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Meeting the Challenges of Time

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Legal Aspects of China's Belt and Road Initiative: A Preliminary Assessment

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ABSTRACT

China's Belt and Road Initiative (BRI) is a global and highly ambitious infrastructural, trade and investment as well as economic development initiative of epic proportions. It is spearheaded and unwritten by PRC China. It strategically and seamlessly connects China in the epicentre with her South, South-east and Central Asian, Middle-eastern, African and European countries as well as Mongolia, Eastern and the rest of Russia. The "Belt" covers a network of overland road and rail routes, oil and natural gas pipelines as well as other infrastructure projects that will span out from Xi'an in central China across Central Asia and ultimately reaching as far away as Moscow, Rotterdam, and Venice. The belt also covers planned business development corridors running far and wide-- along the major Eurasian Land Bridges, through China-Mongolia-Russia, ChinaCentral and West Asia, China-Indochina Peninsula, China-Pakistan, and BangladeshChina-India-Myanmar trade/economic corridors. The "Road", on the other hand, is its maritime counterpart-- the 21st Century Maritime Silk Road -- a network of planned ports and other coastal infrastructure projects that dot the map from South and Southeast Asia to East Africa and the northern Mediterranean Sea. The southern maritime trade routes reach as far as the Oceanic countries in the Pacific Ocean. The BRI's recent expansion incorporates also the Arctic sea routes (Ice Silk Road or One Ring). The focus of this article is more on the salient features of BRI with emphasis on the legal aspects of thereof.

Keywords: Belt and Road Initiative, Ice Silk Road, Economic Development Corridors, Infrastructure Development, Public-private Partnerships

1. INTRODUCTION

The trade routes map issued by PRC China below shows the economic and infrastructural vastness and potentials of China's 21st Century Belt and Road Initiative comprising of two main trade routes - the 21st Maritime Silk Road (beginning in Fujian province and passing through Guangdong, Guangxi, and Hainan before heading south to the Malacca Strait, traversing the Indian Ocean, Suez Canal, and leading to Athens and Venice and meeting up with the land-based Silk Road -- Silk Road Economic Belt -- from Xian (China)

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spanning across Central Asia, Middle East and Russia ending up in the European cities and ports. There is also a southern maritime trade route linking the South Pacific island states. In the Arctic, there is also the Arctic sea routes (the Ice Silk Road or One Ring). The BRI could easily be indicated as the biggest 21st Century trade and development initiative after the WTO and the abandoned TPPA. It is a very gigantic one indeed. The Belt and Road Initiative encompasses more than 62% of the world population (4.4 billion), currently accounting for about 30% of global GDP and more than 35% of global merchandise trade.¹

It must be pointed out and emphasised that the Belt and Road Initiative contemplates a two-way business traffic to the participating states led and underwritten by China. It will in the first stage involve massive investments in infrastructure development along the overland and maritime roads. The infrastructure developments will eventually lead to other greater and vital economic developments or spin-offs along the same roads. On the Indian sub-continent and African continent, too, economic development corridors and trade roads have also been planned and connected to at least one of the main trade roads. Before going any further, a few important and initial remarks must be noted. First, it must be stated in the clearest terms that this Chinese led trade and development initiative is expected to create a win-win economic and trade partnership for all participating states particularly the developing countries. It is unlikely that developing countries along the Belt and Road region will oppose it. Opting out of the trade initiative is likely to occasion economic disadvantage and alienation to the developing countries. It is opined that the Chinese inspired trade and development initiative must be viewed positively by all trading nations.

It should not be viewed negatively as “global commerce on China’s terms” or at the expense of other countries’ national sovereignty or identity provided that there is respect for rule of law, basic human rights compliances, fairness and sustainability considerations underlying this ambitious trade and development initiative. The comments in the Australian news that BRI or ‘OBOR could redefine global trade and mark a tipping point for a new Asian century’, too, need not be viewed with alarm. It must be pointed and stressed that BRI is primarily an Asian inspired and led trade and development initiative with a global perspective for the 21st Century and beyond. It has the potentials of creating a vast and extensive trade and development network by linking at least three continents -- Asia, Europe and Africa. In fact, the final and eventual impact decades later from today may be - “the vision document for OBOR goes well beyond infrastructure, envisioning closer coordination of economic development policies, harmonization of technical standards for infrastructure, removal of investment and trade barriers, establishment of free trade areas, financial cooperation and ‘people to people bonds’ involving cultural and academic exchanges, personnel exchanges and cooperation, media cooperation, youth and women exchanges, and volunteer services.”²

¹ Victoria Crawl in an opinion piece in news.com.au (an Australian newspaper) on 23rd July, 2017. The title of the news bulletin is “China’s Belt and Road Initiative could redraw the map on global trade”. It appeared in the World Economy’s section. Read also Rajeev Ranjan Chaturvedy’s “The 21st century Maritime Silk Road.” An article Observer Research Foundation’s website. An Independent think tank on global economy. 10th February, 2017.

² Based on a post by Mr. Bert Hofman at the October DRC-CIRSD Silk Road Forum 2015, Madrid, Spain. Bert Hofman is the World Bank’s Country Director for China, Mongolia and Korea in the East Asia and Pacific Region. He is based in Beijing. He wrote in his blog on OBOR. The title of this writing is – “China’s

2. THE SHORT-TERM, MEDIUM TERM AND LONG-TERM PLANS AND OBJECTIVES OF BRI

We will list financing or investment as the first hurdle to overcome. Who will underwrite these initial investments? Mostly infrastructural at the beginning. It has been reported that the Chinese-led trade and investment initiative will “receive funding from seven capital pools, amongst which are, the Silk Road Fund, the Asian Infrastructure Investment Bank (AIIB), BRICS Bank, and the SCO Development Bank.”³ These banks are likely to play major roles in funding. “It is expected to cost at least \$900 billion, with estimates up to three times that. China has already pledged more than \$100 billion and it will be completed in a series of bilateral projects - such as the \$46 billion China-Pakistan economic corridor, or a \$5.2 billion railway that will eventually link Laos, Thailand, Malaysia and Singapore.” According to American newspapers, BRI is projected to cost a \$1 trillion.⁴

To reiterate, the long-term objectives will be beyond investment, trade, commerce and economic development. The social welfare of the participating countries and the local communities, transparency, public engagement and adherence to international practices and eventually standard rules, too, should be on the agenda as well. Peace, friendship, cooperation, innovation and security along the Belt and Road region should also be paramount in order to ensure the eventual success of the global trade initiative. Whether it will eventually lead to ‘One Culture One Region’ remains to be seen as one of the objectives of BRI as the 21st Century Chinese-led trade initiative traverses huge regions of the world with diverse racial groups, cultures, historical backgrounds and religions involving and impacting at least some 70 countries.⁴

2.1 What does ‘Belt’ and ‘Road’ encompass?

The “Belt” is a network of overland road and rail routes, oil and natural gas pipelines, and other infrastructure projects that will stretch from Xi'an in central China through Central Asia and ultimately reach as far as Moscow, Rotterdam, and Venice. Rather than one route, belt development corridors are set to run along the major Eurasian Land Bridges, through China-Mongolia-Russia, China-Central and West Asia, China-Indochina Peninsula, China-Pakistan,

Bangladesh-China-India-Myanmar.⁵ The “Road” is its maritime equivalent - the 21st Century Maritime Silk Road--a network of planned ports and other coastal infrastructure projects that dot the map from South and Southeast Asia to East Africa and the northern Mediterranean Sea.⁷ The maritime route extends to the Oceanic nations in the Southern Pacific. In the north, the Arctic sea routes have been planned.

One Belt One Road Initiative: What we know thus far”? Please note that China's ‘One Belt, One Road’ (OBOR) has been seen rebranded as ‘Belt and Road Initiative’ (BRI).

³ ‘SCO’ stands for Shanghai Co-operation Organization. The group includes China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan, covering over 30 million square km and accounting for a quarter of the world's population. It has Afghanistan, Belarus, India, Iran, Mongolia and Pakistan as observers, and Armenia, Azerbaijan, Cambodia, Nepal, Sri Lanka and Turkey as dialogue partners. ⁴ Bert Hofman, *supra* note 2.

⁴ “Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road” (2015/03/28), issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization. See also a book on this new trade initiative: Chris Devonshire-Ellis, *China's New Economic Silk Road*, (Hong Kong: Asia Briefing Ltd, 2015).

⁵ Bert Hofman, *supra* note 2. ⁷ Ibid.

3. CHALLENGES AHEAD FOR THE BRI INITIATIVE

3.1 BRI: Tackling and Ironing Out the Gauge Differences Issue

The railroads linking different countries in the BRI regions use different gauges - the metre gauge, the Standard Gauge Railway (SGR) or other gauge or gauges. These constitute or involve huge transport problems and costs to the railway companies transporting the goods or passengers. The PRC Chinese railways use the Standard Gauge Railway (1.435 meter).

However, India and Russia use wide gauge tracks of 1.676 meters and 1.52 meters, respectively. BRI HSR projects heading towards Central, South Asia, South-east Asia and West towards Europe will have to face the gauge differences. The new railroads (for example, the Indonesian Jakarta-Bandung high-speed railway project or the Nigerian LagosKano HSR project) built under Chinese investment will, of course, not have the gauge issue as the Chinese railway consortiums will use the SGR gauge.

Just to point out and highlight problems caused by the gauge differences, we may now examine the Chinese goods trains heading westwards towards Russia and European cities. Due to the gauge differences, trains cannot operate from China or European countries into or out of the former USSR countries without altering bogies. Usually large facilities are provided to execute this cumbersome procedure at most border crossings between the Russian and SGR gauge territories (e.g. at Zabaykalsk or Erenhot). Changing bogies on a rail car usually takes hours and special, heavy equipments are required. In many cases (especially, containerized freight), freight is transhipped from one train to another without the need of changing the bogies. The use of variable gauge axles may not be a solution either. Such a procedure may save time but it could incur higher capital costs. To add insult to injury, gauge differences along the BRI rail routes may involve geopolitical rivalry as well which may cause serious problems. For example, no offence intended, New Delhi or Moscow may not fancy China to impose geopolitical influence or leadership along its BRI railway routes.

3.2 Framework for Seamless Cross-Border Carriage of Goods by Rail

There is also the legal liability framework for the seamless cross-border carriage of goods by rail for loss or damage to the goods carried on board the trains along the BRI routes. This will also have to be ironed out in the short and medium term. In the long term, the search for a uni-modal legal framework may be necessary in the face of the expected increase in the shipment or carriage of goods by rail throughout the rail roads in the BRI regions as this mode of transportation may prove to be faster, cheaper and safer than by sea or air. The eventual massive and rapid transport and movement of goods by rail especially to and fro the BRI trade routes will definitely also promote goods in transit insurance business as well. Eventually when High Speed Rail (HSR) services also kick in, a liability regime and insurance of the risks involved will also have to be considered. The issues highlighted here may find solutions from the experiences of the European Community in handling and facing the same.

3.3 Framework for Maritime Carriage of Goods

Next, there is the legal liability framework for the maritime carriage of goods. This, too, needs to be fixed in the short-term. Experiences of the European Community will prove to be useful for the BRI maritime regime.

3.4 Framework for the Combined Multi-modal Transport of Goods by Sea and Land in the BRI Countries

There is also the legal liability framework for combined multi-modal transport of goods by sea and land in the BRI regions. This, too, will also need to be determined in the short-term. What is commented in Items 3.2 and 3.3 above equally applies here as well *mutantis mutandis*.

3.5 Massive Private Sector Involvement and Participation in the Infrastructure Development: Role of Public-private Partnerships

At the initial stage, the BRI Initiative may be described as a “loosely defined framework” and bilateral at the most. Participating states may lack the funds and/or expertise for its implementation. Private companies in various sectors in Hong Kong and Mainland China such as banking, construction, infrastructure investment, project planning, management and development, consultancy, etc. which have developed business relationships with many belt and road countries in the past are expected not to procrastinate by taking up the “superconnector” roles to partner with investors, intermediaries and project owners worldwide to take advantage of the massive commercial opportunities, mostly from infrastructural development projects, arising from the BRI Initiative. Experiences with large-scale crossborder infrastructure projects elsewhere in Europe and Africa have indicated that the involvement of private sector companies in the planning, financing, construction and management of large-scale cross-border infrastructure projects are very crucial. Publicprivate partnerships (PPPs) have a very crucial role to play in the ultimate success of the infrastructure projects and developments in the BRI participating countries.⁶ It will be most exciting to see how PPPs will come in and play out eventually to provide the pulse needed to drive the massive infrastructure construction and management and the applicable model law or laws that will eventually emerge in this vital sector. Serious research is urgently needed in this very crucial and niche area. The sheer size and scale of the infrastructure investments, development and construction and management contemplated in the BRI regions are hitherto unprecedented by what had taken place earlier in the other parts or regions of the world.

3.6 Opposition to BRI: How to tackle it?

Taking an academic and non-partisan stance, it must be emphasised that globalisation has taken a new and far more positive and robust promises ahead with the BRI Initiative despite some doubts, which of course, remain to be ironed out in the course of time. China should be highly commended for boldly stepping up and forward to assume leadership in trade and economic development and partnerships and taking risks with the introduction of the BRI Initiative when the WTO is not making much headway and the TPPA abandoned by the Americans. Any adverse comments or opposition to this trade initiative are short-sighted for failing to realise the positive magnitude of this huge trade initiative spearheaded and underwritten by China.⁷ It has gigantic and unprecedented commercial and business opportunities for all participating parties and countries. Most of the risks are to be borne and underwritten by the China seat least in the short term. Any state and party along the BRI regions that does not want to participate will do so at her own economic disadvantage and exclusion. If the opposition is due to geopolitical reasons, then it has to be dealt with by gentle diplomacy. A lot of public relations

⁶ The term ‘OBOR/BRI participating countries’ is more apt at this early stage of the BRI Initiative. It will be too early to talk about ‘BRI member states’ at this stage although the use of the term is irresistible in this article.

⁷ Attack by Robert Lighthizer, the US Trade Representative, that China is a threat to world trading system should be taken lightly as the WSJ had expressed concern about his appointment. Opinion of Tim Worstall in an opinion in the WSJ on 22-8-2017 pointed out that Robert is too concerned with trade deficit.

work will have to be undertaken to persuade those who have doubts and opposition to this huge business venture. The other concerns about BRI will be dealt with later in this article as they come up for discussion.

4. ASEAN MEMBER STATES' ROLE IN BRI

ASEAN with its 640 million populations is both the world's seventh-largest market and thirdlargest labour force, and has been projected to become the fourth-largest economic bloc by 2030. The launching of BRI will certainly pile more pressure and urgency on the ASEAN Economic Community to perform and integrate as an economic community. ASEAN at 51 this year is moving quite slowly. Its efforts towards a more integrated economic community only began in 2015. ASEAN as a regional economic community will have to show more serious seriousness as an economic community with the launching of the ambitious BRI Initiative. It is opined that BRI or China expects ASEAN to step up and play a more active role itself as an economic community and complement BRI with the kind of massive investments made by China in the ASEAN region. A good example is the push and commitment made by China to get the Kunming-Singapore Rail Road through in the very near future. China, too, has poured massive investments into Malaysia with investments in railroad and port construction. ASEAN Economic Community and BRI Initiative together will drive the economic development and prosperity in the South-east Asian region in the decades ahead. In return ASEAN will have to play its active role to guarantee the success itself and the greater BRI Initiative.⁸

5. THE JAPAN AND KOREAN ROLE AND STAKE IN THE BRI

The Japanese Prime Minister, Shinzo Abe, on 14th July 2017 made his intentions very clear that the Japanese businesses will benefit greatly by working hand in hand with the opportunities offered by the BRI Initiative. This is good news for the BRI Initiative. It makes good business sense for the Japanese businesses to come on board and support the BRI initiative. The earlier fear and resistance that AIIB would threaten the Asian Development Bank has proven to be unfounded. It remains to be seen whether South and North Korea will come on board the BRI. It is sincerely hoped that South Korea will not unilaterally push ahead with its "Eurasia Initiative" (EAI) at the expense of peace, stability and integration of the Korean Peninsula. In fact, it is sincerely hoped that with the real prospects of peace in the Korean Peninsula, One BRI-Korea Initiative looks feasible in the near future.⁹

6. GOOD CORPORATE GOVERNANCE REGIME FOR COMPANIES OPERATING IN THE BRI MEMBER STATES

There will be a proliferation of companies or corporations set up to serve and keep the BRI trade and business activities going and developing at the rate required by the various business stakeholders. The first thing that comes to mind is that good corporate governance. This is required of all the companies or corporations set up to provide infrastructural services along the BRI trade routes. Bad corporate regime will result in the failure of companies servicing the BRI businesses. Shrewd business strategy demands eventually that the corporate regime required and expected to be adopted will be uniform all along the BRI trade routes. The

⁸ Even Myanmar has warmed up to China for more trade links with and investment from China. See the news in Myanmar Times on 1-9-2017 under the headline "Government urged to establish Belt and Road Taskforce". Vietnam, too, is one of China's Belt and Road's 65-nation investment plan in infrastructure-- Ralph Jennings, Voice of America news, 13-6-2018. The Trans-Asia HSR passes by the Vietnamese border.

⁹ Maximilian Romer, an MPP candidate at the Hertie School of Governance in Berlin and a Yenching Scholar at Peking University, China.

corporate and the commercial law regimes of Hong Kong¹⁰ may be considered as the starting legal regimes or, perhaps, the more advanced corporate law and commercial law regimes of the European Union may be another viable option to adopt. Eventually one single and uniform corporate and commercial regime should be considered as the standard corporate and commercial regime of the BRI member states.¹¹

6.1 Management of Commercial Risks

Modern-day management of commercial risks is a portfolio that cannot be dispensed with in modern huge infrastructure construction and engineering firms. The construction firms usually build first, and then manage those projects thereafter before handing over those projects back to the project owners when the concession period expires. This matter will be of particular relevance and significance in the contexts of massive infrastructure projects coming up along the Belt and Road regions. Modern business schools will have pay serious attention to the teaching and research on commercial risks management as distinct from Insurance Law. Captive insurance is part of modern risk management. Perhaps more attention has to be paid to captive insurance with respect to risk management of giant infrastructure projects.

6.2 Packaging and Marketing of Insurance Products for the Commercial Risks in the Belt and Road Member States

Of particular relevance and importance in terms of business opportunities is the transit insurance needed for the safety of goods and passengers carried along the Belt and Road railway and maritime routes. This sector is besides the insurance of the infrastructure facilities along the same routes. Reverting to the goods and passengers in transit insurance, the initial focus will be more on the insurance of goods in transit. Eventually when the High Speed Railway links come in for the rapid movement of passengers along the same routes, insurance of passengers in transit, too, will become relevant and necessary. The need for big insurance companies, marine and non-marine, with the packaging and marketing of the right insurance products and the handling and payment of insurance claims will be important to the insured's. Lloyds' insurance policies will be of particular relevance and significance here. This sector will prove to be important and lucrative in terms of the business opportunities for local marine and non-marine insurance companies. They may like to make forays in marine, goods in transit as well as passengers insurance, too, in the future. Local insurance companies may at the moment lack the exposure and expertise in the insurance sector. Joint ventures between the local and foreign insurance companies (with the Lloyds' of London and/or the London Market) may be a viable option in the short and medium for the Belt and Road insurance market. The size of the said insurance market is expected to be large when the movement of goods and passengers go into full swing in the Belt and Road regions. Again here the European Community's experiences in facing and handling the same may prove to be relevant and useful here for the Belt and Road insurance market.

¹⁰ Thanks to the British legacy, the Hong Kong commercial law regimes are to be viewed as a boon rather than a bane to the development of commercial law in the BRI trade and commercial belt. But the more important and fundamental side question is whether PRC China should consider making the English commercial law system as the eventual commercial law of the BRI trade belt as well the commercial law of PRC China itself! This is a question that can only be decided by the Chinese themselves. The Chinese are wise and capable enough to make this vital decision which can really take them go global.

¹¹ It is frankly admitted that the term "BRI member states" as used in this article is not appropriate at this early stage of the implementation of the BRI Initiative. But it is contemplated that at some stage later, this phenomenon is inevitable considering that the Chinese will definitely not let this initiative fail.

7. COMMERCIAL DISPUTES RESOLUTION AND CONFLICTS OF LAW

Commercial disputes are unavoidable in business transactions. The trend today is that businessmen do not like their commercial disputes to be fought out by using the conventional adversarial system of litigation in the courts which may turn out to be highly bitter, costly, time consuming and energy sapping affairs for the parties to a dispute. At the end of the day, both the winner and loser may regret the costs, time and effort spent in litigation through the conventional court system. Consequently, most commercial contracts or agreements nowadays have at least the standard arbitration clause written into them. The rule is that if there is an arbitration clause in a commercial agreement, such a clause is binding on the parties to a contract. No party to such a clause can bypass the clause and bring the dispute to the court for litigation.

Arbitration clause is one thing, but two other related matters must also be highlighted here. The first is the applicable law to an agreement or contract (i.e. the proper law of the contract). It must be clearly stated in the agreement. If not, search for the applicable law may prove to be a costly affair. The second related matter is the forum of dispute resolution. This matter, too, should not be left to the court to determine. The matters highlighted in the foregoing are important to dispute resolutions in the context of modern businesses. It may prove to be an expensive and bitter affair if it is not handled properly by clear contractual provisions in the business agreements.

In mainland China, there are two internationally renowned commercial arbitration centres. They are the Beijing International Arbitration Centre (BIAC) and Shanghai International Arbitration Centre (SHIAC). In Hong Kong, arbitration of commercial disputes can be handled by the Hong Kong International Arbitration Centre (HKIAC). Elsewhere in Southeast Asia, we have the Singapore International Arbitration Centre (SIAC) and the Asian International Arbitration (AIAC) in Kuala Lumpur. Save for the costs involved and with great respect to the others, the best arbitration centres in the China and South-east Asian regions are either the SIAC or HKIAC in terms of the quality of services provided. AIAC is just as competent as the others in the region if one is too concerned about costs of arbitration.

8. THE FUTURE OF BRI

As BRI is a relatively new global trade initiative, much hard work remains to be accomplished and many hurdles and obstacles will have to be faced and tackled over the next few decades. The Kunming-Singapore Rail Road is expected to be through in the next few years once the Indochinese section is completed. The only snag now lies in the Laotian section. The Chinese railroad contractors are now working furiously to complete that missing link. Once the Laotian link is completed, the Kunming-Singapore line will be through. Those railroads heading west towards the European cities have been up and running. The Beijing-London HSR is expected to be launched and operational by 2020. The overland road links with the Indian sub-continental countries may hopefully be through as well in the near future. India is expected to raise some initial resistance and objection to BRI. Hopefully, the resistance may be contained through skilful and patient diplomacy on the Chinese side. It must be pointed out and stressed that India is a huge country with much to share and contribute in terms of basic infrastructure investments and development, technological advancement as well as contributions in terms of legal infrastructure input needed to get the BRI basic legal framework up and running in the foreseeable future. Additionally, India as a biggest democracy in the world has much to contribute, too, in terms of rule of law, basic human rights, labour and environmental norms as well as good administrative and corporate governance norms. Hence, India is a crucial and

equal business partner in the efforts to establish the BRI land links with its ports on the shores of the Indian Ocean. Forays into Russia, Central Asian countries, Arab and Middle Eastern countries and countries in the African Continent are not expected to meet with resistance. In the circumstances, there is no turning back for BRI Initiative now. Much groundwork has been laid and the BRI Initiative is on the forward march. Full and complete linkages of the overland trade routes may take a decade at least to complete. In the context of the success of the BRI Initiative, it will be most useful and relevant to look at ASEAN grouping at 51 years now after its formation in 1967. ASEAN celebrated its 50th Anniversary on 8th August 2017. ASEAN is now making its march towards a rule-based Economic Community. It was once said that most observers did not give ASEAN a chance to survive as it began very slowly as an association of loosely formed states without formal rules and with its infamous policy of non-intervention in the internal affairs of its member states. There is no turning back for the ASEAN Economic Community now. The success story of ASEAN Economic Community will have much to inspire the forward march and ultimate success of the BRI Initiative. Of course, the march towards a BRI Economic Community is undoubtedly far fetch at the present moment, but there will be light at the end of the tunnel if China uses the right business and geo-political strategy towards achieving that end. To look forward, it is best to quote an opinion of a World Bank official about the future and width of BRI:

“OBOR goes well beyond infrastructure, envisioning closer coordination of economic development policies, harmonization of technical standards for infrastructure, removal of investment and trade barriers, establishment of free trade areas, financial cooperation and ‘people to people bonds’ involving cultural and academic exchanges, personnel exchanges and cooperation, media cooperation, youth and women exchanges, and volunteer services.”¹²

In fact, it is interesting to read a piece by Ivan Sekretarev on 13th September 2017 that outside the BRI Initiative, China has already gone on a massive acquisition trails of the world's iconic brands with the objective of creating a global financial empire to shore up the BRI Initiative.

8.1 Economic Regions or Corridors of the BRI Initiative

As BRI is a gigantic trade and investment belt spanning from China across Asia and Africa up to Western Europe, infrastructure, economic investment and development are undertaken and spearheaded by China as per the economic corridors identified and planned. To illustrate the point, some of the economic corridors identified and planned are as follows:

- a) China-Pakistan Economic Corridor (CPEC);
- b) Bangladesh, China, India, Myanmar Economic Corridor (BCIM);
- c) China-Mongolia-Russia Economic Corridor;
- d) China-Indochina Peninsula Economic Corridor;
- e) New Eurasian Land Bridge; and
- f) The proposed China-Nepal-India Trilateral Cooperation.

8.2 E-contracts, E-commerce, E-payment and E-government in the 21st Century

The 21st century has ushered in the era of e-commerce and e-government. E-contracts, emarketing and e-banking and e-logistics, etc. will be the hallmarks of e-commerce and e-government leading to a digital economy - domestic, regional or global. Cyber security will

¹² Bert Hofman, *supra* note 2.

further enhance e-commerce, e-government and digital economy of every country in the 21st Century. In this context, it must be pointed out that PRC China is the world's digital and ecommerce powerhouse. Working with China in vital area (Jack Ma's One Click) is an added advantage.

8.2.1 Digital Belt and Road (DBAR)

Digital Belt and Road (DBAR) is distinct from E-commerce or One Click. Digital Belt and Road (DBAR) programme is another recent (2016) initiative by PRC China as an international business venture in support of sustainable development goals (SGSs) at the national, regional and global levels for the purpose of sharing "expertise, knowledge, technologies, and data to demonstrate the role of Earth observation science and technology and big Earth data applications to support large-scale development in the Belt and Road member states. It was put together by the Chinese scientists (at the Centre for Earth Observation and Digital Earth, Chinese Academy of Sciences, Beijing, China) in cooperation with experts from 19 countries and 7 international organizations.¹³¹⁴

8.3 Making of a BRI Regime: Compliance with Rule of Law, Basic Rights, Fairness, Inclusiveness, Sustainability and CSR

This will be the most crucial component that may give a positive or negative image and rating to China's BRI Initiative in the crucial years ahead. It is also a very sensitive issue so far as China is concerned giving its Communist background. Nevertheless, since it is an important issue bearing serious economic implications on the future of BRI, some discussion thereof is deemed inevitable.

8.3.1 Addressing the Concerns raised about BRI by Independent Observers

Independent observers and commentators have expressed grave concerns that China's BRI Initiative is 'global commerce on China's terms'. It has been pointed out that poorer developing countries are sucked into China's global economic orbit because of the harsh terms of the loan agreements which eventually sucked the debtor countries into a debt trap from which there could be no escape. Is this kind of adverse criticism against the BRI justifiable? Let us take the case of Sri Lanka, for example. Sri Lanka had signed a US \$1.1 billion deal with China for control and development of the deep-sea port of Hambantota. Under the terms of the agreement, a state-run Chinese company will acquire a 99-year lease on the port and about 15,000 acres of land for building an industrial zone. The interest rate is 6.3%. This interest rate is considered by many observers as exorbitant. When the debtor country cannot repay the loan, the investor gets ownership of the project. Observers have pointed out that the Sri Lanka's Hambantota deal looks like an example of this mindboggling strategy to grab poor countries' land at low premium for the investors. The Chinese have made much investment in the Malaysian infrastructure projects of late. The Myanmar government, too, has approached China for infrastructure investment recently.¹⁵ An attempt will be made elsewhere to provide some

¹³ Huadong Guo, Jie Liu, Yubao Qiu, Massimo Menenti, Fang Chen, Paul F. Uhler, Li Zhang, John van Genderen, Dong Liang, Ishwaran Natarajan, Lanwei Zhu & Jiuliang Liu (2018), The Digital Belt and Road Program in Support of Regional Sustainability, *International Journal of Digital Earth*, 11:7, 657-

¹⁴, DOI: [10.1080/17538947.2018.1471790](https://doi.org/10.1080/17538947.2018.1471790).

¹⁵ The Yangon Central railway infrastructure project saw the Chinese and Singaporean contractors working on a joint venture with a Myanmar contractor.

justification or condemnation for this kind of investment strategy of the investing state. It is beyond the scope of this article look into this objection.¹⁶

There are other serious concerns, too, regarding the BRI Initiative which needs to be addressed. Some of them may be noted below:

- a) The allegation that China will export its pollution and unemployment problems back home to her overseas Belt and Road member states;
- b) The allegation that China will bring along not only the professional and skilled workers but unskilled workers as well including the cooks to her overseas investment territories thus depriving the host countries of employment opportunities and transfer of knowledge and sharing of economic benefits required by the developing host countries; and
- c) Concerns about compliances with the rule of law, basic human rights, fairness, inclusiveness, sustainability and CSR.

8.3.2 Compliance with the Rule of law, Basic Human Rights, Fairness, Inclusiveness, Sustainability and CSR

China is taunted to be the world's largest economic superpower in the 21st Century with the expected success in her Belt and Road Initiative involving her most ambitious 21st Century Maritime Silk Road and the revival of her Old Overland Silk Road westwards across Central Asia, Middle East, Africa and terminating in the European cities. However, there are serious concerns expressed by rights groups that there are serious deficiencies back home in China in terms of compliances with rule of law, basic human rights, fairness, inclusiveness, sustainability and CSR. Critics fear that China will probably ship these non-compliances overseas with impunity. History has always reminded us of China's notorious Tiananmen Square's Crackdown of pro-democracy activists in 1989, her treatment of the late Liu Xiaobo and his widow and China's recent back-tracking on the Hong Kong's One Country Two Systems treaty with Hong Kong and Great Britain. Those in charge of Belt and Road Initiative need to address these serious concerns in their dealings with BRI member states. The writers merely wish to make two remarks here. The first is that these concerns and worries are real and serious and will not fade away easily if China aspires to be the world's next super economic powerhouse of the 21st Century. Secondly, the writers wish to point out and emphasise that it only makes good business sense that if one country aspires to become a super economic power, the government has to empower and liberalise her subjects or citizens and others so as to take her country and her subjects or the world to greater heights of achievement in the future. Perhaps, China's one-country-two-systems experiment may influence China eventually to tilt more towards democratic practices in PRC itself rather than just only in Hong Kong or Macau.

8.4 Lessons from the European Union or elsewhere

City University of Hong Kong (CityU), together with Tsinghua University, have agreed with the UN Economic Commission for Europe (UNECE) to establish the International PPP Specialist Centre of Excellence for Public Transport Logistics. Further, European Community experiences on railroad operations and motorways of the seas could be another useful source of corroboration and learning for the BRI research institutions. Research institutions focusing on Belt and Road Initiative will be covered separately below.

¹⁶ Teoh and Ong, *The Dragon Stirs: The New Silk Road*, (Kuala Lumpur: Kanyin Publications), 2018 is a good book to read. One must learn how to transact business smartly with the Dragon.

8.5 The Future of BRI: The Long-term Plans and Objectives

At the rate the BRI Initiative is taking off progressively and simultaneously in different parts of the BRI regions since its launch in 2013, it is crystal clear that BRI is probably a new wave of globalisation of world trade in the making for the 21st Century and beyond. Now, that the BRI has been entrenched in the Constitution of PRC China since the 19th National Congress of the Chinese Communist Party in October 2017. It is now too late now to stop the BRI wave or onslaught. With stalled WTO trade negotiations and failure of TPPA, the fate of the BRI Initiative looks more and more promising! One of the trade initiatives has to succeed and China's BRI looks more likely to succeed. Since multilateralism has failed to gain traction, perhaps, the new trade initiative spearheaded by China looks more likely to succeed in the long term. This is not to deny that multilateralism is not a viable option. It is speculated that it will be the long-term sustainable strategy. Indeed the whole BRI project will eventually link up with the Latin American free trade regions or areas because the Chinese companies and business have already gained footholds in some Latin American countries (for example, Chile and Bolivia). Better connectivity on both sides of Atlantic will allow goods and services from either side to reach or have access to each other. This will eventually force USA and Canada and Latin American trade areas to come into the BRI trade orbit. As has been emphasised earlier that to stay out of the global business and trade orbit is business suicide or economic ruins or exclusion for modern trading nations worldwide. Such is the forecasted Belt and Road global business waves or influences in the next few decades. In the circumstances, the move or trend towards a more rule-based Belt and Road business regime is highly likely to materialise in the long run as it makes more business sense to be linked and governed by a formal legal trade regime, i.e. the BRI Economic Community. The 'One (Business) Culture, One Region' vision is perhaps a fanciful dream which may not materialise even in the long run! There is a need to strive for international human rights, commercial, and good governance norms in the BRI member states and, in particular, PRC China, as the leader of the BRI commercial bloc. PRC China, at the present moment, fails most of the basic norms of international human rights conventions. As a leader of the projected biggest regional or global commercial trading bloc in the future, PRC China has much to learn and gain from the relevant basic norms of European Union or UN or Hong Kong Basic Law. The sooner these norms are complied with by PRC China, the better it would be for the BRI member states particularly China. Eventually in the long term the BRI trading bloc is expected to move towards a rule-based trading bloc complying with basic regional or global commercial and human rights norms. One may query why also the international or regional human rights norms? This is because the BRI member states' trading and commercial activities will impact seriously and adversely the lives of so many citizens of the BRI member states who are directly affected by those business and trade activities.

8.6 Beyond BRI: Connecting with North and South American Trade Belts and Roads

It is speculated that eventually Asian-EU-Pacific BRI trade belt and road will join and link up with the North-and-South American Trade Routes or areas making them the eventual globalised trade routes of the 21st century and beyond. BRI is the next wave of globalisation of world trade in the making. It is speculated that BRI will ultimately be in charge of the whole global business and trade orbit ensuring or guaranteeing all member states free access and connectivity to the global business supply chains and trade.

8.7 How Much Stake do the Member States have in the BRI's Business Opportunities?

It is proper at this juncture to look into the pertinent question of how much stake do the member states of BRI have in the business opportunities generated by the massive trade infrastructure investments and developments as well as the other trade opportunities and benefits arising from these gigantic global trade and business undertakings in the BRI's trade corridors and maritime trade routes. It is argued that the BRI is a huge global business partnership¹⁷ of the member states. Though China spearheads, underwrites and bears most of the initial business and investment risks incurred in the BRI free trade region or regions, the member states, too, have a huge stake, in those business, trade and investment opportunities. There are enough business and investment opportunities for all. As BRI may be divided into development and trade corridors, leaving out its maritime counterpart, some of those opportunities and associated activities that arise may be dealt with at the level of each trade and development corridor. Moreover, some member countries may contribute more because they have the requisite expertise and finances needed for certain kinds of trade activities. For example, in terms of good governance, democratic practices, human rights and labour norms, India is poised to contribute more than China. Hong Kong, too, may have a lot to contribute in terms banking expertise, dispute settlement mechanisms and corporate governance. Moreover, the costs factor may allocate certain business activities to certain parts of the BRI's development corridors. Therefore, member states need not have to worry too much about China grabbing the lion share of those opportunities. Eventually, fair competition rules may help to determine, allocate and distribute how much may each development corridor get out of those business opportunities generated. It is, therefore, argued that the BRI trade regime is a rule-based trade regime. It is inclusive and no country or countries along the BRI trade belt and road is/are excluded. Serious efforts must be made by all trading partners to ensure the success of this important objective.

8.8 What is the Role of UN's Model Business Laws in the BRI Business Law Regimes? As the construction of infrastructural activities go cross border, regional and ultimately global, what then is the role of UN's Model Laws in the BRI business law regimes? It can be envisaged quite easily at this stage that the UN's Model Laws, for example, the UN model law for PPP construction and management of railroads, bridges or ports contracts will be very relevant, acceptable and applicable to the relevant business activities undertaken by BRI member states. Those UN models laws may or need not be fully adopted but they could be readily modified to suit local circumstances at minimal costs.¹⁸ In relation with the PPP model laws, for example, the contract law of individual member states may not be encouraged for the sake of uniformity, certainty and globality. Another type of UN model law that could be adopted by the BRI member states are the ILO's labour standards for the benefits and welfare of workers engaged in BRI's trade, construction and management contracts, for example. The UN International Human Rights Conventions, too, are of great relevance to China and the BRI member states in the future.

8.9 Towards a BRI Economic Community in the Long Run?

As China has shown great leadership, vision, commitment and promises towards the grand BRI trade routes initiative ever since its launch in September and October 2013 by the President of China, Mr. Xi Jinping, international bodies pushing for model laws have been interested also

¹⁷ The term 'partnership' here is not used in the sense used in Company Law contrasting it with company as a separate legal entity.

¹⁸ The UN's Model Law body is already at work in respect of the PPP Model law. The UN Economic Commission for Europe (UNECE) had initiated an agreement with City University of Hong Kong and Tsinghua University in Beijing in January 2016 in Geneva to advance Public Private Partnerships (PPPs) model law within China's BRI initiative.

to promote their model law regimes to China and its agencies in charge of the BRI Initiative. This is obvious even if we were to confine our attention to the construction of BRI's trade routes alone as they were launched in 2013, not the extended and ultimate BRI product as speculated in Item 8.8 of this article. For example, the UN Economic Commission for Europe (UNECE) had signed an agreement with City University of Hong Kong and Tsinghua University in Beijing in January 2016 in Geneva to advance Public Private Partnerships (PPPs) model law within China's BRI initiative. This is a classic example of China's willing acceptance of PPP model laws in its BRI infrastructure projects. This augurs well for the future of the BRI Initiative. This is not surprising in the context of UN's model trade laws. As the BRI Initiative is many times larger than the Economic Commission for Europe's trade project, it is very likely that in the UN itself a trade commission dedicated to the BRI Initiative will eventually be set up as the BRI Initiative develops into a gigantic global trade bloc. Of course, in the long run, there is a high probability that the BRI Initiative may eventually graduate into a rule-based economic community like the European Union and the ASEAN Economic Community.¹⁹

9. CONCLUSION

In conclusion, it must be reiterated that this article covered a wide spectrum of China's ambitious Belt and Road Initiative's general features. Only the more salient and important ones have been highlighted with emphasis on the legal aspects thereof. It cannot be gainsaid that the potential economic and financial prospects of the BRI for the participating countries will be immense in the long term. Only time will tell how much the global economy will be shaped by this very ambitious global economic development and trade initiative. The writers wish to announce that more works will be in the making in the coming years regarding the salient features of the BRI.²⁰

¹⁹ For more information of China's Belt and Road Initiative, please visit China's Belt and Road Initiative's official web portal at: <http://english.gov.cn/beltAndRoad/>. CHINADAILY is a weekly newspaper in English covering and highlighting China's foreign trade and investments. Hong Kong Trade and Development Council (HKTDC) is another website (<http://www.hktdc.com/info/trade-events/EX/en/Exhibitions.htm>) actively promoting the activities of the BRI.

²⁰ This BRI research group wishes to announce that Dr. Mohammad Abu Taher of Southeast University will join this group as the representative from Bangladesh. He is expected to beef up the group's strength in the area of the rights of women and elders.

Admissibility of DNA Evidence in Bangladesh: Options and Challenges

Md. Ayub Ali²¹

ABSTRACT

This article explores the scope for the use of DNA typing as evidence in the proceeding of courts in Bangladesh. DNA is the fundamental building block for the entire genetic makeup of human being that comes into the aids of courts to unfold complex issues of civil and criminal nature. Like some other countries, Bangladesh has enacted DNA Act providing for the admissibility of DNA evidence in civil and criminal proceedings. Judges and lawyers, however, have often to face challenges in overcoming objections to the admissibility of DNA evidence. In addition, checking misuse of DNA profiling is a serious issue that should be handled strictly. This paper makes a critical analysis of the existing legal scholarships, relevant legislation, and case laws to pinpoint the challenges in regard to the use of DNA evidence in Bangladesh. The author argues that absence of a legal protocol in regard to the standard of admissibility of DNA evidence, inadequate laboratory standards and techniques, lack of training of judges and lawyers, and investigation officers on forensic science create obstacles to use of DNA evidence.

Keywords: DNA Profile, Crime Scene, Authenticity, Accuracy, Admissibility.

1. INTRODUCTION

DNA is called the fingerprint of 21st century that can conclusively identify a person and thereby can either link a suspect to, or eliminate him from, a crime. As per *Edmond Locard's* Exchange Principle that every contact leaves a trace, DNA is one of the important evidence the investigating officers collect from crime scenes that can lead to a significant breakthrough in criminal investigation. However, DNA technology has given rise to legal and technical challenges in legal proceedings in Bangladesh, with respect to the proof of any crime of dispute. Unlike in some other countries, the people involved in the administration of justice such as lawyers, investigating officers and judges in Bangladesh are hardly skilled enough to properly evaluate the DNA evidence. An underlying cause for this scenario may be attributed to the shortcomings in the existing legal system and the absence of a functioning infrastructural mechanism as well as the lack of a skilled staff. Considering the huge number of cases pending before the courts and the remarkably poor conviction rate,²² it is imperative to exploit the benefit of DNA technology both in civil and criminal proceedings. Effective use of DNA evidence would have undoubtedly improved the quality of justice or prevented miscarriage of justice. This paper seeks to contribute to the law of evidence by way of ascertaining the barriers to the admissibility of DNA evidence.

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²² The rate of conviction in Bangladesh is below 15%; *vide*, the Workshop Paper of ADB on 'Strengthening the Criminal Justice System' ADB Regional Workshop in Dhaka, held on 30-31 May 2006, available at <https://think-asia.org/bitstream/handle/11540/2949/strengthening-criminal-justice-system.pdf?sequence=1>, retrieved on 13th May, 2018.

2. CONCEPTUALIZING DNA EVIDENCE

Deoxyribonucleic Acid (DNA) is the chemical dispatcher for genetic information,²³ while DNA evidence is biological material from which DNA is or can be extracted.^{24,25} DNA contains the hereditary materials that are used in the development and functioning of all known living organisms.²⁶ The reason it is called ‘deoxyribonucleic acid’ is that it is an acid that is found in every cell of the human body which contains lots of sugar group (ribo) attached to it and each sugar group has a missing oxygen molecule (deoxy)²⁷ that encodes and carries the entire hereditary information of each individual.

The important feature of DNA for forensic purposes is that with the exception of identical twins, no two individuals have the same DNA configuration.²⁸ The DNA tests allow forensic scientists to look at DNA molecules from an individual or a piece of evidence implicated/concerned and compare them with DNA samples from other sources.²⁹ The DNA evidence can establish, to a virtual certainty, the presence or the absence of a defendant at the scene of the crime³⁰ and thereby come into the aid of the court to link or eliminate a person to or from a crime.

The DNA evidence first made its way into the courts in 1986, when police in England asked molecular biologist Alec Jeffrey, who had begun investigating the use of DNA for forensics, to use DNA to verify the confession of a 17-year-old boy in two rape-murders in the English Midlands. The tests proved that the teenager was in fact not the perpetrator. Instead, the actual offender was eventually caught using the DNA testing.³¹ The first DNA-based conviction in the United States took place in 1987 when the Circuit Court in the Orange County, Florida, convicted Tommy Lee Andrews for rape after DNA tests matched his DNA from a blood sample with that of semen traces found in the victim’s body or costume.³² In the constitutional case of *Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) vs. Ministry of Home Affairs and Others*,³³ a former Deputy Inspector General of Police was held accused of illegally having the custody of more than seven children, on the basis of the DNA evidence. The brief facts of the case is that after reading the news item of seven children’s delivery of the wife of a former

²³ Michael J. Pelczar, Jr. et al., *Microbiology: Concepts and Applications* 350-400 (1993) (explaining the structure and characteristics of (DNA); Lansing M. Prescott et al., *Microbiology* 193-201, 236-307 (2nd ed. 1993).

²⁴ *ABA Standards for Criminal Justice: DNA Evidence*, (3rd ed.) the American Bar Association, USA, 2007, P. 25.

²⁶ Walter Hoffmann, *If Evolution is the Answer Then What’s the Question?* Xlibris Corporation, 2011, p. 13.

²⁷ Spencer Wells, *Deep Ancestry: Inside the Genographic Project: The Landmark DNA Quest to Decipher our Distant Past*, National Geographic Society, 2006, p. 14.

²⁸ Ann Barbara Hocking et al, ‘DNA, Human Rights and The Criminal Justice System’ *eLaw Journal: Australian Journal of Human Rights*, Vol.3, 1997
<<http://www.austlii.edu.au/au/journals/AJHR/1997/index.html>> retrieved on 12 June 2017.

²⁹ U.S. Congress Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Tests*, at 3-6, 4150; Prescott et al., *Ibid*, at 197.

³⁰ George Bundy Smith and Janet A. Gordon, *the Admission of DNA Evidence in State and Federal Courts*, 65 *Fordham L. Rev.* 2465 (1997). Available at < <http://ir.lawnet.fordham.edu/flr/vol65/iss6/4>>

³¹ Lisa Calandro, Dennis J. Reeder and Karen Cormier, “*Evolution of DNA Evidence for Crime Solving - A Judicial and Legislative History*,” *Forensic Magazine*, 2005.
<http://www.forensicmag.com/article/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislativehistory>, retrieved on January 18, 2017.

³² *Andrews vs. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988).

³³ Writ Petition No. 5359 of 2006. Available at
<http://www.supremecourt.gov.bd/resources/documents/216639_Writ_Petition_5359-06.pdf> retrieved on January 18, 2017.

Deputy Inspector General of Police (DIG) in a single instance of pregnancy, a serious doubt was created about their parenthood in the mind of the general public. Suspicion was also created amongst the people as to the paternity of the seven children that prompted different organization to move the Court with a writ petition for an order of DNA test of the 7 children. In a civil revision case³⁴ on dower and maintenance for the petitioner and her child, the issue of legitimacy of the child Md. Biman came up. The plaintiff Beautiful Bibi filed an application for DNA (deoxyribonucleic acid) test of the child Md. Biman and also of the defendant Saydur Rahman and for recording additional evidence on the matter. The High Court Division of the Supreme Court of Bangladesh held that the DNA test report prepared by the Government DNA Laboratory was a credible piece of evidence. It was also held that DNA evidence is accepted worldwide as a reliable scientific method for various purposes including determination of parentage.

3. COLLECTION OF DNA EVIDENCE

Collection and preservation of DNA evidence is a great challenge for the prosecution inasmuch as the admissibility of the DNA evidence before the court always depends on its accurate and proper collection, preservation and documentation which can satisfy the court that the evidence put in front of it is reliable.³⁵ In order to submit a piece of DNA evidence for the admission thereof by the court, the prosecution has to produce to courts the particulars of every stage of collecting the evidence, the testing procedure followed and result found in laboratories, and an interpretation of the DNA evidence. DNA evidence may be collected from the body of persons, dead bodies, from crime scenes or from other locations. However, a complete guideline on the use of the DNA has yet to be emerged. Implementation of the guideline for collecting DNA evidence as provided by the Deoxyribonucleic Acid (DNA) Act has become problematic for the absence of implementing Rules.³⁶

3.1 Collection of DNA Samples from Body of Victims, Accused and Others

Adequate caution must be taken in collecting DNA samples from people in order to ensure their privacy, dignity, and human rights, as it is an established principle that individuals own their own DNA and no one can use it without authorization.³⁷ According to International Covenant on Civil and Political Rights (ICCPR), no one shall be subjected to medical and scientific experimentation without their free consent.³⁸ As a ratifying country to ICCPR, Bangladesh has included the above provision in the Deoxyribonucleic Acid (DNA) Act. Accordingly, without written consent of the concerned person or the order of the competent court, as the case may be, and without the presence of at least two witnesses, DNA samples cannot be collected.³⁹

As per section 4, the Police officer will request any victim, suspect or accused or any person involved in the alleged crime for providing a DNA sample and in no circumstances the police

³⁴ *Beautiful Bibi vs. Sydur Rahman*, 67 DLR (2015), P. 1.

³⁵ Nirpat Patel, et al. "The Role of DNA in Criminal Investigation – Admissibility in Indian Legal System and Future Perspectives". *International Journal of Humanities and Social Science Invention*, Volume 2, Issue 7, 2013, pp.15-21.

³⁶ Deoxyribonucleic Acid (DNA) Act, Section 39.

³⁷ Annas, 'Genetic Privacy', in David Lazer (ed), *DNA and the Criminal Justice System: The Technology of Justice*, MIT Press, 2004, p.135.

³⁸ International Covenant on Civil and Political Rights (ICCPR), Art.7.

³⁹ *Vide*, the Deoxyribonucleic Acid (DNA) Act, 2014, Ss. 4,6,10.

can compel the individual so to provide a DNA sample.⁴⁰ In case the person so requested for a DNA sample fails to give consent within three hours, he/she will be deemed to have refused to give consent and the fact of such refusal shall be written in a prescribed form to be submitted to a competent court praying for an order of collecting DNA sample.¹⁹ The court after hearing both the parties and considering the documents before it may order for the collection of DNA sample.⁴¹ Once the above formalities are complied with, DNA samples are collected and then sent forward to the forensic laboratory.⁴² In rape cases, for instance, the forensic exhibits like cloth worn by the victims, undergarments, bed-sheets, etc. internal vaginal swabs, and slides of microscopic examination, along with the blood samples of the victim and/or the accused person, are collected. The vaginal swabs should be collected within 72 hours of the alleged incidence. If the medical examination is delayed more than 72 hours, the above forensic exhibits must be sent to the laboratory along with the victim/victim's blood sample.

In order to collect DNA samples from a suspect with a murder, the National Forensic DNA Profiling Laboratory (NFDPL) requires the production of forensic exhibits that might have been left by the suspects, such as weapon, garments, hat, eyeglasses chewing gum, cigarette butts, tooth picks etc. along with the tissue sample from the victim and blood samples from the suspects. For the identification of the deceased, the blood samples of the nearest relations like mother, father, husband, wife and children along with the biological sample or objects relevant to the case (body parts, body remains such as bones, teeth and hairs with root, used cloths etc.) are required. The exhibit(s) should be packed and sealed in a paper bag without using polythene or plastic bags. All the samples should accompany a Forwarding Note (Form 1),⁴³ a Sexual Assault Examination Form for the victim (Form 3),⁴⁴ and an Identification Form (Form 2)⁴⁵ for the accused, duly filled in and signed in the presence of a witness (Magistrate/Public Representative/ Medical Officer).

3.2 Collection of DNA Samples from the Crime Scene

'Crime scene' is a place where a crime has been committed or where an object is found from the victim's body or from the body of any suspected person or an object carried in there by any relevant person, or where an object related to the crime is found.⁴⁶ Crime scene investigation (CSI) is one of the significant segments of criminal investigation. Of the various kinds of evidence encountered in the crime scene, the most useful evidence is DNA evidence. In order to exploit the DNA evidence, the investigating officer (IO) needs to know where to look for it, how to collect it, and how to package it.⁴⁷ The most common things usually looked for as a DNA evidence at the crime scene are blood, semen, hair, and saliva. DNA may also be found in urine, skin cells, perspiration, teeth, bone, and internal organs of a human body. If a bullet goes clean through the suspect, the bullet itself can be tested for traces of DNA. After all, DNA

⁴⁰ Ibid, section 6(1). ¹⁹

Ibid, section 7.

⁴¹ Ibid, section 8.

⁴² Procedures for Collection, Preservation and Transportation of Sample for DNA Analysis, available at <<http://www.mspvaw.gov.bd/images/DownloadedFile/scp.pdf>> retrieved on 2 July 2017.

⁴³ Prescribed by the National Forensic DNA Profiling Laboratory (NFDPL) <<http://www.mspvaw.gov.bd/images/DownloadedFile/scp.pdf>> retrieved on 2 July 2017.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ The Deoxyribonucleic Acid (DNA) Act, 2014, S. 2(1).

⁴⁷ Dick Warrington, *DNA Collection and Packaging*, Forensic Science Magazine.

<<https://www.forensicmag.com/article/2009/04/dna-collection-and-packaging>> retrieved on 4 July 2017. ²⁷ Ibid.

can be traced on anything relevant, from dirty laundry to eyeglasses, cigarettes, bottles, and drinking glasses, partial fingernails (both broken and clipped), masks, gloves, the steering wheel of a car, door knobs and handles, and cabinets. All these items should be collected and tested for the purpose of determining DNA.

While collecting DNA from crime scene, it is imperative to identify the victim's DNA as well as the DNA of the suspects and anyone else who had access to the evidence and to guard against contamination.²⁷ Contamination is a serious issue to use DNA evidence into the admissibility of the court. In order to avoid contamination, the persons involved should follow the following procedures as prescribed by the National Forensic DNA Profiling Laboratory (NFDPL):⁴⁸

- i. to wear gloves while handling an evidence; ii. to handle on item at a time and change the gloves before starting another one; iii. to avoid touching the area where DNA might exist; iv. to avoid talking, sneezing, and coughing over the evidence;
- v. to avoid eating, drinking or smoking when collecting the evidence; and vi. to avoid touching nose, face and mouth when collecting evidence.

After collecting DNA evidence from the crime scene, caution should be taken in packaging and transporting the same to the laboratory. The DNA evidence should be air-dried before packing into new paper bags or envelopes which will have to be properly labeled and sealed and signed by the investigating officer in presence of a witness, e.g. Magistrate or Public Representative or Medical Officer. Then the DNA evidence is to be sent to the laboratory through the chain of custody with proper documentation.⁴⁹ The investigating officer will have to ensure complete documentation as well as the legality, relevance, authenticity, integrity and continuity of the chain of possession of the DNA evidence.⁵⁰

4. ADMISSIBILITY OF DNA EVIDENCE IN THE COURTS

Admissibility and relevance is not the same thing. By relevance is meant the degree of connection and probative value between a fact that is given in evidence and the issue to be proved. Admissibility means the process whereby the court determines whether the law of evidence permits that relevant evidence to be received by the court. Evidential relevance is a question of fact which is a duty of lawyers to prove, meaning that the counsels need to decide whether to tender such evidence in the court for the purpose of admissibility. On the other hand, admissibility refers to the quality of something for being admitted by the court as any evidence.⁵¹ Once the evidence in question passes the test of relevance, it is most likely to be taken as admissible evidence.

It is a well-known maxim in the Evidence Act that 'all admissible facts are relevant, but all relevant facts are not admissible.' When the court admits the evidence with regard to a fact, it is presumed that the court has first been satisfied that the fact is relevant for the purpose of

⁴⁸ Procedures for Collection, Preservation and Transportation of Sample for DNA Analysis, available at <<http://www.mspvaw.gov.bd/images/DownloadedFile/scp.pdf>> retrieved on 2 July 2017.

⁴⁹ Ibid.

⁵⁰ BR Sharma, *Scientific Crime Investigation*, New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2006, p. 158.

⁵¹ *Public Prosecutor vs. Dato Seri Anwar Bin Ibrahim*, Federal Court of Malaysia (Appellate Jurisdiction) Criminal Appeal No: 05-21-02/2014, available at <<http://elawjournal.com/wp-content/uploads/cases/2017/11/3-ccdbc82cf352ac05add0c8f775c23216/05-21-02-2014.pdf>> retrieved on 18 April 2018.

proving the fact in issue.⁵² But once a fact is proved to be relevant, there cannot be any presumption that the fact would be admitted by the court as there may be bars in law to its admission into evidence. For instance, ‘privileged communications’ may be shown to be relevant, yet the court may not admit them generally in evidence.³³

Section 45 of the Evidence Act,³⁴ provides that when the Court has to form an opinion upon a point of science, or art, or as to identity of hand writing or finger impressions, the opinions upon that point of persons specially skilled in science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. As such forensic evidence, which includes DNA evidence, is relevant fact.

Again, the DNA Act⁵³ categorically provides that a report containing DNA profile may be treated as admissible evidence. But still there is a vacuum in law as to what would be the standard of admissibility. The major challenge for the legal actors to determine the validity and reliability of the DNA evidence is to establish the fact that the same bears the authenticity and accuracy in terms of scientific standards. The common flaws in this regard that may affect the validity and reliability of DNA forensic evidence include, *inter alia*, the inadequate laboratory standards and techniques such as insufficient DNA sample size, deterioration and contamination of the DNA sample, improper test procedures, false positive identification, and false negative results.

To regard a DNA sample as admissible being within the domain of judicial discretion, the court may adopt the internationally accepted standard for determining the admissibility of DNA Evidence. In general, two standards are used globally to determine the admissibility of DNA evidence, such as the “Frye standard” and the “Daubert standard.” The Frye standard originates from a 1923 case, *Frye vs. United States*, where the US Supreme Court ruled that, to be admissible, DNA evidence must be “sufficiently established to have gained general acceptance in the particular field in which it belongs.”⁵⁴ The Daubert standard is derived from the 1993 case *Daubert vs. Merrell Dow Pharmaceuticals*, where the US Supreme Court went beyond the Frye standard to require that evidence must have sufficient scientific validity and reliability to be admitted as relevant “scientific knowledge” that would “assist the Trier of fact.”⁵⁵

In the USA, two major standards exist for deciding whether scientific findings will be admitted into evidence, i.e. the ‘general-acceptance’ test and the ‘sound-methodology’ standard. In addition, some jurisdictions have adopted special statutes that provide for the admissibility of genetic testing in general or of DNA analyses in particular in criminal or civil cases.⁵⁶ But in Bangladesh, neither the Deoxyribonucleic Acid (DNA) Act nor the Evidence Act sets forth any standard that should be met for the admissibility of the result of DNA analysis.

5. OPTIONS OF USING DNA EVIDENCE IN BANGLADESH

There are several options of using DNA evidence both in civil and criminal matters particularly in determining genetic relationship or the identification of paternity/maternity or of dead

⁵² Muhammad Nazrul Islam, *Reflections on the Law of Evidence*, Dhaka, 1995, p. 486.

³³ Sections 121-131, the Evidence Act (Act No. 1 of 1872). ³⁴ Section 45, *Ibid*.

⁵³ Section 37 of the Deoxyribonucleic Acid (DNA) Act, 2014 (Act No. X of 2014).

⁵⁴ *Frye vs. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁵⁵ *Daubert vs. Merrell Dow Pharmaceuticals*, 113 2786 (S. Ct. 1993).

⁵⁶ National Research Council (US) Committee on DNA Forensic Science, *the Evaluation of Forensic DNA Evidence*, National Academy Press, Washington (DC), 1996 available at https://www.ncbi.nlm.nih.gov/books/NBK232610/pdf/Bookshelf_NBK232610.pdf retrieved on May 10, 2018.

bodies, resolving issues concerning the legitimacy of children, resolving dispute regarding testamentary disposition, and investigation and prosecution of the grave offences like rape, culpable homicide, burglary and so forth.

5.1 Determining Genetic Relationship

Each person has a unique set of deoxyribonucleic acid (DNA) sequencing (contained in body cells) that dictates an individual's physical characteristics and identity and stores hereditary information that passes from one generation to the next.⁵⁷⁵⁸ In *Bangladesh Jatiyo Mahila Ainjibi Samity vs. Ministry of Home Affairs and Others*, where the respondent, former Deputy Inspector General of Police, Anisur Rahman claimed that his wife gave birth to seven children at one pregnancy, it was held that by examining DNA molecule that contains all of our genetic information and its genetic code, the differences among individual can be scientifically and accurately determined.⁴⁰ In this case, it was argued by the petitioners that the dispute as to the legal custody of the septuplet could not be resolved unless there was a DNA test of them and their alleged parents. Taking into consideration of the above argument, the High Court Division (HCD) of the Supreme Court of Bangladesh directed for two types of DNA tests in that case: 'Sibling DNA Test' of seven children to ascertain whether or not they are septuplet (whether each of seven children born at one birth) and 'DNA Paternity Test' to see whether they are the biological offspring of the alleged parents (respondents, i.e. former DIG Anisur Rahman and his wife).⁵⁹ Result of Sibling DNA Test showed that all the seven children were unlikely to be related to each other. Based on the DNA test reports, the HCD ruled that the former DIG and his wife were not the biological parents of these seven children and nor were these children the septuplets. In *Frye vs. United States*, it was held that DNA contained the code of a person's hereditary propensities, parentage, and racial origins and more genetic information of biological relatives.⁶⁰ So DNA evidence can certainly assist the court to come up with a conclusive decision on the cases concerning genetic relationship.

5.2 Ascertaining Legitimacy of Children

The question of ascertaining legitimacy of a child arises when the putative father denies that the child is not the offspring of the marriage or when there exists uncertainty as to the paternity. In these circumstances, it is in the interest of morals that one may need to determine that the children born of a valid marriage are not of illicit unions.⁶¹ According to section 112 of the Evidence Act 1872, if a child is born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the child shall be conclusively presumed to be legitimate unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten.⁴⁴ This section talks about 'conclusive proof as to the legitimacy of a child' born during a valid marriage or within 280 days of dissolution of a marriage. Conclusive proof cannot usually be rebutted unless it is allowed by law. The disputing party can rebut the presumption as to the legitimacy

⁵⁷ Natalie A. Bennett, A Privacy Review of DNA Databases, *Journal of Law and Policy*, Vol. 4, No. 3, (2008) p. 821, available at < https://kb.osu.edu/dspace/bitstream/handle/1811/72812/1/ISJLP_V4N3_821.pdf> retrieved on 12 April 2018.

⁵⁸ DLR (HCD) (2009) 371.

⁵⁹ Ibid.

⁶⁰ Supra Note 36.

⁶¹ Joseph Cullen Ayer, Jr. Legitimacy and Marriage, *Harvard Law Review*, Vol. 16, No. 1 (1902), pp. 22-42.

⁴⁴ Section 112 of the Evidence Act, 1872. ⁴⁵ 67 DLR (2015), P.1.

showing the concrete evidence establishing the fact that there was ‘no access meaning physical relation’ between parties to the marriage when the child could have been begotten.

The fact of ‘access or non-access’ could be established either by oral or documentary evidence. Now the question arises as to whether DNA test could be conducted to prove or disprove the fact of access or non-access. Review of some judgments of the Supreme Court of Bangladesh and the Supreme Courts of India reveals that the courts in Bangladesh and India are largely reluctant to allow DNA test under section 112. According to *Beautiful Bibi vs. Md. Sydur Rahman*,⁴⁵ though the DNA Test is accepted worldwide as a reliable scientific method for various purposes including the determination of parentage, courts must be cautious about the probable result of a DNA test exposing a child to a socially deplorable condition as a bastard child. Section 112 can be invoked when the paternity is questioned.⁶² Paternity may come into question in any of the three circumstances: during continuance of a conception, in case of abortion or still born baby and in case the child is born alive. In any of the circumstances, the courts in Bangladesh and India consider the best interest of the child before allowing DNA test.

Conservative attitude of the courts in directing DNA test is justified and rationale on the ground that the illegitimate child shall have to bear a very miserable life in our society. The Kerala High Court observed that the stigma of illegitimacy is very severe since we have not any of the protective legislations as in England to protect illegitimate children.⁶³ The observation of the Kerala High Court is relevant in the socio-economic scenario of Bangladesh. Nonetheless, there is no legal bar to allow DNA test under section 112. In the Criminal Misc. Case, *Md. Mostafa vs. Bedena Khatun and Another*,⁶⁴ the respondent-petitioner alleged that she was raped by the appellant-accused (her cousin brother) and became pregnant which she could not yet feel. Subsequently, she got married to one Shahidul who left her after three month of the marriage when all the symptoms of pregnancy were exposed. Later on, the respondent-petitioner gave birth to a child. Under this situation, the High Court Division of the Supreme Court of Bangladesh observed that it was very easy to ascertain the fatherhood of the child by DNA test. The observation of this judgment makes it clear that the decision of the courts in regard to allowing DNA test may fluctuate depending on the facts and circumstances.

5.3 Identification of Dead Bodies

A dead body may require to be identified in both civil and criminal proceedings and for other purposes. In a criminal case, ascertaining the identity of the victim’s dead body is *sine qua none* since it is said that there lies the clue to the offence in the identity of the victim. In *State vs. Md. Foysal Bin Nayem*,⁴⁹ one of the issues was whether the blood-stained dagger as the police seized from the crime scene was used to kill the victim? DNA test was conducted to ascertain the identification of the victim and the blood-stained dagger. The DNA test result found matching with the blood of the victim which bonded the sequence of evidence in proving the allegation against the perpetrators in that case.

Sometimes, it becomes necessary to identify a dead body and to ascertain medical cause of death for the settlement of insurance claims as well as payment of compensation for death in work place. For instance, the extremely decomposed bodies of some victims of Tazrin Fashions and Rana Plaza incidences were identified by matching the DNA samples collected from the

⁶² M. Monir, *Law of Evidence*, Allahabad, University Book Agency, 2004, p. 528.

⁶³ *Goutam Kundu vs. State of West Bengal and Another*, AIR 2295, 1993 SCR (3) 917.

⁶⁴ LEX/BDHC/0168/2012.⁴⁹
LEX/BDHC/0010/2017.

bodies with those of their relatives.⁶⁵ On April 28, 2013, a writ petition was filed at the High Court Division seeking arrest of the owner of Tazreen Fashions Limited for his ignorance.⁶⁶ On June 8, 2013, the High Court Division directed the authority concerned to carry out the DNA tests of the families of 37 missing victims' of Tazreen Fashion fire⁶⁷ so that the bereaved families could be compensated.

5.4 Investigation of Rape Cases

In a rape case, DNA test provides the courts a means of identifying the perpetrators with a high degree of certainty and confidence. By using DNA technology, the courts are in a better position to reach at a conclusion whereby convicting the real culprits.⁶⁸ DNA evidence is collected from the stains of blood or sperm on the clothes of the victim or accused or from blood/semen in vagina of the victim. The report of DNA test is the most significant medical evidence in a rape case⁶⁹ which is usually used to establish paternity of any issue born of rape, to examine fibres and pubic hairs and to identify the accused by matching his DNA blueprint and establishing his capacity to commit rape.

In a Writ Petition, *Naripokkho and others vs. Bangladesh and others*,⁷⁰ where the petitioners challenged the delay in recording a case following the gang rape of a Garo woman in a microbus in the capital, the High Court Division (HCD) directed that DNA tests must be conducted in all rape or sexual assault cases, and the DNA and other samples should be sent to lab within 48 hours of the occurrence.

In the murder of Sohagi Jahan Tonu, a 19-year-old student of Comilla Victoria Government College who was allegedly raped and murdered by unidentified miscreants, the first autopsy found no evidence of rape or murder.⁷¹ The report created controversy and was subject to pungent criticism from different quarters. The High Court Division of the Supreme Court of Bangladesh ordered a second autopsy. The Second autopsy conducted in Comilla Medical College Hospital also failed to unveil the cause of death and therefore, was kept pending. Prior to the second autopsy, the crime lab of Criminal Investigation Department (CID) collected DNA from semen in Tonu's underwear. By analyzing the DNA, the CID found evidence of rape.⁵⁷ On the basis of the DNA test report, the medical board of Comilla Medical College finalized the second autopsy where it was concluded that Tanu was raped before being killed.⁵⁸

⁶⁵ In 2013, Rana Plaza, a multi-storey building crushed down in Savar on the outskirts of the capital killing at least 1,134 people, mostly garment workers, and injuring several hundred others. More than 321 dead bodies were decomposed beyond recognition. Most of the decomposed bodies were identified through matching of their DNA with that of their family relatives.

⁶⁶ S. M. Solaiman, Unprecedented Factory Fire of Tazreen Fashions in Bangladesh: Revisiting Bangladeshi Labor Laws in Light of Their Equivalents in Australia, *Hofstra Labor & Employment Law Journal*, Vol. 31, Issue 1, 2013, Article 3. Available at <http://scholarlycommons.law.hofstra.edu/hlelj/vol31/iss1/3>, retrieved on June 22, 2018.

⁶⁷ Fire broke out on 24 November 2012, in the Tazreen Fashion factory in the Ashulia district on the outskirts of Dhaka, leaving 117 people dead in the fire, and over 200 injured. 37 dead bodies were burned beyond recognition.

⁶⁸ *Syed Talib Hussain vs. the State*, LEX/FSPK/0005/2013.

⁶⁹ Medico-legal Evidence Collection Form of Rape Victim, Clause 17(d).

⁷⁰ Writ Petition No. 5541/2015.

⁷¹ *Seven months into Tonu murder: Family losing hope of getting justice*. Dhaka Tribune, October 24, 2016.

⁵⁷ *Tonu murder: DNA test finds evidence of rape*, The Daily Star. May 16, 2016. ⁵⁸ *Tonu's 2nd autopsy finds evidence of 'sexual assault'*, The Daily Star. June 12, 2016. ⁵⁹ 25 BLT (2017) (AD) 158; 14 ADC (2017) 271; Manupatra LEX/BDAD/0004/2017.

6. CHALLENGES IN USING DNA EVIDENCE

In *Bangladesh Bar Council vs. A.K.M. Fazlul Kamir*,⁵⁹ the Appellate Division of the Supreme Court of Bangladesh held that this digital age has posed us with entirely a new phenomenon of legal challenges including the forensic evidence which has already revolutionized the law and legal practices. Though the Appellate Division made the casual comment in regard to the overall quality of legal education in Bangladesh, it is very much pertinent to actors of justice system who are involved in using DNA evidence as the above discussion reveals, the application of DNA testing for the case investigation process has opened a new opportunity for identifying criminals in Bangladesh. The challenges the actors have to face in using DNA evidence in administration of justice are many folds.

DNA technology has posed serious challenges to some legal and functional rights of an individual such as the right to privacy, right against self-incrimination.⁷² These rights of the individuals can be maintained by showing the greatest respect and precaution toward human rights and privacy issues as the Deoxyribonucleic Acid (DNA) Act provides for.

Sufficient number of forensic DNA labs with all modern amenities has not been established in Bangladesh. Law enforcing agencies send DNA samples to the National Forensic DNA Profiling Laboratory (NFDPL), the country's first ever forensic DNA laboratory. Established in 2005 at the Department of Forensic Medicine of Dhaka Medical College Hospital, it was given legal shape by the Deoxyribonucleic Acid (DNA) Act, 2014.⁷³ Sophisticated Combined DNA Index System (CODIS) software was added to this laboratory in 2013.⁷⁴ The technology of DNA analysis and equipment used in this laboratory are claimed to be of international standard.⁷⁵ Yet there is a need for international accreditation and further professional training for the persons involved as scientists or technicians, in order to maintain quality.⁷⁶ The country's only DNA lab is suffering from a number of constraints. One of the biggest constraints is the flawed manner in which DNA sample particularly evidence of rape is gathered and preserved. The screening lab and archive room of the laboratory are overburdened with large number of DNA samples.⁷⁷

As per section 24 of the DNA Act, the government is required to establish a National DNA database with crime scene index, convict criminals' index and unknown person's index. Database of this kind could have been used in identifying the perpetrators who repeatedly involve in crimes. But no initiative has yet to be undertaken to establish such database. Consequently, it becomes difficult to maintain the record of DNA profiles prepared in lab by analyzing DNA samples collected from various sources.

⁷² A. Z. M. Arman Habib, 'Deoxyribonucleic Acid (DNA) Act, 2014: A New Era in Criminal Justice System of Bangladesh' *Bangladesh Law Digest*, January 7, 2016, available at <<http://bdlawdigest.org/deoxyribonucleic-acid-dna-act-2014-a-new-era-in-criminal-justice-system-ofbangladesh.html>>.

⁷³ Section 14(3) of the DNA Act provides, "National Forensic DNA Profiling Laboratory located in Dhaka shall be deemed to have been established by the Government under this Act".

⁷⁴ On September 25, 2013, the FBI donated this software to promptly identify 321 unidentified dead bodies of Savar's Rana Plaza Tragedy.

⁷⁵ Sheikh Hafizur Rahman Karzon, "Interrelationship of Genetics and Criminal Behavior: Challenges for Judges and Lawyers", *Dhaka University Law Journal, Studies Part-F*, Vol. 18, No. 1, (2007) 21.

⁷⁶ Review of Lessons Learned 2004 - 2010 Multi-Sectoral Programs on Violence against Women, Ministry of Women and Children Affairs.

⁷⁷ Prothom-alo, April 4, 2014.

The admissibility of DNA evidence is challenged by lawyers on two common grounds: authenticity and accuracy. The term ‘authenticity’ refers to the originality, showing the chain of custody from the source to court room via laboratory. The term ‘accuracy’ which is also known as ‘sound- methodology’ means the absence of mistakes or errors in the procedure followed in collection and analysis of DNA samples. Though the DNA evidence has been made admissible in the proceeding of courts,⁷⁸ judges and lawyers often face challenges in assessing the authenticity and accuracy of such evidence. Absence of guideline in law⁷⁹ setting forth the standard of admissibility of forensic evidence generally and DNA evidence particularly, and lack of training of judges and lawyers on forensic science are mainly responsible for such challenges.

Most judges and the lawyers do not have sufficient training and knowledge to peruse or use the DNA test reports. As a result, they blindly rely on the reports to form decisions as regard to the issue before the court. Such uncritical or uninformed reliance on DNA reports by courts/lawyers is evident from the analysis of the cases cited above. This will give rise to the chances of misusing DNA evidence.

Even in developed countries which are using hi-tech appliances in collecting and testing DNA samples, dozens of cases of DNA typing are reported to have been gone terribly wrong.⁸⁰ For instance, in 1998, a woman was abducted at gunpoint in California, raped by two men, and dumped into a nearby field. Five days after the attack, she identified one Josiah Sutton and his friend as her possible attackers though they were not involved in the crime. Sutton was convicted of rape through DNA analysis and sentenced to 24 years imprisonment. After serving five years, Sutton was exonerated when it was established that the lab was completely wrong in their first report.⁶⁹ Hence, before deciding the admissibility of the result of DNA analysis, the judge must determine whether the applicable standard has been met so as to avoid technical and human error.

7. CONCLUSION

After invention of DNA profiling in 1986 by Sir Alec Jeffrey, administration of justice was revolutionized particularly criminal investigation mechanism assumed a paradigm shift from the conventional mode of identification of suspects. While committing crimes, the perpetrators unknowingly leave some traces and DNA is one of them that result in important leads to identify the suspects comparing their DNA blueprints. However, this is a very challenging job to comply with due procedure in respect of collection and analysis of DNA samples as the aforementioned discussion reveals, any flaw in DNA analysis may inculcate an innocent person having no proximity with the crime. Law invests the courts with discretion to evaluate DNA profiling reports in order to determine admissibility of DNA evidence but did not set forth any standard for the admissibility of the same.

Most judges and the lawyers do not have sufficient training and knowledge to check the validity of the DNA test reports. As such, uncritical or uninformed reliance on DNA reports by courts/lawyers creates the chances of misusing DNA evidence. The investigation officers (IO)

⁷⁸ Section 37 of the Deoxyribonucleic Acid (DNA) Act, 2014 (Act No. X of 2014).

⁷⁹ Section 39 of the Deoxyribonucleic Acid (DNA) Act, 2014 (Act No. X of 2014) mandated the government to promulgate the implementing Rules to accomplish the objectives of the Act, but the Rules is yet to be promulgated.

⁸⁰ Erin E. Murphy, *Inside the Cell: The Dark Side of Forensic DNA*, New York, Nation Books, 2015. ⁶⁹ Ibid.

and some staff of forensic labs are often found not to be trained to ensure complete documentation of the DNA evidence. Moreover, flawed manner in collection and preservation of DNA samples and improper test procedures followed in labs leads to the deterioration and contamination of the DNA sample.

Therefore, it is recommended that judges, lawyers and investigation officials involved in administration of justice have the orientation as to the procedure of DNA analysis relevant to the administration of justice. To this end, legislative and institutional initiative should be adopted to form an efficient and strong investigation and judicial mechanism comprising the experts of different disciplines and providing it with modern equipments and necessary logistic supports. As per the requirement of Deoxyribonucleic Acid (DNA) Act, implementing Rules will have to be promulgated setting down the standards in regard to the documentation of DNA samples and the evaluation of the legality, relevance, authenticity, integrity, and continuity of the chain of possession of the DNA evidence.

The Role of Inspectors in Maintaining Safety Standards in the Garment Sector of Bangladesh: A Legal Analysis

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ABSTRACT

Persons responsible for inspection functions under the Bangladesh Labour Act, 2006 are designated to be 'Inspectors'. Inspectors are basically entrusted with many duties relating to maintaining the standards set by the law with regard to different aspects of the working environment in factories & industries. They carry out their duties by ensuring legal rights pertaining to the workplace that employs huge number of working people. This paper aims at scrutinizing the current role played by the Inspectors in maintenance of safety standards at garment sector which has recently great prominence as national and international issue. Apart from assessing their roles, the paper will also hereby suggest some development mechanisms in this regard.

Keywords: Inspector, DIFE, Safety Standards, Garment

1. INTRODUCTION

Bangladesh emerges as an independent and sovereign country in the world map through a glorious liberation war in 1971. Over the long span of 44 years of independence, a huge number of factories, shops and commercial establishments have flourished in the country. The importance of industry and trade is increasing day by day. Millions of workers are working in these sectors. The Ready-Made Garment (RMG) sector is integral to the Bangladeshi economy, with an estimate of 3,500 export factories in operation, providing employment for over 4.2 million workers. Industry exports totaled \$21.5 billion in 20122013, making Bangladesh one of the world's leading apparel exporters.⁸³ A report of Bangladesh Bureau of Statistics, 2001 states that the number of manufacturing units in Bangladesh at that time was 2,42,818 and the number of shops, hotels, construction companies and commercial health service centers was 20,15,117. It is very reasonably assumed that the number of workplace has increased manifold over these years than the statistics published in thirteen years ago.⁸⁴

But the opposite side of the coin is that Bangladesh is shockingly one of the worst countries in term of ensuring workers' right. As per the 2015 ITUC Global Rights Index published by the

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⁸³ Staff Reporter, 'Labour Inspectors trained on follow up to BUET inspections in RMG sector', *The Daily Ittefaq*, (26th November, 2014), accessed 13th January, 2018, <http://www.clickititefaq.com/in-the-news/labour-inspectors-trained-follow-buet-inspections-rmg-sector/>.

⁸⁴ Department of Inspection for Factories and Establishments, "About Us", accessed 13th January, 2018, <http://www.dife.gov.bd/index.php/en/about-dife/introduction-to-dife/>.

International Trade Union Confederation (ITUC), Bangladesh has been ranked as one of the “worst countries” in the world in terms of workers’ rights.⁸⁵

Among many other mechanisms to improve the safety standards of garment factories, the inspection mechanism is one which can make the compliance level far better. Inspectors are the key enforcing persons of the government of Bangladesh who are keenly responsible to enforce the laws relating to occupational safety and health within the ambit of the Bangladesh Labour Act, 2006. They can ensure the proper application of occupational safety and health related provisions of the Bangladesh Labour Act, 2006 throughout the country.

2. ROLE OF INSPECTORS IN ENSURING SAFETY OF FACTORIES AND INDUSTRIES

Labour inspection is a key area of the labour administration system of a country. The major roles of labour Inspectors include enforcement of legal provisions relating to conditions of work and the protection of workers while engaged in their work; provision of technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; and identification of defects or abuses not specifically covered by available legal provisions.⁸⁶ The Bangladesh Labour Act 2006 specifically provides some roles to be played by the labour Inspectors which are as follows:

2.1 Ensure Purity of Water used in Artificial Humidification

If it appears to an Inspector that the water used in an establishment for increasing artificial humidity is not effectively purified, he may serve on the employer of the establishment an order in writing, specifying the measures which, in his opinion, should be adopted, and requiring them to be carried out before a specified date.⁸⁷

2.2 Ensure Safety of Building and Machinery

If it comes to the knowledge of an Inspector that any building or part of a building or any part of the ways, machinery or plant in an establishment is in such a conditions that it is dangerous to human life or safety, he may serve on the employer of the establishment an order in writing specifying the measures which, in his opinion, should be adopted, and requiring them to be carried out before a specified date. If it appears to the Inspector that the use of any building or part of a building or of any part of the ways, machinery or plant in the establishment involves imminent danger to human life or safety, he may serve on the employer of the establishment an order in writing prohibiting its use until it has been properly repaired or altered.⁸⁸

2.3 Take Precaution in Case of Fire

The Labour Act requires that every establishment shall be provided with at least one alternative connection stairway with each floor and such means of escape in case of fire and fire-fighting apparatus, as may be prescribed by rules. And if it emerges to the Inspector that any establishment is not provided with the means of escape prescribed under the Act he may serve

⁸⁵ Staff Correspondent, “Bangladesh ranked worst in world to work in”, *The Daily Prothom Alo* (14th June, 2015), accessed 13th January, 2018. <http://en.prothom-alo.com/bangladesh/news/69385/Bangladesh-rankedworst-in-world-to-work-in/>.

⁸⁶ Article 3 of the Labour Inspection Convention, 1947 (No. 81).

⁸⁷ Section 55 of the Bangladesh Labour Act 2006.

⁸⁸ Section 61 of the Bangladesh Labour Act 2006.

on the employer of the establishment an order in writing specifying the measures which in his opinion, should be adopted before a date specified in the order.⁸⁹

2.4 Require Specifications of Defective Parts or Tests of Stability

If the Inspector finds any building or part of a building or any part of the ways, machinery or plant in an establishment, in such a condition that it may be dangerous to human life or safety, he may serve on the employer of the establishment an order in writing, requiring him before a specified date-

- a) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or
- b) to carry out such tests as may be necessary to determine the strength or quality or any specified parts and to inform the Inspector of the result thereof.⁹⁰

2.5 Take Samples

An Inspector may, at any time during the normal working hours, inform the employer of an establishment, take a sufficient sample of any substance used or intended to be used in the establishment such use being, in the opinion of the Inspector in contravention of the provisions of the Bangladesh Labour Act or of the rules, or likely to cause bodily injury to or injury to the health of, workers in establishment.⁹¹

2.6 Take Action in case of Certain Danger

If, in respect of any matter for which no express provision is made by or under this Act, it appears to the Inspector that any establishment or any part thereof or any matter, thing or practice in or connected with the establishment or with the control, management or direction thereof, is dangerous to human life or safety or defective so as to threaten, or tend, to the bodily injury of any person, he may give notice in writing thereof to the employer of the establishment, and shall state in the notice the particulars in respect of which he considers the establishment, or part thereof, or the matter, thing or practice, to be dangerous or defective and require the same to be remedied within such time and in such manner as he may specify in the notice.

The Inspector may, by order in writing direct the employer prohibiting the extraction or reduction of pillars in any part of such establishment if, in his opinion, such operation is likely to cause the crushing of pillars or the premature collapse of any part of the workings or otherwise endanger the establishment.

If the Inspector is of opinion that there is urgent and immediate danger to the life or safety of any person employed in any establishment, he may, by an order in writing containing a statement of the grounds of his opinion, prohibit, the employer concerned, until he is satisfied that the danger is removed, the employment in or about the establishment or part thereof of any person whose employment is not, in his opinion, reasonably necessary for the purpose of removing the danger.⁹²

2.7 Dispose of Complaint

⁸⁹ Section 62 of the Bangladesh Labour Act 2006.

⁹⁰ Section 76 of the Bangladesh Labour Act 2006.

⁹¹ Section 84 of the Bangladesh Labour Act 2006.

⁹² Section 85 of the Bangladesh Labour Act, 2006.

After receiving any complaint from any party regarding violation of any rights ensured by the Act and the Rules, the Inspector may conduct enquiry and investigation within 10 (ten) working days of receipt of such complaint and direct the concerned party to take necessary measures in accordance with the Act, and if such party fails to comply with the order then the Inspector shall file a case in the Labour Court in accordance with Form no-14 of the Labour Rules 2015.⁹³

2.8 Organize Training, etc.

The Inspector is empowered to organize training courses and workshops with an aim to increase the knowledge and skills of the concerned parties regarding Act and relevant rules, national and international convention or declaration regarding labour rights, information regarding labour sector, workers and trade unions.⁹⁴

2.9 Emphasize Overall Working Environment

The Inspector while inspecting a factory or establishment shall emphasize on the overall working environment including benefits for the women workers and workers with disability.⁹⁵

2.10 Other General Powers

Apart from the above mentioned powers, Inspectors have some general powers, namely to enter any place, inspect and examine; to obtain, seize or copy any document; to make necessary examination or enquiry to determine whether any law or rules or scheme relating to workers of a particular factory are duly complied with or not; to obtain statement of a person employed in a particular factory or establishment; to obtain statement, record or signature to verify the accuracy of the obtained statement or examination; to summon or to produce explanation from any employer or anyone employed by him about any registrar, record, certificate, notice or any other documents; to apply any other power directed by the law or rules. To lodge complaint with the labour courts for action against any person for any offence or violation or any provisions of this act or of any rules, regulations or schemes.¹⁴

3. SCOPE AND MECHANISM TO EXERCISE INSPECTOR'S POWER

3.1 Department of Inspection for Factories and Establishments (DIFE)

Inspectors have been carrying out their responsibilities under the Department of inspection for Factories and Establishments (DIFE) which is a department under the Ministry of Labour and Employment. This department is responsible for ensuring welfare, safety and health of valuable human resources working in various sectors contributing national development. By enforcing labour laws of the country, the department has been leading the nation in creating a safe and healthy work culture and improving the quality of wage earner. The DIFE is no longer considered a mere labour law enforcement agency, it provides information and advice to employers and workers concerning the most effective means of complying with the legal provisions. The DIFE collaborates with various government and private organizations, agencies along with international organizations especially ILO to facilitate policy, planning, measures and directions adopted to enhance occupational safety and health for all workers by appropriate working conditions and environment.

⁹³ Rule 351(1) (a) of the Bangladesh Labour Rules, 2015.

⁹⁴ Rule 351(1) (b) of the Bangladesh Labour Rules, 2015.

⁹⁵ Rule 351(3) of the Bangladesh Labour Rules, 2015.¹⁴
Section 319 of the Bangladesh Labour Act 2006.

The Department of inspection for Factories and Establishments was discharging its responsibilities by enforcing the law set out in the Bangladesh Labour Act 2006 in such huge number of factories and commercial establishments. The department has been playing a crucial role in ensuring compliance especially in garments factory.⁹⁶

3.2 Activities of Inspectors

Inspectors are entrusted with a large number of duties and activities closely related with the ensuring safety standards in factories and commercial establishments, *inter alia* to inspect factories, shops, industries and commercial establishments, tea garden, railway, internal water transport and road transport for establishing the terms of employment, safety, health issues, labour welfare, payment of wages, ascertaining working hours, leave etc. under the Bangladesh Labour Act, 2006 along with the other existing regulations; to monitor factories of high hazardous risks; to lodge cases in the labour court against the law violating employer or authority; to approve the construction, modification and expansion plan of a factory; promoting occupational safety and Health (OSH) system in the workplaces; to promote prevention and monitoring systems on accidents at work and surveillance on occupational diseases; minimize the problems pertaining occupational injuries or diseases caused by working conditions; and to carry out promotional and publicity programs to employers, workers and the general public to foster and increase the awareness of occupational safety and health.

3.3 Grade of the Factory Inspector

There are five different grades of Inspector such as Chief Inspector, Deputy Chief Inspector, Assistant Chief Inspector, Inspector and Assistant Inspector- with the first two grades generally not being involved in any field of inspection activities. These Inspectors are divided into four basic categories such as Inspectors of shops and establishments, Inspectors (general), Inspectors (engineering), Inspectors (health) and Dock labour safety officer.⁹⁷

3.4 Process of Inspection and Investigation

In every month each Inspector/ Assistant Inspector draws up a plan setting out which factories he/ she intends to inspect. After having approval from the deputy chief Inspector, the Inspector writes a letter to the factories authority informing them that he is going to visit the factory on a particular day while the dock labour safety officer does not draw up a list but waits until ships come to the port.

The process by which inspection takes place is different for different categories of Inspectors like Inspector (medical) and Inspector (engineering). Each has his own checklist corresponding to duties imposed upon the factories in relation to ‘health’ and ‘safety’ respectively. If any violation is identified, the Inspector marks this on the checklist (sometimes mark in a notebook) and at the end of the inspection, the employer (and worker representative) is asked to sign this document. The Inspector then writes to the employer setting out the nature of the violation and a time period by which the violation should be rectified.

For certain violations (those involving bathrooms, staircases, cleanliness, electrical wiring, machine guards, personal protective equipment) a period of one month will be given; for other

⁹⁶ The Department of Inspection for Factories and Establishments, “About Us”, accessed 13th January 2018. <http://www.dife.gov.bd/index.php/en/about-dife/introduction-to-dife/>.

⁹⁷ International Labour Organization (ILO), “Occupational Safety and Health in Bangladesh”, accessed 20th August 2018, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187745.pdf.

violations (involving day care centers, ventilation systems and lighting etc.) a period of between three and six months is given; and for violations that require construction to take place, a period of more than six months will be provided. After the time period has expired a follow up visit will take place after first informing the factory by letter or phone. If the violation still exists, the Inspector will then either give more time or take a decision to prosecute.

4. PROBLEMS

4.1 Number of Inspectors Inadequate

Though increasing, the number of Inspectors in our country is not quietly adequate against the existing factories to safeguard the health and safety matters of the workers in full swing. Currently there are 309 inspectors under Department of Inspection for Factories and Establishments (DIFE) who are entrusted to inspect all factories and establishments of Bangladesh. Bangladesh has a large number of factories and establishments which are supposed to be inspected under DIFE. At present there are 1549 factories and a huge number of establishments in Bangladesh. Though all those factories and establishments are under the inspection of DIFE, in fact it cannot inspect the establishments properly for the manpower it has can cover the factories only somehow and the large number of establishments are left without inspection at all.⁹⁸

The result of lack of sufficient number of inspectors is that very low inspections are taken and for this, most of the time problems relating to health and safety measure violations within the territory of the factories go unnoticed. In addition, whenever an Inspector (engineering) carries an inspection alone, he gets very much reluctant to look into the overall safety issues and this is also certainly same for the function of the Inspector (medical).¹⁸ So, it requires two Inspectors at the same time to be engaged for the sake of having a complete health and safety inspection in a factory.

4.2 Lack of Necessary Equipment

Article 11 of the ILO Convention 81 relating to the factory inspection requires Inspectors to have “suitably equipped” offices and “transport facilities necessary for the performance of their duties in cases where suitable public facilities do not exist”. Moreover, “traveling and incidental expenses” should be reimbursed. But it is merely a provision contained in the report, not a fact at all. Anybody can find out the lack by simply looking into the Inspectorate where very few computers exist and there are some chemical-testing equipments which are not used by the Inspectors as these are too heavy to carry. Furthermore, absence of having private transport makes them more adverse to carry it.

4.3 Lack of Transport Facilities

It is another sad story of the Inspectorate that Inspectors do not have access to vehicles and so for undertaking an inspection they are bound to, finding no other way, depend on public transport. The Chittagong and Dhaka divisional offices each have a vehicle which is only used by the Deputy Chief Inspectors in charge of the respective offices and are not used by any subordinate Inspectors who are in fact actively involved in filed inspection. In addition, it is

⁹⁸ Bikash Kumar Basak, “Occupational Safety, Factory inspectorate, inspectors and inspection”, *The Daily Star* (19th January, 2008), accessed 20th August, 2018. <http://archive.thedailystar.net/law/2008/01/03/index.htm>.¹⁸ Ibid.

very interesting that though there is a system of paying the public transport costs borne by an Inspector, no expenses are paid if the factory is located within 5 km of the divisional office.⁹⁹

4.4 Insufficient Inspection in EPZ

In Export Processing Zones (EPZs) of Bangladesh, labour inspections are rare or under the purview of a special EPZ inspection criteria which does little to enforce the law.¹⁰⁰ Bangladesh Export Processing Zone Authority (BEPZA) has developed its own mechanism of labour inspection, which lacks effectiveness, transparency and accountability.

Against the backdrop of continuous pressure from the International Labour Organisation (ILO) and the sustainability compact partners, the Bangladesh government has recently taken the move to allow labour inspection in conformity with the labour law in factories located in the EPZs. The government is currently working for further amendment of Bangladesh Labour Act as well as to improve the draft EPZ Labour Act. The Govt. has recently decided to incorporate the provisions for labour inspection in the EPZs by the inspector general along with other inspectors under the Bangladesh Labour Act 2006 with the existing inspection system of Bangladesh Export Processing Zone Authority (BEPZA).¹⁰¹

4.5 Many Conventional Norms are not enforced

There are multiple numbers of international conventions connected with the inspection of factories which Bangladesh has already ratified. The problem is not ratifying conventions, but rather transposing those conventions into national law and then enforcing those laws effectively.¹⁰² For example, the Labour Inspection Convention 1947 requires Bangladesh as its state party to provide Inspectors wider range of power so that they can visit or enter into any establishment at any time of the day or night and without service of any prior notice. But the Bangladesh Labour Act is yet to incorporate this norm and requires prior notice from Inspector's side before entering into any establishment.

Furthermore, as per Article 13 of the Labour Inspection Convention 1947, labour Inspectors shall be empowered to take prompt measures with immediate executory force in the event of imminent danger to the health or safety of the workers. But this very norm has been negated in empowering Inspectors under the Bangladesh Labour Act 2006 where even in the event of the grave and imminent danger to human life and safety, Inspectors are not empowered to take prompt and executory measures.¹⁰³

5. POSITIVE MEASURES

5.1 New Fire and Safety Agreement

The Global Unions - IndustriALL and UNI - made history in reaching an agreement with more than 30 garment brands, mostly European, on a comprehensive agreement on fire and building safety. It requires inspections by competent, independent experts, requires companies to

⁹⁹ Bikash Kumar Basak, "Occupational Safety, Factory inspectorate, inspectors and inspection", *The Daily Star* (19th January, 2008), accessed 20th August, 2018. <http://archive.thedailystar.net/law/2008/01/03/index.htm>.

¹⁰⁰ Staff Correspondent, "Bangladesh ranked worst in world to work in", *The daily Prothom Alo* (14th June, 2015), accessed 20th August, 2018. <http://en.prothom-alo.com/bangladesh/news/69385/Bangladesh-rankedworst-in-world-to-work-in>.

¹⁰¹ Staff Correspondent, "Govt. to allow inspection of DIFE in EPZs", *The New Age* (16th May, 2018), accessed 20th August, 2018. <http://www.newagebd.net/article/41286/govt-to-allow-inspection-of-dife-in-epzs>.

¹⁰² The discussion as to lack of enforcement of conventional norms is specifically done in the last part of the 'Suggestion' chapter.

¹⁰³ Sections 61, 85 of the Bangladesh Labour Act, 2006.

remediate violations when they are detected and creates a worker complaints process. The agreement will be managed by a steering committee, which will include trade union representation. The agreement also has important language on transparency, which makes public lists of factories and inspection reports.

5.2 Bangladesh Action Plan 2013

Under the Bangladesh Action Plan 2013, the United States Government encourages the Government of Bangladesh to take significant actions to provide a basis for reinstating Bangladesh's Generalized System of Preferences (GSP) benefits. The US emphasizes implementing commitments under the "National Tripartite Plan of Action on Fire Safety and Structural Integrity" and taking a number of actions *inter alia* Government Inspections for Labor, Fire and Building Standards i.e. to develop, in consultation with the International Labor Organization (ILO), and implement in line with already agreed targets, a plan to increase the number of government labor, fire and building Inspectors, improve their training, establish clear procedures for independent and credible inspections, and expand the resources at their disposal to conduct effective inspections in the readymade garment (RMG), knitwear, and shrimp sectors, including within Export Processing Zones (EPZs).¹⁰⁴

5.3 Upgrading the Directorate to the DIFE

After the country's worst-ever industrial tragedies, Rana Plaza building collapse and the fire incident in Tazreen Garments last year, the Government of Bangladesh has upgraded the Directorate to a Department of Inspection for Factories and Establishments adding 679 new positions, including 392 slots for new Inspectors.

On 15.01.2014, the Ministry of Labour and Employment, after completing all formalities, issued the government order of upgrading the Department of inspection for Factories and Establishments from a directorate into a department having a headquarters and 23 district offices with 993 manpower of which 679 new posts created in revenue budget.¹⁰⁵

5.4 Priority Given in Appointing Inspector to get GSP Back

On June 27, 2013, the US government suspended Bangladesh's trade benefits under the Generalized System of Preferences (GSP), in view of insufficient progress by the government in affording workers internationally recognized worker rights and work place safety. The US government also imposed 16 conditions to get GSP facilities back, including recruitment of 200 factory Inspectors.

In 2014, the Ministry of Public Administration approved a labour ministry proposal for urgently appointing 200 more factory Inspectors to fulfill the condition of the Bangladesh Action Plan set by the United States for the restoration of GSP facilities. The Inspectors had been appointed from Bangladesh Civil Service (BCS) candidates, who have already passed all three tiers of the tests, but so far failed to secure any cadre posts.¹⁰⁶

¹⁰⁴ German Development Cooperation (GIZ), "Promotion of social and environmental standards in the industry (Project Description)" accessed 13th January, 2018. <https://www.giz.de/en/worldwide/14900.html/>.

¹⁰⁵ Department of Inspection for Factories and Establishments, "About Us", accessed 13th January, 2018. <http://www.dife.gov.bd/index.php/en/about-dife/introduction-to-dife/>.

¹⁰⁶ Tribune Report, "110 factory Inspectors asked to learn labour laws", *Dhaka Tribune* (23February 2015), accessed 13th January, 2018. <http://www.dhakatribune.com/business/2015/feb/23/110-factory-Inspectorsasked-learn-labour-laws#sthash.pDBYI2La.dpuf/>.

5.5 Supports from Foreign Bodies

5.5.1 Joint Effort of Domestic and Foreign Venture

Rana Plaza was a great tragedy. After the incident, the Govt. seems to be committed to reform the sector. Around 65 new Inspectors have joined so far. Important amendment has been made in the Bangladesh Labour Act. Together with donor countries' support, the Govt. tries to transform the ready-made garment sector of Bangladesh.

The UK, together with Canada and the Netherlands, is supporting the development of an efficient, credible and transparent cadre of labour Inspectors. Progress has been made in addressing many challenges facing the garment industry through concrete commitments by manufacturers, brands, development partners and the government.

5.5.2 Training Support from International NGOs

The Inspectors were trained by the ILO trainers from June 22 to 25, 2014. Around 125 labour Inspectors, including 11 female Inspectors, of the ministry were trained by the ILO from June 8 to 25 of 2014. In this training ILO taught the Inspectors about the status of the labour Inspectors, and how to improve the inspection visit.¹⁰⁷¹⁰⁸

The Improving Working Conditions in the RMG Program aims to support the Government of Bangladesh to significantly improve the capacity of its inspection system through gradual improvement of the legislative and policy framework, equipping and training of the current and newly recruited Inspectors, support to improving the organizational structure and the business processes of the Department of Inspection of Factories and Establishments (DIFE).¹⁰⁹ **5.5.3 Training for Labour Inspectors**

The government on August 16, 2015 launched a 40-day training course for 160 labour Inspectors. The training included subjects such as labour market, occupational safety and health, international labour standards and local laws, the International Labour Organization that supports the course. The Department of Inspections for Factories and Establishments and Bangladesh Institute of Administration and Management developed the training course. The ILO project was funded by Canada, the Netherlands and UK and ILO's International Training Centre in Turin. Trainers also focused on the issues related to Bangladesh and global economy, government service rules, procedures, teamwork and office management. The training for all 160 Inspectors, including the newly recruits and the experienced ones is supposed to be completed by February 2016.¹¹⁰

5.5.4 Joint Program to Train Inspectors

The governments of Bangladesh and Germany have created a joint program on 'Promotion of Social and Environmental Standards in the Industry' (PSES) to ensure – among various other issues - an improvement in worker's rights and safety in the RMG sector. A key element to reach this goal is an efficient, credible and transparent labour inspection system. A team of

¹⁰⁷ Tribune Report, "Labour Inspectors inadequate", *Dhaka Tribune* (27th June, 2014), accessed 13th January 2018. <http://www.dhakatribune.com/bangladesh/2014/jun/27/labour-Inspectors-inadequate#sthash.1xTMloqR.dpuf/>.

¹⁰⁹ International Labour Organization (ILO), "125 Labour Inspectors Received Training by the ITC-ILO (Press release)", (26th June, 2014), accessed 13th January, 2018. http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_248428/lang-en/index.html/.

¹¹⁰ Star Business Report, "Training for Labour Inspectors", *The Daily Star* (17th August, 2015), accessed 13th January, 2018. <http://www.thedailystar.net/business/training-labour-Inspectors-127981/>.

compliance professionals from GIZ, part of German Development Cooperation, in cooperation with labour inspection experts from the International Labour Organization (ILO), have been conducting a three-day seminar for factory Inspectors. All Inspectors from the general, health and safety wings of the inspection department in the ministry of labour and employment (MoLE) are to participate in this training.

5.5.5 Workshop to Train up Inspectors

A workshop on case management and follow up to the structural building and fire safety assessment of RMG factories was organized by the International Labour Organization (ILO) on 25 November 2014 as part of its Improving Working Conditions in the RMG sector program funded by Canada, the Netherlands and the UK. The need for systematic and comprehensive follow up of fire and structural inspections of ready-made garment (RMG) factories by the Department of Inspections of Factories and Establishments (DIFE) was stressed at this workshop.

The event brought together some 30 DIFE Inspectors who were joined by technical specialists from the Bangladesh Accord on Fire and Building Safety, the Alliance for Bangladesh Worker Safety and Bangladesh University for Engineering and Technology (BUET). The Accord and Alliance, which represent the international brands and retailers sourcing from Bangladesh shared best practice with the DIFE Inspectors on how they ensure RMG factories put into place the remediation steps identified by inspections. BUET staff also provided insight into prioritizing recommendations for follow up.¹¹¹

5.5.6 Initiative to inspect all RMG Factories

Following the collapse of the Rana Plaza in April 2013 efforts were immediately launched to inspect all 3,500 RMG factories throughout Bangladesh for fire and structural safety. By the end of November 2014 some 60% had been inspected by the Accord, Alliance and Bangladesh University for Engineering and Technology (BUET) under the National Tripartite Plan of Action.¹¹² Inspections carried out by BUET are being acted upon by the DIFE Inspectors, while the Accord and Alliance are using their own teams of engineers to carry out the same task.

As part of the implementation of the National Tripartite Plan of Action (NTPA) on Structural Integrity and Fire Safety, the RMG Program has handed over equipment worth some USD 477,000 to Bangladesh University of Engineering and Technology (BUET) to carry out factory safety inspections.¹¹³

5.5.7 ILO Provides Bikes for Labour Inspectors

The competent authority shall make the necessary arrangements to furnish labour Inspectors with the transport facilities necessary for the performance of their duties in cases where suitable public facilities do not exist. Since transport facility is very instrumental for discharging duties smoothly, Article 11 of the Labour Inspection Convention, 1947 requires the Inspectors to be

¹¹¹ Staff Reporter, "Labour Inspectors trained on follow up to BUET inspections in RMG sector", *The Daily Ittefaq* (Dhaka, 26th November, 2014) <<http://www.clickititefaq.com/in-the-news/labour-Inspectors-trainedfollow-buet-inspections-rmg-sector>> accessed 13th January, 2016.

¹¹² Ibid.

¹¹³ Business Desk, "ILO provides 95 bikes for Labour Inspectors", *banglanews24.com* (8th September, 2014), accessed 13th January, 2018. <http://www.en.banglanews24.com/fullnews/bn/98215.html/>.

provided with necessary transport by the government.¹¹⁴ To facilitate the responsibility of Bangladesh Govt., International Labour Organization (ILO) handed over 95 motorbikes to factory Inspectors on 8 September 2014 aiming to boost the capacity of government officials to carry out inspections at garment factories. The bikes are provided to be used by the Department of Inspection for Factories and Establishments (DIFE). The motorcycles were provided by the Improving Working Conditions in the Ready Made Garment (RMG) Sector Program which is an initiative of the Government of Bangladesh, implemented by the International Labour Organization and funded by Canada, Kingdom of the Netherlands and the UK Government. The handover of motorcycles forms part of a threeyear plan to strengthen the Bangladesh labour inspection system.¹¹⁵

6. SUGGESTIONS

With both pros and cons, the Bangladesh Labour Act, 2006 cannot said to be a legally modernized weapon to run the Inspectorate more efficiently. Most of the provisions relating to powers, functions, duties and even recruitment systems are not matched with the present need. If someone pursues these provisions thoroughly and deeply, then he will be able to reach at a conclusion that these are nothing but the mere replication of the previous labour laws (specifically the Standing Orders, 1965 and the Factories Act, 1965). Though the government implemented new Bangladesh Labour Act, 2006 from 11 October 2006 but no such remarkable provisions relating to inspection have so far been added to it. Whatever was pertinent in 1965 considering the whole socio-economic and industrial development of the country has now drastically changed and in this new era of globalization as well as vast industrialization, a more efficient, accountable, and specialized Factory Inspectorate has now become a crying need for the greater interest of the occupational health and safety of the workers. Apart from these the following steps should be taken to flourish the country's ageold structure of the Factory Inspectorate:

6.1 Acquaintance with Relevant Legal Provisions

Inspection functions should be to secure the enforcement of the legal provisions including health and safety; to facilitate technical information and suggestions to both employers and workers concerning the most effective means of complying with the legal provisions; and to inform the government of any defects or abuses not specifically covered by the existing legal provisions. Especially for this, they should be duly acquainted with the relevant laws and regulations.

6.2 Specialization and Sector-wise Inspection should be Preferred

Duly qualified technical experts as well as specialists having sheer proficiency in medicine, engineering, electricity and chemistry should be recruited and just after recruitment adequate training should be provided. Article 9 of Labour Inspection Convention, 1947 (No. 81) provides that: each Member shall take the necessary measures to ensure that duly qualified technical experts and specialists, including specialists in medicine, engineering, electricity and chemistry, are associated in the work of inspection, in such manner as may be deemed most appropriate under national conditions, for the purpose of securing the enforcement of the legal

¹¹⁴ Article 11 reads: *The competent authority shall make the necessary arrangements to furnish labour Inspectors with the transport facilities necessary for the performance of their duties in cases where suitable public facilities do not exist.*

¹¹⁵ Business Desk, "ILO provides 95 bikes for Labour Inspectors", *banglanews24.com* (8th September, 2014), accessed 13th January, 2018. <http://www.en.banglanews24.com/fullnews/bn/98215.html/>.

provisions relating to the protection of the health and safety of workers while engaged in their work and of investigating the effects of processes, materials and methods of work on the health and safety of workers. To this end, the government should maintain a system of sector-wise inspection under the exclusive supervision and control of a central body.

6.3 Number of Inspectors should be increased

As per the Article 10 of the ILO Convention No. 81 relating to the factory inspection¹¹⁶, the number of factory Inspectors will be sufficient to ensure the effective and result-oriented discharge of the duties of the Inspectorate. Moreover, Article 16 of the same Convention requires that the workplace shall be frequently inspected and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions. Considering the number, nature, size and situation of the workplaces, the number of Inspectors should be sufficient and the number of inspection should be rampant. DIFE has made a proposal to raise the number of Inspectors to 900 from the current number of 309.¹¹⁷ If increased, the factories and establishments can be brought under quality inspection. If the government takes initiative, as per section 9(4) of the repealed Factories Act, 1965, to appoint each deputy commissioner as Inspector in his respective district, then some additional Inspectors will be added to the current list.

6.4 Advanced Technology should be used in Inspection

The Inspectorate should be duly equipped with more advanced technologies and in the meantime for carrying these in the workplaces transport facilities should be available for them.

6.5 Inspectors should be monitored

There should be an internal monitoring body within the Inspectorate solely responsible for monitoring the activities of the Inspectors and it shall directly report to the higher authority.

6.6 Enforcement to be combined with Prevention Policies

An effective inspection system is essential to promote and monitor the compliance with legislation and to ensure enforcement and sanction. Enforcement and sanctions are indispensable components of any labour inspection system, but they should be adequately combined with prevention policies, aimed at helping employers and workers to avoid or eliminate the risk of occupational accidents and diseases.

In practical terms, the preventive role of the inspection services implies an increasing emphasis on proactive activities, such as carrying out planned inspection visits for such purposes as education, assessing plans for new buildings, plant, equipment and processes, providing information and advice including awareness raising campaigns, etc. However, proactive action must be complemented by reactive activities, e.g. investigations into accidents to identify actions to prevent recurrences or investigations into complaints.

6.7 Legislation should be changed to Empower Inspectors

Some provisions of the Bangladesh Labour Act, 2006 should be changed to empower Inspectors in line with the ILO Convention No. 81. Some proposals in this regard are as follows:

¹¹⁶ Bangladesh ratified this Convention on 22th June, 1972.

¹¹⁷ Staff Correspondent, "Bangladesh ranked worst in world to work in". *The Daily Prothom Alo* (14th June, 2015), accessed 13th January, 2018. <http://en.prothom-alo.com/bangladesh/news/69385/Bangladesh-rankedworst-in-world-to-work-in/>.

6.7.1 Scope as to Power of Entry to be enlarged

As per section 84 of the Bangladesh Labour Act 2006, Inspectors are given authority to enter into any establishment to take sample used or intended to be used in that establishment. But such entry must be followed by serving notice by Inspector to employer and must take place during the normal working hour. But the Labour Inspection Convention 1947 requires state parties to provide Inspectors wider range of power so that they can visit or enter into any establishment at any time of the day or night and without service of any prior notice. As Article 12 says:

“Labour Inspectors provided with proper credentials shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection”.

An employer may be served with prior notice as to the inspection visit, but the said Convention has made it optional when such a notification may be prejudicial to the performance of the inspection duties.¹¹⁸ So, section 84 of the Bangladesh Labour Act making the service of notice mandatory and restricting the power of entry only during normal working hour can be said to be in defiance of the Labour Inspection Convention which is necessary to be immediately redressed.

6.7.2 Inspectors should be empowered to take Prompt Action

The Inspectors should be empowered to take prompt legal action whenever extreme violation is observed. But this additional power of the Inspectors will not be absolute rather there shall be check and balance. As per Article 13 of the Labour Inspection Convention 1947, labour Inspectors shall be empowered to take prompt measures with immediate executory force in the event of imminent danger to the health or safety of the workers.

But unfortunately this very norm of the globally accepted Convention has been negated in empowering Inspectors under the Bangladesh Labour Act 2006 where even in the event of the grave and imminent danger to human life and safety, Inspectors are not empowered to take prompt and executory measures. As per the existing law, they have to serve notice upon the employer first and the employer will take necessary action.³⁸

The requirement of serving notice by the Inspector upon the employer even in the event of severe danger is nothing but a mockery with the safety rights of workers which should be immediately addressed for reform.

6.7.3 Adequate Penalty to be provided for the Punishment of obstructing Inspectors

Labour Inspection Convention requires the state parties to provide adequate penalties for violations of the legal provisions enforceable by labour Inspectors and for obstructing labour Inspectors in the performance of their duties by national laws or regulations and effectively enforced.¹¹⁹

Chapter XIX of the Bangladesh Labour Act 2006 deals with the penalty and nowhere in this chapter the penalty is provided for the creating obstruction in discharging the duties of labour Inspectors which is flagrant negligence as to the responsibility of Bangladesh towards

¹¹⁸ Art. 12, Sub-Art 2 of the Labour Inspection Convention. ³⁸
Sections 61, 85 of the Bangladesh Labour Act 2006.

¹¹⁹ Article 18 of the ILO Convention No. 81 says: “Adequate penalties for violations of the legal provisions enforceable by labour Inspectors and for obstructing labour Inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced”.

ratification of the norms suggested by Article 18 of the ILO Convention No. 81. The provision should be inserted providing the adequate penalty for obstructing Inspectors from discharge of their legal duty.

7. CONCLUSION

While the Bangladesh Labour Act, 2006 says about the worker's rights, benefits and for decent workplace, Inspectors are the sole administrative body making the laws more effective and conveying the fruits of the laws to the defined subjects of that particular law. There is no other alternative to rebuild a more functional and accountable Inspectorate considering the present perspective and in absence of this, the legal provisions, howsoever highly updated, will remain merely as a blunt weapon in the hands of the king. To make the existing system of inspection more effective, the number of inspectors should be increased, their quality training is to be ensured on regular basis, they have to be sophisticatedly equipped, they should be empowered in line with ILO Convention no. 81.

An Analysis of the Role and Rights of Victims in the International Criminal Trials

Tahsin Khan¹²⁰

ABSTRACT

This article intends to explore the role of victims in international criminal trials with special focus on the value of participatory and procedural rights for victims. In doing so, it especially evaluates and questions some of the recent attempts that have been taken to strike a balance between the rights of victims and the accused. It is concluded by arguing that although it may not initially be apparent, the most significant role of victims in international criminal trials is to ensure the right of the accused to a fair trial, as opposed to the popular belief that participation of victims is necessary for deferring their own sufferings. The author also contends for 'service rights' for victims, including the right to information, counseling, reparation and being permitted to make statements after a determination of guilt and opines that service rights are more important than 'procedural rights' such as participation as an actor in the trial.

Keywords: Victims, International Criminal Trials, Service Rights, Procedural Rights, Fair Trial

1. INTRODUCTION

It is not a fact of a very remote past that victims were neglected in international criminal trials, but they are today at the central point of political concerns and are given greater attention in the trials of recent international criminal tribunals. Nevertheless, it is still believed that the attention which they are receiving does not seem to be meeting their needs in international regime. Therefore, this article strives to focus on the potential roles and rights of victims, with special emphasis on the participatory and procedural rights. It may be mentioned here that the term 'victims' has been used throughout this article to cover "persons who, individually or collectively, have suffered harm, including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power".¹²¹ The author also contends for 'service rights' for victims, including the right to information, counseling, reparation and being permitted to make statements after a determination of guilt and opines that service rights are more important than 'procedural rights' such as participation as an actor in the trial. While it is true that there is an increasing focus on the role of victims of crimes in international criminal trials and

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¹²¹ UN General Assembly, *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29th November 1985, UNGA Resolution 40/34.

consequently a debate as to how victim-related interests can be met, opinions differ. Therefore, the article calls for allowing for a greater role for victims in light of restorative justice theories.

2. VICTIMS' RIGHTS UNDER THE INTERNATIONAL LAW

2.1 Historical Evolution of Victims' Rights

The past two decades have witnessed a renaissance in international law through the evolution of victims' procedural rights. Victims' rights activists consider this to be a restoration of victims to their original central role in the criminal justice system. Until the changing political ideologies in the 18th century redefined the role of the state in criminal trials, it was the victim who was entrusted with the responsibility for the prosecution of the crime.¹²² Thinkers like Beccaria heavily influenced the political thoughts from the 18th century onwards, who supposed individual crimes to be crimes against the state, and convictions were made in the public good as opposed to that of the victim.¹²³ Neils Christie stated in the 1970s that "the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing."¹²⁴ He further stated that this ill-treatment rendered the victim a sort of 'double loser'-firstly to the offender and secondly by having been usurped as the victim in his own case by the state.⁵

As the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and a Council of Europe Recommendation recognised the rights of victims in a criminal trial in 1985, international legal norms gradually began acknowledging that it is imperative to treat the victims with compassion and respect for their dignity and that they are entitled to redress for their suffering in terms of access to justice, compensation and services to assist their recovery.¹²⁵ The trend continued as a series of academic literature and studies also adhered to the Basic Principles. In particular the Van Boven report stressed on couching the victims with the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.¹²⁶ Subsequently, the European Union Framework Decision on the Standing of Victims in Criminal Proceedings was produced in 2001, which is considered to be the first 'hard law' international legal instrument.¹²⁷

2.2 Interplay between Victims' Rights and Right to Fair Trial under International Law

While the evolution of the rights of victims has been a recent phenomenon, the right to a fair trial as a whole has been recognised much earlier. The right to a fair trial was recognised in the Universal Declaration of Human Rights in 1948,¹²⁸ the European Convention on Human

¹²² Robert Elias, *Politics of Victimization: Victims, Victimology and Human Rights* (Oxford: Oxford University Press, 1986), 11.

¹²³ William McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim," *American Criminal Law Review* 13 (1976): 655.

¹²⁴ Neils Christie, "Conflicts as Property," *The British Journal of Criminology* 1 (1977): 3. ⁵

¹²⁵ Ibid.

¹²⁵ United Nations, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1998, UN Doc. E/CN.15/1998/1.

¹²⁶ Theo Van Boven, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 1993, UN Doc. E/CN.4/SUB.2/1993/8.

¹²⁷ European Union, *Council Framework Decision on the Standing of Victims in Criminal Proceedings*, 2001/220/JHA of 15th March 2001, OJ 2001 L 22/1.

¹²⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10th December 1948, Article 10.

Rights in 1950¹²⁹ and the International Covenant on Civil and Political Rights in 1966.¹¹ In fact even before the right to a fair trial was enumerated in these documents, such right was¹³⁰ already believed to be fundamental as it was the only means by which a state could deprive its own citizens from the enjoyment of freedom.¹³¹ Indeed, it is logical to assume that without ensuring the right to a fair trial, it is impossible to grant rights to victims because if the crimes they are victims to have not been satisfactorily proved, one cannot legitimately term them as victims.

This point was aptly recognised by Neils Christie in his article ‘Conflicts as Property’ in which he lamented the ‘stealing’ of conflicts from victims by lawyers and the state.¹³ Christie went on to formulate a four-stage approach to protect the rights of victims and to restore their ownership of the conflict, so to speak. The first step involves a conclusive determination of the guilt of the accused. The victim has no role to play in this step. However, if the accused is found guilty, the next three steps would come into play. The second step that Christie proposed is the most victim-centric one. At this stage, all elements of the victim’s experience are examined and he is given an opportunity to tell his story and narrate the harm suffered and what restitution could make up for this harm. The third stage is sentencing, which takes into account the guilt of the accused as determined in the first stage and the victim’s experience in the second. The last stage of the process involves a return to the victim to determine how the sentencing has been of service to him, facilitating the rehabilitatory value of the entire process.

3. VICTIMS’ RIGHTS AND INTERNATIONAL CRIMINAL TRIALS

A major shift that has been noticed in international criminal trials lately is the participation of victims in such trials. The Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) opted to confine the victim participation to being witnesses only. The exclusion of victim participation resulted in massive criticism and subsequently, when the Rome Statute of the International Criminal Court (ICC) was drafted, it was made sure that victims had a role in the court’s proceedings. Afterwards, when the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established, a new and unprecedented role for victims was introduced which allowed victims to stand as a party in the tribunal, on a par with the prosecution and defence.

3.1 The International Criminal Court (ICC)

It is alleged by a faction that the introduction of victim participation in the ICC has been apathetic at best. The Rome Statute adheres to the Basic Principle model of participation by stipulating that victims may present their views and concerns at an appropriate stage of the proceedings, in a manner which must conform to the fair trial right of an accused. On paper, this seems to be a well-balanced formulation but in practice, many have termed this a procedural nightmare.¹³²

¹²⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4th November 1950, Article 6.

¹³⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16th December 1966, United Nations Treaty Series, Vol. 999, p. 171, Article 14.

¹³¹ See, for example, the 5th Amendment to the United States Constitution: “No person shall be...deprived of life, liberty, or property, without due process of law.”¹³

Supra note 4.

¹³² Yvonne McDermott, “Victims and International Law: Remedies in the Courtroom?” *Hague Justice Journal* 4 (2010): 201.

Interestingly, contrary to the supporting role to the prosecutor which victim participation could reasonably be expected to play, the prosecution as well as the defence have vociferously protested the ICC's liberal interpretation of participatory rights. As for example, the Appeals Chamber has confirmed a Trial Chamber verdict that presenting 'views and concerns' could include the introduction of evidence by victims and a right of access to the Prosecutor's documents.¹³³ Both the defence and prosecution agreed that this was a step too far as it could have the impact of interfering with prosecutorial discretion and could effectively mean that the accused faces two accusers.¹³⁴ One of the earlier decisions allowed victims a role in the investigative stage of the trial even before an accused was identified.¹³⁵ These decisions instilled in victims powers well beyond that granted to the '*partie civile*' in inquisitorial systems, which could potentially complicate things as a large number of victims fall under the rubric of ICC situations.

However, the ICC appears to have taken a step back from the original liberal nature of victims' participation in more recent judgments,¹³⁶ seemingly because participation was becoming too much of a burden on the Court. It is submitted that the court should resort to the definition of participation in Article 68 (3) of the Rome Statute, which makes it clear that victim participation cannot be prejudicial to the rights of the accused.¹³⁷ In other words, the rights of the accused are not to be balanced with the rights of victims, but rather the presentation and considerations of victims' views and concerns must simply conform to the rights of the accused. Also there exists ambiguity as to the clarity of the interplay between the victims and witnesses unit, victims' representatives and the outreach programme, as well as how far victims' rights can stretch, who can be considered a 'victim' for the purposes of participation, and whether the participation of a small number of victims in the cases actually aids post-conflict rebuilding and confidence in the ICC's work in the areas affected.¹³⁸ In order to make sure that both victims and the parties to a case know what to expect from the process in advance, the issuance of some guidelines on the modalities of participation would be a welcome move.

3.2 The Extraordinary Chambers in the Courts of Cambodia (ECCC)

As many as ninety four civil parties, divided into four groups, twenty two of whom were given the opportunity to testify throughout the first ECCC trial in the Kaing Guek Eav (alias Duch) case. As parties to the case, on a par with the prosecution and defence, the scope of the victims' rights is extremely generous. In fact the scope of the victims' rights includes access to the case file, questioning witnesses, and suggesting forms of reparation.²¹ The administrative efficiency of the Victims' Unit of the ECCC has thus far been praiseworthy and many consider it to have left a footprint which the ICC may follow.

¹³³ Yvonne McDermott, "Victims' Rights Must Not Jeopardise Fair Trial," *International Justice Monitor*, 2010, <http://www.lubangatrial.org> (Last visited 27th June, 2018).

¹³⁴ Kathryn Howarth, *Special Court for Sierra Leone-Fair Trials and Justice for the Accused*, 8 ICLR 399 at 403 - 409 (2008/3).

¹³⁵ Supra note 14.

¹³⁶ See: situation in the Democratic Republic of the Congo, *The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui*. Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the PreTrial Stage of the Case, Case No. ICC-01/04-01/07-474, 13th May, 2008.

¹³⁷ Article 68 (3) of the Rome Statute: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appointed by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

¹³⁸ Ibanet, "International Bar Association", <https://www.ibanet.org/Access/Error404.aspx?aspxerrorpath> (Last visited 28th June, 2018). ²¹ Supra note 14.

Nevertheless, the participation of victims as civil parties to the inaugural case has not been without discontent. On 31 August, 2009, the victims who were participating in the case expressed dissatisfaction on the ground that they were not allowed to question the witnesses and the accused on matters relating to the accused's character and hence boycotted the trial.¹³⁹ The victims recommenced appearing on 14 September, 2009.¹⁴⁰ It is, therefore, advisable that the victims should be delineated the exact scope and limits of victims' participation at the outset in order to avoid any discontent. This is further illustrated by the Judges' need to remind victims' representatives to remain within the parameters of Rule 23 of the Internal Rules,¹⁴¹ which states that the object of participation is to facilitate the prosecution and to permit victims to seek collective and moral reparations.

A further suggestion for how best practice could be implemented in the ECCC moving forward is inspired by the closing statement of the Group 2 victims on 24 November, 2009.¹⁴² Their representative asserted that the judges of the Tribunal had been insensitive towards her clients and had not been sufficiently respectful to their suffering. There was one instance where victims were asked to suppress their emotions, and one victim was told to uncover his scars to the courtroom, before his counsel objected. Some might argue that the Judges' actions were intended to avoid any kind of prejudice against the accused, but it should also be borne in mind that these victims have been through incredibly traumatic events and this fact must be treated with deference as giving evidence in a packed courtroom is an intimidating experience.

The Sixth Plenary Session of the ECCC which concluded on 11 September 2009 made several important changes to the modalities of civil party participation in the future.²⁶ Firstly, all civil parties will comprise a single, consolidated group which will be represented by lead co-lawyers, supported by civil party lawyers. Secondly, 'other supplementary forms of victim participation which will occur outside of formalized court proceedings' will be adopted.¹⁴³ Finally, applications to participate as a civil party in a case must be received well in advance of the trial's commencement.

4. VICTIMS' RIGHTS IN THE CONTEXT OF THE RIGHT TO A FAIR TRIAL

4.1 Role of the Criminal Trial

In order to substantiate the correlation between victims' and accused's rights, it is pertinent to attain a normative conception of the criminal trial. The classical account, of course, is that the solitary aim of the trial is to determine the guilt or innocence of the accused.¹⁴⁴ This theoretical basis is defective in a number of ways. Firstly, it oversimplifies the actors in the criminal justice system by reducing the trial to a bi-polar contest between the offender and the state. Secondly, it fails to explain why the system insists on a full-scale contested trial in circumstances where it would appear that the guilt of the accused is undeniable on the weight of evidence against him. Indeed, it would question the need to give participatory standing to the accused- if the solitary function of the trial is to determine the guilt or innocence of an individual, surely it

¹³⁹ *Prosecutor vs. Kaing Guek Eav "Duch"*, Transcript of Trial Proceedings, Case No. 001/18-07-2007ECCC/TC, 26th August 2009.

¹⁴⁰ Supra note 14.

¹⁴¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.4), adopted 12th June, 2007.

¹⁴² *Prosecutor vs. Kaing Guek Eav "Duch"*, Transcript of Trial Proceedings, Case no. 001/18-07-2007ECCC/TC, 24th November, 2009. ²⁶ Supra note 14.

¹⁴³ "Extraordinary Chambers in the Courts of Cambodia," ECCC, https://www.eccc.gov.kh/asp?doc_id=311%20 (Last visited 28th June, 2018).

¹⁴⁴ Alan Young, "Two Scales of Justice: A Reply," *Criminal law Quarterly* 35 (1993): 359.

would make more sense to take a surgical analysis of the entire situation, and not give a voice to anyone outside of what is necessary to determine the truth, particularly those who had a vested interest in interfering with the truth. Thirdly, there are criticisms on recent restrictions on the right to silence, abolition of jury trial, and so on, which lack grounding if it can be proven that these restrictions in fact help to prove the truth.

Therefore, it may be concluded that the ultimate goal of the trial must go beyond a simple fact-finding mission. Many legal philosophers base their conceptions on the purpose of the trial on a broader construction of law as a regulator of relationships between individuals in a polity.¹⁴⁵ For instance, Mireille Hildebrandt constructs the trial as an exercise in “democracy on a case-by-case basis, holding together the meanings of legal norms in the light of past cases, and in anticipation of future ones.”³⁰ While tempting, there is a sense with this line of thinking that the jurist is granting policy-makers too much credit for their foresight and ability to see the bigger picture. In view of some of the brand-aid approaches taken to rebalance the criminal justice system explained above, and the apparent lack of foresight therein, one must question whether the trial process needs to be given such a deep epistemic construction. Indeed, Hildebrandt herself questions whether in the long run, the reduced centrality of the criminal trial will break down the normative significance of criminal intervention as a whole.¹⁴⁶

Having recognised that the trial plays a role going beyond a pure determination of fact, yet falling short of an entire norm-creating or affirming exercise in each instance, one must find a space along the spectrum which fits both the trial’s individualistic nature and the broader societal part it plays. Anthony Duff probably came closest in striking this conceptual balance in 1986, when he said that the aim of the criminal trial is not just to reach judgment on the accused individual’s past conduct, but also to communicate and justify that judgment to himself and others.¹⁴⁷ Duff, along with some other highly acclaimed scholars, reiterated this sentiment in the conclusion of their ‘The Trial on Trial’ project in 2008, when they concluded that the trial is a communicative process through which citizens are publicly called to answer for their wrongdoing and to account for their wrongful conduct.³³ The conception of the trial as a public process realizes that a trial is not just a contest between the state and the accused, but includes concern for the victim.¹⁴⁸

Two observations can be made at this stage. First of all, understanding the trial in this way undermines further the distinction drawn between adversarial and inquisitorial systems in victims’ rights literature, with the latter being more agreeable to the views and concerns of the victims.¹⁴⁹ This distinction is erroneous in modern trial processes, where a purely inquisitorial or adversarial system is hard to come by, and becomes unnecessary in any event when the trial as a whole is viewed as a system of calling into account.¹⁵⁰ This understanding of the trial as a communicative process also explains the significance and role of international criminal trials—the wrongs committed therein render the perpetrators answerable to the international

¹⁴⁵ Lon Fuller, “Human Interaction and the Law,” *American Journal of Jurisprudence* 14 (1969): 1. ³⁰
Supra note 14, at 207.

¹⁴⁶ Ibid.

¹⁴⁷ Anthony Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), 116. ³³
Anthony Duff et al., *The Trial on Trial* (3) (Sussex: Hart Publishing, 2008), 13.

¹⁴⁸ Sandra Marshall and Anthony Duff, “Criminalization and Sharing Wrongs,” *Canadian Journal of Law & Jurisprudence* 11 (1998): 7.

¹⁴⁹ Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice* (Oxford: Hart Publications, 2008), 265.

¹⁵⁰ Johannes Nijboer, “Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective,” *American journal of Comparative Law* 41 (1993): 299.

community as a whole for their conduct. Secondly, those who opt to perceive the trial as a public communicative process of calling into account have raised concerns-and rightly so-on recent attacks, not just on defence rights, but on the system as a whole.¹⁵¹ For example, many jurisdictions have witnessed a proliferation in the amount of plea bargains and outlined administrative processes to deal with alleged offenders, without full due process of the law.¹⁵²

4.2 The Benefit for Victims in Granting a Fair Trial to the Accused

The move away from full, public and procedurally fair trials, while sometimes purportedly taken in the interest of victims, can affect them in a number of ways. Many argue that it takes away the healing effect that comes from the trial recognizing victims suffering and calling offenders into account. Jenny McEwan identified this in her analysis of the trial of ‘The Yorkshire Ripper’, Peter Sutcliffe.¹⁵³ The accused pleaded guilty to manslaughter, but the judge insisted on a full murder trial, presumably because “the cathartic effect of a contested trial would not have been produced by the short sentencing hearing that follows the acceptance of a plea for guilty.”¹⁵⁴

Unfortunately, in the current criminal justice system which is concerned with efficiency and reduction of costs, guilty pleas are often welcomed as a lesser burden for the system to carry. This takes away from the victim the full acknowledgement of his experience.¹⁵⁵ To this end, as Richard Goldstone has noted, “public exposure of the truth is the only effective way of ensuring that history is recorded more accurately and more faithfully than otherwise would have been the case.”¹⁵⁶ A full trial means a full public exposure of the truth, and the acknowledgement of the victim’s suffering in this way facilitates the start of their healing process. This is particularly relevant in the context of international tribunals, where a full trial adds to the historical account of the events and thus a basis for post-conflict reconstruction.

Furthermore, victims and society have a legitimate expectation that offenders will be punished for the crimes committed and not some lesser charge on the grounds that this would make the system cheaper and quicker.¹⁵⁷ This falls under the purview of the right to an effective remedy under international human rights law.¹⁵⁸ In its judgment in the case of *Velasquez Rodriguez*, the Inter-American Court of Human Rights held that the state is obliged to investigate every violation of the rights protected by the Convention. Moreover, “[i]f the state apparatus acts in such a way that the violation goes unpunished...the state has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”¹⁵⁹

Following the *Velasquez Rodriguez* ruling, one can reasonably conclude that by taking rights away from the accused, the state unintentionally finds itself in violation of human rights,

¹⁵¹ Thomas Weigend, “Why Have a Trial when You Can Have a Bargain?” in *The Trial on Trial* (2), ed. Anthony Duff et al. (Sussex: Hart Publishing, 2006), 207.

¹⁵² Supra note 28.

¹⁵³ Jenny McEwan, “Truth and Due Process,” in *The Trial on Trial* (1), ed. Anthony Duff et al. (Sussex: Hart Publishing, 2004), 53.

¹⁵⁴ Ibid.

¹⁵⁵ Richard Goldstone, “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals,” *New York University Journal of International Law & Politics* 28 (1995-1996): 489. ¹⁵⁶ Ibid.

¹⁵⁶ Thomas Miles, “The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused,” *Criminal Law Review* 19 (1995) 196.

¹⁵⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10th December 1948, Article 8; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4th November 1950, Article 13.

¹⁵⁸ *The Velasquez Rodriguez Case*, Judgment of 21st July 1989, Series C, No. 4 (Honduras), Para. 176.

including of victims, even though paradoxically such measures were taken in the perceived interest of victims. Derogation from fair trial rights increases the possibility of convicting the wrong person, which also affects the victims because the individuals who actually committed the crime walk free.¹⁵⁹

5. REALIZATION OF VICTIMS' NEEDS IN INTERNATIONAL CRIMINAL TRIALS WITHOUT COMPROMISING THE RIGHTS OF THE ACCUSED

5.1 Service Rights: Information, Counseling and Victim Impact Statements

Taking into consideration the significance of a full and fair trial to victims and the outcome the particular decisions taken in the interest of victims can have, it is imperative to strive to find a way forward in international criminal trials which respects the dignity of individual victims without sacrificing the fairness of the trials. Therefore, it is desirable that victims' rights do not result in a trade-off between the rights of the accused and the rights of victims. Researchers suggest that as long as victims are fully informed of the details of a trial and so long as they are treated respectfully and with dignity, they are happy to leave the decision making in the hands of authorities.¹⁶⁰ This indicates the increasing necessity of service-based, as opposed to rights-based approaches to victims of crimes.¹⁶¹ This includes keeping victims up to date of progresses in the case, counseling and giving victim impact statements if the accused has been proven to be guilty.¹⁶² Victims might then find that the system serves them sufficiently but without making any interference into the due process rights of the accused.¹⁶³

There is also a genuine need for education in the public sphere regarding the purview and objects of victims' rights, so that those who are not fortunate enough to find themselves in the position of victim to a crime know what to expect.¹⁶⁴ In the pretext of international criminal trials, this could potentially be rolled out as part of the Outreach programme of the ICC and the Victims' Unit of the ECCC. This is likely to diminish some of the angry reactions of the victims that have been experienced when their expectations are not met.

5.2 Service Rights: Compensation

In pursuance of the UN Basic Principles, further acknowledgement of the sufferings of victims could be provided in international criminal trials by means of compensation after the trial and sentencing. The Rome Statute of the International Criminal Court formed a Trust Fund for victims, which is a body independent from the court. The Trust Fund is intended to work with local communities falling under the jurisdiction of the ICC to assist the victims to rehabilitate themselves. Once an accused is convicted, victims may plead before the Court to make an order of reparations for redressing their distress. The Judges may order individual as well as collective reparations, which can be paid out of the Trust Fund. Judges will determine what type of reparations should be granted and it may include compensation, restitution, rehabilitation and symbolic measures such as public apology or a commemoration of memorial.

¹⁵⁹ Clive Walker and Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (Vancouver, Blackstone Press, 1999) 79.

¹⁶⁰ Jo-Anne M. Wemmers and Conrad K. Cyr, "Victims' Perspectives on Restorative Justice: How Much Involvement are Victims Looking For", *International Review of Victimology* 11 (2003): 259.

¹⁶¹ "Hyper Articles en Ligne," HAL. <https://hal.archives-ouvertes.fr/hal-00782986> (Last accessed 29th June, 2018).

¹⁶² Andrew Ashford, "Responsibilities, Rights and Restorative Justice," *The British Journal of Criminology* 42 (2002): 583.

¹⁶³ Ibid.

¹⁶⁴ Supra note 14, at 210.

The judges made numerous interesting suggestions in the closing statements of the ECCC's first trial, which include the preservation of the historical site and documents, establishing a trust fund for victims, and that the accused should write an autobiography in prison and give the royalties to the civil parties.¹⁶⁵ It is beneficial to grant compensation after the allegations have been established as it does not interfere with the presumption of innocence or any other rights of the accused, and also insofar as it gives victims the opportunity to express what they think appropriate restitution for the damage undergone. Generally, international criminal trials experience a large number of victims and therefore one should understand that it is impossible to hear the victims individually. Victims may be asked for their opinions on forms of community reparation as well.

6. CONCLUSION

Victim participation in international criminal trials is a complex but innovative idea. The above discussion reveals that both the ICC and ECCC consider victims' rights and regard victims as an autonomous part of the proceedings. Though, victims' rights may not be absolute, since they are subject to the guarantees of a fair and impartial trial, they should be considered a breakthrough in international criminal trials. An attempt has been taken in this article to illustrate that a common-sense, respectful and 'service-based' approach to victims' rights is what is needed, especially in international criminal trials. The benefit to victims in granting the accused a fair trial and the dangers of derogating from age-old due process concepts, in the interests of 'rebalancing' the system or otherwise should be realized. It is imperative to take into consideration the victims' experiences and treat them with dignity and respect, without making trial process inordinately cumbersome.

¹⁶⁵ Supra note 25.

Medical Negligence in Bangladesh: An Analysis of the Legal Frameworks

Arif Ahmed¹⁶⁶¹⁶⁷, Dr. Sharmin Zaman Momo^{□□}

ABSTRACT

Medical negligence has become a catchphrase in the context of medico-legal arena of this present world including Bangladesh. This is a serious misconduct and a punishable offense which is generally committed by a professional group who are essentially on the duty to take care of the patients even during the emergency strikes as well as when the right to health remains under the serious threat. Bangladesh is a country which lacks the specific and comprehensive legal framework to prevent this gross violation of right to health from which the common people are not getting rid of today. However, the key aim of this research is to conduct a critical analysis on the legal framework to combat medical negligence in Bangladesh. It also strives to discover the legal status of medical negligence on the review of existing legislations of Bangladesh as well as to find out the loopholes and inconsistencies in the existing legislative framework. Finally this study provides few recommendations to protect the overall right to health care of the citizens of Bangladesh.

Keywords: Bangladesh, Medical, Negligence, Right, Violation

1. INTRODUCTION

Negligence is such kind of behavior that is frequently apparent at the different levels of our everyday lives. In our today's materialistic world, like many other things, medical treatment has also become too much costly and manipulative which is often treated as the commodities.¹⁶⁸ The relationship between a doctor and a patient has always been considered as fiduciary and sacred worldwide where the earlier is only to do the wellbeing of the later and eventually to act like the protector. Hence a doctor is treated by the common people like the savior next to the God, who is also considered a key attributing factor playing significant role in the health sector. Hippocrates, the great Greek physician who is also known as the father of western medicine, has quoted "Whenever a doctor cannot do well, he must be kept from doing harm."¹⁶⁹ For this reason the doctors are always responsible to have a certain level of learning, training, expertise, skill, and knowledge and are to maintain a particular degree of 'care and caution', at the time of performing their obligations.¹⁷⁰ In the case *State of Haryana vs. Smt. Santra*, the Supreme Court held that every doctor "has a duty to act with a reasonable

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¹⁶⁸ Md. Ershadul Karim, "Examining Liabilities Arising from Doctor's Negligence", *University of Dhaka Studies*, Part F, Vol. XVI (I), (June, 2005): 151.

¹⁶⁹ Khandakar Kohinur Akter, "A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices", *Northern University Journal of Law*, Vol. IV (2013) 67.

¹⁷⁰ Sheikh Mohammad Towhidul Karim, Mohammad Ridwan Goni, and Mohammad Hasan Murad, "Medical Negligence Laws and Patient Safety in Bangladesh: An analysis", *Journal of Alternative Perspectives in the Social Sciences*, Vol. 5, No. 2 (2013): 424 - 442.

degree of care and skill”.¹⁷¹ Therefore, it is always said that health is the greatest of all possessions reflecting the age old maxim ‘if health is lost everything is lost’.¹⁷² The idea of health care industry or health-providing mechanism has emerged because “physicians as entrepreneurs or as workers in an entrepreneurial enterprise were enmeshed in mutual competition”.¹⁷³ It is alleged that the health care professionals should treat the patients as their friends, and not as the consumers of services.¹⁷⁴ However, deviation from these professional etiquettes is commonly tantamount to committing medical negligence. It is very unfortunate that due to the negligent behavior of physicians we frequently suffer to the extent that numerous people have died prematurely due to such callous disrespect of the peoples’ belief.¹⁷⁵ In this study it is observed that despite there are a number of legislations and institutions preventing medical negligence, though not sufficient, many innocent people of our country have been victimized by the intentional or unintentional breach of obligations of the physicians.

This study is principally based on the qualitative research design with the support of descriptive method where an analysis on the existing legal framework with regard to medical negligence in Bangladesh has been conducted. In order to find out the concrete legal protection that the Bangladeshi laws provide to the victims of medical negligence, it includes a scrutiny of the factual background and the legal literature considers investigation and also the hypothetical basis for this study. In conducting this research data have been collected from various primary and secondary resources and experiences of victims of medical negligence gathered from media reports, publications, laws and policies, articles, books, statutes and cases laws where an attempt has been made to make the contents coherent yet comprehensive.

2. NEGLIGENCE AND MEDICAL NEGLIGENCE: EXPLANATION OF THE IDEAS

Prior to defining the term ‘medical negligence’, the term ‘negligence’ should be clarified at first. Negligence can be defined as a ‘conduct that is culpable as it falls short of what a reasonable person would do to protect another person from probable risks of harm’.¹⁷⁶ The term medical negligence commonly refers to the negligent or rash act of the medical professionals in violation of the duty of care they owe to their patient.¹⁷⁷ It is the breach of a legal duty to care which means carelessness in a matter in which the law mandates carefulness.¹⁷⁸ Negligence is a significant branch of the law of tort. When the term ‘negligence’ is used in the law of torts, it usually means ‘more than mere carelessness’.¹⁷⁹ The term ‘negligence’ has been defined as “the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do”.¹⁸⁰ Negligence consists of

¹⁷¹ *State of Haryana vs. Smt. Santra (2000)* [5 SCC 182: AIR 2000 SC 3335].

¹⁷² Karim, Examining Liabilities Arising from Doctor’s Negligence, 152.

¹⁷³ E. H. Loewy and Roberta Springer Loewy, *Textbook of Health Care Ethics*, 2nd eds. (2004): 83.

¹⁷⁴ E. H. Loewy, “Friendship and Medicine”, *Cambridge Quarterly of Health Care Ethics*, Vol. 3, No. 1 (1994):52.

¹⁷⁵ Karim, Examining Liabilities Arising from Doctor’s Negligence, 152.

¹⁷⁶ Aditya Singhal, “The Veracity of Laws relating to Medical Malpractice in India”, *International Journal of Scientific and Research Publications*, (2015): 1.

¹⁷⁷ Tapos Bandhu Das, “A Study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Perspective”, Report prepared for Ain O Salish Kendra (ASK), 2013: 5. <http://www.askbd.org/ask/wp-content/uploads/2014/02/Report-Medical-Negligence.pdf>.

¹⁷⁸ K. K. S. R. Murthy, “Medical Negligence and the Law”, *Indian Journal of Medical Ethics*, Vol. IV, No. 3, (July-September, 2007): 116.

¹⁷⁹ J. C. Goldberg and B. C. Zipursky, “The fraud-on-the-market tort”, *Vanderbilt Law Review*, Vol. 66: 6 (2013): 1755.

¹⁸⁰ *Blyth vs. Birmingham Waterworks Co. (1856)* [11 EX.78].

unreasonable conduct, which causes harm in breach of a legal duty to take care to avoid harm of that kind.¹⁸¹

If we scrutinize the above definition it is found that there are mainly three constituent elements of negligence: (1) duty to take care; (2) breach of that duty; and (3) loss of the plaintiff because of that breach of duty. In order to establish and prove the charge of medical negligence against a doctor these following elements need to be proved by a patient: (1) duty, i.e. the duty was owed by the professionals; (2) negligence, i.e. reasonable care was not taken; (3) damage, i.e. claimant suffered compensable injury; and (4) causation, i.e. the injury was caused by the conduct of the professionals.¹⁸² In the Indian jurisdiction there is a famous case named *Philips India Ltd. vs. Kunju Punnu*¹⁸³, where the Bombay High Court stipulated that the fulfillment of the following three elements constitute medical negligence against a doctor: firstly, the Doctor was under an obligation to take reasonable care of the claimant to avoid the damage complained of or not to cause damage to the claimant by ensuring reasonable care; secondly, there was a breach of such obligation on the part of the doctor; and finally, such breach of duty was the real cause of damage complained of, and such damage was reasonably foreseeable.

On the other hand, Medical negligence is an issue of serious human rights concern that directly affects the right to health care and right to life of the people. Medical negligence refers to culpable carelessness in the field of medical science and it involves risk to the health and well being of an individual who entrusts his well-being into the hands of a medical professional.¹⁸⁴ Lord President Clyde provided a precise definition of medical negligence and said, “The true test for establishing negligence in diagnosis or treatment on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would have been guilty of, if acting with reasonable care”.¹⁸⁵ It is sometimes uttered that medical negligence is not reliant upon a poor result, and a poor result does not always constitute negligence.¹⁸⁶

In order to address medical negligence the principle of ‘standard of care’ has to be invoked which is considered as the leading principle to regulate the doctor’s professional etiquette.²⁰ This principle has been settled down in the famous English case *Bolam vs. Friern Hospital Management Committee* where Justice McNair rightly defined the principle of ‘standard of care’ and said, “The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art”.²¹

However, it is to be noted here that at present the ‘Bolam Test’ is no more the basis of medical negligence. Today the modern-day test is “Rogers vs. Whitaker (1992) Test”. The High Court of Australia in the *Rogers vs. Whitaker*²² case rejected the Bolam Test²³ of medical

¹⁸¹ Tony Weir, *A Casebook on Tort* (London: Sweet & Maxwell, 1997): 1.

¹⁸² Shyikh Mahdi, “Medical Negligence vs. Violence on Doctors: Alarming Trend on the Rise in Bangladesh”, *Future Law Initiative*. <https://futrlaw.org/medical-negligence-vs-violence-doctors-alarming-trend-risebangladesh/>.

¹⁸³ [(1974) BLR 337 (Bombay High Court)].

¹⁸⁴ S. M. Masum Billah, Right to Life: ‘Judicare’ of ‘Medicare’. *The Daily Star*, 17th April, 2010. <https://www.thedailystar.net/law/2010/04/03/advocacy.htm>.

¹⁸⁵ *Hunter vs. Hanley* (1955) [1st Division, Court of Session, Scotland].

¹⁸⁶ Zachary Matzo, “What Constitutes Negligent Treatment by a Doctor?” www.alllaw.com/articles/nolo/medical-malpractice/what-constitutes-negligent-treatment-by-doctor.html.²⁰ Jaising Modi, *Modi’s Medical Jurisprudence and Toxicology* (New Delhi: LexisNexis, 23rd eds., 2006) 154. ²¹ *Bolam vs. Friern Hospital Management Committee* (1957) [1 WLR 582]. ²² [(1992) 175 CLR 479].

neglig¹⁸⁷ence with regard to the delivery of information and obtaining consent to medical treatment where the main deciding issue was whether the doctor's failure to advise and warn Rogers of risks inherent in the operation constitutes a breach of duty? The High Court of Australia affirmed the Supreme Court of New South Wales' determination that a doctor has an obligation to warn a patient of any material risk involved in a proposed treatment.¹⁸⁸ In this case it was also observed by Mason CJ, Brennan, Dawson, Toohey and McHugh JJ that:

“...the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising & professing to have that special skill...but, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade...”¹⁸⁹

The decision of this above case actually caused a concern among the medical professions who felt that they were now to be judged by the lawyers rather than their medical peers.¹⁹⁰ In another case it was decided that when a medical practitioner consults a patient, he or she owes that patient the following significant duties: (a) duty to care in deciding whether to undertake the case; (b) duty to care in deciding what treatment to give; and (c) duty to care in the administration of the treatment.¹⁹¹ It is to be noted that the offence of medical negligence or malpractice can be categorized as: (1) misdiagnosis; (2) delayed diagnosis; (3) surgical errors, i.e. unnecessary surgery, errors and negligence in anesthesia, wrong site surgery etc.; (4) childbirth trauma and malpractice; and (5) negligent long term treatment.¹⁹²

3. MEDICAL NEGLIGENCE: PRESENT SCENARIO IN BANGLADESH

In Bangladesh each year many people pass away due to the wrong treatment and negligence by the physicians. Both the public and private health care sectors of Bangladesh have been facing serious ‘allegations’ with regard to erroneous treatment of different diseases resulting in death, casualty and disability of the patients. A recent survey estimates that an average of ten people dies each year in the districts outside the Dhaka city because of the mistake or negligence committed by the physicians.¹⁹³ In Bangladesh one of the leading human rights organizations Ain O Salish Kendra (ASK) discovered 504 cases of medical negligence from June 1995 to September 2008.¹⁹⁴ The newspaper reports of 2013 reveal that at least in twenty nine cases the report headline was “wrong treatment” that included twenty seven death cases and two disabilities, in seven cases the headline was death due to “negligence”.¹⁹⁵

However, there are some limitations in the health sector of Bangladesh that can never be denied. The report of World Health Organization (WHO) reveals that the per capita expenditure on health sector should be \$34, while it is only \$5 in Bangladesh. Though the global standard for

¹⁸⁷ *Bolam vs. Friern Hospital Management Committee* (1957) [1 WLR 582] per McNair J.

¹⁸⁸ *Rogers vs. Whitaker*. Australia High Court, *Australian Law Journal*, 67(1), (Jan - 1993): 47 - 55.

¹⁸⁹ *Rogers vs. Whitaker* [1992 HCA 58; 175 CLR 479].

¹⁹⁰ Setting the Standards for Medical Negligence: The Bolam test post *Rogers vs. Whitaker*.
<https://law.anu.edu.au/sites/all/files/users/u4810180/bolam.pdf>.

¹⁹¹ *Dr. Lakshman Balkrishna Joshi vs. Dr. Trimbak Babu Godbole* [AIR 1969 SC 128]: 131-132.

¹⁹² Mahdi, “Medical Negligence vs. Violence on Doctors”, *Future Law Initiative*.

¹⁹³ Ekram Kabir, “What can we do to end medical malpractice in Bangladesh?” *The Dhaka Tribune*, 31st March, 2017. <http://www.dhakatribune.com/opinion/op-ed/2017/03/31/negligence-wears-stethoscope/>.

¹⁹⁴ Eshita Tasmin, “Clinical Negligence”, *The Daily Star*.
<http://archive.thedailystar.net/forum/2012/August/on.htm>.

¹⁹⁵ Farida Akhter, “Wrong Treatment or Negligence”. *Unnayan Bikalper Nitinirdharoni Gobeshona*, 15th April, 2014. <http://www.ubinig.org/index.php/networkdetails/showArticle/1/17/english>.

doctor to nurse ratio is 1: 3, in Bangladesh it is 1: 0.48.¹⁹⁶ Another statistics demonstrates that under the Ministry of Health and Family Welfare the government has a total of 593 hospitals, 22 medical colleges, 9 dental colleges, 15922 doctors, 13235 nurses and 45621 beds for its estimated population of 154.8 million which is very much insufficient to provide the standard health care to the people.¹⁹⁷

4. EXISTING LEGAL FRAMEWORKS ON MEDICAL NEGLIGENCE: BANGLADESH

The law of medical negligence governs the liability of doctors and other treatment providers when they cause harm to a patient through rendering their services negligently. In Bangladesh there is no specific legal framework on this particular area except few scattered references on a number of medical code, ethics and civil or criminal statutes. In the context of Bangladesh this area explicitly falls within the ambit of tortious liability that is usually unwelcomed by the bar or bench who feel reluctant to resort to the Courts for different reasons.¹⁹⁸ However, the existing legal frameworks that are functional to combat medical negligence in Bangladesh are discussed as follows:

4.1. The Constitution of the Peoples' Republic of Bangladesh, 1972

The Constitution of the Peoples' Republic of Bangladesh does not contain any direct provision on the right of the patients. Nayak (2004) observed that actually the patient's rights are the indirect rights.¹⁹⁹ The Constitution of Bangladesh does not recognize the right to health and medical care as the fundamental rights; rather these are recognized as the basic necessities for all citizens and are enshrined as the fundamental principles of state policies in its part II.²⁰⁰ The key reason behind this is that the framers of our Constitution intended for the progressive realization of these rights. The constitutional sanction in favor of right to health and medical care can further be inferred from Article 32 of the Constitution which guarantees right to life as a fundamental right.²⁰¹ Enforcement of such right can be exercised through lodging the writ petitions before the High Court Division under articles 44 and 102 of the Constitution.

In the case *Dr. Mohiuddin Farooque vs. Bangladesh & others*³⁸ popularly known as the Doctor's Strike Case, the petitioner challenged the continuance of strike by the government doctors wherein the Court treated the strike as a failure to perform their statutory and Constitutional obligations to ensure health services and medical care to the general public, arising out of the abstention from obligations by the striking doctors. It was argued that the willful absence of the doctors of BCS (Health Cadre) as members of the Association from their statutory and public duties caused threat to life and body of the public is of no legal effect.²⁰² Apart from the duty of the state to protect and promote the right to health and medical care, there exists another aspect of this particular issue i.e. the duty of the citizens and public

¹⁹⁶ Das, "A Study on Medical Negligence and Fraudulent Practice in Private Clinics", 14.

¹⁹⁷ Health Bulletin, Management Information System, Directorate General of Health Services, Ministry of Health and Family Welfare, Govt. of People's Republic of Bangladesh, 2014.

¹⁹⁸ Billah, Right to Life: 'Judicare' of 'Medicare'. *The Daily Star*, 17th April, 2010.

¹⁹⁹ R.K. Nayak, "Medical Negligence, Patients' Safety and the Law", Regional Health Forum (India), Vol. 08, No. 2, (2004): 5.

²⁰⁰ Article 15 of the Constitution contains provisions regarding basic necessities and article 18 of the Constitution deals with public health and morality.

²⁰¹ Das, "A Study on Medical Negligence and Fraudulent Practice in Private Clinics", 17. ³⁸ Writ Petition No.1783 of 1999.

²⁰² Mahdi, "Medical Negligence vs. Violence on Doctors", *Future Law Initiative*.

servants delivering health care and medical services which is evident in Article 21(2) of the Constitution.²⁰³ Thus it appears that the Constitution of Bangladesh in its several provisions emphasizes on the right to health and medical care to a significant extent.

4.2. The Penal Code, 1860

The Penal Code, 1860 is the key penal law of Bangladesh which deals with the different categories of crimes in general though it does not contain any specific provision that principally addresses the culpable negligence of a doctor save as those relating to causing miscarriage etc. The criminal complaints are being lodged against the doctors alleging the commission of offences punishable under Sections 304A, 336, 337 and 338 of the Penal Code, 1860 alleging negligence or rashness on the part of the doctors resulting in the loss of life or injury of varying degree to the patients. However, sections 80 and 88 of the Penal Code, 1860 contain defenses for the doctors accused of criminal liability.²⁰⁴

4.3. The Medical and Dental Council Act, 2010

The Medical and Dental Council Act, 2010 replaced the previous Medical and Dental Council Act of 1980 and governs the Bangladesh Medical and Dental Council (BMDC) which works as the regulatory body of the health professionals and medical practitioners in Bangladesh. Section 5 of the Medical and Dental Council Act, 2010 deals with the power and responsibilities of the Council. Sections 18 and 19 of the Act respectively deal with the registration of recognized physicians and dentists while section 20 provides for registration of professional medical assistants. Section 22 forbids the practice of allopathic medicine or introduction of oneself as a physician or a dentist without registration under this Act. Infringement of this provision will be punishable with imprisonment which may extend to three years or with fine which may extend to 1 lac taka or both. According to section 23 when any medical practitioner or dentist is found guilty of misconduct in respect of his profession, the Council may also refuse to permit registration of that person and an appeal can be preferred against such cancellation.²⁰⁵

4.4. The Medical Practice and Private Clinics and Labs (Regulation) Ordinance, 1982

This Ordinance was enacted in order to regulate the medical practice and functioning of private clinics and laboratories in Bangladesh. Section 2(b) of the Ordinance provides “medical practice” includes surgical operation, conduction of labor, pathological or radiological examination and any other medical examination or service. Section 4 prohibits a registered medical practitioner in service of the Republic to carry on private medical practice during office hours. Another provision emphasizes that every registered medical practitioner carrying on private medical practice shall maintain a chamber in a hygienically sound condition with necessary facilities for the examination of patients and a room for the waiting of patients and their attendants.²⁰⁶

This Ordinance also has given supervisory powers to the Director General of Health, section 11 of which provides that the Director General of Health or any other officer authorized by him

²⁰³ Article 21(2) of the Constitution provides that “Every person in the service of the Republic has a duty to strive at all times to serve the people.”

²⁰⁴ S. Prakash, “A Comparative Analysis of Various Indian Legal Systems Regarding Medical Negligence: Criminal, Consumer Protection and Torts Laws” (Unpublished thesis paper), Hidayatullah National Law University, Raipur, India, 2007.

²⁰⁵ The Medical and Dental Council Act (2010), Section 24.

²⁰⁶ The Medical Practice and Private Clinics and Labs (Regulation) Ordinance (1982), Section 5.

shall have the authority to inspect any chamber of registered medical practitioner, private clinic, private hospital or pathological laboratory whether they have contravened or failed to comply with any provision of this Ordinance. Section 13 deals with penalty of which subsection (1) states that if any registered medical practitioner or any owner of a private laboratory contravenes any provision of this Ordinance, he shall be punishable with fine which may extend to 5,000 taka, and the Court, while convicting such owner may order forfeiture to the Government of all or any of the movable property in the laboratory.

4.5. The Code of Medical Ethics, 1991

The Code of Medical Ethics, 1991 was adopted by the BMDC which provides the normative guidelines of professional conduct to be followed by the registered physicians and dentists.²⁰⁷ Section 5(a) of the Code provides that gross negligence of medical and dental practitioners in their duties to their patient may be regarded as misconduct sufficient to justify the suspension or the removal of their names from the Registrar. The Code, however, does not expressly provide any specific standard for degree of care that a medical or dental practitioner owes to the patients; rather it only addresses the gross negligence and unauthorized professional association.

4.6. The Consumers Rights Protection Act, 2009

Medical negligence with special reference to the Consumer Rights Protection Act, 2009 has the same sanctity of protection and enforcement of rights of patients.²⁰⁸ The medical service or treatment is one of the services that are prevailing in Bangladesh. The definition of service is contained in the Consumer Rights Protection Act, 2009.²⁰⁹ Since the patients are receiving services from the hospitals and doctors, they are the consumers of medical services. Section 45 of the Act provides that if doctors or hospitals do not provide promised service in lieu of payment, the offender will be punished with imprisonment for a term not exceeding one year or with fine not exceeding 50,000 taka or both.

It should be noted that it is quite difficult to prove whether the doctors or hospitals did not provide their intended services as the services involve such minute or numerous details or which is so dependent on the personal qualifications or volition of the doctors that violation cannot be ascertained.²¹⁰ Another provision of the Act provides that whoever does any act which can endanger life or security of consumer will be punished for imprisonment for a term not exceeding three years or with fine not exceeding 200,000 taka or with both.²¹¹ Again, section 53 of the Act emphasizes that the medical service providers can be prosecuted if there is negligence or intentional act or omission leading to endangering life and security of the patients.

²⁰⁷ This Code was adopted by the BMDC in one of its meetings held on 24th March, 1983 under the provisions of the Medical and Dental Council Act, 1980 which has subsequently been replaced by the Medical and Dental Council Act, 2010.

²⁰⁸ Belal Hosain Joy, "Health Care Laws in Bangladesh".
<http://www.scribd.com/doc/67389243/HealthcareLaws-in-Bangladesh-Final>.

²⁰⁹ Under section 2(22) of this Act, "Service" means service of any service of transport, telecommunication, water supply, sanitation, fuel, gas, electricity, construction, residential hotels and restaurants, and health, which are made available to the consumers in exchange of price but this will not include free service.

²¹⁰ Karim, et al., "Medical Negligence Laws", 436.

²¹¹ Section 52, the Consumer Rights Protection Act, 2009.

4.7. Civil Remedy under the Contract Act, 1872 and the Specific Relief Act, 1877

The physicians and dental surgeons in Bangladesh can also be vicariously or individually held liable for their negligent behavior and faulty medical services under the civil law as well. That is to say, the medical professionals can be held liable to provide monetary compensation for their medical negligence whenever there is breach of a contract as to the treatment or service.²¹² Thus the aggrieved patient is entitled to claim remedies against the opposite party under the Contract Act, 1872. Under the Contract Act, 1872 medical negligence issue has also been addressed which is though not appropriate as providing medical service and fulfillment of the contractual obligations are entirely two different issues.²¹³ In fact, it is quite difficult to prove the allegations under this Act and the compensation or damages being granted stand at a different footing.²¹⁴ Moreover, an aggrieved patient may also seek permanent and temporary injunction under the Specific Relief Act, 1877 as against the health professionals violating their service and contractual terms and conditions.

5. MAJOR FINDINGS OF THE STUDY

After having a careful review of the existing legislations with regard to the offence of medical malpractice or negligence in Bangladesh, this present study finds out few significant limitations lied within them, which are described as follows:

5.1. Lack of Specific Legislation

Though there are numerous provisions in the various existing legislations on medical negligence or malpractice in Bangladesh they are not so organized or codified. As a result, the victims of medical negligence or malpractice become puzzled in making the decision as to under which statute they should lodge a law suit or to which Court they should go in order to redress their grievance against the medical wrongdoers. Thus the Courts might be overburdened with the multiplicity of suits. For example, if a victim lodges a criminal case against a medical practitioner under the Penal Code, 1860 it might create a problem for that medical practitioner as the allegation brought against him does not necessarily mean that the doctor is guilty and it is not appreciable indeed. Conversely, the civil Courts cannot punish the offenders except ascertaining the amount of damages and hence going to a civil Court might not be that much fruitful for the victim.

5.2. Complexity to bring Action under the Consumer Protection Laws

Though remedies are available for medical negligence under the Consumer Protection Act 2009, the procedure of filing a case under this Act is quite complex. Therefore, the victims feel discouraged to bring actions against the wrongdoers and it is a major obstacle in prosecuting and punishing the medical professionals working in the private sectors. As a result, the incidents of medical negligence in private clinics are increasing gradually in Bangladesh.

5.3. Higher Court Fees

Sometimes the higher court fees as has been determined under the Court Fees Act, 1870 become the key obstacle for the poor victims to redress their grievance in our country. In most of the time it is observed that filing a law suit before the appropriate court requires a huge amount of money along with the higher court fees which is not affordable by the poor and pauper litigants

²¹² Mahdi, "Medical Negligence vs. Violence on Doctors", *Future Law Initiative*.

²¹³ Akter, "A Contextual Analysis of the Medical Negligence in Bangladesh", 72.

²¹⁴ S. K. Verma, *Legal Framework for Health Care in India* (India: Indian Law Institute Publication), 1st eds., 2002: 158.

in Bangladesh. For this reason, often it becomes quite impossible for the victims of medical negligence or malpractice to seek assistance through the normal legal procedure in Bangladesh.

6. SUGGESTED RECOMMENDATIONS

Because of having few subtle loopholes in the existing legislations against the offence of medical negligence, most of the time the perpetrators remain out of the reach and unpunished resulting serious violation of the right to health of the common people in our country.

Moreover, absence of comprehensive legal framework on medical negligence and complexity arising out of the existing laws dealing with negligence are the key attributing factors that are responsible for the offences of medical malpractice and negligence in Bangladesh. In this regard, this study suggests the following recommendations:

1. In Bangladesh, since long time the arena of medical negligence and the violation of right to health remains ignored. Therefore it is high time to enact a separate complete or special law to address this issue inserting an exhaustive definition of ‘medical negligence’ with its entire uniqueness.
2. Amendment should be brought in few provisions of the Consumers Rights Protection Act, 2009 of Bangladesh in order to make it more effective, fruitful and adaptable to the litigations relating to medical negligence and malpractice.

7. CONCLUSION

The key aim of the law of medical negligence is to protect the patients from the infringement of their right to health care through ensuring the accountability as well as penalty of the medical professionals who engage themselves in doing the intentional breach of their professional duties. This law is indispensable where the right to life is not to be a transient inhalation exposed by a doctor’s flaw, surgeon’s knife, and anesthetist’s disinterest or instrumental deficiency.²¹⁵ It should be remembered that the law does not aim to punish the physicians for their all mistakes, but only for those which they commit out of negligence.²¹⁶ In Bangladesh the awareness of people on medical negligence has gradually been rising where the hospital managements both in private and public sectors have been accepting numerous complaints from the patients and their relatives with regard to the facilities, services, levels of professional skill, and the precision of their diagnostic and curative methods.

This study finds that due to having undue business sentiment and workload of the physicians, lack of accountability and rule of law, shortage of essential medical equipments, loopholes in the existing legal framework, people’s reluctance to bring action against the medical professionals, lack of proper skill or knowledge or research on medical science or inventions the medical practitioners are sometimes found to be negligent in their professions. The doctors should be well acquainted with the legal effects of these situations so that they can act meticulously avert landing themselves in the litigations as well as other controversies in their profession.²¹⁷ However, formation of sufficient number of health tribunals, establishing effective accountability system through creating greater sense of liability, enacting comprehensive legal framework with effective enforcement mechanisms, raising public

²¹⁵ Billah, Right to Life: ‘Judicare’ of ‘Medicare’. *The Daily Star*, 17th April, 2010.

²¹⁶ Karim, et al., “Medical Negligence Laws”, 440.

²¹⁷ Md. Zahidul Islam, “Medical Negligence in Malaysia and Bangladesh: A Comparative Study”, *IOSR Journal of Humanities and Social Science*, Vol. 14, Issue 3 (Jul - Aug, 2013): 87.

awareness on medical negligence, removing corruption of the government employees in the health sector, and delivering ethical education and training to the physicians might be the effective ways to get rid of medical negligence in our society and the country at large.

Reality of Child Labour in Bangladesh: An Examination of Existing Laws

Amdadul Hoque²¹⁸

ABSTRACT

This article aims at exploring the on hand social, economic, cultural and other related aspects of child labour in Bangladesh which has drawn the attention of child rights activists of not only Bangladesh but also of other parts of the globe. While recognizing the detrimental blow of child labour in a society in general and predominantly in Bangladesh, child labour itself has been tried to be categorized in different categories depending on the associated body, health and mental hazard with it. Categorization of child labour has also been stemmed from phase by phase eradication of child labour in conformity with the economic reality of Bangladesh. While striving to unveil the causes of child labour, interconnections between the causes have been tried to be crystallized. Although a watertight system against child labour is neither possible nor desirable, but honest appraisal of the recommendations given in this article is very much likely to assuage current derisive condition of child labour in Bangladesh.

Keywords: Child, Labour, Right, Economy, Reality

1. INTRODUCTION

Human Rights as a general notion, in its true sense of the term and all other practicalities, without any doubt whatsoever, encompass the rights of the children for their existence as human beings. Notwithstanding the emergence, acceptance and enforcement, albeit with varying degree, of human rights by almost all the states of the world, discussion of children's rights as an independent branch of law might seem to be redundant in many aspects. However, because of the vulnerability and special nature of children, recognized by every human being, some special rights for the children has emerged as an independent branch of law from early 1990s.²¹⁹ To date, all the countries agree that children are entitled to some special care and attention from their parents, teachers, states and those to whom their care is entrusted and in contrast there are some areas of prohibition, permission, commencement and ending of childhood and many more concerning a child over which state parties are yet to agree. Child labour is one of the areas which all the states agree to have a serious negative impact over the physical and mental development of a child. In spite of the determination of the states to keep children safe from certain categories of labour, due to unequal state of wealth of each country and other prevalent socio-economic conditions this determination is facing serious complexities to achieve the goal. Almost all the independent countries have ratified the UN Convention on the Rights of the Child (UNCRC); however, each country has its unique implementation policy depending on its unique economic, social and cultural realities. A considerable percentage of the world's total child workers are from Bangladesh. Realizing that

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²¹⁹ It was done by adoption of the UN Convention on Rights of the Child (UNCRC) in 1989 and its entry into force in 1990.

child labour is not only violation of child rights rather a serious hindrance in the way of many national development goals of a country, Bangladesh signed and ratified the UNCRC and is also trying to ensure its commitment under the UNCRC regarding child labour. A straightforward idea may lead to thinking about enacting laws providing a watertight system of zero tolerance towards child labour, however, this type of thinking is, no doubt, an attempt without understanding the social, cultural and especially economic reality of Bangladesh. This Article, with a view to giving an overview of the reality of child labour in Bangladesh, will examine the obligations of Bangladesh regarding child labour, causes which give rise to child labour, steps taken to fulfill those obligations, efficacy of the steps taken and recommendations for improving the shortcomings, deficiencies and weaknesses, if any.

2. CHILD RIGHTS AND BANGLADESH

Bangladesh, a densely populated²²⁰ country of south Asia, gained its independence on 16th December of 1971 and since then acknowledging and participating actively with international community's newly emerging concepts of rights and freedoms, of which rights of the children is an important one. Bangladesh ratified²²¹ the UN Convention on Rights of the Child (UNCRC) and has set up several domestic policy and institutional framework for fulfilling its obligation under UNCRC. Because of its economic, social and cultural reality Bangladesh is still struggling to accord to all of its obligations.

2.1 Who is a Child?

Internationally definition of 'Child' was one of the important contentious issues of negotiations in the original drafting of CRC.²²² The contention was basically centering the pro and anti abortion attitude of different negotiating countries raising the fundamental question as to whether a fetus should be included within the definition of a child or not. Some scholar comments that:

“One's philosophy, One's experiences, One's exposure to the raw edges of human existence, One's religious training, One's attitudes toward life and family and their values and the moral standards one establishes and seeks to observe, are all likely to influence and to color One's thinking and conclusions about abortion.”²²³

In other words, the question was about the commencement of childhood. UNCRC, making a compromise with these two contradictory attitudes of negotiating states, set the definition²²⁴ of a child as any person under 18 years but it was subjected to the proviso that a domestic law that sets legal majority at an earlier age will not be compromised.²²⁵ This laxity of precision in defining child also gave considerable room for Bangladesh in defining a child with different age limit for different purposes. The Employment of Children Act, 1938 did not allow employment of child under 12 in regular jobs except as apprentices.²²⁶ The Factories Act, 1965

²²⁰ Bangladesh has almost 160 million populations on an area of 147570 square km being 1252 people on every square km.

²²¹ Bangladesh ratified UNCRC in August, 1990.

²²² Trevor Buck, *International Child Law*, (Abingdon-on-Thames, UK: 2nd eds., Routledge, 2011) 122.

²²³ Robert H. Mnookin, *Child, Family and State Problems and Materials on Children and the Law*, (New York: Little, Brown and Company, 2014) 4.

²²⁴ The definition is given in Article 1.

²²⁵ Trevor Buck, *Supra* note 4, 123.

²²⁶ The Employment of Children Act (1938), Section 3.

prohibits child employment in factories if the child is below 14 years.²²⁷ Under the Children Act, 1974 any person irrespective of sex is a child who is under 16 years of age.¹⁰ The Prevention of Oppression on Women and Children Act, 2003 considers a person up to 16 years of age as a child. The effect of the Court of Wards (Amendment) Act, 2006 is that an orphaned child is not entitled to claim or sell his inherited property until he/she has reached the age of 18. The Contract Act, 1872 applicable in Bangladesh sets 18 years of age generally as an age for contractual capacity.²²⁸ The Child Marriage Restraint Act, 1929 has made 18 and 21 years of age as an age of marriage for girls and boys respectively.²²⁹ The family matters in Bangladesh are dealt with under the shariah law which sets puberty as the age of marriage for boys and girls which is generally 9 years for girls and 12 for boys. In response to the above hegemonies Bangladesh Labour Act, 2006 fixes two different ages for child and adolescent. Under this law a child is anyone who is below the age of 14 and an adolescent is one who is above 14 but below 18 years of age.²³⁰ Finally under the amended Child Act, 2013 a child, irrespective of sex, is any person who has not completed 18 years of his age.

2.2 What is Child Labour?

It is recognized that restriction on the ability of the child to work was, historically, made as a reform effort to prevent exploitation of children but definitely there should be a limit of such restriction otherwise it may act contrary to the purpose for which child labour is restricted.²³¹ When child labour is restricted for the welfare of children at the same time there should not be such restriction which impedes their welfare and therefore, a fundamental question arises as to which categories of child labour are restricted to which categories of children. For the above purpose defining child labour is, perhaps, the biggest problem in emancipating the children from harmful child labour and at the same time for imposing a legal regime to reduce or eliminate child labour entirely, need of a precise definition of child labour is a must.¹⁵

Child labour is defined as work that deprives or tends to deprive children of their childhood, their potential, dignity and which is harmful to their normal physical and mental development.²³² UNICEF defines child labour as ‘work that exceeds a minimum number of hours, depending on the age of a child and on the type of work. For children aged 5 to 11, this would include at least one hour of economic work or 28 hours of domestic work per week. For the 12 to 14 age group, this would include at least 14 hours of economic work or 28 hours of domestic work per week and for children aged 15 to 17, child labour occurs when a child works at least 43 hours of economic or domestic work per week.’²³³ It is said by ILO that ‘in its most extreme forms, child labour involves children being enslaved, separated from their families, exposed to serious hazards and illnesses and/or left to find for themselves on the streets of large cities - often at a very early age.’¹⁸ It is now, therefore, very important to draw a dividing line, by assessing the impact of a particular kind of work on a child, between exploitative or

²²⁷ The Factories Act (1965), Sections 2 and 25. ¹⁰

The Child Act (1974), Section 2.

²²⁸ The Majority Act (1875), Section 3.

²²⁹ Child Marriage Restraint Act (1929), Section 2(a) (b).

²³⁰ Bangladesh Labour Act (2006), Section 2.

²³¹ Robert H Mnookin, *Supra* note 5, 646. ¹⁵

Trevor Buck, *Supra* note 4, 165-166.

²³² Sharmin Aktar and Abu Syed Mmuhammed Abdullah, “Protecting Child Labour in Bangladesh: Domestic Laws versus International Instruments”, *Bangladesh e-journal of Sociology*, 2013, 10(1) 154.

²³³ Study of Child Labour in Bangladesh by UNICEF. http://www.unicef.org/bangladesh/Child_labour.pdf.

¹⁸ <http://www.ilo.org/ipecc/facts/lang--en/index.htm>. Accessed on 9th of February 2016. ¹⁹ Trevor Buck, *Supra* note 4, 167.

dangerous work in one hand and beneficial child work on the other.¹⁹ For the above purposes ILO has categorized work of a child into economic activity, child labour and hazardous work. By economic activity ILO refers to those productive activities undertaken by children irrespective of it is for market or not, paid or unpaid, full time or part time and casual or regular of which child labour is that which is not permitted light work done by child of at least 12 for few hours in a week and also not those which is classified as hazardous work done by a child of at least 15.²³⁴ Hazardous work by children includes any activity which by its nature or type has or leads to adverse effect on a child's safety, physical or mental health and moral development.²³⁵ When we are expressing concern about child rights we are basically focusing on the last two categories of child work for some particular types of child work might also help in proper development of child in the society.

2.3 Causes of Child Labour in Bangladesh

While talking about causes of child labour in Bangladesh, the causes behind child labour is almost the same in every developing country. The causes may be classified as social, economic, cultural and political, however, each of these causes are connected to, influencing and influenced by the other. 'A key feature of child labour is that it is not only caused by structural economic, educational and social disadvantage, but also contributes to the maintenance of such inequalities.'²³⁶

Poverty is considered as one of the main causes of child labour in Bangladesh. The National Child Labour Elimination Policy, 2010 also identified it as the first and main reason behind child labour in Bangladesh.²³⁷ Some scholars also support this view stating that poverty is the main reason of child labour and is strongly correlated with child labour.²³⁸ Poverty may be absolute in the sense of having nothing to eat and sustain and relative poverty indicates low standard of living compared to the average standard. In Bangladesh both of the above mentioned types of poverty exists. By four separate case study conducted in Mirpur²³⁹ it is found that the children are giving hard labour either to sustain themselves or to contribute to the family income and in some cases all family members are dependent on the income of a child.²⁴⁰ According to the economic census of Bangladesh almost 40 million population of Bangladesh are below the poverty line.²⁴¹ Population density and at the same time poverty are in most of the cases driving children without parental care and the parents of children to engage them in labour irrespective of the nature of the work.

Ignorance and lack of education of the parents and of the children contribute to a great extent in increasing the number of child worker in Bangladesh. It is also admitted by some scholar that 'the role of education is a key component in any discussion about the causes of child

²³⁴ Ibid.

²³⁵ ILO Convention No. 182, article 3(d).

²³⁶ Trevor Buck, Supra note 4,169.

²³⁷ Sharmin Aktar and Abu Syed Mmuhammed Abdullah, Supra note 16, 160.

²³⁸ Haradhan Kumar Mohajan, "Child Rights in Bangladesh", *Journal of Social Welfare and Human Rights*, 2014, 2(1) 207, 213.

²³⁹ One of the places in the capital city of Bangladesh.

²⁴⁰ Sharmin Aktar and Abu Syed Mmuhammed Abdullah, "Protecting Child Labour in Bangladesh: Domestic Laws versus International Instruments", *Bangladesh e-journal of Sociology*, 2013, 10(1) 159-161.

²⁴¹ Bangladesh Bureau of Statistics, Economic census of Bangladesh 2013.

<http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/EcoCen13/FinalReport%20Part%201.pdf>.

labour.²⁴² Every parent, no doubt, is affectionate to their children, their interests and well being. When the parents themselves are not well familiar with the impact of a certain types of work on the physical and mental development of their children, it is very simple for them to let their children work and earn some money even if they are not poor. According to the report on Bangladesh literacy survey 2010 almost 70% of the total population of Bangladesh has not completed their primary education and almost 41% cannot even write their name and address.²⁴³ Case study conducted about the causes of child labour also supports the reality that without being poor, parents are engaging their children in work not permitted by law.²⁴⁴ It is not weird that when a person does not know his interest well he might do something to safeguard his interest which in fact goes against his interest.

Lack of effective initiative from government also results in continuation of this problem. Every problem has a solution but the solution is almost impossible when the person or the authority who are entrusted or empowered to solve the problem are themselves part of the problem. Among the total number of child labour of Bangladesh almost 15% are working in industrial establishment and most of these industrial establishments are owned, controlled and directly or indirectly linked with some powerful persons of the government.²⁴⁵ Child labour is comparatively cheaper than adult labour and keeping this economic benefit in mind strict enforcement of existing laws and policies are not being monitored by government and this is also contributing significantly in the rise of child labour.

When we are describing poverty, lack of education or awareness and non-implementation of anti-child labour laws and policies as causes of child labour, it is not easy to identify which of the causes are main and which are effect of other causes and acting as an independent cause and, therefore, all the causes should be addressed simultaneously without any priority basis. In addition to the above causes, inadequate recreational infrastructure, poor educational curriculum, corruption, human trafficking and parentlessness of children are also responsible for child labour in Bangladesh.

2.4 The Child Labour Reality in Bangladesh

The reality of child labour in Bangladesh is very much shocking. Hundreds of thousands of child workers work in places and manners identified by ILO as hazardous and often exposed to psychological and sexual abuse, excessive working hours, unhealthy and unhygienic working environment and many more.²⁴⁶ Up to 2005, 3400 children worked in brick field, stone breaking, construction industry and other works which are by nature hazardous for children.²⁴⁷ A key statistics^{248,249} conducted by the UNICEF shows the following facts and figures of child labour in Bangladesh:

Working children, aged 5-17	7.4 million
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²⁴² Trevor Buck, Supra note 4, 169.

²⁴³ Bangladesh Literacy Survey 2010. <http://www.bbs.gov.bd/WebTestApplication/eshr%202010f.pdf>.

²⁴⁴ Sharmin Aktar and Abu Syed Mmuhammed Abdullah, "Protecting Child Labour in Bangladesh: Domestic Laws versus International Instruments", *Bangladesh: Bangladesh e-journal of Sociology*, 2013, 10(1), 163.

²⁴⁵ Bangladesh Child Labour Data Country Brief. <http://www.ilo.org/ipecinfo/product/download.do?>

²⁴⁶ Report on Child Labour in Bangladesh by UNICEF (2010) 3. http://www.unicef.org/bangladesh/Child_labour.pdf.

²⁴⁷ ILO and BBS, Baseline Survey for Determining Hazardous Child Labour Sectors in Bangladesh, 2005.

²⁴⁸ UNICEF Report, Supra note 32, 1.

²⁴⁹ International Labour Organization (ILO), Baseline Survey on Child Domestic Labour in Bangladesh, 2006.³⁶ BBS/UNICEF, Multiple Indicator Cluster Survey, 2006, October 2007.

Working children, aged 5-14	4.7 million		
Child labourers (according to definition, below), aged 5-17	3.2 million		
Children engaged in hazardous labour, aged 5-17	1.3 million		
Child domestic workers ³⁵	421,000		
Percentage of children (aged 5-14) engaged in child labour (2006) ³⁶	National	Slum	Tribal
	12.8	19.1	17.6

The 2011 Country Report on Understanding Children's Work (UCW) in Bangladesh reveals that unlike most other developing countries children employment generally takes place outside family. It also shows that 37% non-student children are employed as paid employees and a further 27% in other non-family modalities including domestic works, apprentices and self-employed, where 36% work without wages within their families.²⁵⁰ It is also found by this report that non-student girls are more likely to work domestically compared to their male counterpart. 26% and 5% of girls and boys are respectively working domestic works without wages and in terms of paid domestic work the figure is 43 and 36 respectively.²⁵¹ Type of children works also varies significantly depending on the geographical locations within Bangladesh. Children of Sylhet Division are engaged more in agriculture and children of Khulna and Barisal Division are engaged more in outside services and most of the children workers engaged in manufacturing works in industrial establishment come from Dhaka, Chittagong and Rajshahi Divisions.³⁹ Existing study also shows that:

“149,000 children were engaged in five hazardous industries welding, auto-workshops, road transport, battery recharging and recycling, and street children. They were also found in biri (hand-rolled cigarettes) factories, construction industry including brick breaking, leather tanneries, fisheries, agriculture and informal sector and in domestic services.”²⁵²

Bangladesh government has not yet prepared and published the list of occupations which will be considered as hazardous depending on the age of the concerned child, however, based on the hazardous work list of ILO it is submitted that among the total child workers in Bangladesh 63% of children aged 5-9 and 56% of children aged 10-14 and 57% of children aged 15-17 are engaged in the hazardous forms of child labour.²⁵³ Among the worst forms of child labour in Bangladesh, child labour in road transport sector including working as a helper in bus, mini-bus, three wheeled wagon, rickshaw, boat and other manual and engine driven modes of transportation are readily mentionable. An overwhelming majority of these children working almost 10 hours a day are boys and most of them work as helper and some are also found as driver. Reportedly 41% of them suffer from work related injury or illness and among them 93% require medication²⁵⁴

Another hazardous and worst form of child labour sector in Bangladesh is automobile establishments. Children aged 5-17 working in this sector constitutes 42% of the total sector

²⁵⁰ Report of Understanding Children's Work in Bangladesh (UCW), (2011). http://ucwproject.org/attachment/Bangladesh_child_labour_report20111125_094656.pdf.

²⁵¹ Ibid.³⁹

Ibid.

²⁵² A critical analysis of CRC trends and implementation status in Bangladesh, prepared under alternative report preparation initiative on CRC on Save the Children, Sweden and Denmark, 4th December 2007.

²⁵³ Report of UCW regarding Bangladesh, Supra note 34, 41.

²⁵⁴ Ibid, 43.

workforce of children and they work generally 9 hours and 6-7 days a week having no chance to attend school.²⁵⁵ Their work involves mechanical repairs, painting vehicle and reconstructing or repairing damaged vehicles. Domestic child workers constituted mostly girl are often exposed to domestic violence and sometimes sustain serious bodily injury by their employers. They are paid very poor and have to specific time table for work and are generally back and call to every other members of the family in which they work. Generally the orphaned and very poor girls from village migrate to towns and works within a family and sometime having no chance go out without being escorted by the employer. The domestic child workers are tortured physically and sometime brutally for some silly reasons and these unlawful acts in most of the cases remain unreported and unpunished.²⁵⁶ There are many other sectors including prostitution, leather tanneries and garments industry where children are being brutally utilized without looking at their rights under national and international laws.

3. LAWS AND POLICIES OF BANGLADESH GOVERNMENT AND EFFICACY TO TACKLE CHILD LABOUR

A considerable number of laws and policies are in place to combat child labour in Bangladesh, however, all of these laws and policies are isolated and fragmented approach without any comprehensive focus and harmony within the laws and policies. Above all some important provisions of the existing laws remain unenforced because of bureaucratic and other complexities. In 1993 the Bangladesh Government established a national labour commission to revise and harmonize existing labour laws.²⁵⁷

The Constitution, supreme law of Bangladesh, has specific reference for protecting rights and ensuring social security of children and also obliges state to take effective measures to ensure free and compulsory education for children up to a certain stage.²⁵⁸ In addition to the above, reference to the fundamental rights to the Constitution of Bangladesh can be utilized by judicial activism to emancipate children from child labour.⁴⁷ Apart from the constitutional provisions and other human rights documents Bangladesh has enacted a number of legislation and policies focusing directly the harmful effect of child labour including the National Child Labour Elimination Policy 2010, the Bangladesh Labour Act 2006, the Children (Pledging of Labour) Act 1933, the employment of Children Act 1938, the Tea Plantation Ordinance 1962, the Children Act 1974, the Mines Act 1923, the ILO Minimum Age Convention 138 (C138) 1973, the UN Convention on the Rights of the Child (CRC) September 1990 and the ILO Worst Forms Convention 182 (C182) 1999. To give emphasis to the best interest of the child recently the Domestic Violence (Prevention and Protection) Act, 2010 and the Anti Trafficking Act, 2011 were also passed. The Bangladesh Government is also, in response to the UPR recommendation by other states, committed reconsidering its reservation on the right of the child to freedom of thought, conscience and religion under Article 14(1) of the UNCRC.²⁵⁹

The National Child Labour Policy, 2010 basically focuses on the practical anomaly resulting from lack of coordination and harmony between the works of the Ministry of Women and

²⁵⁵ Bangladesh Bureau of Statistics (BBS), Report of the Baseline Survey on Child Workers in Road Transport Sector, 2003 (March, 2004).

²⁵⁶ A Desk Review on Child Labour in Domestic Work in Bangladesh. http://globalmarch.org/sites/default/files/CDW%20desk%20review%20by%20BSAF_0.pdf.

²⁵⁷ Haradhan Kumar Mohajan, "Child Rights in Bangladesh", *Journal of Social Welfare and Human Rights*, 2014, 2(1), 217.

²⁵⁸ Constitution of the People's Republic of Bangladesh, Articles 14, 15 and 17. ⁴⁷

Ibid, Articles 27-29, 31, 34, 37-41.

²⁵⁹ UPR report situation of child rights in Bangladesh by Ain o Salish Kendra (ASK) (2012), 7.

Children Affairs and the Ministry of Labour and Employment and recommends for entrusting the duty of child and child labour issues to the Ministry of Labour Employment. Besides addressing a standard framework concerning working environment, health, education, security, recreation etc. of children, the policy also suggested setting up of a National Child Labour Welfare Council by some child labour experts and a separate unit to coordinate other activities mentioned in the policy.

The Child Labour Act, 2006 is considered a milestone in the development of child labour in Bangladesh. Instead of fixed age of childhood it categorizes persons under 18 into child and adolescent and also prohibits any forms of work by any child under 12 even with certificate of fitness. A person aged 14-16 is competent to work without any compromise with the time table of school if the concerned child is school going. Adolescents are those who have completed his 16th years but not 18th and are generally competent to work. However provisions are made that a person between 12 to below 14 can work in some light work with a certificate of fitness. Apparently the mechanisms though sound good but are lacking effective enforcement and monitoring system.²⁶⁰ In case study it is found that many children are working in many sectors obtaining fitness certificate illegally or showing false documents as to age and sometimes the employers knowingly recruits child workers for their cheap rate.⁵⁰ Regular monitoring, raiding and bringing the responsible persons to book are not taking place and, therefore, expected practical aims are long way to be achieved. In addition to the above problem, this Act focuses on child labour in industrial establishments only and other fields of child labour are beyond the scope of the Labour Act, 2006.

The Mines Act, 1923 defined any person under 15 as child and now this has been made 18 by the amendment in 2005.²⁶¹ Work within coal, gas and other types of mine is by nature risky and hazardous to life even for adults but complete prohibition for child labour, though desirable, into mine is not yet in force. Some other provisions regarding health, safety, wages and medication are far from being satisfactory bearing the nature of the work in mind.²⁶² Although there is provision for maintaining a separate register for child workers, most of the factories do not comply with this rule.²⁶³ It is reported that in Barapukuria, one of the biggest coal mine of Bangladesh, most of the doctors providing first aid to the mine workers are Chinese and due to language barrier the Bangladeshi workers cannot explain their disease and cannot get proper treatment.²⁶⁴ Although, discrimination of treatment facilities between Chinese and Bangladeshi workers, no regular medical checkup, and absence of safety related training to workers are the common complaint from the workers, but effective measures are not being taken to remedy these situations.²⁶⁵

The Child Act, 1974 though has prime concern for anti-social activities by children, covers various aspects of child exploitation including begging, drugs, brothels and seduction.²⁶⁶ This Act also lacks effective enforcement mechanisms. One of the very shocking forms of child

²⁶⁰ Shituna Zaman, Sabrina Matin and Ashiq Mahmud Bin Gholam Kibria, "A Study on Present Scenario of Child Labour in Bangladesh", *IOSR Journal of Business and Management*, 2014, 16(6), 25-26. ⁵⁰ Ibid.

²⁶¹ The Mines Act (1923), Section 3.

²⁶² Study Report on Status of Coal Mine Workers in Bangladesh, 2011. <http://www.amrc.org>.

²⁶³ Sharmin Aktar and Abu Syed Mmuhammed Abdullah, "Protecting Child Labour in Bangladesh: Domestic Laws versus International Instruments", *Bangladesh e-journal of Sociology*, 2013, 10(1) 166.

²⁶⁴ Shituna Zaman, Sabrina Matin and Ashiq Mahmud Bin Gholam Kibria, "A Study on Present Scenario of Child Labour in Bangladesh", *IOSR Journal of Business and Management*, 2014, 16(6), 14.

²⁶⁵ Ibid.

²⁶⁶ The Children Act (1974), Sections 34 to 43.

exploitation is mutilating children and using them as beggars'.²⁶⁷ A very heart touching report telecasted on ntv, a television media of Bangladesh shows how much cruelty is done on children, specially street and parentless children, to make money using those children as beggars.⁵⁸ It is found that there are some active criminal groups using children in such cruel way and the group leaders very often have strong connection with some political leaders and, though sometimes imprisoned, manage to get bail and continue the previous heinous work.⁵⁹

4. RECOMMENDATIONS FOR IMPROVING CHILD LABOUR SITUATION IN BANGLADESH

Over the last few years Bangladesh has made considerable progress in improving children's welfare and access to basic services including health and education and it is submitted that 75% of the issues raised by 'save the children' and its partners were reflected in the UPR accepted recommendations.²⁶⁸ In the last 10 years per capita income has increased by 250 USD and literacy rate has increased by 6% and accordingly child labour has not decreased.²⁶⁹

When poverty and lack of education is shown as the primary causes of child labour in Bangladesh then absence of optimum child labour improvement consistent with the improvement in literacy and per capita GDP increment shows different conclusion which is non-implementation of existing laws and policies as one of the main causes of child labour in Bangladesh.²⁷⁰ In terms of number there are many laws prohibiting or regulating child labour but poor implementation and not holding the abusers accountable frustrate optimum success.

As a foundation for action child labour laws should be harmonized keeping the policy of developed countries in consideration. Provision should be made for coordination of the works of every departments entrusted with the power and duty of tackling child labour. Most importantly, abusers should be dealt with relatively severe punishment and brutal offenders like those who mutilate children for using them as beggar or who uses children for prostitution or other related purposes should be dealt with the highest punishment of the state. Dealing with such criminals should be kept above any kind of political consideration.

The quality and access to education should be improved so that working group of children may not lag behind their non-working counterparts and to that end special form of teachers, schools, curriculum and teaching equipments should be ensured. 'Additional measures are needed to account for the indirect or opportunity costs associated with children's school attendance.'²⁷¹ Expanding social protection, strategic communication and advocacy, targeted actions against worst forms of child labour, building national capacity to combat child labour and to that end allocating considerable amount in the national budget will help reduce child labour in Bangladesh.

5. CONCLUSION

The birth of a child is by nature very much expected and long awaited. As long as there is more than one person in a place there is likely to have a conflict of interest for the potential harm by one to another. The children up to a certain age are universally recognized not to have any *mens*

²⁶⁷ Md Abdullah Al Helal and Kazi Shahdat Kabir, "Exploring cruel business of begging: The case of Bangladesh", *Asian Journal of Business and Economics*, 2013, 3 (3.1). ⁵⁸ <https://www.youtube.com/>. Accessed on 13th February 2016. ⁵⁹ Ibid.

²⁶⁸ The UPR Successful Examples of Child Rights Advocacy. <http://www.uprinfo.org/sites/default/files/generaldocument/pdf/>.

²⁶⁹ Bangladesh Bureau of Statistics. <http://www.bbs.gov.bd>.

²⁷⁰ Ain O Shalish Kendra Report, Supra note 46, 12.

²⁷¹ Report of UNICEF regarding Bangladesh, Supra note 34, 89.

rea or guilty mind and thereafter during rest of the childhood, in whichever way childhood is defined, are less likely to commit serious injury to others' interest. This universal recognition of inherent incapacity of children to harm other entitles the children some special and greater protection compared to others. The entitlement of children to this special protection also results from their vulnerability and inability to protect them. Child labour, with varying definitions, is an obvious threat to this inherent right of a child and an act which is contradictory to the above mentioned universal recognition. Again, most importantly, child labour should be prohibited, regulated and controlled with utmost care and cost not only for the sake of children but also for the adults for their feeling in and pleasure from children. Keeping the above in mind violators of the child rights should be dealt with no mercy and no favour.

Ensuring Environmental Justice through the Environment Court Act in Bangladesh: An Analysis

Regan Ahmed²⁷²

ABSTRACT

Bangladesh environmentally is in a pernicious state of bother as Bangladesh has been ranked 2nd worst country globally in curbing pollution and Dhaka as the most polluted city in the world in the Environment Performance Index (EPI), 2018. As a healthy Environment is inevitable for the overall development of the country, along with the Governments obligations under various international treaties and the recent trends of the Environment pollution propelled the Government in anticipation to enact an exclusive law i.e. The Environment Court Act, 2000 subsequently replaced by the Environment Court Act, 2010 creating for Environment Courts in Bangladesh. The said Act was expected to effectively curb environmental issues in Bangladesh beside the existing mechanism but the present context states otherwise. The Environmental Courts are almost inactive due to lack of cases as on an average 80 cases are filed monthly which is the lowest rate of environmental cases filed globally. A close perusal of the Environment Court Act, 2010 discerns its relevancy to the present context and divulges glitches in the

Act as to restriction of general people's access to the Courts directly, lack of expert judges etc. Thereby the article analyses and evaluates the Environment Court Act, 2010 as to how far it is substantially placed to deal with the present Environment Court issues in Bangladesh and also overviews the substantive state of National Green Tribunal Act of India on a comparative note. The author finally recommends and justifies amendments required in the Environment Court Act, 2010 to ameliorate the present state of Environment Courts and Environment Cases in Bangladesh leading to substantive Environmental Justice.

Keywords: Environment Court Act 2010, Lacunas, Bangladesh, Environment Courts, Green Tribunal India

1. INTRODUCTION

Gradually with the advent of technological advancement, growth of population, unawareness etc. on the part of the people is causing irreparable harm to the environment as a whole. Diverse activities of the people, not conducive to the environment but economically viable are on the upsurge with little attention to sustainable development. However, a healthy environment can be directly responsible to a better human health which will certainly impact in the economic development of a country and poverty amelioration. Health environment today is inevitable as the World Health Organization and other arrays of agencies around the world are embarking as to how significant environment issues are on an overall impact index. Environmental risk factors currently result in excessive over 80 ailments and injuries globally. Pruss Ustun and Corvalan states “that 24% of the global disease burden and 23% of all deaths can be attributed

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to environmental factors, which can be prevented through environmental modification (such as through provision of safe water, improved sanitation, and adequate hygiene)”.²⁷³ Bangladesh is currently in a precarious position environmentally. According to the Environment Performance Index (EPI) ranking Bangladesh has been ranked as the 2nd vilest country out of a total of 180 countries in curbing corruption.²⁷⁴ Further such has been the extremity of pollution that Dhaka the capital of Bangladesh has again been poled to be the most polluted city in the world.²⁷⁵ Thereby in anticipation of the present scenario to protect environment and being obliged under Chapter 8 of Agenda 21 to develop separate court structure to protect environment, the Bangladesh Government enacted the Environment Court Act, 2000 which was subsequently replaced by the Environment Court Act, 2010. It is a surge of new ray to the commitments of the government of Bangladesh in curbing pollution in addition to the existing mechanism. Without a faint of doubt, adoption of the preceding law epitomizes a new milestone in the pursuance of environment protection in Bangladesh.

The Environment Court Act, 2010 was expected to bring new breakthroughs in environment protection. However, on a sad note the said Act has not been able to deliver the expected result due to the various vices present in the Act itself. The Environment Court Act, 2010 was enacted to establish Environmental Courts for the speedy trial of certain offences relating to the environment and matters connected thereto. But provisions like in matters of procedures of trials in following the Civil Procedure Code, 1908, Criminal Procedure Code, 1898, no direct access to the people to avail the benefits of Environment Courts allied others have marred the very purpose of the said Act itself. Such has been the impact that today the Environmental Courts in Bangladesh sit idle with hardly any cases and has the lowest rate of Environmental cases intake.²⁷⁶

Thereby this article evaluates critically the Environment Court Act, 2010 in its noble pursuance of Environment protection. This article also further enlightens on the fact as to whether the vices of the said Act has any resemblance on the functioning of the Environmental Courts, the very purpose of the said Act itself and the cases intake. Finally, the author suggests various recommendations as to how such glitches substantially and procedurally could be overcome.

2. ENVIRONMENT COURT ACT, 2010 OF BANGLADESH

The seeds to the present Environmental regime was laid back with Stockholm Conference 1972 and the Rio Conference, 1992 to both of which Bangladesh is a party as these called on the member parties to take necessary steps for environment protection and to set up different sets of Environment Court in respective jurisdictions. The first of its kind a full fledged comprehensive Environmental Law called the Bangladesh Environment Conservation Act was enacted in the year 1995. Further, to implement the provisions of this above said Act effectively the ‘Jatiya Sangshad’ of Bangladesh executed the Environment Court Act, 2000 on 10th April, 2000. In context to the Environment Court Act, 2000, the Government by a notification set up

²⁷³ P. Ustun and C. Corvalan, “Preventing Disease through Healthy Environments: Towards an estimate of the environmental burden of disease”, World Health Organisation, France, 2006. Available at: http://www.who.int/quantifying_ehimpacts/publications/preventingdisease.pdf. Accessed on 3th April, 2018.

²⁷⁴ SM. Jahangir, “Bangladesh second worst country in curbing environmental pollution.” *The Financial Express*, 25th January, 2018. Available at: file:///C:/Users/law/Desktop/Environment%20Court%20Act%. Accessed on 4th April, 2018.

²⁷⁵ “Dhaka again ranked world’s most polluted city.” *Dhaka Tribune*, 11th April, 2018. Available at: file:///C:/Users/law/Desktop/EnvironmentTribune.htm. Accessed on 4th April, 2018.

²⁷⁶ Solaiman Salman. “Environment Court inactive due to lack of cases.” *The Daily Sun*, 5th June, 2017. Available at: file:///C:/Users/law/Desktop/Environment/Environment20daily-sun.com.htm. Accessed on 4th April, 2018.

two special courts with Joint District Judges in Dhaka²⁷⁷ and Chittagong division,²⁷⁸ to deal with environmental offences only. Further in regard to redress grievances of these lower Environmental Courts an Environment Appellate Court was set up at Dhaka for the whole of Bangladesh. In addition, from the year 2005 the Joint District Judge's Court of Sylhet is as well operating as Environment Court in cumulation of its ordinary functions.²⁷⁹ The Environment Court Act, 2000 was further amended in 2002 and was finally replaced by a new Environment Court Act, 2010. The Environment Act, 2010 has been bestowed with special significance in cases of overriding powers over other laws. The present Environment Act does not mandate distinguish and exclusive Environment court but rather intends to set up one or more Environment Court with the Joint District Judges of each districts who in addition to its general duties also dispose of the environmental cases within its jurisdiction. Thus, it is lucid that there exists no separate or distinct court for environmental matters under the Environment Court Act, 2010 which certainly is a drawback as technical environment issues demands special expertise in proper adjudication.

One would arguable ask the need for special Environment Courts requirements in a country as we already have existing general court structure which in addition to other subjects also deals with special subjects like environment. However, studies from the USA, Australia and other countries evidences that special court can aid in ameliorating the processing of court cases that are more intricate or require special expertise such as environment, bankruptcy etc.²⁸⁰ Recently Specialization of Court is a phenomenon which is hastily spreading globally. A study shows that there are 360 Environmental Courts and Tribunals existing globally.²⁸¹ One may concur that proliferation of specialization of courts is primarily due to the fact of increasing specialized laws on one side and mounting multifaceted topics on the other.

Judicial specialty commonly signifies that judges have special knowledge and have certain state of expertise in a specific area of the law. Thereby it implies that certain categories of cases are adjudicated distinctly for the very nature of such subjects. Dr. Heike Gramckow and Barry Walsh summarizes below the core advantages of separate and exclusive subject courts as follows:

“Firstly... specialized Courts would lead to greater efficiency in handling technical subjects like environment; Secondly, A judiciary of specialists’ leads to higher-quality decisions, especially in complex areas of the laws; and Thirdly the creation of specialized courts with exclusive jurisdiction over particular areas of the law would enhance uniformity of decisions in those areas”.¹⁰

²⁷⁷ MoL, Notification No. SRO 45-Law/2002 dated 06.03.2002.

²⁷⁸ MoL, Notification No. SRO 44-Law/2002 dated 06.03.2002.

²⁷⁹ Md. Akhtaruzzaman and Imtiaz Ahmed Sajal, “Common People’s Access to the Environment Courts of Bangladesh: An Appraisal,” *Judicial Administration Training Institute (JATI) Journal* 25, 2016, Available at: https://www.researchgate.net/publication/317035859_Common_People%27s_Access_to_the_Environment_Courts_of_Bangladesh_an_Appraisal. Accessed on 7th April, 2018.

²⁸⁰ Dr. Heike Gramckow and Barry Walsh, “Developing Specialized Court Services International Experiences and Lessons Learned”, Justice and Development Working Paper Series, World Bank, 2013. Available at: <http://documents.worldbank.org/curated/en/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf>. Accessed on 17th April, 018.

²⁸¹ George Pring and Catherine Pring, “Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Environment, Climate Change, and Sustainable Development at the Confluence of Human Rights and the Environment”, Yale University & U.N. Institute for Training and Research 2nd Global Conference on Environmental Governance and Democracy, (USA: Yale Law School, 19th September, 2010). ¹⁰ Supra note, 11.

Unfortunately, the Environment Court Act, 2010 do not imbibe in it the provisions for specialized environment court for environment matters rather lays it to the Joint District Judges of each district to dispose of such cases in addition to his usual duties. Thus, this is a grave loophole in the Environment Court Act which demands immediate attention to make the Environment Court structure more effective and efficient.

3. VALUATION OF THE ENVIRONMENT COURT ACT AND ITS EFFECTIVENESS

The Laws are adopted with specific objectives and similarly the Environment Court Act has also been enacted with the purpose to set up Environment Courts for the speedy trial of certain offences relating to the environment and matters connected thereto. Thereby, it requires to go through the significant provisions of the said Act in appreciating as to how far it has been crafted to directly or indirectly serve its purpose and matters connected. It would also help us in understanding as to its effectiveness and efficiency in doing environmental justice.

3.1 Court Structure

The Environment Court Act, 2010 sets up a 3 (tier) Court structure i.e. Environment Courts, Special Magistrate Courts, Mobile Courts with an Environment Appellate Court for the whole of Bangladesh. The above said Act aims to set up one (1) or more Environment Courts in each district.²⁸² Such Court will be presided by a Joint District Judge and such judge shall dispose off Environment Court cases besides carrying out his ordinary functions.²⁸³ The Government will appoint such Joint District Judge in consultation with the Supreme Court.¹³ Thereby, it is apparent the Act does not intend to establish an exclusive and separate Environment Court. All the civil suits²⁸⁴ can be instituted with the Environment Courts and in determining civil cases it will be considered as a Civil Court and will follow the procedure of trial as laid down in the Civil Procedure Code, 1908. In Criminal cases it tries all those cases received from the Special Magistrate (discussed later) for offences punishable with more than 5 (five) years imprisonment or a fine exceeding 5 (five) lac taka) for offences under Environmental law.²⁸⁵ The Court as well has the authority to impose fines for violating its order and the court in its ruling further command the offender or anyone else connected, to prohibit it doing it again or continue or to take preventive or remedial measures to avoid the offended and probable injury to environment.²⁸⁶ The Environment Court while it will take criminal cases it will be considered as a Criminal Court and should follow the procedures laid down in the Criminal Procedure Code, 1898 of that of a Session Court for the purposes of trial and disposal of cases.²⁸⁷ It must conclude the trial within 180 days.²⁸⁸

However, if the trial is not completed within the given time then the Court may further have 90 days.²⁸⁹ Even after this if the trial cannot be completed the Environment Appellate Court may transfer the cases on an application by the Director General or any one authorized by the Director General or an Advocate. Then such Environment to which the case is transferred must

²⁸² Section 4 (1), the Environment Court Act, 2010.

²⁸³ Section 4 (2), the Environment Court Act, 2010. ¹³
Ibid.

²⁸⁴ Section 7 (2), the Environment Court Act, 2010.

²⁸⁵ Section 7 (1), the Environment Court Act, 2010.

²⁸⁶ Section 7 (3), the Environment Court Act, 2010.

²⁸⁷ Section 14 (1), the Environment Court Act, 2010.

²⁸⁸ Section 14 (8), the Environment Court Act, 2010.

²⁸⁹ Section 14 (9), the Environment Court Act, 2010.

conclude trial within a further extended period of 90 from the date of receiving the case.²⁹⁰ Even after such extension if the trial is not concluded then the Environment Appellate Court within 60 days from the expiry of 90 days extended after holding inquiry determine who is responsible and ask the concerned authority to take legal actions against that person.²⁹¹

In addition to the Environment Court the Environment Act also mandates the establishment of one or more Special Magistrate Court in each district.²⁹² The Government in consultation with the Supreme Court will appoint any Metropolitan Magistrate or Magistrate of the First Class to dispose of the cases of such courts. The Government of the People's Republic of Bangladesh vide a notification²⁹³ has empowered all the Metropolitan Magistrate and beyond a metropolitan area Senior Judicial Magistrate to act as Special Magistrate. The Special Magistrate Court can try those offenses for which the punishment does not extend an imprisonment exceeding 5 years or a fine not exceeding 5 lakh takas or both. The time limitations to conclude the trial is same as that of Environment Court as discussed earlier. The mechanism of Summary trials is to be followed by the Special Magistrate Courts as laid down in Criminal Procedure Code 1898.

Aside these two (2) types of Court the Executive Magistrate can play a role in convicting or imposing a penalty at spot on the basis of confession as according to the Mobile Court Act, 2009.²⁹⁴ The Environment Court Act has also made provisions for appeals. Any appeal shall lie against any judgement or a decree or a penalty imposed by an Environment Court to the Environment Appellate Court within 30 days²⁹⁵ of the date of passing the judgement, decree of compensation or penalty or order of dismissal of a civil suit or against including an order of temporary injunction, an order to maintain status quo, an order granting or refusing bail, an order of framing charge or discharge, an order of taking cognizance of an offence or refusal.²⁹⁶ In all other cases there will lay no appeal against the Order or propriety of such Order of the Environment Court.²⁹⁷ There is only one Environment Appellate Court for the territory of Bangladesh situated at Dhaka. In cases of appeals relating to offences, as well as suit for compensation, the Environment Appellate Court will have the powers of a Sessions Court as an appellate court under the Code of Criminal Procedure and also will have the powers of an appellate court under the Code of Civil Procedure respectively.

3.2 Procedure for Inquiry, Institution of Case and Investigation

One of the biggest drawbacks of the Environment Court Act is the limitation to directly file a suit to the Environment Court. The above said Act clearly lays down that no Environment Court shall receive any claim for compensation under environmental except on the written report of the Inspector.²⁹⁸ However the Environment Court can directly take a case if the Inspector does not act within 60 days from the date of receiving the complaint after being given the opportunity of being heard to the Director General or the Inspector.²⁹⁹

²⁹⁰ Section 14 (10), the Environment Court Act, 2010.

²⁹¹ Section 14 (11), the Environment Court Act, 2010.

²⁹² Section 5 (1), the Environment Court Act, 2010.

²⁹³ M/O Law, Justice and Parliamentary Affairs notification No. Bicher-1/4P-1/2008-13 dated 22.03.2011.

²⁹⁴ Supra note 7.

²⁹⁵ Section 19 (2), the Environment Court Act, 2010.

²⁹⁶ Section 19 (3), the Environment Court Act, 2010.

²⁹⁷ Section 19 (4), the Environment Court Act, 2010.

²⁹⁸ Section 7 (4), the Environment Court Act, 2010.

²⁹⁹ Ibid.

In cases of offence the investigation is to be generally done by an Inspector or any other person to whom the Director General authorizes by a special order.³⁰⁰ The said inspector will start initiation of the case only after a written complaint is made to him and further with the prior approval of the officer authorized by the Director General.³⁰¹ The officer before starting his investigation shall first make a preliminary report of the case and submit it to the Officer authorized by the Director General in this regard. If the Officer directs the Inspector is going to go ahead with the investigation otherwise the case stops there.³⁰² If the decision is taken to go ahead with the case then the said Inspector will record the information as a First Information Report (FIR) to the concerned police station and the said Inspector will continue with the Investigation.³⁰³ The Investigating officer as the case may be after completing its investigation acquire the approval of the Officer authorized by the Director General in this regard and then submit a copy of the investigating report with the original or the attested copies of the supporting documents to the Environment Court or to the Special Court as according to the jurisdiction of the respective Courts. The Investigation Officer is required to keep one copy to its office and another copy is to be presented to the concerned police station.³⁰⁴

However, if the Special Magistrate is conducting the trial of Mobile Court then the Inspector or the Officer authorized by the Director General without following the earlier formalities stated directly make a complaint to the Special Magistrate and on the basis of such complaint the Special Magistrate may take cognizance of the case and try the case or send it to the Environment Court for trial if it is beyond its jurisdiction.³⁰⁵

3.3 Alternative Dispute Resolution

One of the striking features of the Environment Court Act, 2010 is the inclusion of the mechanism of the Alternative Dispute Resolution (ADR). It provides certain offences to be compromised which are provided in the Environment Conservation Act, 1995. The activities which can be compromised are the Orders of the Director General under Section 4 (2) and (3) of the Environment Conservation Act, 1995 if not followed and it amounts to a first offence. In such cases to compromise a compliance report has to be submitted stating that the order has been executed which earlier was not executed and along with it a minimum fine of 50,000 (fifty thousand) taka is to be paid.³⁰⁶

Further if any activity or processes is prohibited in any Ecologically Critical area under Section 5 (4) of the Environment Conservation Act and if such activity or processes is started or continued and it constitutes 1st offence then for the purpose of compromise a written undertaking has to be submitted stating that such activity or process will be closed permanently and will not be at any time along with a fine of 50,000 (fifty thousand) taka is paid.³⁰⁷

Further all compromise under the Environment Conservation Act has to be at the satisfaction of the Director General.³⁰⁸ The undertaking and the compliance report will be presented by the

³⁰⁰ Section 12 (1), the Environment Court Act, 2010.

³⁰¹ Section 12 (2), the Environment Court Act, 2010.

³⁰² Section 12 (3), the Environment Court Act, 2010.

³⁰³ Section 12 (4), the Environment Court Act, 2010.

³⁰⁴ Section 12 (7), the Environment Court Act, 2010.

³⁰⁵ Section 12 (11), the Environment Court Act, 2010.

³⁰⁶ Section 18 (1) (a), the Environment Court Act, 2010.

³⁰⁷ Section 18 (1) (b), the Environment Court Act, 2010.

³⁰⁸ Section 18 (1), the Environment Court Act, 2010.

Director General or the officer authorized by him if they are satisfied that such order is thereby fulfilled before the compromise of the offence. Finally, when the compromise is submitted if is in custody will be released on bail, if is on trial, the trial will be concluded and warrant has been issued the warrant will be recalled and cancelled.³⁰⁹ The compromise can be filed during investigation, after submission of police report, during trial, appeal or revision.³¹⁰

3.4 Definitional Clause

The Environment Court Act, 2010 deems to settle compensation cases and offences pertaining to all issued given in the Environmental Law. Thereby it is pertinent to go through as to what exactly by environment law has been signified in the said Act. Section 2 (c) of the Environment Court Act, 2010 defines “Environmental Law means this Act, the Bangladesh Environment Conservation Act, 1995 (Act No. 1 of 1995), any other law specified by the government in the official Gazette for the purposes of this Act, and the rules made under these laws”. However, the Bangladesh Government has not included any other laws in the terminology of environmental law under this Act leaving the jurisdiction of the Courts to only Environment Conservation Act, 1995 and Environment Court Act, 2010.

3.5 Functioning of Environment Courts in Bangladesh

The Government of the People’s Republic of Bangladesh has established 3 Environment Courts in Bangladesh i.e. at Dhaka, Chittagong both in the year 2002 and one Sylhet in the year 2005. The Environment Appellate Court was also set up for the entire Bangladesh at Dhaka in the year 2002. The cases filed in these courts looks bleak and distressing as the no of environmental cases filed in these courts is the world’s lowest rate of cases filed. Dhaka Divisional Environment Court has a sordid picture as it is mostly inactive due to the presence of hardly any cases and the court is now dealing with substantially with civil and criminal cases. The table below shows the picture of cases file in the Dhaka Paribesh Adalat as follows:

Serial No.	Years	Cases Filed
1	2003	17
2	2004	72
3	2005	23
4	2006	37
5	2007	04
6	2008	97
7	2009	82
8	2010	60
9	2011	33
10	2012	24
11	2013	9
12	2014	9
13	2015	8
14	2016	4

³⁰⁹ Section 18 (3), the Environment Court Act, 2010.

³¹⁰ Section 18 (2), the Environment Court Act, 2010.

Table 1.1³¹¹ Cases filed in Dhaka Divisional Environment Court

The Chittagong Environment Court is also painted with the similar condition of lack of cases. Mr. Saiful Islam Ovi, who is the Public prosecutor of the Chittagong Environment Court, stated that “We are now dealing with criminal cases for not getting environment-related cases”.⁴² Hereby is given the annual rates of cases filed in the Chittagong Environment Court as follows:

Serial no.	Year	Cases Filed
1	2012	18
2	2013	16
3	2014	28
4	2015	4
5	2016	19

Table 1.2³¹² Cases filed in Chittagong Divisional Environment Court

Similarly, Sylhet Environment Court which started its operation from the year 2005 has only seen the filing of 467 cases up till 2015 out of which 300 cases are still pending.³¹³ The Environment Appellate Court as well as suffers from lack of appeals as from the year 2005 to 2015 only 43 appeals have been filed which discerns the concerns on various facets pertaining to environmental regulation in Bangladesh. Bangladesh has the lowest cases filed annually globally.⁴⁵

4. ESSENTIALS OF EFFECTIVE ENVIRONMENTAL COURTS AND TRIBUNALS

It is very essential that the substantive law vest the Environment Courts and Tribunal with the desired requisites to serve the Environmental Justice effectively. Justice Brian J Preston SC³¹⁴ lays down some characteristics that is imperative for the proper adjudication of environment disputes as follows below: **4.1 The Need for Expertise**

In *State of Washington vs. General Motors Corporation*, it was held that since environment involves scientific, technical and complex issues it is impractical and ineffective to unravel the adjudication of environmental disputes unless and until the judges are specially designed to deal such issues.³¹⁵

4.2 Workload Considerations

Since Environment matters are of complex issues and require a through deliberation and more time and focus in adjudication it can be argued that such courts should be specialized with the

³¹¹ Supra note at 7. ⁴²

Ibid.

³¹² Ibid.

³¹³ Supra note at 7. ⁴⁵

Ibid.

³¹⁴ Justice Brian J Preston SC. “Characteristics of successful environmental courts and tribunals”, *Journal of Environmental Law*, 26 (3), (2014). 365-393. Available at: https://www.researchgate.net/publication/274049004_Characteristics_of_Successful_Environmental_Courts_and_Tribunals. Accessed on 20th May, 2018.

³¹⁵ *State of Washington vs. General Motors Corporation*, 40 U.S.L.W. 4437 (U.S. April 24, 1972); *Ohio vs. Wyandotte Chemicals Corporation*, 401 U.S. 493 (1971).

only function of adjudicating environmental cases only. Dealing in other issues aside environmental issues may be detrimental to efficient environmental adjudication.³¹⁶

4.3 Independent from Government and Impartial

Another important aspect of environmental justice and governance is the existence of an independent and impartial adjudicator. Thereby independence not only signifies separation from the other branches of the government but all other influences that may prejudice the cases to be decided on factual and merit wise.

4.4 Operates as a Multi-door Courthouse

Each dispute is different to another dispute thereby the courts should be inferred with the powers of various remedies aside the usual remedies i.e. Alternative Dispute Resolution (ADR) etc.

Alternative Dispute Resolution (ADR) mechanisms may offer a number of benefits over litigation. First, these non-adjudicative mechanisms can, in some circumstances, offer a more affordable source of justice than traditional litigation. Secondly, resolution of a dispute through ADR mechanisms will often be quicker and more efficient than court proceedings.

Thirdly, attempting to resolve a dispute through ADR can often yield creative “win-win” solutions for parties that could not be sanctioned by the adversarial legal system. Fourthly, parties will often prefer ADR to litigation on the basis that they have greater power over the outcome of the dispute resolution process. Finally, some forms of ADR may potentially enhance communication, develop cooperation and preserve existing relationships between parties that could otherwise be damaged through stressful and conflict-based litigation.³¹⁷

4.5 Provides Access to Scientific and Technical Expertise

Since Environmental issues involve scientific and technical issues it is important there are provisions in the law vesting the courts with permanent expert facilities who can act as wings in every stages of the litigation with valuable opinions.

4.6 Facilitates Access to Justice

A very fundamental issue to an effective court and tribunal is the direct participation of the general people directly to file suits, complaints, access to information, participation in law making etc. Liberating³¹⁸ barriers in direct access to Environmental Courts may work wonders in serving environmental issues in Bangladesh.

4.7 Achieves Just, Quick and Cheap Resolution of Disputes

The object of general environmental litigation is to thwart or alleviate damage to the environment. When the final determination or interim relief takes times in perpetuity to be commanded, by then it may be too late to save the environment from irreparable damage.³¹⁹ Thus specialized courts in the form of Green Benches or Green Tribunal can help in reducing delays in dispensation of justice.

³¹⁶ Scott C. Whitney, “The Case for Creating a Special Environmental Court System.” *William and Mary Law Review* 14 (3), 1973. 473-522.

³¹⁷ Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) 91-94.

³¹⁸ *Houghton vs. Minister for Planning and Macquarie Generation* (2011) [185 LGERA 373].

³¹⁹ Diosdado M Peralta, ‘A Brief Overview: The Environmental Initiatives of the Philippine Supreme Court’ (Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 1st September 2010) 9-13.

5. ENVIRONMENTAL COURTS OF INDIA

The National Green Tribunal Act, 2010 repealed the earlier National Environmental Tribunal Act, 1995 and the National Environmental Appellate Authority Act, 1997 to set up Green Tribunals, or Environmental Courts or Green Benches in India. For the first time in India an Environment Court has been set up with a huge mandate to deal with environmental issues. The said Act was notified on October 10, 2010. The preamble of the National Green Tribunal Act, 2010 lays down its objective for the expeditious disposal of cases relating to Environment and conservation of forests and other natural resources.³²⁰ Further it also aims to give relief to the violation of any legal right connected to the Environment. Thereby, it appears to vest the Green Courts with vast powers in dealing with Environmental issues. The NGT is composed of judicial members as well as expert members, having the required qualification to deal with environmental matters. The Tribunal is not bound to follow the rules of Civil Procedure but needs to comply with the rules of natural justice.³²¹

The Act also empowers the Tribunal to hear initial complaints as well as appeals from decisions of authorities under various environmental laws. Its decisions are binding on the parties.³²² There can be appeals to the Supreme Court against the decisions, orders or awards of the Tribunal. The most salient feature of the Act is that the Green Tribunal is enjoined to follow the internationally recognized and nationally applied environmental principles of sustainable development, Precautionary principle and polluter pays Principle while issuing any order, decision or award.³²³ Further the general people are given complete access in case of filing suits for the violation of their legal rights.³²⁴

6. ANALYSIS OF PRESENT SCENARIO OF ENVIRONMENT COURT IN BANGLADESH

After a close perusal of the above provisions we can discern that the environment court suffer from substantive lacunas which has derailed the effective and expeditious functioning of the environment courts in Bangladesh aside other reasons. Though India through the National Green Tribunal Act, 2010 have come up with an efficient substantive law imbibing the requisites for an effective Act perpetrating for a better environmental justice, Bangladesh is lacking in this regard. Hereby are some of the drawbacks to the Environment Court Act, 2010 as follows:

- i. The Environment Court Act, 2010 neither provides for ‘Specialized Judges’ nor experts attached to the Courts who are well versed in dealing with Environmental matters. There has been no setting up of Specialized Environmental Courts as the Joint District Judges of the concerned Districts are to deal with the Environmental issues of that district.
- ii. In Bangladesh the general people’s awareness on environmental issues and environmental education both are not conducive for the proper implementation of environmental law and effective enforcement of the people’s rights.

³²⁰ Bharat H Desai and Balraj Sidhu, “On the Quest for green Courts in India”. Available at: <https://www.nycourts.gov/court-innovation/Winter-2010/jciDesai.pdf>. Accessed on 6/6/2018.

³²¹ Section 16 and Section 18, the National Green Tribunal Act, 2010.

³²² Sections 14 and 15.

³²³ Section 29, the National Green Tribunal Act, 2010.

³²⁴ Amlanika Bora, “National Green Tribunal and Environmental Justice in India: An Analysis”, *International Journal of Science and Research* 6 (11), 2017. 2089-2094.

- iii. The above said Act substantially closes the access of the common people to bring claims directly to the Environmental Courts or the Special Magistrate Court as the law lays down that the above stated cannot initiate or take cognizance of a case unless the Inspector of the Department of the Environment files a written report. However, there is an exception to this provision as when the Inspector do not act within 60 days from the day of receiving complaint then the said Courts can take cognizance of the case only after giving the Director General or the Inspector a hearing.
- iv. Though there is a provision of Alternative Dispute Resolution in the above said Act, the conditions of paying a fine of 50,000 (fifty) thousand taka and the absence of a detail procedure as to how such mechanism is to be conducted really puts a question in the objective of putting such a provision in the Act.
- v. The Environment Court Act, 2010 has over emphasized the dependence on the Director General or officer authorized by the Director General of the Department of Environment. The primarily responsibility to file suits, written reports etc vests on the Director General and the Inspector, even the compromise of certain offences under the Act has to be also on the satisfaction of the Director General.
- vi. The Jurisdiction of the Environment Court under the said Act suffers from uncertainty and limitation. The Environment Court Act vests the jurisdiction of the Environment Court over Environmental Laws.³²⁵ However, the definition of the 'Environmental Law' includes the Bangladesh Environment Conservation Act, 1995, Environment Court Act, 2010, rules made thereto in pursuance of the above laws and other laws which are to be declared by the Government by gazette notification. Unfortunately, the Government on this regard has not included any other law by gazette notification, so there arises uncertainty over the other Environmental laws and the Environment Courts jurisdiction over such other laws.
- vii. The Environment Courts are to follow the procedures of Civil Procedure Code, Criminal Procedure Code and the Evidence Act. These prevailing laws demand the victims to prove their cases which is in a way difficult as proving environmental matters requires special technical and scientific assistance which without any support is virtually impossible. Further the said Act do not facilitate anything on this regard. Further the cumbersome and complexity involved with these procedures is detrimental to the effective functioning both on the Courts front and as well on the victim's front.
- viii. The Act lays down that the decision of the above said Court is final and cannot be called in question in other Court except with a provision of appeal with the Environment Appellate Court. Sensitivity issues like the Environment scientific and technical issues demands attention of the highest Court i.e. The Supreme Court of Bangladesh (The Appellate Division and the High Court Division).
- ix. Further the provision that the Court can take cognizance of a case directly only after 60 days from the date of receiving complaint if the Inspector do not Act and after giving the Director General and the Inspector a reasonable opportunity of being heard. In such cases 60 days is a long time by which irreparable damage may have already occurred to the Environment and the evidence of such damage may also not be apparently found in the horizon. Further it is

³²⁵ Dr. Md. Iqbal Hossain. *International Environmental Law: Bangladesh Perspective* (Dhaka: Ain Prokashan, 2017), 637-657.

also not clearly stated what happens if the Director General or the Inspector satisfies the Court of such delay.

x. Under the new Environment Act, 2010 there has been no establishment of separate Environment Court. The earlier Courts set up under the repealed Environment Act, 2000 continue to exist i.e. Dhaka Division Environment Court, Chittagong Division Environment Court and the Sylhet Division Environment Court.

xi. On a comparative note with the Green Courts in India as discussed earlier under the National Green Tribunal Act, 2010 are better placed substantially to do environment justice than the Environment Courts in Bangladesh.

After a proper elucidation and analysis of the Environmental Act, 2010 and its relevancy to the effective functioning of the Courts at present to be at the near future, here are some valuable recommendations by which such lacunas appearing at the above said Act may be overcome.

i. The Government of Bangladesh can amend the Environment Court Act, 2010 by keeping in view the National Green Tribunal Act, 2010 which ticks most of the boxes for a sound functioning of Environment Courts.

ii. ³²⁶Since the main object of the said Act is speedy trials of certain offences the said Act has to be amended in regard to pre-condition of filing a written report prior taking to cognizance of a case, following of general procedures of Civil Procedure Code and Criminal Procedure Code in trial of the Environmental cases is detrimental to the very objective of the Act. Thereby, it is prudent that the Act is amended to done away with such cumbersome processes.

iii. The Government should come up with requisite action plan to improve the environmental education in Bangladesh and to ameliorate the level of environmental awareness of the general people.

iv. Further the success and proper 'Environmental Justice' can only be served when people have a direct access to the Courts in regard to filing suits etc. However, The Environment Court Act, 2010 has restricted such access of the common people by attaching the condition that no Environmental Court can take cognizance of a case nor initiate proceedings unless a written report is filed by the Inspector. Thereby this is a big drawback and may be counted as one of the reason for low rates of Environment Cases in Bangladesh. In this regard we can take lessons from the National Green Tribunal Act, 2010 in our neighboring country India which has liberalized common people's direct access to the courts. Thus, the Environment Court Act, 2010 should be amended with immediate effect on this regard.

v. The Judges of these Courts should be appointed on the basis of the expertise so that they can tackle the environmental issues effectively and the law should provide for such prerequisite in the appointment of the Judges.

vi. As in India, the Environment Court Act also should facilitate the Courts with environmental experts permanently positioned so that they can assist the court with necessary advice on each stages of the case for efficient and effective functioning of the Court.

vii. The said Act should make way for appeals to the Highest Courts of Bangladesh as this at present is missing as such technical and scientific environmental issues at cases may demand such attention for a final and comprehensive adjudication.

³²⁶ BLD (AD) 1997; 49 (1997) DLR AD 438.

viii. Proper implementation of the said Act also has to be ensured as yet we are to set up further Environment Courts covering for the entire of Bangladesh and offices of the Department of Environment in all districts of Bangladesh which is at present lacking.

ix. The Government needs to further enhance the Jurisdiction of the Court with certainty by including further laws by official gazette notification and also by framing separate rules for the efficient functioning of the Courts.

7. CONCLUSION

Today the environmental jurisprudence has developed significantly nationally and globally. Nationally, the significance of environment to overall development of the country and to well being of people has been recognized in the case of *Dr. Mohiuddin Farooque vs. Bangladesh*, represented by the Secretary, Ministry of Irrigation, Water Development and Flood Control⁵⁸ which vehemently declared that right to life³²⁷ under the Constitution of Bangladesh also includes 'right to live in a healthy environment'.³²⁸ In some other cases³²⁹ the Highest Court of Bangladesh demonstrated its commitment to environment protection and exemplified as to how crucial environment is at the present context. Further, a new article has also been incorporated in the Constitution of the People's Republic of Bangladesh which vests on the government to protect and improve the environment.

Today's Environmental initiative in respective jurisdiction is solely due to the progresses made internationally and their consequent obligations on the designated states. Starting with UN Conference on Human Environment, 1972, The UN Conference on Environment and Development, 1992 adoption of treaties i.e. UN Convention on the Law of the Sea, 1982, Vienna Convention on Civil Liability for Nuclear Damage, Vienna, 1963, Vienna Convention for the Protection of the Ozone Layer, 1985, Kyoto Protocol, 1997, Framework Convention on Climate Change (UNFCCC), New York, 1992, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 1989 etc, judicial adjudication in the form of Trail smelter case⁶², Pacific Fur Seal Arbitration, 1893, Lac Lanoux Arbitration⁶³ and adoption of noble principles like Common but Differentiated Responsibility, Intergenerational Equity, Precautionary, Polluter's Pay etc. have taken Environmental protection to a different level altogether. In this backdrop of national and international progress the Environment Court Act, 2010 does not catch the true spirit of Environment Justice in toto.

The said Act requires necessary amendments to effectively and efficiently put the Environment Courts in rhythm to work for Environmental activism. The Environment Court Act, 2010 is still lagging behind in various aspects as to common people's access to courts. For example, cumbersome processes, lack of procedure of appeals to highest courts, no detail of alternative dispute resolution mechanism, lack of expertise on environmental issues etc. Thus, for the proper functioning of courts, succeeding to the purpose of the Environment Court Act, 2010 and to be in line with global aspirations of Environmental Justice the Government of Bangladesh must amend the law with necessary effect.

³²⁷ Article 32, Constitution of the People's Republic of Bangladesh, 1972.

³²⁸ Dr. Mohiuddin Farooque. *Law and Custom on Forests in Bangladesh: Issues and Remedies* (Dhaka: Bangladesh Environmental Lawyers Association, 1997).

³²⁹ *BLAST and others vs. Bangladesh and others* ['Vehicular Pollution' Case] Writ Petition No. 1694/2000 (22 BLD (HCD) 245); *Sharif Nurul Ambia vs. Deputy Commissioner and others*, 58 DLR (AD) 253; *M Saleem*

Ullah and others vs. Bangladesh [55 DLR 1]; *Bangladesh Environmental Lawyers Association (BELA) vs. Bangladesh, represented by the Secretary, Ministry of Shipping Bangladesh Secretariat and others; Bangladesh Paribesh Andolan and another vs. Bangladesh, represented by the Secretary, Ministry of Works and others* (2004) [33 CLC (HCD)].

⁶² (United States, Canada), 3 UNRIAA, p. 1905, 1952.

⁶³ *France vs. Spain* (1957) [12 R.I.A.A. 281; 24 I.L.R. 101].

Bangladesh: Let's Grasp up the Upper Middle Income Status by Upgrading Rule of Law

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ABSTRACT

Neo-liberalism has diagnosed a concrete nexus between rule of law (ROL) and economic development (ED). This thought optimistically inspired economists, politicians from developing countries as well as donor agencies like World Bank (WB), ADB (Asian Development Bank) and IMF (International Monetary Fund) to progress their member countries economic status with evolving their rule of law status. As a developing nation, Bangladesh is no longer an exception. However, their recent staining graduation from low income country (LIC) to lower middle-income country (LMIC) is one of the challenges to keep persistent economic development over a long time that Bangladesh has overwhelmed successfully. The present apprehension for Bangladesh, like many other lower middle-income LMI economies, they are squeezed by inadequate legal instrument on the one hand, and ineffective application of ROL on the other. Though ensuring justice, fairness and values are the main governing principle of the ROL; the World Justice Project report, 2016 (WJP) ROL indicator, however, does not show a satisfactory ranking of Bangladesh. Identical weakness also reflected in World Governance Indicator, 2016 (WGI) as WJP. This paper examines the existing legal instruments which are supportive for economic development of Bangladesh, and it also find out some existing problems and provides its viable solutions as recommendations which have gathered form global experiences.

Keywords: Bangladesh, Lower Middle-income Country, Rule of Law, Economic Development, Sustainable Development

1. INTRODUCTION

Since its independence, Bangladesh has come a long way in its economic development. In contrast to other countries that are relatively the contemporary of Bangladesh, it is still lagging behind.³³² Political instability, inequality, corruption, and non-abidance to the ROL are some of the reasons Bangladesh are behind their contemporaries.³³³ Adjacent to this according to the 2016 fiscal year statistic, Bangladesh is achieving the status of LMI countries.³³⁴ It had experienced with the 2000s steady economic growth that boasted to increase the countries per

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³³² Mohammed Helal and Md Amzad Hossain, "Four Ddecades of Eeconomic development of Bangladesh: An Aassessment", *Journal of the Asiatic Society of Bangladesh (Hum.)* 58, No. 2 (2013): 335 - 362.

³³³ Ambar Rabnawaz, "Corruption, Inequality and Economic Growth", *Developing Country Studies* 5, No. 15 (2015): 106 - 111.

³³⁴ Staff Correspondent, "Per capita income rises to \$1466", *The Daily Star*, 6th April 2016, <https://www.thedailystar.net/frontpage/capita-income-rises-1466-1204930>.

capita income US\$90 in 1973 to US\$1314 in 2015.³³⁵ It manifesting the features of a modern economy, i.e. paradigm has shifted from traditional agricultural dependency to services sectors dependency. That makes Bangladesh more confident in global arena.

However, from the last couple of decades the concept of the ROL has changed from its pure legal thought to economic conscientious conjunct with these two for the productive progression of a global market economy.³³⁶ It started since the 1970s when the legal scholars and society represented a new relation between the law and economic development addressing it as “law and development movement”.³³⁷ It also mentioned that “the new wave of law and development activity corresponds with a shift toward market-oriented economic policies in the developing world”.³³⁸ However, there has been an invisible chemistry between the ROL and economic affluence. Actually, each and every country’s economy has hanged on a sound system of law and justice. The structure of law and dispute resolution system also plays an important role to ensure justice. The ROL limits the power of the government to give protection to individual rights because the ROL states that regardless of the position or status in society of a person, each person is subject to the law and will be treated equally. The ROL is considered as the supreme law of the people and the government. To promote the value of the ROL for the protection of civil and political rights, the Delhi declaration has (1959)³³⁹ pointed out that:

“...the rule of law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.” (3)

In addition to that, Asian Development Bank (ADB) said that the ROL is essential to economic development. In a wider sense, a comprehensive and viable governance system is indispensable part for economic development.³⁴⁰ Therefore, accountability and transparency are most inherent components to run every government smoothly. It proliferate the enforcement of law and accelerates citizen involvement in the governmental affairs. All of these characteristics of good governance consist of the ROL. So, abidance and implementation of the ROL are obligatory for sustainable economic growth.³⁴¹ This paper thus examines the existing legal instruments which are supportive for economic development of Bangladesh, and it also find out some existing problems and provides its viable solutions as recommendations which have gathered form global experiences.

³³⁵ Fahmida Khatun, “Still a way to go for a middle-income Bangladesh”, East Asia Forum. 15th October 2015, accessed 9th October, 2017, <http://www.eastasiaforum.org/2015/10/15/still-a-way-to-go-for-a-middleincome-bangladesh/>.

³³⁶ Bufford, Samuel L. “International Rule of Law and the Market Economy-An Outline.” Sw. JL & Trade Am. 12 (2005): 303.

³³⁷ Ginsburg, Tom. “Does law matter for economic development? Evidence from East Asia.”, *Law & Society Review* 34, No. 3 (2000): 829-856.

³³⁸ Ginsburg, “Does law matter for economic development? Evidence from East Asia, 829-856.

³³⁹ Marsh, Norman S., International Commission of Jurists, and International Congress of Jurists (New Delhi, India)). *The Rule of Law in A Free Society: A Report on the International Congress of Jurists*, New Delhi, India, 5th -10th January, 1959. International Commission of Jurists, 1959, p. 3.

³⁴⁰ Sharma, Shalendra D. “Democracy, good governance, and economic development.” *Taiwan Journal of Democracy* 3, No. 1 (2007): 29 - 62.

³⁴¹ Parris, Thomas M. “Gender and sustainable development.” *Environment: Science and Policy for Sustainable Development* 47, No. 7 (2005): 3-3.

The research methodology chosen for this article is qualitative in nature. Those undertaking the research in law, doctrinal or library based research is the most common methodology.³⁴² For the doctrinal method, this article will rely on secondary sources. The secondary sources consist of library materials (textbooks, journal articles and newspapers), internet resources, annual reports of ADB, WB and online databases.

2. LITERATURE REVIEW

Often, scholars are trying to find out the answer of the question is that why the economic growth of different countries or the same country in different periods are different in rates? Scholar answers come from two different angles one group emphasized on a good rule of law situation and others said about economic influenced rest find out equal contribution. Indeed, World Bank, IMF and other International Organizations opined that ROL is a fundamental element of social welfare, strength and economic growth.³⁴³ They also address that ROL is motherhood and apple pie of economic development.³⁴⁴ Skaaning pointed out that it is hardly surprising in case of production, quality and use of governance indicator has been thriving in the recent few years because of the direct and indirect influence of ROL.³⁴⁵ So there is no other alternative thinking of development of the country's economy without the co-relation between the ROL and economic expansion.

Correspondingly, author has noticed a relationship between the ROL and economic growth from the viewpoint of the protection of the property rights and the enforcement of contracts. He also finds out a positive correlation amongst rule of law, investment and economic growth. Moreover, the economics perception the major source of economic growth across the countries depend on the development of economic institutions i.e. property rights, regulatory institutions, institutions for macroeconomic stabilization, institutions for social insurance, institutions for conflict management, etc. that has already been established.³⁴⁶ It has great influence on investments in the physical capital, human capital, technology, industrial production and also important for resource distribution. Apart from that a good numbers of expert beliefs that a comprehensive property rights and a strong legal system have played an imperative factors for economic development.³⁴⁷ Therefore, not only ROL accompanied by economies institutional development plays a vital role for countries economic progression but also abovementioned factors are also fundamentally contributable for a sustainable economic development.³⁴⁸

Instead, the author mentioned that considering regulatory environments issues such as the capability to start a business, hire workers, and protect investors, enforcement of contracts and

³⁴² Singhal, Ashish Kumar, and Ikramuddin Malik. "Doctrinal and Socio-Legal Methods of Research: Merits and Demerits." *Educational Research Journal* 2, No. 7 (2012): 252 - 256.

³⁴³ Belton, Rachel Kleinfeld. *Competing definitions of the rule of law: implications for practitioners*. Carnegie Endowment for International Peace, 2005. Haggard, Stephan, Andrew MacIntyre, and Lydia Tiede. "The rule of law and economic development." *Annu. Rev. Polit. Sci.* 11 (2008): 205 - 234.

³⁴⁴ "Economics and the rule of law Order in the jungle", *The Economist*, 13th March 2008, <https://www.economist.com/node/10849115>.

³⁴⁵ Skaaning, Svend-Erik. "Measuring the rule of law." *Political Research Quarterly* 63, No. 2 (2010): 449-460.

³⁴⁶ Pereira, Carlos and Vladimir Kuhl Teles. "Political institutions as substitute for democracy: A political economy analysis of economic growth", Working Paper. FGV-EESP, August 2009.

³⁴⁷ Barro, Robert J. "Human capital and growth." *American Economic Review* 91, No. 2 (2001): 12-17.

³⁴⁸ Pereira, Carlos and Vladimir Kuhl Teles. "Political institutions as substitute for democracy: A political economy analysis of economic growth", 1 - 39.

investment have a relation between the ROL and economic development.³⁴⁹ Besides this, it proved by the findings that effective governmental monitoring is strongly allied with economic growth.³⁵⁰ Moreover, literature review also discovers that the aspect of horizontal accountability and checks on corruption within the government is *de facto* ROL which ensures the economic growth. Haggard and Tiede³⁵¹ give importance on the impact of the rule of law for economic development in the perspective of security of a person, property in conjunction with contracting rights, governmental accountabilities, limits and check of the governmental powers and corruption as well. Analysis revealed that ROL is combating component for eliminating the corruption and foster the growth.

To sum up, with regard to justice and governmental performance, it can be said that ROL is an instrument of the state policy it helps to establish rules, develop its institutions and working in situ for the advancement of the economy.³⁵²

3. NEXUS FLANKED BY RULE OF LAW AND ECONOMIC DEVELOPMENT

In a strict sense, ROL refers a legal concept which is guaranteeing the impartial application of law.³⁵³ On the other hand, if the principles of ROL are used in terms of economic perspective, at that juncture it ensures the economic development by imposing the obligation of the ROL for accountability, corruption and protection of the rights of the investors as well. So, in all aspects, there is a strong relation between ROL and economy. Without the ROL or correlation between economies, it's very difficult to maintain a sound economic growth. In this respect, many literatures are evident that kin between the ROL and economic development is a combined movement.²³

In the 1970s, a wave of law and development activity corresponds with a shift toward marketoriented economic policies in the developing world.³⁵⁴ Afterward in 1990s, the second movement also evident for equivalent development which addressed that rule of law plays a vital role in easing social and economic change.³⁵⁵ Hence, when development takes place it demands legal reform with a specific change of economic policies.

In a nutshell, it can be said that proper adherence of ROL and justice possess that makes a country's economy stable. Meanwhile, every country's legal system can ensure that how much their structure of law and dispute resolution system is comprehensive to uphold the judgments and decisions and it is inseparably connects with international communities along with the investors. A strong condition of ROL can defend the investor's rights and providing a mechanism to control foreign-based corporations. In addition to that, it refrain the governments

³⁴⁹ Caroline Roseveare, "The rule of law and international development". Department for International Development (DFID), London, UK (2013): 87. <https://www.gov.uk/dfid-research-outputs/the-rule-of-law-and-international-development>.

³⁵⁰ Jalilian, Hossein, Colin Kirkpatrick, and David Parker. "The impact of regulation on economic growth in developing countries: A cross-country analysis." *World development* 35, No. 1 (2007): 87-103.

³⁵¹ Haggard, Stephan, and Lydia Tiede. "The rule of law and economic growth: where are we?" *World Development* 39, No. 5 (2011): 673 - 685.

³⁵² Roseveare, "The rule of law and international development", 87.

³⁵³ Meyerson, Denise. "The rule of law and the separation of powers." *Macquarie Law Journal* 4 (2004): 1. ²³ Ginsburg, Tom. "Does law matter for economic development? Evidence from East Asia." (2000): 829 - 856. Cross, Frank B. "Law and economic growth." *Tex. L. Rev.* 80 (2001): 1737. Barro, Robert J. "Human capital and growth." *American economic review* 91, No. 2 (2001): 12-17.

³⁵⁴ Ginsburg, Does law matter for economic development? Evidence from East Asia, 829-856.

³⁵⁵ DeLisle, Jacques. "Lex Americana: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond." *U. Pa. J. Int'l Econ. L.* 20 (1999): 179.

to exercise arbitrary powers and keep in pressure to the government to treat all citizen equally. The judicial system is able to go forward, to change and to adjust the needs who seek justice no matter how difficult the circumstances are.

4. LMIC AND THE ECONOMY OF BANGLADESH

Despite political instability, poor infrastructure, corruption, insufficiency of power supplies, slow implementation of economic reforms, and the 2008-2009 global financial crisis and recession, the economy of Bangladesh has experienced a growth of an estimate of 6% per annum since 1996.³⁵⁶ Bangladesh has been relatively successful in making its economy progress and in spreading the benefits of the economic growth across its different societies. The country has made an average of 5% - 6% annual gross domestic product (GDP) since the 1980s.³⁵⁷ Bangladesh has since then moved its status from a Lower Income Country (LIC) to the status of Lower Middle-Income Country (LMIC), which the whole nation considered as favorable news. Bangladesh shares the rank of LMIC with the other 51 countries on the list of WB. This includes India, Pakistan, Sri Lanka, and Vietnam. WB reports that Bangladesh garnered a Gross National Income (GNP) per capita including yearly incomes of \$1,046 to \$4,125 in order for it to be classified as an LMIC. This is considered as great feat by the government who projected in its timeline for Bangladesh to cross the middle income economy by 2021.³⁵⁸ Assessing the social infrastructure of the country is needed in order to see how the desired level of economic growth rate and per capita income level targets were achieved. Such initiative requires an annual GDP growth of 7.5% - 8% including surpassing obstacles like taking advantage of new opportunities presented by the ever changing global situations.

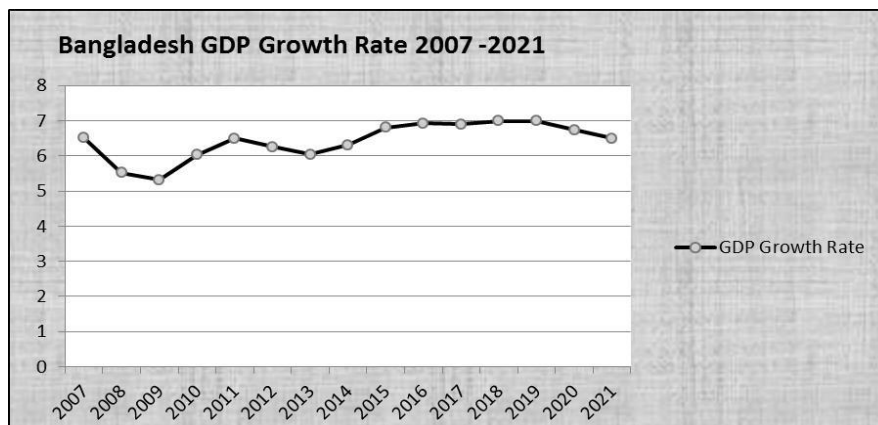


Figure 1: GDP Growth Rate of Bangladesh, 2007-2021

Source: World Bank national accounts data, and OECD National Accounts data files.

Table 1 demonstrates the GDP growth rate of Bangladesh from 2007 for the next 14 years. The overall GDP growth rate is persistent with certain fluctuation has marked from 6.5 in 2007 to 5.30 in 2009. After that in 2013, the growth rate 6% was gradually reaching at 7%

³⁵⁶ "GDP growth (annual %) World Bank national accounts data, and OECD National Accounts data files", The World Bank IBRD-IDA, accessed 10th January, 2018, <https://data.worldbank.org/>.

³⁵⁷ The World Bank IBRD-IDA, "GDP growth (annual %) World Bank national accounts data, and OECD National Accounts data files."

³⁵⁸ Anu Mahmud, "Lower middle income status", *The Independent*, November 11, 2015, <http://www.theindependentbd.com/printversion/details/22536>.

in 2016 and predicted that it will stabilize until 2019. Then the growth rate will be decreased in few points.

Country classification is entirely a WB phenomenon. The WB classified its 185 member countries as low-income, middle-income (subdivided into lower middle and upper middle) and high-income groups on the basis of their gross national income (GNI) per capita, for its operational and analytical purposes. MICs are a diverse group with complex social, cultural, political and development challenges, varying development needs and different preferences for what they want financial assistances from the WB.

Several Middle Income Countries (MICs) are taking interest on the fast access to the target technical expertise and knowledge in reference to the experience of gain of the World Bank (WB). Consistently, but not always, the MICs want to procure such knowledge and expertise along with finance.³⁵⁹ The estimated Gross National Income per capita of WB shows a significant marked economic performance of many LICs which include Bangladesh, Kenya, Myanmar, and Tajikistan with annual income of USD1,046 - USD4,125. On the other hand, Mongolia and Paraguay have transitioned from Lower Middle-Income status to Upper Middle-Income status with annual income level of USD 4,126 - USD12,735.³⁶⁰

Gross National Income (GNI) refers to the broad-based measure of income created by the residents of a country from international and domestic activities. The GNI per capita also serves as measure of the average amount of resources that are available for people living in a given economy; the GNI represents also the economic well-being of its population. Bangladesh has been included in the slate of LMIC because its per capita income rose to USD1314 for the present fiscal year. This increase in per capita income put Bangladesh in the 58th place of the largest economy in the world in terms of nominal value³⁶¹. If the country consistently achieves an average of USD1045 per capita income for three consecutive years, it will be identified as a middle-income nation.

In 2014, the per capita income of Bangladesh reached USD1190. In 2012 - 2013, the per capita income was at USD1154. WB classified the income threshold as follows: low income is pegged at USD1,035 or less; lower middle-income ranging from USD 1036 to USD 4,085; upper middle-income is from USD 4,086 to USD 12,615; and high income is at USD 12,616 or higher.³⁶² Bangladesh aims to be a middle-income nation by 2021, the 50th year of independence of Bangladesh. At present, the country hopes to achieve the middle-income status in the next three years. However, the pervading challenge for the government of Bangladesh is how to maintain its political stability.

5. TO WHAT EXTENT BANGLADESH MAINTAIN THE PRINCIPLE OF RULE OF LAW IN ITS ECONOMIC DEVELOPMENT

The concept of rule of law is the brine child of Aristotle in the 4th BC. After that A.V Dicey has further explained as the concept of rule of law which contemplated the absence of wide

³⁵⁹ A. N. M. Nurul Haque, "The middle-income matrix," *The Daily Star*, 18th November 2007, <http://www.thedailystar.net/news-detail-12033>.

³⁶⁰ Staff Reporter, "Bangladesh moves up to lower-middle income group," *Bangladesh Sangbad Sangstha*, 2nd July 2015, <http://bssnews.net/newsDetails.php?cat=2&id=503140&date=2015-07-02>.

³⁶¹ Staff Correspondent, "Bangladesh's per capita income rises to \$1,314," *bdnews24*, 14th May 2015, <https://bdnews24.com/economy/2015/05/14/bangladeshs-per-capita-income-rises-to-1314>.

³⁶² A. N. M. Nurul Haque, "Middle-income status for Bangladesh," *The Daily Sun*, 6th July 2015, <http://www.daily-sun.com/home/printnews/56690>.

powers in the hands of government officials.³⁶³ Though this principle has previously confined only citizens' political liberty but now it is so propagative for the economic and human rights development³⁴. ROL has adopted in the Bangladesh Constitution as one of the fundamental principles like other developed and developing countries but its application is massively criticized by national and international communities.

The Worldwide Governance Indicators (WGI) reports aggregate and individual governance indicators for over 200 countries and territories over the period 1996 - 2015, for six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption. The following table 2 mentions the ROL indicator for Bangladesh with other LMICs and UMICs situation.

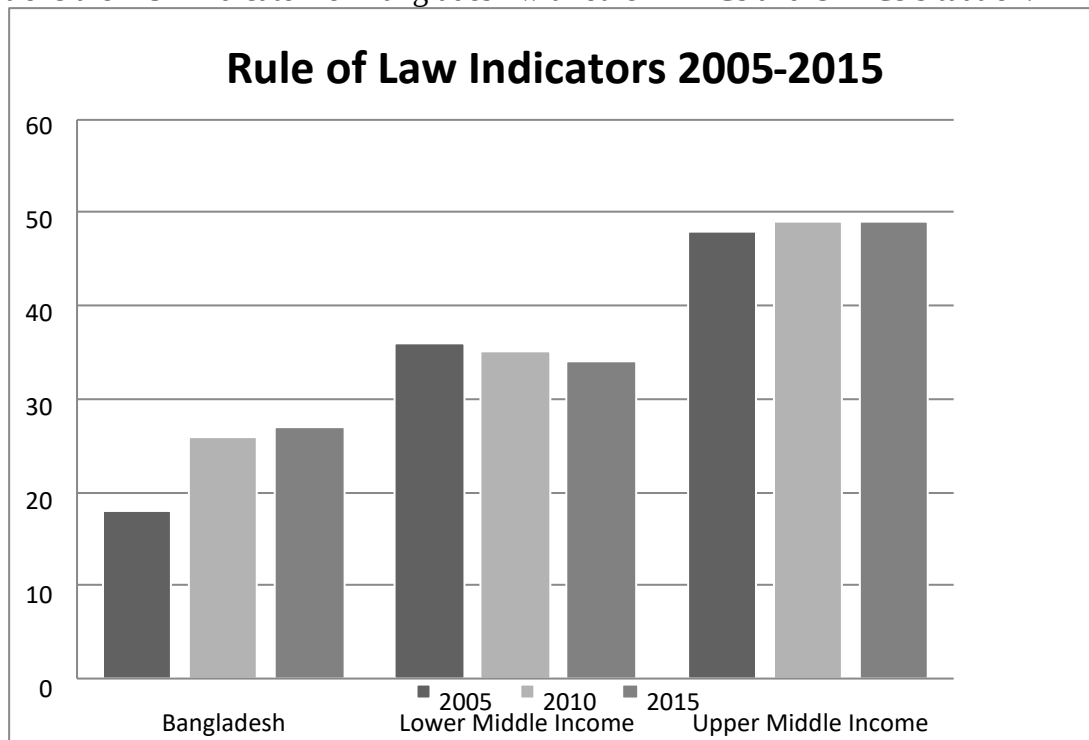


Figure 2: Rule of Law Indicators 2005-2015 Source: The Worldwide Governance Indicators

The above mention table 2 illustrates the worldwide governance indicators ROL position in Bangladesh, others LMICs situation compared to upper middle income countries (UMICs). As indicator shows in 2005 Bangladesh ROL ranking was 18 out of 100. Furthermore it developed a while in 26 and 27 out of 100 in 2010 to 2015. Instead, table indicates that most of the LMIC ROL ranking was 36 in 2005 and 34 in 2015 out of 100. However, in case of UMIC in 2005 they were in 48 ranking out of 100 and in 2015 it was nearly 50 out of 100.

Though Bangladesh in now LMIC its ROL ranking is not satisfied compared to other LMIC ranking. Most of the UMICs ROL abidance is 50 but Bangladesh is below 30 compared to other LMICs. Therefore, Bangladesh needs to develop its ROL ranking to enter in to the status of UMIC. Earlier mentioned propositions have depicted that though there is a strong relationship

³⁶³ Mollah, Md Awal Hossain. "Rule of Law in Bangladesh: An Overview." ³⁴ Candela, Rosolino, and Ennio Emanuele Piano. "Rule of Law." (2017).

between ROL and ED it is essential to develop countries ROL situation for the better benefit of the nation. The bellow table 3 shows the Bangladesh as a LMIC how much maintain the ROL for the progress of the country's economy. On the other hand, table tries to show the situation of other HIC and UMIC Rule of Law abidance ranking and also pointed out the other LMICs example whose ROL ranking is higher than Bangladesh.

At first, Bangladesh as a LMIC its ROL ranking was below 30 out of 100 in the year of 2005 to 2015. On the other, Indonesia and Thailand also LMIC but their ROL abidance is higher than Bangladesh. Table shows their ranking for Indonesia 25 to 40 in the year of 2005 to 2015 and Thailand 55 to 54 in 2005 to 2015 out of 100. However, UMIC like Malaysia its ranking was 66 to 72 out of 100 in the year of 2005 to 2015. In addition, Korea as a HIC it ROL abidance was 80 to 82 out of 100 in 2005 to 2015. The reason behind to choose the abovementioned countries' ROL abidance scores because it depicted that there is a strong nexus between ROL abidance and economic development. The table 3 shows that developed countries belonging higher score than developing countries and developing countries scores are higher than least developing countries.

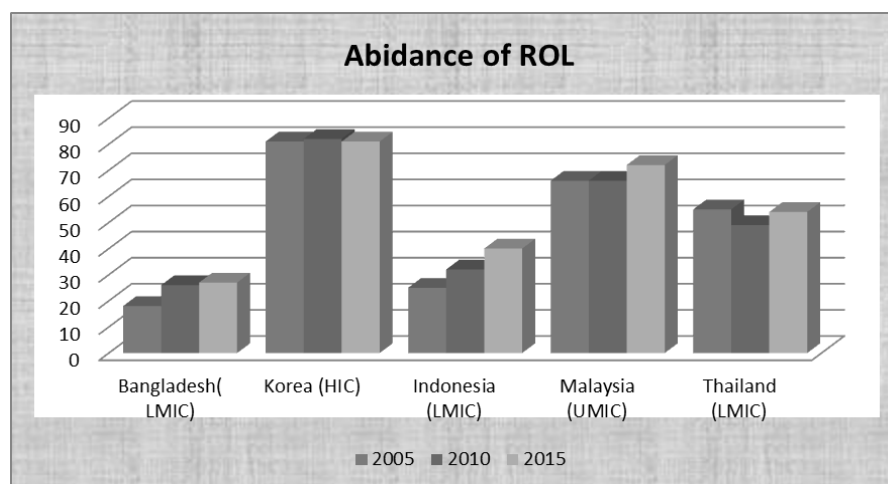


Figure: 3 Countries with Different Income Status and Abidance by the ROL
Source: The Worldwide Governance Indicators 6. CHALLENGES FOR BANGLADESH

Economic development and socio-economic challenges is a double-edged sword. The journey to development is not an easy feat for any nation. Bangladesh as a developing economy, which is conceivably making a gradual progress, it apparent that the growth is not inclusive of the other factors related to it. Hence Bangladeshi economy has continuously faced several challenges which include: political uncertainty, growth of infrastructure deficit, and a difficult regulatory regime. Other factors mentioned below need to be addressed as well.

6.1 Narrow Growth Rate

Economic growth of any country refers to its economic development. However, the imbalanced economic growth among the Bangladeshi citizen is not properly reflected in the economic growth of this country. Statistical data illustrate that, the total size of an economy of a country is USD100 billion and 30% of its total people live under the poverty line, 40% belongs to the lower middle class, 25% of it ranks as upper middle class and the remaining 5% is classified

as the elite who own 60% of the wealth of the total country' wealth³⁶⁴. A double growth of the size of an economy is not always equivalent to the notion that all of the income of each of the groups has increased equitably. For example, if 30% of the population is still considered living below the poverty line, then the economic growth is not inclusive. Inclusive growth along with economic growth has been a sword in the head in Bangladesh.³⁶⁵

6.2 Unequal Opportunities for the Investors of Local and Foreign

Because of the increase in the number of job seekers, Bangladesh is in need of foreign investment in order to create more opportunities for employment. Foreign investment can only be realized by means of investment-friendly policies. Provisions for a level playing field should be given to both local and foreign investors in terms of policies and practices. Clearly, there is a scarcity on investment friendly policies and attitudes³⁶⁶.

6.3 Political Stability

Political stability is one of the key ingredients of economic development; its absence poses a great challenge to future economic development. Transparency is needed to be shown in political platforms and parties so that they may be made liable for every action, from selection of candidates to selection of ministers. The economic resilience of Bangladesh has been constantly challenged by political instability, weak global markets, and structural constraints. The challenging political environment of Bangladesh has had an impact on its economy. Bangladesh has lost 1% of its total GPD as direct production losses as a result of commotion of economic activities due to political disturbance³⁶⁷.

6.4 Improper Handling of Rise in Unemployment

In 2014, the total unemployment rate in Bangladesh was 4.2% which was a slight development from the year of 2013 that was 4.3%³⁶⁸. Every year, many of its citizens enter the job market. It has become an onerous task for the government to ensure employment for its unemployed population. The private sector also shares with this problem. Multiple platforms exist for employment generation. However, such platforms will only materialize through better coordination among agencies in order to arrive at perceivable outcomes. Exporting trained manpower and skilled professionals is one of the probable solutions to this concern.

6.5 The Guarantee of Demand-driven and Profession-oriented Education

The number of the unemployed educated individuals is increasing. Reorganizations of the education system should also be done. Profession-oriented and demand-based curriculums must be installed. Coordination between the schools and industries is needed in order to effect the adjustments that need to be done in the curriculum. Enhancing also the quality and relevance of education can also guarantee an increased return.

³⁶⁴ Abdin, Md. "Socio-economic challenges of Bangladesh." (2014).

³⁶⁵ Md. Joynal Abdin, "Socio-economic challenges of Bangladesh," *The Financial Express*, 21st December 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544236.

³⁶⁶ Abdin, Md. "Investment Climate in Bangladesh: Performance and Possibilities." (2015).

³⁶⁷ The World Bank, "Bangladesh Development Update: Economy Moving Forward Despite Internal and External Challenges", April 2015. <http://www.worldbank.org/en/country/bangladesh/publication/bangladeshdevelopment-update-economy-moving-forward-despite-challenges>.

³⁶⁸ Mohammad Al-Masum Molla and Wasim Bin Habib, Job Opportunity: Higher degree, lesser scope unemployment rate highest among those having higher degrees, says latest BBS survey, *the Daily Star*, 29th May 2017, <https://www.thedailystar.net/frontpage/job-opportunity-higher-degree-lesser-scope-1412233>.

6.6 Structural Reforms

These reforms have gone ahead in economic zones and Public-Private Partnership (PPP) laws; however, these reforms went a notch down in loan restructuring and incorporation of the new value-added tax (VAT) law. An increase in investment by at least 5% is needed from the present 28.7%³⁶⁹.

6.7 Increasing Efficient Growth

Increase in efficiency growth entails a fast-paced shift from agriculture to achieving higher productivity in manufacturing and services. This can also be done by taking on the experience of other countries and firms with a higher productivity rate and by increasing the outward orientation of diversifying labor-intensive exports.

6.8 Preserving Fiscal Space

By preserving the fiscal space of the country, Bangladesh can ensure of flexibility in exchange rate and improved financial sector accountability.

6.9 Boosting Private Investment

Private investments can experience higher progress by means of the establishment of special economic zones.

6.10 Development of the Private Sector

The private sector can be developed by means of giving adequate attention to the regulatory environment. This also entails limiting inflation, stabilizing prices and the democratic institution. Furthermore, table 4 point out the Bangladesh position in the following WGI reports. The 2005 - 2015 reports indicates that voice, accountability, political stability, government effectiveness, control of corruption, and regulation are factors that affect the progress of the country, Bangladesh. Table 4 shows the years 2005 – 2015 with voice and accountability rank between 26 - 31; political rank is from 4 to 11; government effectiveness is ranges from 21 to 24; control of corruption is at 5 to 18 rank, and regulatory quality is at 17 to 22 rank. The figures range from zero (0), being the lowest rank and 100 as the highest rank. The figures themselves prove that all the indicators for compliance to the ROL do not meet a satisfactory rank for Bangladesh which is still in its infancy stage of development.

³⁶⁹ Shawkat Hossain, “Budget outlay increases, growth rate decreases”, *The Daily Protham Alo*, 29th May 2015, <http://en.prothomalo.com/economy/news/67839/Bigger-budget-lesser-growth>.

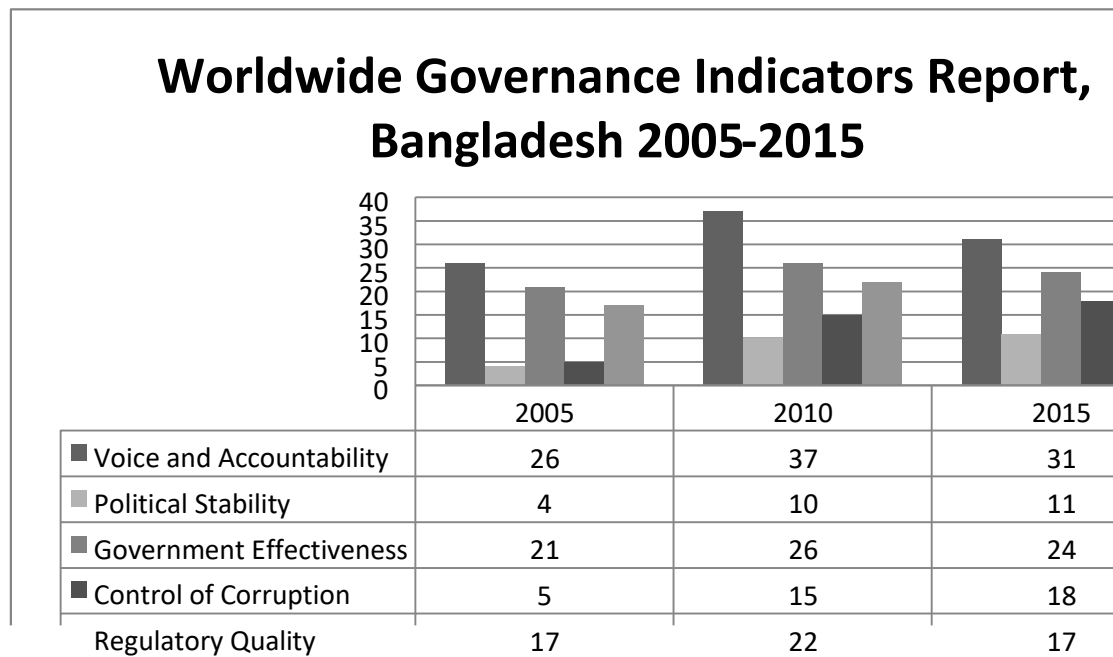


Figure: 4 WGI Reports 2005-2015

Source: <http://info.worldbank.org/governance/wgi/index.aspx#reports>

Another statistic from WJP (world justice project) Rule of Law Index surveys to measure how the ROL is experienced in everyday life around the world. Performance is assessed through 44 indicators organized around 8 themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. According to the WJP 2016 index Bangladesh overall score 0.41, regional rank 4/6, income rank 23/28 and global rank is 103/113. . It is worthy to note that, the scores range between 0 and 1, where 1 signifies the highest score (high ROL adherence) and 0 signifies the lowest score (low ROL adherence).

Apart from the above-mentioned issues, there are many other socioeconomic problems facing Bangladesh. Our policy makers, politicians, think-tanks and civil societies will have to respond to the demand of time. If the issue of economic development is the uppermost in our minds, every citizen of the country has a stake in the affairs of the state. Growth remains below what is needed for Bangladesh to be in the comfort zone of middle-income by 2021.

The above discussion pointed out that in order to achieve the goal of UMIC status Bangladesh has to consider various improvements that need to be done. In the absence of transparency and accountability in enforcing the ROL among the state any progress taken and decision made will be ineffective. Bangladesh is considered as an LMIC, the government can manage to overcome the problem and boost up its economic growth to push the country from a lower income to an upper middle -income status.

Therefore, special attention needs to be given in reforming the public accountability and transparency to keep in balance the law and order of the country.³⁷⁰ Law enforcement agencies

³⁷⁰ Abu Bakar, Nur Barizah, Zakiah Saleh, and Muslim Har Sani Mohamad. "Enhancing Malaysian public sector transparency and accountability: Lessons and issues", *European Journal of Economics, Finance and Administrative Sciences* 31 (2011): 133-145.

should demonstrate their concern in protecting the independence of judiciary.³⁷¹ Apart from that Doner³⁷² remarks that successful implementation of ROL in point of social, economic; and political includes the defeat of corruption while strong corporate governance principle can play an important role to shift Bangladesh to upper middle-income status.

7. CONCLUSION

Bangladesh LMI status is not only the challenge for the donor and politicians but also for the intellectuals. It is expecting that, in quest for a developed Bangladesh and shifted to UMIC state has to be implemented both long term and short terms social as well as political policies reform, political process leading towards democracy, prudent economic management. Furthermore, effective development of the ROL along with judicial independence, instead of negative social and political consequences uphold the changing situation and to succeed the goals. Apart from that, a good coordination between judiciary, executive and political branches also promoting industry and economic development. Only with these reform and adaptation of the advance, effective and efficacious policies, Bangladesh can develop their socio and economic development.

³⁷¹ Geoffrey Robertson QC, “Judicial Independence,” International Bar Association, 4th June 2014, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9f2297b2-5bdf-4c7c-b950-025604a2c363>.

³⁷² Doner, Richard F., and Ben Ross Schneider. “The middle-income trap: more politics than economics.” *World Politics* 68, No. 4 (2016): 608 - 644.

Notes for Authors

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