the question that the case was barred because the respondent did not file any review before the President in respect of the order of his dismissal from service does not arise. It is obvious that the President was the appointing authority and the order of appointment was issued by the Secretary of the Ministry concerned in accordance with the provisions of article 55 (4) of the Constitution. It is true that the respondent was dismissed in a departmental proceeding under provisions of the Government Servants (Discipline and Appeal) Rules, 1985. Under rule 23 of these Rules, review lies to the President but the bar that was imposed by the second proviso to sub-section 2 of section 4 of the Administrative Tribunals Act was not there when the respondent filed the case. Furthermore, in *Government of the People's Republic of Bangladesh and Others vs Syed Sakhawat Hossain*, it was held: "When order of removal from service is passed on the approval of the President, it is optional for the aggrieved Government servant either to file application for review or he can straight way file an application before the Administrative Tribunal within the statutory period of limitation".

3.1. Measuring Natural Justice and Their Relevance

The research keeps its first look on insights of the principle of Natural Justice.[34] Whilst the term 'Natural Justice' is often retained as a general concept, it has largely been replaced and extended by the more general 'duty to act fairly'.[35] What is required to fulfill this duty depends on the context in which the matter arises. In a famous English decision in *Abbott vs Sullivan*, it is stated:

> The principles of 'Natural Justice' are easy to proclaim, but their precise extent is far less easy to define. It has been stated that there is no single definition of 'Natural Justice' and it is only possible to enumerate with some certainty the main principles. During the earlier days the expression 'Natural justice' was often used interchangeably with the expression Natural Law, but in recent times a restricted meaning has been given to describe certain rules of judicial procedure.[36]

Natural justice is concerned with two rules,[37] namely, the rule against bias (*nemo judex in causa sua*),[38] and the right to a fair hearing (*audi alteram partem*).[39] Where it appears that any administrative agency is obliged to act judicially, there is a presumption that all aspects of the rules apply, in which case the court would require clear statutory words in order to justify any exclusion of Natural Justice.[40]In Bangladesh, no statutory provision is found for rule against bias, whereas some of the statutory provisions are available for a rule of fair hearing.[41] Indeed, procedural laws are

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[34] 'Natural Justice' is a term of art that denotes specific procedural rights in English legal system and the systems of other nations based on it and it is similar to American concepts of fair procedure and procedural due process having roots that to some degree parallel the origins of Natural Justice. See for details M. A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh* (Allahabad: Law Book Company Pvt. Ltd. 1990), 191-192.

[35] I. P. Massey, *Administrative Law* (Eastern Book Company 2008) 26.

[36] [1952] 1 K.B. 189

[37] M. A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh* (Allahabad: Law Book Company Pvt. Ltd. 1990), 191-192.

[38] It means that a person adjudicating on a dispute must have no pecuniary or proprietary interest in the outcome of the proceedings and must not reasonably be suspected, or show a real likelihood, of bias.

[39] The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. The mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by Natural Justice. The principle of *audi alteram partem*, that is, hearing both sides of the question, goes back several centuries and has been applied in a variety of circumstances. See for details Z. Hossain, Law of Writs (Universal Book House 2012) 257.

[40] Daniel E. Hall, *Administrative Law: Bureaucracy in a Democracy* (5th edn, Pearson 2011)

[41] The Code of Civil Procedure 1908, or 9(13); The Public Servants (Inquiries) Act 1950; The Government Employees (Discipline and Appeal) Rules 2018; *Md. Abdur Rashid and Another v Abdul Barik and Others*, (1984) 4 BLD (AD) 83. The Constitution of Bangladesh 1972, art 135(2) reads as follows: "No person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why action should not be taken." The trace of this principle is also found in the Civil Procedure Code which deals with procedural matters and not substantive rights. Procedural laws are grounded on rules of Natural Justice. If summons is not duly served on the defendant, that is a good ground for setting aside an *ex parte* decree under order 9, rule 13 of the CPC. In such a case, the question of knowledge is not at all relevant and *ex parte* decree will be set aside even if the defendant had knowledge of the institution of the suit. Further, the Public Servants (Inquiries) Act, 1950, and the Government Employees (Discipline and Appeal) Rules of 2018display the contents of Natural Justice, namely, 1) notice to accused; 2)

grounded on rules of Natural Justice. The rule of pecuniary bias disqualifying a judge operates in the Indo-Pak subcontinent,[42] and for the first time a case concerning the issue came before the Bombay High Court in 1895.[43] Indian and Pakistani courts have applied the rule against bias strictly wherever personal prejudice or ill-will could be proved from the proceedings or from the conduct of the parties.[44] The doctrine of Natural Justice in service matters was applied in Bangladesh prior to the establishment of ATs and the AAT and this is till today guiding us. In theoretical discourse on Administrative Tribunals, it is found that no two cases adhering to the principle of Natural Justice are exactly alike. Each case has to be decided on its own facts and circumstances. To substantiate the position, the use of hearsay evidence in departmental proceeding,[45] conduct of preliminary inquiry behind the back of the delinquent officer,[46] and a representation in writing excluding oral hearing from the principles of Natural Justice could be helpful.[47] On this point, a debate is primarily centered on the issue as to what extent administrative decisions are liable to be questioned. Administrative decisions require interference of tribunals, if there is disregard of the principle of Natural Justice, but in no case, the Tribunals can challenge their authority to order or to impose penalty. Reliance can be put on a decision on which one can hardly offer any innovation:

> The order of discharge from service passed against the delinquent by order of the Governor-General is not liable to be questioned on the ground that material may not have justified the passing of that order. It is not within the competence of the civil court to sit in judgment over the decision of the authority that is competent by law to dismiss a public servant provided he has been afforded an opportunity to defend himself consistently with the substance of the Constitutional guarantee.[48]

3.2. Legitimate Expectation: A New Phase to Natural Justice

Another doctrine known as the doctrine of Legitimate Expectation[49] has an appeal to the protection of rights of civil servants, who face difficulty in articulating their

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copy of charge and list to be furnished to accused; 3) evidence of prosecution and examination of witnesses; 4) evidence for defence and examination of witnesses and 5) report of the officer with reasons.

42 Md: Jakir Hossain, *Law of Writs Constitutional Remedies* (1st edn, Universal Book House 2012) 308.

43 [1895] 20 ILR 502. In the case the accused was an employee of Treacher and Co. He was tried and convicted by the Presidency Magistrate of criminal breach of trust as a servant in respect of certain goods belonging to the company. It appeared that the Magistrate was a shareholder in the company which prosecuted the accused. The accused moved the High Court in its revisional jurisdiction under section 435 of the Code of Criminal Procedure (Act No. X, 1882) on the ground of bias. It was held that "the Magistrate was disqualified from trying the case". The proceedings including conviction and sentence were set aside and it was directed that the complaint be disposed of by a duly qualified magistrate.

44 Hossain (n 42) 307. See for details, *Mohammad Mohsin Siddique v Govt. of West Pakistan* [1964] PLD 64; *Pratap Singh v State of Punjab* [1964] AIR 72 (India); *A.P.S.R.T Crop. v S. Transport* [1965] AIR 1303 (India).

45 *Haryana and another v Ratan Singh* [1977] AIR 1512.

46 *Nand Kishore Prasad v State of Bihar* [1981] C.R.P.F. 2 SLR 182.

47 *Pradesh Industries Limited v Union of India* [1966] AIR 671.

48 ibid.

49 Lord Denning first used the term 'Legitimate Expectation' in 1969. From that it has assumed the position of a significant doctrine of public law in almost all jurisdictions. See for details, M. Nigar and H. N. Urmi, 'Doctrine

grievances beyond department. The doctrine is an outcome of synthesis between the principle of Administrative Fairness (a component of the principles of Natural Justice) and the rule of Estoppels. The principle of Legitimate Expectation means an expectation that may arise from an express promise given on behalf of the public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[50] It is a Common law principle which applies to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise.

It is pertinent to mention that a person cannot have a legitimate expectation that an authority will do something which is *ultra vires*.[51] In other words, any expectation to be a legitimate one must succumb with the terms of the statute. It does not mean that the authority enjoys an absolute liberty using the shield of statutory scheme. The courts will make sure as far as possible that the authority is held to its promises by looking for other plausible ways to redress the unfairness. In judging the acts of a public body, courts in most cases are inclined to rely on the principle of Wednesbury unreasonableness arising out of *Associated Provincial Picture House Ltd. V. Wednesbury Corporation*.[52] Here it was decided: "Decision is so unreasonable that no reasonable authority could ever have come to it".[53] The court further held:

> For it to intervene and overturn the decision of the defendant corporation, the condition would have to be so unreasonable that no reasonable authority would ever consider imposing it. Such a condition did not fall into the category of being so unreasonable that it would not be reasonably considered by such a public authority.[54]

Therefore, the claim failed and the decision of the Wednesbury Corporation was upheld. The principle endorsed in this case known as Wednesbury unreasonableness is cited in English courts as a reason for courts to be hesitant to interfere into the decisions of administrative bodies. However, this doctrine is found in article 27 of the Constitution of Bangladesh which abhors arbitrariness and insists on fairness in all administrative dealings.[55] It contains both positive and negative contents; if it is applied negatively, an administrative authority can be prohibited from violating the legitimate expectations of the people and if applied positively, an administrative authority can be compelled to fulfill their legitimate expectations. In *Asaf Khan and Others vs The Court of Settlement, Dhaka and Others*, Justice M.M. Ruhul Amin in favour

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of Legitimate Expectation in Administrative Law: A Bangladesh Perspective' (13 July 2014) <http: // works.bepress.com/meher.nigar/2> accessed 16 November 2021.

[50] *Sirajul Islam v Bangladesh* [2008] 60 DLR 79.

[51] *R v the Secretary of State for Education and Employment ex P Begbie* [2002] 1 WLR 1115.

[52] [1948] 1 KB 223.

[53] ibid.

[54] ibid.

[55] The protection of equality before law is available in case of arbitrary class legislation as well as in case of arbitrary state action and this is now strongly established.

of the Division Bench expressed: "Legitimate Expectation is a concept of administrative law, which means that an administrative authority cannot abuse its discretion by legitimate expectation by disregarding undertaking or statement of its intent".[56]

It appears that the doctrine of Legitimate Expectation in Bangladesh has been developed mainly covering contractual obligations of the government. A modern government has multifarious activities and in performance of those activities, the government has to enter into contracts of different types. The doctrine of Legitimate Expectation has been developed, focusing on the point that in a contract between the government and any individual, though the state is in the equal footing of other party of the contract, at the same time, the duty of the government to act fairly which is implied in the contract cannot be ignored.[57]

A frequent application of this doctrine is seen in service matter that is also a contract of employment.[58] Though an employment in the service of Republic initiates a contract, the relationship of the government with the servant is more of a status than contract and is controlled by the provisions of the Constitution and the laws and rules.[59] This contention gives an employee in the service of Republic an extensive opportunity to challenge any administrative action affecting his service. This opportunity includes confronting the authority even when his service is based on a contract and the impugned action has been taken under the guise of the contract of employment. A landmark case in this respect is *Bangladesh Biman Corporation vs Rabia Bashri Irene and others*.[60] The state contended that "the expectation that has arisen between the petitioners and the Corporation is of a relationship pursuant to a contract and beyond contract the petitioners are not entitled to anything as regard their service".[61] Rejecting the contention of the state, the supreme judiciary held:

> In the context of employment by statutory corporations, the relationship of the corporation with its employees is not that of master and servant and all contracts with statutory corporation are subject to challenge in the writ jurisdiction. The corporation by its past practice has created the legitimate expectation in its employees that after completion of the prescribed period they would be absorbed as

[56] [2003] 23 BLD 24.

[57] Meher Nigar and Homaira Nowshin Urmi, 'Doctrine of Legitimate Expectation in Administrative Law: A Bangladesh Perspective' [2014] < http: // works.bepress.com/meher.nigar/2/> accessed 16 July 2014.

[58] ibid.

[59] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 576.

[60] [2003] 55 DLR 132. In the case, writ petitions were filed challenging validity of some parts of the individual contract of employment as violative of legitimate expectation of the employees of being absorbed as permanent staff after completion of their 5 years tenure and their expectation was reasonable in view of the practice existing at the time of their employment. They were not absorbed as a permanent employee rather reappointed under a fresh contract depriving them of some benefits including of being absorbed as permanent staff.

[61] *Bangladesh Biman Corporation v Rabia Bashri Irene and others* [2003] 55 DLR 132.

> permanent staff. By not absorbing them as permanent and appointing them under a new contract, the corporation has acted discriminatorily.[62]

It is worth noting also the case of *Md. Shamsul Huda and others v. Bangladesh and others*,[63] where ten additional judges were not appointed as judges in the High Court Division ignoring the recommendation of the Chief Justice and without communicating any reasons to the Chief Justice and thereby, violated the expectation of the petitioners which was based on the established practice being followed over thirty years. Thus the doctrine of 'Legitimate Expectation' has been emerged in employment sector in Bangladesh as a safeguard for employees in the service of the Republic sometimes by upholding past practice, sometimes by resorting to Constitutional convention, or sometimes promoting the practice of seniority.[64] It in essence requires the concerned authorities to act reasonably in dealing with the rights and interests of the people under their control in given circumstances.[65] At the same time, the concept of 'Legitimate Expectation' cannot be given such wide interpretation so as to allow any wishful hope without lawful root.[66] In *Hafizul Islam (Md.) vs Government of Bangladesh and Others*, Justice Amirul Kabir Chowdhury held: "'Legitimate Expectation' to be enforceable shall have some legal basis. Mere wishful expectation without legal basis is not sustainable in the eye of law. When the action of the government is taken fairly showing reasons, it cannot be struck down".[67] Advocating the true essence of this doctrine, the supreme judiciary, in *Chairman, Bangladesh Textile Mills Corporation vs Nasir Ahmed Chowdhury*, goes as follows:

> For a Legitimate Expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue until some rational grounds for withdrawing it are communicated to him and he is given an opportunity to defend his cause. [68]

A descriptive idea of this doctrine is restated in *Golam Mustafa vs Bangladesh*, where the Court observed:

> Judicial review may be allowed on the plea of frustration of Legitimate Expectation' in situations, namely, I. if the authority makes a promise expressed either by their representations or conducts; II. within the Wednesbury principle the decision of the authority was arbitrary or unreasonable; III. the concerned authority failed to act fairly in taking the decision; IV. the expectation to be a legitimate one must be based

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[62] ibid.

[63] [2009] 17 BLT 62.

[64] The general concept of the doctrine of Legitimate Expectation is that the administrative authority cannot abuse its discretion by following any inconsistent policy by disregarding undertaking or statement of intent or by ignoring any past practice covering this matter.

[65] *Bangladesh Soya-Protein Project Ltd. v Secretary, Ministry of MDMR* [2001] 6 BLC 681.

[66] *Hafizul Islam (Md.) v Government of Bangladesh and Others* [2002] 7 MLR 433.

[67] ibid.

[68] [2002] 22 BLD 199.

> on clear facts and circumstances leading to a definite expectation and not a mere wish or hope and also must be reasonable in the circumstances and V. judicial review may allow such a Legitimate Expectation and quash the impugned decision even in the absence of a strict legal right unless there is an overriding public interest to defeat such an expectation.[69]

Though the doctrine of Legitimate Expectation was imported from English Law and greatly influenced in the country by Indian case laws where Legitimate Expectation was only procedural in its initial stage and substantive Legitimate Expectation was comparatively a recent experience, in Bangladesh, Legitimate Expectations are not classified as either procedural or substantive. If an expectation is found to be legitimate, the Apex court will protect that expectation by holding the relevant administrator to the representation that gave rise to the expectation. The development of this Legitimate Expectation in Bangladesh is overall a symbol of positive sign to ensure a more accountable administration by force of expectation beyond law. The term Legitimate Expectation has not been used till now in cases concerning service matters. The remedy for the violation of Legitimate Expectation in non-government service matters is judicial review which is clear from the above last two cases, namely, *Bangladesh Biman Corporation vs Rabia Bashri Irene and others* and *Md. Shamsul Huda and others vs Bangladesh and others*.[70] But if a person is in the service of the Republic or of statutory public authority, then he has to go to Administrative Tribunals for enforcing his service rights under the umbrella of Legitimate Expectation.

There are limitations on Wednesbury principle. In applying it, the court defers to the exercise of discretion by the administrative authority and interferes only when an action is so out of proportion to the mischief sought to be curbed that no reasonable man can reasonably take it.[71] Hence, a stricter scrutiny of the reasonableness of an administrative action is required and here comes into play the doctrine of Proportionality, though it is generally accepted that it is not for the court to substitute its choice as to how the discretion ought to have been exercised for that of the administrative authority.[72] Yet there is a desire to fashion a criterion that will allow judicial control without thereby leading to substitution of judgment or too great an intrusion on the merits.[73]

A question often arises whether an exercise of discretionary power may be interfered with for its harshness on application of the doctrine of Proportionality, though the problem of this principle requires the court to assess the merit of exercise of discretion by the administrative authority.[74] True to their traditional role of upholding the Rule

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[69] [2007] 15 BLT 128.

[70] *Bangladesh Biman Corporation v Rabia Bashri Irene and others* [2003] 55 DLR 132.

[71] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 576.

[72] *R v Cambridge Health Authority* [1995] 2 All ER 129.

[73] *Rogers v Swindon NSH Primary Care Trust* [2006] 1 WLR 2649.

[74] Islam (n 71) 712-713.

of Law and recognizing the vulnerability of the individual faced with coercive state power, a variety of mechanisms including the doctrine of Proportionality have been developed to curtail government intrusion where it excessively impinges on individual rights and autonomy.[75] The doctrine of Proportionality is recognized and exercised as a writ of certiorari in our domain of jurisprudence, though the Appellate Division of the Supreme Court refused to recognize the doctrine of Proportionality stating:

> This concept involves the court to evaluate whether proportionate weight has been attached to one or other consideration relevant to the decision. As a ground for judicial review, it is absolutely a new concept to our jurisprudence. In accepting it, this court shall have to accord different weights to different ends or purposes and different means which cannot be allowed in a review.[76]

Though there is no judicial recognition of this doctrine, it is observed that the concept of unreasonableness under article 31 is really unreasonableness in the Wednesbury sense, but when deprivation of life or personal liberty is involved in an administrative action, a stricter scrutiny of unreasonableness is called for under article 32.[77]

4. Setting Mechanisms: Promoting Protection of Rights

Administrative adjudication, irrespective of any domain, suffers from many shortcomings that cannot perhaps be denied. But, like delegated legislation, it is an inescapable necessity in a modern complex society. Therefore, to overcome shortcomings, few safeguards or standards require to be ensured to make administrative adjudication impartial and certain. These standards do not fix a parameter and are liable to change due to changing circumstances of the society. These standards or safeguards include: a) Appointment of Members and their guarantees of independence will determine the first standard. Two questions are linked to this standard and these are 'who appoints?' and 'who are appointed?'. So far as the first question is concerned, recruitment of Members of Administrative Tribunals must not be made by the Executive, as it is a violation of the doctrine of Separation of Powers and the concept of independence of judiciary. It needs to be noted that separation of judicial power from executive power is one of the facets of the principle of Rule of Law. Recruitment of adjudicators in Tribunals requires to be overseen by a selection committee headed by a sitting judge of the Supreme Court, acting under the authority of the Chief Justice. This mechanism is, so far, able to ensure transparency in the matter of appointments. With these considerations in mind, the first question further concerns guarantee of independence, which rest

[75] E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law* (Oxford University Press 2009) 3.

[76] *Ekushey Television v Dr. Chowdhury Mahmood Hasan* [2003] 55 DLR 26.

[77] *Rogers v Swindon NSH Primary Care Trust* [2006] 1 WLR 2649.

chiefly on terms and conditions of service. Adjudicators must be granted life tenure or long tenure by their status. They must be irremovable, unless fall in very limited grounds of incapacity or misbehaviour; and in order to prevent them from any interference of the executive power, all the main decisions concerning their career have to be made by an independent council, called the Superior Council of Administrative Tribunals and the Administrative Appellate Tribunal. The Council needs to be responsible for all aspects of their organization, functioning, staff recruitment or training, promotion, transfer etc. and in this way the Council will work as a kind of small ministry of administrative justice in charge of their administrative management.

So far as the second question is concerned, persons recruited need to be equipped with the expertise in service jurisprudence. In sum, the first standard demands that Administrative Tribunals should be manned by persons possessing legal training and experience. In addition, the appointment of members should be made in consultation with the Supreme Court. b) The second standard is deeply seated in procedure. It is noteworthy that administrative adjudication is a dynamic system of administration, serves more adequately than any other method and one of its advantages is flexibility in terms of procedure. A Tribunal should not be barred by the provisions of the Evidence Act. In order to discover the truth, the Tribunal may resort to inquisitorial procedure, provided no principle of Natural Justice is violated. Again, Tribunals shall be guided solely by the principles of Natural Justice unfettered by anything in the CPC and shall have the power to regulate its own procedure. It is undeniable that case law concerning Natural Justice is not consistent and the person affected and adjudicators may be unable to have a clear understanding of procedures which have to be followed. Flexibility may be justifiable to a certain extent, as Tribunals should have the freedom to decide procedures in accordance with the needs of the specific body, but this must not result in multiplicity of procedures followed by Tribunals, and then the law regarding procedures will be unpredictable. Hence, with a view of making a sound Administrative Tribunal, there must have a legislation for its functioning, which will provide expeditious disposal of cases and set a simple procedure reflecting principles of Natural Justice. c) Reasons must be shown behind every decision delivered by Administrative Tribunals. A reasoned decision goes towards convincing those, who are affected by it, about its innate fairness and is a check against misuse of power.

5. Scrutinizing Impediments and Safeguards

At present all over the world the biggest litigant is the government itself. In Bangladesh just three decades ago lots of cases were hanging before the regular courts of law and this was a major threat for our judicial system. However, prior to the establishment of the tribunal the High Court Division had the original plenary jurisdiction of judicial review under article 102 in service matters with a regard of

appeal to the Appellate Division and that civil courts' original jurisdiction under the Civil Procedure Code was subject to the appellate and revisional jurisdiction of the High Court Division and the Appellate Division had an appellate jurisdiction against the decision of the High Court Division. Though Administrative Tribunal had been established in our country under the Administrative Tribunals Act, 1980, but necessity of it was felt earlier.

Mustafa Kamal J. expressed:

> Delay in formal court proceedings has recently given rise to a new concept of multitiered court-house consisting of the formal court system as well as the alternative dispute resolution mechanisms like conciliation, arbitration and mediation boards. This trend was known to the draftsmen of our constitution. The Constitution made provisions in article 117 for conferring state's judicial powers on some tribunals and enabled the Parliament to make necessary legislation for evolving a system that may in future cumulate some of the attributions which are divided between the formal court system and the growing practice of adjudication of disputes by Tribunals.[78]

Civil servants now can go to Administrative Tribunal, then against it to the Administrative Appellate Tribunal (AAT) and, as a last resort if dissatisfaction continues, to the Appellate Division subject to article 103. So far as the first standard is concerned, protection of rights of civil servants' is challenged because of its recruitment method, especially the issue of recruiting adjudicators is always perceived of within this domain as being carried on within political institutions of the executive. It is just this natural tendency to bury hidden differences between executive and judiciary, which ultimately lead to the violation of the principle of institutional Separation of Powers. But the Tribunals are capable of avoiding an unacceptable threat to the independence of thought and action of its members from the viewpoint of institutional aspect of Separation of Powers.[79] No bureaucrat is eligible to be a Member of Administrative Tribunals and this is pursuant to institutional Separation of Powers. The scenario is not same in the Administrative Appellate Tribunal. The Act of 1980 opens a space of recruiting one Member in the AAT among civil servants, which is antagonistic to the aspect noted above. Furthermore, Members have the status of judges as it is not prohibited anywhere and actually, they are chosen from District Judges. Principles established in *Masder Hossain's* case apply to its members. Whatever hopes are created about the preservation of the theory; these are lost whenever it is found that the domain relies entirely on the executive for management and funding.

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[78] [1992] 44 DLR (AD).

[79] Separation of Powers, as propounded by Montesquieu, has two aspects, namely, institutional and functional. The basic requirement of institutional separation of executive from judiciary is that officials should be prohibited from serving in both branches simultaneously.

Leaving aside analysis of institutional Separation of Powers within the domain of Administrative Tribunals, let us move now other structural issues dominating the research. Stop gap duty, lack of knowledge and training of adjudicators, want of attractive and motivating provisions regarding terms and conditions of their service are never serious indications of their practicability. Efficiency of Administrative Tribunals are far-reaching from the point of view of and not coherent with the 1st aspect of the Delhi Declaration, extended version of Rule of Law.[80] While looking to the matter, it appears that functions of Parliament, so far as the Administrative Tribunals Act and the Rules are concerned, fail to create environment which leads to the enhancement of dignity of man as an individual.

A critical examination with ways out has been made at first from the view point of first safeguard, as narrated and assessed in section four of this article. It is beyond doubt that the success of this alternative forum depends on the availability of really intelligent, experienced and independent Members, so it has to be ensured. It is tempting to note here that the principle of Separation of Powers is neither constitutionally recognized nor practically utilized in the set-up of the country. Courts and Tribunals are not entirely different from each other from the bottom to the top and the earlier one is allowed to interfere in the activities of the latter as the Supreme Court is the guardian over all courts and Tribunals including Administrative Tribunals. Without bringing changes in the existing set up, it is recommended to bring modifications for the recruitment of the Chairman and Members of the Administrative Appellate Tribunal and Administrative Tribunals.

The mode of recruiting the Chairman as well as Members, their promotions, transfers, removal etc., that means, everything regarding their terms and conditions of service has to be entrusted in the hands of a 'Superior Council of Administrative Tribunals and the Administrative Appellate Tribunal' headed by the Chief Justice of Bangladesh. Otherwise, a provision like 'no appointment of a Chairman and of a Member in Administrative Tribunals or the Administrative Appellate Tribunal shall be made except after consultation with the Chief Justice' has to be inserted and the framing of a complete legislation, namely, the Chairman and Members (the Administrative Appellate Tribunal and Administrative Tribunals) Recruitment Rules, can enhance this purpose.

In line with this, mandatory provisions require to be incorporated in the proposed legislation to put compulsion on the Ministry to receive advises of the Chief Justice of the country. If this formula were adopted, it would give full effect to judicial independence as enshrined in *Secretary, Ministry of Finance vs Masdar Hossain*,[81] and

[80] Rule of Law was extended by the International Commission of Jurists known as the Delhi Declaration, 1959, which was subsequently confirmed at Lagos in 1961. This Declaration sets three ideals of Rule of law. One of them is establishing and maintaining conditions so that the dignity of man as an individual can be uphold by the functions of the legislature.

[81] [1999] 52 DLR 82.

would reduce executive interference and pressure which is ultimately expected for establishing the principle of 'Separation of Powers', as it is one of the facets of the principle of 'Rule of Law'. The challenge of the mode of appointment for the statutorily recognized post of Members had been faced and the next question is 'who is to be appointed?' While concentrating on adjudicators best fitted to Administrative Tribunals, the foremost importance has to be rested on choosing young District Judges considering his capacity to work and knowledge seeking attitudes. Open or participative mechanism paving the way of recruiting adjudicators from amongst lawyers is not deserved within the legal domain of Bangladesh. Therefore, in choosing Members, merit and capability for work would stand together leading the present mode to be changed.

Nevertheless, an acting judge of the High Court Division has to be placed in the position of a Chairman of the Administrative Appellate Tribunal because a judge in service feels secured in service persuading to take strong steps in A.T. suits. The tenure of judges of the Supreme Court is secured under the Constitution, whereas the tenure of judges of the High Court Division, who are placed in the AAT, is for contractual period. The service for contractual period gives rise to lack of security and restrains the Chairman from providing any decision in appeal for which the government would be annoyed. Satisfaction of the government helps him to get further extension of his service period and dissatisfaction leads the otherwise. Considering these, it is recommended for an acting judge of the High Court Division for the post of the Chairman. Besides, it will ease the Chairman due to his post to cause personal appearance of the concerned high officials even the Secretaries of the Ministries. This will indirectly work as a pressure for government departments and force them to obey the decision of the AAT. Then no appeal would lie against the decision of the AAT and no application for execution would also be filed, it would be finished in the AAT.

It is true that the above recommendation is a solution but a judge with strong personality and morally and ethically strong and sound can take any steps, irrelevant of his position or power. Even the recommendation can be fruitless, if an acting judge of the High Court Division does not match to the criteria noted in the preceding sentence. However, section 5 of the Administrative Tribunals Act, 1980, which violated to some extent the institutional aspect of Separation of Powers, needs to be amended to rule out the possibility of the retired judges of the High Court Division getting chance to hold an office involving financial gain.

The above proposed modification in section 5 begs the necessity of amending articles 147 (3) and 99 of the Constitution. Another option claims that article 99 (1) be amended to provide a cooling period of at least five years after the retirement of a judge from the Supreme Court to the following effect: 'A person who has held an office as a judge otherwise than as an Additional Judge shall not, after his retirement or removal there from, plead or act before any court or authority or be eligible for any

appointment in the service of the Republic before the expiration of five years after he has ceased to hold that office.' All the future calculations shall surely be passed away after the expiry of this five years cooling period. Moreover, the duration of a political government being five years, it is difficult on the part of a particular judge to get any persuasive assurance of favor.In the Administrative Appellate Tribunal, except the Chairman, among two Members, one of them holding the post of District Judge is appointed in the same way parallel to Members of Administrative Tribunals. Suggestions offered for reshaping the post of Members in ATs also apply to equivalent post of the Member in the AAT.

On the contrary,section 5 of the Administrative Tribunals Act, 1980, allowing a civil servant not below the rank of Joint Secretary to work as a Member of the Administrative Appellate Tribunal, needs immediate amendment to prevent infringement of the rule of biasness. Provision of choosing one Member from amongst the practicing lawyers having at least ten years' experience in service disputes has to be inserted. Job security for a decade, an assurance of pension and other retiral benefits must attract a busy lawyer and an expert in the field to accept such assignments.

As mentioned earlier, not only Members of Administrative Tribunals are required to train themselves in service jurisprudence but also the introduction of compulsory training programme is necessary for the Chairman and Members of the AAT and even for the officers before resumption of office for improving its efficiency. The nucleus of a corps of trained and experienced judges and lawyers has to be made by providing them a thorough comparative knowledge of Administrative Tribunals of some countries; and this endeavor is not only to juxtapose one system with another, but constantly to compare approaches, solutions, and methods with reference to social, political, and legal background. This effort will certainly give to concerned stakeholders a far better insight into the liability of the state and its public officers, the nature, character and remedies available to victims over the countries; and thereby it must be endeavored to improve its behavior as well as national laws regarding Administrative Tribunals. In this regard, preparation of different modules for different sorts of persons, one for the Chairman and Members and another for the Registrars and staffs working over there, can surely enhance its advancement.

Regarding terms and conditions of service of the Chairman and Members of Administrative Tribunals and the Administrative Appellate Tribunal, the power rests with the government and it is not clear as to how much period they will hold office and on what terms. Their job tenure over there is not secured and this is also a major obstacle to the concept of independence of judiciary. Long tenure for them has to be granted to make them free from the interference of the executive; to make them independent and to let them gain expertise and use knowledge over there. Nevertheless, provisions regarding resignation and removal of the chairman and

Members of Administrative Tribunals and the Administrative Appellate Tribunal have to be inserted.

It is known that procedures of Administrative Tribunals are simple and are easily understood by a layman. The fact on which the research puts its utmost attention is that both the Administrative Tribunals Act, 1980 and the Administrative Tribunals Rules, 1982 did not mention strangely with full description, as found in the Code of Civil Procedure, 1908 for civil suits, as to what procedure have to be followed. Simply it is mentioned in the Act that for the purpose of hearing an application or appeal, as the case may be, a Tribunal shall have all powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 in respect of matters mentioned therein.[82] Besides, a Tribunal shall, for the purpose of execution of its decisions and orders, follow, as far as practicable, provisions of the Code of Civil Procedure, 1908, relating to execution of a decree.[83] Full elaboration in matters of procedure including the dismissal for default in the Act of 1980 is required to address situations without undue delay.

It is undoubtedly true that it is not possible on the part of the legislature to contemplate all the possible circumstances which may arise in future litigation and to face those emergencies, there comes into play the inherent power guided by equity, justice, and good conscience. It is a matter of deep concern that the Act of 1980, on the one hand, is not devoted to full-fledged procedures for matters covered by its section 4 and on the other hand, is not giving Administrative Tribunals inherent power like section 151 of the Code of Civil Procedure, 1908. Rather the applicability of the Code of Civil Procedure to Administrative Tribunals has been excluded in many respects which fails to cope up with a large variety of functions. The Act of 1980 has to be exhaustive providing for all varieties of available circumstances and otherwise, the application of the Code of Civil Procedure has to be extended like section 216 of the Bangladesh Labour Act, 2006 covering procedures for civil matters in Labour Court, which is another statutory Tribunal. A very recent judicial decision recognizing the inherent power of the Tribunal will work greatly on techniques deployed to resolve disputes. It was held:

> All tribunals, whether civil or criminal, possess this power in the absence of any provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle, namely, *quando lex aliquid alique, concedit, conceditor, it sine quo resipsa eshe non potest*, i.e., when the law gives a person anything it gives him that also without which the thing itself cannot exist.[84]

Considering two references, the Appellate Division of the Supreme Court has supported the vesting of inherent powers in the Tribunal so that it does not find itself

[82] The Administrative Tribunals Act 1980, s 7.

[83] The Administrative Tribunals Rules 1982, r 7.

[84] *Government of Bangladesh and Others v Sontosh Kumar Shaha and Others* [2016] 1 LNJ 61.

helpless for administering justice. The first reference was cited from an Indian case law.[85] The second reference was cited from a Criminal Review Petition.[86]Inherent power is an old power of courts, civil or criminal; and endorsing this, it was opined:

> The inherent powers of a Tribunal remind the Judges of what they ought to know already, namely, that if the ordinary rules of procedure results in injustice in any case and there is no other remedy, it can be broken for the ends of justice. This power furnishes the legislative recognition of the old age and well-established principle that every Tribunal has inherent power to act *ex debito justitiae,* i.e., to do that real and substantial justice and administration of which alone it exists to prevent abuse of the process of the court.[87]

Taking into consideration the references cited above, the AD of the Supreme Court has tried to present reasons behind the conferment of this inherent power to the Tribunal. It was observed:

> We cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If the primary function of the court is to do justice in respect of causes brought before it, then on principle, it is difficult to accede to the proposition that in the absence of specific provision the court will shut its eyes even if a wrong or an error is detected in its judgment. To say otherwise, courts are meant for doing justice and must be deemed to possess as a necessary corollary as inherent in their constitution all the powers to achieve the end and undo the wrong. It does not confer any additional jurisdiction on the court; it only recognizes the inherent power which it already possesses.[88]

The Appellate Division of the Supreme Court has set criteria before resorting to inherent power of the Tribunal. These are: 1. the power can be exercised when no other power is available under the procedural law; 2. nothing can limit or affect the inherent power of a Tribunal to meet the ends of justice since it is not possible to foresee all possible circumstances that may arise to provide appropriate procedure to meet all those situations; 3. it is a power of a Tribunal in addition to and complementary to the powers expressly conferred under the procedural law; 4. the power will not be exercised if its exercise is inconsistent with, or comes into conflict

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[85] *Shipping Corporation of India v. Machadeo Brothers* [2004] AIR 2093.

[86] The review petition was filed on the 17th august, 2013 by Mollah, A. Q. The fact of the case is that under the International Crimes (Tribunals) Act, 1973 there was no provision for review. The condemned prisoner filed a review petition. Learned Attorney General raised a preliminary objection about the maintainability of the review petition on the ground that in view of article 47A (2) of the Constitution, the review petition is not maintainable, in as much as, the Act of 1973 is protected by article 47A of the Constitution. According to him, a judgment which has attained finality cannot be challenged by resorting to the constitutional provisions which has been totally ousted by the Constitution (Fifteenth Amendment) Act, 2011 and the Constitution (First Amendment) Act, 1972 respectively. This court repelled the objection and held that "the review petition was maintainable, in as much as, apart from article 105 of the Constitution, this court can invoke its inherent power if it finds necessary to meet ends of justice or to prevent the abuse the process of the court. There is inherent right to a litigant to a judicial proceeding and it requires no authority of law."

[87] ibid.

[88] *Shipping Corporation of India v. Machadeo Brothers* [2004] AIR 2093.

with, any of the powers expressly or by necessary implication conferred by the procedural law; 5. it cannot be exercised capriciously or arbitrarily; 6. they are not intended to enable the Tribunal to create rights for the parties, but they are meant to enable the Tribunal to pass such orders for ends of justice as may be necessary; 7. If the law contains no specific provisions to meet the necessity of the case, the inherent power of a court merely saves by expressly preserving to the court which is both a court of equity and law, to act according to justice, equity and good conscience; and 8. It is an enabling provision by virtue of which inherent powers have been vested in a court so that it does not find itself helpless for administering justice.

Indeed, after establishment, there is a slow rise in the number of suits lodged with Administrative Tribunals. Many of them stem from the violation of the principle of Natural Justice, one of the techniques closely affiliated with Administrative Tribunals, as depicted and discussed in chapter two. Administrative Tribunals are duty bound to see as to whether departmental proceedings are as per law or not, that means, whether they have given the parties sufficient opportunities to be heard or not. A number of cases is always filed in Administrative Tribunals claiming that they were not given the right to a fair hearing or there was a violation of the rule against bias, while awarding punishments, minor or major. These disciplinary cases are in the nature of dismissal, removal, termination, compulsory retirement, demotion, censure, warning, extra ordinary leave without pay etc. It is surprising that where most of the cases are with regard to disciplinary proceedings, there the Administrative Tribunals Act, 1980, and the Administrative Tribunals Rules, 1982 did not recognize the principle of Natural Justice. Not only the statutory recognition and complete elaboration of the principle of Natural Justice will enable adjudicators to understand the procedure fully but also cooperate in providing speedy and inexpensive justice as it will prevent the loss of unnecessary time in realizing techniques accrued from the principle of Natural Justice.

Though in Bangladesh this principle is not statutorily recognized,[89] the Tribunals feel pressurized to grab it and operate the processes of this legal action accordingly. The principle has enormous significance undoubtedly for service disputes and its violation affects the root of the inquiry conducted by the department. Here the operation of the Tribunal comes into play. It was held in *Mujibur Rahman vs Bangladesh* that "it can strike down an order for violation of Natural Justice".[90] Several decisions are found supporting the assertion.[91] It is worth considering how important

[89] Natural Justice enjoys no express Constitutional status. The Appellate Division of the Supreme Court of Bangladesh in *Abdul Latif Mirza v. Government of Bangladesh* noted in (1979) 31 DLR 1 (Bangladesh) had observed: "It is now well- recognized that the principle of 'Natural Justice' is a part of the law of the country".

[90] [1992] 44 DLR 123

[91] See for details, *Bangladesh Public Service Commission represented by its Chairman, Public Service Commission Secretariat and Another v. Maloti Rani Mondol* [2012] 17 MLR104-108 (Bangladesh); *Sonali Bank v. Md. Zalaluddin and Others* [2009] 14 MLR 70-75 (Bangladesh); *Janata Bank, represented by its Chairman and Another v. Fazlul Huq and Another* [2009] 14 MLR 217- 218 (Bangladesh); *Director-Cum-Professor, Pabna, Mental Hospital and Others v. Tossadek Hossain and Others* [2005] 10 MLR 110-115 (Bangladesh); *Director General of Prisoners of Bangladesh,*

in consequence the principle is. The Act and the Rules were framed without keeping it in mind, eventually, the legislation fails to be a complete Code. The Code of Civil Procedure, 1908 has limited application to proceedings in Tribunals; this non-application of the CPC creates the necessity of adding a non-exhaustive list of factors constituting a violation of principles of Natural Justice during the departmental inquiry.

Though the essence of Natural Justice is found present in the Public Servants (Inquiries) Act, 1850, and the Government Employees (Discipline and Appeal) Rules, 2018, an integrated and complete Code enshrining principles of Natural Justice and showing violation of it is required for its functioning. With that end in view, necessary amendments have to be made in the Administrative Tribunals Act, 1980 with a view of giving statutory recognition of the principle, making it more specific, providing guidelines to adjudicators, and getting solid pictures of it. Thereby independent status of Tribunals has to be achieved in consolidating all the scattered case laws.

So far as the third standard is concerned, the eligibility of providing reasoned decision mostly depends on his intellectual capability. This appears to be achieved once the anticipated suggestions referred above for the first protection method are fulfilled.

6. Conclusion

Administrative disputes are, of course, distinct from regular disputes and hence some sort of extra machinery is required to settle these. This thinking led our parliamentarians to create the Administrative Tribunals Act, 1980. Civil servants did not welcome these Tribunals at first as they were used to constitutional protection. Again, our people have less faith on political parties and so persons serving for the Republic or statutory public authority thought that the creation of Administrative Tribunals was a political trick and to overpower the bureaucracy to his arbitrary will. Because of this tendency lots of writ petitions were filed even after establishment of Administrative Tribunals and this distrust has now been reduced almost completely. Now if writ petitions are filed, even then the High Court Division deviates from declaring the judgment and pronounces that Administrative Tribunals have exclusive jurisdiction in deciding matters.

Nazimuddin Road, Dhaka and Others v. Md. Nasim Uddin [2001[6 MLR 149-151(Bangladesh); *Bangladesh Krishi Bank and Others v. Mohammed Hossain Bhuiyan* [1999[7 BLT 308 (Bangladesh); *Government of Bangladesh, represented by the Secretary, Ministry of Post, Telegraph and telecommunication and Others v. Mr. Abul Khair* [2004] 9 MLR 221-224 (Bangladesh), [2004[56 DLR (AD) 183-185 (Bangladesh); *Md. Shahinur Alam v. People's Republic of Bangladesh and Others* [1998] 3 MLR 20-22 (Bangladesh), [1998] 50 DLR 211-212 (Bangladesh); *Bangladesh, represented by the Secretary, Establishment Division and Others v. Mahbubuddin Ahmed* [1998] 3 MLR 121-129 (Bangladesh); *Abdul Aziz v. the Chairman, Board of Directors, Sonali Bank and Others* [1999] 4 MLR 401-402 (Bangladesh).

It is true that civil servants regarded these Tribunals as an affront to their independence as these Tribunals had retired civil servants and judges as members, who had no security of tenure and the executive branch of the government dealt with their appointments, transfers, and removal. These fueled their suspicion and distrust. Suspicion and distrust could be removed once anticipated suggestions surrounding structural issues noted in this article are implemented. Furthermore, scattered procedural complexities are existing under this domain leading the procedure to be lengthy and cumbersome, though one of the purposes of the creation of Administrative Tribunals is to provide quick justice. It is required to devise a complete Code reflecting the principle of Natural Justice, promoting as well quick and inexpensive justice.

Nevertheless, civil servants are provided protection through Administrative Tribunals subject to defects or imperfections noted in the article, which means, they receive protection in a limited way, and safeguards in full swing will be possible to be given after a specific time span. Indeed, it is a matter of no doubt that the search for safeguards through a single institution constantly remains a never-ending revisiting of issues and many possibilities of solutions cannot be predicted at all times, and for all places and all scenarios; hence, what has been seen at present to occur in our Tribunals certainly calls for ameliorative efforts in the paper.

Demystification of Multi-Perpetrator Rape (Gang Rape) and Gender Justice in Bangladesh: A Comprehensive Study

Rafea Khatun[*]
Shakil Ahmed[**]

Abstract: Undoubtedly, rape is a heinous crime that leaves devastating physical, psychological, economic, socio-cultural, and legal consequences on its victims. The incident of multi-perpetrator rape is an indication of an aggravated form of unhealthy society, lawlessness and demoralization among the people. The causes of multi-perpetrator rape are not only multi-dynamic but also alarming for the well-being of society. Sustainable development of society is not possible where unhealthy practices go on. Multi-perpetrator rape reminds us of the abominable condition of women in society. However, some incidents make us concerned that multi-perpetrator rape should not be amalgamated with other types of rape. Though multi-perpetrator rape during wartime is a very common concern for the world, technically this paper will not extend its focus towards wartime MPR (gang rape). This paper demysties various conceptual issues on MPR. First of all, the paper dissects different theories behind the occurrence of gang rape to conceptualize the idea for its better understanding. In line with that, the article attempts to diagnose the socio-legal reasons leading to gang rape. It also sheds light on how the laws address the crux of MPR. The study ends by suggesting some recommendations to combat MPR.

1. Introduction

> *"Not enough people understand what rape is, and until they do…,*
> *Not enough will be done to stop it."*
>
> [A rape victim, quoted in Groth 1979, p. 87]

The offence of rape is not a recent one. It can be traced from the very beginning of our society. At the outset of civilization, it was considered a barbaric action against humanity. As time goes by, the community attempts to stop this heinous offence from society. Yet there is a soaring trend all over the globe, and Bangladesh is not out of it. Lately, in our country, the rate of rape incidence is increasing alarmingly, this also includes multi-perpetrator rape (MPR) or Gang rape in cities and villages as well. Odhikar, a human rights-oriented organization, has reported that in 2007 the number of gang rape was about 79. The number significantly climbed over time, hitting 283 in 2021. Ain o Salish Kendra reported a total of 62 rapes in January 2022, of them 14 were gang rapes. Hence, this appalling situation urges immediate and hands-on action to confront the problem. For that, an academic and social understanding of the

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concept and reasons behind such transgression is necessary, since it will help to address the challenge. Thereby, keeping the said context in mind, this paper will try to demystify various conceptual issues on MPR to understand the actual causes of the said outrage. Throughout the whole paper, the term MPR and gang rape will be used alternatively.

2. Conceptual Understanding of Gang Rape

A thorough understanding of rape is necessary before delving into the concept of gang rape. The crime of rape and its conceptual basis can be found in every piece of literature, e.g the Latin origin *rapere* means 'to snatch, to grab, to carry off'[1], whereas in Roman law rape is denoted as 'the carrying off of a woman by force'[2]. In Medieval English Law, the offence was known as 'kidnapping or abduction'.[3] The notion in the contemporary world is widely noted as sexual violence. In addition to the above, recent jurisprudence termed the said offence as a violation of autonomy[4], an invasion of integrity, and a moral injury[5]. However, one feature of the evil of rape that is common in every culture is the element of nonconsensual sexual behaviour by applying physical force.[6]*John O. Savino* and *Brent E. Turvey* in their writings[7] refer to four different dimensions of the concept of rape: legal, clinical, moral, and political.[8] The statutory definition of rape is surrounded by the *actus rea* (guilty act) and *mens rea* (guilty mind) of the perpetrator, whereas the clinical conception of the term is treatment-oriented.[9] The moral and political understanding of rape is correlated with each other. *John O. Savino* has pointed out that from moral context rape is the consequence of anger, a desire for retribution, and even revenge.[10]

A statutory definition of rape, in Bangladesh, has been provided in a couple of laws. For instance, the Penal Code of Bangladesh defines the offence of rape from the perspective of the victim, on the other hand, the Prevention of Oppression against Women and Children Act 2000 delineates the term from the standpoint of the perpetrator. The former one enlisted five circumstances on the consensual argument

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1 Corinne Saunders, *Rape and Ravishment in the Literature of Medieval England* (D.S. Brewer 2001).

2 Keith Burgess-Jackson, *A most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press 1999) 16.

3 Inhee C. Berg, 'Female Gender Marginality in the Imperial Roman World: Affinity between Women and Slaves in their Shared Stereotypes and Penetrability' (1993) Dunbarton Oaks DOI: 10.2478/genst-2020-0001; Gillian Clark, 'Women in Late Antiquity: Pagan and Christian Life-styles' [1993] Oxford University Press 36.

4 It infringes on the right to decide with whom/when to have sexual relations.

5 It is an attack on the dignity of the woman victim, and by extension on the dignity of women as a class, a gendered crime.

6 Charlene L. Muehlenhard, and others, 'Definitions of Rape: Scientific and Political Implications' (1992) 48 Journal of Social Issues 23.

7 John O. Savino and Brent E. Turvey, *Rape Investigation Handbook* (2nd edn, Academic Press 2011).

8 ibid.

9 Jemma C. Chambers and others, 'A Typology Of Multiple- Perpetrator Rape' (2010) 37(10) Criminal Justice and Behavior 1114—1139: a treatment-oriented definition should focus on the perceptions of the victim and the impact of offense behavior, rather than the intent of the offender.

10 ibid.

of a female to communicate sexual intercourse with the accused, a male, where the offence of rape constituted: (a) against her will, (b) without her consent, (c) with her consent, when her consent has been obtained by putting her in fear of death, or of hurt, (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, (e) with or without her consent when she is under fourteen years of age.[11] On the flip side, *the Prevention of Oppression against Women and Children Special Act 2000,* defines the offence by specifying the intention of the offender, to meet his sexual urge 'illegally'. By the word 'illegally' the Act narrate that the offender with dishonest intention touches the sexual organ or other organs of a woman, assaults a woman sexually, or makes any indecent gesture.[12] Another difference between the aforementioned Acts is that the Penal Code 1860 inscribes a limitation against the said outrage which is absent *in Nari O Shishu Nirjatan Daman Ain 2000.* The limitation as provided in the Penal Code 1860 is that a man is exempted from the said liability if he has intercourse with his wife, who is fourteen years old or above, under the aforesaid five circumstances. In addition to that, from the perspective of the imposition of punishment on the convicted, the Penal Code of 1860 provides a greater punishment than the special law on offences against a woman.[13]

In the case of multi-perpetrator rape (MRP),[14] the definitional context, in general, is the same as rape, only distinction is made on the number of the perpetrator. More than one perpetrator participates in multi-perpetrator rape whereas in the case of rape incidents the number of the offender is single. However, there still have some arguments as to its precise distinction, and often argued that all the multi-perpetrator rapes were not done by only gang groups. Consequently, it will be logical to assume that gang rape can be a species of multi-perpetrator rape and should not be confused as an alternative to group rape/multi-perpetrator rape.

From the characteristic perspective, MRP can be explained in the following words:

a) It is a sexual assault done by a group of people.
b) The perpetrator group may consist of two or more people.

[11] The Prevention of Oppression against Women and Children Act 2000, s 375.

[12] The Prevention of Oppression against Women and Children Act 2000, s 9.

[13] The Penal Code 1860, s 376: Whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; Section 9 of the Nari O Shishu Nirjatan Daman Ain 2000: (a) Whoever, to satisfy his sexual urge illegally, touches the sexual organ or other organ of a woman or a child with any organ of his body or with any substance, his act shall be said to be sexual oppression and he shall be punished with imprisonment for either description which may extend to ten years but not less than two years of rigorous imprisonment and also with fine. (b) Whoever, to satisfy his sexual urge illegally, assaults a woman sexually or makes any indecent gesture, his act shall be deemed to be sexual oppression and he shall be punished with imprisonment for either description which may extend to seven years but not less than two years of rigorous imprisonment and also with fine.

[14] Multi-perpetrator rape – alternatively known as 'Gang Rape', 'Group Rape', or 'Party Rape'.

c) There may have multi-factorial issues behind the perpetrator's criminal motives.
d) The multi-perpetrator rape cases are more vicious and have higher chances for the victim to be murdered.
e) In most cases, perpetrators are previously known to the victim and they have anger upon the victim.
f) In the case of reporting multi-perpetrator rape to the police station, the rate is much higher compared to lone rape except in South Africa.[15]
g) The most common places of occurrence are lone areas of the city or village, vehicles, educational institutes, abandoned houses, bushes, jungle *et. al*.
h) There may have a clear leader and follower roles.[16]
i) In some cases of MPR, there must have been organized attacks and strategic planning for doing the crime.
j) Most of the criminals in MPR are youthful offenders.

3. Critical Examination of Theories on Multi-perpetrator Rape/ Gang Rape

Table 1: Examples of variations on theories relating to MPR

Name of Theory	Reference	Specifications
Psychodynamic Theory	Freud (1922) ; Blanchard (1959); Sparling (2007); Sandy (2007)	- *To prove superior heterosexual behviour in the male community*
Sociological Theory	Amir (1971);	- *Teenagers from lower socio-economic backgrounds experienced their sexual desire* - *Stereotypical attitudes towards women and sexual identity*
Feminist Theory	Groth and Birnbaum (1979); Lees (2002); Brownmiller (1975); Donat and D' Emilio, (1992); Russell (1975)	- *To prove the dominant position (power, control, camaraderie, and validation of masculinity) of men over a woman.*
Multi-Factorial Theory	Harkins and Dixon (2010, 2013); Bronfenbrenner (1979); White and Kowalski (1998); Henry, Ward, and Hirshberg (2004)	- *the individual factors (deviant sexual interests and leadership traits);* - *the sociocultural context (negative attitudes towards women, male dominance, and hostile masculinity); and* - *the situational context (street gangs, war, college fraternities, sports teams, prisons, and anti-gay/lesbian violence)*

[15] Marcel van der Watt and Johan van Graan, 'Towards the demystification of gang rape: An investigative analysis of a sample of closed and unsolved gang rape cases in Port Elizabeth' [2013] Acta Criminologica: Southern African Journal of Criminology <https://www.researchgate.net/publication/264240477> accessed 22 September 2022.

[16] Devina Buckshee, 'The Psychology of a Gang Rape: Exploring Why Men Hunt in Groups' [2019] <https://www.thequint.com/fit/profiles-of-men-who-gang-rape> accessed 22 September 2022.

Over the period, several theories have evolved to conceptualize the concept of rape. However, most of them are associated with lone-perpetrator rape. Theories explaining the concept of MPR are very limited in number. Possibly, *Sigmund Freud* first encountered the concept by analyzing the motivational factors of human behavior. Unconscious motivation mainly pursued human behavior, *Freud* remarked. He further added that the memories of childhood often influenced the memories of the adult; thereby, any sexual aggression in childhood triggers the mind of the adult. *Freud's* psychodynamic theory on gang rape was later illustrated by his followers namely *Blanchard* (1959), *Sparling* (2007), and *Sandy* (2007). They emphasized the heterosexual behavior of the male community and explained that by taking part in multi-perpetrator rape males mainly show their heterosexuality in disguise of their homosexual behaviour, and accordingly prove their superiority in sexual orientation in the male hierarchy.

Menachem Amir another scholar on MPR theories criticizes *Freud's* psychodynamic theory by stating that *Freud's* theory on MPR is purely based on speculation and no material shreds of evidence are hardly found in his favour. According to him, a multi-perpetrator rape is the consequence of the combination of multiple human behavior-driven factors. *Amir* primarily blamed those adolescents who are from a lower socio-economic background. He believes adolescents from the aforesaid environment at their development stage are associated with heightened sexual desires and sexual experimentation. The aforementioned causes together with other factors like group processes, stereotypical attitudes toward women and sexual identity are acted to stimulate the violence-prone community in sexual assault. The main difference between *Freud's* psychodynamic theory and *Amir's* sociological theory is that *Freud* emphasized the sexual preference of the individual whereas *Amir* highlighted the age factor of an individual.

The evil of multi-perpetrators rape attracts the attention of the scholars of the feminist movement in the twentieth century. The main exponents of this school are *Groth and Birnbaum* (1979); *Lees* (2002); *Brownmiller* (1975); *Donat and D' Emilio*, (1992); *Russell* (1975). They believe the male-dominant culture in our society is mainly responsible for a such heinous crimes. They rightly pointed out that a multi-perpetrator is simply the upshot of male dominance, control over women as well as the physical advantage of the group.

The MPR is better explained by the multi-factorial theory. The theory suggests that the interactions of individual, sociocultural context and situational milieu are fundamental components to instigate the said incident. These factors sometimes function alone and sometimes jointly. Deviant sexual interest (e.g homosexual feelings) and leadership traits (leadership was more commonly demonstrated through participative action than through direct order-giving) pursue the interactions of the individual in committing multi-perpetrator rape. The socio-cultural context of gang rape includes negative attitudes toward women, male dominance, and hostile

masculinity. The sociocultural context is mainly based on the belief that in patriarchal society masculinity is seen as dominant on the other hand femininity is seen as submissive. The situational prospect of the school advanced that certain circumstances provoke the offender in participating in such a hideous crime. For an instance, at the time of war sexual violence is used as a strategy against a specific group of people, viz prisoners of war.

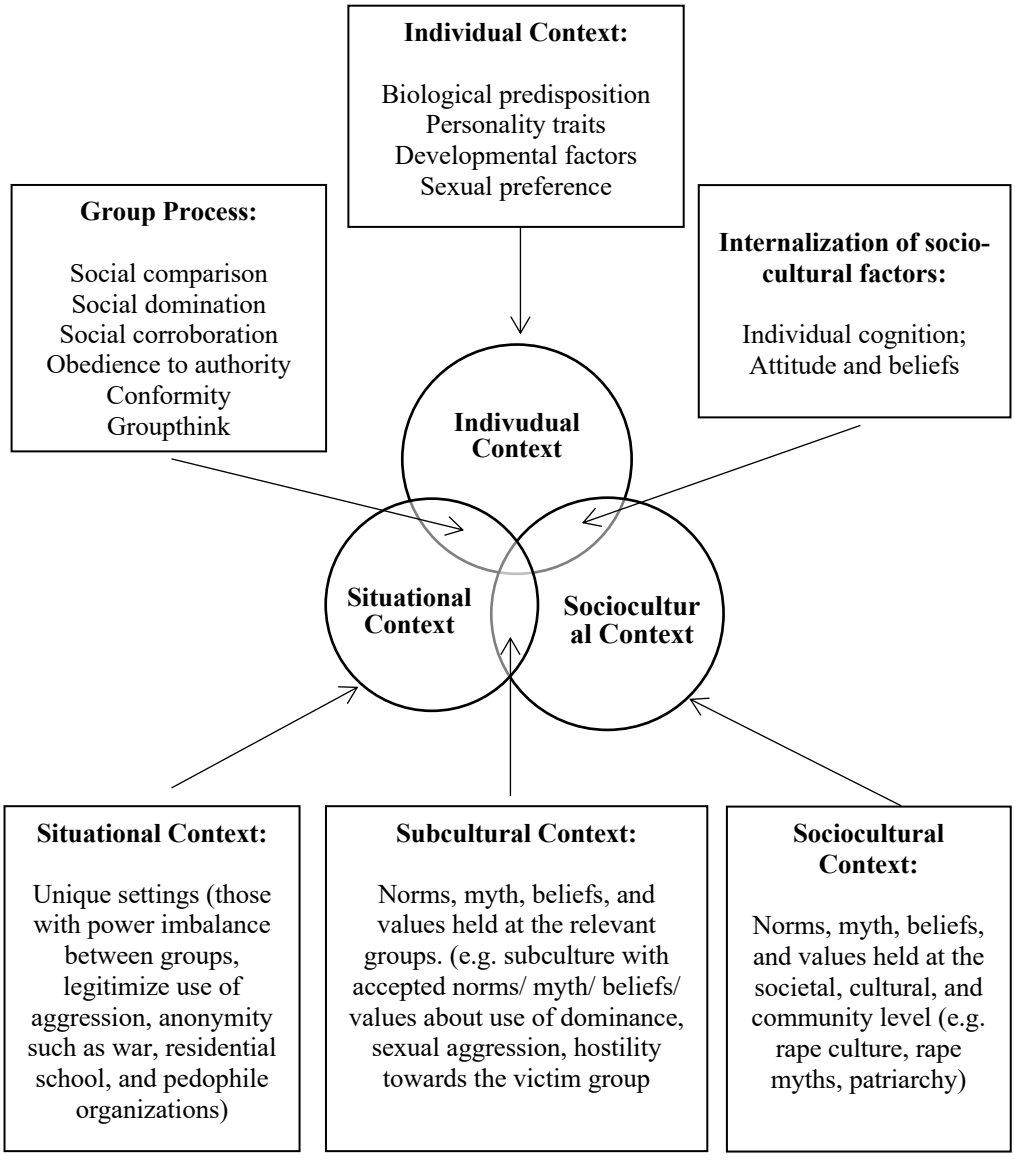

Figure 1: Multi-factorial Model of Multiple Perpetrator Sexual Offending.[17]

[17] By Jane Wood, Theresa A. Gannon (ed), *Crime and crime reduction: The importance of group processes* (Routledge 2016) 75-95.

4. National Legislation and Statistical Discussion on Multi-Perpetrator Rape: Bangladesh Perspective

Laws relating to multi-perpetrator rape or gang rape can be traced in the provision of the Prevention of Oppression against Women and Children Act, 2000. The Act provides that Gang Rape can be happened by a group of individuals either in police custody or outside the police custody. In the former incident, the officials who are responsible for the safety of the victim are collectively liable for the occurrence, whereas in the latter case, the theory of individual criminal liability is followed meaning each of the gang shall be liable under the Act. In the second case, the Act specifies the punishment of the death penalty, or rigorous imprisonment for life, and also with a fine of up to one lac taka for each perpetrator of gang rape.[18] Additionally, for rape in police custody, the police officials may be liable collectively both for being failed in securing proper safety in custody which would be punished with rigorous imprisonment from five to ten years along with a fine also.[19] It is here noted that the Nari O Shishu Nirjatan Daman Ain 2000 only includes one category of law enforcement officials, the police, and the specific indication of the involvement of police officials in the occurrence is absent. Thus, if gang rape is committed with the participation of law enforcement officials[20] whether in the custody or out of custody shall be liable individually under the Act, 2013. Here, the incident of rape will fall under the definition of torture.

For gaining a broad-spectrum inkling of the inclinations and magnitudes of gang rape in our country, the following table enlists the trend of Gang Rape covering from 2007 to 2021. The statistics represent the rate of Gang Rape in three different categories: children, women, and unidentified. The table is drawn taking data from statistical reports published by Ain O Salish Kendra (ASK) and Odhikar. The data was compiled from various newspapers.

Table 2: *Statistics of Gang Rape in Bangladesh from 2010 to 2021*[21]

Year	Gang Rape			Sub-Total of Gang Rape
	Children	Women	Unidentified	
2010	88	89	0	177
2011	108	93	2	203
2012	99	107	6	212
2013	131	141	5	277
2014	92	118	17	227
2015	94	127	15	236

[18] The Prevention of Oppression against Women and Children Act 2000, s 9 (3).

[19] The Prevention of Oppression against Women and Children Act 2000, 9 (5).

[20] The Torture and Custodial Death (Prohibition) Act 2013, s 2.

[21] <https://odhikar.org/wp-content/uploads/2020/02/Statistics_Rape_2001-2019.pdf> accessed 22 December 2022.

Year	Gang Rape			Sub-Total of Gang Rape
	Children	Women	Unidentified	
2016	84	101	12	197
2017	115	119	5	239
2018	95	119	0	214
2019	79	97	0	176
2020	70	110	0	180
2021	72	119	0	191

Source: Ain O Salish Kendra (ASK) and Odhikar

It is apparent from the table data that an increasing trend in Gang Rape was observed between 2010 and 2017. The trend declined in 2019, from 2014 to176. However, the trend again is soaring steadily – 176, 180, and 191 in the year 2019, 2020, and 2021 respectively. Thus, the situation is pointing as a warning for law enforcement officials and the community in general as to the new category of crime in society.

5. Reasons behind the Occurrence of Multi-Perpetrator Rape: Bangladesh perspective

5.1. Ideological Discussion

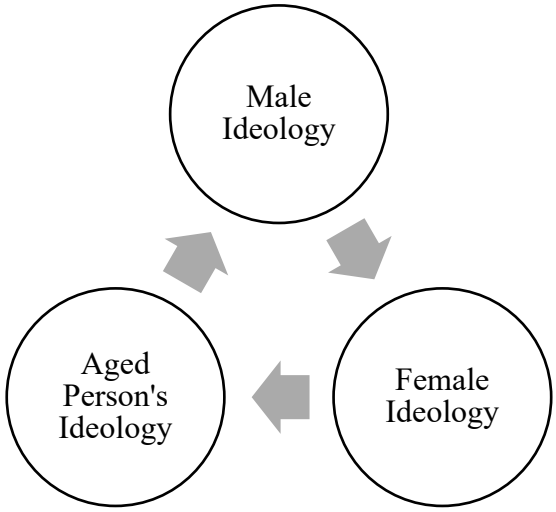

Figure 2: Ideological Factors of Gang Rape Occurrence

5.2. Male Ideology

In the context of Bangladesh, every time an incident of rape occurs, it is always the women who are to be blamed for such an occurrence. A gang rape incident may be backed by numerous spurs. Comprehensive knowledge of multi-perpetrator rape

may lessen the risk of MPR incidence.[22] Many have many reasons behind such causation of MPR or gang rape in the context of Bangladesh. While discussing so, we have found out a few reasons and those are to be explained precisely hereinafter:

Women's Liberation: It is a common belief created by the male society that the liberty of women has brought them to such incidents. The more a woman enjoys liberty, the more likely she is to face such harassment and incidents. Furthermore, they believe that to prevent such sort of occurrences, women should stay in the house more, and should not go outside alone needless to mention especially at night.

Stereotyped belief: Another common belief prevails in our society that young boys are often provoked by attractive, scantily, and seductively dressed girls to commit sexual violence. However, this belief falsely puts the complete onus of the action on the victim, further victimizing her in the process.

Furthermore, a male's ideology behind the causation of rape is that women should dress properly to avoid rape. There have been rapists who were acquitted because the victims dressed "provocatively' in jeans and t-shirts. But here, the question comes where would it be ended? The mindset behind this advice is not far from that of countries where women were required by law to dress in shapeless head-to-toe black dresses with a mask and two slits for the eyes so as not to provoke a sexual attack.

Gender Equality: Gender equality is another reason behind it. Sometimes they argue that, though the basic purposes of gender equality are many, it affected the number of rape incidences positively.

Women's Familiarity with other Men: Familiarity with men which causes their trust in their counterpart is also considered one of the common reasons behind the increasing number of gang rape. However, most of the gang rape occurred by the previously known person in a secluded place.

Men will be men: In other words, it means "Girls will be victims?" This is a common scenario in the context of our country that Men will hold the supreme or dominant position in the family or toward women. As a common myth, they firmly believe that women deserve, which may have an adverse impact on encouraging potential rapists who want the victims would be immobilized by fear.

Other Explanations: The belief of the social science is the causation of rape has to do with sexual desire rather than motivated by men's endeavors to dominate and rheostat women. It also contends that rapists are nurtured by their social culture.

[22] Randy Thornhill, and Craig T. Palmer, 'Rape and Evolution: A Reply to our Critics' (2002) 4 Psychology Evolution and Gende 283 <http://dx.doi.org/10.1080/14616661.2002.10383129> accessed 15 November 2018.

5.3. Female ideology

Expression of power: From various social factors men are taught that they are sexually superior to women. However, some men rape because they just want to prove themselves superior to their counterparts.

Revenge: Some gang rape incidents are occurred by men just to take their revenge against any specific girl for numerous reasons such as got rejection ofa love offer or got underestimation by any girl for good reasons.

Media: Some of the feminist scholars advocated that pornography objectifies women which causes sexual aggression against them. It is also proven that exposure to pornography is liable to increase men's aggression, particularly when a male participant has been affronted, insulted, or provoked by a woman. However, unfortunately, our TV events and movies are also full of various scenes of women being threatened, raped, and tortured.

5.3.1. Aged person's ideology

Lack of Morality: The aged people firmly believe that it is the contemporary changes in our country which is the reason behind the causation of rape. They believe that with the passage of time, the sense of morality has decreased and this lead people to commit such heinous crimes.

Religious Perspective: Another reason is that aged people think that nowadays people are not so engaged with the views and ideologies of religion. They don't abide by the rules and are given path ways that have been provided by their religion. They also think that if they had followed their religious obligations, they would have had fear of God and punishment or consequences afterlife. Therefore, they could've never done this heinous offence.

Effect of Modernism: Things around us are changing and with this change, we, the people of this country are also changing. Day by day, we have been adopting western culture and its ideologies. We have forgotten our own cultures and traditions without thing any further consequences.

Family's Ignorance: One thing which we have found interesting is the family's involvement. In our country, nowadays, family's involvement with their children's upbringing is getting low. Therefore, the children are not getting enough value from their families. Thus it leads to the causation of rape.

5.4. Social Factors

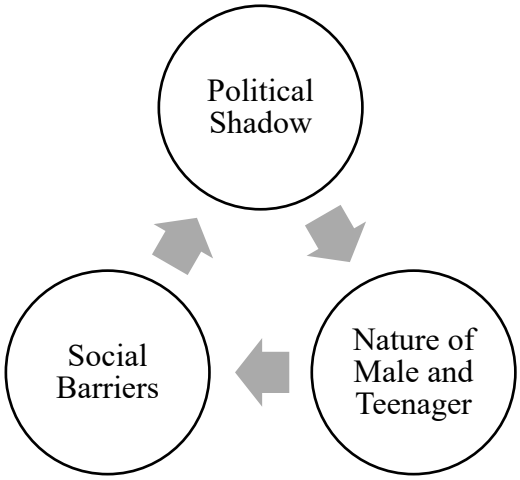

Figure 3: Social Factors of Gang Rape Occurrence

While working on this paper, we concluded that there are some factors that both the male, females, as well as aged people, believe to be the causes of rape occurrence. Those are to be discussed briefly as follows:

Political Shadow: They believe that sometimes group rape is also the agenda or propaganda of the political parties. In the context of our country, political parties have the tendency to create new issues and indulge the people of the country with them. By doing this they try to confuse them and take advantage of such situations.

Nature of the Male: While there have many points on which we have found dissimilarity or conflicting statements among the male, female, and aged person, many of them agreed that it is the nature of the male which leads to such heinous offence. Also, they believe that its perspective or mentality is the reason for child rape, the rape of a 70-year-old lady, etc.

Fun Activities have gone wrong by Teenagers: In most of the MPR cases, the perpetrator used to justify their offence as an accident and without having any prior mala-fide – intention to occur any sexual offences. In addition, they confess that initially, that was a fun activity which later on went wrong by losing control of them.

Social Barriers: Another important common reason that we found is, the society and the trends of the society. They believe that it is society and its long-practiced tradition which indirectly promotes rape and it is believed that society plays an important role in protecting the rapist as it is the tendency of the society that the woman who is subjected to such heinous offence is the sole reason. Therefore, we should blame the female, not the rapist. They believe that maybe it is the girl who induced that man to rape her. Whenever rape happens in our society, people of the society point out the

girl's character and blame her for her immoral character thinking that she must have done something.

Therefore, it can ascertain that there is no specific reason for rape. It solely depends on the perspective of the man who actually does such an act. No law can change the mentality of any man. It is the man himself and his family, and society that can ultimately change a man's thinking.

5.5. Problems in Multi-perpetrator Rape Litigations in Bangladesh

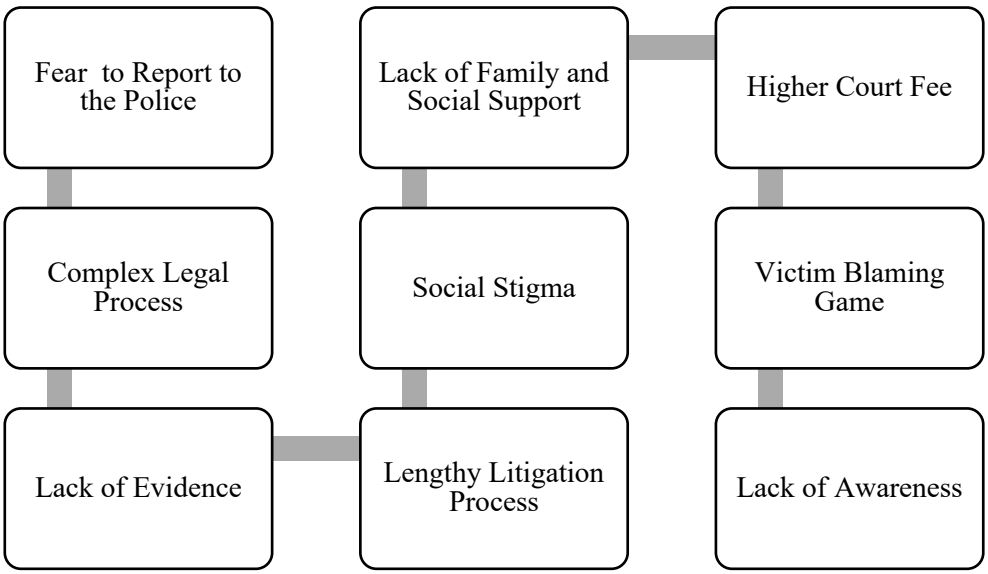

Figure 4: Frequency of Gang Rape Litigation Problems

Fear to Report to the Police: In most case of MPR in our country, the group or gang party belong to a politically patronized or powerful armed group and the possibility of further harm to their family often demotivated the victims to lodge a police complaint.

Social Stigma: In our society, if a girl is raped by a group of people, it means she lost everything in life. She would be considered untouchable by others in society. However, due to social avoidance and dishonour, many of the victims are unwilling to go through legal processes in further.

Lack of Evidence: Due to various reasons in the case of MPR proper evidence couldn't be found and produced before the court which bound the court to free the MPR perpetrator.

Lack of Family and Societal Support: Most MPR victims do not get sufficient support from family and society as well.

Lengthy Litigation Process: Due to the lengthy litigation procedure the legal relief lost its actual feasibility to the victims.

Reparation Theory of Justice in MPR Cases: Still now our judges are binding them in giving simple fines and imprisonment. Though there is a legal bar in announcing compensation in MPR cases, due to some unknown reason giving compensation is quite rare.

6. Multi-perpetrator rape laws in other countries

India

Though India has the world's lowest per capita rape, it is not free from the curse of gang rape. The country does not collect separate data on gang rape. Under the Indian Penal Code of 1860[23], gang rape offence was punished with rigorous imprisonment from 20 years to life imprisonment and a fine also. Additionally, such a fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Indonesia

A lancet study of Jakarta and Jayapura city on New Guinea island, found gang rape prevalence rates to be 2% and 6.8% of all Indonesian men respectively, at some point in their lifetime, have committed multi-perpetrator rape. About 52% of the perpetrator had raped more than one woman, while 12% had gang-raped a woman and raped a man. In Indonesia, a new sexual violence bill was passed very recently and provides capital punishment and chemical castration for gang rapists along with other punishments.

Malaysia

Like other nations, Malaysia does not segregate rape and gang rape cases. Malaysia reported about 3000 rape cases in 2012, a rape incident rate of about 10.7 rapes per 100000 people. Under the Malaysian Penal Code, Section 375B provides punishment for gang rape with imprisonment for 10 years to 30 years.

Pakistan

The 2013 National Crime Data report for Pakistan suggests a current rape rate of 8.4 women per 100000 population, of which about 10% were gang rapes. Besides these, Bahawalpur gang rape, Lahore gang rape, Peshwar gang rape, Karachi gang rape, etc. are mentionable. Life imprisonment or the death penalty are the two options of punishment for gang rapists in Pakistan.[24]

South Africa

[23] The Penal Code 1860, s 375D.

[24] Protection of Women (Criminal Laws Amendment) Act 2006.

Gang rapes occur frequently in South Africa, and in certain parts, it is termed *jackrollin*. South Africa reported over 64000 rapes in 2012, or about 127.5 women per 100000 population. With one woman raped every 4 minutes, South Africa has the world's highest rape incidence rate per 100000 women. Between 10% to 33% of all rapes are gang rapes involving three or more people. About 25% of youth near Johannesburg describe gang rape as recreational and fun. In the case of gang rape, life imprisonment for indeterminate and in other rape cases 15 years imprisonment are the prescribed punishment in this country.[25]

United Kingdom (UK)

Though an increased rate of gang rape occurrence has been noticed since 1996 in the United Kingdom, till 2011 no separate data on gang rape was recorded there. Media reports of gang rapes in the UK are often racially charged since late 2000. A rapist may be punished with either life imprisonment or any other shorterterm here. This punishment is also appealable.[26]

France

In banlieues, organized gangrapes are referred to as tournaments, or 'pass-around'. One of the first people to bring public attention to the culture of gang rape was Samira Bellil, who published a book called DansI'enfer des tournaments ('In Gang Rape Hell'). Here, a minor convicted of gang rape would be punished with 10 years imprisonment.[27]

United States of America (USA)

The USA records at least one rape incidence every 6.2 minutes. Though it does not collect separate data on gang rapes, Vogelman and Lewis estimate that 25% of all rapes in the US are gang rapes. However, one–fourth of rapes here is gang rape. A Roger Williams University study estimates from a survey of crime data that 16% of all male rapists in the US joined in a gang rape crime.[28] In these countries, the punishment for gang rape is life imprisonment to various terms of imprisonment which may vary from country to country in the United States of America.

[25] South Africa's Criminal Law Amendment Act 1997, s 54.

[26] Aarzoo Guglani, *Punishment against rape in different jurisdictions* (iPleaders, 14 July 2020) <https://blog.ipleaders.in/punishment-against- rape-in-different-jurisdictions/> accessed 24 September 2020

[27] Scott Sayare, *Light Gang Rape Penalties Provoke Outcry in France* (The New York Times, 11 October 2012) <https://www.nytimes.com/2012/ 10/12/world/europe/in-france-light-gang-rape-penalties-prompt-outcry.html> accessed 16 September 2020.

[28] <https://en.wikipedia.org/wiki/Rape_in_the_United_States> accessed 17 September 2020.

7. Multi-Perpetrator Rape and other Contemporary Issues

7.1. Restorative Justice in Gang Rape Cases: Right to Reparation

The restorative justice notion advocates rape crime not merely as a law-breaking incident but rather as a deep-rooted personal and social injury. Misfortunately, the rape laws in our country mostly uphold punitive solutions. However, in some cases, the offences are mutualized by giving the victim marriage with the rapist which would be complicated in case of gang rape cases. In cases of rape, as in our country rape and gang rape are not considered as different in consequences to the victim, imposing a fine under Nari O Shishu Nirjatan Daman Ain, 2000 is mandatory and common. But Under Section 15 of the above Act providing compensation is within the discretion of the Court and it has no evidence to be imposed in our country. On this point, a study on BLAST also advocated for granting compensation to rape victims for ensuring full justice in rape cases.[29] However, in 2007, a draft of the Crime Victim Compensation Act was done by our law commission providing a healthy system for victims of crime such as establishing the Victim Compensation Fund and a Victim Services Committee in each district of the government. Taking the graveness into consideration mandatory compensation provisions need to be incorporated especially in the case of gang rape victims.

7.2. Gender Justice: Can women be accused of gang rape?

Whether a woman can rape or not, is clear from the definition of rape from the two existing penal laws on Rape.[30] Section 175 of the Indian Penal Code talks about 'person' rather than the word 'man'. Though, this part can be interpreted positively to convict women as perpetrators in rape as well as in gang rape cases. However, the judicial authority in India did not welcome this broader explanation very open-mindedly.

In *Priya Patel vs State of Madhya Pradesh*[31], it can be observed here-

> The non-ambiguous language of section 375 of IPC expressly mentions that the act of rape can simplest be carried out via 'guy' and no longer by using 'any individual'. Thus a woman can not commit rape. The court further dominated that a female can not have an aim to rape, as it miles conceptually unbelievable and therefore, she will be able to neither be held for rape, nor gang rape.

Another case, *the State of Rajasthan vs. Hemraj*[32], Smt. Kamla was acquitted only because she is a female in this case by following the above judgment. Though later it

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[29] Taqbir Huda, 'No Justice Without Reparation, Why Rape Survivor must have a Right to Compensation' (2010) 2 Rape Law Reforms Research Report 2020 <https://www.blast.org.bd/content/publications/No-Justice-without-Reparation.pdf> accessed 18 November 2020.

[30] The Penal Code 1860, s 30.

[31] [2006] AIR (SC) 2639.

[32] [2011] 13 SCC 705.

was criticized for leaving many questing on this issue unearthed such as whether a girl could be charged for group rape by abetting also.

8. Some Remarkable Multi-Perpetrator Rape Cases in Bangladesh

On March 20, 2016, the dead body of a 19-year-old girl named Shohagi Jahan Tonu had been discovered in the Maynamoti cantonment area. Primarily, the sign of sexual assault was recognized in her dead body. However, the first medical report released that there was no evidence of rape on her body. After this, the second medical report revealed a contrast that got some sign of sexual assault on her body which sparked controversy. Unfortunately, there was no rapist found though the family of that victim girl repeatedly claimed against some members of that cantonment.

In March 2020, a 14 years-old impoverished girl was living in a train station and she was forcibly taken to a secluded place and raped by a gang of delinquents at night.

In March 2020, two ethnic girls from Bandarban were gang raped by two men (ages 23 and 27) after they were taken to a different destination at night in a local vehicle.[33]

In April, A child was taken in an isolated place from her school and was raped by two adolescent boys. Primarily the local people rescued her after hearing her screaming and hospitalized nearly. However, later she needed to be transferred to another hospital due to her deteriorating condition.[34]

On September 25, 2020, a young couple was roaming around at MC College in Sylhet. At night, some young people snatched their vehicle and forcefully took the girl inside the college. There the girl was raped by 9 young people and her husband was tied down outside. Lastly, the local police rescued them after getting the information from the local people.[35]

On 2nd September 2020, a woman was sexually harassed by some men and that was taken in video coverage that later got viral.[36]

9. Suggestion

Though it is not possible to vanish multi-perpetrator rape, it can be controlled and reduced through various effective measures. In considering the above discussion on problems of multi-perpetrators rape cases this research suggests the following prospective ways outs—

[33] <http://www.thedailystar.net/2-rmg-worker-ethnic-minority-cmmunity-raped-in-bandarban-1882984> accessed 16 November 2020.

[34] Teenagers held Over Child-Rape, *Dhaka Tribune* (Dhaka, 31 May 2020); and Teenagets Arrested for Raping a Child in Kurigram, *Dhaka Tribune* (Dhaka, 31 May 2020).

[35] Women Gang-Raped Insylhet's MC College, *Dhaka Tribune* (Dhaka, 14 October 2020).

[36] Noakhali Gang Rape Victim: Delwar Raped Her Several Times Before, *Daily Star* (Dhaka, 14 October 2020).

I. Most importantly we need to consider multi-perpetrator rape (gang rape) as a distinct category of crime as well as the most heinous nature of the sexual assault.

II. Reform should be made in rape-related laws especially ensuring severe punishment for multi-perpetrator (gang rape) rape.

III. Standard response procedures should be formulated for gang rape incidence.

IV. Every police station can maintain a docket system of information on Gang rape or multi-perpetrator rape so that NGOs and other governmental organizations can use this docket for further development of gang rape prevention.

V. Multi-perpetrator rape cases should be taken most seriously and need to be adjudicated speedily. Additionally, in the case of multi-perpetrator rape the parameter of proving the crime need to be easier and victim-friendly.

VI. The court should be careful in analyzing the issue regarding consent, body scratching as well as medical report findings.

VII. More restricted use of social media by the youth should be controlled by the government authority.

VIII. Moral and ethical education should be ensured from both home and educational institutions.

IX. Deterrent and exemplary punishment should be inflicted to discourage others from copycatting crimes of MPR.

X. A compulsory provision for victim's compensation needs to be inserted in the Nari O Shishu Nirjaton Daman Ain, 2000needs to be modified.

XI. Enact the draft Crime Victims Compensation Act.

XII. Judicial officers need to be trained in restorative justice mechanisms.

XIII. As this crime is very common among the youths, the parents of youth need to be more careful about their adolescents' activities and circle with whom they make the most of the planning.

10. Conclusion

In a civilized world gang rape or group, rape should not only be considered heterogeneous delinquency with sundry perpetrators with varying impetuses but also a crime against society. On top of this, this crime is also considered internationally a crime against humanity and in special time a war crime. Additionally, as a stakeholder of SDGs government and non-governmental organizations need to pro women achieve goals 5 and 16 of sustainable development goals. Most importantly, gang rape or group rape is a distinct category of crime that should be differentiated from the common single rape. Due to the recent alarming increase in these crimes, combined efforts with comprehensive laws on rape with specific provisions on gang rape need to be ordained as soon as possible. Besides

these, all families need to be proactive in giving moral education to their sons. There are few contemporary areas on gang rape (GR) in which further comprehensive research is much needed to identify the real risk factors. However, the findings of those research could help to develop an effective risk assessment tool to combat MPR in our country. Finally, some issues related to gang rape are less focused on due to time constraints, and word limitations are hereby confessed by the authors.

Informal Workers' Safety Rights and Sustainable Development Goal-8: Insight from Old Town Dhaka, Bangladesh

Zelina Sultana*

Abstract: Thousands of workers are working in many informal sectors in old town of Dhaka city that have played pivotal role in forming the country's economy. The informal workers of old town remain and continue their work in old, narrow, dark and congested buildings which results in unsafe work experience, and they become sick, fail to be productive and sometimes expire. The COVID-19 situation impacts countrywide, including the informal workers at old town of Dhaka City. The study attempts to observe the informal workers working facilities related to their work place, health and safety in old town which are the key requirement of decent work and economic growth in goal 8 of Sustainable Development Goals (SDGs). It also highlights the existing legal framework and policies of worker related working facilities and safety by adopting the policy analytic method to examine how far these are applied for them. It finds informal workers, who are 80% of total labour force in Bangladesh left behind the scope of extant legal framework and policies, which is against the norms of SDGs. In addition, workers are deprived of wages, definite working hour, leave, and other service benefits as well as work in unhealthy and old risky buildings. If they are left beyond the legislation and policies, the goal 8 of SDGs achievement would be unimaginable for Bangladesh. The study argues that safety facilities should be same for both formal and informal workers and same should be implemented by amending the country's labour related legislation and policies. It also stimulates the forthcoming policies to ameliorate their safety and work place facilities in order to achieving SDG-8.

1. Introduction

In Bangladesh, 80% of the labour force is constituted from the informal sector which is a combination of different sectors such as agriculture, hunting and forestry, wholesale and retail trade, manufacturing, transport, storage and communication.[1] Old town which is known as *Puran* (old) Dhaka has become the main business area, facilitating informal trade, commerce and business which generated informal employment and income.[2] The informal activities mainly observe two characteristics such as: labour intensive and exclude formal state regulations signifying to the informal activities.[3] However, the Labour Welfare Foundation Act, 2006 Section 2 (a) provides a clear definition of informal sector but not informal worker directly. According to this Act 'Informal sector means the non-government sectors where

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1 Abdur Razzaque Sarker, 'Informal Workers in Bangladesh: An Analysis from Socio- economic Perspective, (2013) 6 (3) Asian Journal of Research in Business Economics and Management 42, 48.

2 Md Nazmul Alam, 'A Socio-economic Study of Informal Sector Workers of Dhaka City' (2012) 9 Bangladesh e-Journal of Sociology 101,108.

3 ibid.

workers' work or condition of work etc. are not recognized or controlled by existing labour law and related policies and where there is very limited scope for employed workers to be organized'.

Old town, which accommodates thousands of informal workers, consists of small manufacturers, warehouses, and small factories, market places situated in Laksmibazar, Tantibazar, Shankharibazar and the adjacent study area.[4] The entire area of old town is very congested, crowded with narrow and raw roads, buildings; resulting in increased sufferings of the workers, dwellers and businessmen.[5] This congested nature of roads and building is remaining unchanged and looming the life of the workers for frequent fire incidents[6] and building collapse.[7] Sometimes the premises have no work place minimum facilities for the workers and they suffer lots.

However, old town presently has become susceptible, where thousands of century-old buildings are situated and their possibility of collapse at any time create a dilemma to preserve the heritage sites or demolish the buildings by the respected Government officials.[8] The new buildings make the businessmen and workers more vulnerable and prone for insufficient work-place facilities. Building constructions of old town remains beyond the legal rules of Bangladesh National Building Code 2006 (BNBC)[9] the newer buildings are more vulnerable to collapse which needs study and further empirical research. Workers death for unsafe building is rife and the first loss of 73 lives was the event of spectrum garment factory building collapse in Savar near Dhaka.[10]Again Rana Plaza, an eight-story commercial building has collapsed where 1,134[11] people died and approximately 2,500[12] were injured. In this regard, formal and informal both workers need a safe working premise which is also a part of decent work and need more research on it.

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4 Pinaki Roy '400 Years of Dhaka, Golden past of olden Dhaka' *The Daily Star* (Bangladesh, 28 July 2008) <www.thedailystar.net/news-detail 47801> accessed 15 March 2022.

5 Ahmad Ilderim Tokey, and others, 'Redevelopment of a Dense Area: A Participatory Planning Approach for Regeneration in Old Dhaka, Bangladesh' (2020) 31 (3) Journal of Regional and City Planning 217, 236.

6 Wasim Bin Habib and Mohammad Al-Masum Molla, 'Old Dhaka at Grave Fire Risk, More than one Fire Takes Place a Day in Old Town Mainly Because of Numerous Chemical Storage, Plastic and Other Factories' *The daily Star* (Bangladesh, 02 March 2019) <https://www.thedailystar.net/frontpage/news/chawkbazar-fire-tragedy-old-dhaka-grave-fire-risk-1709428> accessed 17 March 2022.

7 Arifur Rahman Rabbi, 'Old Dhaka Building Collapse: Another Body Found' *Dhaka Tribune* (Bangladesh, 2019 July 18) <https://archive.dhakatribune.com/bangladesh/dhaka/2019/07/18/old-dhaka-building-collapse-another-body-found> accessed 17 March 2022.

8 ibid.

9 Md Faiz Shah and Osamu Murao, 'People's Seismic Risk Recognition in Dhaka and Bangladesh National Building Code (BNBC) 1993' (2010) <https://www.researchgate.net/publication/283311087_PEOPLE'S_SEISMIC_RISK_RECOGNITION_IN_DHAKA_AND_BANGLADESH_NATIONAL_BUILDING_CODE_BNBC_1993> accessed 17 March 2022.

10 Geertjan, 'Spectrum collapse: eight years on and still little action on safety' (2013) Clean Cloths <https://cleanclothes.org/news/2013/04/11/spectrum-collapse-eight-years-on-and-still-little-action-on-safety> accessed 23 May 2022.

11 Tansi Hopkins, 'Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22' *The Guardian* (23 April 2015) <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> accessed 23 May 2022.

12 Julhas Alam and Farid Hossain, 'Bangladesh Collapse Search Over, Death Toll 1, 127' (13 May 2013) < https://www.the-review.com/story/news/2013/05/13/bangladesh-collapse-search-over-death/19271220007/> accessed 24 May 2022.

Despites the work premises difficulties, the workers of old town are constantly facing health and service related problems in absence of strict regulation for them.[13] They face health and safety problem like clean water supply and sanitation.[14] Informal workers health and safety in decent working condition should be maintained by adopting comprehensive approach involving different stakeholders and organizations.[15] Otherwise the achievement of goal 8 of SDGs of decent work and economic growth would be a difficult one.[16] Bangladesh needs to understand the possibilities and challenges to ensure decent working condition in informal sectors.[17] Literatures also proved that the informal workers health, economy and care crisis increased and need comprehensive strategies to protect their rights, safety and facilities for continuing their livelihoods in emergency situation like COVID-19.[18] Thus, the paper aims to highlight the questions such as: what are economic activities and the facilities available for informal workers particularly in old town? How does the SDG-8 relate with the safety and rights of informal workers? How far is the available legal protection adequate to address the issue of the informal workers protection as well as the linked with achievement of SDG-8?

After reviewing existing literatures on this topic, it is found that legal research is in dearth relating to ensuring the informal workers rights and safety facilities for achieving SDG-8. This study desires to cover the gaps addressing by the above research questions through both empirical research in old town and analytical study of contemporary laws, policies and scholarships. Therefore, the paper explores and synthesize the informal workers work related safety and facilities both in primary and secondary sources. It finds that Bangladesh has no existing legislations, plans and policies for informal workers protection which hinders achievement of SDG 8 and other related SDGs and global goals such as food security which is based on informal workers. Thus, it recommends comprehensive policy measures to tackle the informal workers deprivation of safety and facilities led crisis in Bangladesh in order to attain the SDGs within 2030. The study is crucial for informal workers protection in Bangladesh as well as to step forward in achieving SDGs particularly goal-8. In addition, this study will assist to understand the situation of informal workers in a better way which trigger to integrate the facilities and safety of informal workers in

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[13] cf Alam (n 3).

[14] Arthur Jason, 'Organizing Informal Workers in the Urban Economy: The Case of the Construction Industry in Dares Salaam, Tanzania' (2008) 32(2) Habitat International 192, 202.

[15] ibid.

[16] Nahid Sultana, Mohammad Mafizur Rahman and Rasheda Khanam, 'Informal Sector Employment and Economic Growth: Evidence from Developing Countries in SDG Perspective' (2022) 14 (19) Sustainability, 11989.

[17] OXFAM, 'Pursuing Decent Work in the Informal Sector, Understanding Employers' Views on Decent Work Principles in the Informal Sector in Rangpur and Barishal, Bangladesh, (2019) <https://oxfamilibrary.openrepository.com> accessed 26 May 2022.

[18] Md Salman Sohel, Babul Hossain, Md Nazirul Islam Sarker, Gazi Abu Horaira, Md Khaled Sifullah and Md Abadur Rahman, 'Impacts of COVID 19 Induced Food Insecurity Among Informal Migrants: Insight from Dhaka, Bangladesh' (2021) Journal of Public Affairs e2770; See also Ana Carolina Ogando, Michael Rogan, and Rachel Moussié, 'Impacts of the COVID-19 Pandemic and Unpaid Care Work on Informal Workers' Livelihoods'(2022) 161(2) International Labour Review 171, 194.

forthcoming labourer and development related policies. Since sustainable development is not worthwhile in any country by leaving behind the protection of any sector of people; and the present study is very crucial.

The extant scholarships focus on informal economy[19], informal workers challenges[20] their socioeconomic conditions[21], Impact of COVID 19 on them[22] and so on but do not focus on the selected research topic. Considering the necessity of this research and based on the research questions, it begins with an introduction stating the importance to address the aims of this study. Later, the paper provides an overview on the research methodology and the process of collection of data and information. The third heading tries to answer the first research question and elaborate the economic activities in old town and the workers' condition in reality. Next part briefly outlines the linked between the SDG-8 achievement and the legal regime addressing these. Lastly this paper addresses the findings with the way forward and with a concluding observation.

2. Materials and Methods of Data Collection

Study Area: The study area is located in old town Dhaka and in three *Thana*s (Sub-districts), such as: Kotwali, Sutrapur and Bongshal because the informal workers are more employed in main business places like Sankharibazar, Tantibazar, Chawkbazar, Islampur, Banglabazar, Bongshal, and Dholai Khal.

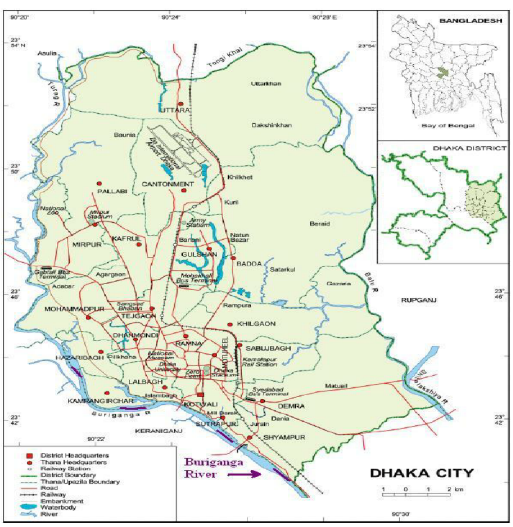

Figure 1: Dhaka City Corporation (DCC) Area[23]

[19] Md Hasan Reza and Nicole F. Bromfield, 'Human Rights Violations Against Street Children Working in the Informal Economy in Bangladesh: Findings from a Qualitative Study' (2019) 4 J. Hum. Rights Soc. Work, 201, 212.

[20] cf Alam (n 3).

[21] cf Sarker (n 2).

[22] cf Sohel et al. (n 19); and see also cf Ogando et al. (n 19).

[23] Banglapedia, 2009 National Encyclopedia, <https://en.banglapedia.org/index.php/Bangladesh> accessed 28 May 2022.

Target Group: Many categories of informal workers[24] are working in old town but the research is only focused on the workers who work in different small warehouses, small factories, printing press, colouring house, book binding houses and storehouses. The respondents are selected judgmentally.

Population Size: 200 workers of different business places are interviewed. The question was in Bengali for their understanding because most of them are not educated.

Data Collection Tools: A Bengali questionnaire is developed on the basis of rights which are provided to the formal workers under the Bangladesh Shrama Ain 2006 (Bangladesh Labour Act 2006 hereinafter BLA 2006) and regarding business premises to collect primary data. However, the secondary data and information are collected from books, journal articles, and newspaper articles and a large number of data are collected through internet browsing. Informal economy, informal workers rights, old town business premises condition, health and occupational rights, laws relating to workers rights and safety were the key words for searching the information. Online daily newspaper articles on fire incidents and workers safety in work place is also browsed by the researcher to gain contemporary knowledge of the topic.

Data Collection Process: In depth face to face interview has been done in the old town. The in depth interview has been done to find out the reality of the working environment in the business institutions and worker's rights including occupational health and safety. On the other hand observation is also used as a data collection tools. Data are collected in working time and from 12 January 2022 to 8 February 2022.

Data Analysis: Many data are collected but only relevant data are analyzed. Primary data is analyzed through using MS Excel. Secondary data are collected and analyzed and only related information is used to discuss the objectives of the paper.

3. Economic Activities in old Town and Informal Workers' Facilities

Though informal sector represents a significant part of the country's economy but the workers are deprived of rights and safety as being informal workers.[25] Informal workers are those who are wage labourers, self-employed persons, unpaid family labourers, piece-rate workers, and other hired labourers.[26] According to ILO guidebook, informal employment includes the self-employed, paid workers in informal enterprises, unpaid workers in family businesses, casual workers without fixed employers, and sub-contract workers connected to both formal and informal

[24] 'Informal economy in Bangladesh' ILO in Bangladesh, <www.ilo.org/dhaka/Areasofwork/informal-economy/lang--en/index.htm> accessed 28 May 2022.
[25] cf Sarker (n 2).
[26] ibid.

enterprises.[27] They are not formally regulated or governed by the existing laws, rules and regulations or by government authority or autonomous body.[28] As stated above, lots of informal workers are employed in different business activities and it is found that the informal workers are facing constant challenges in absence of status as formal workers mainly in developing countries. [29]

In addition, informal nature of work has raised issues for public health, as informal laborers often have to work in small and undefined workplaces, and in unsafe working conditions.[30] Fire incidents and workers deaths are rife for congested and narrow areas of old town.[31] The fire out broke in 2010 at Nimtoly old town Dhaka has caused 117 death, 150 received critical burn injuries.[32] Most of the houses around 80% of residential houses[33] in old Dhaka have some kinds of factories or warehouses on the ground floors or up to third/fifth floor and residential flats on the rest of the top-floors.[34] Most of these informal work sectors such as: warehouses or factories are either used for storehouse of chemicals or plastic materials, papers, cloths, different acids using in gold factory etc., which are dangerously toxic and inflammable.[35] Both the owner of business and workers are in dangerous condition for the risky premises. However, the workers minimum working rights and safety is not maintained in the study area.

Despites the unhealthy and unsafe conditions of building premises, the informal workers are found working longer hours in unhealthy condition, about 10-12 hours in a day for their daily working activities.[36] They have no overtime and extra payment for extra working hours and this long time of the day is their regular working schedule without any overtime/ extra payment. Informal workers complained first about their daily working hours which should be fixed by a comprehensive legal regime like formal workers.[37] They feel discrimination when they found that formal workers paid extra for working extra time but they are not. This survey result

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[27] International Labour Organization, 'Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators' [2018] Department of Statistics (STATISTICS): Geneva, Switzerland.

[28] Fabian Sebastian Achana and Augustine Tanle, 'Experiences of Female Migrants in the Informal Sector Businesses in the Cape Coast Metropolis: Is Target 8.8 of the SDG 8 Achievable in Ghana?' (2020) 6 (2) African Human Mobility Review 58, 79.

[29] ibid.

[30] Marisol E. Ruiz, Alejandra Vives, Èrica Martínez-Solanas, Mireia Julià, and Joan Benach, 'How does informal employment impact population health? Lessons from the Chilean employment conditions survey (2017) 100 Safety science 57, 65.

[31] Md Anisuzzaman Ibne Omar, Mihoko Matsuyuki, Sangita Das, and Michio Ubaura, 'An Assessment of Physical Aspects for Seismic Response Capacity in Dhaka, Bangladesh' (2021) 10 Progress in Disaster Science, 100175.

[32] Imam Husain, 'Nimtoli Tragedy: The Worst Nightmare' *The Daily Star* (Bangladesh, 12 Jun 2010) <www.thedailystar.net/news-detail-142316> accessed 27 May 2022.

[33] ibid.

[34] Found by the researcher during survey.

[35] ibid; Fernando G. Benavides, Michael Silva-Peñaherrera and Alejandra Vives 'Informal Employment, Precariousness, and Decent Work: From Research to Preventive Action' (2022) 48(3) Scandinavian Journal of Work, Environment & Health 169, 172.

[36] cf Achana (n 29); See also Table 1.

[37] Found by the researcher.

regarding working hour and payment has similarity with the previous study done by Alam in 2012.[38]

Table 1: Working Hours of the Workers

Working Hours Per Day	Percentage
8-9 Hours	12%
10-11 Hours	45%
12 Hours	30%
12 Hours more	13%

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Informal workers are generally uneducated and sometimes inexpert and unskilled, as informal sector facilitate the employment opportunity for them.[39] Many times, salary fixation depends on the employers and they fixed it by negotiation at the time of joining. Most times workers are paid monthly but payment is delayed for want of having fixed day of payment. Both appointment and discharge of the informal workers are absent and there is no specific rules and authority to regulate their appointment and discharge.[40] Generally, they are appointed orally and there is no written contract between the workers and the employer regarding the work, hours of work, payment, leaves, and holidays.[41] It is proved that, work without a written contract and legal protection is more risky in perspective of occupational injury than the formal work.[42] Moreover, they are removed from their job without any lawful grounds and any notice. This legal deficiency caused the failure to take legal action against the employers. It paves the way to economic exploitation of the workers by the owners. The research has also found owners complaint against the workers; about leaving their work without advance notice for which they face economic loss. Further they argue that workers might escape by committing theft and owners face hurdle to recover the money back. Thus, absence of formal appointment system has two-fold demerits one for workers and another for employers.

The most significant problem is, workers do not have any group or union for achieving their rights and status like formal workers.[43] It makes them more vulnerable and helpless in time of crisis. In survey, only in Tantibazar, a union of gold ornaments makers is found, but from the workers perspective the union is ineffective and done nothing for the worker's benefit and protection of their rights and safety. Their contribution in GDP is also remarkable and informal sector is popular sector as it provides greater income opportunity for illiterate people, rural

[38] cf Alam (n 3).
[39] cf Reza (n 20); See also cf Alam (n 3).
[40] cf Alam (n 3).
[41] cf Sarker (n 2).
[42] cf Benavides (n 36).
[43] cf Alam (n 3).

women, seasonal unemployed and aged people in Bangladesh.[44] However, workers become vulnerable more in old age in absence of specified retirement age and the facilities such as: pension, gratuity after the retirement age.[45]

Table 2: Particulars Relating to Employment

Particulars		Yes	No
Know about Labor Law			100%
Workers Union		5%	95%
Unknown about Health & Safety related Provision			100%
Fixed Retirement Age			100%
Old Age Facilities After Retirement			100%
Written Contract in employment			100%
Worker Wage	Monthly	93%	
	Weekly	7%	

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Naturally, informal worker remains in health and safety risk.[46] Particularly in old town of Bangladesh, business premises have lack of interior facilities and the only drinking water facility is provided by the employer but not attached to business premises. Owner arranged it from their house or buying from shops because the supply water of the study area is not suitable to drink. The business premises have water supply and adequate fresh-rooms for workers but unsuitable for use due to unclean and unhygienic condition. 97% of the workers expose that the buildings have facilities for fresh rooms with poor condition[47] while all have given complain about the cleanliness and hygienic condition of the rooms with mosquitoes and flees.[48] All most in all business premises there are lack of fire exit (91%) and stairways (81%).[49] However, workers have faced problems when fire break out in old town and for lack of fire exist, they died or injured severely.[50] In addition, there is no enough air and light passing facilities for congested buildings.[51] 30% of respondents work in dark room without sunlight and air while 37% of respondents agree that the working premises has not enough doors and windows for proper ventilation.

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44 cf Reza (n 20).

45 cf Alam (n 3).

46 Michelle Black, Jiban Karki, A. C. K. Lee, Prabina Makai, Y. R. Baral, E. I. Kritsotakis, Alexander Bernier, and A. Fossier Heckmann, 'The health risks of informal waste workers in the Kathmandu Valley: a cross-sectional survey (2019) 166 Public health 10, 18.

47 ibid.

48 cf Achana (n 29).

49 cf Omar (n 32).

50 Mahmud Hossain Opu, Arifur Rahman Rabbi, Ashif Islam Shaon, Fahim Reza Shovon, Aminul Islam Babu, Kazi Mubinul Hasan Shanto, Syed Zakir Hossain, Saidun Nabi, Nawaz Farhin Antara, Kamrul Hasan and Fazlur Rahman Raju, 'Fire Strikes Old Dhaka Again: 67 Killed in Chawkbazar Inferno' *Dhaka Tribune* (Bangladesh, 22 February 2019) <Dhakatribune,https://www.dhakatribune.com/bangladesh/dhaka/2019/02/22/fire-strikes-old-dhaka-again> accessed 27 May 2022.

51 cf Omar (n 32).

Table 3: Facilities in the Work Place

Welfare Facilities in Work Places	Yes	No
Water Supply	82%	18%
Drinking Water		100%
Urinal/Latrine	97%	3%
Healthy and hygienic Urinal/Latrine		100%
Light and Air	70%	30%
Fire Exit	9%	91%
Enough stairway	19%	81%
Enough door and window	63%	37%

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Table 4: Age of Working Building premises

Ages of building Premises	Percentage
1 to 30	48%
31 to 50 years	12 %
Above 50 years	20%
Not Known	20%

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Despite health problem, old, narrow and congested buildings and roads also increase the workers suffering.[52] However, building constructions do not maintain the information of establishing date and year and the long-lasting date or year of its life.[53] Thus, general people including owners, workers do not know the age of any buildings in old Dhaka. The respondents guess the age of building according to starting date or year of their business or starting year of the work. Many buildings of old town are declared ineligible for using as residential and business premises but no one is monitoring that thousands of workers are working and people are residing there in dangerous condition.[54] However, many new buildings are built in replace of old building without following the building construction legislations and rules.

[52] ibid.
[53] ibid.
[54] ibid.

Table 5: Work Place Premises Condition in Old Town

Work Place Accident	Yes	No
Become sick in Working Place	42%	58%
Feel Fear in Work Time	73%	37%
Defective Building Construction	52%	48%
Accident by collapsing plaster of Construction	10%	90%
Death happened by collapsing Construction		100%

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Most of the workers work on dirty, dark, damp and wet floor and in harmful environment which makes them sick and weak, vulnerable to various psychological health hazards.[55] Breathing problem, asthma, headache, and chest pain are very common among the workers for working in dark floor. Unhealthy working environment poses threat to the health of 42% of the workers.[56] Despite health issue, 73% of the workers are in fear for the vulnerable conditions of the working premises. They feel fear of collapsing the building premises. Although the death incident did not occur due to collapse of any building premises in study area, building collapse and fire incident in working place become rife in Bangladesh. In addition, 10% of workers complain about minor accident for old construction in the study area. The workers cannot claim any remedy or compensation for their injury if the accident happens working hours and in working premises for informal nature of work. [57]

Undoubtedly workers of old towns are in fear of continuing their work in this traditional old building. The safe and secured building premises are in dearth in the study area, while all respondents agreed with the necessity of safe building construction for their work.[58] Notability only 10% owners of old town showed their willingness to replace the old building with a new one.[59] Thus, their work place security lacks and the informal nature of work deprives them from enjoying benefits and facilities countrywide and they are failed to attract the policy makers to make a comprehensive legal regime for the protection of their rights and safety.[60]

[55] Shohel Mahmud, Rayhan Mahmud and Mst Nusrat Jahan, 'Health issues of female garment workers: evidence from Bangladesh' (2018) 26 (3) Journal of Population and Social Studies [JPSS] 181,194.
[56] Table 5.
[57] Sakhawat Sajjat Sejan, 'Bangladesh's Position on Occupational Safety and Health: an Analysis' (2018) 1(2) SCLS Law Review 29, 33.
[58] ibid.
[59] Table 6.
[60] cf Sejan (n 58).

Table 6: Necessity of Safe Building Premises

Safe Building Related	Yes	No
Necessity of Safe building for Work	100%	
Law is followed in making building	50%	50%
Building Owner's mentality to replace	10%	90%
Talk with Owner about building's problem	22%	78%

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

Moreover, the owners of business should provide some safety facilities while 100% of owners do not provide such facilities in old town.[61] 65% of owner of business do not provide monetary aid to the workers in time of sickness and their workplace injury. Even in time of emergency there is no accessibility of first aid in any of the business premises which results the deprivation of first aid facilities in the work place around 70% of workers. In case of other facilities like welfare facilities 100% of workers negatively answer that owners do not provide them other safety and welfare facilities. Now this is crucial to ensure their safety and facilities including business premises safety for their better outputs which support full and productive employment. Decent working environment cannot be ensured except ensuring safety and work facilities of the informal workers.

Table 7: Responsibilities of the Owners of the Business

Events	Yes	No
Providing Safety and Welfare Facilities		**100%**
Providing Monetary Aid in sickness and Accident	**35%**	**65%**
Providing First Aid	**30%**	**70%**
Providing Other safety and welfare facilities		**100%**

Survey Conducted in old town Dhaka from 12 January to 08 February 2022

As mentioned above, there is no legislation, policy or plan for the protection of safety and rights of the informal workers in Bangladesh.[62] This situation is reason for many challenges of the informal workers and detrimental to achieve SDG 8 and related economic goals.[63] According to fire service data, about 500 more chemical storehouses and factories are operated unlawfully in old town area such as: Lalbagh, Hazaribagh, Sadarghat and Siddique Bazar, where it has already 468 fire incidents are struck.[64] In these incidents, casualties were low, only one death incidents and two injuries but

[61] Table 7.
[62] cf Sejan (n 58).
[63] cf Achana (n 29).
[64] Wasim bin Habib and Mohammad Al-Masum Molla, 'Old Dhaka at grave fire risk' *The Daily Star* (Bangladesh March 02 2019) <https://www.thedailystar.net/frontpage/news/chawkbazar-fire-tragedy-old-dhaka-grave-fire-risk-1709428> accessed 10 June 2022.

damage of properties worth Tk 6.88 crore.[65] The existence of chemical warehouses and other types of inflammable warehouses enhance the chance of fire casualties in old town.[66] And in case of old and unsafe buildings which are in danger for public safety or property shall be declared unsafe and repaired or demolished as directed by building officials.[67] The existing law is, 'no dangerous factory or warehouse can run their functions in residential buildings'.[68] Problem is the implementation of existing rules for building safety as well as proper monitoring. If this continues it surely one way hinders ensuring workers' rights and on other way obstructs to attain economic growth stated in SDG-8.

4. Informal Workers Facilities and SDG-8: Legal Landscape in Bangladesh

The informal economic sectors in which the informal workers are connected on a regular basis or indirectly, are addressed by the SDGs, particularly SDG 8 which stand for to 'promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'. As it is found informal workers are poor, vulnerable and discriminated, the global blueprint SDG addresses the challenges of poor, destitute and inequality. Thus, evaluating the target population of SDG-8 and the condition of the poor informal workers, it is logical that the two themes are intrinsically linked.[69] The survey has found that the situation of the informal workers is not ideal, since they are usually not recognized, regulated or otherwise protected under labour related legislations and policies and other social protection systems.[70] Thus, the ameliorative legal policies, plans are essential to meet the SDG norm 'on one should be left aside' and should be a priority sector of government of Bangladesh as it is crucial to attain other SDGs such as: goals 1, 2, 3, 5, 10, 16 and 17.[71] More specifically the target 8.5 (full employment and decent work with equal pay) and 8.8 (protect labour rights and promote safe working environment) related to the scope of this study which neglected by the world and by Bangladesh itself.[72] On those targets, the world presents limited or no progress, and the situation is relatively worse in South Asian region.[73]

The survey has found that the informal workers are in countless difficulties. Their rights as worker are in dearth, their legal protection is absent, and they become sick in

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[65] ibid.

[66] Nushrat Jahan, Sanjana Islam and Md Imam Hossain 'Fire Hazard Risk Assessment of Mixed Use Chemical Storage Facilities: A Case Study of Chemical Warehouses in Old Dhaka' ISSN 2075 (2016) Journal of Bangladesh Institute of Planners.9363.

[67] Bangladesh National Building Code 2006 part 2, P. 13 <http://bnbcinfo.blogspot.com/p/bnbc-1993.html> accessed 11 June 2022.

[68] ibid, part 3.

[69] Hari Srinibas, 'Sustainable Development Goal #8: Decent Work and Economic Growth, SDG 8 and the informal sector' (2020), < https://www.gdrc.org/informal/sdg8.html> accessed 12 June 2022.

[70] ibid.

[71] ibid; cf Achana (n 29).

[72] Verónica Amarante, 'Informality and the achievement of SDGs' (2021) Background paper for United Nations Department of Economic and Social Affairs Sustainable Development Outlook.

[73] ibid.

working unhealthy and unhygienic environment.[74] Informal sector workers usually face risks of getting infected by diseases caused by chemical, physical agents, biological, infectious, respiratory diseases, skin diseases, muscle diseases etc.[75] Our survey and published literatures both support that COVID-19 pandemic severely affect the informal workers lives and livelihoods.[76] They have lost their jobs and the persons who did not lost work did not receive salaries within this pandemic period which is against the norms of decent work condition.[77] So, informal working activities in Bangladesh have failed to ensure the decent working nature before pandemic, during pandemic and in present time, which also hinders the attaining SDG-8. However, a work can be called decent considering all aspects of healthy work environment and safety, including the condition of workers' rights.[78] Considering the fact of the existing situation of informal sectors, it is true that it does not comply with the decent work concept which is stated in SDG 8. Thus, Bangladesh is far beyond to achieving the targets of SDG 8 within 2030.

Bangladesh has prepared SDG progress report in 2020 and focus that the achievement of SDG 8 particularly depend on sustained, inclusive economic growth, full and productive employment and decent work for all.[79] It also focuses some challenges such as: lack of mutually supportive relationship between economic and social policies, lack of implementing full employment and decent work etc. hinders to meet the SDG-8.[80] The crucial things to overcome this problem are suggested to implement strategies for inclusive and sustainable economic growth, technology, and structural transformation. The existing disparity in legal rules and policies is posing threat to attain SDG 8. Thus, a synergistic approach is essential by addressing the other challenges of environmental degradation and social exclusion, otherwise stand-alone progress for SDG 8 would be insufficient and could not be achieved.[81] However, increased productivity growth in Bangladesh is essential for creation of job sectors which are decent and healthy.[82]

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[74] cf Alam (n 3) and see also cf Reza (n 20).

[75] Minhazur Rahman Shihab, 'Informal workers need occupational safety' *The Financial Express* (Bangladesh, 20 February, 2022) <https://thefinancialexpress.com.bd/views/informal-workers-need-occupational- 1644925289> accessed 12 June 2022.

[76] Nahrin Rahman Swarna, Iffat Anjum, Nimmi Nusrat Hamid, Golam Ahmed Rabbi, Tariqul Islam, Ezzat Tanzila Evana, Nazia Islam, Md Israt Rayhan, K. A. M. Morshed, and Abu Said Md Juel Miah 'Understanding the Impact of COVID-19 on the Informal Sector Workers in Bangladesh' (2022) PLoS ONE 17(3) e0266014

[77] ibid.

[78] ibid.

[79] Bangladesh Planning Commission, 'Sustainable development goals: Bangladesh progress report' (2018) General Economics Division, Bangladesh Planning Commission, Ministry of Planning, Bangladesh.

[80] cf Achana (n 29); and see also cf Amarante (n 73).

[81] ibid.

[82] ibid.

SDGs	Goal Issue	Targets Details Under the SDG Goals 2030
SDG 1 T 1.1	No Poverty	• By 2030, eradicate extreme poverty for all people everywhere whose income is extreme low 1.25 a day.
SDG 2. T 2.3 T 2.4	End hunger	• double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment • By this target sustainable food production systems should be ensured with implementing resilient agricultural practices to increase productivity and production, to maintain ecosystems, to strengthen capacity for adaptation to climate change and disasters and which can progressively develop land and soil quality.
SDG 3. T 3.9	Healthy lives and well-being	• This target will help to reduce the number of deaths and illnesses substantially from hazardous chemicals and air, water and soil pollution and contamination.
SDG 5 T 5.1	Gender Equality	• End all forms of discrimination against all women and girls everywhere.
SDG 10 T 10.3 T 10.4 T 10.5 T 10.6	Reduced Inequality	• Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard • Adopt policies, especially fiscal, wage and social protection policies, and progressively achieve greater equality • Improve the regulation and monitoring of global financial markets and institutions and strengthen the implementation of such regulations • Ensure enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions
SDG 16 T 16.6 T 16.7 T16.12	Peace, Justice and Strong Institutions	• Develop effective, accountable and transparent institutions at all levels. • Ensure responsive, inclusive, participatory and representative decision-making at all levels. • Promote and enforce non-discriminatory laws and policies for sustainable development.
SDG 17 T 17.10	Partnerships for the Goals	• Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda

Figure 2: Targeted SDGs and Goals related to SDG 8[83]

Bangladesh should address the challenges of the informal workers and should facilitate their healthy working environment with other rights and regulate their services legally. However, the norm of decent work is not new and not addressed by the SDGs only. This agenda was covered into the center of ILO policies, at the time of adoption of Declaration on Fair Globalization by ILO in 2008.[84] And ILO in its all agenda promoted to decent work and occupational safety in all of its activities.[85]

[83] Prepared by author after studying SDGs goals and targets.
[84] Diane F. Frey and Gillian MacNaughton, 'A human rights lens on full employment and decent work in the 2030 sustainable development agenda' (2016) 6(2) SAGE Open 2158244016649580.
[85] ibid.

Historically, decent working condition is the core aim of UN charter 1945 where 'higher standards of living, full employment, and conditions of economic and social progress' as well as 'universal respect for, and observance of, human rights are promoted.[86] Moreover, the 'right to work' is accepted by all human rights documents such as UDHR 1948, ICCPR 1966 and ICESCR 1966.[87] So, different stake holders should work synergistically to protect the informal workers rights and safety because of the achievement of SDGs 8 and its connection with other SDGs (Figure 2) and related global goals.[88]

In addition, international instruments for the safety and health are adopted by International Labour Organization such as: Occupational Safety and Health Convention 1981, Occupational Health Services convention 1985, and Promotional Framework for Occupational Safety and Health Convention 2006. The Occupational Safety and Health Convention, 1981 is, however, broadly covered all the labourers from all corners of economic activity.[89] According to this, the work place health signifies not only diseases or infirmity free but also adds physical and mental essential impacts on health which are related to cleanliness and safety of work place.[90] The Occupational Health Services Convention, 1985 denotes the term 'occupational health services' as the services assigned with crucial preventive actions and accountable for advising the owners, the labourers and their representatives in the project firstly, on the requirements for ensuring and continuing a safe and healthy working environment which will assist best physical and mental health in relation to work and secondly, on the adjustment of work to the abilities of the labourers in respect to their state of physical and mental health.[91]

However, none of the conventions or recommendation by ILO is focused in national legislations, plans or policies for the protection of informal workers. However, Bangladesh Ministry of Work and Employment has passed in 2013 a policy named 'The National Occupational Health and Safety Policy 2013' which mainly dealt with obligations, duties and liabilities of employers, trade unions and workers related to occupational health and safety. Unfortunately, the Policy of 2013 is not implemented yet in Bangladesh. Thus, informal workers of Bangladesh cannot enjoy the formal workers rights and continue their work in unsafe and unhealthy environment in countrywide including old towns. Unfortunately, there is no civil society or organization to speak in favour of informal workers' rights protection and their safety in Bangladesh.[92] The achievement of SDG-8 seems far for Bangladesh, though stand-

[86] UN Charter 1945, art 55.
[87] cf Frey (n 85).
[88] cf Swarna (n 76).
[89] The Occupational Safety and Health Convention 1981, art 2 <www.ilo.org/safework/industries-sectors/WCMS_219580/lang--en/index.htm> accessed 14 June 2022.
[90] ibid, art 3.
[91] The Occupational Health Services Convention 1985, art 1.
[92] 'Occupational Safety and Health in Bangladesh: National Profile' (2015) Bangladesh Institute of Labour Studies (BILS) 46 < www.bilsbd.org> accessed 14 June 2022.

alone SDG-8 is crucial to the achievement of other SDGs such as: eradication of poverty, the elimination of hunger, ensuring gender equality and the improvement of health and well-being etc.[93]

5. Findings and Way Forward with Concluding Observation

The old town informal workers are undergoing with many problems and issues. However, the study findings are:

Firstly, all the workers are illiterate, breadwinners of their family and do not know the formal workers rights and safety. They have no fixed working hour, fixed salary, bonuses, leave, and other facilities (insurance and old age/retirement facilities) like formal workers. These facilitate the owner to exploit the worker economically and it also creates discrimination between the informal and the formal workers.

Secondly, the workers of old town have faced many problems including their work and the work place to carry out their work. They are not provided with minimal standard as a formal worker in those business activities. They cannot enjoy the rights and safety and cannot claim any remedy for their violation of rights and safety in absence of any comprehensive legal system.

Finally, at present context ensuring decent working environment is overlooked in study area. Moreover, no policy, plan and legislation focus the linked of SDGs and the informal workers rights and safety which is detrimental to achieving SDGs specifucally SDG 8.

The informal workers are in dire need of legal safety and facilities like other formal workers of the country. The work place premises should follow Bangladesh National Building Code 2006, which could solve premises related challenges of workers and owners. They should be protected by the extant legal regime or should be an umbrella of legal protection by initiating new policies to meet the SDG-8. The government could take step the following initiatives for their protections:

- the definition of worker under the Bangladesh Labour Act 2006 may include the term 'informal worker' and can include an extra part for informal workers types and give them a legal status as worker as a temporary solution.
- a comprehensive legal regime is particularly essential for the protection of the rights and safety of different informal workers to protect their rights in COVID like situation. The workers should ensure decent working condition by facilitating their safety and rights. The Government should integrate policies, plans and regulation for the protection of informal workers' rights and safety in order to attain SDGs by 2030.

[93] cf Frey (n 85).

The paper presented that the informal workers of old towns were deprived of the rights and safety in countrywide and old town is no exception. COVID 19 situation makes them more susceptible for want of legal protections. They had no status and facilities like the formal workers, whereas they played a positive role in enhancing informal economy of Bangladesh. Old town workers had a peculiar issue relating to business or working premises with their general issue of workers' rights and safety. However, in order to deal with old, unhealthy and unsafe business or working premises, the government should take steps to implement the BNBC and other rules and plans relating to building construction. Concerning the rights and safety of both formal and informal workers, government should establish a society without exploitation and discrimination. Amendment of Bangladesh Labour Act might solve the existing problems partly and temporary but for a permanent and robust solution Government should undertake long term plans and policies for their protection and to ensure decent work condition as well as to attain SDG-8 and other global goals. The paper thus contended to work synergistically with governments, international organizations, civil society and funders to establish decent and healthy working condition for all in all situations. Finally, the 2030 Agenda would not be achievable for the country leaving beyond the informal workers from legal protection. Thus, the paper lastly suggested enacting and implementing integrated plans, policies for the protection of informal workers rights and safety as well as attaining SDGs within 2030.

Intellectual Property Rights and Environmentally Sound Technologies: Is Human Rights Regime a Possible Resort?

Md. Abdur Razzak*

Abstract: The global diffusion of mitigation and adaptation technologies is indispensable to pursue the collective endeavor of the international community to combat climate change. In this context, the role of intellectual property regime remains highly contested so far as the access of the global south to Environmentally Sound Technologies (ESTs) is concerned. Developing countries consistently press the allegation that Intellectual Property Rights(IPRs) constitute a barrier to accessing ESTs. They call for reforms in the global rules on IPRs, especially in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPS). The reform proposals underscore the need for possible exemption or relaxation of patents on ESTs. By contrast, developed countries continue to oppose such allegations, accentuating the need for stronger IPRs protection to promote innovation in climate change research. This polarized debate between the two opposing quarters indicates a bleak prospect for a possible reconciliation, inhibiting mankind's collective effort to address the climate crisis as a common good. Although not a silver bullet, it is widely argued that, a human rights approach to intellectual property has the potential to strike an effective balance between the rights of inventors and the wider public interest. This paper posits that a human rights reading of the international law obligations of the states in the context of climate change reinforce that developed countries should take a human rights approach in transferring ESTs to the global south.

1. Introduction

The climate change literature unequivocally confirms that countries in the global south are the most vulnerable to the adverse effects of climate change. There is enough evidence to suggest that they are disproportionately affected by the devastating impacts of climate change and their carbon footprint is gradually expanding.[1] Cities in the global south are grappling to find a balance between their energy needs spurred by increasing developmental needs and the quest to meet climate goals set out in the major international climate agreements.[2] Most countries in

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[1] NH Ravindranath and Jayant Sathaye, *Climate Change and Developing Countries* (Springer Dordrecht 2002) 247.

[2] Bloomberg, 'The World's Fastest-Growing Cities Are Facing the Most Climate Risk' <https://www.bloomberg.com/news/articles/2022-02-28/global-south-cities-face-dire-climate-impacts-un-report;> accessed 05 October 2020.

the global south are now focusing mostly on adaptation to strengthen their resilience against extreme weather events.[3] However, they also need support for mitigation to substantially reduce carbon footprint while not compromising the growing developmental needs of their people. A study conducted by Asian Development Bank concludes that GHG emissions[4] from countries such as Bangladesh, Bhutan, the Maldives and Sri Lanka will jump from 58 million tons of CO2 recorded in 2005 to approximately 245 million in 2030 mainly because of the increasing energy consumption by the industrial and transport sectors.[5] Studies further indicate that climate change impacts could shrink the South Asian Economy by up to 9% every year, with serious financial and human toll induced by floods, landslides, droughts and other extreme weather events.[6] Due to the region's heavy dependence on agricultural sector[7], the impact is likely to be magnified manifold. The recent floods in Pakistan[8] and the increasing intensity of extreme weather events causing significant loss to GDP growth in Bangladesh[9] indicate that there is a dire need for climate technologies in these countries. On the other side of the spectrum, there is an increasing trend among the firms to patent climate technologies, raising the financial bar too high for developing countries to afford them at cheap and affordable price. Most of the arguments for patent waiver in the case of green technology or weakening the patent protection for green technologies are proffered by the global south which have so far met strong opposition from the global north. Many scholars argue that this is in part due to the lack of evidence based analysis highlighting the specific barriers created by the IPRs and their resulting negative impact on the transfer and diffusion of green technologies to the developing countries. Inadequacy of such evidence based research does not however rule out the possibility that IPRs do not constitute a barrier to the transfer of Environmentally Sound Technologies (hereafter ESTs/EST) to developing countries as will be shown throughout this paper. The visible impact of such barriers can be discerned from the developing countries inability to import green technologies for the purpose of climate change mitigation

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[3] Malcom Aroas and others, 'Climate Change Adaptation Planning in Large Cities: A Systematic Global Assessment' (2016) 66 Environmental Science & Policy 375.

[4] Dunnan Liu and others, 'What Causes Growth of Global Greenhouse Gas Emissions? Evidence from 40 Countries' (2019) 661 Science of the Total Environment 750.

[5] World Bank and Asian Development Bank, 'Climate Risk Country Profile - Nepal' <www.worldbank.org> accessed 11 December 2022.

[6] Climate Change May Slash 9% From South Asia's Economy By 2100, See, <https://www.adb.org/news/climate-change-may-slash-9-south-asias-economy-2100-report> accessed 15 October 2022.

[7] Robert Mendelsohn, 'The Impact of Climate Change on Agriculture in Developing Countries' (2009) 1(1) Journal of Natural Resources Policy Research 5.

[8] See, Amnesty International, 'Pakistan: Deadly floods reminder to wealthy countries to remedy unfettered climate change' <https://www.amnesty.org/en/latest/news/2022/08/pakistan-deadly-floods-reminder-to-wealthy-countries-to-remedy-unfettered-climate-change/> accessed 09 September 2022

[9] Sarah Riggs Stapleton, 'A Case for Climate Justice Education: American Youth Connecting to Intergenerational Climate Injustice in Bangladesh' (2019) 25(5) Environmental Education Research 732.

and adaptation.[10] In such a context, it is significant to recall the human rights obligations of the developed states in the context of climate change as well as the extra-territorial human rights obligations of the developed countries to not use IPRs to the disadvantage of the wider public interests to benefit from the scientific progress and innovations in ESTs.[11] A human rights based approach is thus of immense significance to rethink the existing provisions in the Agreement on the Trade Related Aspects of the Intellectual Property Rights (hereafter TRIPS) to facilitate the transfer of ESTs and reinforce the obligation of the developed states to do what is needed to deliver on their commitments to human rights obligations in the context of climate change.[12]

Next to the introduction, this paper is divided into four sections followed by conclusion. First section unpacks the concept of a climate resilient city focusing on the areas of concerns and challenges for the cities in the global south to develop resilience against the increasing frequency of extreme climate events in line with the objectives of the international climate change law. Second section deals with the issues related to the transfer of Environmentally Sound Technologies (ESTs) and their growing intersection with the global climate goals with particular reference to the countries vis-à-vis cities in the global south. Third section examines the legal and non-legal challenges resulting from the existing provisions of the WTO Agreement on TRIPS associated with the transfer of ESTs. This section further provides an analysis inquiring into the existing barriers inhibiting developing countries' ability to the use of flexibility provisions set out in the TRIPS Agreement, and their overall impacts on the transfer of EST from the global north to the global south and how the patent landscape can be harnessed to facilitate large scale deployment of green technology transfer to the developing countries. Fourth section of the paper offers a nuanced understanding on how human rights approach can be employed in the context of climate change to overcome the challenges posed by the IPRs regime and what prospects are there in the human rights approach to IP law to reinforce the state obligation to protect human rights in the context of climate change by ensuring smooth flow of ESTs to the countries in the global south. Finally, the paper draws its conclusion based on the overall analysis. Throughout the paper the term ESTs will be interchangeably used with the terms climate technology or green technology

[10] Dalindyebo Bafana Shbalala, 'Climate Change, Human Rights, and Technology Transfer: Normative Challenges and Technical Opportunities' in Molly K. Land and Jay D. Aronson (eds) *New Technologies for Human Rights Law and Practice* (Cambridge University Press, 2018) 46.

[11] David Popp, 'International technology transfer, climate change, and the clean development mechanism' (2020) 5(1) Review of Environmental Economics and Policy.

[12] Margaretha Wewerinke -Singh, 'State Responsibility for Human Rights Violations Associated with Climate Change' in Sebastien Jodioin, Sebastien Duyck and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge *2018)* 75.

2. Changing Dynamics of City Landscape and the Quest for Climate Resilience

City population is growing leaps and bounds. Almost one-half of the world population are now city residents.[13] There are projections that by the year 2050 around sixty eight percent of the global population will live in cities.[14] Not to mention, cities around the world are responsible for the overwhelming amount of greenhouse gas emissions leading to climate change.[15] Plagued with cumulative density of population, congested infrastructures, high concentration of assets and resources, cities are being increasingly exposed to the devastating impacts of climate change which manifest in intense and recurrent occurrences of flooding, heatwaves, droughts, hurricanes, storms, cyclones and earthquakes.[16] This is undoubtedly generating disproportionate consequences for the cities in the global south with most critical climate change related challenges. A 2021 Emergency Event Database estimates that among the total number of 432 recorded disaster events resulting from natural hazards worldwide, Asia alone had suffered 40% of the most disproportionate consequences including 49% deaths and 66% of the total people affected.[17] Countries such as Cambodia, Vietnam, Pakistan, India, China and Bangladesh routinely encounter disaster events which lead to deaths, displacement, and numerous other forms of loss and damage in and around the city landscape.[18] Notably, cities adjacent to the coastal zones are more likely to be affected due to the increasing onset of flood events and hydro-meteorological disasters. While witnessing rapid urbanization, the East Asia region alone has 46 million people living at risk of flooding from storm surges.[19]

A city that is well equipped with tools to withstand the intensity and frequency of extreme weather events through adequate mitigation and adaptation measures can be considered as a climate resilient city. Cities in the global south require massive transformation in which city governments, communities and other stakeholders need to initiate multidimensional interventions to respond to the negative impacts of climate change in the face of the changing dynamics of the city landscape. Addressing climate change impacts through reaching net zero emission and adopting disaster

[13] Jennifer Temmer and others, 'Building a Climate-Resilient City: Disaster preparedness and emergency management' (2017)' <https://www. iisd. org / publications / brief / building - climate - resilient - city- disaster-preparedness-and-emergency-management> accessed 25 December 2022.

[14] United Nations Department of Economic and Social Affairs, '68% of the world population projected to live in urban areas by 2050' <https://www.un.org/development/desa/en/news/population/2018-revision-of-world-urbanization-prospects.html> accessed 01 February 2023.

[15] Olga Izdebska and others, 'Transformation Pathways Towards Climate Resilient Cities: A Comparative Analysis of Halle (Saale) and Mannheim, Germany' (2022) 9(2) *Triple Helix* 216.

[16] Neeraj Prasad and others, 'Climate Resilient Cities' <https://reliefweb.int/report/world/2021-disasters-numbers> accessed 20 November 2022.

[17] ibid.

[18] UNDESA (n 14).

[19] UN ESCAP, 'Disasters in Asia and the Pacific: 2015 year in review' (2015) United Nations report Economic and Social Commission for Asia and the Pacific 7.

risk reduction strategies require massive deployment of carbon mitigation and climate adaptation technologies and this can be possible through concerted efforts by local governments, their partners supported by a potentially large scale financial and technological assistance from the developed nations who bear the historic responsibility for the climate crisis we are experiencing today. A city to develop climate resilience must mainstream climate change and human rights agenda as an integral component of its spatial planning, infrastructure development and disaster risk reduction strategies.[20] A climate resilient city is a precursor to a human rights friendly city for without climate resilient planning a city will not be able to fulfill the most basic human rights and fundamental freedoms of the city dwellers. This needs no mention that the cities in the global south are mostly characterized by poor quality infrastructure, low-quality building stock, lower resilience, energy inefficient housing, inefficient land use, poor transportation.[21] All these factors continue to fuel the emission of greenhouse gasses in the absence of adequate mitigation technologies. Furthermore, the lack of adaptation technologies increases the exposure and vulnerability to extreme weather events. Rapid and unplanned urbanization leading to the increased dependence on fossil fuel use will continue to worsen the climate change implications for these cities unless cutting edge green technologies are employed to combat the wrath of nature caused by anthropogenic climate change. This requires extensive support and cooperation of the developed economies and a convenient intellectual property law framework fostering the transfer of green technologies from the global north to south.

Although minimal compared to the scale and intensity of carbon emission from the global north, sectors such as energy, transportation, agriculture, forestry and waste in the global south continue to release increasing degrees of greenhouse gasses into the atmosphere because of excessive dependence on fossil fuel sources. Despite being detrimental to the environment, almost all of the countries in the global south now depend on conventional energy sources such as coal, gas, and oil because they are relatively cheap and reliable. For renewable energy to surpass fossil-fuel use, there must be market forces facilitating a fair competition between the two, gradually making the door wide and open for renewable energy technologies. Developing countries face financial hardships to afford these technologies due to patent protection entitling proprietary rights to firms. For example, solar photovoltaic and wind energy technologies owned by developed countries are increasingly being subjected to stringent patent protection.[22] Although it has wide implications for

[20] Jennifer Temmer and others, 'Building a Climate-Resilient City: Electricity and information and communication technology infrastructure' (2017) <https://www.iisd.org/publications/brief/building-climate-resilient-city-electricity-and-information-and-communication> accessed 23 September 2022.

[21] Zifeng Liang, 'Assessment of the construction of a climate resilient city: an empirical study based on the difference in differences model' (2021) 18(4) International Journal of Environmental Research and Public Health 2082.

[22] Christoph Bohringer and others, 'The impact of the German feed-in tariff scheme on innovation: Evidence based on patent filings in renewable energy technologies' (2017) 67 Energy Economics 545.

opening up trade opportunities in such technologies, such a trend tends to undermine the free flow of these technologies for the global south to make a smooth transition to a low carbon economy.

Transportation in the global south cities constitutes the most pressing challenge today. Emission from public and private transport in the cities in emerging economies is increasing day by day due to the rapid expansion of business and industries triggering the growth of vehicles fueled by unclean energy. To decarbonize the transportation system, electric vehicles(EVs) are gradually gaining significant traction in developed cities. It is anticipated that electric vehicles as EST will gradually dominate the transport landscape around the world. At present the patent landscape in electric vehicles is dominated by the developed countries. While developing countries such as India and China are showing promise in R & D expenditure in EVs, this is not the case for the other global south countries.[23] While rapid urbanization and increase in population in developing countries provide a profitable market for EVs, how far cities in the global south would be able to use EVs in the near future remains unclear. Further, cities in the global south will need to be equipped with adequate support infrastructures to retrofit advanced green technologies in the transport sector which can replace the conventional carbon emitting vehicles. Critical issues in transforming the transport sector with the support of EVs include; making fuel cell and hydrogen technology available, providing charging facilities for electric vehicles everywhere in the city.[24] The widespread deployment of ESTs is also needed in the coal-based thermal power plants to produce clean energy for supporting the transport system. Many other technologies which a city needs to make it climate friendly are gradually being patented as consumer products. The demand for patented technologies facilitating carbon capture and storage(CCS), energy efficiency in buildings, water and wastewater treatment are exponentially rising to meet the GHG mitigation commitments under the UNFCCC[25] and the Paris Climate Agreement. In this light, the next section of the paper attempts to analyse the increasing intersection between green technology transfer and the climate change discourse with reference to the specific needs of the cities in the global south.

3. Transfer of ESTs and the Climate Goals: The Global South Cities in Context

Available literature supported by the growing body of scientific evidence asserts that international commitments to address climate change impacts will remain virtually unfulfilled in the absence of green innovation and successful diffusion of ESTs. Notably, such a development and diffusion of ESTs will need to be multidirectional,

[23] Joyeeta Gupta, 'The Paris climate change agreement: China and India' (2016) 6 (1-2) Climate Law 171.

[24] Amrita Goldar, 'Working Paper 382: Climate Change & Technology Transfer – Barriers, Technologies and Mechanisms' (2019)' < https://think-asia.org/handle/11540/10948?show=full> accessed 15 January 2023.

[25] The United Nations Framework Convention on Climate Change (adopted 19 June 1993, entered into force 21 March 1994) (UNFCCC).

taking place both at vertical and horizontal levels, regardless of the financial ability, technology absorption capacity and geographical location of the different states contributing to, and suffering from, the effects of climate change at varying degree and scale. According to the United Nations Environment Program (UNEP), Environmentally Sound Technologies are those technologies that "protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their waste and by-products, and handle residual wastes in a more acceptable manner than the technologies for which they are substitutes".[26] Technology transfer is further defined by the Intergovernmental Panel on Climate Change as "a broad set of processes covering the flows of know-how, experience and equipment for mitigating and adapting to climate change among different stakeholders such as governments, private sector entities, financial institutions, non-governmental organizations (NGOs) and research/education institutions".[27]

Green technologies help a city in many ways to develop resilience against the negative impacts of industrialization leading to climate change. Cities vulnerable to climate change impacts face multiple challenges in treating industrial waste, producing clean and drinkable water , generating clean energy at a scale needed to support industrial activities and reducing carbon footprint.[28] To overcome these challenges, green technologies have proven to offer viable solutions. Both hard and soft technologies constitute essential components in green technology transfer. While hard technologies may include climate change mitigation equipment such as solar panels, wind turbines and adaptation technologies such as early warning systems, irrigation machines, drought resistant plants, soft technologies involve expertise sharing, capacity building and training to manage and operate hard technologies. Hard technologies in most cases are patented. Transfer of these technologies may occur by way of contract, licensing, collaborative research or assignment agreements.[29] The physical possession of these technologies mostly depend on the funds to acquire them and the required expertise to use them and in this context IPRs play a significant role.

Technology transfer typically involves two dimensions. One is vertical and the other is horizontal. When technologies are transferred by relocation or sale by way of granting patent rights of production or license without sharing the intellectual property, this is called vertical transfer. On the other hand, horizontal transfer involves long-term sharing of intellectual property through joint ventures, subsidiaries or licensing or cooperation between direct investors or domestic

[26] See, 'Transfer of Environmentally Sound Technology, Cooperation and Capacity-Building' <https://enb.iisd.org/vol05/0525016e.html> accessed 10 October 2022.

[27] 'Intergovernmental Panel on Climate Change Sixth Assessment Report (2022)' <https://www.ipcc.ch/report/ar6/wg2/> accessed 02 February 2023.

[28] Irina V. Shugurova and Mark V. Shugurov, 'International Technology Transfer-Controversial Global Policy Issues' (2015) 45(3/4) *Environmental Policy and Law* 133.

[29] ibid.

companies. While the benefits under horizontal transfer over vertical transfer are considered to be high, the effectiveness of either mode of transfer depends on the regulatory landscape of the foreign direct investment(FDI) and the ease of doing business in the technology receiving country. Horizontal transfer facilitates knowledge spill-over opportunities which is important for developing countries. However, owing to the unfavorable climate of business in most developing countries, this process proves to be slow. Most of the time private companies engage in this kind of technology transfer transactions. While both modes of transfers have their advantages and disadvantages, developing countries mostly seek to avoid the risks of high costs and IP rights violations. The most convenient mode of transfer being advocated by developing countries is horizontal transfer. However, it appears to be most beneficial for them when instead of private sector engagement, the transfer takes place by way of government-to-government contracts.

In view of the increasing trends in global energy consumption, ESTs are considered as the indispensable assets capable of substantially reducing or eliminating the emission of GHG[30], bolstering the global efforts to tackle the adverse impacts of climate change. Furthermore, ESTs demonstrate considerable implications for the global economic vision since the economic policies in a country need to be in sync with the global climate goals where the centrality of ESTs is widely evident. In an attempt to develop ESTs to support both the economic vision and achieve climate goals, developed countries continue to invest[31] heavily on the development of ESTs, making significant headways for carbon mitigation in the economic landscape alongside measures aiming to develop adaptive resilience against the slow and rapid onset of extreme weather events. As a result, green technology revolutions in the renewable energy sector have mostly taken place in developed countries which include the United States, Japan, South Korea and Germany.[32]

In this backdrop, the countries in the global south, especially their increasingly industrialized urban landscape are facing two-fold challenges. First, their energy consumption is on the rise in the face of their exponentially increasing developmental demands, which is massively reliant on the extensive use of fossil fuel sources. This is gradually making them emerging carbon emitters, jeopardizing the right to a healthy environment of the city dwellers. Second, due to the exposure and vulnerability to natural hazards prompted by anthropogenic climate change, the cities in the global south are experiencing recurrent and extreme disaster events leading to significant loss and damage to both lives and livelihoods. A survey of the existing level of carbon

[30] Yongmin Chen and Thitima Puttitanun, 'Intellectual Property Rights and Innovation in Developing Countries' [2005] Journal of Development Economics 474.

[31] According to the White House, the 2009 economic stimulus bill included more than $80 billion in funding for renewables and clean energy. <https://www.nytimes.com/2009/02/18/opinion/18wed1.html> accessed 02 March 2023.

[32] Binru Cao and Shuhong Wang, 'Opening up, international trade, and green technology progress' (2017) 142 Journal of Cleaner Production 1002.

emission by countries in the global north and the global south will reveal that the extent of emission is still disproportionately high in the industrialized and developed nations in the global north. However, the burden of the looming climate crisis mostly contributed by the carbon intensive economies in the developed countries is being unevenly shouldered by the countries in the global south. In this context, developed nations have both moral and legal obligation to extend cooperation and support to the countries in the global south to tackle the loss and damage unleashed by the climate crisis. One way of extending such a cooperation is facilitating the transfer of ESTs to countries in the global south to help them build resilient cities through adequate deployment of mitigation and adaptation technologies.

Recognizing the growing vulnerability of the developing nations in the face of the climate crisis, the United Nations Framework Convention on Climate Change (UNFCCC) has explicitly underscored the obligations of the developed nations "to take all practicable steps to promote the transfer of or access to EST and know-how to developing countries, to enable them to implement the provisions of the convention."[33] Therefore, to achieve the global climate goals, it is imperative that ESTs are transferred to the emerging and least developed countries that are seeking to pursue low emission pathways of economic development and tackle the disaster induced loss and damage. International cooperation based on the principle of 'common but differentiated responsibilities' has been reiterated by the states in the international climate change negotiations. Differentiated responsibilities imply that developed countries should mobilize both financial and technical assistance in the form of transfer of technologies and capacity building initiatives to help developing countries gain strength and resilience to achieve climate goals in line with objectives of the Paris Agreement.

It is worth noting that to facilitate the domestic uptake of climate technologies through technical assistance and information at an international level, a Technology Mechanism (TM) has been established under the UNFCCC. However, the mechanism has not delivered fruitful results owing to the lack of adequate financial support and cooperation from UNFCCC member states. Moreover, limited cooperation from the developed countries and their private business enterprises which own most of the climate technologies impeded its progress. This mechanism conducts technology needs assessment(TNA) at subnational level upon request from UNFCCC member countries.[34] In this connection, the Climate Technology Centre and Network (CTCN) as an implementing arm of the TM has conducted TNA for the purpose of identifying the need for flood management technology in Jakarta in Indonesia which is a coastal city needing adaptation measures to combat the adverse impacts of extreme weather

[33] The UNFCCC 1994, Art 4, Para 5.

[34] CTCN, 'The Development of Technology Needs Assessment at Sub-national Level' <https://www.ctcn.org/technical-assistance/projects/development-technology-needs-assessment-subnational> accessed 01 January 2023.

events.[35] Similarly, small Africa countries also made a collective request to the CTCN for TNA to address their national climate technology needs and this request has met with success in terms of understanding the technology needs at sub-national contexts and capacity building through absorption of such technologies. This mechanism will see greater success if it is sufficiently resourced and can undertake collaborative research with private companies investing in climate technology with the financial assistance from developed countries.[36] CTCN should be able to mobilize a significant level of financial resources to meet the rising technology demands of the developing nations.

As mentioned above, the cities in the global south are doubling down on their energy consumption. Bulk of their energy needs are met by energy sources of fossil fuel. Therefore, they need technology to decarbonize the city and develop adaptive resilience to extreme weather events. Their transition from fossil fuel to renewable energy will be determined by the extent of their access to ESTs. Their complete reliance on carbon dioxide emitting coal, oil and gas to expand urban facilities such as electricity, heating, and transport will only exacerbate the climate vulnerability they are already exposed to. Moreover, they need climate technologies to adapt to the increasing intensity and frequency of extreme weather events such as floods, cyclones, earthquakes etc. For instance, coastal cities in Bangladesh regularly experience floods and cyclones, inundating a significant part of the city infrastructures, causing colossal amounts of loss and damage. The latest onslaught of cyclone Sitrang in Bangladesh affecting six districts, 1.5 million people, damaging 6000 hectares of agricultural land and partially devastating 10,000 houses testifies the need for technology to develop adaptive resilience in the areas vulnerable to climate change impacts[37]

Studies on the technological needs assessment on developing countries show that not only they are encountering economic and financial challenges but also legal and regulatory challenges with respect to access and management of green technologies. In this connection, the global and domestic IPRs standards, especially the patent landscape under the TRIPS is critical to understand the dynamics of EST transfer. In addition to IPRs, some of the most pressing market related challenges these countries face in the transfer of ESTs include weak financial sector, unpredictable and ill-defined tariff and non-tariff barriers, high import duties. Although these factors have wide implications for the IPRs, they are however beyond the scope of this paper. The

[35] Woo Jin Lee and Rose Mwebaza, 'The Role of the Climate Technology Centre and Network as a Climate Technology and Innovation Matchmaker for Developing Countries' (2020) 12(19) Sustainability 7956.

[36] Padmashree Gehi Sampath, 'Can the climate technology mechanism deliver its promise? Some issues and considerations' (2012) *Realizing the Potential of the UNFCCC Technology Mechanism* (35, ICTSD 2012) 3 <https://unfccc.int/topics/what-is-technology-development-and-transfer> accessed 12 March 2023.

[37] Bangladesh Red Crescent Society, *Cyclone SITRANG, Bangladesh Situation Report* (2, 26 October 2022) <https://reliefweb.int/report/bangladesh/cyclone-sitrang-bangladesh-situation-report-2-26-october-2022> accessed 20 November 2022.

next section of the paper delves into the challenges posed by the TRIPS Agreement provisions in facilitating the transfer of EST to the global south.

4. The TRIPS Agreement and the Transfer of ESTs

Popularly dubbed as double edged sword, the TRIPS Agreement's potential for facilitating the transfer and diffusion of climate technologies is still a subject of relentless scholarly debate. The TRIPS Agreement, on one hand, sought to strengthen the hitherto weak IPRs regime in developing countries to promote and protect scientific research and inventions. One the other hand, it has allowed a number of flexibilities for the developing nations in the implementation of the minimum IPRs standards set forth in the Agreement. Some scholarly arguments seek to posit that flexibility measures provided for in article 7, 8.2 and 31(b) of the TRIPS Agreement can be used to facilitate green technology transfer. However, the key phrases emphasized in these provisions[38] reflecting flexibility measures have not delivered optimum benefits for developing countries in their practical implementation. Thus far, they did not augur well for the transfer of climate technologies. The ongoing trends indicate that the use of these technologies are less likely to advance the technology needs to the advantage of developing nations to meet their climate goals in the long run.

The TRIPS Agreement permits member states to incorporate both voluntary and compulsory licensing provisions aiming to limit the scope of exclusive rights conferred by patents and open avenues for exceptions with a view to advancing public interests and anti-competitive practices.[39] However, both these options are plagued with challenges in fostering the transfer of ESTs. Under voluntary licensing practice, even if a country is willing to pay the fees demanded, some patent holders tend to charge high royalty and license fees while others tend to decline the licensing of the technology if such a transfer does not satisfy their profit margin. This opens the avenues for patent abuse. For instance, many Indian firms were denied licenses on patented technologies designed to replace ozone-depleting substances. Thus, this option seems to depend entirely on the willingness and profit motive of the patent holder/owner. On the other hand, the use of compulsory licensing options in the domestic IPRs regime, although designed to counter the negative outcomes under the voluntary licensing practice, has not lived up to the expectations. Article 31 of the TRIPS Agreement enumerates that in case of 'national emergency, and other circumstances of extreme urgency, and in any cases of public non-commercial use'

[38] Key phrases reflected in Article 7, 8.2 and 31(b) of the TRIPS Agreement in this context include 'mutual advantage of producers and users of technological knowledge', 'promoting social and economic welfare', 'balance of rights and obligations', 'right of states to take action against abusive IPR policies', the authorization of the access to inventions on grounds of 'national emergency or other circumstances of extreme urgency or in cases of public non-commercial use'

[39] Elias Mcdave, 'Intellectual Property Rights as a key Driver in Climate Change Mitigation' (2022) 13.2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 87.

compulsory licensing which does not require the authorization of the patent holder can be invoked. However, there is no mention of the climate technologies in this article or the scope to interpret this provision in the context of the transfer of ESTs is discouraged by firms. While Article 31 envisaged the terms 'national emergency and public interest' whether member states may be able to bring the need for access to and transfer of climate technologies on ground of national emergency or public interest is unclear. Theoretically, however, it sounds that there is ample room for interpreting these phrases to include EST transfer to enable the developing nations to incorporate legislative provisions allowing compulsory licensing for such purposes. Although predates the TRIPS Agreement, an example of such a practice can be seen in the United States. The US government has allowed private industries greater access to air pollution control devices under the Clean Air Act 1970. However, due to a number of barriers, most of the developing countries have not yet tapped into the potential of compulsory licensing and national statutory provision for the purpose of EST transfer.

As it currently stands, to what extent the flexibilities provided for the in the TRIPS Agreement have been used or can be used by the countries in need for EST is a question largely unanswered or shrouded with uncertainty. Apparently, there is no specific obligation imposed on states parties under the TRIPS Agreement requiring them to facilitate technology transfer by allowing the developing nations to use these flexibilities to fulfill their climate commitments. However, such a sense of obligation under the TRIPS Agreement can plausibly be discerned from other international climate change instruments discussed above. The current technology transfer trends from countries dominating the ownership of climate technologies and enjoying benefits thereof through royalties and licensing demonstrate their reluctance to transfer green technologies to the countries in the global south as these countries do not have adequate domestic legislation protecting IPRs. This seems to suggest that right holders of patented technologies place utmost importance on their profit, seeking to avoid all possible risks that entail losing control on their technological products along the transmission chain.[40]

This is true that many countries in the global south have weak IPRs laws. As a result, they depend on formal technology transfer which is quite expensive[41] although it allows them to imitate through copying advanced technologies. A stronger IPRs regime in particular patent landscape in line with the requirement of the TRIPS is likely to impede their ability to do such imitation on green and clean technologies to strengthen their climate resilience. There is also evidence to suggest that stronger IPRs systems in many cases restrict the scope of local R&D because of the monopoly

[40] Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)' (2009) XXXV UNESCO Publishing 204.

[41] Matthew Rimmer, *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice* (Springer Singapore 2018) 125.

rights conferred by patent to the foreign firms. However, this is not true for all countries as in most cases economic strength and market mechanisms of a country determine the growth of R & D to a great extent. China in this case set a number of examples which is discussed in the next section of this paper.

The theoretical approaches in the analysis of TRIPS Agreement are unlikely to unravel the underlying impediments it unleashes in practice as far as the transfer and diffusion ESTs are concerned. These impediments for the developing countries include the high cost of commercialization, lack of capital to buy and license technologies, lack of bargaining capacity to negotiate licenses. While the proponents of restrictive IPRs regime claim that there are no visible barriers posed by IPRs in technology transfer as of now or there is lack of sufficient evidence in this regard, the World Bank Development Report in 2010 underscored the ongoing drive of the firms to patent green technologies which clearly signals that the existing and future risks of potentially high degree of barriers cannot be entirely ruled out.

4.1 Why TRIPS Flexibilities are mostly Underutilized by the Global South?

Many experts call flexibilities envisaged in the TRIPS Agreement as provocative ploys effectively designed to persuade the developing countries to endorse the TRIPS.[42] There are compelling reasons to believe that developing countries have not been able to appropriate the benefits under the TRIPS due to a number of factors such as domestic market considerations and the pressures from the bilateral and multilateral levels. Sadly, most of the technical experts in developing countries employed their knowledge to develop understanding of compliance with TRIPS provisions rather than trying to dissect the flexibility provisions to utilize them in pursuit of greater green technology diffusion. Dominant multinational firms remain a leviathan in many developing countries with respect to technology diffusion.[43]They tend to exert all their powers and influence at their disposal to make sure that TRIPS flexibilities are not used to undermine their dogged quest for profit maximization.

Many south Asian countries in their free trade agreements had to curtail TRIPS flexibilities because they lack bargaining capacity. The USA used its legal tools forcing countries to bypass TRIPS flexibilities and extend the IPRs protection even beyond the level accorded under the Article 1(1) of the TRIPS Agreement. Resisting this pressure requires a considerable amount of political maneuvering and financial strength which global south countries lack. Sadly, the growing advocacy of the WIPO standing committee in favour of adopting a Substantive Patent Law Treaty is argued to have the effect of further undermining the existing flexibility options available

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[42] Carolyn Deere, 'The Implementation Game: Developing Countries, the TRIPS Agreement, and the Global Politics of Intellectual Property' (5 In South Centre's fifth South Innovation Perspectives Series Seminar, Geneva December 2007).

[43] Benjamin Coriat, and Olivier Weinstein, 'Patent regimes, firms and the commodification of knowledge' (2012) 10(2) Socio-Economic Review 267.

under the TRIPS Agreement. Some scholars suggest that global south countries should develop regional cooperation through a common legal framework based on their common interest to meet their green technology demand. Given that these countries have almost similar level of economic capacity, an effective and functional mechanism based on common interest would greatly enhance their negotiating powers in both bilateral and multilateral agreements to facilitate technology transfer. Moreover, countries in the Global south such as India, China and Brazil who are relatively better equipped in technological capacity and have the potential to grow as future providers of green technology can seek to leverage south-south cooperation in technology transfer to counter the rising dominance of the north in the technological landscape.

4.2 The Impacts of the IPRs on the Transfer of ESTs and the Global South

Despite the paucity of evidence based analysis, the concerns surrounding the access to developing countries to EST because of patent protection cannot be readily dismissed. It is evidently putting the developing nations on the back foot with respect to the adoption of mitigation and adaptation measures in fulfillment of their mandate under the major international climate laws. Available studies intending to decipher the nexus between the IPRs and the diffusion of climate technologies demonstrate divergent findings. A considerable body of scholarship in this area, attempting to base their findings on evidence based analysis, stands to oppose the view that IPRs constitute barriers to access ESTs.[44] By contrast, there are studies which tend to see IPRs as potential barriers for the transfer of climate technologies to developing countries.[45] Opinion of the legal scholars reflects both skepticism and pragmatism about the patent implications for green technology towards achieving the climate goal. It is worth mentioning that, even the skeptics tend to underscore the necessity of adaptation in the patent law through necessary reforms in order to address the potential barriers impeding the transfer of ESTs.

The OECD Patent Database[46] suggests that most patents in ESTs are filed in developed countries.[47] The increasing wave of ESTs being patented are in the domain of energy, transport and ICT. Among these, the majority of the ICT products subject to patent protection have environmental use such as energy efficiency in buildings, carbon capture and storage, water and waste water treatment and climate mitigation and adaptation. With the ownership of most of the advanced energy technologies

[44] Maskus Keith, 'The role of intellectual property rights in encouraging foreign direct investment and technology transfer' (1998) 9 Duke J. Comp. & Int'l L 109.

[45] Varun Rai and others, 'International low carbon technology transfer: Do intellectual property regimes matter?' (2014) 24 Global Environmental Change 60.

[46] See, OECD Patent Database <https://stats.oecd.org/Index.aspx?DataSetCode=PATS_IPC> accessed 11 December 2022.

[47] USA dominates the list with 23 percent, Korea has 20 percent and Japan 14 percent <https://stats.oecd.org/Index.aspx?DataSetCode=PATS_IPC> accessed 11 December 2022.

private enterprises in developed countries mostly control and determine the speed of their diffusion to climate vulnerable countries. The Clean Energy Patent Growth Index (CEPGI) published by Rothenberg & P.C suggests that private companies mostly located in developed countries such as the US, Japan, Germany, France, UK and South Korea are the key drivers of advanced energy technologies which are subject to patent protection.[48]For example, DuPont patented HFC-134a which is an alternative of CFCs that helps decrease depletion of ozone layer. This technology needs reverse engineering to replicate in the domestic industry. Indian and Korean firms wanted to import this technology to produce CFC substitutes and in turn meet the goals of Montreal Protocol. However, they faced huge difficulties in doing so as Indian companies found it highly expensive due to the patent license and patent owners showed unwillingness to license the technology to Indian companies. The monopoly granted to private companies could be argued to motivate them to invest more, however, their tendency to maximize profit negates the wider public interests. There is enough empirical evidence to suggest that the TRIPS Agreement transpired differential impacts on developed and developing states. With patent hold up of above 90% of the advanced technologies, 80% of which are leased to developing countries, patent owners and their affiliate multinationals of developed countries continue to reap the benefits of over 70 % of the global royalty and licensing fee payments.[49] Eventually strict patent laws appear to enrich the multinational corporations and has the effect of stifling the growth in local R & D. It has been argued that strong patent laws must be complemented by adequate absorption capacity of technologies in the countries of the global south which is seriously lacking and such laws, given the practical barriers, tend to work to the disadvantage of the developing countries.

While patent drives innovation and helps investors recoup their costs, the additional financial burden it creates for developing nations should be borne by the developed nations in the spirit of international cooperation to help vulnerable countries to combat the adverse impacts of climate change. Certainly, stringent IPRs provisions can help facilitate technology transfer in the forms of international trade, FDI and imports, raising the prospect of extending higher protection to the interests of inventors. However, in cases where reverse engineering is required IPRs tend to impede the indigenous development of ESTs, potentially downsizing the local R&D.

Public funded scientific research interventions in the past used to consider scientific research output/findings as public good. In recent decades, corporate investment in

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[48] Bernice Lee and others, 'Who owns our low carbon future? Royal Institute of International Affairs (RIIA)' *A Chatham House Report* (2009) <https://www.chathamhouse.org/sites/ default/files/public/Research/Energy%2C%20Environment%20and%20Development/r0909_lowcarbonfuture.pdf> accessed 10 October 2022.

[49] United Nations Development Programme, *Human Development Report* (1999) <https://reliefweb.int/report/world/human-development-report-1999-globalization-human-face?gclid=Cj0KCQjwocShBhCOARIsAFVYq0gA15_1Y1V1ShQlCYmwJNFn1bF5lwQV9TkQY07c0atI-bGLGZBJUbAaAlK0EALw_wcB> accessed 14 February 2023.

scientific research has increased to a great extent. As a result, the IPRs regime started to attach greater proprietary interests in scientific research, diverting its focus from providing incentives to inventors to inspire and protect private sector investment.[50] Eventually, IPRs standards embraced legal restraints[51] followed by high prices of mature technologies and restrictive access to these technologies by people who are unable to pay. These trends have undoubtedly resulted in negative implications for EST transfer from the developed states to developing states.

Many cite China as a success story in the international transfer of renewable technology. It has been able to manufacture and commercially deploy renewable technology such as Solar PV, wind turbines and biomass power plant. The industry China developed focusing on the development and commercial manufacturing of green technologies is a direct outcome of technology transfer arrangements China made with countries such as Germany, United States and Denmark. For example, the growing biomass power plant industry in China owes its growth to a technology which is licensed in Denmark. The transformation of solar and wind energy sectors in China supported by robust innovation facilities prove that with the right kind of support and technology sharing most of the countries in the global south can develop climate resilient cities. However, like China, not all countries in the global south have the equal financial strength and global influence to transform their energy sector. China's experience is an indication of the fact that for a country to leverage international technology transfer, it needs to develop adequate capacity and innovation support systems and policies. However, capacity building needs financial support which developed nations may provide in the form of climate finance to enable the developing states to meet their climate commitments while not interfering with their developmental needs. In this regard, major emerging economies including India advocate for putting some IPRs related green technology in public domain so that countries in the global south may use them to decarbonize their economy.[52] In addition to technology transfer, it is also important that needed know-how and capacity building initiatives are facilitated through international cooperation.[53]

4.3 How to Maneuver the Patent Landscape to Mobilise EST Transfer?

One of the potentially negative consequences of patents is that due to its reliance on market demand based[54]on consumer-pays model of innovation it has the effect of not

[50] A.R. Chapman, 'The human rights implications of intellectual property protection' (2002) 5(4) Journal of International Economic Law 861.

[51] ibid.

[52] Goldar (n 24) 12.

[53] G8 Summit, *The Ministerial Meeting of the Dialogue on Climate Change, Clean Energy and Sustainable Development launched* (Gleneagles 2005) <https://www.mofa.go.jp/policy/economy/summit/2008/doc/pdf/0708_05_en.pdf> accessed 21 October 2022.

[54] Rogeij and others, 'A new scenario logic for the Paris Agreement long-term temperature goal' (2019) 573(7774) Nature 357.

promoting innovations in socially valuable but not much profitable inventions.[55] In the context of ESTs, although developing nations have the demand in response to climate commitments, they in most cases do not possess the capacity to pay due to the expensive and high-technological solutions offered by patents over cheaper options. Despite being based mostly on theoretical hypothesis, These assumptions certainly raise some valid questions as to whether patents are desirable mechanisms to promote green innovation since the consumers in the global south are financially incapable for most of the expensive patented ESTs. There is widespread consensus in the literature that patents discourage simple and cheaper solutions that are unlikely to encourage innovation for poorer populations. Even if substantial investment is made in developing technologies which the poorer countries need, these countries perhaps will not be able to gain access to such technologies due to financial burden resulting from stringent IP protection and limited absorption capacity. A case in point is the pharmaceutical patent in the context of the right of health. In the case of covid-19 vaccine, most of the poorer and developing countries could not afford vaccines on time due to patent barriers and high price resulting therefrom.[56] Covid-19 and the avian flu crisis[57] in 2004-2005 served as a reminder that patents are used as an effective tool in times of public health emergency to maximize profit margins.[58] More so, with few exceptions, firms are heavily investing in R & D for pharmaceutical products which address diseases suffered by people in developed nations.

Scholars who seek radical reforms in patent law believe that patents do not provide appropriate market incentive for green technologies, they suggest some non-market mechanisms or alternatives such as climate prizes or rewards as innovative incentives.[59] One such model of reward as suggested by Gregory Mandel proposes that states may buy the ownership of the ETSs which are socially beneficial in return of compensation.[60] However this has numerous practical setbacks so far as the commercial viability of the ESTs are concerned and hence this should be assessed case by case. It is however a reality that patent suspension does not offer a solution either because firms would invariably seek to recoup their R &D costs through various modes and channels of technology transfer. A more viable alternative is

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[55] Rochelle C. Dreyfuss, 'The Challenges Facing IP Systems: Researching for the Future' in 4 KRITIKA (eds), *Essays on Intellectual Property* (1 Peter Drahos 2020).

[56] Avani Laad, 'Vaccine Nationalism, the TRIPS Waiver Proposal and Public International Law' (2021) <https://opiniojuris.org/2021/08/23/vaccine-nationalism-the-trips-waiver-proposal-and-public-international-law/> accessed 12 December 2022.

[57] Nina Khouri, 'Bird Flu, TRIPS and the Customary International Law Doctrine of Necessity' (2008) 5 New Zealanad Yearbook of International Law 37.

[58] Avanee Tewari, 'Commercializing a Pandemic-How to balance patents and public health emergencies' (2021) <https://www.iam-media.com/article/commercialising-pandemic-how-balance-patents-and-public-health-emergencies> accessed 12 October 2022.

[59] Gregory N. Mandel, 'Promoting Environmental Innovation with Intellectual Property Innovation: A New Basis for Patent Rewards' (2005) 24 TEMP. J. SCI. TECH. & ENV'T L. 64.

[60] Gregory N. Mandel, 'Innovation Rewards: Towards Solving the Twin Market Failures of Public Goods' (2016) 18 VAND. J. ENT. & TECH. L. 303.

practical reforms in patent law in the context of development, transfer and diffusion of ESTs, offering wide ranging options for green technology transfer including 'exclusions to patentability' enhanced experimental use defenses or collaborative licensing models.[61] Developed countries may consider establishing 'Climate Innovation Centres' involving patent pools which would enable developing countries to gain access to patented technologies. Research shows that patent hold up in green technologies in some instances may involve multiple industries[62] which seriously hinder the deployment of mature technologies, resulting in patent misuse with potentially harmful consequences for climate goals. Licensing also involves complexity for technologies dependent on integration and interoperability.[63] There have been proposals for introducing a green patent regime which aims to use patents subject to environmental regulation which may accelerate green innovation.

A compulsory licensing provision for green technologies under the TRIPS Agreement is proposed by many scholars which is believed to enable the global south an easy access to EST. However, preceding discussion pointed out the inefficacy of compulsory licensing, making reference to the limited success of the compulsory licensing for medicines. While there is little evidence to substantiate the claim that compulsory licensing would make EST transfer easy from global north to south, the existential threat posed by climate change justifies trying all possible options for that matter. While the importance of patents for technology commercialization and diffusion cannot be ignored, the singular focus on patents as the most suitable tool to facilitate green innovation is uncalled for by many scholars. Identifying weaknesses in the innovation policy is important to make the patent system compatible for green innovation[64] so that provisions relating to patents implemented by the developed states parties do not run counter to the expectations of the UNFCCC commitments.

In the midst of the pandemic, war, runaway inflation, looming financial and climate crisis, countries around the world are finding it increasingly difficult to keep their commitment on phasing out the use of fossil fuel and make a smooth transition to renewables. Nevertheless, what seems to be a prospect at this stage to reduce GHG emission is the rapid advancement of green energy technology to reach closer to the net zero carbon emission target envisioned by the Paris Climate Agreement. At this backdrop, attention should be geared towards generating policy debates to examine the extent to which existing IPRs rules and standards can be streamlined to facilitate climate technology transfer from developed to developing countries by extrapolating

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[61] Matthew Rimmer, 'A Proposal for a Clean Technology Directive: European Patent Law and Climate Change' (2011) 2 RENEWABLE ENERGY L. & POL'Y REV 185.

[62] Kane Wishart, 'Management of Intellectual Property in Australia's Clean Technology Sector: Challenges and Opportunities in an Uncertain Regulatory Environment' in Matthew Rimmer (ed) *Intellectual property and clean energy: the paris agreement and climate justice* (Springer Nature 2018) 183.

[63] Suzanne Scotchmer, 'Standing on the Shoulders of Giants: Cumulative Research and the Patent Law' (1991) 5 J. ECON. PERSPS. 29.

[64] Quellettee and Lisa Larrimore, 'Patent Experimentalism' (2015) 101 VA. L. REV. 65.

arguments from the international climate change law and human rights law. Legal scholars therefore should strive to understand what specific problems patent system encounter in striking the balance between the need for encouraging green innovation while not stymieing the diffusion of green technology to countries in the global south to enable them to face the increasingly adverse climatic events induced by anthropogenic climate change. Both the UNFCCC and Paris Agreement unequivocally acknowledged the importance of green technology for adaptation and mitigation and the role developed countries should play in realizing the goals of the Paris Agreement.

5. A Human Rights Based Approach to IP Law in the Context of Climate Change

Despite the fact that intellectual property rights(IPRs) found their theoretical underpinning in the human rights law, the growing intersection between human rights and IP seems to be widely neglected in practice. A human rights approach to IP law in the context of green technology transfer should primarily and fundamentally seek support from the interpretation of article 27[65] of the UDHR and the Article 15 of the ICESCR. As a legally binding human rights instrument, Article 15(b) of the ICESCR at first recognized the right of everyone to benefit from the scientific, literary and artistic inventions which is then followed by Article 15(c) necessitating the recognition of the moral and material interests of the intellectual creations of persons in the above-mentioned fields. A human rights approach to IP law implies that the level of protection afforded to scientific and cultural innovations should aim to broadly benefit the members of the society both individually and collectively while not compromising the moral and material interests of the creators/authors. It implies that the protection of IPRs within the meaning of the article 15 may be construed to extend to such an extent which would not undermine broader public interest to access the benefits of scientific inventions. It is then important to see whether the existing patent protection standards under TRIPS Agreement are consistent with the central human rights norms, satisfying the normative threshold of the article 15 of the ICESCR, and paving the way for an affordable and flexible mode of technology transfer from the developed to developing countries. Ironically, the above analysis, has shown that the steady growth of intellectual property laws, especially the TRIPS Agreement, has outgrown both the semantics and spirit accorded to them in the human rights instruments. The current framing of intellectual property protection cannot but serve corporate intellectual property interests instead of individual entitlement to intellectual property as intended by the human rights connotations of

[65] Universal Declaration of Human Rights 1948, art 27:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

IP protection. This eventually frustrates the public policy goals of the IPRs. While addressing these concerns, the committee on economic, social and cultural rights added a different dimension to the intellectual property rights in the general comment 17[66] by dissociating the right to intellectual property from other legally recognized mainstream human rights and by denouncing the radically different course taken by the growing intellectual property regime, especially in the domain of patent.

A human rights approach to IPRs to facilitate EST transfer seeks to place primacy on values of human dignity and common good over market considerations.[67] Thus, a human rights approach to IPRs calls for the framing of IPRs standards using a vulnerability lense.[68] This would have the effect of extending the benefits to those who are otherwise unable to gain easy access to these benefits. Therefore, policy decisions and standard setting activities surrounding the patent landscape ought to factor in the human rights imperative of the people in the global south so that they can benefit from the major scientific and technological developments taking place in the global north. The necessity for economic incentives in the development, deployment and commercialization of EST should be counterbalanced by the urgent need to address the irreversible harms caused by climate change to mother earth where climate vulnerable states bear the disproportionate burden. This requires more public interest science advocates coming forward to convince the scientific community by using human rights norms that the application of science should drive human welfare and this is all the more pronounced when it comes to dealing with climate change as a collective global effort.[69] Almost all human rights treaties impose obligations on states to protect and ensure rights to individuals in their territory and beyond under the extra-territorial obligation through international cooperation. There are some rights which could be relevant to the transfer of or access to technologies in respect of climate change: rights to share in the benefits of scientific progress, right to food, adequate standards of living, to health, and to life, right to family life and privacy etc. A strong link between human rights and climate change can bring about a transformative change in the nature of obligations developed nations have in fostering technology transfer to the developing countries.

Predominantly founded on a state-centered development model, the current approach of the climate change discourse towards technology transfer focuses on

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[66] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)'para 1; UN Doc. E/C.12/GC/17 (2006), para 2.

[67] Peter K Yu, 'Reconceptualizing intellectual property interests in a human rights framework' (2006) 40 UC Davis L. Rev.1039.

[68] A. R. Chapman, ' Human Rights Approach to Health Care Reform' in A. R. Chapman (ed.), *Health Care Reform: A Human Rights Approach* (Washington, D.C.: Georgetown University Press 1994) 153.

[69] See, e.g., J. T. Edsall, 'Scientific Freedom and Responsibility: A Report of the AAAS Committee on Scientific Freedom and Responsibility' (American Association for the Advancement of Science: Washington, D.C. 1975).

state-to-state obligation with respect to the technological and financial support needed to combat the adverse impacts of climate change. This needs a paradigm shift to embrace a human rights approach where populations vulnerable to the impacts of climate are prioritized over states. It strengthens the fairness claims in justifying technology transfer between the developing and developed nations overlooking the cost-benefit calculations involved in the process. It has the effect of limiting the scope of protection to the technologies conferred by IPRs. It should be mentioned here that the global efforts to address climate change under the UNFCCC is based on the principle of 'common but differentiated responsibilities'. This principle requires developed countries to shoulder additional responsibility for the purpose of advancing the goals of the Paris Agreement. One of such additional responsibility when read with the extraterritorial obligation entrenched in the ICESCR requires that developed states provide multilayered assistance including EST transfer to bolster the mitigation and adaptation efforts of the developing countries, in effect advancing the promotion and protection of a wide range of human rights from being violated due to adverse impacts of climate change.[70]

State responsibility to address human rights harms associated with climate change reinforces that framing and enforcement of IP law should aim to facilitate all kinds of activities to avert the adverse consequences of climate change. This responsibility is essentially an extension of the extra-territorial human rights obligations of the developed states in the context of climate change deeply rooted in the ICESCR and the major climate change instruments including UNFCCC and the Paris Agreement. With the loss and damage dimensions of climate change related human rights harms gaining significant traction in the international climate change law, the obligation of the developed states to provide financial support and facilitate technology transfer is louder than ever. Developed countries are therefore required to take measures which aim to protect the most vulnerable from the adverse impacts of climate change.[71] This entails facilitating the different modes of technology transfer via international contracts and cooperation in the scientific field with the ultimate goal of realizing the objectives of the Paris Climate Agreement. Such an approach is supported by the 1975 Declaration on the Use of Scientific and Technological Progress in the interests of peace and for the benefit of mankind. This declaration stipulates that "all states have the obligation to extend the benefits of science and technology to all strata of the population."[72] There can be no greater benefit to mankind than contributing to the cause of climate change by being sensitive to the special needs of the vulnerable people in developing countries.

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[70] Marc Limon, 'Human rights obligations and accountability in the face of climate change' (2009) 38 Ga. J. Int'l & Comp. L.543.

[71] Alan Boyle, 'Climate change, the Paris Agreement and human rights' (2018) 67(4) International & Comparative Law Quarterly 759.

[72] Audrey R Chapman, 'Towards an understanding of the right to enjoy the benefits of scientific progress and its applications' (2009) 8(1) Journal of Human Rights 33.

There is apprehension among some scholars that the UNFCCC style of obligation imposed upon developed countries towards developing countries is problematic as it creates a 'donor framework' turning the attention away from the 'vulnerabilities of the people affected by climate change' in the global south. It has been argued that such an obligation should be predicated upon a 'demandeur' centric framework where vulnerable populations from developing countries alongside their government can lawfully advance their claims for green technology against developed states to protect them from the perilous impacts of climate change. This in turn makes it hard for difficult developed nations to decline the demands for EST transfer under the garb of profit or patent protection. In fact, a liberal interpretation of IP law portrays that in contrast to the present dynamics of the IP law seeking to place full and unrestricted monopoly rights over the patent owner, a human rights approach to IP law makes the IP protection conditional on contributing to the common good and welfare of the society.[73] The present paradigm of IP law as envisaged in the TRIPS Agreement is arguably failing to perform the social functions of the IP law.[74] This can be discerned from the experience of the covid-19 pandemic. Despite the development of good number of vaccines, the extremely unequal distribution of vaccine globally and the resulting slow rollout leading to vaccine inequity was essentially fueled by the developed nation's aggressive drive for vaccine nationalism and the pharmaceutical companies' dogged quest for enhanced IP protection circumventing the obligation to engage in international cooperation and assistance to combat the repeated onslaught of the pandemic.[75] This is due in part to the intellectual property protection of the Covid-19 vaccine pursuant to the TRIPS Agreement under the WTO legal framework. Despite loud calls for treating Covid-19 vaccine as a global public good, developed nations have nevertheless invoked the IP law as a tool to serve the corporate interests of their pharmaceutical industries in time of such a rare public health emergency of an unprecedented scale.[76] In consequence, it has seriously undermined the human right to health, inhibiting equitable and affordable access to vaccines for the developing countries. That said, one thing that makes the vaccine patent stand in stark contrast to the human right to health is the strict enforcement of the TRIPS obligations under the WTO dispute settlement mechanism in comparison to the weaker system of enforcement of provisions under the ICESCR. This is however no indication that human rights obligations should plausibly be subordinated to the TRIPS obligations.

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[73] Audrey R Chapman and others, *Human rights and intellectual property: Mapping the global interface* (Cambridge University Press 2011) 233.

[74] Christohe Geiger, 'The social function of intellectual property rights, or how ethics can influence the shape and use of IP law' in Graeme B Dinwoodie (ed), *Methods and perspectives in intellectual property*, (Edward Elgar Publishing 2013) 412.

[75] Nancy S Jecker and Ceasar A Atuire, 'What's yours is ours: waiving intellectual property protections for COVID-19 vaccines' (2021) 47(9) Journal of Medical Ethics 595.

[76] Mirela V Hristova, 'Are Intellectual Property Rights Human Rights-Patent Protection and the Right to Health' (2011) 93 J. Pat. & Trademark Off. Soc'y 98.

Currently, many developed countries are encountering a flurry of climate change litigations for their failure to adopt adequate mitigation and adaptation measures.[77] Almost all these litigations have used human rights arguments to hold states accountable for their inability to stop human rights harms resulting from climate change impacts. The problem is that most of these litigations are being filed in the global north and most of these judgments miss to emphasize the obligation of the developed countries to extend support to protect the climate vulnerable people in the developing countries. Since the potential of ESTs to address climate change is profound, such litigations may also challenge the IPRs barriers impeding the diffusion of climate technologies to the global south. The arguments may be based on the proven facts that this is gradually putting billions of people in the developing countries at risk of severe climate related human rights violations. Recently a Brazilian[78] court has declared Paris Agreement as a human rights treaty and the UN Human Rights Council held Australia accountable under the ICCPR for failing to protect a range of human rights of the Torres Strait Island People[79] against the increasingly perilous impacts of climate change. In this context, extraterritorial human rights obligations of the developed states in the context of climate change recently recognized by the Inter-American Court of Human Rights(IACtHR)[80] and the United Nations Committee on the Rights of the Child(CRC) in the Saachi and others v Argentina and others[81] may serve as a critical tool to advocate for the removal of visible and invisible barriers in the IPRs for technology transfer or allowing the developing nations to use existing flexibilities implicit in the TRIPs Agreement to their fullest extent.

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[77] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (2021) Grantham Institute on Climate Change and the Environment *(GRI)*.

[78] Climate Home News, 'Brazilian Court World's First to Recognize Paris Agreement as Human Rights Treaty' (2022) <https:// www . climatechangenews . com / 2022 / 07 / 07 / brazilian - court - worlds - first - to - recognise-paris-agreement-as-human-rights-treaty/> accessed 08 October 2022.

[79] Monica Feira-Tinita, 'Torres Strait Islander: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights, (2022), Available <https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/ > accessed 15 October 2022.

[80] While the IACtHR issued an advisory opinion in 2017 underscoring the responsibility of governments for significant environmental damage that they cause within and beyond their borders, a more recent advisory opinion from the same court was requested by Chile and Colombia in 2023 asking for court's opinion on the scope of the state obligations for responding to the climate emergency <http://climatecasechart.com/non-us-case/request-advisory-opinion-inter-american-court-human-rights-concerning-interpretation-article-11-41-51-american-convention-human-rights/ & http://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/> accessed 20 February 2023.

[81] See Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey); Sixteen children filed a petition before the CRC against Argentina, Brazil, France, Germany and Turkey alleging the violation of the rights under the CRC due to insufficient actions of these countries to cut GHG emission. While the CRC declared the claim to be inadmissible, the committee nevertheless agreed with the claimants that States may be held responsible for transboundary harms caused by carbon emission originating in their territory. Consistent with the Advisory opinion held by IAtHRC in 2017, the CRC noted that countries have extra-territorial responsibilities related to GHG emission causing human rights violations.

In light of the challenges posed by the IP law in the realization of human rights, the UN sub-commission on the promotion and protection of human rights' resolution[82] focusing on intellectual property and human rights recommended that "IPRs regime in countries should reflect the social functions of the IP law by taking into consideration the international human rights-obligations of the states." The sub-commission also proposed a mechanism to conduct a human rights review of patent and copyright determination procedures. It also called for integration of human rights principles into IP policies, practices and operations. In 2003, implementation of the DOHA declaration faced opposition from the US on the ground that patent exceptions under the Doha Declaration to produce generic medicines for the purpose of fulfilling the public health needs in countries which do not have capacities would lead to the disadvantage of the pharmaceutical industry in the USA.[83] The dispute however was resolved by the WTO General Council for TRIPS by allowing patent exceptions to fulfill the public health needs. It is a clear reflection of the social functions of the IP law. Some scholars argue that something similar could be done to facilitate EST transfer with the objective of advancing not only the climate goals but also a wide range of human rights recognized under international human rights law which are adversely affected due to the existential threat posed by climate change.

6. Conclusion

The paper attempted to show that the rapid economic globalization over the last few decades led to the commercialization of science at an unprecedented scale, making it highly difficult to achieve the balance between material interest of innovators and the wider public interest as entrenched in human rights law.[84] The first step towards understanding the balancing approach implicit in human rights law in the context of EST transfer is to assess the existing barriers in the way of technology transfer from global north to south with an intent to advance the global climate goals. The prevailing trends in EST transfer reveal that the intended benefits of firms and multinationals patenting the technologies tend to outweigh the wider public interests which is why it can be argued that the balance is uneven and not in accordance with the emerging human rights norms in the context of climate commitments of the developed states. In view of the circumstances, beyond a balancing approach between the incentive and rewards of the inventors and the wider public interests, the current reality suggests that IPRs regime in the context of climate change should go extra miles recognizing the existential threats posed by climate change and the cumulative human rights harms it is causing upon the climate vulnerable nations mostly

[82] David Weissbrodt and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution' (2003) 5.1 Minn. Intell. Prop. Rev. 45.

[83] Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health (TRIPS: Council for TRIPS, WTO Doc., WT/L/540, Aug. 30, 2003) 6.

[84] Audrey R. Chapman, 'A Human Rights Approach to Health Care Reform' in Audrey R. Chapman, (Ed*), Health Care Reform: A Human Rights Approach* (Washington, D.C.: Georgetown University Press 1994) 153.

concentrated in the global south. Therefore, human rights obligations of the states in the context of climate change have to be emphasized to reinforce both the moral and legal responsibilities of the developed countries under international law to assist the developing countries in the Global South to develop climate resilient cities by way of EST transfer via patent waiver, compulsory licensing and adequate financial support. Therefore, taking a human rights approach to patent protection by linking the existing human rights norms with the recently emerging human rights dimensions of the climate change law such as UNFCCC and the Paris Agreement, there is a growing sense that IPRs framework, especially the patent landscape affecting the transfer of the ESTs, needs revisiting to meet the growing global expectations on climate change. While radical reforms in patent landscape is called for to meet the increasing demand for climate technology, the apprehension that such a reform would discourage innovation is not founded on objective basis and there are many alternatives that can be used to offset the moral and material interests of the firms investing in R & D for green innovation which the above analysis suggested. Finally, the application of the TRIPS Agreement in the context of EST transfer ought to be informed by the growing human rights jurisprudence advancing the climate change agenda in order to enable the patent regime under the TRIPS Agreement to materialize its social function by advancing global climate goals.

Judicial Discourse in Liberalising Locus Standi: Bangladesh and India in Perspective

Md. Shahidul Islam*

Abstract: With the increase of governmental function and governmental influence in public matters, rigidity to locus standi requirements starts changing under the auspices of the court. The constitutional courts in Common law based countries following the footprint of their British predecessor adopt liberal approach in accepting pro bono publico litigation. As a part of it, the Supreme Court of Bangladesh and the Indian Supreme Court have contributed much to the liberalisation of locus standi. Given this background, this article analyses the Bangladeshi and Indian judicial discourse towards liberalising locus standi. Accordingly, it discovers that locus standi has been liberalised significantly by the apex courts of both the countries. It also reveals that though liberalising process of locus standi starts a bit earlier in Bangladesh compared to India, the Indian Supreme Court's contribution to the field is more vibrant. Establishment of a PIL Cell and publication of a list where PIL will and will not be entertained is the latest edition in this respect in India.

1. Introduction

Locus standi is the gateway to vindicate any legal right or legal injury before the court. In legal parlance, *locus standi* means the right to institute a legal proceeding.[1] In other words, it implies 'legal capacity' to question the validity of a law, an order or a decision.[2] It entitles a party to establish sufficient linkage to 'the law or action challenged'.[3] The right to seek judicial redress, either for vindication of legal injury, legal right or enforcement of fundamental rights emanates either from statute or the constitution. However, one has to follow the judicial procedure which starts with the question whether he will be permitted to the threshold of justice. As the earlier view denotes, an individual personally aggrieved has the right to appear before the court while the modern approach demonstrates that any person may appear before the court for the cause of those who, for their economic, social or educational backwardness or other disadvantage, are unable to approach the court for judicial remedy. In this backdrop, this article attempts to make a comparative yet chronological display of the judicial contribution crafted by the Bangladeshi Supreme Court and the Indian Supreme Court in their efforts to develop the concept of *locus standi* within the parameters of their respective Constitutions. In addition, this article

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1 Law Web, 'Basic Concept of Locus Standi' (2015) <https://www.linkedin.com/pulse/basic-concept-locus-standi-law-web> accessed 30 May 2022.

2 VG Ramachandran, *Law of Writs* (6th edn, Eastern Book Company, Lucknow, India 2006) 26.

3 ibid.

focuses on the areas where *locus standi* has been denied by these two apex Courts. Finally it draws its conclusion.

This article is a part of a chapter of the unpublished PhD thesis of the author.

2. The Concept of Locus Standi Explained

The rule of *locus standi (*standing*)* carries two concepts, one is based on traditional view and the other is constructed on liberal view. As the tradition method of seeking judicial redress goes, one should prove before the court the legal right to question the alleged act, or decision of the government.[4] According to the traditional view, a person aggrieved 'personally', has the right to seek judicial redress from the court of law of the land.[5] This right of approaching the court of law for judicial remedy is traditionally called the right to maintain a suit or *lis* which is technically called *locus standi* or *standing*.[6] This principle correlates the remedies with the rights and leads to the view that only the aggrieved is entitled to seek remedy.[7]

By contrast, the modern view rests on the argument that rigidity to the requirement of *locus standi* should be liberalised. It is because, requirements for granting *locus standi* to the justice seekers, in areas affecting environment, women's right, right of the children, workers, peasants, farmers, garments workers, under-trial prisoners, raises concerns about the implementation of the scheme of the Constitution. Now, a person aggrieved by governmental action can 'activise the judicial process'.[8] People seek judicial redress against 'illegal official action and unconstitutional governmental behaviour'. [9] In this type of proceedings, the plaintiff shakes off the role of a traditional justice seeker and instead challenges 'the constitutionality' of legislative or official action.[10]

As a result, the courts of law liberalise or dilute *locus standi* rule in a bid to give justice to poor, needy and marginalised segment of the people specially children and women who are not able to knock the door of the court for their being poor, illiterate, etc.[11]

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[4] Ramchangran (n 2).

[5] *Dr Mohiuddin Farooque v Bangladesh* [1996] 49 DLR (AD) 69.

[6] *Black's Law Dictionary* (7th edn, 1999) 952, the *Locus Standi* is defined as a place of standing. The right to bring a legal action or to be heard in a court of law. See Also - P Ramanatha Iyer, 'Law Lexicon', *The Encyclopaedic Law Dictionary With Legal Maxims, Latin Terms, Words & Phrases.* (2nd edn, 2019) 1145, *Locus Standi* is defined as a place of standing, a right of appearance in a Court of justice and which signifies a right to be heard.

[7] *Farooque* (n 5).

[8] SP Sathe, 'Public Participation in Judicial Process: New Trends in Law of Locus Standi with Special Reference to Administrative Law' (1984) 26 Journal of the Indian Law Institute 1 <https://www.jstor.org/stable/pdf/43950880.pdf?casa_token=_Fvx0o5KIT4AAAAA:yV-JLGu-Ler-av1qTmIPFMv1bNYom_FtEVSzggCQpE2DEBCDKRVSfFKyZrAwfeCv5Ja70atm6rIUPyigYEH5uQBr0Xq9WPrtY_rMeR7Xi8Ywoq8RMg89> accessed 31 May 2022.

[9] Dianne L Haskett, 'Locus Standi and the Public Interest' (1981) 4 Canada-United States Law Journal 39 <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1645&context=cuslj> accessed 30 May 2022.

[10] ibid 41.

[11] *People's Union of Democratic Rights v Union of India* [1983] 1 SCR 477-479.

3. Historical Background of Locus Standi

The concept of *locus standi* has received profound changes in Bangladesh and India through judicial discourse. The rule of *locus standi* in Bangladesh and India has been deeply influenced with the concept of *locus standi* in the United Kingdom.[12] Under Common law, a litigant had to comply with two requirements, firstly right to sue with a 'legal interest' in the subject-matter and secondly, he had to show that his 'personal interest' was involved in the alleged administrative action.[13] There was no scope for one to advocate for 'the interests of the public'.[14]

The *locus standi* requirements witnessed a paradigm shift in England during the 1970s through good number of cases known as the *Blackburn cases*.[15] Raymond Blackburn, an ex-Parliament Member, comes to Court with four cases which involved his own but the cause of the general people. Of these cases, in *Regina v Greater London Council ex Parte Blackburn*, (1976) 1 WLR 550[16], Raymond Blackburn draws the attention of the court to the fact that pornographic films, openly being shown in cinemas in London and elsewhere, are grossly indecent.[17] He further argues that despite their being contrary to the Common law of England, the Greater London Council, the lincensing authority is doing nothing.[18] Therefore, he seeks for a writ of *prohibition* for closure of those cinema halls thereby restraining them from showing those indecent films.[19]

In the course of the proceeding, his *standing* is objected. However, the Court takes the contrary view holding that Raymond Blackburn being a citizen of London, a taxpayer and a parent has 'sufficient interest' when a governmental agency is 'guilty' of abuse of power.[20] Reaffirming his position in *McWhirter's case*[21], Lord MR Denning observes:

> …If … a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and … the courts in their discretion can grant whatever remedy is appropriate.[22]

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[12] Busisiwe Mqingwana, 'An Analysis of Locus Standi in Public Interest Litigation with Specific Reference to Environmental Law: A Comparative Study between the Law of South Africa and the Law of United States of America' [2011] Submitted in fulfillment of the requirements for the degree LLM in Constitutional and Administrative Law in the Faculty of Law, University of Pretoria 9 <https://repository.up.ac.za/bitstream/handle/2263/ 27926/dissertation.pdf?sequence=1> accessed 06 September 2019.

[13] ibid.

[14] ibid 10.

[15] *Regina v Commissioner of Police, ex parte Blackburn* [1968] 2 QB 118; *Blackburn v Attorney General,* [1971] 1 WLR 1037; *Regina v The Commissioner of Metropolis, ex parte Blackburn* [1973] QB 241; and *Regina v Greater London Council, ex parte Blackburn* [1976] 1 WLR 550.

[16] [1976] 1 WLR 550.

[17] *Regina v Greater London Council, ex parte Blackburn* [1976] 1 WLR 553.

[18] ibid.

[19] ibid.

[20] ibid 558-559.

[21] [1973] 629 QB 649.

[22] *Regina* (n 17) 559.

Thereafter, it becomes a common practice in the Common law countries that in case there is a 'public wrong' or 'public injury' affecting a vast majority of people, any one from the community preserves the right to cross the threshold of justice. Hence starts liberalising process of *locus standi* requirements by courts in common law countries.

4. Laws Governing Locus Standi in Bangladesh and India

This section analyses the respective laws on granting *locus standi* in Bangladesh and India.

4.1. Bangladeshi Law

Article 102(1) of Bangladesh *Constitution* empowers the HCD to issue any direction or order to enforce fundamental rights on the basis of a petition of a person who is 'aggrieved'. One has to establish that he is a 'person aggrieved'. In parallel, 'any person aggrieved' is entitled to agitate the HCD for an order for a direction compelling a person concerned to abstain from doing that which law does not permit him to do or to do that which law obliges him to do.[23] This rule is equally applicable if a person seeks a judicial intervention by the HCD for a declaration that an action taken or proceeding adopted by the Republic is of no legal effect.[24] Thus, it appears that a person has to prove before the Court that he is 'personally aggrieved' if he prays seeking a writ of *prohibition*, *mandamus* and *certiorari* before the Court.[25]

However, the *Constitution of Bangladesh* relaxes the rigidity of the *locus standi* requirements for *habeas corpus* and *quo warranto* from the HCD. Here he needs not be 'personally aggrieved' if he wants to move the HCD applying for these writs.[26]

4.2. Indian Law

By contrast, article 32 of the *Indian Constitution* offers wide discretionary power upon the Supreme Court of India in respect of *locus standi*. Literally, it entirely depends upon the sweet will of the apex Court to determine the 'appropriate procedure' for entertaining a writ of any category to enforce fundamental right.[27] In a similar fashion, article 226 of the Constitution equips every High Court of India to issue direction, order or writ along with *habeas corpus*, *mandamus*, prohibition, *qou warranto* and *certiorari* to any persons or authority.[28]

5. Judicial Discourse in Liberalising Locus Standi in Bangladesh and India

This section examines the judicial discourse towards liberalisation of *locus standi* requirements in Bangladesh and India.

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[23] The Constitution of Bangladesh 1972, art 102(2) (a)(i).
[24] ibid, art 102 (2) (a) (ii).
[25] ibid, art 102 (2) (a) (i) & (ii).
[26] ibid, art 102 (b) (i) & (ii).
[27] The Constitution of India, art 32(1) & (2).
[28] ibid, article 226(1).

5.1. Judicial Discourse in Liberalising Locus Standi in Bangladesh

The case of *Kazi Mukhlesur Rahman v Bangladesh (Mukhlesur Rahman's case)*[29] is the torchbearer on *locus standi* expansion move in Bangladesh. The *Delhi Treaty* 1974 permits exchange of territories between Bangladesh and India. Consequently, a portion of the territory of Bangladesh was ceded to India.

The petitioner challenges the legality of this *Treaty* on the grounds, *inter alia*, it involves surrendering of Bangladeshi territory to India and hence curtails his freedom of movement to every part of the territory as fundamental right. The HCD summarily rejects the petition arguing that the writ petitioner is not a permanent resident of the ceded territory and hence his fundamental right of freedom of movement has not been infringed. On appeal, he contends that the term 'any person aggrieved' should be given a liberal construction and a wide meaning as granting of remedies under article 102(2) of the Constitution is discretionary.[30]

The appellant is granted l*ocus standi* despite his not being an inhabitant of the ceded territory involved in the *Delhi Treaty*. The Court accepts his standing as he raises a grave constitutional issue of cessation of Bangladeshi territory infringing his rights under the Constitution. These rights are not local in nature rather they 'pervade and extend' everywhere in Bangladesh extending to her continental shelf.[31]

The HCD entertains the petitioner in *Dr Mohiuddin Farooque v Bangladesh (Mohiuddin Farooque's case)*[32] on *pro bono publico* ground after a long lapse of twenty three years since *Mukhlesur Rahman's case*. The petitioner contends that FAP-20 is likely to displace around 3 lack people in the project area and disturbs the natural habitat of man and other flora and fauna.[33] The fundamental rights mechanism under article 102 can entertain both individual and common grievance when the rights affect the total population and territory.[34] He crystalises the position of the Court on the question of *standing* with the help of the following words:

> Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association … espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under article 102.[35]

In view of the Court, if the public-spirited individuals are not permitted to move for poor, illiterate, ignorant and disadvantaged group, the very constitutional spirit

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[29] *Kazi Mukhlesur Rahman v Bangladesh* [1974] 26 DLR (AD) 44.
[30] ibid, para 17.
[31] ibid, para 18.
[32] *Dr Mohiuddin Farooque v Bangladesh* [1997] 49 DLR (AD) 1.
[33] ibid, para 22.
[34] ibid, para 44.
[35] ibid, para 48.

would be ''frustrated'.[36] Thus, a person, whose heart bleeds for those who are less fortunate, is an aggrieved person.[37]

The *Ekushey Television v Dr Chowdhury Mahmood Hasan*[38] presents another glaring example of liberalising of the doctrine of *locus standi* requirements by the HCD. On appeal, the Appellate Division confirms the finding of the HCD in granting *locus standi* to the writ petitioner. Briefly, the fact is that on 09-03-1999 Ministry of Information signs a licensing agreement with Mr AS Mahmud.[39] Afterwards, the Ministry of Information gives approval to transfer this licence to the ETV Ltd.[40]

The petitioners challenge this agreement and approval of the same to ETV Ltd. on the ground that it involves breaches of constitutional obligations and statutory duties by and on behalf of the respondents.[41] To their contention, respondents violate legal mandates and public policies while entering the licensing agreement.[42] Therefore, they feel that they have a legal duty to seek the extra-ordinary jurisdiction of HCD under article 102 of the Constitution in order to compel the respondents to perform their public duty following the requirements of law of Bangladesh.[43]

After perusal of the evidence, the HCD makes the Rule absolute. On appeal, the Appellate Division finds the presence of 'shady deal' while approving the licence.[44] The government officers appear to 'wash off their hands from public duty' under pressure from their higher authority without regard to the law.[45] Therefore, this case illustrates an 'all permissive dimension' of administrative corruption in Bangladesh.[46] The Appellate Division the abuse of powers in licensing the ETV should be permitted to challenge otherwise it will undermine the constitutional provisions on rule of law.[47] In the observation of the Court, the State owes this duty to maintain rule of law to the general public.[48] So to prevent the governmental authority from making 'gross' infringement of fundamental rights, the Appellate Division stipulates:

> Such gross violation of fundamental rights should shock the judicial conscience and force it to leave aside additional procedure which shackles the *locus standi* and gives standing to the petitioners.[49]

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[36] ibid, para 97.
[37] ibid, para 97.
[38] [2002] 54 DLR 132.
[39] ibid, para 4.
[40] ibid.
[41] ibid, para 5.
[42] ibid.
[43] ibid.
[44] ibid, para 70.
[45] ibid.
[46] ibid.
[47] ibid.
[48] ibid, para 71.
[49] ibid, para 73.

In the case of *Abdul Mannan v Government of Bangladesh*[50], the Appellate Division declares Nonparty Caretaker Government as introduced through the *Sixth Amendment* of the Constitution unconstitutional. Here, the petitioner argues, amongst other, that democracy and independence of judiciary, both being basic structures of the Constitution, come under threat through this amendment.[51] Therefore, as a citizen and a practising lawyer of the Supreme Court, he has a sacrosanct duty to safeguard and defend constitutional supremacy.[52] The HCD grants *locus standi* to the petitioner.[53] On appeal, the Appellate Division concurs with position of the HCD and observes that as a citizen and a learned practitioner of the Supreme Court, the petitioner has reason enough to be aggrieved on the matter involving the Constitution and independence of the judiciary of the country.[54]

The judgement in the case of *Tayeeb v Government of Bangladesh (Tayeeb's case)*[55] sets another pillar towards the expansion the *locus standi* rule. The HCD, on reading a story of a news circulated in *The Daily Banglabazar Partika* on 02 December, 2000, issues *suo moto* rule upon the respondents. This daily publishes under the heading, *Naogaon-er grame aj fatoabajder shalishe vaggo nirdharon hobe grihobadhu Shahida'r (*Housewife Shahida's future will be determined at the meeting of the Fatwabaz at a village of Naogaon*)*. As is revealed, one Saiful of Atitha village within Kirtipur Union Parishad under Naogaon Sadar Police Station, divorces his wife Shahida by pronouncing *talak* out of anger but still they continue their conjugal life as husband and wife. Haji Azizul Huq of the same village declares that the marriage between Saiful and Shahida no longer exists and forces Shahida to enter a *hilla* marriage with her cousin Shamsul under a so called *Fatwa*. The HCD observes that the so-called *Fatwa* is illegal and unauthorised under section 7, *Muslim Family Laws Ordinance* 1961 and is punishable in view of sections 494/498/508 and 509 of the *Penal Code* 1860. Thereafter, the HCD issues a *suo moto rule nisi* calling upon the Naogaon District Magistrate to show cause as to why he should not be asked to follow the course of law.[56] Upon hearing the respondents, the HCD makes the rule absolute.

On appeal, the fundamental question that centres round the arguments is the competency of issuance of *suo moto* rule *nisi* by the HCD in the absence of any application filed by any person let alone the victim Shahida herself. The Appellate Division emphasises on the scheme and spirit of the Constitution particularly on the essence of fundamental rights. Justice ABM Khairul Haq observes that the spirit of substantive law takes precedence over procedural law.[57] In his view, when the

[50] [2012] 64 DLR (AD) 169.
[51] ibid, para 6.
[52] ibid.
[53] ibid, para 7.
[54] ibid.
[55] [2015] 67 DLR (AD) 57.
[56] ibid, para 200.
[57] ibid, para 71.

fundamental rights of the 'helpless womenfolk' are in jeopardy, the court would not sit in idleness rather uphold the spirit of the Constitution.[58] Filing of application is merely a procedural requirement and not an absolute precondition to exercise power under article 102 of Bangladesh Constitution.[59]

Justice Syed Mahmud Hossain notes that the HCD has jurisdiction to issue *suo motu* rule in a situation when it finds that fundamental right is infringed.[60] The HCD, in such a situation, may treat 'paper report, post-card, written material' as a petition and provide appropriate remedy to the seeker of justice.[61] In his view, the HCD 'must' record its reasons about exercise of power.[62]

The *Warrant of Precedence* as designed by the Government of Bangladesh becomes the centre point of discussion and determination in the case of *Bangladesh v Ataur Rahman*.[63] In this case, the petitioner, being a member of the judicial service and the Secretary-General of Bangladesh Judicial Service Association, challenges the *Warrant of Precedence* 1986.[64] As a citizen of the country, he incurs a duty to observe and maintain the laws of the land under the authority of article 21 of the Constitution.[65] He files the writ petition in his capacity as a 'concerned, affected and aggrieved person' to protect interest of indefinite number of the people of Bangladesh and to uphold the rule of law by way of public interest litigation.[66] The petition is against 'arbitrary placement' of judicial officers and constitutional office holders in inappropriate places in the *Warrant of Precedence* in derogation of their dignity and status in public perception.[67] So to do welfare of the country and to maintain rule of law, he proceeds with the *pro bono publico* petition to challenge the impugned *Warrant of Precedence*.[68] The HCD grants him *standing* to proceed with the writ petition.[69] On appeal, question of *locus standi* of the petitioner also comes to the forefront of debate before the Appellate Division which approves the legal position held by the HCD on the issue of *locus standi*.[70] The Appellate Division observes that a petitioner succeeds if his petition enjoins the 'civil rights of the indefinite number of people or citizen of Bangladesh' and the 'fundamental rights enshrined in articles 27 and 31 of the Constitution'.[71] The Court justifies granting of *locus standi* to the petitioner since he is

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58 ibid, para 72.
59 ibid, para 77.
60 ibid, para 329.
61 ibid.
62 ibid.
63 [2017] 69 DLR (AD) 17.
64 ibid, para 2.
65 ibid, para 3; See Also - The Constitution of Bangladesh 1971, art 21 (2) Every person in the service of the Republic has a duty to strive at all times to serve the people.
66 *Rahman* (n 63).
67 ibid.
68 ibid.
69 ibid, para 36.
70 ibid.
71 ibid.

not an officious by-stander, an interloper, or a busy body to invoke writ jurisdiction under Article 102.[72]

The case of *Bangladesh v BLAST*[73] is another example where the HCD grants *locus standi* to three human rights organisations and five individuals though none of their private right has been infringed or none of them has any personal interest in the proceeding.[74] They all appear purely *pro bono publico* to serve the cause of the general public.

Therefore, it appears that the Bangladesh Supreme Court starts liberalising the rigidity of *locus standi* down from the case of *Kazi Mukhlesur Rahman* where the Court recognises the right of every Bangladeshi to demonstrate before the Supreme Court to enforce fundamental rights. Therefrom, the Court makes ground breaking decision in respect of *locus standi* in the *Mohiuddin Farooque's case* by expressing the view that any public-spirited person, who has feeling for the disadvantaged and the poor, has standing to go to the court to have fundamental right enforced. With this view, the liberalisation process of *locus standi* culminates through *Tayeeb's case* in which the Supreme Court opens a new era legitimising *suo motu* exercise of power by the HCD in case fundamental right is violated and the victim is left with no means to seek judicial redress before the HCD.

5.2. Judicial Discourse in Liberalising Locus Standi in India

On the Indian side, liberalisation process of *locus standi* starts with at a slow pace. In its formatting period from 1960-1970, no significant development of *locus standi* rule is noticed for its adhering to the traditional *locus standi* rule founded under the garb of the Anglo-Saxon System of jurisprudence.[75] However, with the passage of time, the apex Court of India starts rethinking on liberalising *locus standi* requirements during the third decade of its journey. From 1971 to 1980 onward, the Supreme Court moves towards liberalising the rigidity of *locus standi* requirements taking into account the socio-economic and socio-political background of India.[76]

Thus, in *Maganbhai Iswarbhai Patel v Union of India*[77], the Indian Supreme Court deals with the issue of *locus standi*. After a longstanding clash between India and Pakistan, the dispute surrounding the *Rann of Kutch* is settled by an arbitration dividing this territory between the contestants. This results in the legal controversy before the Supreme Court. None of the petitioners has been inhabitant of the *Rann of Kutch* but

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[72] ibid.

[73] [2017] 69 DLR (AD) 63.

[74] The organisations are the *Bangladesh Legal Aid and Services Trust (BLAST), Ain-o-Salish Kendra, Shamilito Shamajik Andolon* while the individuals are Sabita Rani Chakraborti, Alhaj Syed Anwarul Haque, Sultani-uz Zaman Khan, Ummun Naser alias Ratan Rahmatullah and Moniruzzaman Hayet Mahmud. For details, See *BLAST* (n 73) para 50.

[75] *People's Union of Democratic Rights v Union of India* [1983] 1 SCR 456, 478.

[76] ibid.

[77] [1969] 3 SCR 254.

claims *locus standi* to agitate the court to exercise fundamental rights to travel, reside, or settle down and to exercise right to property under *Indian Constitution*. One of them named Madhu Limaye makes an additional plea that he has attempted to explore the possibility of settlement but has turned back. In addressing the grievance of all the petitioners including Madhu Limaye, the Supreme Court observes:

> [W]e are not to be taken as establishing a precedent for this Court which declines to issue a writ of *mandamus* except at the instance of party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. From this point of view, we would have been justified in dismissing all the petitions except perhaps that of Madhu Limaye.[78]

The *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai*[79] reveals that a good number of businessmen in Bombay appointed a considerable number of workmen whom they used to pay *ex-gratia* payment by way of bonus prior to 1965 but stopped paying this bonus from the year 1965.[80]

The workmen make an application for continuation of the said bonus to a Board of Arbitration constituted under section 10A of the *Industrial Disputes Act* 1974. After being rejected, the dispute comes before the Indian Supreme Court where one of the fundamental contentions has been whether the appellant *Mumbai Kamgar Sabha, Bombay (the Union),* who is not a party to the controversy, has *locus standi* to appear for the workmen.[81]

In deciding this issue, the Court opines that though the dispute is between the workmen and the employers, the *Union* appears for the protection of the interest of the workers.[82] So such obvious matter, formal defects fades away.[83] The Court rules that liberal interpretation of *locus standi* requirements promotes public interest particularly when the litigants are weaker.[84] Thus, while granting *locus standi* to the *Union*, the Court pronounces:

> We do not expect the rigid insistence on each workman having to be a party *eo nomine*. The whole body of workers, without their names being set out, is, in any case, sufficient ... For these reasons, we decline to frustrate this appeal by acceptance of a subversive technicality.[85]

The *Sunil Batra v Delhi Administration*[86] is a glaring example where the Supreme Court of India explores the scope and limit of *locus standi*. In this case, Sunil Batra and Charles Sobraj bring two separate writ petitions challenging sections 30(2) and 56 of

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[78] ibid 270.
[79] [1976] 3 SCR 591.
[80] ibid 594.
[81] ibid 596.
[82] ibid 597.
[83] ibid.
[84] ibid.
[85] ibid 598.
[86] [1979] 1 SCR 392.

the *Prisons Act* 1894 as *ultra vires* of articles 14, 19 and 21 of the *Indian Constitution*.[87] In dealing with this case, the Supreme Court recognises that public interest proceedings are in advance of traditional court proceedings of India.[88] Liberalised concept of *locus standi* enhances people's 'vicarious involvement' in the administration of justice.[89]

The Indian Supreme Court, in *Hussainara Khatun v State of Bihar*[90], adopts a broader view of *locus standi*. A huge number of under-trials have been languishing in the Tihar Jail of Bihar without any trial for long. Some of them have been incarcerated for a period longer than the maximum length of punishment had they been tried. Ms Kapila Hingorani, a lawyer, communicates this plight of the under trial prisoners of Tihar Jail to Supreme Court.[91] Upon hearing the case, the Court orders for immediate release of these prisoners as they have suffered longer period in jails than that which they would have suffered had they been convicted.[92]

The fact of *Fertilizer Corporation Kamagar v Union of India*[93] in short is that the *Sindri Fertilizer Factory* (Factory) opens a tender for sale of its certain plants and equipment. One Ganpatrai Agarwal submits the highest tender with Rs 4.25 crores which has been accepted by the authority.

The petitioners premise their petition on the provision of article 19(1) (g) of the *Indian Constitution*.[94] They challenge the legality of the sale by the respondents[95] as no expert opinion was sought regarding sale of the Factory plant and equipment.[96] Hence, the petitioners seek to stop the sale of the plant and equipment.[97] But the Attorney General raises objection regarding *locus standi* of the petitioners.[98]

In dissolving this contention, the Supreme Court stresses on the necessity of liberalising the rule of *locus standi*. The Court observes that l*ocus standi* requirements must be given a liberal interpretation to meet the demand of time.[99] To quote Justice VR Krishna Iyer on the necessity of liberalising *locus standi*:

> "In simple terms, *locus standi* must be liberalised to meet the challenges of the times. *Ubi just ibi remedium* must be enlarged to embrace all interests of public-minded citizens."[100]

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87 ibid 409.
88 ibid 414.
89 ibid.
90 [1979] 3 SCR 532.
91 ibid 536.
92 ibid.
93 [1981 2 SCR 52.
94 The Constitution of India, art 19(1)g.
95 *Kamagar* (n 93).
96 ibid 56-57.
97 ibid 58.
98 ibid.
99 ibid 71.
100 ibid.

The *SP Gupta v President of India (SP Gupta's Case)*[101] is a classic example of adopting liberal view of *locus standi*. The short story of the case is that the then Union Law Minister of the Indian Government issues a letter addressing the Chief Justice of each High Court.[102] This letter is questioned at the Court as it seeks for the consent of Additional High Court Judges for permanent High Court Judgeship including their choice of High Court in order of preference.[103]

Mr Iqbal Chagla, along with other learned Advocates of Bombay High Court, moves a writ petition before this High Court impugn the circular letter as attacks the independence of Indian judiciary.[104]

In the hearing before the Indian Supreme Court, *locus standi* of the petitioners are challenged on the ground that none of petitioners suffers any legal injury.[105] The Respondent argues that only the Additional Judges, whose consent is sought to be obtained or who are appointed temporarily, alone are entitled to question the constitutional validity of the circular.[106]

The Court leans its support to the view that in the event a person legally wronged is unable to move the court for economic or other legitimate cause, some other person may approach the court in his behalf.[107] To borrow it from the judgment:

> [W]here a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of … his socially or economically disadvantaged position, some other person can invoke assistance of the Court.[108]

The case of *Munna v State of Uttar Pradesh*[109] sets another example on the way liberalising *locus standi* in India. The fact that led to the case is that one Shri Madhu Mehta of the *Hindustani Andolan* makes a visit to the Kanpur Central Jail incognito.[110] She discovers that 10 to 14 young boys are being supplied to the convicts for their delectation.[111] This shocking news of sexual exploitation is published in the *Indian Express* on 02 December 1981.[112] Based on this news, three writ petitions come before the Supreme Court alleging sexual exploitation of more than 100 juvenile under-trial

[101] [1982] AIR SC 149.
[102] ibid, para 2.
[103] ibid.
[104] ibid, paras 2 and 3.
[105] ibid, para 13.
[106] ibid.
[107] ibid, para 16.
[108] ibid.
[109] [1982] 3 SCR 47.
[110] ibid 50.
[111] ibid.
[112] ibid 51.

prisoners housed in the Kanpur Central Jail by the adult prisoners.[113] The Supreme Court accepts the petition.[114]

The *People's Union of Democratic Rights v Union of India*[115] makes another development towards relaxing *locus standi* rule. The case in short is that the *People's Union for Democratic Rights* (*Organisation*) addresses a letter to a Justice Indian Supreme Court in which the Organisation complains labour law violation by the respondents and seeks judicial interference to render social justice to the affected workmen by appropriate directions.[116] The letter is treated by the Supreme Court as a writ petition.[117] In this case, it is observed that the India legal system has come out of the 'narrow confines' of *locus standi* rule. [118] The Court clarifies:

> [T]he traditional rule of *standing* … has now been jettisoned by this Court and … a new dimension has been given to the doctrine of *locus standi* which has revolutionised the whole concept of access to justice.[119]

The Supreme Court focuses on the socio-economic settings of India.[120] Therefore, the Court finds it necessary to introduce a new strategy by liberalising the traditional *locus standi rule* to make justice accessible to the 'lowly and the lost'.[121]

Accordingly, the *Sheela Barse v State of Maharashtra*[122] arises out of a letter stating custodial violence of women prisoners in police lock ups.[123] This letter is given status of a writ petition.[124]

The case of *Labourers Working on Salil Hydro-Project v State of Jammu & Kashmir*[125] emerges from a news item broad to light the *Indian Express* describing the maladies of migrant workers engaged in this project.[126] Based on this news, the *People's Union for Democratic Rights* thereupon addresses a letter to a Justice of the Indian Supreme Court for appropriate directions in this regard.[127] This letter is also accepted as a writ petition.[128]

The Indian Supreme Court makes another drastic effort towards liberalising *locus standi* rule thereby making the door of the court easily accessible by the backward

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113 ibid.
114 ibid 50.
115 [1983] 1 SCR 456.
116 ibid 466.
117 ibid.
118 ibid 477.
119 ibid.
120 ibid 478.
121 ibid.
122 [1983] 2 SCR 337.
123 ibid 340.
124 ibid.
125 [1983] 2 SCR 473.
126 ibid 477.
127 ibid.
128 ibid.

segment of the society through *Bandhua Mukti Morcha v Union of India (Bandhua Mukti Morcha's case)*.[129] The *Bandhua Mukti Morcha* writes a letter to Justice PN Bhagwati alleging, amongst others, that a fair number of bonded labours of the country are working in 'inhuman and intolerable conditions'.[130]

Treating this letter as writ petition, the Court appoints an inquiry commission to study the genuineness of the allegations made by the petitioner.[131] In view of the Court, if the case involves violation of fundamental right of the poor or disadvantaged section, then *pro bono* approach of a public-spirited person advocating their cause must be granted with *locus standi*.[132] Even a letter addressing the Court is enough to be an appropriate proceeding.[133]

In *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh*[134], the Supreme Court grants *standing* to an organisation as it moves the court for environmental and ecological balance. In this case, the Indian Supreme Court orders to close all lime-stone quarries in Doon Valley since these sites adversely affect water sources and environmental ecology.[135]

The rule of *locus standi* takes a new shape in the case of *MC Mehta v Union of India*.[136] This case widens the scope of article 32 of the *Constitution of India.* In this case, a PIL is instituted before the Supreme Court praying for a direction to close various units of Shriram Foods and Fertiliser Industries (*Shriram*) for their being hazardous for human community.[137] The Court grants a prayer for amending the petition for inclusion of claim for compensation for the victim of oleum gas leakage.[138]

The Court formulates its observation regarding the basis and philosophy of epistolary jurisdiction as under:

> Therefore, where the poor and the disadvantaged are concerned … a letter addressed by a public spirited individual or a social action group acting *pro bono publico* would suffice to ignite the jurisdiction of this Court.[139]

The case of *Paramjit Kaur v State of Punjab* arises out of a telegram sent to an Indian Supreme Court Justice mentioning alleged kidnap of one Sardar Jaswant Singh

[129] [1984] 2 SCR 67.
[130] ibid 91.
[131] ibid 96.
[132] ibid 106-107.
[133] ibid 168.
[134] *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh* [1985] 3 SCR 169.
[135] ibid 172.
[136] [1987] 1 SCR 819.
[137] ibid 825.
[138] ibid 826.
[139] ibid 828.

Khalra, General Secretary of *Human Rights Wing of Shiromani Akali DalI*.[140] The Supreme Court treats this telegram as a *habeas corpus* petition.[141]

The case of *Indian Council for Enviro-Legal Action v Union of India*[142] is registered following a writ petition filed by *Indian Council for Enviro-Legal Action*, an environmental activist organisation.[143] This petition complains of grave environmental pollution in *Bichhri*, a small village under Udaipur district, Rajasthan. It contaminates the earth, water and all other things that come in contact with it.[144] The Supreme Court entertains this petition considering the importance of environment and ecology in the life of human being.

The *MC Mehta's case (1996)* emerges out of a news published in the *India Express* under the caption 'Kamal Nath dares the mighty *Beas* to keep his dreams afloat'.[145] At the centre of the news, it is revealed that Kamal Nath, the Minister of Environment and Forests regularises and leases out to Span Motels Private Limited Company 27.12 *bighas* of land, along with considerable area of forest land on the bank of the river *Beas* on 11 April 1994. The Supreme Court takes cognizance of this news item and thus the proceeding starts.[146]

The *People's Union of Civil Liberties* advances a PIL under article 32 following a report on 'Tapping politicians' phone by the Central Bureau of Investigation' published in volume XXIX of the *Mainstream* on 26 March 1991.[147] The petitioner challenges the constitutional correctness of section 5(2) of the *Indian Telegraph Act* (the Act).[148] It argues for inclusion of procedural safeguards to remove arbitrariness and to prevent indiscriminate telephone tapping.[149] The Court grants *standing* to the *Organisation*.

6. Areas Where Locus Standi is Denied

The *locus standi* rule is constructed on sound policy which argues that the time and energy of the judiciary should not be allowed to be misused over hypothetical, abstract questions, at the instance of a professional litigant or busy body.[150] On this question, de Smith cautiously mentions:

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140 ibid.

141 ibid.

142 [1996] 3 SCC 212.

143 ibid.

144 ibid.

145 <https://sci.gov.in/jonew/judis/14637.pdf> accessed 14 June 2018.

146 ibid 1.

147 *People's Union for Civil Liberties v Union of India* (1996) 1 < https://sci.gov.in/jonew/judis/14584.pdf> accessed 14 June 2018.

148 ibid.

149 ibid.

150 SP Sathe, 'Public Participation in Judicial Process: New Trends in Law of Locus Standi with Special Reference to Administrative Law' [1984] 26 Journal of the Indian Law Institute 1 <https://www.jstor.org/stable/pdf/43950880.pdf?casa_token=_Fvx0o5KIT4AAAAA:yV-JLGu-Ler-av1qTmIPFMv1bNYom_FtEVSzgg

> All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest-the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him.[151]

Therefore, while liberalising the requirements of *locus standi* rule, the judiciary in both jurisdictions have adopted some degree of cautions. Accordingly, *locus standi* has been denied in some specific areas based on some principles.

Thus in the case of *Mazharul Huq v Returning Officer*[152], the HCD comes across the question whether the appellant has *locus standi* to invoke the writ jurisdiction of the Court in election matter. The HCD answers the question in the negative holding that due to the death of one of the two contesting candidates before the poll, the sole surviving candidate in the field has duly been declared elected. The rules do not provide for holding a poll to enable the electorates of the Union to cast their votes in the above circumstances.[153] It cannot, therefore, be said that the appellant has been denied the right of franchise by an act of any individual. On appeal, the Appellate Division upholds the ruling of the HCD on the ground that the appellant, being a voter, is not an 'aggrieved' person and hence has no *locus standi* to move the High Court Division in its writ jurisdiction under article 102(2) of the Constitution.[154]

The judgment of *Bangladesh Sangbadpatra Parishad v Government of Bangladesh* attaches a condition for a petition to be considered as public interest litigation. It observes that to be a *pro bono publico* petition, the petitioner must espouse the cause of a downtrodden and backward section of community who are not able to spend money to establish their fundamental rights and enforce constitutional remedies.[155]

In the case of *BRAC v Professor Mozaffor Ahmed,*[156] the HCD grants *locus standi* to the petitioner but on appeal the Appellate Division adopts contrary view.[157] In deciding this issue, the Appellate Division holds that there is no question of granting *locus standi* since there is no violation of fundamental right let alone the infringement of any right of the petitioner.[158] Besides, the petitioner has failed to show how the right

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CQpE2DEBCDKRVSfFKyZrAwfeCv5Ja70atm6rIUPyigYEH5uQBr0Xq9WPrtY_rMeR7Xi8Ywoq8RMg89> accessed 31 May 2022.

151 De Smith, *Judicial Review of Administrative Action* (4th edn, 1980) 409 <https://www.jstor.org/stable/pdf/43950880.pdf?casa_token=_Fvx0o5KIT4AAAAA:yV-JLGu-Ler-av1qTmIPFMv1bNYom_FtEVSzggCQpE2DEBCDKRVSfFKyZrAwfeCv5Ja70atm6rIUPyigYEH5uQBr0Xq9WPrtY_rMeR7Xi8Ywoq8RMg89> accessed 31 May 2022.

152 [1975] 27 DLR (AD) 11 .

153 ibid, para 1.

154 *Bangladesh Sangbadpatra Parishad v Government of Bangladesh* [1991] 43 DLR (AD) 126, para 11.

155 ibid.

156 54 DLR (AD) 36.

157 ibid, para 2.

158 ibid, para 4.

of any vulnerable and socially disadvantaged class of person has been infringed which warrants judicial protection.[159] Further, the competency of the writ petition is questioned since the petitioner does not represent the common people to mitigate their common sufferings.[160]

The Appellate Division observes that the HCD has traveled beyond the scope of article 102 in making Rule absolute.[161] Therefore, it sets aside the writ petition and discharges the Rule[162] as the writ petition simply aims to 'protect the alleged interest of intending promoters of banking companies' who cannot be defined as less fortunate persons.[163]

The pair cases of *Anti-Corruption Commission v Mahmud Hossain*[164] and *Anti-Corruption Commission v ATM Nazimullah Chowdhury*[165], bring to surface the question as to whether a fugitive is entitled to obtain a judicial order defying the process of the Court given the proposition that when a person wants to seek remedy from a Court of law, he is required to submit to the due process of the Court.[166] The Appellate Division answers the question in the negative observing that justice seeker in the first place, must come before the Court to move his grievance and thereafter, must surrender to the process of justice.[167] The Appellate Division rules:

> When a person wants to seek remedy from a Court of law, he is required to submit to the due process of the Court ... and unless he surrenders to the jurisdiction of the Court, the Court will not pass any order in his aid.[168]

The case of *National Board of Revenue v Abu Saeed Khan (Abu Saeed Khan's case)*[169] sets the yardsticks for exercising discretionary power in entertaining a PIL by the HCD. Thus, a petition that seeks to the opulent members of the society and challenge the governmental policy, promotional orders or transfer order, tax-imposition will not be entertained.[170] Besides, a petition which trespasses into the reserved areas for the executive and the legislature will not be accepted as a PIL case.[171] Further, an interloper is not entitled to proceed with a litigation.[172]

Side by side, in India, there are some instances where the Supreme Court disagrees with the contention seeking for *standing* in various cases on numerous grounds. The

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[159] ibid.
[160] ibid.
[161] ibid, para 34.
[162] ibid.
[163] ibid, para 13.
[164] [2009] 61 DLR (AD) 17.
[165] [2010] 62 DLR (AD) 225.
[166] ibid, para 9.
[167] *Commission* (n 164) 13.
[168] *Commission* (n 165) 9.
[169] [2013] 18 BLC (AD) 116.
[170] ibid, para 38.
[171] ibid.
[172] ibid.

Court observes that cases which do not espouse legal injury, where the petitioners are found to be a officious busybody, interloper, idle peddler of blackmail litigator and by-stander, do not have the right to vex the Court by abusing the process of the court.

In the case of *Jasbhai Motibhai Desai v Roshan Kumar, Haji Bashir Ahmed*[173], the Supreme Court of India examines the scope of the expression 'aggrieved person' and the rule of *locus standi*. Thus it is observed that the expression 'aggrieved person' defies exact definition and is comprehensive in nature.[174] The Court illustrates:

> The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept … Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him.[175]

This case outlines the scope of *locus standi* in a writ of *certiorari*. In a writ of *certiorari*, the applicant should be a person aggrieved and not a stranger, a busybody or meddlesome interloper who does not have any interest in the proceeding but masquerades as a crusader for justice.[176] Finally, the Supreme Court lays down some tests to distinguish a stranger from a real or legal interest holder in public interest litigation. The tests, *inter alia*, are whether the legal right of the applicant has been infringed and prejudicially affected by the action or omission of the authority.[177]

Finally, the issue of *locus standi* has taken a precise shape in India with the publication of the list of areas where the Supreme Court will entertain a letter-petition as public interest litigation. The areas cover the issues arising out of bonded labours, neglected children, non-payment of minimum wages.[178] Moreover, it includes exploitation of casual workers and complaints of labour rules violation, petitions complaining jail harassment, pre-mature release and release after completion of 14 years jail. It further covers the issues of transfer, release on personal bond and speedy trial.[179] These also address petitions against police refusal to register a case, police harassment and custodial death and petitions against women atrocities.[180] Further, petitions that complain of persecution or torture of villagers by their fellow-villagers fall in this category.[181] Again, a petition advocating environmental pollution, ecological disturbance, drugs and food adulteration, cultural heritage maintenance including forest also comes under this category.[182] Besides, a petition from a riot –victim and

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[173] [1976] 3 SCR 58.
[174] ibid 64.
[175] ibid 64-65.
[176] ibid 71.
[177] ibid 71-72.
[178] <https://www.sci.gov.in/pdf/Guidelines/pilguidelines.pdf> accessed 27April 2019.
[179] ibid.
[180] ibid.
[181] ibid
[182] ibid.

family pension also is entertained by the Supreme Court as Public Interest Litigation.[183]

At the same time, the Supreme Court also publishes a list of areas in which there will be no Public Interest Litigation. These include landlord-tenant controversy, matters involving service, pension and gratuity. [184] In addition, a complaint against governmental bodies is not maintainable.[185] Moreover, petitions seeking placement to medical and educational institutions and petitions for speedy disposal of cases are not entertained as a PIL.[186]

7. Findings and Concluding Remarks

The above discussion on the liberalisation of *locus standi* in Bangladesh and India through judicial discourse reveals marked differences as regards its extent of development. As is pointed out, the process of dilution to the rigidity of the rule of *locus standi* in Bangladesh started quite earlier in 1974 with *Mukhlesur Rahman's case* but thereafter, it remains silent quite for some couple years until the Supreme Court reopens its door through *Mohiuddin Farooque's case* culminating in the *Tayeeb's case.* In *Tayeeb's case*, the Supreme Court of Bangladesh has taken a wider approach to the rule of *locus standi* significantly widening the scope for *pro bono publico* litigation. However, the *Abu Saeed Khan's case* defines the categories where a PIL will and will not be entertained. By contrast, in India, the liberalisation process of *locus standi* has started a bit later reportedly with the case of *SP Gupta's case*. Subsequently, the Indian Supreme Court has broadened the concept of *locus standi* through a series of cases covering the various aspects of human life including environment and ecology. That apart, the apex court of India has established a PIL Cell to appreciate the petitions in the form of letters, telegram, telephone etc. on its way to concertising its epistolary jurisdiction, a step forward towards liberalising the rule of *locus standi*.[187] Publication of the list indicating the area where PIL will be entertained and where not by the Indian Supreme Court, of course, is the latest remarkable addition in progression.

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[183] ibid.
[184] ibid
[185] ibid.
[186] ibid.
[187] *MC Mehta v Union of India* [1987] 1 SCR 819, 829.

Marine Environment Protection in the Sea Lines of Communication in Asia-Pacific Region: Application of 1982 UNCLOS and Some Unresolved Questions

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Abstract: Being blessed with the unique geographical features like straits and archipelagos, the Asia-Pacific region is entangled with several confrontational and contradictory questions. Marine pollution is one of these pressing issues which gives rise to serious concern in the maintenance of safe and secure passage through the Sea Lines of Communication. At this backdrop, this paper examines the impact of marine pollution in the Sea Lines of Communication in the Asia-Pacific zone. To this end, this study explores the relevant provisions of the UNCLOS governing marine environment pollution with a view to ensuring safe and secure passage through the Sea Lines of Communication in the Asia-Pacific region. While doing so, this paper reveals that there remain some unresolved questions in this particular area of ocean governance. Thus it chalks out the possible answer to those unresolved questions in light with the UNCLOS and concludes therewith.

1. Introduction

Sea Lines of Communication (SLOC)[1] are key marine passages that facilitate significant maritime traffic and host the transportation of major vessel freight. Some of the SLOCs such as Grief of Malacca and Singapore, strait of Hormuz and the south China Ocean are one of the busiest and strategically important. According to the Indian Ocean Region Journal, more than 80% of the world's maritime trade in oil suffocation points passes in the Indian Ocean, 40% through the Strait of Hormuz, 35% through the Strait of Malacca and 8% through the Strait of Malacca via Bab al-Mandab Strait.[2]

Approximately 50,000 vessels[3] passing annually through the Straits of Malacca are in chief vulnerable to Filth from ships and another sources. The principal and minor blockade of the road had disastrous consequences, which have may be evolved by

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1 The idea of a sea line of communication, or SLOC, gives the world's strategic waterways, like the Strait of Malacca and the Strait of Hormuz, the status of "maritime highways," which make it easier for huge trade flows that are important to the prosperity of the global economy. These passages are exposed to a variety of factors that pose a threat to their accessibility and security. Non-military concerns include natural disasters, accidents related to navigation, pollution, piracy, terrorism, and the "creeping jurisdiction" of regional states, in addition to military concerns regarding threats posed by conflicts between nations and sea mines.

2 Sergei Desilva-Ranasinghe, 'Why the Indian Ocean Matters?' *The Diplomat* (United States, 2011).

3. Hans-Dieter Evers and Solvay Gerke, 'The Strategic Importance of the Straits of Malacca for World Trade and Regional Development' (2006) SSRN 4.

incidents due to shallow and narrow grief with high traffic volumes. If the accident involves a tanker, such as the situation near Seaport Dickson on 19 August, 2009, and the Changi marginal on 30 May, 2010, it may be necessary to close the strait or partially close the customs clearance.[4] The outcome of a shutdown of the Strait for a few days would have a huge influence on for international trade and commerce and the supply of oil and other substances which run the economy of the state. Marine Environment protection thus attracts a great deal of animus by the International community to keep the passageway safe and secure for the vessel passes through the Straits. In accomplishing this job, UNCLOS has produced some provisions for sharing responsibility within user states and maritime realm to protect such straits and narrow channel from closure.

The oceans' limited capacity to disperse all waste means that the excessive waste released will be a burden on them.[5] Heavy metals[6], pops[7], pathogens[8], radioactive materials[9], and other forms of solid waste are examples of pollutants that enter the marine environment and have a negative impact on it. Chemicals, wastewater, invasive species, persistent organic pollutants, siltation, pesticides, marine litter, heavy metals, and a variety of other impacts, including the destruction of coastal and marine habitats, contaminate ecosystems, posing a threat to ocean health. Shipping activities that, for convenience, discharge pollutants into the sea rather than into harbors may also be linked to areas adjacent to shipping lanes and coastal pollution[10]. A number of rapid maritime investigations have uncovered high concentrations of hydrocarbons and other substances from vessel spills, particularly in the watercourse of Malacca and the South China Ocean. The frequent contamination of a narrow channel like the Archipelagic sea lane passageway or the Strait of Malacca and Indonesia raises the possibility of its closure as a protected area. The same situation exists in the South China Sea passageway.

In addition, a significant number of accidents have occurred in the Brine lines of Communication in the Asia-Pacific Zone over the past fifteen years, which are associated with marine pollution. In 2015, there were 60 of these kinds of accidents, a number that is likely to rise each year as traffic in the Drain grows.[11] The main

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[4] Heather Gilmartin, 'EU, US, and China: collaboration across the Malacca Straits' [2008] HAMBURGER BEITRÄGE 1 <http://www.isn.ethz.ch/isn/DigitalLibrary/Publications/Detail/ ?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=94660> accessed 19 May 2011.

[5] Keith Sverdrup and Virginia Armbrust, *An Introduction to the World's Oceans* (10th edn, McGraw-Hill Education 2008).

[6] T.M. Ansari, I.L. Marr and N. Tariq, 'Heavy Metals in Marine Pollution Perspective–A Mini Review' (2004) 4 Journal of Applied Sciences 1-20.

[7] J.W. Farrington, and H. Takada, 'Persistent Organic Pollutants (POPs), Polycyclic Aromatic Hydrocarbons (PAHs), and Plastics: Examples of the Status, Trend, and Cycling of Organic Chemicals of Environmental Concern in the Ocean' (2014) 27(1) Oceanography 196.

[8] Y. Baskin, 'Sea Sickness: The Upsurge in Marine Diseases' (2006) 56(6) Bio Science 464.

[9] H.D. Livingston and P.P. Povenic, 'Anthropogenic marine radioactivity' (2000) 43 Ocean& Coastal Management 689; also A. Aarkrog, 'Input of anthropogenic radionuclides into the World Ocean' (2003) 50(17–21) Deep-Sea Research II: Topical Studies in Oceanography 2597.

[10] Tom Garrison, Oceanography: An Invitation to Marine Science (5th edn, Brooks Cole 2004).

[11] Krishnadev Kalamur, 'High Traffic, High Risk in the Strait of Malacca' *The Atlantic* (America, 21 August 2017).

director of the Malaysian Marine Police, Zulkifli Abu Bakar, stated that there had been a collision in the waters that Singapore and Malaysia claimed[12]. According to Bloomberg News, the Alnic MC, the tanker that caused the accident, was hired on 17 August to transport oil from Southeast Asia to the Far East.[13] In light of this growing vulnerability, the main purpose of this paper is to talk about the lawful system, specifically the United Nations Convention on the Law of the Ocean from 1982 and the holes in it when it comes to protecting maritime environments in sea lines of foreordination. In addition, the technical issues that determine user states' rights and coastal state measures to implement a vibrant method of continuing collaboration on sharing responsibility for dealing with environmental degradation will be demonstrated in this paper.

2. Methodology

This qualitative study made use of documentary, library, and internet resources, as well as official documents from the UN, IMO, and other regional organizations. The qualitative approach aims to explore and discover development, clarify and explain relationships, and build results that are applicable beyond the immediate limits of the research, whereas the quantitative approach closely follows the design of the research from start to finish, there is no room to include any new idea that has not been mentioned in the design before. All of the data and information gathered from primary and secondary sources has been arranged, reviewed, analyzed, and interpreted in light of the primary focus of the study.

3. Pollution from land based source and passing ships

Both land-based activities and pollution continue to pose a serious threat to the marine resource ecosystems. About 80% of pollution that ends up in the ocean comes from land.[14] With nearly 40% of the world's demography breathing within 100 kilometers of the coast[15], coastal areas face frequent pressures from tourism, urbanization, industrial plants, aquaculture, agriculture, and deforestation. Nitrogen from non-renewable energy source ignition, compost misfortune, and people and creatures the commitment of waste to supplements. Algae over-reproduce and enrich many marine areas. In developing nations, where approximately 90% of wastewater may enter rivers and coastal waters without treatment, sewage discharges are common.[16]

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[12] David Tweed and Andy Sharp, 'Ten Sailors Missing After U.S. Warship Collision Near Singapore' *Bloomberg* (New York, 21 August 2017).

[13] ibid.

[14] Tundi Agardy and others, 'United Nations Environment Programme (UNEP), UNEP in 2006' [2007] UNEP.

[15] Tundi Agardy and others, 'Ecosystems of the Coast' in R. Hassan, M. Scholes and N. Debris (eds.) *Human Health and the Environment: Present status and Patterns: The findings of the Millennium Ecosystem Assessment's Condition and Trends Working Group, Millennium Ecosystem Assessment Series*, vol 1 (Washington, DC: Island Press 2005) 513–549.

[16] Elizabeth Braun, *Reactive Nitrogen in the Environment: Too Much or Too Little of a Good Thing* (UNEP 2007) 5.

The new UNCLOS states that land-based pollution includes pollution of the Sea area (1) by watercourses and (2) by the coast.[17] This definition is consistent with all regional conventions. The Paris Convention and the 1980 Protocol to the Barcelona Convention include in this definition pollution caused by three artificial structures under the jurisdiction of the States Parties to these conventions.[18] The 1980 Protocol, in contrast to the Paris Convention, stipulates that it only applies to structures serving purposes other than the exploitation of the seabed's mineral resources. The fourth type of terrestrial pollution that has been identified by all of the existing conventions—with the exception of the Paris Convention—is ocean air pollution. Although the UN Convention on the Law of the Sea (UNCLOS) contains a number of provisions that deal with marine pollution caused by land-based sources, it lacks precise environmental requirements and is extremely ambitious. The adoption of laws to prevent and manage land-based causes of marine pollution is required by UNCLOS Article 207, which also encourages States to establish global and regional standards. It is particularly challenging to manage human activities on land that have an impact on the marine environment without cooperation. Over 125 coastal states, each with its own set of national laws and policies, mostly set the rules.

However, in a broader sense, the imbalance between human populations and industrial activity as well as the marine environment's limited capacity to absorb the waste they produce are the root causes of land-based marine pollution.[19] The marine environment cannot be shielded from land-based sources and activities by a single nation due to the transboundary nature of land-based marine pollution. As a result, preventing land-based marine pollution requires international cooperation between nations. Therefore, it is necessary to establish a global legal framework to regulate land-based marine pollution. In any case, until now, there is no thorough settlement on this issue, and land-based marine contamination is directed essentially by a set number of local arrangements.[20]

Ship-caused marine pollution is another major source of pollution. It restricts the use of the ocean for various purposes and is harmful to marine life, which has an indirect impact on human health. Ship-related marine pollution makes up about 20% of all marine pollution, according to estimates.[21] The boat's daily activities and accidents contribute to marine pollution. The ship is unloading their blenders during day-to-

[17] This convention includes the 23 March 1981 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, the Paris Convention on the Prevention of Marine Pollution from Land-Based Sources in 1974, the Convention on the Protection of the Marine Environment of the Baltic Sea Area in 1974, and the Barcelona Convention for the Protection of the Mediterranean Sea in 1974. Against Pollution, 16 February 1976, Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, 12 February 1982

[18] P. A. Bliss Guest, 'The Protocol against Pollution from Land-Based Sources' (1981) 2 Stanford Journal of International Law 272.

[19] The 1995 Washington Declaration on Protecting the Marine Environment from Land-Based Activities acknowledges the interdependence of human populations and the coastal and marine environment.

[20] ibid 17.

[21] The Independent World Commission, *The Ocean is Our Future* (Cambridge University Press 1998).

day operations without a convenient international regulation. Accidental profanation of the marine environment comes from ships carrying dangerous goods and tankers. Boat pollution damages marine habitats, which has a negative impact on human health. Additionally, the ocean's use for various purposes is limited.

The impact is disastrous as a result of the vessel's frequent transportation of hazardous cargo and a large quantity of pollutants.[22] A few poisons are delivered by the boat, either in activity or a mishap. Emissions from household waste and bilge water, ballast water discharge and tank cleaning, exhaust emissions, leaching of anti-fouling paint, the significant harm that material pollution, toxic, elimination, and the introduction of biological, acoustic, and visual interference[23] do to the environment Problems with marine pollution that are primarily made worse by five main sources:

1. Ships' bilge and ballast water is oily and contains shipping-derived hydrocarbons;
2. Dumping solid waste that is not biodegradable into the ocean; accidental oil leakage;
3. Fuel, other hazardous goods, or other cargo at the port and on the way;
4. Provisions; management and construction of inland channels and ports;
5. Destruction of the environment and the introduction of exotic species brought aboard.

The International Convention for the Prevention of Profanation from Ships (MARPOL) regulates ship-caused or accidental pollution of the marine environment. The Convention was adopted in 1973 by the International Maritime Organization (IMO). Additionally, this Convention establishes regulations regarding ship-borne pollution in the International Strait and Archipelago.

4. Control of pollution in straits used for international navigation and UNCLOS

The most significant legal document governing all aspects of the act of the sea, including international straits, is the UN Convention on the Law of the Sea (UNCLOS) 1982. Part III of UNCLOS offers a unique kind of arrangements overseeing an extraordinary sort of sea zone likely Waterways utilized for Global route. States in the Straits have a strong desire for the protection of the Sea environment and a direct stake in ensuring the safety and security of their waters and the areas that are adjacent. In a similar vein, it is in the user state's best interest to safeguard the passageway for safe passage through the straits. Marine pollution cannot be adequately addressed at the pragmatic or even sub-regional level because of its nature. Participation at the pragmatic and international levels, including

[22] EMSA, *Work Program for the European Maritime Safety Agency* (European Maritime Safety Agency 2008).
[23] UNEP, 'Report on Protecting the Oceans from Activities on Land' (Report No. 71, Oxford: GESAMP Study and Report 2001).

collaboration with the IMO, is also essential, in addition to cooperation between the straits' riparian states.

Part III of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) aims to prevent marine pollution in straits used for international navigation without violating the rights of transiting states. It emphasizes that all users, including the Strait States, are obligated to safeguard the maritime environment in international navigation straits. The connection between Part III, which addresses international navigation straits, and Part XII, which addresses the preservation and protection of the marine environment, is the focus of Article 233 of the UNCLOS 1982.

5. Article 233 of the UNCLOS and issues related to enforcement

The marine environment of the Strait States was ignored during the third phase of UNCLOS 1982 in favor of the right to transit. Part III and Section 233 both require revision to incorporate the distinctive aspects of the statement on article 233 from 1982. According to Article 233 of Part XII of the 1982 LOSC, which is titled "Protections concerning waterways used for worldwide route," nothing in segments 5, 6, or 7 has an effect on the valid system of waterways used for universal route. However, in the event that a remote vessel other than those mentioned in Article 10 has been submitted in violation of the laws and guidelines outlined in Article 42 (1) (a) and (b), causing or taking steps to cause extreme harm to the Marine Environment of the Straits, the flanking states may take the appropriate implementation measures, and if so, the arrangements of this segment will be regarded similarly. As per UNCLOS, when an unfamiliar boat disregards the regulations and guidelines alluded to in Article 42 (1) (a) and (b), jeopardizing the marine climate of worldwide waterways, the Waterways States might make an implementation move. In accordance with generally accepted international regulations approved by the relevant international organization in accordance with Articles 41 (3), 41 (4), and 41 (5), requirements that promote safe navigation and maritime traffic regulation are referred to in Article 42 (1) (a). 5). Article 233 raises a number of legal issues, making its full application unclear. Article 233 provided a definition for the phrase "creating or threatening serious damage to the maritime environment." However, the definition of major damage in the LOSC of 1982 is vague. Article 233's definition of severe damage to the maritime environment must be evaluated to determine whether it complies with international liability and compensation agreements. What criteria could be used to distinguish between major and minor damages? Foreign vessels would be held accountable in the event of a violation of the laws and regulations of the Strait State by causing or threatening to cause significant damage to the marine environment in accordance with Article 42(1)(a) and (b). Section 233 says that the Strait State can take the right steps to enforce these laws' violations. The Convention provides no definition for these measures. Presently another inquiry strikes a chord could we at any point discuss a suspension of travel entry despite the fact that Article

44 specifies that section on the way can't be suspended?[24] Another question is how the two nations implement Article 233 in a similar way and take enforcement actions. This issue was not resolved by UNCLOS 1982. The right to suspend the right of transit passage and an environmental formula for resolving marine pollution caused by foreign flag vessels are absent from Part III.[25]

Another omission was discovered in the provision regarding navigational safety, water depth, and marine environmental protection. This provision is especially important in Southeast Asian waters, especially in the Straits of Malacca and Singapore, which are the world's shallowest Straits used for international navigation. The International Maritime Organization approved two essential safety measures in 1981: a traffic separation plan for the Straits of Malacca and setting the tanker at 3.5 meters under keel clearance.[26] Despite this, the Traffic Separation Program and Under Keel Clearance requirements were not enforced by ships in violation of UNCLOS 1982.[27] There is no way for the Strait States to stop ships from violating the Keel Clearance requirements when they pass through them. Additionally, warships, other naval vessels, aircraft, and other ships or aircraft inherited or operated by a state and used solely for non-commercial governmental purposes are granted sovereign immunity under Article 233. As a result, the States of the Strait lack authority over them to safeguard the marine environment.

6. Article 43 of UNCLOS and control of pollution in a strait

The following is a summary of Article 43 of the UNCLOS: Users' states and States on either side of the Strait should work together in accordance with (a) to develop and maintain navigational aids for the waterway or other improvements to global navigation; and (b) to prevent, lessen, and manage ship-borne contamination. There are a few reasons why this article is particularly intriguing. First and foremost, it goes without saying that client nations are obligated to participate in order to guarantee a safe route and reduce contamination in international straits.[28] "It can be argued that this includes cooperating to enforce and enforce compulsory pilotage on vessels that pose the greatest risk,[29]" the statement reads. Second, it makes reference to "various upgrades in overall course" among the zones wherein client States should assist the Line States.

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[24] Mary George, 'Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention' (2010) 33(2) Ocean Development & International Law 189.

[25] ibid.

[26] Kheng Lian Koh, *Straits in International Navigation* (London: Oceana Publications 1982) 158.

[27] At the Law of the Sea Conference, efforts were made to include a provision that a violation of the 3.5-meter limit would be considered "causing or threatening major damage to the marine environment of the Straits." In the final convention, it was not approved. See - Zakaria receptacle MohdYatim, 'Law of the Ocean and Related Regulation' (1980), 2(2) Sekitar (a paper introduced at the Public Course on the Insurance of the Marine Climate and Related Eco-framework, 21 June 1979, Kuala Lumpur, coordinated by monetary and Social Com-mission for Asia and the Pacific)

[28] Sam Bateman and Michael White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment' (2009) 40 OCEAN DEV 184.

[29] ibid.

Robert C. Beckman says that there are seven things about Article 43 that you need to know.[30] First and foremost, the use of the word "should" makes it abundantly clear that the obligation is optional. Second, it acknowledges that the "user country," which has not yet been defined, wants to benefit from and take advantage of measures to reduce pollution in international channels and increase shipping safety.[31] Thirdly, agreement is the only way to cooperate. Fourthly, it is abundantly clear that the scope of this cooperation should extend beyond the enhancement of navigational safety to include pollution prevention, reduction, and control.[32] Fifth, coastal countries are hosted by the international organization of the competent authorities, even though Article 43 does not refer to "supervision of international organizations" if it does not meet the wording or purpose of Article 43.[33] Sixth, new lighting systems and dredging channels for deep seabed vessels are two examples of questions that could be the subject of an agreement under Article 43. Commentators have stated that straits like the Strait of Malacca were specifically considered when UNCLOS 1982 included Article 43.[34]

7. Fees for service in the territorial sea, strait and archipelagic waters

Under Article 43, the interests of the states using the straits and those boarding the straits are balanced. The topic of cost recuperation related with route guideline and contamination alleviation measures isn't obviously tended to in this part. Article 43, on the other hand, focuses on how expenses are used to achieve equitable sharing, which is critical to the literature on the topic.

As per Hugo Caminos and Vincent P. Cogliati-Banz, Article 43 didn't mirror the beach front state's capacity to charge for specific administrations. Through collaboration, Article 43 aims to develop means, including financial ones, to reduce the financial impact of the universal obligation on the governments that surround the Strait.[35] They added that this initiative also sought to bring together all interested States to adopt financing mechanisms that would ensure the highest possible level of security for the benefit of all in order to alert passing ships to the dangers of navigation.[36] In addition, it is necessary to ascertain whether the absence of article 43 of Part IV of the UNCLOS 1982 has any normative implications. Obviously, even without advice, nothing can stop the involved nations from coming to a cooperation agreement on aid navigation and the prevention or control of the island's water pollution.[37]

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[30] Robert C. Beckman, 'The International Legal Regime Governing the Safety of Navigation and the Prevention of Pollution in International Straits' (1998) 13 Singapore Journal of International and Comparative Law 355.
[31] ibid.
[32] ibid.
[33] ibid.
[34] ibid.
[35] Hugo Caminos and Vincent P. Cogliati-Banz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press 2014) 373-374.
[36] ibid.
[37] ibid.

In the absence of cooperative agreements under Article 43, the coastal State cannot demand payment for the use of general aids, devices, assistance, or traffic control, with the exception of services rendered at the ship's request, for which states bordering a strait or an archipelagic state may request a reasonable fee. With the exception of the exceptional regimes covered by Article 35 (c), the United Nations Convention on the Law of the Sea evaluates the legality of these measures in the context of Articles 39, 41, and 42. Part IV's goals and objectives make it clear that, for reasons that support cooperation with the straits, the kind of cooperation envisioned in Article 43 would be acceptable for archipelagic sea lanes.[38] The conclusion of the Article 43 agreement will benefit everyone, depending on the number and location of routes typically used for international travel, or, where appropriate, passageways and routes.

8. Determination of the status of the users

Article 43 envisions collaboration between the Strait's riparian states and its user states. Any existing requirement, it has been stipulated, does not apply directly to the user ships, but rather to the States whose ships utilize the channel.[39] From Article 43, this textual difference indicates that the term "user country" refers to the flag State and does not include other countries especially those who trade through the Straits. Article 43 follows the traditional treaty approach and is cited by referring only to states. However, it must be remembered that more and more market forces and the use of private companies are the characteristics of more and more economic policies. Therefore, article 43 does not preclude the participation of private customers such as Protection and Indemnity (PBI) Clubs or oil firms, nor does it preclude an arrangement established by charging the ship itself.

As a result, UNCLOS does not provide a precise definition of user status; it appears that only a empiric approach can yield adequate outcomes. Many times in UNCLOS, it is stated that a "user state" is not limited to flag states, and it is unclear which states would be designated as "user states." Some have suggested "users"; broadly can include "the convenience and economic other direct and indirect beneficiaries provided by the Straits".[40] This may range from the benefits of freight to the broad beneficiaries of the end consumer. It was also noted that if all types of vessels were to participate in a section 43 agreement, the next question would be whether the participating State would be the owner's state; the more likely candidate would be the flag State.[41] Although it was agreed that "user States" should be interpreted broadly to

[38] Hasjim Dajal, 'Funding and Managing International Partnership for the Malacca and Singapore Straits Consonant with Article 43 of the UNCLOS, 1982' (1999) 3 Sing. J. Int'l & Comp. L. 457.

[39] ibid.

[40] White (n 28).

[41] B A Hamzah, 'Funding Services in the Straits of Malacca: Voluntary Contribution or Cost Recovery? 1999(3) Singapore journal of International and Comparative Law, 508

include not only flag States but also the interests of States and the private sector, there was much debate on the question of precisely who such interests could be included.[42]

Some participants identified some of the East Asian countries such as the Republic of Korea, Japan, China are the main beneficiaries of the safe passage through the Strait.[43] It has not been denied that these States are legitimately considered as "users." More difficult to determine whether this list should be extended to oil exporters in the Middle East, emerging economies such as the People's Republic of China, or the Flag States such as Liberia, Panama, and Greece.[44] Various categories such as major flag states, exporting states, importing states, port states, and trading states were mentioned as being included in the discussion of the defining criteria of a "user state."[45] Users" in the private sector were considered to include the petroleum, shipping, and marine insurance industries, as well as ship and freight owners.[46] Several delegates felt that the types of cargo to be included in the definition of "users" should be expanded to cover hazardous materials. The petroleum, shipping, and marine insurance businesses, as well as ship and freight owners, were deemed "users" in the private sector.[47] It was finally suggested that some measure of prioritization was needed.[48] Some participants suggested that littoral states should put in place a form of priority to identify and consult with the most important users.[49]

9. Shouldering Burden and Responsibilities

From February 15 to 17, a summit of nations that use the Malacca and Singapore Straits, or "States of Use," was held in Alameda, California, by the United States.[50] The objective was to talk about how the "coastal states" of Indonesia, Singapore and Malaysia could help make the strait safer and protect the environment. This was in keeping with the Jakarta Declaration, which was reached at a meeting between the Indonesian government and the International Maritime Organization (IMO) in September 2005 in Jakarta.[51]

The Malacca and Singapore Straits' safety, security, and environmental protection are the goals of the Jakarta summit.[52] The rights and responsibilities outlined in the United Nations Convention on the Law of the Ocean from 1982 were acknowledged in the subsequent declaration from Jakarta, particularly article 43 on burden-sharing.

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[42] Bernard H. Oxman, 'Observations on the Interpretation and Application of Article 43 of UNCLOS with Particular Reference to the Straits of Malacca and Singapore' (1998) 2 Sing. J. Int'l & Comp. L. 408.
[43] Alan Tan Khee-Jin, 'Control of Pollution in the Straits of Malacca and Singapore' (1998) 2 Sing. J. International and Commercial L. 269.
[44] ibid.
[45] Oxman (n 42).
[46] ibid.
[47] ibid.
[48] Caminos (n 35) 379.
[49] ibid.
[50] Sam Bateman, 'Burden Sharing in the Straits: Not so Straightforward' [2008] Rajaratnam School of International Studies.
[51] ibid.
[52] ibid.

Article 43 stipulates that coastal states and nations using the Straits must cooperate in its use and preservation. The Jakarta proclamation mentioned that the International Maritime Organization (IMO) consider holding a progression of follow-up gatherings with seaside states to assess their necessities and goals, related to the three beach front states. Additionally, he urged states to investigate potential aid sources to meet those requirements.

From providing and maintaining navigational means and communication systems to search and rescue, offshore security services, rescue of essential vessels, services, and emergency maritime pollution arrangements, coastal states bear a great deal of responsibility for serving ships crossing the Straits. Sam Bateman says that burden-sharing mechanisms are bad and need more research.[53] The creation of a mechanism for cost recovery is one of the most significant issues. Should the governments of the countries of use, the states of science, or the ship's owners directly contribute to the costs?[54] Over the years, a number of international and regional forums have discussed these issues, but no satisfactory burden-sharing formula has been developed.

The Maritime Institute of Malaysia held an international symposium in October 2004 in Kuala Lumpur on burden-sharing and collaboration between users and coastal states (MIMA). "User states must be able to utilize the Strait of Mali for the safety of the Strait of the Sea," stated Malaysian Deputy Prime Minister Datuk Seri Najib Razak at the beginning of the conference. "There should no longer be free transit for countries utilizing the Strait of Malacca." In this context, the user states include Taiwan, China, South Korea, Japan, and the United States. China was invited to the Alameda user state meeting, but it didn't appear to show up. The invitation did not mention Taiwan.

Unquestionably at the forefront of discussions was the issue of burden sharing and aid payment to guarantee navigational safety and prevent or control pollution. Some argue that wealthy and poor governments require fundamentally different approaches in a global society of unequal nation-states.[55] Because of this, the overall nature of the Article 43-recommended collaboration may result in a cost accumulation that is significantly greater than what is directly associated with actual measures.[56] It was emphasized that measures such as institution building, capacity building of key institutions, human resource capacity, and assistance in ratifying or implementing the Convention could be included in cooperation under Article 43.[57]

An asset ought to be established and overseen by a worldwide element, as per Singapore's Clergyman of Correspondence and Data Innovations. The IMO, users,

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[53] ibid.
[54] ibid.
[55] E. Gold, 'Preventing and Managing Marine Pollution in the Malacca and Singapore Straits: Framework for Cooperation' (1999) 3 Singapore Journal 359.
[56] ibid.
[57] IMO Doc NAV 41/23, PARAS 4.2- 4.4.

other users, and representatives from coastal states should all contribute, and this contribution should be based on the cost recovery concept.[58] All of these suggestions point to an increase in the number of burdens in the context of burden sharing, despite the fact that the plans that will be agreed upon have not yet been stated. The recommendations made in the context of the Straits of Malacca and Singapore may serve as a model for other straits, despite the fact that a strait-by-strait approach is preferred.

10. Marine protected Areas

The term "MPA" (Marine Protected Zone) is widely used to describe more than 90 distinct types of restricted areas.[59] However, the Council's use of the term "MPA" is erroneous due to the fact that not all MPAs safeguard substrates, water, or biota in particular locations from physical damage, chemical pollution, or inability to extract resources.[60] In most cases, the decision to create a protected area comes from realizing that controlling specific pollutant sources is not the best way to protect delicate habitat. However, to enact abstract sets of laws that prohibit, limit, and coordinate all regional uses[61]

MPAs are based on the International Maritime Organization's special guidelines as well as general and regional treaty instruments.[62] For instance, MARPOL, the Convention for the Protection and Development of the Ocean Environment of the Wider Caribbean Region, the Abidjan Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, and the Mediterranean Ocean Against Pollution. In both national and international policy, the preservation of maritime regions is gaining importance.

11. Particularly Sensitive Sea Areas (PSSAs) and problem with enforcement

The PSSA concept has received particular attention in international security due to Australia's mandatory piloting obligations to the Torres Strait, where PSSAs were created outside of the binding treaty framework.[63] In 1978, the International Maritime Organization (IMO) emerged an invitation to investigate and compile a list of marine areas where vessel-source pollution and dumping must be avoided. This led to the evolvement of the PSSA idea. Worldwide sea exercises represent various threats to the sea's delicate environment.[64] Oil accidents caused by stranding and collisions,

[58] Y. C. Tong, 'Opening Location' (1999) 3 Singapore Diary of Worldwide and Near Regulation 298.
[59] Caminos (n 35) 410.
[60] J L Dough Puncher, *Manual for Marine Safeguarded Regions* (Administration of South Australia 2000).
[61] Markus J. Kachel, *Particularly Sensitive Sea Areas : The Imo's Role in Protecting Vulnerable Marine Areas* (2008th edn, Springer 2008).
[62] Caminos (n 35) 410.
[63] Nihan Unlu, 'Particularly Sensitive Sea Areas: Past, Present and Future' (2007) 3 WMU Journal of Maritime Affairs 159.
[64] Julian Roberts, *Protecting the Marine Environment and Conserving Biodiversity* (2007th edn, Springer 2007).

material damage to ships, habitats, and creatures, and operational emissions pose risks to individual vessels, particularly those transporting oil and other dangerous goods.[65]

The PSSA is not specifically mentioned in the UNCLOS. "Especial mandatory measures are requisite for technical reasons to prevent ships from being contaminated by the sea and by the ecological use or to protect its resources and particularity of its traffic," the IMO is authorized to take areas within the distinguished economic zone by Article 211.[66] Waterfront nations should expect this to assign a skilled global association. The organization in this instance is IMO. With the sanction of the IMO, coastal States can adopt stricter laws and regulations to prevent ship pollution in designated areas.[67] The International Maritime Organization (IMO) may receive requests from Member States on a case-by-case basis and respond with measures drawn from its armory, despite the fact that various international agreements have been recognized as providing specific protection for particular kinds of fields. Under the general mandate of Article 15(j) of the IMO Regulations, the idea of PSSAs was consecrated in IMO Assembly Resolution A.720 (17) (1991), which was later amended by A.885 (21) (1999), A 927(22)(2001), and A.982 (24) (2005).[68]

A legal framework for the area in question is only established through Associated Protected Measures (APMs), not through the designation of the region as a PSSA. The major processes of acceptable APMs connected to PSSA are adhered to when flag state enforcement is put into place.[69] These are the guidelines: Individuals states ought to go to all fitting lengths to guarantee ships flying their banner agree with important defensive measures embraced to safeguard indicated PSSAs. Article 211(2) of the United Nations Convention on the Law of the Sea states in the national anthem: In order to keep ships carrying their flag or records from contaminating the Sea environment, states must pass laws and regulations. According to the report, these acts and regulations have leastwise the same outcome as internationally recognized norms and standards consecrated by the appropriate international institution or the general Diplomatic Conference.[70] The national anthem The state must abide by the regulations that apply to ships registered in the nation. The flags are visible. Other mechanisms, such as port state control systems, are more likely to be promoted or developed by nations that do not take this commitment seriously. However, there are no effective enforcement tools in the international legal framework to ascertain that protection and arrangement measures are adhered to in areas that are not under national control.[71] The issue with flags of advantage demonstrates that the flag state

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[65] ibid.
[66] United Nations Convention on the Law of the Sea 1994, art 211(6)(a).
[67] Robert C. Beckman, 'PSSAs and Transit Passage Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 Ocean Dev. & Int'l L. 325.
[68] IMO Resolution 1991, para 720(17).
[69] IMO Resolution 982(24), para 9(3).
[70] United Nations Convention on the Law of the Sea 1994, art 211(2).
[71] Kristina Gjerde, 'The Future of High Seas Marine Protected Areas' (2006) 26 Ocean Yearbook 148.

regime in place at the moment is neither adequate nor effective.[72] Additionally, some vessels illegally fly their flags without the consent of the flag States.[73]

Given that all illegal activities, including illegal fishing, spills, and releases of pollution, take place outside of national jurisdiction and are likely to have a negative impact on the marine environment, the compliance and enforcement mechanisms are clearly inadequate.[74] In order to guarantee the successful implementation of MPAs, an appropriate enforcement system is required. The inaccessibility of the website, lack of funding, public support, and responsibility on the part of law enforcement are the main obstacles to implementation. Promoting respect for protection measures requires the participation of all relevant communities and stakeholders.[75] Particularly, the rules that apply to MPA networks need to be in line with the goals of protection, doable, and understandable to the general public. Coercion measures must be strengthened in weak areas with low compliance and low community support. There is no efficient global assent and enforcement mechanism to control and monitor all worldly activities in areas beyond nationwide jurisdiction, which makes the current international framework flawed.[76] To encourage MPA compliance, surveillance and monitoring programs must also be developed. New technical capabilities are recognized as a means of enhancing implementation outside of national jurisdiction. New innovations incorporate boat checking frameworks that make it simpler to find ships sent by satellite to control specialists, satellite route frameworks, transmitters, and electronic planning to work with the recognizable proof of safeguarded destinations, appropriate limitations, and vessel area.[77]

The fact that the existing legal framework does not specify how MPs' positions would be established is another flaw in the enforcement mechanism. It is common knowledge that MPAs will be established in conformity with international law and on the basis of scientific data. However, in order to establish an essential foundation and guarantee the consistency of MPA development standards, it is necessary to adopt scientific criteria for determining areas of biological and ecological momentous and to define MPAs. The state party to the Convention on Biological Diversity adopted scientific standards in May 2008 to identify sea areas that are ecologically or biologically important and require protection. In addition, it provides clear guidance for the selection of networks in the form of representative sea protected areas. In addition, numerous delegations had argued at the United Nations Working Group Meeting that international collaboration and coordination were required to guarantee the sustainable use and conservation of marine biodiversity. Effective management

[72] Lee A. Kimball, 'The International Legal Regime of the High Seas and the Seabed Beyond National Jurisdiction and Options for Cooperation to Establish Marine Protected Areas (MPAs) in Marine Areas Beyond National Jurisdiction' [2005] Montreal: Secretariat of the Convention on Biological Diversity 64.
[73] ibid.
[74] ibid.
[75] Gjerde (n 71) 3.
[76] Kimball (n 7) 44.
[77] Caminos (n 35) 430.

activities were hindered, according to some delegations, by a lack of coordination among the various sectors. After fifteen years, the PSSA concept has not yet made it possible to safeguard excellent sites by ensuring a satisfactory level of protection for these maritime zones. They stated that coordination and collaboration must be carried out at all levels in order to fully implement existing commitments. The PSSA's provisions are widely accepted due to the IMO's international legitimacy in international maritime transport and the widespread identification provided by shipboard charts. However, in practice, there are numerous restrictions and controversy, making it difficult to designate a region as a PSSA. To protect these regions from pollution, a more comprehensive regional or case-by-case mechanism is required.

12. The designation of PSSA and its impact on Straits

It is evident that there is a misinterpretation of the destination of Article 211(6) within the PSSA when examining the proposed designation of Western European waters. In 2003, proposals for the PSSA were presented by France, Belgium Ireland, Spain, Portugal, the United Kingdom, the western coast of Belgium, France, Spain, and Portugal, as well as the northern Shetland Islands and Vicente's southern corner, as well as the Straits and its surroundings.[78] Except for double-hull tankers, which will be subject to 48-hour notice and related measures that will be determined later, the proposed PSSA prohibits the transportation of heavy hydrocarbons through PSSA on ships of more than 600 dwt. The substantial size of the proposed area was cited as a source of concern by some delegations as a barrier that could impede innocent passage and navigation freedom.[79] In this regard, the APM project's legality was questioned, and it was pointed out that international agreements prohibited travel through the international strait.[80] According to countries and professional organizations, the raised venue may not be covered by Article 211(6) due to its excessive size and diversity. Additionally, they expressed concern that the 48-hour notice might result in the vessel's detention, obstructing them from exercising their emancipation of navigation and maiden passage. Misunderstandings about whether the International Maritime Organization (IMO) has the rebel to recommend shipment in a strait and whether mandatory pilotage impedes transit under the United Nations Convention on the Law of the Sea emerged in the debate over Australia's and Papua New Guinea's proposal to impose mandatory pilotage in the Torres Strait.

In the PSSA 2001 guidelines, the United States proposes to eliminate the requirement for pilotage. This measure was not mentioned in the 2005 version. Due to the region's significance and vulnerability, MEPC designated the Torres Strait Food Security Special Plan in 2005 as an extension of the Great Barrier Reef in accordance with the

[78] Caminos (n 35) 430.
[79] ibid.
[80] IMO Doc. MEPC 49/22(2003), para 8(14).

2001 Guidelines.[81] For the Torres Strait, the IMO Assembly approved resolution A.710 (17) on November 6, 1991, recommending tankers loaded with liquefied gas carriers and vessels larger than 70 meters. Utilize the Australian Commonwealth's pilotage service.[82] According to some organizations, the actual effect of transit rights would be denied, hindered, impeded, and impair by ships passing through the straits used for international navigation, which would violate UNCLOS article 42(2).[83] In addition, it should be noted that the Australian system's debates regarding the IMO's competence in compulsory pilotage or the impact of a resolution with a proven recommendation are not the only issue. Transit fees are not allowed, as was discussed in Part V, and it has been argued that navigation service is not included in a mandatory system.[84] Article 43's requirements for cooperation and burden-sharing are envisioned as an equitable means of preventing unilateral taxation on both sides of the strait. It was suggested that mandatory piloting should be included in the scope of Article 43.

13. Conclusion

Human activities are threatening marine biodiversity outside of national jurisdiction, including straits and archipelagic sea lanes used for international navigation. Additionally, these actions have reduced fisheries resources. This international cooperation is being strengthened for the conservation and sustainable use of marine biodiversity in the straits and other crowded waterways, particularly in South-East Asia and its adjacent areas, given the widespread recognition of the significance of healthy ecosystems. As a result, PSSA is regarded as an essential tool for safeguarding marine ecosystems, resource sustainability, and marine biodiversity. Since existing legal systems need to be improved, marine protected areas may play a significant role in this improvement. The UN Convention on the Law of the Sea (UNCLOS) provides a comprehensive legal framework for the regulation of activities and resources on the high seas, but it does not contain any specific regulatory measures to regulate the establishment of AMPs. The UN Convention on the Law of the Sea (UNCLOS) includes obligations to safeguard marine living resources and the marine environment, but these obligations are too broad to address the threat posed by human activity in designated protected areas. Existing worldwide arrangements need guidelines and guidelines for procedure on the high oceans and water under global locale, like sea life logical exploration and the laying of links and pipelines. A legal framework for managing all current and emerging activities that may affect fragile and important ecosystems is required to effectively protect marine biodiversity.

[81] Caminos (n 35) 438.
[82] ibid.
[83] ibid.
[84] Bateman (n 28).

Maternity Protection in Bangladesh: An Analysis with Special Focus on the ILO Standard

Mahmuda Amir Eva*

Abstract: Women are customarily defined as homemakers with responsibilities of home and child rearing. However, in this modern age, an increasing number of women are entering into the workforce either by obligation of economic pressure or by choice of career. These large numbers of women struggle with different hurdles and discrimination in their economic sphere of life. Among other challenges and discrimination, discrimination on the ground of maternity is the most unfortunate. Ensuring women's right to equal opportunity of employment without any kind of discrimination is beyond imagination in the absence of sufficient maternity protection and family-friendly approach at the workplace. Therefore, maternity protection has grabbed significant attention from both national and international perspectives. International Labour Organization (ILO) prioritizes maternity protection at the workplace as a fundamental labour right addressing beyond maternity and back to work protection. Issues of maternity protection are also enshrined in key universal human rights treaties with emphasis on special care, assistance and adequate social security benefits for motherhood and childhood. Protecting maternity at the workplace is not a privilege or favor offered to women, rather a human right guaranteed to women which enables women to harmonize both their productive and reproductive roles. In Bangladesh, the maternity related right is ensured under the Bangladesh Labour Act, 2006 which covers the area of maternity leave, cash benefits during leave and employment protection whilst on leave. But necessary beyond maternity protection such as childcare benefits, flextime or breastfeeding facilities etc. are still widely not available in Bangladesh. This paper analyses the concept of maternity protection at work under both Bangladesh and International labour law and explains the necessity of establishing every aspect of maternity protection in Bangladesh as of right consistent with ILO standard.

1. Introduction

Every woman cherishes motherhood as an exceptional episode and momentous experience of her lifetime. But for working mothers this experience becomes a challenge if maternity facilities are not duly adequate at their workplace. Thus the concept of maternity protection originates from providing a complete package of protection along with health care to the woman and her child when her health condition is not favorable to perform duty properly. It connotes that women's work should not become a threat to the health of women or their children, their

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reproductive roles should not compromise their job opportunity and financial security. Ensuring maternity protection promotes the dignity of motherhood.

Maternity related rights are linked to labour rights and in Bangladesh this particular right is regulated by the relevant labour law of the country. After giving a tour over the history of labour law, three distinctive enactments are found for the purpose of maternity benefits as such the Maternity Benefits Act 1939 (which was most widely used in manufacturing, service and other organizations), the Mines Maternity Benefit Act 1941 and the Maternity Benefits (Tea Estate) Act 1950. All of the above-mentioned legislations have been repealed and further incorporated into the Bangladesh Labour Act 2006 under Chapter IV as "Maternity Benefits" which include maternity leave, cash benefit and employment security. However, this Act was amended in 2013, but some sections of Chapter IV (Maternity Benefits) still remain unchanged.[1]

International labour standards and frameworks have always been engaged in stretching the scope of maternity protection. Most significantly, the ILO standard designs maternity protection addressing economic security and healthcare issues of both mother and child which not only includes leave and cash benefits but also medical benefits, breastfeeding arrangements, safe workplace etc. Maternity protection finds a core consideration from ILO since its establishment and accordingly, three distinctive Conventions on maternity protection *i.e.* C-003[2], C-103[3], C-183[4] have been adopted. Among them, the most contemporary one is the C-183 Maternity Protection Convention 2000 (C-183) accompanied by the R-191 Maternity Protection Recommendation 2000 (R-191)[5]. Implication of maternity protection at work to protect the health and financial security of women and their children is reflected as a broad consensus in international labour standards. Therefore, apart from the selected ILO Maternity Protection Conventions, several other ILO Conventions also address different aspects of maternity protection. C-102 Social Security Convention (minimum standards) Convention 1952[6], C-189 Domestic Workers Convention 2011[7] are examples of some of those conventions which encompass occupational safety, economic security of maternity protection etc in their embodiment.

Presently in Bangladesh, the proportion of working women is getting higher and most of the women feel the taste of motherhood at some stage of their lives. Due to the increasing number of women employees in the workforce, it is essential for the national progress to maintain every aspect of maternity protection to build a healthy nation.

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1 Md. Zahidul Islam, 'Maternity Benefits in Bangladesh Labor Law: An Empirical Study on Apparel Industry' (2015) 4(1) MIUS 2.
2 C003- Maternity Protection Convention 1919 (No. 3) (adopted 29 Oct 1919).
3 C103 Maternity Protection Convention (Revised) 1952 (No. 103) (adopted 28 June 1952).
4 C183- Maternity Protection Convention 2000 (No. 183) (adopted 15 June 2000).
5 R191- Maternity Protection Recommendation 2000 (No. 191) (adopted 15 June 2000).
6 C102- Social Security Convention (Minimum Standards) Convention 1952 (No. 102) (adopted 28 June 1952).
7 C189- Domestic Workers Convention 2011 (No. 189) (adopted 16 June 2011).

2. Maternity Protection: Right or Privilege

Protecting maternity at work holds a significant place in labour law worldwide. In fact, the ILO uses a human rights based approach while incorporating the core elements of maternity protection in its conventions. Maternity protection is a recognized human right enshrined in basic universal human rights treaties.

The Universal Declaration of Human Rights (UDHR), 1948 pays specific heed to maternity and childcare. Article 25(2) of the UDHR prescribes special care and assistance on motherhood and childhood. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 recognizes supporting family responsibilities of workers during their job tenure. It particularly recognizes paid maternity leave along with suitable social security benefits.[8] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 entails distinctive measures to ensure maternity protection and childcare.[9] Article 11(2) of CEDAW addresses every aspect of maternity protection such as like, maternity leave and non-discrimination, cash benefit and employment protection, childcare facilities, health protection. Childcare, an integral part of maternity protection, has received basic concern from the Convention on the Rights of Child (CRC), 1989. It recognizes the childcare centers and cash benefits necessary for parents in their childcare responsibilities.[10] It is important to note that UDHR, ICESCR, CEDAW, CRC are legally obligatory for the ratifying states.

Maternity protection supports the realization of fundamental human rights for women of reproductive age. It guarantees the right to equal opportunity of work without any fear of discrimination in conditions of economic security and to entertain fair working conditions.[11] Fundamental rights are incorporated in and therefore guaranteed by the Constitution. With respect to the Bangladesh Constitution, it is a fundamental right for all working women to get protected against discrimination regarding equal opportunities and termination of employment on the ground of maternity. Gender equality is one of the fundamental rights guaranteed under Bangladesh constitution. According to the constitution, women shall have equal rights with men in all spheres of the state and of public life.[12] And maternity protection is a precondition for realizing gender equality. Article 29 of the Bangladesh Constitution declares equality of opportunity in public employment. According to Article 29 (2), "No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or

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8 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, art 10(2).

9 Adrienne Cruz, 'Good practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the Workers with Family Responsibilities Convention, 1981 (No. 156): A comparative study' (2012) ILO Working Papers, International Labour Organization 2/2012, 994713613402676 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_192554.pdf> accessed 18 November 2022.

10 Convention on the Rights of Child 1989, art 18.

11 'Maternity Protection Resource Package: From Aspiration to Reality for All, International Labour Office' (2012) Conditions of Work and Employment Programme (TRAVAIL), Geneva: ILO 21.

12 The Constitution of the People's Republic of Bangladesh, art 28(2).

office in the service of the Republic." Right to life and personal Liberty is another fundamental right guaranteed under Bangladesh Constitution.[13] Right to life means the right to lead a meaningful, complete and dignified life which embraces the right to health, right to adequate standard of living and right to social security. Right to life and personal liberty has been interpreted broadly by several landmark judgments of Indian judiciary. Article 21 of Indian Constitution guarantees right to life and personal liberty. The Supreme Court of India in *Unni Krishnan vs. State of Andhra Pradesh 1993*[14] offered an extended interpretation of the right to life and gave a list of rights that can cover Article 21 where right to life includes 'Right of every child to a full development', 'Right to health and medical aid'. Ensuring health protection, medical care for the pregnant worker and ensuring breastfeeding, childcare arrangement respectively relates to the right to health and right to life. Absence of breastfeeding and childcare facilities at the workplace undermines the health benefits of both mother and child which consequently violate the fundamental right to life. Maternity protection with appropriate health care, medical care, childcare and breastfeeding fall within the expanded meaning of right to life. Undoubtedly, ensuring maternity protection is not a privilege offered to the women, it is guaranteed under both human rights and constitutional obligation.

Maternity period is not an ordinary phase rather it is a struggle, a challenge inevitable to every mother. It should not be treated as a privilege entertained by women by any stretch of imagination but a right entitled to women. For example, maternity leave is not a vacation where women are sleeping on the couch and resting the whole day or enjoying quality time with families on a tour. This leave embraces the continuing cycle of feeding, burping, diaper change and cleaning the baby. Mothers have to deal with sleepless nights; pain in walking and moving normally, sitting straight for long hours or carrying out daily physical activities.[15] Still there are no sick days for new mothers, rather they have to take care of their babies without considering their stitched-up body or other complications. Therefore, the leave is not even a sick leave for women. In addition to that, cash benefits whilst maternity leave support women's role of childbearing without thinking about economic security. The new role of motherhood in no way affects a woman's productive worth and job performance after she returns to work. Therefore, a working mother deserves the paid maternity leave as of right, not as an option chosen by the authority.

Maternity protection is not sympathy or favor offered to women, it is an issue of protecting fundamental human rights of a woman and her baby.

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[13] The Constitution of the People's Republic of Bangladesh, art 32.

[14] Unni Krishnan, J.P. & Ors. v State of Andhra Pradesh & Ors [1993] AIR (SC) 217.

[15] Deepshikha Chakravarti, 'Maternity Leave is Not a Vacation, Especially for the New Mother' <https://www.shethepeople.tv/home-top-video/maternity-leave-vacation-new-mother> accessed 20 November 2021.

3. The Concept of Maternity Protection in Bangladesh Labour Law

Bangladesh Labour Act 2006 is the most vital and extensive enactment in the field of labour law which covers the following area with regard to maternity protection;

3.1 Maternity Leave and Prohibition of Employment

According to sections 45(1) and 45(2), no woman in any establishment knowingly shall be engaged by her employer during the 8 weeks immediately following the day of delivery. Also under sec 45(3), the employer shall not employ any women worker for ten weeks of prenatal and antenatal period for any arduous nature of work which requires lengthy hours of standing and where any woman worker is prone to be adversely affected doing such work.

3.2 Cash Benefit

According to sec 46(1), cash benefit is guaranteed for 16 weeks such as 8 weeks preceding the expected date of delivery and 8 weeks immediately following the day of delivery. It is the legal mandate on employers to provide cash benefits to the employees. However, cash benefit is conditional upon the completion of at least six months of service with the employer. The payment at the rate of daily, weekly or monthly average as the case may be shall be determined by dividing the total wages earned by the women during three months immediately preceding the date of her notice by the number of days she actually worked during the period under sec 48. Sec 49 extends the cash benefit support to the woman worker who dies at the time of her delivery or during 8 weeks following thereof or before giving birth to the child.

3.3 Prohibition of Dismissal of Woman Worker

No woman shall be dismissed on the ground of her pregnancy. Sec 50 discourages an employer to dismiss, discharge or remove a woman worker without sufficient cause but if such a notice or order of dismissal, discharge or removal is given within a period of six months before delivery and eight weeks after delivery then woman shall not be deprived of her maternity benefit.

Besides the enactment of 2006, Bangladesh labour laws provide some additional maternity facilities under separate Rules. According to the gazette of the finance ministry's amending rule 197(1) of part-I of the Bangladesh Service Rule[16], a female government servant will entertain 6 months maternity leave.

4. Extent of Maternity Protection under International Labour Law

Women's reproductive role is associated with pregnancy, confinement and breastfeeding whereas their productive role is concerned with paid work in either typical or atypical economies. ILO adopted several Conventions[17] over the course of

[16] Effective from 9 January 2011.

[17] C003- Maternity Protection Convention 1919 (No. 3) (adopted 29 Oct 1919); C103- Maternity Protection Convention (Revised) 1952 (No. 103) (adopted 28 June 1952); C183- Maternity Protection Convention 2000 (No. 183) (adopted 15 June 2000).

history addressing the balance between women's productive and reproductive role. These Conventions accompanied by their corresponding Recommendations have stretched the scope and entitlements of maternity protection at work and provided comprehensive direction to orientate national policy and action.

C-183 accompanied by R-191 is the latest maternity protection Convention adopted by ILO member States and as defined in C-183, there are seven key elements to maternity protection in general and these elements are: scope, leave, benefits, health protection, job protection and nondiscrimination, breastfeeding breaks and breastfeeding facilities. These elements hold a minimum standard requirement for any national legislation on maternity protection.[18] Under the C-183, all employed women including those in atypical forms of dependent work are entitled to maternity protection.[19] This Convention allows 14 weeks of maternity leave along with 6 weeks of mandatory post-natal leave.[20] It ensures the woman's right to rest from work for a certain period because of pregnancy, delivery and postnatal session.[21] While ensuring maternity benefit, C-183 includes both cash benefits (not less than two thirds of previous earnings) during maternity leave and access to medical care, including prenatal, childbirth and postnatal care, as well as hospitalization when necessary.[22] Along with medical care, it contemplates special healthcare for the mother and child by prohibiting the pregnant or nursing women to perform any hazardous or risky work that may be detrimental to their health or that of their child.[23] It also guarantees a woman's job security and the right to come back after her maternity leave to the same job or an equivalent one with the same salary.[24] At the same time a woman cannot face any discrimination at work or while searching for any job vacancy because of her reproductive role. Most importantly, it supports working mothers to breastfeed for a minimum of one daily break with pay or to express milk at the workplace.[25]

Every working mother longs for healthy pregnancies and healthy newborn children paralleled by her career and economic security. To support this aspiration, ILO broadly influences countries to adopt and upgrade national legislation around the issue of maternity protection in line with international labour standards.

5. Comparative Analysis on Bangladesh and ILO Standard

Maternity protection under ILO standard extends to healthcare and medical care during pregnancy and postnatal period, childcare and breastfeeding arrangement.

[18] Sarah Amin and others (eds), *The Maternity Protection Campaign Kit: A Breastfeeding Perspective*, (2nd edn, IMCH and UNICEF 2008).
[19] C183- Maternity Protection Convention 2000 (No. 183) (adopted 15 June 2000) art 2 (1).
[20] MPC 2000, art 4.
[21] MPC 2000, art 5.
[22] MPC 2000, art 6.
[23] MPC 2000, art 3.
[24] MPC 2000, art 8(2).
[25] MPC 2000, art 10.

Thus ILO advocates for beyond maternity and back to work protection whereas Bangladesh labour law is confined to the term "maternity benefit" in this regard encompassing rights related to maternity leave and cash benefits only. The essence of maternity protection is not fully covered and entertained by Bangladesh labour law. Hazardous or unsafe working environment and existing biological, physical or chemical substance at the workplace, heavy manual and productive work (e.g. lifting, long hours of standing or sitting) potentially poses risks to the health of pregnant women and their fetuses. They may also lead to complications during pregnancy, miscarriage and stillbirth, premature birth and other problems. Childcare and motherhood become a challenge for working mothers when accessible and reliable child care resources are not easily available. Lack of breastfeeding support at the workplace denies the importance of breastfeeding according to international health recommendations. The WHO and UNICEF have set out a global public health recommendation that infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health.[26]

ILO Convention C-183 is the core and most progressive instrument for maternity protection but the practical implication of this Convention is neither obligatory nor universal all over the world. Nonetheless, the forthcoming ILO global report "Maternity at work: A review of national legislation, Second Edition" after comparing the relevant legal provisions in 167 ILO member states with the most recent ILO standards, finds that globally 30% of the member states utterly comply with the C-183 on particular three key aspects: providing for at least 14 weeks of leave, granting leave at a rate of minimum two-thirds of previous earnings and ensuring cash benefit. The report also finds that cash benefits are not only in the hands of employers but rather paid by social security, public funds or in accordance with national law and practice in those member states.[27]

The ILO global report finds Central Asia and Europe with the highest percentage of countries in compliance with the facets of the C-183.[28] In France, 100 percent salary for 16 weeks (six weeks preceding birth and 10 weeks after) is guaranteed. French legislation provides 34 weeks leave for twins and 46 weeks for triplets and more.[29] Every employee of Canada is entitled to a leave up to 17 weeks which may begin not earlier than 13 weeks prior to the estimated date of her confinement and end not later than 17 weeks following the actual date of her confinement.[30] In addition they can also avail 35 weeks of parental leave with wages subject to provincial legislation.[31]

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[26] 'Maternity Protection Resource Package: From Aspiration to Reality for All, International Labour Office' (2012) Conditions of Work and Employment Programme (TRAVAIL), Geneva: ILO 21.

[27] *Maternity at Work: A Review of National Legislation* (2nd edn, International Labour Office, Conditions of Work and Employment Branch, Geneva: ILO 2010).

[28] ibid.

[29] <https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/france> accessed 3 November 2021.

[30] Canada Labour Code 1985, art 206.

[31] Keerthi M Menon, 'Indian Maternity Law: Painful or Pain free statute? A Comparative insight on problems and prospects with the International standards' (2016) 6(4) IJAR 17.

Another generous example is Sweden which introduces both maternity and paternity leave under the head of parental leave. The employee may entertain parental leave until the child reaches 18 months and the state pays for a total of 480 days per child to compensate for the leave. Sweden also offers full-time leave for a female employee after the birth of her child and while breastfeeding.[32] Even in Saudi Arabia, the Labour Law recognizes paternity leave for three days[33] along with fully paid maternity leave of 10 weeks[34], medical care[35], and right against dismissal during pregnancy[36].

According to Labour Standards Act of Japan, 14 weeks of maternity leave, 6 weeks before childbirth (14 weeks in cases of multiple pregnancies *i.e.* twins etc)[37] and 8 weeks after childbirth is guaranteed.[38] Legal provision exists for childcare or nursing breaks of 30 minutes twice per day for those with infants less than one year.[39] According to the Labour Standards Act of Korea, female employees are entitled to maternity leave up to 90 days with 100% of wages for 60 days.[40] Use of pregnant women in hazardous work is prohibited and 2 x 30 minute paid breaks for breastfeeding per day for workers with children less than one year of age are ensured in Korea.[41]

The Republic of Moldova has ratified Convention No 183 and after ratification, Moldova legislations guarantee female workers' rights related to pregnancy, maternal health and breastfeeding facilities at the workplace. For example, a mother with a child less than three years old enjoys additional breaks every three hours during the working day for at least 30 minutes to feed the child.[42]

Among Asia, India is one of the exemplary nations with its particular maternity legislation, The Maternity Benefit Act 1961 which has the longest maternity leave period.[43] It provides female employees fully paid maternity leave for 12 weeks. However, after the enactment of Maternity Benefit (Amendment) Act 2017, the existing 12 weeks leave is increased to 26 weeks.[44] This act also incorporates facilities for nursing and breastfeeding mothers with mandatory provisions for establishments having fifty or more employees to have a breastfeeding facility or crèche.[45]

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32 Parental Leave Act 1995, s 4.
33 Labour Law 2005, art 113.
34 LL 2005, art 151, 152.
35 LL 2005, art 153.
36 LL 2005, art 155, 156.
37 Labour Standards Act 1947, art 65(1).
38 LSA 1947, art 65(2).
39 LSA 1947, art 67(1).
40 LSA 1947, art 74(1).
41 LSA 1947, art 75.
42 Cruz (n 9) 48-57.
43 Menon (n 31).
44 Maternity Benefit Act 1961, s 5(3).
45 MBA 1961, s 11A.

The analysis of laws and practice of different countries shows that not only the phenomenal maternity rights but also the exceptional maternity aspects of C-183 *i.e* medical care, childcare benefit, and breastfeeding facilities are being incorporated in national laws and practices of those countries. However, unfortunately the overall conformity with ILO standard with regard to maternity protection is still comparatively low in Asia and the Pacific and the Middle East[46] and Bangladesh is one of them. Women workers in Bangladesh are deprived from exclusive coverage of maternity protection. The labour law of Bangladesh is too far to accumulate the international aspirations for maternity protection.

In this regard, it is necessary to examine the adequacy of different aspects of maternity protection in Bangladesh in comparison with ILO standard.

5.1 Reproductive Healthcare Issues

Safe and hygienic workplace is indispensable for every worker to keep fit both physically and mentally.[47] The Labour Act of 2006 also incorporates some provisions germane to the health and hygiene issues of workers in its sections 51-60. The Act has mentioned cleanliness, ventilation, safe drinking water, adequate number of toilets and washrooms etc. The health care issues for expecting mothers are particularly addressed by Bangladesh Labour Act 2006 in its sec 45(3). It prohibits the employer to employ any women worker for ten weeks of prenatal and antenatal period when the work is of arduous nature or the work is of such nature which involves long hours of standing or any woman worker is likely to be adversely affected doing such work.

Important to note, workplace health protection throughout pregnancy and postnatal period requires special attention because women may become sensitive to some workplace related risks at these periods of their reproductive cycle which may cause significant harm to their reproductive health as well as to their babies. C-183 necessitates ensuring the right of pregnant or nursing women not to perform work prejudicial to their health or that of their child.[48] R-191 explains further details of the working conditions that are especially prejudicial for the mother and her child. It also calls for regular risk assessment at the workplace and notification of any risk to the concerned employee.[49]

This comparative analysis reveals that the provision of Bangladesh labour law is not up to the mark of ILO standard in ensuring reproductive healthcare at workplace during employment for both mothers and babies. There is no workplace risk assessment process available in Bangladesh labour law to identify and address the particular hazards and risk during pregnancy and nursing. Consequently, no

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[46] *Maternity at Work: A Review of National Legislation* (2nd edn, International Labour Office, Conditions of Work and Employment Branch, Geneva: ILO 2010).

[47] 'Maternity Protection Resource Package: From Aspiration to Reality for All, International Labour Office' (2012) Conditions of Work and Employment Programme (TRAVAIL), Geneva: ILO 21.

[48] C 183- Maternity Protection Convention 2000, art 3.

[49] R191- Maternity Protection Recommendation 2000, art 6(1).

workplace related risk is notified to the pregnant or nursing employee. Pregnant women are not even offered any alternative opportunity against hazardous work or to switch to another post without compromising their payment or paid leave.

5.2 Childcare Facilities

Childcare is a worldwide concern for every working parent, both mother and father. Workplace support is one of the means of accessing assistance with childcare. A number of international conventions acknowledge the pivotal role of government in enhancing and encouraging the development of childcare facilities for working parents. The CEDAW considers social service security essential to maintain family obligations and work responsibilities in parallel. To that purpose, CEDAW promotes the establishment and development of child-care facilities.[50] On the other hand, the ILO also echoes the necessity of promoting childcare facilities through public or private authorities. The ILO Convention on Workers with Family Responsibilities 1981 (No. 156) calls for minimum realization of national resources to develop or promote child care measures and family services and facilities.[51] Childcare helps mothers continue their careers and productive roles even after having babies. A Europe based study demonstrates that only those countries tend to have higher rates of women's workforce contribution keeping pace with fertility where governments bear the responsibilities of costs of widely available childcare, as is particularly the case in Nordic countries.[52]

In Bangladesh, with the advent of the nuclear family system, the traditional family support system is fading away. Children of working parents are left in the hands of servants for the entire working hour of parents. When a mother is stressed with the safety of her child, it gets difficult for her to contribute to the productivity of the workplace. It is even more difficult for some women to get back to work. The CRC also recognizes the childcare responsibilities of working parents and calls for both child care benefits and childcare facilities.[53] But there is no provision for child care benefits given to working parents under the Bangladesh Labour Act 2006. Thus, in Bangladesh childcare expense is a personal issue not a labour rights issue. Nonetheless, if childcare room or space is available at the workplace according to the sec 94(1) of Bangladesh Labour Act 2006, then the workers need not bother about separate day care institutions.

Motherhood becomes a challenge for working mothers when childcare is not addressed by proper authority. There is no effective application and mandatory

[50] Convention on the Elimination of All Forms of Discrimination against Women 1981, art 11(2)(c).
[51] C156- Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 1981, art 5(b).
[52] Catherine Hein and Naomi Cassirer, *Workplace Solutions for Childcare* (International Labour Office, Geneva 2010) 8.
[53] CRC 1989, art 18.

practice of law related to childcare facilities in Bangladesh to ensure the balance between job responsibilities and motherhood responsibilities of a working woman.

5.3 Breastfeeding Facilities

Since 1919, ILO Maternity Protection Conventions support breastfeeding at work and have incorporated breastfeeding breaks or nursing breaks.[54] Most national laws (more than 90 countries) provide breastfeeding breaks in their own manner.[55] Exclusive breastfeeding till six months of babies is considered an established public health policy worldwide and childcare is also closely related to breastfeeding. But a number of working mothers especially from RMG and private sectors have to return to their work station after a maternity leave of less than six months in fear of getting sacked[56] and for those mothers breastfeeding breaks during work hours are a must. Otherwise, they are seen to quit their jobs after the birth of their children when it becomes unaffordable to spend time with children for breastfeeding or care during employment.[57] Sometimes, returning to paid work without any breastfeeding arrangement at work becomes a major ground for women stopping breastfeeding.[58] On the other hand, in a male dominated country like Bangladesh very few mothers have support or capability to make a balance between her job and child and the majority of women compromise their job to take care of the child.

The framework of breastfeeding rates and duration is designed in C-183 which calls for breastfeeding breaks[59] and R-191 encourages establishing space for breastfeeding facilities at the workplace.[60] Maternity protection laws of different countries mandate for providing crèche in case of female workers more than a minimum number in the workplace. For example, the Maternity Benefit (Amendment) Act 2017 of India incorporates mandatory provisions for establishments having fifty or more employees to have a breastfeeding facility or crèche.[61]

However, in comparison to India or other nations and ILO standard, Bangladesh labour law lags behind in ensuring breastfeeding facilities. There is neither particular arrangement for breastfeeding breaks of facilities, nor provision for breastfeeding breaks per day in every eight-hour working day for a period of at least six months nor arrangement for breastfeeding space with appropriate privacy at workplace or near the workplace.

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54 C003- Maternity Protection Convention 1919, art 3(d).
55 Menon (n 31).
56 Awaj Foundation, 'Maternity Rights and Childcare in Bangladesh: A Study of the workers in the Ready-made Garment Sectors' (2019) Fair Labour Association 1.
57 ibid.
58 'Maternity Protection Resource Package: From Aspiration to Reality for All, International Labour Office' (2012) Conditions of Work and Employment Programme (TRAVAIL), Geneva: ILO 21.
59 C 183- Maternity Protection Convention 2000, art 10(1), 10(2).
60 R191- Maternity Protection Recommendation 2000, art 9.
61 Maternity Benefit Act 1961, s 11A.

6. Challenges and Barriers in Ensuring Maternity Protection in Bangladesh

Bangladesh is a member state of ILO. But the ILO Convention C-183 has not yet been ratified by her which is still open for ratification by member states.[62] Apart from ILO mandate, the practice regarding maternity related rights is also inconsistent with pen and paper obligation.

Availability of on-site childcare in Bangladesh is not sufficient but the Labour Act of 2006 calls for every establishment having more than 40 workers to provide and maintain adequately furnished and well equipped rooms with appropriate facilities for the use of children below six years.[63] In reality, only a handful of organizations (particularly large garments, banks and NGO) offer their female employees on-site child care.[64] For example, BRAC has a daycare center and there are also very few government and private day-care centers where women can leave their children and go to work.[65] There are 63 low-cost government day care centers run by the Department of Women's Affairs countrywide but their quality is not satisfactory. [66] On the other side, privately run day care centers are too expensive to afford for the majority of middle class or lower class families.[67] Daycare centers in RMG are ornamental to mislead people about the factory's conformity with the law. Surprisingly enough, some factories occupy their center during buyer visits with hired local children to prove that their workers bring children to the center.[68]

The practice with regard to maternity leave is inconsistent in public and private working sectors of Bangladesh. According to the amending rule of the Bangladesh Service Rule, the permanent government servant has the right to take six months maternity leave which is applicable only to the women working under Bangladesh Service Rules whereas employees who work under the Labour Act of 206 has the right to take 16 weeks (four months) maternity leave. As a result only one-third of the maternity leave is offered to the workers employed in the private sector than the women permanently employed in the public sector.[69] Even sometimes employers of private offices or companies express their grievances over employing females in the

[62] <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328> accessed 18 January 2023.
[63] Bangladesh Labour Act 2006, s 94(1).
[64] Nilima Jahan, 'How long will it take for employers to offer childcare centres?' *The Daily Star* (Bangladesh 18 January 2019) 33.
[65] Rumana Liza Anam, 'Inadequacies and Variations of Maternity Leave Policies throughout the World: Special Focus on Bangladesh' (2008) 1 BRAC University Journal 93-98.
[66] Jahan (n 64) 33.
[67] Jinat Jahan Khan, '7 day care centres in Dhaka for working parents' *The Daily Star* (Bangladesh 29 April 2022) <https://www.thedailystar.net/tech-startup/news/7-daycare-centres-dhaka-working-parents-3014951> accessed 20 November 2019.
[68] Awaj (n 56).
[69] Ashiya Akter, 'A Critical Review on the Protection and Promotion of Working Women regarding Maternity Benefit Rights: Bangladesh perspective' (2014) 8 World Vision Research Journal 1.

workforce because of the liability of ensuring maternity benefits.[70] Apart from that, maternity leave is restricted for women who already have two or more surviving children alive at the time of delivery in the current workplace.[71]A woman is entitled to only two pregnancy leave along with full pay under the Labour Act 2006. The Maternity Benefits provided under the Labour Act 2006 is for the workers and the definition of worker as provided in Chapter I, section 2 (LXV) clearly excludes the women who are working at the management level and therefore, neither maternity leave nor any other benefit is available to management level (women) workers in Bangladesh under the Labour Act of 2006. RMGs in Bangladesh have a discriminatory administration regarding maternity leave related policies. Although some owners provided leave to their employees, they did not pay them as per the provisions of the Law.[72] Most of the women in RMG are seen to be forced to quit their jobs after childbirth or after returning back from maternity leave, they lose their former positions they have to start as new employees with lower wages and salaries.[73]

According to the sec 46(1) of Bangladesh Labour Act 2006, employers are liable to provide maternity benefit to the employees who have completed at least six months of service with the employer by the date of confinement. But many RMG factories mandate one year or higher term of service in granting maternity leave and benefits which illegally deprive a lot of women employees of these benefits.[74] Some factories do not provide even the least entitlement of leave and benefits protected by the labor law.[75]

Another frustrating step by Bangladesh labour law is Labour Rule Amendment 2022 which limits maternity leave and cash benefit facilities with its ambiguity and restricted calculations.[76] After the Bangladesh Labour Rules (Amendment) 2022, the payment at the rate of daily average shall be computed by dividing the total wages earned by the women during three months immediately preceding the date of her notice by 26 days (one month excluding the weekly holidays).[77] Earlier under the sec 48 of Labour Act 2006, in determining the payment "actual working days" of a woman was considered but under the new Rule of 2022, payment shall be determined considering "26 working days". Therefore, holidays (except the weekly holidays) cannot be set aside from her actual working days in determining the daily wages.

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[70] Shahana Huda Ranjana, 'Maternity Leave is a Basic Worker Right' *The Daily Star* (Bangladesh, 29 March 2021) <https://www.thedailystar.net/lifestyle/news/maternity-leave-basic-worker-right-2068309> accessed 20 November 2019.

[71] Bangladesh Labour Act 2006, s 46(2).

[72] Rumana Liza Anam, 'Inadequacies and Variations of Maternity Leave Policies throughout the World: Special Focus on Bangladesh' (2008) 1 BRAC University Journal 93-98.

[73] Naila Kabeer, *The Power to Choose: Bangladeshi Garment Workers in London and Dhaka* (Verso 2002) 25.

[74] 'Maternity Protection Resource Package: From Aspiration to Reality for All, International Labour Office' (2012) Conditions of Work and Employment Programme (TRAVAIL), Geneva: ILO 21.

[75] ibid.

[76] Taslima Yasmin, 'Sromo Bidhimalay Shimito Holo Matrittokalin Adhikar (translated - Labour Rule Restricts Maternity Rights)' *The Daily Prothom Alo* (Bangladesh 8 November 2022) 8.

[77] Bangladesh Labour Rules 2015, r 39(ka).

Due to this new calculation, the value of daily wages during maternity leave period will be less than earlier.[78]

7. Conclusion

Motherhood and maternal health is a special concern for the world of work. International labour standards embark on the fundamental human rights at work, establish substructure to keep national legislation and policies updated with modern demands for working women of every sector. With regard to the opportunity of employment, women are more exceptional than that of men because of their maternity. In fact, unhealthy and hazardous workplace, long working hours, patriarchy and gender discrimination are powerful determinants of maternal mortality and morbidity. Therefore, exceptional treatment at the workplace and employment security is a special concern for the women during their pregnancy, child birth and pre child birth. If sufficiently good maternity facilities are not available, women are forced to stop working.

Bangladesh labour law recognizes maternity benefit as a right of women and offers paid maternity leave, employment protection etc. But in practice, other facilities to keep work-life balance such as onsite care facilities, flexible scheduling options, medical care, breastfeeding arrangements etc are not available for working mothers and their children. Thus, the standard of maternity protection as framed by ILO is not addressed in Bangladesh labour law. The core elements of maternity protection are designed to guarantee the fundamental human rights of working women and their children. Bangladesh should be prompt to develop all the elements of maternity protection in her national legislation.

To that purpose the Bangladesh Labour Act 2006 should adopt provisions for breastfeeding facilities, medical benefits, health protection especially for pregnant workers. The Bangladesh labour law can adopt separate maternity protection legislation ensuring all core elements of maternity protection in line with ILO standard. Workplaces of Bangladesh should provide fully-equipped daycare centers with efficient caregivers for children of workers less than six years as required by the law.

A woman enjoys both womanhood and motherhood side by side but motherhood is absolutely a unique and exceptional journey. A woman finds her new existence as a mother at the moment her child is born and for such a new existence we must consider exceptional measures to make her maternity journey and motherhood more meaningful.

[78] Yasmin (n 76).

Relevance of Medical Jurisprudence and Forensic Evidence in the Legal Education of Bangladesh

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Abstract: Appreciation of forensic evidence is a constant phenomenon of the criminal justice delivery system. Forensic evidence assessment requires academic knowledge, training and experience of the persons involved. At this backdrop, this study explores the status of Forensic Medicine and Medical Jurisprudence in the legal education of Bangladesh and beyond. It also examines the relevance of it in the criminal justice system of Bangladesh. To this end, it conducts a questionnaire survey among the law teachers, judicial officers and advocates. The survey results display that forensic evidence forms an integral part of Bangladeshi legal system though it is hardly being taught in Bangladesh. Thus the respondents unanimously advocate for induction of Forensic Medicine and Medical Jurisprudence, as a course, in the law syllabus of Bangladesh. Based on these major findings, this study suggests for formation of a technical board consisting of the senior and experienced law teachers towards finding an appropriate placement of this course in the law syllabus of Bangladesh. The board should also advise the concerned authorities to pick suitable experts to conduct this course.

1. Introduction

Medical Jurisprudence and Forensic Medicine occupies a permanent position in the legal system of any country particularly the criminal justice system of any country. It is equally true for Bangladesh. It is because the criminal justice system of Bangladesh requires forensic evidence for objective assessment of evidence in order reach fair and speedy disposal of cases. Medical Jurisprudence teaches 'the application of knowledge of law in relation to practice of medicine'.[1] It implies the application of 'the principles and knowledge of medicine to the purposes of law'.[2] This branch of law encompasses 'all questions which affect the civil or social rights of individuals and injuries to the person and bring the medical man into contact with the law'.[3] The issues like medical termination of pregnancy, medical negligence, consent, medical ethics, professional misconduct … rights of doctor, etc. come within the province of Medical Jurisprudence.[4] As is pointed out, Medical Jurisprudence means:

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[1] Gautam Biswas, *Review of Forensic Medicine and Toxicology* (2nd edn, Jaypee Brothers Medical Publishers, New Delhi, India 2012) 4.

[2] Jaising P Modi, *A Textbook of Medical Jurisprudence and Toxicology* (6th edn, India Printing Works, 9, Bakehouse Lane, Fort, Bombay 1940) 1.

[3] ibid.

[4] Rajesh Bardale, *Principles of Forensic Medicine and Toxicology* (1st edn, Jaypee Brothers Medical Publishers (P) Ltd, New Delhi, India 2011) 1 <https://medfreecon.files.wordpress.com/2018/04/principles-of-forensic-medicine-and-toxicology.pdf> accessed 20 October 2020.

> All which tends to preserve the public health, to favor the vigor of the population, to insure life and liberty to the citizen, appertains to medical police or public hygiene: also the examination of the air, water, and localities, of food and drinks, of habitations, of prisons, of epidemics, of epizootics, etc. etc., belong to the domain of that science.[5]

On the other hand, Forensic Medicine speaks of the 'application of medical knowledge in the administration of law and justice'.[6] It teaches the use of 'medical knowledge' to solve civil and criminal matters.[7] Learners of the this subject master the art of applying medical knowledge in injuries, alleged murder, alleged sexual offenses, cases, pregnancy and delivery etc. for medico-legal purposes.[8] Its basic purpose is to provide 'aid in the administration of justice'.[9] To be more specific, the chief objects of forensic medicine are to assist 'the law so far as medicine and its collateral branches are concerned' to determine the 'extent of the culpability of the individual, by a development of such circumstances as medicine alone is competent to unravel'.[10] Forensic evidence deals with 'facts or opinions' tendered in criminal.[11] The term forensic evidence encompasses two distinct ideas and processes: the forensic part refers to the processes utilized in the forensic science at issue through which facts are generated.[12] Therefore, an offence involving a medico-legal question belongs to the 'province of the medical jurist, whose previous studies and preparation of mind enables him to bestow upon them their just value, and bearing upon the case under investigation'.[13] This branch of study deals with 'the use of multiple disciplines such as physics, chemistry, biology, computer science and engineering for evidence analysis'.[14] It plays an 'important and indispensable part in the investigation of crimes'.[15] This branch of knowledge helps in 'prosecuting the offenders'.[16] Therefore it appears that Medical Jurisprudence and Forensic Medicine is the day to day phenomenon of the legal system of Bangladesh. Given this background, this study

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5 Henry Grafton Clark, *Medical Jurisprudence* (The Annual Meeting of the Massachusetts Medical Society, on 03 June 1868) 62; <http://www.massmed.org/About/MMS-Leadership/History/Medical-Jurisprudence-1868-(pdf)/> accessed 26 October 2020.

6 Bardale (n 4); See - Roshni Duhan, 'Forensic Medicine and Indian Criminal Laws: A Study of Relevancy with Legal Provisions' (2016) 4 (2) Innovare Journal of Medical Science 1. <file:///C:/Users/user/Downloads/7179-Article%20Text-39897-1-10-20160421%20(1).pdf> accessed 26 October 2020.

7 Bardale (n 4).

8 ibid.

9 Biswas (n 1) 1.

10 James Wynne, *Study of Legal Medicine: A Lecture Introductory to the Course on Medical Jurisprudence* (H Bailliere, New York 1859) 2 <https://collections.nlm.nih.gov/ext/mhl/28520350R/PDF/28520350R.pdf> accessed 26 October 2020.

11 Terrence F Kiely, *Forensic Evidence: Science and the Criminal Law* (CRC Press, London 2001) 38.

12 ibid 41.

13 Wynne (n 10).

14 <https://ifflab.org/the-importance-of-forensic-science-in-criminal-investigations-and-justice/> accessed 21 September 2021.

15 William J Deadman, 'Forensic Medicine: An Aid to Criminal Investigation' (1965) 92 (13) Canadian Medical Association Journal 666. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1928256/pdf/canmedaj01093-0021.pdf> accessed 21 September 2021.

16 ibid.

aims to examine whether this branch of learning constitutes a part of the legal education of Bangladesh *vis-à-vis* the law syllabus of some prominent universities across the globe. In parallel, it appreciates the position of Medical Jurisprudence and Forensic Medicine *qua* the legal system particularly the criminal justice system of Bangladesh.

In carrying out the objectives, this study is a mixture of both the doctrinal and empirical approaches. It adopts doctrinal method for exploring the relevant doctrines and principles on the one hand and employs empirical study among the stake-holders, namely, judges, advocates and law academics to assess the rationale for introducing Medical Jurisprudence and Forensic Medicine in the syllabus of legal education in Bangladesh on the other. Thus the blend of doctrinal and empirical approaches leads the study towards a successful completion.

For doctrinal purpose, this study relies on the secondary sources of data. To this end, it consults the books, scholarly articles, research papers, etc. in the relevant field. However for empirical study, it has conducted a questionnaire survey among three distinct but intensely related stakeholders, the law teachers, judicial officers and advocates. These group of stakeholders have been chosen for the reason that they are directly involved in the study and application of Medical Jurisprudence and Forensic Medicine. The *Google docs* has been used as a platform in order to collect data from the stakeholders. The questionnaire has been sent to them through this platform. The stakeholders have accessed on it and accordingly filled in it and submitted. The questionnaire includes 16 questions. There are four categories of questions. Out of which question numbers (1-6) and (15-16) have common characteristics and therefore are designed for all classes of respondents while question numbers (7-8), 9-11) and (12-14) have been formulated for the law teachers, judges/magistrates and advocates respectively. Thereafter it has been collected, analysed and evaluated.

Needless to say that Medical Jurisprudence and Forensic Medicine has wide ranging use and application in entire legal system of Bangladesh, both civil and criminal. Apart from civil and criminal justice system, it is useful in other areas also. However, this study is limited to the relevance of this branch of knowledge to the criminal justice system of Bangladesh. Thus it leaves the significance of it in other areas un-explored.

This paper is a modified version of the research report submitted to Jagannath University in compliance with the requirements of the research programme of Jagannath University for the Fiscal Year 2020-2021.

2. Position of Medical Jurisprudence and Forensic Medicine in the Legal Education of Bangladesh and Beyond

This section of the study makes a survey of the position of Medical Jurisprudence and Forensic Medicines as a course in the legal education of Bangladesh. It constitutes an

integral part of the criminal justice system of the Bangladesh. From this viewpoint, the present study considers the LLB (Honours) and LLM syllabus of different leading universities of Bangladesh and beyond as existing literature in this field.

The University of Dhaka is the oldest university of Bangladesh. The Department of Law is one of the founding departments of the University. However, Dhaka University Law syllabus does not contain Medical Jurisprudence and Forensic Medicine as a course either in the LLB (Hons.) of LLM syllabus. Similar is the position of this subject in the law syllabus of the Department of Law of the University of Rajshahi.

However, the Department of Land Administration and Law has recently included this course in its syllabus. The course *Forensic Medicine and Toxicology*, as included in its syllabus, is designed to produce students with indepth knowledge in medico-legal aspects. This broad objective of this course is to impart knowledge among the graduates in the matters of medical certification and medico-legal reports, kinds and causes of death, inquest, exhumation, medico-legal autopsies, mechanical injuries and regional injuries. It also deals with injuries due to physical agents and their medico-legal importance, asphyxia, sexual offences, criminal abortion and biological fluids. In its toxicology part, this course covers the issues arising out of poisoning along with types of poisons, insecticides, drug abuse and dependence.

The University of Chittagong which is offers LLB (Hons) and LLM Programmes under the Department of Law does not offer this course at either level. The Islamic University, Kushtia presents similar picture. This study finds that the Jahangirnagar University has not included this subject as a course in none of its law programmes. The overall situation of the other public universities in Bangladesh is more or less same.

The Department of Law of Jagannath University, however, presents a different picture in this regard. At the initial stage, Medical Law and Jurisprudence was included in the LLB (Hons) programme. However, it has been dropped from the current LLB (Hons) syllabus designed for the students of 2019-2020 session onward.

Medical Jurisprudence and Forensic Medicine has been left out of the law syllabus of almost all the private universities except a few. For example, the Independent University of Bangladesh has introduced this course in its law syllabus in the title *Criminalistics & Forensic Science*. In broad conspectus, it covers the core issues of forensic science and scientific evidence including relevancy and admissibility of forensic evidence in a legal setting. In addition, forensic principles and protocols, expert opinion and rules, crime scene and its element, different branches of Forensics like Forensic chemistry, Forensic biology/Pathology, Forensic dentistry/odontology, Forensic behavioral sciences (e.g., forensic psychiatry), Forensic entomology and Forensic toxicology. It also deals with Ballistics DNA profiling and related issues, etc.

There are many law colleges in Bangladesh which function under the authority of National University of Bangladesh. These colleges offer a four years LLB pass programme. However, the syllabus of this programme has not included this course.

Though the importance of Medical Jurisprudence and Forensic Medicine has been ignored in the law syllabus of almost all the law degree offering institutions in Bangladesh, quite opposite picture is found in the renowned universities in international arena.

The Harvard University law syllabus has included this course in the name of *Bioethics and Health Law*. This course basically brings within its sweep the health care law, public health law, and (especially) bioethics.[17] The topics like informed consent, medical confidentiality (including issues pertaining to medical big data), the duty to treat and conscientious objection in health care are taught.[18] In addition, ownership and patenting of human tissue, organ donation and allocation, abortion, reproductive technologies, end of life decision-making, the definition of death, and mandatory testing for diseases are covered under this course.[19] Besides, Harvard University law syllabus also offers another course namely, *Drug Product Liability Litigation*. This course deals mainly with 'liability cases'.[20] It also covers the issues of 'special evidentiary problems when doctors are witnesses'.[21]

Drug related evidence constitutes an essential part of forensic evidence. The Harvard University Law School offers a course titled *Food and Drug Law*. The basic objective of induction of this course is to orient the learners with 'the full range of federal regulation of products subject to the jurisdiction of the Food and Drug Administration (FDA)'.[22] In details it disseminates knowledge on food, human prescription and nonprescription drugs, animal feed and drugs, biologics and blood products and medical devices.[23]

The LLB (Honours) syllabus of the University of Delhi contains a course named Law, Science and Technology which includes lessons on Health Law, Biotechnology and Comparative Law. Basic objective of this course is to introduce the learners with the advancement of modern technology and its impact on human life including law. This course imparts knowledge, *inter alia*, on health law and policy, biotechnology and bioethics. The Banaras Hindu University inducts a course on Law and Medicine in the syllabus of the Department of Law. It also teaches on Law, Science and Technology.

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[17] <https://helios.law.harvard.edu/CourseCatalogs/hls-course-catalog-2020-2021.pdf> accessed on 24 October 2020.
[18] ibid.
[19] ibid.
[20] ibid 154.
[21] ibid.
[22] ibid 224.
[23] ibid.

Medical Jurisprudence and Forensic Medicine has been given a more solid position in the Law syllabus of King's College London. The Centre of Medical Law and Ethics under the Dickson Poon School of Law of the King's College London offers two courses on medico-legal issues. These are Medical Ethics & Law and Medical Law. The Medical Ethics & Law focuses on the 'ethical and legal questions' involved in medical practice and science. This course arranges elaborate discussion on issues of 'conflicts between mother and foetus, physician-assisted suicide, psychiatry, the allocation of scarce medical resources, the boundaries of the market in medicine and the law and ethics of medical research'. On the other hand, the course on Medical Law concentrates on the 'patient's right to consent to or refuse medical treatment' as is 'protected by human rights law and common law principles'. This right protects the patient's self-determination, bodily integrity and dignity. The major areas it covers include debates about assisted reproduction, abortion, assisted suicide and euthanasia, psychiatric ethics and mental health law, organ donation and the allocation of scarce resources. In parallel, the Nottingham University Law School offers Medical Law as a course that focuses on the 'legal and ethical issues surrounding the provision of medical treatment and care, and apply the law to solve medico-legal problems'.

The Bioethics and Health Law catalogued as an undergraduate law course offers lessons on a variety of topics covering 'informed consent, medical confidentiality, the duty to treat, conscientious objection in health care, ownership and patenting of human tissue and organ donation. It also discusses on allocation, abortion, reproductive technologies, end of life decision-making, the definition of death, and mandatory testing for diseases.

The foregoing discussion reveals that the major universities of Bangladesh have ignored the necessity of Medical Jurisprudence and Forensic Medicine inclusion in their respective law syllabus. However, it is seen that some of the prominent universities like the Department of Land Administration and Law of the University of Rajshahi has included this course its syllabus. In parallel the overall picture of the private universities is almost same as that of their public counterparts. Though a meagre number of private universities like Independent University of Bangladesh has adopted this course in its law syllabus, the maximum number remains reluctant on the issue. Meanwhile, colleges offering law programme under the National University of Bangladesh have not included this course in its law syllabus.

On the other hand, the global picture offers a different scenario. It is seen that some of the world's top universities have put emphasis on the importance of Medical Jurisprudence and Forensic Medicine. Accordingly, the Harvard University and the Oxford University have inducted a similar course in their respective law syllabus.

On the other hand, the justice system of Bangladesh both civil and criminal provides for admissibility of forensic evidence. As the term goes, evidence, arrived at by

scientific or technical means such as ballistic or medical evidence, is called forensic evidence.[24] Forensic science sits at the nexus of science, law, policy and investigation and it should be viewed as a process that encompasses the crime scene through to court.[25] In contrast, as is viewed from literature review, no course on forensic evidence is being taught at the major law offering entities in Bangladesh.

3. Status of Medical Jurisprudence and Forensic Medicine in the Legal Education of Bangladesh

Considering the significance and admissibility of the forensic evidence before the court of law for the purpose of reaching objective conclusion, many prominent universities across the globe have included Medical Jurisprudence and Forensic Medicine as a part of their respective Law syllabus. The broad objective of such inclusion is to orient the law graduates with the basic issues involving forensic evidence. It is also design to further research abilities among the learners in the relevant field.

In order to reveal the status of Medical Jurisprudence and Forensic Medicine, this study has conducted a questionnaire survey among three distinct professionals who base their profession on law degrees. They are the law teachers, judges/magistrates and advocates. They were asked specifically whether any such course like Medical Jurisprudence and Forensic Medicine is taught in Bangladesh. The respondents are found to be divided on responding to this question. While 57% of them say that it is being taught, the remaining portion 43% state that it is being taught.

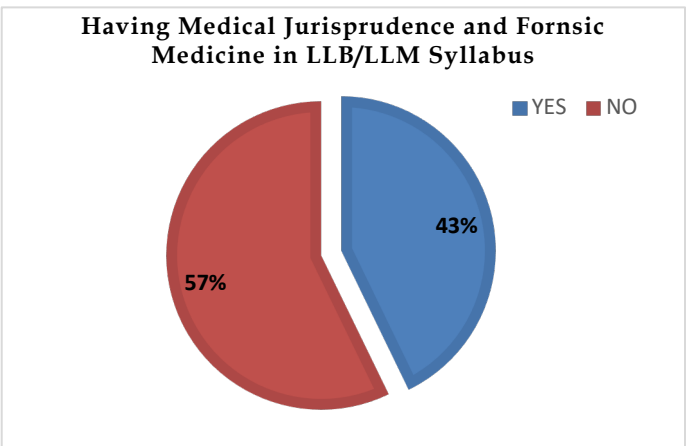

Figure 1: Status of Medical Jurisprudence and Forensic Medicine in the Law syllabus

[24] Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thompson Reuters, Texas, USA 2009) 665 <https://ia802804.us.archive.org/1/items/BlacksLawDictionary-Editions1-9/Black's%20Law%20Dictionary%20-%20Editions%201-9/9th%20Edition.pdf> accessed 24 January 2019.

[25] Science and Technology Select Committee, *England: Forensic Science and the Criminal Justice System: A Blueprint for Change* (HL 2017-19 6). <https://publications.parliament.uk/ pa/ld201719/ldselect/ldsctech/333/333.pdf> accessed 12 October 2021.

Reasons for being Taught

The respondents were asked the reasons for inclusion of Medical Jurisprudence and Forensic Medicine in the LLB/LLM syllabus. The overwhelming majority of them express that its inclusion is essential as Bangladeshi criminal justice system requires forensic evidence to dissolve criminal cases. However, a small fraction of them endorse the view that for civil justice system, this course should be included in the syllabus of legal education of Bangladesh.

Table 1: Reasons for Medical Jurisprudence and Forensic Medicine being taught

Reasons	**Responses**	***Percent of Cases (N=156)***
Bangladeshi criminal justice system requires forensic evidence to dissolve criminal cases	144	92.3
Bangladeshi civil justice system needs forensic evidence	20	12.8
Other areas of disputes also requires forensic evidence for their proper disposal	39	25
Total Multiple Responses	**203**	**130.1**

Respondents Having Medical Jurisprudence and Forensic Medicine as a course in the LLB/LLM syllabus

Do the respondents have Medical Jurisprudence and Forensic Medicine in their LLB/LLM study? In response to this question, more than half of them (66%) answered that they haven't read it in their study neither in LLB nor LLM. But a considerable section of them (34%) answered in the positive.

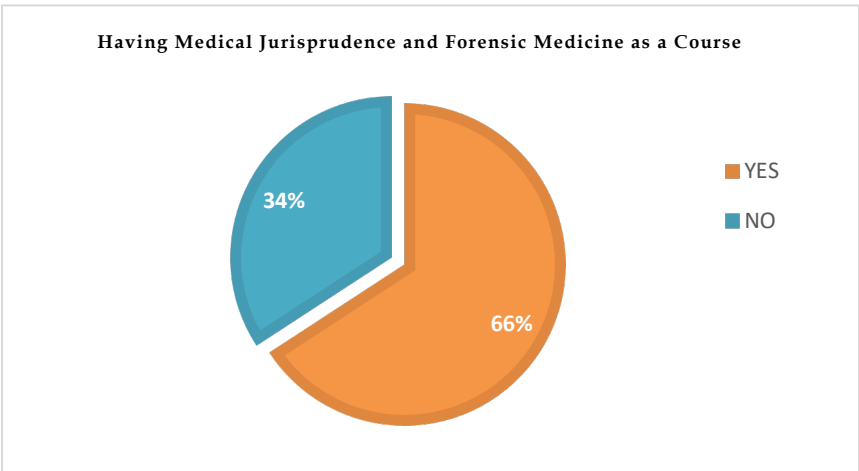

Figure 2: Respondents' having Medical Jurisprudence and Forensic Medicine as a course in the legal studies.

4. Significance of Medical Jurisprudence and Forensic Medicine in the Legal Education of Bangladesh

Forensic evidence plays a pivotal role in the disposal of criminal cases. It also comes in aid in civil suits and other related areas. There is a close relationship between medical issues and law in the areas of 'legislation and administrative regulations affecting medical practice' and 'court judgments on problematic or controversial ethical issues in medicine'.[26] Medical matters also interact with law when the former becomes the subject matter of legal controversy on 'medical malpractice' or 'medical negligence'.[27] In particular medical matters encounter law as evidence before the court in cases 'of homicide, rape, wounding, workman's compensation, insurance claims and the like'.[28] The basic objective of this chapter is to portray the relevance of Medical Jurisprudence and Forensic Medicine with the legal system of Bangladesh. In this respect, this chapter discusses the significance of this subject in disposal of criminal cases in Bangladesh. It also analyses the laws of different categories which provoke production of forensic evidence before the criminal courts in Bangladesh for the purpose of disposal of criminal cases in particular.

Medical evidence (forensic evidence) is 'routinely required for administration of justice' in all the countries of the world.[29] Forensic evidence is admissible in the court of law both for civil and criminal purposes in Bangladesh. It is the knowledge in Medical Jurisprudence and Forensic Medicine that assists the members of the bar and the bench to make a proper appreciation of the forensic evidence produced before the court. Forensic evidence differs from other evidence because:

> Forensic science involves the application of scientific theory accompanied by laboratory techniques encompassing a wide variety of the natural sciences (many of which are centered in the use of the comparison microscope and other developments in the field of microscopy) to the investigation and prosecution of crime. The sciences referred to here are often designated the hard sciences as opposed to the so-called soft sciences, based in psychiatry or psychologically centered disciplines such as criminal profiling or credibility assessments.[30]

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[26] HAU Kong-lung, 'Law and Ethics in Medical Practice: An Overview' (August 2003) 8 Medical Section 3 <http://www.fmshk.org/article/746.pdf> accessed 02 January 2020.

[27] ibid.

[28] ibid.

[29] Rakesh Gorea, 'Medical Witness and Indian Courts' (2007) 7(1) Journal of Punjab Academic of Forensic Medicine and Toxicology 21 <https://www.researchgate.net/publication/236624445_Medical_Witness_and_Indian_Courts> accessed 02 January 2020.

[30] Kiely (n 11) 46.

endorse the view that for civil justice system, this course should be included in the syllabus of legal education of Bangladesh.

Table 2: Reasons for Medical Jurisprudence and Forensic Medicine being taught

Reasons	**Responses**	***Percent of Cases (N=156)***
Bangladeshi criminal justice system requires forensic evidence to dissolve criminal cases	144	92.3
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Other areas of disputes also requires forensic evidence for their proper disposal	39	25
Total Multiple Responses	**203**	**130.1**

Medical evidence is corroborative in nature which indicates the manner in which the alleged offence has been committed.[31] Though an expert is defined as a witness of opinion but he is sometimes considered as an expert of fact also.[32] However, if there is inconsistency between eye witness and the medical evidence, the evidence of eye witness prevails unless medical evidence 'completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses'.[33]

The parties in civil and criminal cases seek to rely on forensic evidence in order to prove or disprove a case instituted against them.[34] They want to establish a connection of the defendant/accused with the help of forensic evidence. But forensic evidence involves 'studies that may only be probative of any such connection by way of extrapolation, without the individualizing expert testimony typically provided by forensic scientists'.[35]

Use of forensic evidence in criminal matters includes 'some form of laboratory work' in order 'to resolve factual matters in the case itself'.[36] Though civil suits warrants varied areas of 'scientific focus' such as chemistry, pharmaceuticals, biological, mechanical, electrical engineering, etc., the criminal courts require varying degrees of forensic sciences.[37] Legal issues involving science is a day to day phenomenon in life of a nation.[38] The criminal courts of Bangladesh have to address forensic evidence arising out of unnatural death including injuries human body. Besides, it appreciates forensic evidence on the issues like hair analysis, fiber analysis, glass fragments and paint chips analysis, soil analysis, ballistic and tool marks, fingerprints, footwear, tire

[31] *Solanki Chimanbhai Ukabhai v State of Gujarat* [1983] AIR 484 SC.

[32] *Smt. Majindra Bala Mehra v Sunil Chandra Roy* [1960] AIR 706 SC 706 [cited in ML Singhal, 'Medical Evidence and Its Use in Trial of Cases' [1995] The Journal of Judicial Training & Research Institute, Uttar Pradesh 2; <http://ijtr.nic.in/articles/art28.pdf> accessed 14.09.2021.

[33] *Solanki Chimanbhai Ukabhai v State of Gujarat* [1983] AIR 484.

[34] Kiely (n 11) 41.

[35] ibid 41-42.

[36] ibid 42.

[37] ibid 41.

[38] ibid 16.

impressions, blood spatter analysis, DNA analysis, forensic anthropology, forensic archeology, forensic odontology, questioned document analysis forensic psychiatry and psychology.[39] In all these cases including many more, Medical Jurisprudence and Forensic Medicine come in aid to the members of the bar and the bench.

Interpretation of 'multiple physiological aspects of a crime scene' does matter to make forensic evidence admissible in criminal cases. The issues like 'physical crime scene created and left by the perpetrator', 'crime scene material collected by the crime scene personnel', 'crime scene material capable of being tested by the crime laboratory and the results of any such tests' and 'crime scene information allowed into evidence by the trial court according to the case issues and the rules of evidence' are to be given much importance.[40] Given this background, the law schools across the globe have started putting emphasis on the inclusion of forensic medicine in their legal discourse. As is pointed out by Terrence F Kiely:

> Law school and postgraduate legal training has recently begun reemphasizing the importance of forensic evidence instruction as well as the more familiar tools of criminal law, such as constitutional criminal procedure, criminal law theory, and the law of evidence. The importance of forensic science to criminal law lies in its potential to supply vital information about how a crime was committed and who committed it, which information may survive the screening function of the rules of evidence and be accepted as evidence of a material fact in the ensuing trial.[41]

As a part of forensic medicine, clinical forensic medicine is intensely connected with the justice system of a country.[42] This branch of study is associated with examination and report on patients of 'assault, road traffic and industrial accidents, sexual assault, elder, spousal and child abuse, neglect and starvation, torture, self-infliction, criminal abortion, criminal poisoning, and drunkenness/ intoxication by alcohol or any other means'. [43] Many of these areas require 'highly specialized skills for a proper examination and expert opinion'.[44]

Forensic evidence is 'crucial in death investigations'.[45] It starts with examination of the dead body and collection of evidence 'at the scene and proceeds through history, physical examination, laboratory tests, and diagnosis'.[46] The objective is to generate

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[39] ibid 38-39.

[40] ibid 42.

[41] ibid 43.

[42] ND Subedi ND and S Deo, 'Status of medico legal service in Nepal: Problems along with suggestions' [2014] 10(1) Journal of College of Medical Sciences-Nepal 50 <https://www.google.com/search?q=1.%09Concept+and+Development+of+Medical+Jurisprudence+and+Forensic+Science&ei=x5raXazTKZCkwgOu5ZiADA&start=40&sa=N&ved=2ahUKEwjs0oWijoPmAhUQknAKHa4yBsA4HhDy0wN6BAgLEDE&biw=1440&bih=756> accessed 24 November 2019.

[43] ibid 50.

[44] ibid.

[45] ibid.

[46] ibid.

'objective evidence of cause, timing, and manner of death for adjudication by the criminal justice system'.[47]

Medical evidence includes forensic evidence, laboratory analyses, photos, micrographs, x-rays, and various scans.[48] It brings within its sweep 'victim's or the perpetrator's medical records, medical records of treatment, or death.[49] Therefore while producing medical evidence before the court, either as a prosecution or defence lawyer, an advocate 'must understand how to approach the criminal case when these issues come into play'.[50]

5. Relevance of Medical Jurisprudence and Forensic Medicine with the Legal System of Bangladesh

Forensic evidence is 'always essential in the criminal justice system'. It is not possible for a lay man to grasp the details of this branch of evidence without 'proper education and training'.[51] In modern days, with the revolutionary development in science and technology, importance of forensic medicine is demonstrating 'an increasing tendency' specially for the purpose of law.[52] In particular:

> In a trial where injury or death is involved, or for an offence of causing hurt to a human body, the opinion of medical man is sought for ascertaining the cause of death or injury or to determine as to the injuries are anti-mortem or post-mortem, probable weapon used, the effect of injuries, medicines, poisons, the effect and consequence of wound whether they are sufficient to cause death in the ordinary course, the duration of injuries and the probable time of death. In the same way while the offence or trial of kidnapping and rape the medical opinion is adduced to establish the fact that the girl is minor, whether rape was committed under influence of liquor, medicine or intoxicant, threat by using weapon, to extent injury on private part of prosecutrix and that of accused, or if death is caused by excessive force used by the accused to the minor child etc.[53]

Forensic evidence acts as an 'important thread' between the prosecution evidence and the judgement in a given case.[54] Being based on scientific knowledge, it 'may not be easily accessible or available to the persons having no technical knowledge, including

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[47] ibid.

[48] Elliott B Oppenheim, 'Lessons Learned: The Offensive Use of Medical Evidence in Criminal Defense Cases' (2010) 19(1) Annals of Health Law 167 <https://lawecommons.luc.edu/cgi/ viewcontent.cgi?article=1093& context=annals> accessed 14 September 2021.

[49] ibid.

[50] ibid.

[51] R Jaro Jasmine and R Arya, 'Role of Medical Evidence in India-A Critical Review' [2018] 120 (5) International Journal of Pure and Applied Mathematics 77 <https://acadpubl.eu/hub/2018-120-5/1/27.pdf> accessed 14 April 2021.

[52] Shubhada S Pednekar, 'Role of Medical Evidence in certain Offences against Women' <https://shodhgangotri.inflibnet.ac.in/bitstream/123456789/1502/1/pednekar%20s%20s.pdf> accessed 02 January 2020.

[53] ibid.

[54] Jasmine (n 51) 88.

the judges'.[55] Therefore, the opinion of the medical expert always has evidentiary value.[56] However, on many occasions, the decisions of the court goe 'contrary to popular expert opinion on issues like bone cut, rape, burns, age, consent, dying declaration, compos mentis, etc.[57]

The interplay of medicine with law has played the 'main role in the recent years'.[58] It is because medical science furnishes 'clue as to how the death of the person, how the injury, was caused, while the law prosecutes a person for killing and injuring other'.[59]

Forensic evidence is an inevitable part of the criminal justice system of Bangladesh. The civil justice system in some areas also has to heavily rely on the use of forensic evidence with a view to discovering the truth of a controversy at hand. It is also essential in other areas where scientific examination comes into play. At this backdrop, the legal system of Bangladesh provides for admissibility of forensic evidence in discovering the truth of fact. In this respect the following discussion can be considered:

Contents of postmortem report

Postmortem report is produced before the court as evidence showing the cause of death of a person. A death arising out of direct toxic effect of a drug, due to secondary complications like hepatitis and other infectious diseases and resulting from violent situations.[60] In general a postmortem report includes, inter alia, a description of the scene of death,[61] a precise and detailed study of the type and extent of any morphological damage or trauma, including microscopic examinations. It also contains determination of the direct cause of the injury such as disease, physical force, chemical agents, etc. and a follow-up toxicological, biochemical, micro-biological, and other laboratory tests on selected tissues and body fluids as indicated by gross findings.[62]

Analysis and examination of postmortem report is very crucial in determining the cause of death. Sound knowledge and understanding in forensic medicine is very much essential in assessing and appreciating forensic postmortem report.

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[55] ibid.

[56] ibid.

[57] Gorea (n 29) 22.

[58] Pednekar (n 52).

[59] ibid.

[60] Violent intoxications sometimes cause death when it leads the victim to run in front of a moving vehicle, jump from a high place, or aggressively invite violence from others calls for postmortem investigation. <https://www.ojp.gov/pdffiles1/Digitization/ 44094NCJRS.pdf> accessed 13 September 2021.

[61] ibid, A death scene report takes note of the signs of disorder, position of the deceased, presence of any possible evidential material, such as pills and prescription bottles in suspected drug deaths.

[62] Biological specimens to be retained for drug and poison analyses are: Adipose tissue 25-50 gm, bile 5 ml, blood 200 ml, brain 250 gm, hair 5 gm, kidney 100 gm, liver 100 gm, lung 250 gm, nails 2 or 3 whole nails, skin from all pertinent areas, whole of the spleen, urine 50 ml and all vitreous fluid. For details see, Thomas T Noguchi, ibid.

Penal Code 1860

The *Penal Code* (PC) 1860 imposes different kinds of punishment including death sentence for different offences. In broad heading these penal provisions are catalogued, in broad heading, in sections 44 and 299-338A.[63] These offences warrant different categories of punishment including death sentence. In all these cases, forensic evidence comes as an aid and plays a formidable role in determining and discovering the facts in controversy.

Code of Criminal Procedure 1898

Section 174 empowers the police to inquire and report on cases of suspicious death of a person. This section makes it a duty of the police to inqire into whether a person has committed suicide or has been killed by another or by an animal or by machinery or by accident or has died under circumstances that raises a reasonable suspicion that some other person has committed an offence.[64] Thereafter the police shall immediately intimate the same to the nearest Executive Magistrate empowered to hold inquests.[65] Then the police shall proceed to the place where the dead body of the person is placed and prepare 'a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted' in presence of 'two or more respectable inhabitants of the neighbourhood'.[66] Subsequently the report shall be signed by the police officer making the inquest and some other persons concurring with the contents of the report which shall be forthwith forwarded to the District Magistrate.[67] In case the police officer finds any doubt as to the cause of death, he shall forward the body for examination to the nearest Civil Surgeon if he considers it expedient.[68] Private medical institutions can undertake medico-legal examination and treatment of the living, but autopsies can be conducted only with the permission of the State Government.[69]

Section 176 speaks of the inquiry of death in police custody. If a person dies in police custody, the nearest Magistrate empowered to hold inquests shall make an inquiry into the cause of death of such person.[70] This power of the Magistrate extends to all

[63] The Penal Code 1860, s 44, and 299-338A.
[64] Code of Criminal Procedure 1898, s 174(1).
[65] Code of Criminal Procedure 1898, s 174(1).
[66] Code of Criminal Procedure 1898, s 174(1).
[67] Code of Criminal Procedure 1898, s 174(2).
[68] Code of Criminal Procedure 1898, s 174(3).
[69] Roshni Duhan, 'Forensic Medicine and Indian Criminal Laws: A Study of Relevancy with Legal Provisions' (2016) 4 (2) Innovare Journal of Medical Science 1. <https://www.google.com/search?q=1.%09 Concept+and+ Development+of+Medical+Jurisprudence+and+Forensic+Science&ei=24TaXdOFHIr0vgTyrq-oBg&start=10&sa= N&ved=2ahUKEwiT3_at-YLmAhUKuo8KHXLXC2UQ8tMDeg> accessed 24 November 2019.
[70] Code of Criminal Procedure 1898, s 176(1).

the cases coming under section 174(1) of the CrPC.[71] The Magistrate shall record the evidence taken by him in connection with the alleged incidence of death and according to the circumstances of the case.[72] However, if the Magistrate is of the opinion that the dead body already interred shall be 'disinterred and examined' in order to discover the cause of death, he may order for such disinterment.[73] Therefore, under this section the Magistrate inquire into death caused in police custody, death due to police firing, death in prison, reformatories, death in a psychiatric hospital and dowry deaths. This power of the Magistrate is independent of the power of the police officer under section 174 of the CrPC.[74]

Under section 509(1) of the CrPC, a Civil Surgeon or a medical witness who has given deposition in presence of the accused before a Magistrate becomes a witness and thereby treated as a witness before the court.[75] This is equally applicable to a witness whose deposition has been taken on commission.[76] The Court has the power to 'summon and examine' these deponents as to the 'subject-matter his deposition'.[77] Similarly, the post-mortem report prepared by a Civil Surgeon or other medical officer may be used as evidence despite death or unavailability of such Civil Surgeon or other medical officer.[78] Besides, a report of any Chemical Examiner or Assistant Chemical Examiner to Government or any serologist, handwriting expert, finger print expert or fire-arm expert appointed by the Government, upon any matter or thing submitted to him for examination or analysis is relevant in any proceeding under the CrPC.[79] Such report may be used as evidence in any inquiry, trial or other proceeding even without calling him as a witness.[80] However, if the Civil Surgeon or medical officer, or any other person authorised to prepare any forensic report is alive, capable of giving deposition before the court and is summoned as a witness, he 'must be examined as any other witness'.[81]

Evidence Act 1872

The *Evidence Act* 1872 makes expert opinion upon 'a point of foreign law, or of science, or art, or as to identity of hand writing or finger impressions' relevant.[82] A forensic expert, for his 'education, profession, publication or experience, is believed to

[71] Code of Criminal Procedure 1898, s 176(1).
[72] Code of Criminal Procedure 1898, s 176(1).
[73] Code of Criminal Procedure 1898, s 176(2).
[74] Duhan (n 69).
[75] Code of Criminal Procedure 1898, s 509(1).
[76] Code of Criminal Procedure 1898, s 509(1).
[77] Code of Criminal Procedure 1898, s 509(2).
[78] Code of Criminal Procedure 1898, s 509A.
[79] Code of Criminal Procedure 1898, s 510.
[80] Code of Criminal Procedure 1898, s 510.
[81] *Fazar v Crown* [1952] 4 DLR 99 100 citing in Sarkar Ali Akkas, *Law of Criminal Procedure* (5th edn, University Publications, Dhaka 2019) 254.
[82] Evidence Act 1872, s 45.

have special knowledge of his subject beyond that of the average person'.[83] This expertise of a forensic witness is accepted as 'sufficient that others may officially and legally rely upon his opinion'.[84] Forensic expert is summoned before the court with a view to 'support the proper administration of justice and the early resolution of dispute through fair and unbiased expert evidence'.[85]

The court is empowered to invite forensic evidence on any of those areas of controversy in order to determine the truth. When an expert on the field of forensic evidence presents his opinion on any specific issue at hand, he comes under the definition of a witness within the meaning of the *Evidence Act* 1872 and is thus subject to cross examination like other witnesses. Here, therefore, the provisions of section Chapter IX, X and XI of this *Act* come into play.

Among these, the provisions containing in sections 145, 146, 147, 154, 155, 156 and 165 is crucial as these sections enact laws on the examination and cross examination of witnesses by the adverse parties, parties calling the witness and even the trial court.

Under section 145 of the *Act*, an expert on forensic evidence puts himself under the sword of cross examination by the adverse party as to his statement submitted before the court on any matter in controversy. Here the opposite party has the right to examine him in details as what he has tendered before the court in the form of opinion regarding matter in controversy.[86] In this respect, the both the advocate and the judge have to have well equipped on the subject-matter under cross examination. For example if the forensic evidence relates to any medical issue like the question of post-mortem, they have to have proper and adequate knowledge on that subject. It is because, while the advocate has to cross examine the forensic witness on appropriate areas in order to locate its weakness, the judge has to have knowledge enough so as to appreciate whether the questions put to the forensic expert are being directed in an appropriate manner. In the absence of proper knowledge and training on this issue in particular, neither the judge nor the advocate would be in a position to find out the truth in controversy. If the advocate is without foundational knowledge on the issue, he would not be able to put proper question to the forensic expert. In consequence, there is a great likelihood that the legal weakness in the post mortem report will remain in darkness leading to the acquittal of the real culprit or conviction of an innocent. In either case, it is a failure of justice.

On the other hand, if the judge is not properly oriented with the minute details of the forensic issue at hand, there is great likelihood of his being misguided since he is not in a position to make proper assessment of the forensic evidence produced before him

[83] Gorea (n 29) 21.
[84] ibid.
[85] ibid.
[86] Evidence Act 1872, s 145.

for want of proper foundational knowledge on it. Besides, he may be misled. In either case, it may result in failure of justice.

This is only a hypothetical display of the possible danger of not being taught the rules on forensic evidence. It may not happen. But if it happens, justice is sure to fail. The ultimate consequence is the acquittal of the real culprit or conviction of the innocent. Besides, this, there are great deal of delicate scientific issues that come before the court by way of forensic evidence which have to be assessed by the judges. It is the learning and training on Medical Jurisprudence and Forensic Medicine that adequately equips the judges and advocates appreciating and assessing the forensic evidence. It is highly improbable that mere experience substitutes this foundational knowledge vacuum. Therefore, learning on this vital issue is a *sine qua non* for ensuring justice.

Meanwhile section 146 opens the door for the adverse party to cross-examine the forensic expert relating to his veracity, his post and position in life including any other issue that may directly or indirectly expose him to any civil or criminal liability. Section 148 empowers the judge with discretionary power as to whether any particular type of question is to be asked to a witness. If it a matter of forensic evidence, the judge has to be well-versed in the matter in dispute. It is his knowledge that will guide him to decide which questions are proper and which are not. Accordingly, he will be able to direct the questioning party while cross-examining the forensic expert. If the judge is knowledgeable, he will be able to guide to the adverse party in an appropriate direction. Otherwise, he will be failure to discharge his duty. Therefore, to discharge his duty under this section, the judge has to have knowledge in the Medical Jurisprudence and Forensic Medicine. Similarly, section 148 comes in aid to the court to decide when question shall be asked and when witness shall be compelled to answer such question. Here is also knowledge in forensic evidence is a must to apply the judge's discretionary power.

Section 155 of the *Evidence Act* also provides a catalogue of mechanisms through which credit of witness may be impeached. A forensic expert is no exception to it. Under this section, credit of a forensic expert may be impeached by the testimony of persons who know that the forensic expert is 'unworthy of credit' and hence his expert opinion is unreliable.[87] An expert may be impeached by showing that he has accepted bribe or has accepted the offer of a bribe or has received 'any other corrupt inducement'.[88] His credit may be impeached by showing that his 'former statements inconsistent with any part of his evidence which is liable to be contradicted'.[89] In each case, a person requires knowledge in the forensic evidence which is only possible through formal learning in Medical Jurisprudence and Forensic Medicine.

[87] Evidence Act 1872, s 155(1).

[88] Evidence Act 1872, s 155(2).

[89] Evidence Act 1872, s 155(1).

Section 165 of the *Evidence Act* arms the Judges with the tool to 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant' He is also empowered to issue 'order the production of any document or thing'. The Judge is empowered to do so in order to 'discover or obtain proper proof of relevant facts' and none is entitled to raise any objection to any such question put or order passed by the court.[90] Moreover, neither of the parties is entitled 'to cross-examine any witness upon any answer given in reply to any such question'.[91] Moreover, in assessing the evidence, the court shall be independent and self-sufficient in assessing evidence of every kind. He should not be dependent upon any person or agency.

In each of these stages, knowledge on Medical Jurisprudence and Forensic Medicine is the basis for making a proper assessment of the forensic evidence leading to a fair and objective trial.

***Deoxyribonucleic Acid* (*DNA Act*) 2014**

The *Deoxyribonucleic Acid* (DNA Act) 2014 is a significant addition to the criminal justice system of Bangladesh. This *DNA Act* comes into force on 12 November 2015. The basic objectives of this Act is to collect DNA sample of a person and its analysis, to control the use of DNA sample and its profile, to establish DNA laboratory, to establish national DNA Database and related issues.[92]

The *DNA Act* makes DNA evidence admissible in cases of identification of person, identification of person involved in the commission of any offence, find out the whereabouts of a person or identification of unknown person, determination of relationship between or among persons, identification of persons died in natural calamity or in accident, dissolution of disputes and any other matter determined by law.[93] The provisions of the *DNA Act* 2014 prevail over all other laws in the relevant field.[94] However, it does not override the provisions of section 112 of the *Evidence Act* 1872.[95]

DNA sample under this Act is confined to DNA collected from the body of a person for DNA profiling.[96] In particular DNA sample means body fluids collected from the body of a person, a cell from a human body, body fluids of a person collected from dress, body fluids collected from the place of offence and any other sources as are fixed by law.[97]

[90] Evidence Act 1872, s 165.
[91] Evidence Act 1872, s 165.
[92] DNA Act 2014, preamble.
[93] DNA Act 2014, s 12.
[94] DNA Act 2014, s 3(1).
[95] DNA Act 2014, s 3(2).
[96] DNA Act 2014, s 2(6).
[97] DNA Act 2014, s 2(6).

The DNA Act 2014 empowers the Police to collect DNA for the purpose of investigation of an offence. For this purpose a police officer may request person who is injured for the offence to give DNA sample.[98] The police officer may also request any suspect of offence, an accused person or a person involved in the commission of an offence to give DNA sample for the purpose of investigation.[99] However if such person are minor or are mentally or physically challenged, the police officer may request the parents or legal guardian or lawyer appointed by such parents or legal guardians to give consent to collect DNA sample from them.[100] Their consent would be treated as the consent given by such minor, mentally or physically challenged persons.[101]

In case the person requested to give DNA sample of his/her body, the police offer may apply to a competent court for permission to collect of DNA sample from the body of such person for the purpose of investigation of offence.[102] Such competent court has the power to hear the parties to such controversy. After perusal of the evidence produced before him if the Court becomes satisfied that there is no reason to deny giving of DNA sample for investigation, it may order the person requested by the police to give DNA sample.[103] In the event the requested persons are minor, physically or mentally challenged, the hearing should be held in presence of their parents or legal guardians or appointed lawyers as the case may be.

Thereafter the DNA sample is to be collected by competent persons in presence of two witnesses following the procedure established by law.[104] Such competent persons will prepare a DNA profiling report and sign it.[105] This DNA profiling report shall include a forwarding note signed by the DNA laboratory chief, a minute of the procedure followed while DNA profiling, the procedure for DNA profiling and other related issued fixed by law.[106]

Evidence generating from forensic DNA profiling is a powerful tool that is used to both exonerate and implicate persons of interest in criminal cases.[107] An analysis of the *DNA Act* 2014 reveals the facts that DNA evidence includes scientific analysis of body fluids collected from human body. It involves minute scientific details which fall within domain of forensic medicine. Without having foundation knowledge in the Medical Jurisprudence and Forensic Medicine, it is hardly possible for a lay man

[98] DNA Act 2014, s 4(1).
[99] DNA Act 2014, s 4(1).
[100] DNA Act 2014, s 4(2).
[101] DNA Act 2014, s 6(2).
[102] DNA Act 2014, s 8(1).
[103] DNA Act 2014, s 8(2).
[104] DNA Act 2014, s 10.
[105] DNA Act 2014, s 11(1).
[106] DNA Act 2014, s 11(2).
[107] Jo-Anne Brigh and others, 'The Interpretation of Forensic DNA Profiles: An Historical Perspective' (2020) 2(50) Journal of the Royal Society of New Zealand <https://www.tandfonline.com/doi/abs/10.1080/03036758.2019.1692044> accessed 12 October 2021.

to interpret and appreciate the delicate issues involved in it. Ultimate result is improper assessment of forensic evidence leading to failure of justice. Therefore, the very nature of this Act warrants induction of such subject in the legal education of Bangladesh.

Law teachers' view on inclusion of Medical Jurisprudence and Forensic Medicine in the legal education of Bangladesh

The law teachers (97%) participating in the survey express their view that this course should be a part of the legal education of Bangladesh (*Figure 6*). As is unveiled from table 4 below, this course should be taught because forensic evidence plays pivotal role in dissolution of criminal cases (92%). Some of them also mention its efficacy in the civil justice as well as other purposes.

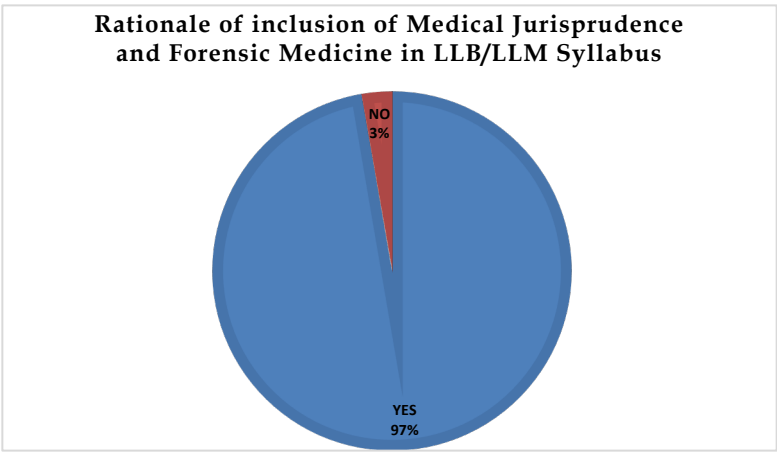

Figure 3: Law teachers' view on inclusion of Medical Jurisprudence and Forensic Medicine as a course in the law syllabus.

Table 3: Law teachers' arguments for inclusion of Medical Jurisprudence and Forensic Medicine in the law syllabus of Bangladesh.

Reasons	**Responses**	***Percent of Cases (N=136)***
Forensic evidence plays pivotal role in dissolution of criminal cases	125	91.9
Forensic evidence is also a vital role player in civil justice system	30	22.1
Forensic evidence is also essential for many other purposes	52	38.2
Total Multiple Responses	**207**	**152.2**

Judges/magistrates' view on whether absence of Medical Jurisprudence and Forensic Medicine in their legal education creates difficulties

In responding to a query whether lack of institutional knowledge in Medical Jurisprudence and Forensic Medicine creates difficulties in making proper and objective assessment of forensic evidence. All the respondents ansswerd in the positive.

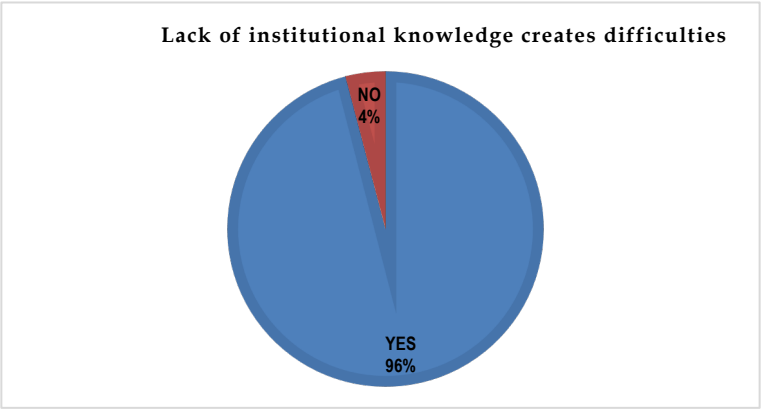

Figure 4: View of judges/magistrates on the necessity of Medicial Jurisprudence and Forensic Medicine

Types of difficulties faced for absence of institutional knowledge on Medical Jurisprudenec and Forensic Medicine

In refering the type difficulties, majority of the respondents observe that it creates knowledge vacuum in the relevant field while the other opine that it creates dependency on mere experience. However a significant percentage of them are of the view that it runs the risk of inappropriate conclusion.

Reasons	**Responses**	***Percent of Cases (N=123)***
It creates a knowledge vacuum in the relevant field	82	66.7
It creates dependency on mere experience	46	37.4
It runs the risk of inappropriate conclusion	48	39.0
Others	2	1.6
Total Multiple Responses	**178**	**144.7**

Figure 4: Problems faced by judges/magistrates for not having Medical Jurisprdudence and Forensic Medicine in thier legal studies.

Reasons for not facing any difficulties

They also express their view that consulting senior colleagues and treatise come in aid to remove difficulties.

Reasons	Responses	*Percent of Cases (N=115)*
Senior colleagues assist in solving the problem	82	71.3
Consulting treaties in the relevant field removes the difficulty	41	35.7
Human conscience provides necessary guidance	24	20.9
Others	5	4.4
Total Multiple Responses	**152**	**132.3**

Figure 5: Reasons for not facing difficulties by judges/magistrates

Advocates' view on absence of Medical Jurisprudence and Forensic Medicine

All the advocate respondents (98%) mention that they haven't have Medical Jurisprudence and Forensic Medicine as a course in either their LLB or LLM programme.

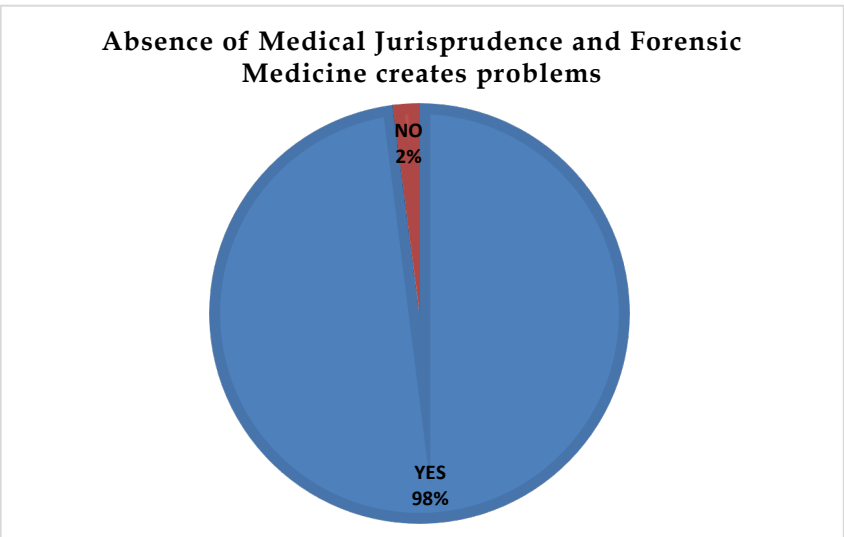

Figure 5: Advocates' having Medical Jurisprudence and Forensic Medicine in their law studies

Nature of the problems encountered

While referring to the kind of problems they encounter with for not having this course, a vast majority of them (79%), mention that absence of this course in their respective law programmes has created a knowledge vacuum in the relevant field. The remaining portion says that its absence creates dependency on mere experience while other view that it weakens basic foundation in the relevant field.

Problems	**Responses**	***Percent of Cases (N=143)***
It creates a knowledge vacuum in the relevant field	113	79.02
It creates dependency on mere experience	51	34.96
It weakens basic foundation in the relevant field	40	27.97
Total Multiple Responses	**204**	**141.95**

Figure 6: Problems faced by advocates

Reasons for not come in contact with any difficulties

The following table shows the reasons of not facing any difficulty by the advocates despite their not having this course in their legal studies. In their view, conventional lesson from the senior advocates, consulting treaties in the relevant field and human conscience come as an aid to remove the difficulties.

Reasons	**Responses**	***Percent of Cases (N=131)***
Senior advocates enlighten	96	73.3
Consulting treaties generates knowledge	43	32.8
Human conscience provides necessary guidance	28	21.4
Others	3	2.3
Total Multiple Responses	**170**	**129.8**

Figure 7: Reasons for not facing difficulties

6. Findings, Suggestions and Conclusion

Findings are the essence of a study based on survey. It is because the field reality can best be picked up by conducting survey. This section pinpoints the findings which emanate from the doctrinal discussion as well as analysis of the view of the stakeholders through questionnaire survey. Alongside it records the suggestions and conclusion of the study.

6.1. Findings

From the preceding analysis of the data, the following findings emerge:

(i) All categories of respondents unanimously of the view that Medical Jurisprudence and Forensic Medicine is an indispensable part of Bangladeshi criminal justice system. However a significant portion of them also leans support to the view that it is also a part of civil justice system of Bangladesh.

(ii) Medical Jurisprudence and Forensic Medicine is not being taught in all the major universities of the country though some of the universities both private and public have started offering this course either in LLB or LLM programme.

(iii) Medical Jurisprudence and Forensic Medicine has not been available as a course to the respondents during their law study.

(iv) All classes of respondents (judges/magistrate and advocate) with overwhelming majority are of the view that absent the course in their respective law syllabus creates knowledge vacuum in them creating difficulty in their professional life. Though they of the view that aid from seniors, consulting treatises and experience guide them in their respective professional life.

(v) All classes of respondents are of the view that Medical Jurisprudence and Forensic Medicine should be included in the law syllabus of Bangladesh and be made a part of the legal education of Bangladesh. It is for the reason that, induction of this course in the law syllabus, will, *inter alia*, orient the law graduates with basic principles of forensic evidence, generate knowledge in forensic medicine and impart research skill leading to further flourishment of forensic medicine.

6.2. Suggestions

It appears from the foregoing findings generating from data analysis, that Medical Jurisprudence and Forensic Medicine should be inducted as a part of the law syllabus of Bangladesh for the reason that forensic evidence is an indispensable part of the Bangladeshi criminal justice system. Therefore, this study suggests that a board comprising of the senior and experienced law teachers should be formed so as to determine the contents of this course and to find out the technical know-how as to how this course could be inducted and accommodated in the law syllabus of all the law offering entities in Bangladesh. In parallel, it should be chalked out the way the experts could be picked up for conducting this course.

6.3. Conclusion

Forensic evidence includes many technical and delicate issues coupled with many medical terms. It requires foundational knowledge for appropriate and objective evaluation of forensic evidence for arriving at a fair and speedy judicial conclusion. Absent a course like Medical Jurisprudence and Forensic Medicine, the law graduates of the country are left with no orientation in this vast but complicated field of forensic evidence which is the day to day phenomenon of the criminal justice system of Bangladesh. Judges/Magistrates and Advocates without basic learning in this field are completely dependent upon the opinion of the medical experts. Consultation with senior colleagues, browsing treaties and experience may be a great help but that cannot cure inherent weakness generated from foundational knowledge gap. This foundational knowledge gap may be an obstacle to make proper and objective assessment of the forensic evidence. This may occasion to failure of justice in some cases. So to avoid it, the law learners should be equipped with the knowledge forensic evidence through Medical Jurisprudence and Forensic Medicine.

The Offense of Rape Under the Penal Laws of Bangladesh and India: A Comparative Definitional Analysis

Yasin Al Razi[*]

Abstract: Rape is a heinous crime. The number of rape incidents is increasing alarmingly day by day across the world. Bangladesh and India are suffering a lot from this atrocious offense. An exhaustive definition of the offense of rape is needed to fight this evil. This paper works on that issue. It investigates the scope of widening the definitional ambit of rape under the penal laws of Bangladesh and India. For this, it primarily collates the existing definition of rape under section 375 of the Penal Code 1860 of Bangladesh (PC) and the Indian Penal Code1860 (IPC). It also analyzes the similarities and dissimilarities of the provisions regarding rape in the penal laws of Bangladesh and India to find out the existing definitional lacunae. After a rigorous analysis, this paper appreciates that s 375 IPC accommodates a more complete definition of rape with fewer lacunae than s 375 PC does. It submits that though s 375 PC is supplemented by section 9 of the *Nari O Shishu Nirjatan Daman Ain* 2000 (NSNDA), the lacunae are still present in the definitional province of rape in Bangladeshi penal laws. This paper further submits that if widened, the ambit of s 375 PC makes s 377 PC more precise and effective. This paper also finds that the PC needs amendment to make its provisions on rape complete and modern. Finally, it puts down some concrete suggestions for the penal laws of Bangladesh and India to avail an exhaustive definition of rape that might help both nations to achieve a commendable anti-rape legal regime.

1. Introduction

The offense of rape is indubitably diabolic. The Supreme Court of India (SCI) holds that 'Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim'.[1]This offense causes 'psychological and physical harm to the victim, leaving upon her indelible marks'.[2]In such a way, the grotesque crime of rape puts down a 'permanent scar on the life of the victim'.[3]It destroys the dignity of the victim by effectuating a severe assault in person. Sadly, an absolute definition of rape is found nowhere in the existing legal systems of the world. Somewhere it is wider, somewhere narrower, but nowhere is it exhaustive. The legal systems of Bangladesh and India are no exception to that. The penal laws of Bangladesh and India revolve around the Penal Code 1860 of Bangladesh (PC) and the Indian Penal Code 1860 (IPC) respectively. The IPC was enacted during British rule in India and with some changes, it is still effective in India

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[1] *Deepak Gulati v State of Haryana* [2013] AIR SC 2071 <https://indiankanoon.org/doc/12623793/> accessed 5 June 2022.

[2] ibid.

[3] ibid.

and Bangladesh. However, time is changed and the majority of the provisions of the Code need transformations to cope with the shifting socio-economic conditions of both States. This statement is particularly pertinent as regards the definition of 'rape' under s 375 PC. While India has taken some measures to modernize its antique provisions on rape in 2013 by amending s 375 IPC, Bangladesh, on the other hand, has not done anything yet to overhaul s 375 PC. In this article, an attempt has been made to bridge the gap between the age-old and the modern definition of rape under the penal laws of Bangladesh. A thorough comparison has been made among the provisions of s 375 PC and s 375 IPC for that purpose. In addition, the related section on rape in the Nari O Shishu Nirjatan Daman Ain (The Prevention of Repression against Women and Children Act)2000 (NSNDA) of Bangladesh has been perused.

This article seeks to make clear that the IPC section 375 is solid and modern. Therefore, section 375 of the Penal Code requires significant changes to match its modernity. The paper additionally submits that being modern s 375 PC might make s 377 PC more effective thus making a strong legal regime to combat sexual offenses. It is noteworthy that the provisions of rape in the IPC are in no way absolute. There is enough scope to improve those. That being so, this paper intends to find out the significant similarities, dissimilarities, and lacunae of the provisions relating to the definition of rape in the penal laws of Bangladesh and India to mark out some concrete suggestions to eradicate the existing definitional shortcomings.

2. Concept of Rape Explained

The term 'rape' has been derived from the Latin word '*rapere*' meaning 'to snatch; to grab; to carry off'.[4] It is the act of forceful snatching of a female constituting '*raptus*' under Roman law whether or not it includes any carnal conjunction.[5]This very notion denoted either 'abduction' or 'rape' in medieval England signifying 'sexual violation' in a neoteric sense.[6] In general, 'rape' is the ravishment of a woman without her consent and against her will by force, fear, or fraud from the side of the perpetrator.[7] Rape violates the human rights of the victim and is a 'crime against the entire society'.[8] It is the forceful carnal knowledge of a woman against her will, and without her consent that consequently invades her human rights of 'privacy'[9], 'personal security'[10], 'social security'[11], and 'right against degrading treatment'[12]. Remarkably, carnal knowledge as a phrase always connotes the penetration of the human penis to

4 Corinne J. Saunders, *Rape and Ravishment in the Literature of Medieval England* (Boydell & Brewer 2001) 20.

5 Keith Burgess-Jackson, *A Most Detestable Crime: New Philosophical Essays on Rape* (OUP 1999) 16.

6 ibid.

7 Sarkar Ali Akkas, *Principles of Penal Code* (Bijoy Law Book House 2021) 338 citing RA Nelson, *The Pakistan Penal Code*, Sheikh Abdul Halim (ed) (first published 1983, 7th edn, Vol II, Law Publishing Company 2014).

8 *Gulati* (n 1) 17.

9 Universal Declaration of Human Rights 1948 (UDHR), art 12.

10 UDHR, art 3; International Covenant on Civil and Political Rights 1966 (ICCPR), art 9(1).

11 International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR), art 9.

12 UDHR, art 5; ICCPR, art 7.

any of the slightest degrees into the human vagina.[13] Had it been forceful, carnal knowledge can simultaneously be degrading and gruesome for the victim. For this reason, the Apex Court of India held that 'Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female'.[14] On top of that, the crime of rape 'devastates a women's soul, shatters her self-respect and for a few, purges their hope to live'.[15] It is 'tantamount to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity'.[16] Since the SCI observed that 'Right to life means life with dignity',[17]rape is a direct assault on the right to life of the victim.

According to Black's Law Dictionary, rape is in Common Law 'unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will'.[18] The definition of rape has been widened recently in many legal systems so that the marital status and the gender of the victim be irrelevant.[19] Hence, the modern definition of rape tends to hold gender neutrality.

If the penal laws of England are looked over in search of the definition of rape, quite an extensive definitional province is found. In the case of *F* (2002), the court held that the word 'vagina' in the definition of rape should not be used in its strict anatomical sense but rather in the general sense.[20] Again, 'vagina' will include 'vulva' while interpreting the definition of rape.[21] Besides, provisions on rape through the anal cavity were first introduced into the English legal system by section 142 of the Criminal Justice and Public Order Act 1994; and the Court of Appeal has decided not to distinguish between rape through the anal and vaginal passages while dealing with sentencing of the offense.[22] Further, provisions regarding 'oral' rape have been incorporated through the enactment of the Sexual Offences Act 2003, meanwhile, the Sexual Offence Review recognized this kind of rape as 'abhorrent, demeaning and traumatizing' as 'vaginal' and 'anal' rape.[23]

In the United States of America, the United States Department of Justice (USDJ) defines 'rape' as penetration, no matter how slight, of the vagina or anus with any

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13 BM Gandhi, *Indian Penal Code* (4th edn, Eastern Law Book Company 2017) 629.
14 *Lokesh Mishra v State of NCT of Delhi* [2014] [29] <https://indiankanoon.org/doc/173157344/> accessed 3 June 2022.
15 *Mishra* (n 14) 2.
16 *Gulati* (n 1) 17.
17 *Vishaka & Ors v State of Rajasthan & Ors* [1997] <https://indiankanoon.org/doc/1031794/> accessed 5 June 2022.
18 Bryan A. Garner (eds), *Black's Law Dictionary* (9th edn, West 2009) 1374.
19 ibid.
20 David Ormerod, *Smith & Hogan Criminal Law* (11th edn, OUP 2005) 617.
21 ibid.
22 ibid.
23 ibid.

body part or object, or oral penetration by a sex organ of another person without the consent of the victim'.[24] The USDJ also praised this definition by asserting that:

> For the first time ever, the new definition includes any gender of victim and perpetrator, not just women being raped by men. It also recognizes that rape with an object can be as traumatic as penile/vaginal rape. This definition also includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity. Furthermore, because many rapes are facilitated by drugs or alcohol, the new definition recognizes that a victim can be incapacitated and thus unable to consent because of ingestion of drugs or alcohol. Similarly, a victim may be legally incapable of consent because of age. ... Physical resistance is not required on the part of the victim to demonstrate lack of consent.[25]

Despite being short this definition grasps wider scope for not containing any gender-specificity and specificity for the passage of penetration. Moreover, it does not define any particular body part to cause the act of penetration but rather holds that penetration is also viable using any other object as a means of insertion. This definition of rape contains unambiguous provisions on the notion of 'consent'. Therefore, it is submitted that this broad and progressive definition is creditable.

In France, under article 222.22 of the Penal Code of 2005, 'sexual aggression' has been defined as 'any sexual assault committed with violence, constraint, threat or surprise'.[26] Article 222.23 defines 'rape' as 'any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise'.[27] Article 121-4 of this Code asserts that the mere attempt of committing rape will be recognized as complete perpetration of the offense; while rape along with rape attempts are subject to the same punishment before the Assize Court.[28] In France, the definition of rape is gender-neutral regarding the victim and the criminal. The definition assures that any act of sexual penetration will be known as rape if done with brutality, restraint, menace, or shock. Further, no express provision on 'consent' is present in the definition though its essence indicates that the crime may be committed with or without the assent of the victim. Hence, the definition is wide and modern in nature.

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[24] The United States Department of Justice Archives, 'An Updated Definition of Rape' <https://www.justice.gov/archives/opa/blog/updated-definition-rape> accessed 27 May 2022; See also Federal Bureau of Investigation, 'Frequently Asked Questions about the Change in the UCR Definition of Rape' <https://ucr.fbi.gov/recent-program-updates/new-rape-definition-frequently-asked-questions> accessed 27 May 2022.

[25] Department of Justice Archives (n 24).

[26] Christelle Hamel, Alice Debauche, Elizabeth Brown, Amandine Lebugle, Tania Lejbowicz, Magali Mazuy, Amélie Charruault, Sylvie Cromer, Justine Dupuis, 'Rape and sexual assault in France: Initial findings of the VIRAGE survey' [2016] Population & Societies 2016/10 (No 538) 1, 4 <https://www.cairn-int.info/article-E_POPSOC_538_0001--rape-and-sexual-assault-in france.htm?contenu=citepar> accessed 31 May 2022. For the French Penal Code of 2005 see also Equal Rights Trust <https://www.equalrightstrust.org/content/french-penal-code> accessed 20 October 2022.

[27] Hamel et al. (n 26).

[28] ibid.

Meanwhile, in Germany, rape is defined as sexual intercourse of a degrading or penetrative nature by the offender with the victim; or performance of similar sexual acts with the victim; or allowing those acts to be performed on himself by the victim through impulsion, intimidation of jeopardizing the life or any limb of the victim, or exploitation of the victim's lack of protection and helplessness.[29] The definition is gender-neutral and does not indicate any stereotyped passage for penetration. Therefore, it is neither narrow nor outdated.

Under international law, the offense of rape is generally recognized as forceful aggression of sexual nature to the victim in person. The Istanbul Convention[30] has defined rape as 'non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object'.[31] It also mentions other forms of non-specified non-consensual sexual acts between the victim and the perpetrator and states that it will amount to rape providing that the victim is forced to have non-voluntary acts of sexual nature with another person.[32] The definition of rape under the said Convention is extensive and it does not contain gender-specificity.

Further, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Furundžija* case (1998) holds that rape requires 'coercion or force or threat of force against the victim or a third person'.[33] In the *Kurunac* case (2001), the same tribunal attempts to picture an exact definition of rape under international law by inquiring into the other factors which will 'render an act of sexual penetration non-consensual or non-voluntary on the part of the victim'.[34] Furthermore, the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case (1998) states that 'Rape is a form of aggression'[35] and that '[T]he central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.[36]This tribunal has also defined

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[29] German Criminal Code 1998, art 177 <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1659> accessed 1 June 2022.

[30] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

[31] ibid art 36. This article of the Istanbul Convention reads as follows:

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalized:

a. Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

b. Engaging in other non-consensual acts of a sexual nature with a person;

c. Causing another person to engage in non-consensual acts of a sexual nature with a third person.

2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognized by internal law.

[32] ibid.

[33] <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93> accessed 26 May 2022.

[34] ibid.

[35] ibid.

[36] ibid.

rape as a 'physical invasion of sexual nature, committed on a person under circumstances which are coercive'.[37] Thus the ICTR has progressively widened the ambit of the definition of rape under international law.

Since the crime of rape obliterates the inherent right to dignity of the victim, it is widely regarded as a means of committing crimes against humanity under various international instruments.[38] On top of that, in the *Akayesu* case and *Musema* case, the ICTR holds that if the perpetrator fulfills particular conditions for genocide, then rape can be the means of genocide too.[39] Therefore, as an offense, rape is one of the serious components of international crimes.

Before the enlightenment of the Western world, the rape of a woman was treated as a crime against the man under whose custody the woman belonged.[40] Historically, the Common Law has treated rape as a crime against the virginity of a female.[41] Nonetheless, the situation has changed in most parts of the contemporary world, and rape is now recognized as a crime committed by the perpetrator against the victim where the gender of either the perpetrator or the victim is immaterial.

3. Rape under Bangladesh Penal Laws

In Bangladesh, the definition of rape has been incorporated in section 375 of the Penal Code. According to that section, a man is said to have committed rape if he engages in sexual activity with a woman against her will, without her consent, when she gives it under duress (such as the threat of physical harm or death), with her consent when she thinks the man is her husband but the man knows he is not, or with or without her consent when the woman is under the age of fourteen. Just the slightest penetration is sufficient to establish the facts of rape. Ejaculation is not required to occur. There is no rape case if a man has a sexual relationship with his wife if she is at least thirteen years old.[42] This definition of rape appears to lack broadness because of its smaller orbit. However, it has been supplemented by section 9 of the NSNDA. Hence, s 375 PC is currently subject to the provisions of s 9 NSNDA.[43] Section 9 of the NSNDA states that a man commits rape if he, out of lawful wedlock, has sexual intercourse - (a) with a woman over sixteen years of age without her consent, or with her consent where that consent is obtained employing coercion or deceit; or (b) with a woman below the age of sixteen years whether there is consent or not.[44]

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[37] ibid.

[38] Statute of the International Tribunal for Rwanda 1994, art 3(g); Rome Statute of the International Criminal Court 1998, art 7(1)(g); Statute of the Special Court for Sierra Leone 2000, art 2(g); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia 2009, art 5(g).

[39] IHL DATABASE (n 33).

[40] Lisa Sharlach 'Rape as Genocide: Bangladesh, the Former Yugoslavia and Rwanda' (2000) 22(2) New Political Science 89. citing Claudia Card, 'Rape as a Terrorist Institution' (Cambridge University Press 1991) 303.

[41] Ormerod (n 20) 617.

[42] Penal Code 1860 (PC), s 375.

[43] Nari O Shishu Nirjatan Daman Ain 2000 (NSDNA), s 2(e) [Author's Translation].

[44] ibid s 9(1) [Author's Translation].

In the case of *Monwar Malik v State*(2007),[45] the High Court Division (HCD) of the Supreme Court of Bangladesh (SCB) holds that if a person has consensual sex with a woman over the age of sixteen, he will not be alleged to be a rapist in that case provided that he promises her to wed. The Court thinks that despite being condemnable, sexual intercourse, in this case, does not constitute rape since consent is present in this particular case.[46] Copulation without the woman's free consent will constitute rape. [47] Moreover, consent should be 'conscious consent with the knowledge of the act'.[48] Where the victim of rape is a prostitute, the prosecution needs strong evidence to demonstrate the absence of consent on her part.[49] At the same time, in a case of rape, where the prosecutrix is of a very tender age, the evidence adduced by her is given great value by the court.[50] Fundamentally, the law on rape is designed to protect a woman's freedom of choice in her sexual connections.[51] If interpretations of the notion of consent swing like a pendulum, it will be very difficult for the victim to avail justice in a rape case. Therefore, uniformity in the interpretations is a necessity.

Besides, the Appellate Division (AD) of the SCB observes that partial penetration rather than deep penetration will suffice to prove a rape case.[52] This view is derived from the Common Law rule where it is presumed that the slightest degree of penetration will suffice to prove rape.[53] In Common Law, rupture of the hymen is not necessary to establish a case of rape.[54] The AD confirms the same; and in addition, holds that there is no need for seminal discharge to prove the crime of rape.[55] Even an attempt for penetration is enough to establish rape.[56] The presence of spermatozoa is not important in a rape case if shreds of evidence such as injuries of the private part, signs of violation, etc. are visible on the physique of the victim.[57]

The definition of rape under the penal laws of Bangladesh depends heavily on the crime being done without the consent, and against the will, of the victim as is evident from the first two conditions of s375 PC.[58] Apart from this section, some significant provisions regarding consent are found in section 90 of the Penal Code. This section

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45 59 DLR 301, 308.

46 ibid; See also Syed Lutfor Rahman et al. (eds), *Zahirul Huq's Penal Code* (5th edn, Anupam Gyan Bhandar 2005) 1089 citing 39 CrLJ 674.

47 Rahman (n 46) 1089 citing PLD [1958] SC 337.

48 ibid.

49 15 DLR 115 WP.

50 Rahman (n 46) 1089 citing [1974] PCrLJ 16.

51 Rahman (n 46) 1088 citing 40 CriLJ 280.

52 *Syed Sajjad Mainuddin Hasan v State* [2009] 70 DLR (AD) 71; See also *Mishra* (n 14) [37] citing *Walid Khan v State of M.P.* [2010] 2 SCC 9.

53 Ormerod (n 20) 616.

54 ibid.

55 *Hasan* (n 52) 71; See also Rahman (n 46) 1096 citing 1980 CriLJ 138 (Bom).

56 Akkas (n 7) 339; Rahman (n 46) 1098 citing [1972] Raj LW 620.

57 *State v Shahidul Islam* (2006) 58 DLR 545, 567; *Hasan* (n 52) 71; See also *Saleh Muhammad v State* (1966) 18 DLR (WP) 67; *Moinul Haque v State* (2001) 56 DLR (AD) 81.

58 Akkas (n 7) 340.

says that no consent will be presumed under the Code if it is given, under trepidation or misapprehension of facts; by an insane person; or by a person under the age of 12 years unless otherwise, the context requires.[59] The courts *inter alia* use this section to interpret the notion of consent found in s 375 PC. Alternately, there is no express definition of the concept of will in the PC. In essence, will is defined as 'wish, desire, pleasure, inclination, choice, the faculty of conscious, and especially of deliberate action' which is a psychological process.[60] Hence, 'against her will' in any case of sexual intercourse denotes intercourse with a woman despite her resistance and opposition.[61]The victim remains helpless in front of the perpetrator while carnal assault is committed against the victim's volition. In contrast, the notion 'without her consent' stands for an act done with the combination of reason and calculation.[62]Every 'consent', according to Stroud's Judicial Dictionary (SJD), 'to an act involves a submission; but it by no means follows that a mere submission involves consent.[63]'There does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is "consent".'[64] Whether consent is a 'willing consent' or 'passive submission' depends primarily upon the circumstances of each case.[65]In addition, the facts and circumstances of each case indicate whether consent has been obtained through intimidation of death or hurt.[66] Further, in *People v McIlvain*[67] it has been held that:

> In order to constitute 'rape', *there need not be resistance to the utmost*, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, *if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not 'consent'*.

Thus, resistance plays a pivotal role in any rape case because a woman will impulsively resist an act of sexual intercourse against her will and nature.[68] In *People v*

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[59] Section 90 of the PC reads as:
90.Consent known to given under fear or misconception. – A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
Consent of insane person. – if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
Consent of child. – unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

[60] *State of U.P v Chhoteylal* (2011) 16. citing *State v Schwab* 143 N.E. 29 <https://indiankanoon.org/doc/1408786/> accessed 2 June 2022.

[61] Gandhi (n 13) 634.

[62] ibid.

[63] *Chhoteylal* (n 60) 15. citing Frederick Stroud, *Stroud's Judicial Dictionary* (4th edn, 1971) 555 citing *R v Day* 9 C. & P. 724; See also Rahman (n 46) 1094 citing AIR [1967] Raj 159.

[64] *Chhoteylal* (n 60) 15. citing *Holman v The Queen* [1970] W.A.R. 2.

[65] Rahman (n 46) 1095 citing AIR [1979] SC 185.

[66] ibid.

[67] *Chhoteylal* (n 60) 16. citing 55 Cal. App. 2d 322 (emphasis added).

[68] Rahman (n 46) 1095 citing 1972 CriLJ 270.

Pelvino,[69] the Court interpreted 'consent' as a notion that 'requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent'. The presence or absence of consent is presumed from the surrounding circumstances of each case.[70]The rule on consent in the cases of rape has its genesis in the principle of '*volenti non fit injuria*' meaning a person must bear the consequences of a consensual injury.[71] The woman consents, without any doubt, only when she acts freely to submit herself to the person for the act of intercourse.[72]Moreover, the Court observes that pure virginity, until the perpetration of rape, of the victim girl will engender strong evidence against the presumption of her consent.[73] Therefore, if a woman says no to an act of sexual nature, her consent is presumed absent in that particular incident.

For the definitional pliability of consent, the courts tend to depend on medical reports to check whether the victim has suffered any kind of injury during the act of penetration; in this way, the courts determine the presence or absence of consent in an impugned case. This process finds its basis in the case of *Abdul Aziz (Md) and another v State* where it was held that:

> *As the prosecutrix did not sustain any injury on her face, cheeks or breasts at the time of the commission of the alleged rape* and the Medical Board also did not detect any trace of sexual violence on the two victims, the offence under s 376 PC is not proved beyond all reasonable doubt for which the appellants are entitled to get benefit of doubt.[74]

The victim might suffer injury if she tries to resist the perpetrator in a non-consensual and forceful penetration, but sometimes when the victim is under serious threat of death or coercion, she might not resist the act of penetration to save her life. In that case, no marks of injuries might be present on her body. If the court takes this situation for granted as consensual intercourse and presumes no rape, then there remains enough chance of injustice. Unfortunately, there is no provision in s 375 PC regarding this salient issue; and this might cause vulnerability to justice in the cases of rape. The remaining clauses of s 375 PC mention the circumstances where 'consent' can acquire the status of 'no-consent'.

From the above discussion, it is conspicuous that the definition of rape under s 375 PC supplemented by s 9 NSNDA lacks adequacy because of its narrower ambit. In *Mofizuddin Mondal v State* (1962),[75] the Court affirmed the cramped scope of s 375 PC

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[69] *Chhoteylal* (n 60) 16 citing 214 N.Y.S. 577.

[70] Rahman (n 46) 1095 citing [1972] CriLJ 270.

[71] KD Gaur, *A Textbook on the Indian Penal Code* (3rd edn, Universal Law Publishing Co Pvt Ltd 2005) 589-90.

[72] ibid 592.

[73] Rahman (n 46) 1095 citing AIR 1925 Lah 613.

[74] Rahman (n 46) 1092 citing 2 BLC 630 (emphasis added). It is to be noted that s 376 PC is related to punishment for the offence of rape.

[75] 14 DLR 821.

by remarking the definition of rape as a 'controversial' one. Hence, to figure out the exact nature of the crime of rape, the definition of this offense requires amendment.[76]

4. Rape under Indian Penal Laws

Before the enactment of the Criminal Law (Amendment) Act 2013 (CLA)[77], the provisions of s 375 IPC were narrow in their ambit.[78] The CLA has broadened the definitional scope of rape under the penal laws of India which is quite visible had there been a comparison between the previous and the present s 375 IPC. The revised s 375 IPC characterizes rape as such a crime that is perpetrated by a male on a female against her volition and, without assent of her; with assent gotten through perturbation; with assent procured by misinterpretation of fact (where the woman accepts the individual as her legal spouse whereas the individual knows that he's not); with assent when the lady is unsound or inebriated to such a degree that produces her incapable to calculate the results of assent; with or without assent when the lady is underneath eighteen years; or when the female is incapable to communicate her assent; by sexual entrance of penis, to any degree, through a woman's vagina, urethra, mouth or anus or making her to undertake to do so with him or with another individual; inclusion, to any degree, of anything or body portion apart from penis to any opening of the woman or making her do so with him or with another individual; utilization of any portion of the victim's body to ease the act of entrance through any opening or making her to undertake and do so with him or with another individual; or application of mouth to any opening of the woman or making her to undertake to do so with him or with another individual.[79]

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[76] Khair Mahmud, 'Laws Relating to Rape in Bangladesh and India: A Comparative Study' (2013) 1 (1) Jagannath University Journal of Law 91.

[77] Act 13 of 2013.

[78] Prior to the enactment of the CLA, s 375 of IPC was read as:
375. Rape. – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -
Firstly. – Against her will.
Secondly. – Without her consent.
Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly. – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly. – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly. –With or without her consent, when she is under sixteen years of age.
Explanation. – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception. – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

[79] Indian Penal Code 1860 (IPC), s 375.

The CLA was introduced in response to the repercussions of the '*Delhi Gang Rape Case*' (the '*Nirbhaya Case*') of 2012.[80] This case was filed on the ground of a vicious gang rape in Delhi which was perpetrated on a 23 years old paramedical student who died later on of the collateral injuries she was inflicted with.[81] The Government appointed a Commission headed by the then Chief Justice of India J. S. Verma J to suggest amendments in the penal laws to fight strongly against the cases of sexual assault; and upon the report of the Commission, the CLA has been enacted.[82] Passed on 19 March 2013 by the Lok Sabha, and on 21 March 2013 by the Rajya Sabha, the CLA provided for the amendment of the provisions regarding sexual offenses under the IPC and other relevant statutes.[83] It was at first promulgated as an Ordinance by the President of India responding to the protests that occurred back then.[84] The Criminal Law (Amendment) Bill 2013 received the assent of the President on 2 April 2013 and was deemed to be effective from 3 February 2013.[85]

Before this amendment, the courts lacked consistency in interpreting crimes of rape in general. Consequently, this dastardly offense had sometimes been interpreted either strictly or liberally which in many cases saved the convicts from the appropriate punishment. This argument is discernible from some significant case laws where the quantum of punishment for rape was different even if there were notable factual similarities among the cases. The shallow definitional purview of rape in the penal laws of India was predominantly responsible for that.

To be clearer regarding this issue some noteworthy case decisions might be looked upon. In *Sakshi*(2004) the SCI declined to broaden the scope of s 375 IPC by holding that:

> Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to a serious confusion in the minds of prosecuting agency and the Courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. *We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of "rape" as contained in Section 375 IPC by a process of judicial interpretation as is sought to be done by means of the present writ petition*.[86]

Again, in *Tukaram v State of Maharashtra* (1979)[87] (the '*Mathura Rape Case'*),the Bombay High Court underpinned the Sessions Court's failure in crystallizing the difference

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[80] Yamini (National Law University Jodhpur) 'Criminal Law (Amendment) Act, 2013: Sexual Offences' [2015] <www.lawoctopus.com/academike/criminal-law-amendment/> accessed 19 March 2022.

[81] C. K. Takwani (Thakker), *Indian Penal Code* (1st edn, EBC Publishing (P) Ltd 2014) 243.

[82] ibid; See also Gandhi (n 13) 627-29.

[83] Yamini (n 80).

[84] ibid.

[85] ibid.

[86] *Sakshi v Union of India* [2004] [26] (emphasis added) <http://indiankanoon.org/doc/1103956/> accessed 3 June 2022.

[87] Gandhi (n 13) 635 citing 2 SCC 143: 1979 SCC (Cri) 381.

between 'passive submission' and 'consent'. But in the appeal, the SCI determined no incidence of passive submission and held that sexual intercourse, in this case, did not amount to rape as the victim had consented to the intercourse.[88] Inflicted with immense criticism, this judgment caused the Parliament to define and incriminate custodial rape distinctly.[89] Regarding the notion of consent as found in the definition of rape under s 375 IPC, the present rule is that if a female confirms that she did not consent to intercourse, the court will presume that there was no consent.[90] Similar rule has been reflected pointedly in a case where the SCI held that 'Submission of the body under the fear of terror cannot be constructed as a consensual sexual act'.[91] Further, the Court delineated a fine line between 'will' and 'consent' by stating that if a person acquired consent for sexual intercourse with the victim using fraud, that consent would not be treated as 'valid' consent.[92] Moreover, it has also been observed that the Court must interpret the notion of consent on a case-by-case basis as each case contains particular facts of its own;[93] and it is a well-settled principle of law that the judgment in any particular case relies on its discrete facts.[94]

By contrast, in *Harpal Singh v State of H.P.* (1981)[95], a 16 years old girl was gang raped and it was held that bodily injury and sexual activeness are immaterial to prove an offense of rape. Again, in another case, the Orissa High Court held that:

> A mere…inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be 'consent'. *Consent on the part of a woman as a defense to all allegation of rape, requires voluntary participation after having fully exercised the choice between resistance and assent*.[96]

Besides, in *Nanak Singh* (1984)[97] the Allahabad High Court opined that the statement of the prosecutrix might not be discredited by the mere fact that there were absences of injuries on her body. Further, In *Narayanamma (Kum) v State of Karnataka & Ors* (1994) the SCI legendarily declared that '[F]act of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual

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88 ibid.

89 ibid 636.

90 ibid.

91 *Chhoteylal* (n 60) 17 citing *State of H.P. v Mango Ram*.

92 Manjeet Kumar Sahu, 'Change in Definition of Rape in India' citing *State of U.P. v Chhotey Lal*<http://www.legalservicesindia.com/article/880/Change-in-definition-of-Rape-in-India.html(29> accessed 1 June 2022.

93 *Chhoteylal* (n 60) 18 citing *Uday v State of Karnataka*.

94 *Mishra* (n 14) 45 citing *Harijana Thirupala and Ors v Public Prosecutor, High Court of A.P., Hyderabad* [2002] 6 SCC 470.

95 Gandhi (n 13) 637 citing 1 SCC 560: 1981 SCC (Cri) 208: 1981 Cri LJ 1.

96 Gandhi (n 13) 636 citing *Bijoy Kumar Mohapatra v State* [1982] SCC On Line Ori 106: [1982] Cri LJ 2162 (emphasis added).

97 Gaur (n 71) 594 citing *Nanak Singh v State of Uttar Pradesh* [1984] All LJ 548; See also *Mishra* [n 14] [38], [39] citing *Ranjit Hazarika v State of Assam* [1998] 8 SCC 635, *B.C. Deva v State of Karnataka* [2007] 12 SCC 122.

intercourse'.[98] Furthermore, the Court affirms that the positive report of the two-finger test will not confirm the presence of consent in a given case of rape.[99]

However, in another case, the Delhi High Court acquitted the accused solely because of the absence of bruises on his penis presuming it was an indication of consensual sex where the victim was non-resistant to the act of penetration.[100] Woefully, the Court did not take into consideration the very tender age (7 years) of the victim and the bite marks on her body; and the Court also neglected evidence of ruptured hymen of the victim as well as the statement of the eyewitnesses.[101] It has been a controversial case decision in the criminal justice system of India. Besides, in *Rajkumar* (2014),[102]a minor girl aged 14 years was raped and murdered and the SCI though found the crime atrocious set aside the death sentence of the convict and commuted it to 35 years of imprisonment. Again, in *Bantu @ Naresh Giri v State of M.P.* (2002),[103] a 6 years old girl was raped and murdered. The SCI in its verdict commuted the capital punishment of the convict to that of life imprisonment considering his younger age (which was below 22 years while committing the crime), absence of injury marks on the body of the victim, and the unpremeditated nature of the murder. It is to be noted that the Court had assertively confirmed the ghastly and diabolic nature of the crime of rape in that judgment.[104] Further, in *Neel Kumar v State of Haryana* (2012),[105] the Court substituted the death sentence of the convict, who had raped and murdered his 4 years old biological daughter, with imprisonment of 30 years. This decision is not beyond controversy either.

From the above-mentioned case decisions, it is apparent that interpretations of the crime of rape were lacking uniformity in the Indian criminal justice system. Since the fundamental right of the victim guaranteed under Article 21 of the Indian Constitution gets infringed by the odious offense of rape,[106] unwavering interpretation is a must to deliver fair justice. Other than this, a wider definitional ambit of s 375 IPC can bolster the effective delivery of justice in rape cases. The

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98 *Lillu and Rajesh & Anr v State of Haryana* (2013) [8] citing 5 SCC 728 <https://indiankanoon.org/doc/78844212/>accessed 4 June 2022.

99 *Lillu* (n 98) 13.

100 Sahu (n 92) citing *Mohd. Habib v State*.

101 ibid.

102 *Rajkumar v State of M.P.* [2014] [21] <https://indiankanoon.org/doc/46587735/> accessed 5 June 2022.

103 ibid 17. citing AIR 2002 SC 70; See also *Sebastian @ Chevithiyan v State of Kerala* [2009] where the Supreme Court of India (SCI) had substituted the death sentence of the appellant (who was aged 24 years and convicted of raping and murdering of a two years old girl) by imprisonment for the rest of life. <https://indiankanoon.org/doc/223583/> accessed 6 June 2022; *Mohd Chaman v State (NCT of Delhi)* [2001] where the 30 years old accused raped and killed a one and a half year old girl and the SCI substituted the death sentence by imprisonment for life. <https://indiankanoon.org/doc/1060261/> accessed 7 June 2022.

104 *Rajkumar* (n 102) 17. citing AIR 2002 SC 70; See also *Rajkumar* (n 102) [18] citing *Mohinder Singh v State of Punjab* [2013] AIR 2013 SC 3622; *Shankar Kisanrao Khade v State of Maharashtra* [2013] [21] (MB Lokur J) citing *Rahul v State of Maharashtra* [2005] 10 SCC 322 <https://indiankanoon.org/doc/79577238/> accessed 5 June 2022.

105 *Khade* (n 104) 56. (MB Lokur J) citing 5 SCC 766.

106 *Lillu* (n 98) 11 citing *State of Punjab v Ramdev Singh* [2004] AIR 2004 SC 1290.

enactment of the CLA was thus much needed. The CLA is currently working on accomplishing these ends.

The amendment of s 375 IPC brought by the CLA has been an outstanding one. The present section is wider than the previous s 375 IPC in its scope. Hence, while evaluating the amended s 375 IPC, one author has observed:

> The new law on rape has enlarged the meaning of the term 'rape' by delimiting its scope. Thus, the offence of rape does not require the proof of penile-vaginal intercourse any more. In view of the amended definition of the offence of rape, penetration of *any* orifice of a woman in the seven given circumstances shall amount to rape. This penetration need not be by penis as was the case before. Penetrating a woman in vagina, anus, urethra or mouth, etc. with penis or any other part of the body of the accused or even with some foreign object shall amount to the offence of rape, making a woman to do so with the accused or any other person shall also amount to rape. It shall amount to rape if the body of the woman is manipulated in a manner that it causes penetration of her own body or body of the offender or a third person in the orifices. If a man applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person, the offence of rape is complete.[107]

Importantly, the amended s 375 IPC provides a substantive definition of consent right now. That being so, s 90 IPC will be the least vital in interpreting the question of consent in cases of rape.[108] The amended IPC section has also extended the age of giving consent to 18 years, and it has been done to fulfill India's obligation under international law.[109] The history of the age limit for valid consent under the Indian penal laws has been thus:

> The age of consent was only 10 years when the Indian Penal Code was brought on statute book in 1860. It was raised to 12 years in 1891 and 14 years in 1925. The age of consent was raised to 16 years in the year 1949. However, after India signed the Convention of Rights of the Child (CRC) in the year 1990, a demand was made to increase the age of consent to 18 years as any person under that age is considered a child.[110]

The amended IPC section defines 'consent' as an unambiguous volitional concurrence where the female uses sentences, gesticulations, or other kinds of gestural processes to express her inclination toward taking part in a particular act of sexual nature.[111] The SCI precisely observes that 'Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side'.[112] In its very nature 'consent' may be 'express or implied, coerced or misguided, obtained

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107 Gandhi (n 13) 630.

108 ibid. It is to be noted that s 90 IPC is exactly similar to s 90 PC.

109 ibid 640.

110 ibid.

111 IPC, s 375.

112 *Gulati* (n 1) 18.

willingly or through deceit'.[113] The court needs to discern the condition of the individual who is giving consent to examine whether it has been given under any kind of apprehension of injury or factual misconception.[114] Again, it should also be inquired by the court whether the person obtaining consent was fully aware of the fact that the consenting person would not have consented if there was no fright or misunderstanding.[115] Where a woman does not physically resist the coition, this absence of resistance will not establish the presence of consent in that context.[116] However, no medical procedure or intervention will constitute rape; and if a man copulates with his wife who is not less than fifteen years of age, there constitutes no rape.[117] On the other hand, the expression 'against her will' in the definition of rape under s 375 IPC signifies the commission of the offense notwithstanding the woman's opposition to that act.[118]

5. Findings of the Study

5.1 Commonalities between s 375 PC (supplemented by s 9 NSNDA) and s 375 IPC

Based on the above analysis, it is found that there are remarkable commonalities between s 375 PC (supplemented by s 9 NSNDA) and s 375 IPC. First, the victim of the offense of rape must always be a female while the perpetrator is a male. Second, penile penetration to any extent is enough to constitute rape. Third, proof of ejaculation is not mandatory. Fourth, the presence of a ruptured hymen is not essential. Fifth, there is no recognition of 'marital rape' during a 'lawful wedlock'[119] except where the age of the wife is below thirteen years as per s 375 PC and under fifteen years as per s 375 IPC. Sixth, the expressions 'without her[120] consent' and 'against her will' play a pivotal role in a case of rape. Seventh, consent obtained through trepidation is recognized as 'no-consent'. Last of all, when a female makes love with a male believing him as her husband whereas the man knows that he is not, intercourse between them, in this case, will be deemed as 'non-consensual' because consent obtained through the misconception of facts is not valid under the penal laws of Bangladesh and India.

5.2 Distinctions between s 375 PC (supplemented by s 9 NSNDA) and s 375 IPC

Based on the diligent analysis of s 375 PC (supplemented by s 9 NSNDA) and s 375 IPC some major distinctions are found.

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113 ibid.

114 ibid [19] citing *Deelip Singh @ Dilip Kumar v State of Bihar* [2005] AIR 2005 SC 203.

115 ibid.

116 IPC, s 375.

117 ibid.

118 Gandhi (n 13) 633 citing *Kaini Rajan v State of Kerala* [2013] 9 SCC 113: [2013] 3 SCC (Cri) 858.

119 It is to be noted that, in Bangladesh, under s 9 NSNDA, no matter with or without the consent of a below 16 years old girl,if a man copulates with her outside the lawful wedlock, it will constitute rape.

120 In this and the latter expressions, 'her' indicates 'The Victim'.

First, under the PC, rape can only be perpetrated by vaginal penetration. There is no mention of oral, urethral, or anal penetration. The IPC is quite progressive in this context in contrast. It holds vaginal penetration as well as oral, urethral, and anal penetration as means of committing rape.

Second, rape, according to the PC, constitutes only when penetration is done by a human penis. Nothing is mentioned anywhere in the PC regarding the insertion of anybody part or object other than the penis. Whereas, the IPC has a definite take on that. IPC Section 375 statesthat the insertion of any body part or object other than the penis to any extent will amount to rape. For example, if a man fingers the vaginal, urethral, oral, or anal orifice of the female victim, or inserts any kind of sex toy or a similar object, rape will be committed in the light of this section.

Third, as per the IPC, manipulation of any body parts of the woman for ease of penetration establishes the crime of rape. On the contrary, the PC contains no substantive provision like this.

Fourth, under the PC, the provisions regarding rape signify that particular acts of sexual nature are always committed on the female victim by the accused male,[121] whereas, the IPC manifests modern thinking. It deems that if the female victim is compelled to do particular sexual acts on her that will amount to rape too.

Fifth, the IPC exclusively states that if the perpetrator orally stimulates the vagina, urethra, mouth, or anus of the victim, rape will be established. By contrast, this major issue is absent in the PC.

Sixth, the IPC recognizes consent as 'no-consent' if it is obtained through the inebriation or unsoundness of the woman either by her or by the act of another person where she cannot understand the consequences following that consent. But, s 375 PC does not contain any direct provision regarding this issue. Since s 90 PC holds specific provisions regarding this, s 375 PC is read with s 90 PC to interpret this context.

Seventh, the IPC avers that if the victim woman does not resist penetration physically and as a consequence, intercourse happens, the absence of resistance does not indicate consent to intercourse in this scenario. The PC, in contrast, does not have any provision akin to this.

Eighth, s 375 PC does not provide any definition for the term 'consent'. In Bangladesh, consent under the PC is interpreted by the courts with the help of s 90 PC and precedents. On the contrary, s 375 IPC provides a plain definition of consent.

Last but not least, under the PC, the making of a consensual or non-consensual sexual relationship by a man with a woman aged under 14 years amounts to rape. On top of that, s 9 NSNDA extends this age limit to sixteen years. However, the IPC has fixed

[121] That means the victimendures the submissive role-play. For example: if rape is constituted by penetration of the vaginal orifice, the PC presumes that it is the victim who is at the receiving end.

this age at eighteen years which is an internationally recognized age of obtaining adulthood.

5.3 Weaknesses in the definition of rape in the PC:

The Penal Code of Bangladesh is ancient. The provisions of s 375 PC also reflect that. It demonstrates old-school thought. For instance, it maintains gender specificity for the victim and the criminal. The rape victim must always be a female while the perpetrator must always be a male. It implies the antediluvian nature of the PC and causes a pragmatic contradiction. Possibilities are there that rape might be perpetrated by a male to a male, by a female to a female, and by a female to a male. Section 375 of the Penal Code does not possess any provision regarding these coherent issues. The primary reason is its narrow indication for the passage of penetration. The outmoded definition of rape in the PC takes for granted that to commit rape vaginal intercourse is a must. Thence, the definition directly excludes the possibility of rape by a female – of a female as she cannot naturally penetrate; of a male, as he has no vagina and she is naturally incapable of penetrating physically. Further, the rape of a male by a male has also been excluded from the purview of s 375 PC as the victim needs to be a female.

Carnal intercourse between two males falls under s377 PC[122] - the section that is related to sexual intercourse against the order of nature. The PC deems that penetration through the vaginal passage is the sole rule of nature for conducting copulation by humankind, and thus a man can only take carnal knowledge of a female. That is why for the commission of rape evidence of vaginal intercourse is most importantly needed. Hence, provisions on 'anal rape' does not fall within the sphere of s 375 PC. The same is also understood from the decision in *Muhammad Ali v State* (1960) where it was held that penetration through the anus is not essential to constitute an offense under s 375 PC.[123] As a consequence, while committing rape, if the perpetrator penetrates through the anal, oral, or urethral cavity of the victim, the case will be fallen within the ambit of section 377 even if the victim is a female, as penetration through these orifices is against the order of nature. This situation had occurred in a landmark Indian case[124] where an 11 years old victim with 'moderate intellectual disability' was raped and sodomized before being murdered; and the SCI condemned the Police for failing to charge-sheet the accused under s 377 IPC, as well as the Prosecution for failing to make a case under the said section.

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[122] This section reads as:
377. Unnatural offences. – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also liable to fine.
Explanation. – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[123] Rahman (n 46) 1090 citing 12 DLR 827: 1961 PLD (Dac) 447.

[124] *Khade*(KS Radhakrishnan J and MB Lokur J) (n 104).

Notably, the gravity of punishment is lesser in s 377 PC[125] than that of s 375 PC which has further been supplemented by an amended provision regarding the punishment of rape in the NSNDA.[126] Hence, s 375 PC needs a wide definitional ambit to benefit from the said amendment. The jurisdiction of s 377 PC causes some incidents of rape to fall within the range of 'intercourse against the order of nature'. For example, sometimes male children fall victim to 'anal rape' in Bangladesh. In these cases, the Penal Code provides for punishment to the accused persons under section 377. The lenient punishment available in s 377 PC regrettably creates less deterrence. Therefore, the rate of such a heinous crime is not lessening. As s 375 PC lays out greater punishment, it is crucial to widening the definitional horizon of s 375 PC to incorporate appropriate provisions to fight this evil of 'male-anal-rape'. If Bangladesh wants to make its anti-rape penal laws up to the mark, these core issues need to be considered carefully. There should not be any kind of gender specificity in terms of the victim and the perpetrator.

The Penal Code mentions nothing about any other object of insertion except the human penis as a means for penetration. For example, if any other object or body part is inserted even in the vagina of the victim, it will not amount to rape under s 375 PC. Besides, an express provision regarding marital rape is absent in the PC. Especially,on marital rape, the Court held that:

> The traditional view is that one cannot be held guilty of raping his wife because her *consent to marriage constitutes consent to sexual intercourse* with him which in law cannot be revoked during continuance of the marriage. *The offence of rape is in law a single act of sexual intercourse. It is not a continuing offence*.[127]

'The marital right of the husband to have intercourse with his wife exists by virtue of consent given by wife at the time of the marriage not by virtue of a consent given at the time of each act of intercourse, as in the case of unmarried persons.'[128] Since the ethnoreligious and cultural sentiment of the citizens of Bangladesh has not yet been ready to cope with this issue, their emotions demand respect.

Section 375 of the Penal Code lacks a concrete definition of consent. A plain definition of this term is urgently needed. Last but not least, the minimum age under which sexual intercourse will be treated as rape irrespective of the presence or absence of consent is not standard in Bangladesh. It has been stated as 14 years in s 375 PC, and prevailing 16 years in s 9 NSNDA; but eventually, it is lower than the standard age of

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125 This section provides for punishment in the forms of imprisonment for life, or imprisonment of either description for a term which may extend to ten years, along with fine.

126 This amendment Act is known as the Nari O Shishu Nirjaton Daman (Amendment) Ain 2020. It has incorporated death penalty in addition to the previously available imprisonment for life in the NSNDA as the punishment for rape. This Act will be found at: <http://bdlaws.minlaw.gov.bd/act-details-1351.html> accessed 6 June 2022.

127 Rahman (n 46) 1088 citing 40 CriLJ 280 (emphasis added).

128 Rahman (n 46) 1096 citing [1949] 2 AllER 448.

adulthood of 18 years.[129] Standardization of this age limit is important to maintain Bangladesh's obligation under international law.

5.4 Weaknesses in the definition of rape in the IPC

As for the Indian Penal Code, it is submitted that after the amendment of 2013 the definition of rape has found a great shape though still there are some lacunae. Gender specificity for the victim and the perpetrator is a significant issue. This scenario is similar to Bangladesh and the same arguments are applicable against it. Therefore, it will be redundant to reiterate them. The absence of particular provisions regarding marital rape is striking but it can only be sorted out if the citizens' ethnoreligious and cultural emotions permit.

However, a provision of section 375 might be in danger of being misused. Section 375 of the IPC holds that where a woman does not resist penetration physically, this absence of resistance will not indicate consensual intercourse. This provision has been enacted to ensure the safety of a woman. When a female is under an assault by a strong lone man or a group of men, where a situation arises that her resistance will risk her life, she might submit herself to save her life. This is logical but can be misemployed either for revenge or any other means. For instance, when a man is in love with a woman and has consensual intercourse with her out of wedlock and afterward their relationship breaks up, the scope is there that the woman might misuse this provision to take revenge against the man. What she needs to prove is that she did not resist the penetration physically because of saving her life. Any false case like this can be devastating to the accused as it can prove him guilty of the offense of rape. An observation of the Delhi High Court is pertinent here:

> However,*…it cannot be denied that false allegation of rape can cause equal damage, humiliation, embarrassment, harassment, disgrace and agony to the accused as well…* The desire to take revenge is an evolved outgrowth of our human sense of unsatisfied reciprocity. We can trace innumerable instances of revenge in the history and also in our Hindu mythology. The feeling of revenge destroys the rationale and a common sense even in an otherwise wisest person. At times the feeling of revenge is so strong that the avenger himself also fails to realize the impact of his deeds and easily get swayed by his emotions to wreak vengeance. *In order to take revenge he does not even mind doing gravest of act. An avenger may use various means to take revenge. One such means can be process of law i.e., by false implication of the aggressor*.[130]

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[129] Under the provisions of article 1 of the Convention on the Rights of the Child 1989 (CRC), every human being under the age of eighteen years is a child unless majority is attained earlier by that child under the law applicable to it. Section 4 of the Children Act 2013 (applicable in Bangladesh) also spells out the same. In addition, section 2(3) of the Balya Bibaha Nirodh Ain (Child Marriage Restraint Act) 2017 states that adulthood in terms of marriage will be obtained at twenty-one years for male and eighteen years for female.

[130] *Atender Yadav v State Govt of NCT of Delhi* [2013] [72], [74] (emphasis added) <https://indiankanoon.org/doc/151172763/> accessed 4 June 2022; *Yadav*(n 130) [76] citing *Rajoo and Ors v State of Madya Pradesh* [2009] AIR 2009 SC 858; See also *Lillu* (n 98) [10] citing *Narender Kumar v State (NCT of Delhi)* [2012] AIR 2012 SC 2281.

In addition, in *Radhu v State of Madya Pradesh* (2007),[131] the SCI holds that 'False charges of rape are not uncommon'; therefore, the accused needs protection against any kind of false implications of rape.[132]

Apart from these loopholes, the provisions regarding rape enshrined in s 375 IPC are commendable.

6. Suggestions

By perusing the lacunae of the provisions of s 375 PC, it can be said that the following suggestions might work well:

a. The victim and the perpetrator should not be classified by gender. Classification by gender restricts the scope of this section. Rather a gender-neutral definition of rape should substitute the present definition. Stereotyping the rapist as a male and the victim as a female needs to be stopped forever.
b. For an exhaustive definition of rape, other canals of penetration (e.g., oral, urethral, and anal) should be included in the definition. This inclusion will recognize a large number of victims of unnatural lust under s 377 PC as rape victims under s 375 PC irrespective of their gender. By this, punishment will be more deterrent in respect of particular sexual offenses.
c. Provisions should be included to acknowledge the insertion of any other object or body part other than the penis into the vaginal, anal, oral, or urethral orifices of the victim as rape.
d. The minimum age for valid consent may be fixed at eighteen years below which, regardless of the presence or absence of consent on the part of the victim, if someone copulates with the victim out of wedlock, rape will be presumed.

On the other hand, the definition of rape under s 375 IPC is more exhaustive than its counterpart. Hence it needs fewer things to add. That being said, the gender-based classification of the victim and the culprit needs to be excluded from the definition of rape. In this regard, the first suggestion provided for the PC might equally apply to the IPC. Moreover, the provision that presumes the absence of physical resistance by the woman as non-indicative of consensual sex needs a rethought. It should be illustrated precisely in the definition to delimit its threshold.

7. Conclusion

The similarities among the provisions relating to rape under s 375 PC and s 375 IPC are less visible than the dissimilarities. The definition of rape under the PC has excessive lacunae. It is old and narrow; thus, unable to match modernity. Despite being supplemented by s 9 NSNDA, it cannot come out of its antiquity and incompleteness. Hence, s 375 PC needs amendment to subsume a complete definition

[131] *Yadav* (n 130) [75] citing [2007] CriLJ 4704.
[132] *Yadav* (n 130) [76] citing AIR 2009 SC 858.

of rape which is now lacking in the penal laws of Bangladesh. If s 375 PC finds completeness, then it will bolster s 377 PC to be more precise and effective. As a result, a large number of victims of sexual offenses will get desired justice. Quite the opposite, the amendment of 2013 has augmented the definitional scope of s 357 IPC. This amendment has filled in much of the previous lacunae but yet further improvement is possible. If the suggestions provided in this paper are duly executed, the definitional ambit of rape under the penal laws of Bangladesh and India may be more dilated. Consequently, it may be solid, modern, and standard as well. On top of that, the anti-rape legal regime of both nations might successfully be able to fight the evils of this 'most shameful act of rape'.[133]

[133] The offense of rape has been vehemently condemned with this very expression by the Supreme Court of India in the *Molai* Case.See*Shahidul Islam @ Shahid v State* (2016) 70 DLR (AD) 70 citing *Molai v State of Modhya Pradesh* AIR 2000 SC 177; *Khade* (n 104) [22] (KS Radhakrishnan J) citing *Molai and another v State of M. P.* [1999] 9 SCC 581.