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Contents

Dr. Md. Shahidul Islam Md. Asaduzzaman Saadi	Role of the Higher Judiciary in Safeguarding the Rights regarding Trial and Punishment in Bangladesh and India: A Comparative Study	1
Shuvra Chowdhury Ahmed Ehsanul Kabir	Protection of the “Best Interest Principle” for the Unaccompanied Migrant Children (UMC) under the Hostile Environment Policy in the UK	15
Munira Jahan Sumi	International Best Practices and Dealings with Indigenous Land Rights: Lessons for the Santal Community in Bangladesh	37
Nameera Ahmed	Identification of the Inadequacies in the Legal Mechanisms addressing Workplace Sexual Harassment of Females in the Context of Corporate Bangladesh using Lyotard’s Theory of Differend	53
Mahmuda Amir Eva Nurunnahar Mazumder Sarmin Akter	Restorative Justice in Bangladesh for the Victims of Sexual Offences	75
Shakil Ahmed	Addressing Medical Negligence in Bangladesh: Need for a Comprehensive Medico-legal Framework	95
Md. Mofazzal Hossain	Prospects in Using Artificial Intelligence in Bangladesh’s Maritime Security through the Lens of Ethical Issues	121
Shuvra Chowdhury	Institutional Framework to Ensure Child Development and Alternative Care under the Children Act 2013: An Overview	139
Baishakhi Rani Karmakar Sarmin Akter	Access to Mental Healthcare in Bangladesh: Analyzing the Prisoners' view	161

Hasan Muhammad Roman Afzalur Rahman	Legal Dynamics of World Health Organization (WHO) and United Nations (UN) in Securing Global Health during the COVID-19 Pandemic: An Assessment Surrounding the Traditional vs. Non-Traditional Security Debates	181
Evnat Bhuiyan	Revisualizing the Status of Conflict-induced Eco-crimes as an International Crime: Basis and Barriers	201
Numan Mahfuj Mahabubul Alom Riffat Farhana	Access to Justice in Rural Bangladesh: A Study on Selected Village Court in Rajbari Sadar Upazilla	237

Role of the Higher Judiciary in Safeguarding the Rights regarding Trial and Punishment in Bangladesh and India: A Comparative Study

Dr. Md. Shahidul Islam*
Md. Asaduzzaman Saadi**

Abstract: The legal system of Bangladesh and India symbolised by their respective Constitution ensure some safeguards in respect of trial and punishment. These include the right to protection from retrospective operation of law, double jeopardy and self-incrimination. It guarantees speedy and public trial as well as shields them from torture, cruel, inhuman or degrading treatment or punishment. In parallel, it protects an under-trial from being exposed to greater penalty or different punishment. Given this context, this study aims to examine the legal regime of Bangladesh and India towards ensuring the rights in respect of trial and punishment. It explores and analyses the relevant constitutional, statutory and judicial pronouncements in Bangladesh and India from comparative point of view. By using qualitative method, it finds that both the jurisdictions guarantee these basic human rights. However, the right to speedy and public trial, though is not explicitly mentioned in the Indian Constitution, is made a part of Indian jurisdiction under the auspices of the Indian Supreme Court. In parallel, though the Constitutions of both countries guarantee protection against self-incrimination, the Indian jurisdiction prohibits application of narco-analysis technique, polygraph examination and the Brain Electrical Activation Profile (BEAP) test to adduce relevant data from a witness. Meanwhile, protection from torture, cruel, inhuman or degrading treatment or punishment is constitutionally guaranteed in Bangladesh but these guarantees are made part of Indian jurisdiction through judicial intervention. Thus the study concludes with a note that the Indian judiciary has shown a proactive role in ensuring the rights concerning trial and punishment compared to its Bangladeshi counterpart.

1. Introduction

The Constitution of Bangladesh and that of India guarantees a bundle of rights as fundamental rights to ensure protection from retrospective operation of law, double jeopardy and self-incrimination while rational punishment connotes guarantee to be

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saved from torture, cruel, inhuman or degrading treatment or punishment. Moreover, the legal systems of both jurisdictions shield a person from being exposed to greater penalty or different punishment. Bangladeshi and Indian legal system guarantee these rights as fundamental rights. Nonetheless, the contour of fundamental rights has been significantly extended at the hand of the Appellate Division of the Supreme Court of Bangladesh (AD). However, as the supreme law of the land, the Constitution of Bangladesh literally accommodates all these rights, the case is a bit different in the context of India. Though the Constitution of India has a fundamental rights chapter incorporating a bunch of fundamental rights, many of them have emerged from judicial interpretation of constitutional provisions at the hand of its higher judiciary particularly the Supreme Court of India. The fundamental aim of this study is to underpin the contribution of the Bangladeshi higher judiciary in the expansion of the rights in respect of trial and punishment with that of the Indian one. Given this backdrop, the study employs doctrinal research methodology and examines the role of the AD and the Supreme Court of India in their efforts to enrich the length and breadth of rights regarding protection in respect of trial and punishment in their respective jurisdictions. In the result, the study discovers that the Indian top Court has demonstrated a proactive role in flourishing the horizon of the protection as to trial and punishment than the AD.

2. A Comparative Study of the Rights in respect of Trial and Punishment in Bangladesh and India

Under the garb of the provisions of article 35 of *the Constitution of Bangladesh* and article 20 of the *Constitution of India*, an under-trial has been guaranteed a bundle of rights while being tried before the court of law. These rights are known as protection from *ex post facto* law, protection from double jeopardy, speedy and public trial as well as protection against self-incrimination. Moreover, both Constitutions ensure protection from torture, cruel, inhuman or degrading treatment or punishment and protection against greater penalty or different punishment. The following sub-sections make a meticulous account of these rights and appreciate the role of the higher judiciary of Bangladesh and India in expanding the length and breadth of these rights.

2.1. Protection from *Ex Post Facto* Law

An *ex post facto* law denotes that a person can be tried for a past offence by a future law. It is a natural justice principle that one cannot be punished for a present offence by a future law. Alternatively, it can be said that a person subjects himself to be punished for the violation of a law which exists at the time of committing the offence.

In Bangladesh, a person alleged to have committed any offence is saved from the retrospective operation of law and at the same time is guaranteed with the right to 'a speedy and public trial'.¹ But these protections are not extended to a person who is a convict under article 47(3) of the Constitution.² Moreover, such persons are disentitled from moving the High Court Division (HCD) for enforcement of their fundamental rights.³ Article 35(1) of the *Constitution of Bangladesh* bars conviction or sentence under an '*ex post facto law*'.⁴ Parliament under article 65 of the Constitution has total power to pass any law on any subject both retrospectively and prospectively. But it cannot pass a law to craft a new offence which is not in existence while committing the alleged offence nor can it increase penal liability and attach retrospective effect with it.⁵

However, a law does not become void or unlawful though it becomes inconsistent or repugnant to the Constitution if it is passed in order to detain, prosecute, punish any member of the armed or defence or auxiliary forces regardless of its being inconsistent or repugnant to the Constitution.⁶ Similar is the case with the law passed by the Parliament in a bid to detain, prosecute or punish any individual or organisation or prisoner of war, or a prisoner for genocide, crime against humanity or war crime including other crimes recognised in international law.⁷

Everyone whether he is a citizen or not is guaranteed with the 'inalienable right' to the 'protection of law' and treatment following the course of law.⁸ The Constitution protects everyone from any action which is puts in peril the life and liberty of a person otherwise than due process of law.⁹ In India, the scope and content of article 20(1) of the *Constitution of India* not only covers prohibits passing of any *ex post facto* law but also invalidates any conviction or sentence.¹⁰

However, clause (1) of article 20 of the Constitution only covers the conviction or sentence under *ex post facto* law and not the trial itself which may be under a different procedure than that which exists at the time when the offence is

¹ *Constitution of Bangladesh*, article 35(1) & (3).

² *ibid*, article 47A (1).

³ *ibid*, article 47A (1) & (2) read with article 47(3) and 44.

⁴ *Tarique Rahman v Government of Bangladesh*, (2011) 63 DLR (AD) 18, para 39.

⁵ *ibid*.

⁶ (n 1) article 47(3).

⁷ *ibid*.

⁸ (n 1) article 31.

⁹ *ibid*.

¹⁰ *Rao Shiv Bahadur v State of Vindhya Pradesh*, 1953 SCR 1188, pp 1199-1200.

committed.¹¹ The Court states that a person accused of committing a criminal offence has no fundamental right to choose a particular court or procedure to be tried.¹² But he is entitled to raise allegation of discrimination.¹³

2.2. Protection from Double Jeopardy

The notion ingrained in 'double jeopardy' subjects a person to be vexed or tried twice for the same offence. Thus protection from double jeopardy is a principle of natural justice that shields a person from being tried second time for the same offence.

The AD in the case of *Serajul Islam v Director General of Food*¹⁴ holds that the principle of double jeopardy is not applicable to the departmental inquiry of a government employee since the principle relates only to trial and punishment in criminal proceeding only.¹⁵ The petitioner unsuccessfully challenges the charge-sheet for violation of articles 27, 31 and 35 of the Constitution before the HCD.¹⁶ On appeal, the AD also approves the opinion formed by the HCD holding the same view.¹⁷ The Court rules that this protection is guaranteed in criminal proceedings only.¹⁸ In parallel, article 20(2) of the *Constitution of India* provides guarantee from being vexed twice for the same offence. Under this article, if a person is convicted and punished for an offence by a court of law, he shall not be vexed for that offence for the second time. Section 26 of the *General Clauses Act 1897* lends support to this proposition.

In *SA Venkataraman v Union of India*¹⁹ upon an elaborate analysis of the relevant provisions of the *Public Servants (Inquiries) Act 1850*; the *Indian Penal Code 1860* and the *Prevention of Corruption Act 1947*, the Supreme Court demarcates the ambit and scope of article 20(2) of the Constitution. It finds that the principle contained in article 22(2) is narrower than those of the Common law or the double jeopardy doctrine.²⁰ To invoke the prohibition under article 20(2) of the Constitution, one must have to be prosecuted and punished for the same offence.²¹ Thus an inquiry conducted by the Commission and the subsequent action of dismissal from service

¹¹ *ibid*, p 1200.

¹² *ibid*.

¹³ *ibid*.

¹⁴ *Serajul Islam v Director General of Food*, (1990) 42 DLR (AD) 199.

¹⁵ *ibid*, para 4.

¹⁶ *ibid*, para 2.

¹⁷ *ibid*, para 4.

¹⁸ *ibid*.

¹⁹ *SA Venkataraman v Union of India*, 1954 SCR 1150.

²⁰ *ibid*, p 1153.

²¹ *ibid*, p 1154.

of the petitioner does not constitute a proceeding before a judicial body and hence does not come under the mischief of article 20(2) of the Constitution.²² The Court holds that departmental or administrative measures do not come within the fold of the term, prosecution and punishment'.²³ Moreover, the Court rules that in order to invite the guarantee of clause (2) of article 20 there must be both prosecution and punishment.²⁴ Thus the petitioner is not entitled to the safeguard enshrined in article 20(2) of the Constitution.²⁵

In settling a question whether conspiracy to crime is different from the objective that crime, the Supreme Court of India, interpreting article 20(2) of the Constitution, pronounces there lies clear difference between an offence of conspiracy and that of committing the offence itself.²⁶ Therefore where offences are different, they warrant no application of the rule of double jeopardy.²⁷ Article 20(2) comes into play only when ingredients of offences constitute two different offences.²⁸

In *State of Rajasthan v Hat Singh*²⁹ it is stated that *Rajasthan Sati (Prevention) Act* 1987 is enacted for the purpose of creating new offences coupled with the provision to punish activities to glorify *sati* and violation of any prohibitory order passed against glorification of *sati*. Section 5 of this *Act* provides punishment for glorification of *sati* while section 6, being preventive in nature, makes provisions for punishing contravention of prohibitory order and thus the two offences are not same in nature.³⁰ They are different from each other. Hence punishment under these offences does not come within the prohibitory clause stipulated in article 20(2) of the Constitution.³¹ In the case of *Monica Bedi v State of Andhra Pradesh*³², the top Court reiterates the same position. The Court holds that article 20(2) of the Constitution cannot be called for if same fact giving rise to different prosecution and punishment.³³

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*, pp 1161-1162.

²⁶ *Leo Roy Frey vs. Superintendent District Jail, Amritsar*, (1958) SCR 822, p 827.

²⁷ *State of Bombay v SL Apte*, (1961) 3 SCR 107.

²⁸ *ibid.*, p 114.

²⁹ *State of Rajasthan v Hat Singh*, (2003) 2 SCC 152.

³⁰ *ibid.*

³¹ *ibid.*

³² *Monica Bedi v State of Andhra Pradesh* (2010); available at:
<https://www.sci.gov.in/jonew/judis/37081.pdf>; para 17.

³³ *ibid.*

2.3. Fair, Speedy and Public Trial

Speedy and public trial forms another important part of protection regarding trial and punishment. It stands on the axiom that delayed justice amounts to denial of justice which is to be balanced with the proverb that justice hurried is justice buried. Closed door trial beyond public view is countenanced by it. Thus it follows that justice should not only be done but conspicuously and manifestly be seen to be done. In Bangladesh, every accused has fundamental right to speedy and public trial by independent and impartial court.³⁴ In contrast, the *Constitution of India* does not include any explicit provision in this field.

The concept of speedy and public trial has taken new shape through the judicial intervention of the top Court in Bangladesh. This right gets steadied through the case of *Abdul Kader Mirza v Bangladesh*³⁵ wherein the Court holds that the purpose of criminal jurisprudence is to ensure 'expeditious disposal of cases in the matter of investigation, trial and prompt delivery of judgment'.³⁶ As the Court formulates:

The object intended and purpose of criminal jurisprudence is for expeditious disposal of cases ... [and ensure] the right to speedy and public trial by the defendant through an impartial Court or tribunal established by law.³⁷

In regard to the necessity of speedy trial the Court further declares that the trial process should not be delayed as 'protracted litigation' amounts to denial of justice.³⁸ Further, delay in disposal of case constitutes an 'abuse of the process of the court'.³⁹

Speedy trial is very essential for administration of justice. Former Chief Justice of India, YK Sabharwal, emphasises on the necessity of speedy trial propounding that a party may lose his case not for his own faults but for 'tardy judicial process'.⁴⁰ He describes speedy trial as an 'essential feature of a fair trial' which remains a 'distant reality'.⁴¹ It is argued that in some cases, 'inordinate delay contributes to acquittal of guilty persons' for the reason that by this time evidence may be lost or witnesses may forget all the details or the witnesses may decline to come forward to give 'true evidence due to threats, inducement or sympathy leading to injustice'.⁴²

³⁴ (n 1) article 35(3).

³⁵ *Abdul Kader Mirza v Bangladesh*, (2008) 60 DLR (AD) 185.

³⁶ *ibid*, para 21.

³⁷ *ibid*.

³⁸ *ibid*, para 23.

³⁹ Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd Edition, Mullick Brothers, Dhaka, 2012), p 294.

⁴⁰ Justice YK Sabharwal, *Delayed Justice*; available at: https://highcourthd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/Delayedjustice.pdf; accessed on 30.06.2019.

⁴¹ *ibid*, pp 2-3.

⁴² *ibid*.

In view of the Supreme Court of India, speedy trial is inherent in the 'broad sweep and content' of article 21.⁴³ Thus cases involving children below 16 years of age shall be absolved speedily.⁴⁴ The Supreme Court terms pendency of criminal appeal for six years before the High as a 'regrettable feature' and 'harassment and abuse of judicial process'.⁴⁵

To ensure speedy trial, the top Court of the country warns the court not to adjourn the court proceeding lavishly for sadistic pleasure by not examining the witnesses present before the court in a given day.⁴⁶ The Supreme Court finds this attitude of the presiding court as a primitive one which must be reformed to expedite the fair and speedy trial. This can no better be picked in the language of the Court as below:

It is a sad plight in the trial courts that witnesses ... stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day ... No sadistic pleasure in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers.⁴⁷

2.4. Protection against Self-incrimination

The general criminal procedural law principle envisions confessional statement to flow voluntarily and spontaneously from the knowledge of the accused making the confession. In the simplest, self-incrimination⁴⁸ implies to be a witness against oneself. However, controversy arises as to the scope of the term 'to be a witness' against himself and the meaning of the expression, 'testimonial compulsion'. Under article 35(4) of the *Constitution of Bangladesh*, a person is protected from being a witness against himself. At the same time, he is also shielded from compulsion of any kind. Similar safeguard is provided in India.⁴⁹ In the absence of any compulsion, the statement made by an accused shall not be unlawful and will not be violative of article 35(4) of the Constitution.⁵⁰

⁴³ *Hussainara Khatoon v Home Secretary*, AIR 1979 SC 1360, p 1365.

⁴⁴ *Sheela Barse v Union of India*, 1986 SCALE (2)230, p 231.

⁴⁵ *S Guin v Grindlays Bank Ltd*, (1985) 3 SCR Suppl. 818, p 820.

⁴⁶ *State of Uttar Pradesh v Shambhu Nath Singh* (2001), Appeal (crl.) 392 of 2001, p 3<<https://main.sci.nic.in/jonew/judis/17780.pdf>>accessed on 17 August 2024.

⁴⁷ *ibid*.

⁴⁸ Self-incrimination also means acts or declarations by which a person explicitly or implicitly admits his connection with a crime driving interrogation by the investigating agency of by way of statement before a Magistrate either before trial or during trial. For details see Shakil Ahmad Khan, *Advanced Law Lexicon* (Fifth Edition, LexisNexis, Haryana, India, 2017) p 4719.

⁴⁹ Article 20(3) of the Constitution of India provides: No person accused of any offence shall be compelled to be a witness against himself.

⁵⁰ *Anti-Corruption Commission v Sheikh Hasina Wazed*, (2008) 60 DLR (AD) 172, para 41.

On the Indian side, its Constitution vividly guarantees that none can be 'compelled to be a witness against himself'.⁵¹ As the Supreme Court of India expounds, article 20(3) entails three components namely, (i) it includes a right pertaining to an 'accused person', (ii) it guarantees protection against the compulsion 'to be a witness' and (iii) it offers the protection against compulsion resulting in his giving evidence against himself.⁵² It is held that this right of protection against 'testimonial compulsion' is not limited to the oral evidence but also to documents or intelligible gestures made by a dumb witness.⁵³ However, in a later stage, Court disagrees with this observation concerning the scope of the term, 'to be a witness'.⁵⁴ In the judgment of *State of Bombay v Kathu Kalu*⁵⁵, a seven Judges Bench of the Supreme Court though agrees with the conclusion drawn in *MP Sharma v Satish Chandra*⁵⁶ but disagrees with the observation that 'to be a witness' may be equivalent to 'furnishing evidence'.⁵⁷ As the Court rules, information must be based on the personal volition of the witness and denounce mechanical process of any kind.⁵⁸

Therefore, in order 'to be a witness' means to impart knowledge on relevant fact through oral or written statement by a person who has personal knowledge of the fact under inquiry or investigation.⁵⁹ Further 'to be a witness' to a certain state of facts implies that the witness has understood it by his senses.⁶⁰

Every witness including the accused preserves a right to remain silent at the time of examination in or out of the Court. This right is constitutionally guaranteed. Application of force of any kind changes the character of the statement from voluntary to involuntary thereby converting it to one of testimonial compulsion. Justice Jagannadhadas in *MP Sharma v Satish Chandra*⁶¹, makes out the meaning of testimonial compulsion. To him, every positive volitional act furnishing evidence is a testimony and testimonial compulsion connotes coercion.⁶² Testimonial compulsion is

⁵¹ (n 49) article 20(3).

⁵² *MP Sharma v Satish Chandra*, 1954 SCR 1077, p 1086.

⁵³ *ibid*.

⁵⁴ *Ritesh Sinha v State of Uttar Pradesh* (2012), Criminal Appeal No. 2003 of 2012, date of judgment 07 December 2012, para 13; available at: <https://www.sci.gov.in/jonew/judis/39801.pdf>; accessed on 04.12.2018.

⁵⁵ *State of Bombay v Kathu Kalu*, (1962) 3 SCR 10.

⁵⁶ (n 52) 1954 SCR 1077.

⁵⁷ *ibid*, p 29.

⁵⁸ (n 55) pp 31-32.

⁵⁹ *ibid*, p 30.

⁶⁰ *ibid*.

⁶¹ *ibid*.

⁶² *ibid*, p 1088.

antagonistic to the concept of remaining silent on the part of a witness.⁶³ When evidence is deduced from a person putting him under compulsion, it becomes incriminatory in a number of ways, such as, it may be used to strengthen the case of the prosecution, it may be of derivative use, it may lead to transitional use and it may facilitate comparing materials that are already in possession of the investigating agency.⁶⁴

Now, there comes the question of involuntary administration of certain scientific techniques like the narcoanalysis technique, polygraph examination and the Brain Electrical Activation Profile (BEAP) test in order to adduce relevant data from a witness. The use of these techniques are applied to improve investigation efforts in criminal cases⁶⁵ as a means to procure evidences which can be furnished through the lips or by producing a thing or a document or in other ways.⁶⁶ Furthermore, pointing or nodding, a type of communicative gesture also conveys personal knowledge of a relevant fact may expose a person to 'criminal charges or penalties' or provide a link of evidence for the prosecution.⁶⁷

Though information adduced applying polygraph examination or BEAP test does not satisfy the requirements for being statement but it generate similar consequences are similar as the examiner of these tests gathers knowledge from the mind of the person undergoing the test which otherwise would not become available to the investigators.⁶⁸ These results are subsequently used by the prosecution against the person undergone the test and in the result deprives him of the right to remain silent.⁶⁹ The yielded by administering polygraph test or BEAP test is administered is not a positive volitional act and therefore is irrelevant.⁷⁰ So these results obtained through involuntary administration of such tests come within the scope of 'testimonial compulsion' and attract the protective shield of article 20(3).⁷¹

The judgement of the case of *Ritesh Sinha v State of Uttar Pradesh* (2012)⁷² declares that by giving voice sample one does not become a witness within the purview of the test as laid down in *State of Bombay v Kathu Kalu* (*Kathu Kalu case*)⁷³ and *Selvi v State of*

⁶³ *ibid.*

⁶⁴ *Selvi v State of Karnataka*, Criminal Appeal No. 1267 of 2004, date of judgment 05 May 2010; available at: <https://www.sci.gov.in/jonew/judis/36303.pdf>; accessed on 01.12.2018.

⁶⁵ *ibid.*, para 1.

⁶⁶ (n 52) p 1087.

⁶⁷ (n 64) para 158.

⁶⁸ *ibid.*, para 160.

⁶⁹ *ibid.*

⁷⁰ *ibid.*, para 161.

⁷¹ *ibid.*, para 165.

⁷² (n 54) para 3.

⁷³ (n 55).

Karnataka (Selvi 2010).⁷⁴ In tendering answer to these questions, the Supreme Court relies upon the test 'to be a witness' laid down by it in its earlier decisions in *Kathu Kalu case* and *Selvi (2010)*. In the result, the Court observes that voice sample being equated with finger print impression, signature or specimen handwriting of an accused, does not impart any personal knowledge by him relevant with the matter in controversy and hence does not within the protection clause of article 20(3) of the Constitution.

2.5. Protection from Torture, Cruel, Inhuman or Degrading Treatment or Punishment

Protection from torture, cruel, inhuman and degrading punishment or treatment is an important facet of the right in respect of trial and punishment. The *Constitution of Bangladesh* through its article 35(5) guarantees this right. Its Indian counterpart does not contain any such explicit protection.

Police brutalities are common phenomenon in India. Numerous incidents of torture are reported to have committed in police custody. Though the *Constitution of India* does not specifically mention the right to enjoy the protection cruel, inhuman and degrading treatment or punishment, the Supreme Court of India has put greater emphasis on this right by entertaining petitions demonstrating this right in different landmark cases. In its attempt to define it, the Court elucidates that torture is an instrument to impose the will of the 'strong' over the 'weak' by suffering.⁷⁵ Torture is synonymous with the darker side of human civilisation.⁷⁶ To make it more transparent, the Court approves the concept of torture expounded by Adriana P Bartow depicting:

Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralysing as sleep and dark as the abyss.⁷⁷

The Indian law does not permit the police to inflict torture upon the suspects at the time of investigation, trial or conviction.⁷⁸ Maltreatment by the police to the helpless detainees can be compared with a 'game-keeper becoming a poacher'.⁷⁹ Apart from

⁷⁴ *ibid.*

⁷⁵ *DK Basu v State of West Bengal*, (1997) 1 SCC 416, para 10.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *State of Andhra Pradesh v N Venugopal*, AIR 1964 SC 33.

⁷⁹ *Dagdu v State of Maharashtra*, 1977 AIR (SC) 1579.

physical threats or violence, psychological torture, atmospheric pressure, environmental coercion, tiring interrogation by police constitutes violation of law.⁸⁰

The Supreme Court expresses that it is 'deeply disturbed by the diabolical recurrence of police torture' which generated 'terrible scare' among the general populace thereby putting their life and liberty at peril.⁸¹ In view of the Supreme Court degrading treatment is 'offensive to human dignity' and a law that permits inflicting degrading treatment cannot win the 'test of reasonableness and non-arbitrariness'.⁸²

The case of *Khatri v State of Bihar*⁸³ is remembered for its making public the blistering torture, inflicted by the law enforcing agencies, still shocks the human conscience. Eye sight of some unfortunate under-trial prisoners was destroyed as the police pierced their eyeball and poured acid in them.⁸⁴

The judgment of case of *Sheela Barse v State of Maharashtra*⁸⁵ lays down guidelines regarding arrest in general, and arrest of women, in particular. In this regard, the Court issues some guidelines to select 'four or five police lock ups' in a 'reasonably good localities' to be escorted by female constables.⁸⁶ Besides, they should be interrogated in presence of female constables and informed of the ground of arrest immediately and the news of such arrest should be intimated to the nearest Legal Aid Committee which will take immediate step to render legal aid to the arrestee.⁸⁷ Directions of the Court further includes that there shall be surprise visit made by a City Sessions Judge in order to find out the conditions of the police lock ups and at the relatives of the arrested person shall be communicated with the fact of such arrest.⁸⁸ The same view is expressed in *State of Uttar Pradesh v Ram Sagar Yadav* case.⁸⁹ Here, the Court observes that police most often destroys the evidence of torture perpetrated in the 'sanctum sanctorum' of police station.⁹⁰ In such a situation, the Court argues for stern action to be taken against such erring police officer.⁹¹ Thus the Court laments:

⁸⁰ *Nandini Satpathy v PL Dani*, (1978) 3 SCR 608, p 644.

⁸¹ *Ragbir Singh v State of Haryana*, (1980) SCR 277.

⁸² *Francis Coralie Mullin v Administrator, UT of Delhi*, (1981) 2 SCR 516, p 529.

⁸³ *Khatri v State of Bihar*, 1981 AIR (SC) 928.

⁸⁴ *ibid.*

⁸⁵ *Sheela Barse v State of Maharashtra*, (1983) 2 SCR 337.

⁸⁶ *ibid.*, pp 345-347.

⁸⁷ *ibid.*

⁸⁸ *ibid.*, p 347.

⁸⁹ *State of Uttar Pradesh v Ram Sagar Yadav*, (1985) 2 SCR 621.

⁹⁰ *ibid.*

⁹¹ *Gauri Shankar Sharma v State of Uttar Pradesh*, (1990) 1 SCR 29, pp 30-31.

Death in police custody must be seriously viewed ... It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.⁹²

Inflicting injuries is a common phenomenon while interrogating a suspect. The Supreme Court negates the view of inflicting injuries at the time of interrogation.⁹³ Regarding unacceptability of maltreatment, the Court warns that to torture a person and use of third degree method are medieval and barbaric in nature.⁹⁴ Equally custodial violence as well as torture and custodial death shake the foundation of the rule of law.⁹⁵ It is to be mentioned that the police enjoy ample opportunity to manipulate any atrocity taken place against a detainee in their custody. It is possible because there remains no direct ocular witness excepting the victim and the offender. The judgment of *Munshi Singh Gautam v State of Madhay Pradesh*⁹⁶ picks up the malady of brutalities in police custody in the following words:

Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel ... Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity.⁹⁷

The Court observes that the police apply 'third degree methods' and detain people just to 'ease the pressure'.⁹⁸ Therefore, the Supreme Court puts emphasis on conducting a thorough scientific investigation' by prompt and efficient prosecution following the course of law.⁹⁹ Through the case of *Prithipal Singh v State of Punjab*¹⁰⁰ the Supreme Court of India stands against police brutalities. The apex Court disapproves torture of any kind as it militates against the safety of the people.¹⁰¹ On the same argument, torture of any kind is negated by article 20 and 21 of the Constitution.¹⁰² The term 'harassment' includes 'torment and vexation' and for that the right to life cannot be put in 'abeyance' by arrest.¹⁰³

⁹² *ibid*, pp 30-31.

⁹³ *Bhagwan Singh v State Of Punjab*, (1992) 3 SCR 180.

⁹⁴ *ibid*, p 188.

⁹⁵ (n 75) and *People's Union for Civil Liberties v Union of India*, 2005 AIR (SC) 2419

⁹⁶ *Munshi Singh Gautam v State of Madhay Pradesh*, 2005 AIR (SC) 402.

⁹⁷ *ibid*.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

¹⁰⁰ *Prithipal Singh v State of Punjab*, (2012) 1 SCC 10.

¹⁰¹ *ibid*.

¹⁰² *Mahmud Nayyar Azam v State of Chattisgarh* (2012) Civil Appeal No. 5703 of 2012, para 22<
<https://www.sci.gov.in/jonew/judis/39447.pdf>> accessed on 05 January 2019.

¹⁰³ *ibid*, para 22.

The *Ram Lila Maidan Incident v Home Secy, Union of India case*¹⁰⁴ imposes some duties upon the State to protect the arrested persons from torture or cruel treatment at the hands of the law enforcers. These include guarantee of 'security to all' by protecting 'human dignity'.¹⁰⁵ Therefore, an act which impeaches upon human dignity amounts to deprivation must satisfy the test other fundamental rights.¹⁰⁶ Thus non-interference by the court in cases in which police perpetrates unjustified torture upon the persons in custody tantamounts to give 'long rope' to the police.¹⁰⁷ In view of the Supreme Court stress, disorder and anxiety destroy the brightness as well as strength of will power of an individual in police custody.¹⁰⁸ The Supreme Court further observes that when torment adds with stress, disorder and anxiety, it disturbs the mental stability of the detainee and the slow poison gets activated¹⁰⁹ which takes away the very essence of life as envisioned in article 21 of the Constitution.¹¹⁰

Therefore, it appears that the Supreme Court of India is vocal in reprimanding the mal-treatments perpetrated by the law enforcers and at the same time, is innovative in formulating guidelines directing the authorities towards minimizing the brutalities. Moreover, the Court also directs the concerned to bring to book the offenders who inflict torture upon the helpless detainees.

2.6. Protection against Greater Penalty or Different Punishment

In Bangladesh none can be put suffer greater penalty than or different from the one which could have imposed upon under the law in force while committing the offence.¹¹¹ The principle of natural justice demands that a convict is liable to suffer only that punishment which the relevant penal law prescribes specifically. There shall not be any departure from this stipulation. Similar protection is attached to every individual in India.¹¹²

The case of *Wealth Tax Commissioner, Amrtisar v Suresh Seth*¹¹³, deals with the second part of article 20(1) of the Constitution. This case arises out of legal complexities regarding assessment of income tax return for the years 1964-65 and 1965-66. Justice

¹⁰⁴ *Ram Lila Maidan Incident v Home Secy, Union of India*, (2012) 5 SCC 1.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *S Nambi Narayanan v Siby Mathews*, (2015) 14 SCC 664, para 5.

¹⁰⁸ (n 103) para 46.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ (n 1) article 35(1).

¹¹² (n 49) article 20(1).

¹¹³ *Wealth Tax Commissioner, Amrtisar v Suresh Seth*, (1981) 3 SCR 419.

Venkataramiah observes that enhancement of punishment by subsequent legislation is violative of article 20(1) of the Constitution.¹¹⁴ Finally, the Supreme Court holds that the amendment introduced in *Wealth-tax Act 1957* in 1964 and 1969 carries no retrospective operation in computing penalty.¹¹⁵

3. Conclusion

From the foregoing discussion it is revealed that the higher judiciary in Bangladesh and India has played pivotal role in the expansion of the right in respect of trial and punishment. By way of analysis, it found that in Constitution of both the countries incorporates a catalogue of rights as fundamental rights. At the same time, the Constitutions of both countries equip their higher judiciary with the jurisdiction to enforce them. In parallel, it is also found that the Constitution of both countries empowers their higher courts to interpret the provisions of their respective Constitution including other laws. In the exercise of this power, the higher courts of Bangladesh and India have expanded the width and breadth of the fundamental rights in their respective jurisdictions. As it is seen, the Constitution of Bangladesh and that of India conspicuously accommodate, in letter and spirit, the right to protection from retrospective operation of law, double jeopardy and self-incrimination. However, their scope and ambit have been elaborated at the behest of their higher judiciary. It is thus found that application of BEAP test is prohibited in India to elicit information from a witness. An important discordance recorded in the study is that unlike the Constitution of Bangladesh, the Constitution of India about the protection cruel, inhuman and degrading treatment or punishment. But the Supreme Court of India has put greater emphasis on this right by entertaining petitions demonstrating this right in a fair landmark cases. The Indian top Court compares torture by a human being over his counterpart as an instrument to impose the will of the 'strong' over the 'weak' by suffering and terms it as the darker side of human civilisation. Therefore protection from torture, cruel and inhuman or degrading treatment or punishment has now become an integral part to access to justice in India. In concluding it can be said that the Indian higher judiciary is more progressive in ensuring the rights regarding trial and punishment compared to its Bangladeshi counterpart.

¹¹⁴ *ibid*, pp 429-430.

¹¹⁵ *ibid*, p 434.

Protection of the “Best Interest Principle” for the Unaccompanied Migrant Children (UMC) under the Hostile Environment Policy in the UK

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Abstract: The unaccompanied children are separated from their parents and relatives at the time of applying for asylum in the UK and the immigration authority recognized them as unaccompanied migrant children (UMC). They are the most vulnerable part of the British society who are unable to raise their voices against the deprivations and sufferings. The UK government has enacted a great deal of laws to ensure the best interest of the children in compliance with the United Nations Convention on the Rights of the Child (UNCRC). On the other hand, the hostile environment policy has been reflected in many enactments which actually undermine the rights and protection of the UMC in the UK. Due to the effects of the hostile environment policy, the UMC are leading a precarious life and consequently in every phase of asylum and immigration proceedings they are subjected to different forms of assessments. This article portrays the rights and interests of the UMC who have granted the discretionary unaccompanied asylum-seeking children (UASC) leave to stay in the UK and lived an uncertain life in the dilemma of immigration restrictions and welfare limitations. The recommendations have been given to enforce the best interest principle in compliance with the UNCRC and to protect the rights of the UMC.

1. Introduction

The unaccompanied migrant children (UMC) arrive in the UK to get a better life. There are many causes³ which forced the UMC to undertake the risky and traumatic journey of migration. The best interest principle as described in article 3 of the United Nations Convention on the Rights of the Child (UNCRC) has been incorporated in the Children Act, 1989 as well as in the Border, Citizenship and Immigration Act, 2009. But, in practice in many instances, the Home Office has subordinated this best interest principle. To rectify this subordination, the Supreme Court of UK has intervened and upheld the best interest principle of the children.

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³ The reasons include well-founded fear of persecution, compulsory military conscription, armed conflict, natural disaster, no access to educational facilities and high rate of unemployment. According to UNHCR, among 71% survivors of Female Genital Mutilation are applying for asylum in EU. Deprivation of liberty i.e. false imprisonment, compulsory conscription, trafficking and violence against girls such as non-consensual marriage, lack of access to contraception or safe abortion force them to flee from their home countries. In addition, environmental impacts such as natural disasters and climate change made the children unable to live in their homelands.

The court clearly declared that it is unlawful to take a decision without considering the best interest principle in the immigration proceedings when issues of children are involved. Now, the best interest principle becomes a gateway right to challenge the hostile environment policy by the unaccompanied migrant children in the UK. The restrictive or punitive framework of law for the UMC can be seen in the controlled immigration proceedings and the hostile environment policy. The Immigration Act, 2014 and its subsequent amendment in 2016 provides restrictive measures for the unaccompanied migrant children having UASC leave. By these legislations the UASC have been portrayed as 'underserving' and a 'thick border' has been created. Moreover, 'structural violence' initiated by which the UMC are directly and indirectly deprived from the welfare benefits and social services. The detention of the UMC is another glaring example of the hostile environment policy. Because of immigration detention, the UMC's physical and mental health have been seriously affected. When an UMC is put in the immigration detention, it violates the mandate of section 55 of the Border, Citizenship and Immigration Act, 2009. Though granting UASC leave to the UMC is not directly related to the hostile environment policy but it also made the life of the unaccompanied children precarious and uncertain.

2. The Unaccompanied Migrant Children (UMC)

Unaccompanied children are separated from their parents and relatives at the time of applying for asylum in the UK and the immigration authority recognized them as unaccompanied migrant children.⁴ From 2010 to 2020, the unaccompanied minor children have been representing 15.4% of the total number of asylum applicants. In 2021, the UK received 3762 applications from unaccompanied children. Until March 2020, there were 5000 UASC living in the UK.⁵ After asylum claim, when a child is granted refugee status then the best interests is served and local authority will undertake a pathway plan reflecting the prospect of living for long term in the UK. Where the unaccompanied child has not granted refugee status then they may nevertheless qualify on humanitarian protection ground. Similar actions will be taken by the local authority for the unaccompanied children granted humanitarian protection. The unaccompanied asylum-seeking children (UASC) discretionary leave will be granted where a child fails to meet the criteria of refugee status and

⁴ Home Office and Border and Immigration Agency, *Better Outcomes: The way forward improving the case of unaccompanied asylum seeking children* (2008) <<https://dera.ioe.ac.uk/228/4416-8866.pdf>> accessed 20 August 2024

⁵ Refugee Council, *Quarterly Asylum Statistics* (2021) <https://media.refugeecouncil.org.uk/wp-content/uploads/2021/12/24150621/Asylum-Statistics-Nov-2021.pdf> accessed 20 August 2024

humanitarian protection ground. If an unaccompanied child fails to fit into any of the above categories, then he/she will be refused outright.

3. The Best Interest Principle

Article 3 of the UNCRC provides the best interest principle for the children. The UNCRC is a universally ratified convention, but the USA has not ratified it. The provisions of the UNCRC are equally applicable to all children without any adverse distinction on the basis of race, colour, language, religion, social status, political ideology or any other similar criteria. The Committee on the Rights of the Child has identified the four basic principles of the UNCRC for the implementation at national levels such as the best interest principle as enshrined in article 3(1), non-discrimination as described in article 2, right to life, survival and development as delineated in art. 6 and the right to express freely as narrated in article 12. The mandate of article 3 is that State party will treat the best interest principle as a primary consideration for all children. So, it becomes the responsibility of the UK to identify the best interest principle as a primary consideration.⁶ The best interest principle has not been defined in the UNCRC but it includes the protection of wellbeing of the children, the views of the children must be considered, safe environment to be ensured and the right to remain in the family must be respected.⁷ It has been recognized by the apex court of UK that the best interest principle is the binding international obligation.⁸ Moreover, the best interest principle is the combination of procedural and substantive rights.⁹ On 18 November 2008, the UK withdrawn its reservation to the applicability of the UNCRC in the asylum and immigration matters and the best interest principle was incorporated in section 55 of the Border, Citizenship and Immigration Act, 2009. Subsequently, the Supreme Court of UK has declared that if the immigration authority takes any decision without considering the best interest principle, then such decision will be unlawful.¹⁰ In addition, the Department for Education has identified the best interest principle as a holistic concept which includes the psychological, spiritual, physical, ethical and

⁶ Jane Fortin, ‘Are Children’s Best Interests Really Best’ – *ZH (Tanzania) (FC) v Secretary of State for the Home Department* (2011) 74 Mod L Rev 947

⁷ UNHCR, *Guidelines on Determining the Best Interests of the Child*, <<http://www.refworld.org/docid/4848c342.html>> accessed 20 April, 2024, 14

⁸ Judith Ferby, ‘A Legal Analysis of Child-sensitive Asylum Procedures’ (2014) *Journal of Immigration, Asylum and Nationality Law* 28 IANL 255

⁹ UN Committee on the Rights of the Child General Comment No 4, *On the right of the child to have his or her best interests taken as a primary consideration* (art. 3 para. 1)(2013) para 74 CRC/C/GC/14.

¹⁰ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 23

social development.¹¹ So, under the umbrella of the best interest principle, the UMC separated from their family are eligible to receive special support and assistance.

For many reasons unaccompanied children arrive in the UK¹² among them trafficking, fear of persecution and economic reasons are prevalent.¹³ After the appearance of the UMC in front of the immigration officer, it becomes the responsibility of such officer to comply with the requirements of section 55 of the Border, Citizenship and Immigration Act, 2009 that means to protect and promote the wellbeing of the UMC.¹⁴ To get the protection under the existing legal regime, the UMC have to fulfill the criteria of either refugee status or humanitarian protection ground¹⁵, otherwise he/she will be granted the UASC leave.¹⁶ The immigration officer will conduct the initial assessment procedure, then the UMC will be sent to the local authority by virtue of section 20 the Children Act, 1989.¹⁷ But the UMC have identified the immigration threshold as unclear, distressing and demeaning.¹⁸ It

¹¹ Department for Education, *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery: Statutory Guidance for Local Authorities* (2017) <http://consult.education.gov.uk/chidren-in-care/care-of-unaccompanied-and-trafficked-children/supporting_documents/Revised%20UASC%20stat%20guidance_final.pdf> accessed 20 April, 2024

¹² Helen Connolly, 'For a while out of Orbit: Listening to what unaccompanied asylum-seeking/refugee children in the UK say about their rights and experiences in private foster care' (2014) *Adoption and Fostering*, vol. 38(4), 334

¹³ Katia Bianchini, 'Unaccompanied asylum-seeker children: Flawed process and protection gaps in the UK', (2012) <<http://www.fmreview.org/youan-and-out-of-place/>> accessed 21 April, 2024

¹⁴ Anna Gupta, 'Caring for and about unaccompanied migrant youth' in Sue Clayton, Anna Gupta and Katie Willis (eds), *Unaccompanied Young Migrants* (Bristol University Press, Policy Press, 2019) 79

¹⁵ Francesca Meloni and Rachel Humphris, 'Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom', 2019 *Journal of Refugee Studies*, 34

¹⁶ According to Home Office, an UASC is a person under 18 years old or in the absence of documentary evidence establishing age, appears to be under 18, with no relative or guardian in the UK, who is applying for asylum in his or her own right as cited by P. Rigby, M. Fotopoulou, A. Rogers, A. Manta and M. Dikaiou, 'Problematising separated children: a policy analysis of the UK safeguarding Strategy: Unaccompanied asylum Seeking and refugee children' (2019) *Journal of Ethnic and Migration Studies* 2

¹⁷ Jo Wilding, 'Unaccompanied Children Seeking Asylum in the UK: From Centre of Concentration to a Better Holding Environment' (2017) *International Journal of Refugee Law*, vol 29, no 2 271

¹⁸ Children's Commissioner for England, *Children's Voices: A Review of Evidence on the Subjective Wellbeing of Children subject to Immigration Control*, (Office of the Children's Commissioner 2017) <www.childrencommissioner.gov.uk/up-content/uploads/2017/11/Voices-Immigration-Control-1.pdf> accessed 20 April, 2024

happens because of non-implementing the best interest principle in the true sense in every phases of the immigration proceedings.¹⁹

3.1 Subordination to Best Interest Principle by the Home Office

The best interest principle has been manifested both in the children law²⁰ and in the asylum law²¹ in the UK. It is the State responsibility to consider the best interest principle to be reflected in the asylum and immigration law, guidance, policy, assessment process and in the implementation stage.²² So, if any decision has been taken without protecting and promoting the wellbeing of the children in asylum and immigration matters, then such decision will be unlawful.²³ To ensure the best interest and to safeguard the wellbeing of the children in asylum and immigration proceedings, the UK government has prepared and published statutory guidance. But there are number of instances which portray that the best interest of the UMC has been subordinated by the Home Office, *first*, after ratification of the UNCRC, the process of assessing the initial asylum claim of the UMC has not been changed, *second*, the UMC on arrival in the UK has to apply for asylum and recent statistics show that the rate of granting adult asylum seeker's claims is higher than the rate of granting the UMC's asylum claims, *third*, the Home Office has exercised the discretion on wide variables at the time of deciding the asylum claims of the unaccompanied migrant children, *fourth*, the failure of the Home Office to implement 'Dubs Agreement' which confers the responsibility²⁴ on the Secretary of State of the Home Office to support and relocate the UMC from other countries in Europe.

3.2 Judicial Intervention to Uphold the Best Interest Principle

For not protecting the best interest of the UMC by the Home Office, the apex courts in the UK have intervened to hear the grievances and provided the appropriate remedy upholding the rights and interest of the UMC. ²⁵ There is a series of cases²⁶ by which

¹⁹ Lisa Shamseldin, 'Implementation of the United Nations Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum Seeking Children: Findings from Empirical Research in England, Ireland and Sweden' (2012) 20 Int'l J Child Rts 90, 94

²⁰ Children Act 1989 and 2004

²¹ Borders, Citizenship and Immigration Act 2009, s 55.

²² Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 of the Committee on the Rights of the Child: *On the General Principles regarding the human rights of children in the context of international migration*, (16 November 2017) para 29

²³ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 23

²⁴ Immigration Act 2016, s 67.

²⁵ Ruth Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) Human Rights Law Review 772

the UK jurisprudence on the best interest principle relating to the UMC have been developed. The UK courts have developed a jurisprudence that the best interest of the children is the primary consideration and failure to consider such principle will make the decision unlawful. So, the best interest principle is the gateway right by which the UMC in the UK are challenging the hostile environment policy and protecting their rights.²⁷ The Court must consider the best interest principle first to promote and safeguard the welfare of the children.²⁸ In addition, the best interest principle has been adopted by the European Court of Human Rights (ECtHR) to interpret Article 8 of the European Convention on Human Rights (ECHR).²⁹ The Secretary of State has to dispose of his functions under section 55 BCIA, 2009 after careful consideration of the best interest principle.³⁰ The duties conferred under section 55 of the BCIA, 2009 must be embodied in the rule making process under the immigration and asylum law.³¹ At the time of deciding the asylum claims, best interest principle must be considered separately without referring the immigration history of the parents.³² To ensure error free proportionality balancing assessment, best interest principle must be considered at the first instance.³³ For non-complying with the duties conferred by section 55 BCIA, 2009 by the UKBA, a series of removal orders have been rejected by the court.³⁴ There is a clear message from the Supreme Court to the UKBA that if there is a presence of the child in the asylum and immigration proceedings then, such presence will make a significant difference in the assessing process. The best interest of children cannot be devalued by something for which the child is not responsible.³⁵ If circumstances require, the child must be represented separately from his/her parents in asylum claims.³⁶ In immigration proceedings, failure to consider the best interest of child has

²⁶ *ZH (Tanzania) v Secretary of State for the Home Department (SSHD)* [2011] UKSC 4 23; 2 AC 166, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, *JO and Others (Section 55 duty) v Nigeria* [2014] UKUT 517 (LAC), *MM (Lebanon) and Others v Secretary of State for the Home Department* [2017] UKSC 10, *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, *Kaur v Secretary of State for the Home Department* [2017] UKUT 14

²⁷ Kekelly, "The best Interests of the Child: A Gateway to Children's Rights?" in Sutherland and Barnes MacFarlane (eds), *Implementing Article 3 of the United National Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, 2016 62

²⁸ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 23

²⁹ *Zoumbas v Secretary of State for Home Department* [2013] UKSC 74

³⁰ *JO and others (section 55 duty) v Nigeria* [2014] UKUT 517 (IAC)

³¹ *MM (Lebanon and others v Secretary of State for Home Department* [2017] UKSC 10

³² *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874

³³ *Kaur v Secretary of State for the Home Department* [2017] UKUT 14

³⁴ Jane Fortin, 'Are Children's Best Interests Really Best, *ZH (Tanzania) (FC) v Secretary of State for the Home Department* (2011) 74 Mod L Rev 947

³⁵ *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 3 WLR 90

³⁶ Ayesha Christie, *The Best Interests of the Child in UK Immigration Law*, 2013, 22 Nottingham LJ 16

been recognized as serious error of law and justifies a ground of appeal.³⁷ The decision maker can ensure the best interest principle after collecting sufficient information about the children.³⁸ So, the best interest of the children must be considered procedurally and substantially as a primary consideration by a decision maker before taking a decision.

4. Hostile Environment Policy and the UMC

The hostile immigration measure was first introduced during Thatcher’s regime in 1980s.³⁹ Subsequently in May 2012, in an interview with the Telegraph, Theresa May, the then Home Secretary expressed her plan to create ‘a really hostile environment’ for illegal migrants to Britain.⁴⁰ This hostile environment policy came into effect by the enactments of the Immigration Acts, 2014 and 2016 which provide restrictive measures to control and eradicate illegal immigrants limiting their access to housing, employment, health facility, bank accounts and more.⁴¹ The main aim of the policy was identified by the House of Commons Home Affairs Committee is “to deter people without permission from entering the UK and to encourage those already here to leave voluntarily.”⁴² So the ultimate goals of the hostile environment policy are two folds: to reduce net migration and to punish irregular migrants by “marginalising, isolating and further criminalizing”.⁴³

Though the policies were initiated to deter illegal immigration, but it had adverse impact on the individual who have right to live in the UK, eg. the ‘Windrush generation’⁴⁴ who have a legal right to stay in the UK under the Immigration Act, 1971.⁴⁵ As a result, this policy has been criticized by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related

³⁷ *SS (Sri Lanka) v SSHD* [2012] EWCA Civ 945

³⁸ *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin) 13

³⁹ Sheona York, ‘The “Hostile Environment” – How Home Office Immigration Policies and Practices Create and Perpetuate Illegality’ (2018) 32 IANL 363, 365

⁴⁰ <<http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment>> accessed 20 August, 2024

⁴¹ Russell Taylor, *Impact of ‘Hostile Environment’ Policy Debate*, (House of Lords Library 2018) 1

⁴² House of Commons Home Affairs Committee, *Immigration Policy: Basis for Building Consensus* (15 January 2018) (HC 500 of Session 2017-19) p 20

⁴³ Yeo, ‘Briefing: What is the hostile environment, where does it come from, who does it affect?’ (Free Movement Blog, 1 May 2018) <<https://www.freemovement.org.uk/briefing-what-is-the-hostile-environment-where-does-it-come-from-who-does-it-affect/>> accessed 21 August 2024

⁴⁴ The ‘Windrush generations’ named after the arrival of the SS Empire Windrush at Teilburg Docks on 22 June 1948, ‘Windrush Generation: Who Are They and Why Are They Facing Problems?’ *BBC News* (London, 18 April 2018)

⁴⁵ Russell Taylor, *Impact of ‘Hostile Environment’ Policy Debate*, (House of Lords Library 2018) 1

Intolerance, Professor Tendayi Achiume, as violative to the International Human Rights Law.

This hostile environment policy has attracted huge criticism from different stakeholders, consequently the policy has been rephrased by 'compliant environment' in 2017 by the Home Secretary Sajid Javed.⁴⁶ The hostile environment policy is not expressly aimed to the UMC but it has the possibility to impact indirectly or directly⁴⁷ the rights of the UASC. Until 2008, the UASC were not entitled to get the protection under the UNCRC in UK because of UK's reservation. After the withdrawal of reservation, s. 55 of the BCIA, 2009 was incorporated to guarantee the best interest of the children in the asylum and immigration process.

There are three main ways by which the UK government prevents the arrival of the refugee as identified by J.R. Campbell, *first*, externalizing the refugee flow, *second*, funding the 'push back' to control the entrance of refugee and *third*, shutting down the legal process for applying refugee status.⁴⁸ This migration policy has been recognized by Agier as 'thick border' featured with restrictive methods and practices such as arrest, detention, eviction, deportation, etc.⁴⁹ In addition, the UASC are also becoming the victims of the 'structural violence' because of immigration departments are imposing restriction on carriers, collaborating with other countries and using new technology to divert them from borders and refuse to provide humanitarian assistance.⁵⁰ The instances of structural violence are also evident when the immigration rule requires the relocation of the UASC from the other countries of Europe and they are keeping in the refugee camps in the UK. This happens because of the failure of the Home Office to implement the 'Dubs Agreement' which has been incorporated in section 67 of the Immigration Act, 2016.⁵¹ After the Brexit, the UK government has withdrawn from the Dublin III regulation which actually debar the UASC from European countries to apply for asylum process and to be reunited with

⁴⁶ Alan Travis, 'Post-Brexit Immigration White Paper Delayed Until Late Autumn' *The Guardian* (London, 20 October 2017)

⁴⁷ Ruth Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) *Human Rights Law Review* 772

⁴⁸ John R. Campbell, 'Why the "Best Interests" of Unaccompanied Asylum Seeking Children are Left at the Border: Structural Violence and British Asylum Practices, (2020) *Journal of Border Studies*, vol. 37, No. 3, 3

⁴⁹ Agier Michel, *Borderlands*, (Cambridge Polity Press 2016)

⁵⁰ Menjivar Cecilia & Krista M. Perreira, 'Undocumented and Unaccompanied Children of Migration in the European Union and the United States' (2019) *Journal of Ethic and Migration Studies* No 2, 45, 197

⁵¹ John R. Campbell (n 52) 11

their family in the UK. To deal with this issue, ‘a new plan for immigration’⁵² has been adopted by the government which is no more in operation, resultantly, the USAC are becoming the victims of this ‘cruel and inhuman’ actions.⁵³

Moreover, a child rights impact assessment on law, guidance, policy and funding must be conducted by the State to identify their impacts on the child or the group of children.⁵⁴ But unfortunately in UK there is no such impact assessment of the hostile environment policy. As a result, the UASC are challenging the decisions of the Home Office before the higher courts of the UK and upholding their rights guaranteed by the UNCRC. The immigration law in UK has been described by the Supreme Court as an “impenetrable jungle of intertwined statutory provisions and judicial decisions”. Sometimes, it happens that the trial courts are overlooking the rights of the children under section 17 of the CA, 1989 which have been rectified by the Appeal Courts.⁵⁵ Thus, the decisions of the apex courts give the ray of hope to the vulnerable groups of children.⁵⁶ So, the hostile environment policy has detrimental impact on the interests and rights of the UASC.

The hostile environment policy has been intensified by the initiation of the Immigration Act, 2014 and its subsequent amendment in 2016. These laws empowered the Home Office to examine the status and credibility of the immigrants in a wider context and also created the new categories of ‘bordering agents’ across the society to make the life of illegal immigrants difficult e.g. checking the immigration status by the private landlords, prohibiting to open the bank accounts, cancelling driving licence depending on immigration status, etc. So, the hostile environment policy is not confined in the border rather it is moving inside the border and targeting to diverse groups of migrants.⁵⁷ Specially, the best interests of the UASC have been subordinated by this policy and the austerity also shrinking the welfare approach and limiting their entitlement to social support.

⁵² Secretary of the State for the Home Department, *New Plan for Immigration – Policy Statement*, 2021

⁵³ Helen Stalford, ‘Why the UK’s New Plan for Immigration Misrepresents the facts and could be in breach of the law’ (2021) as cited by Sanches- Clemente N, Eisen S., Harkensee C. et al, , ‘Beyond Arrival: Safeguarding Unaccompanied Asylum Seeking Children in the UK’, Arch Dis Child (2022) 0:1

⁵⁴ Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (2013) paras 45 – 47, Committee on the Rights of the Child, General Comment No. 14, *The Right of the Child to have his or her best interests taken as a primary consideration*, (29 May 2013) para 35

⁵⁵ *M v Islington and SSHD* [2004] EWCA Civ 235 as cited by Sheona York, ‘The Law of Common Humanity: Revisiting Limbuela in the ‘Hostile Environment’ (2017) 31 IANL 318

⁵⁶ *Patel and Others (appellants) vs SSHD* [2013] UKSC 72

⁵⁷ Irene Gedalof, ‘In the Wake of the hostile environment: migration, reproduction and the Windrush Scandal’, (2022) *Feminist Theory*, 6

So, the hostile environment policy in the UK has victimised the UMC in many ways. There are a number of immigration and asylum laws⁵⁸ which restricted the services and benefits to the UASC and identified them as undeserving.⁵⁹ The main aim of the policy is to deter the illegal immigrants and those who have no right to stay in the UK but ultimately this policy is affecting the interests and rights of the UMC.⁶⁰ Consequently, this policy has violated the international standards and obligations created by the UNCRC.⁶¹ The hostile environment policy has been reflected in the following restrictive measures of the UK's local and immigration authorities.

4.1 Restrictions on the Welfare Benefits and Social Services

The main aim of the hostile environment policy is to deter the illegal immigrants by limiting their migrant rights and denying welfare benefits and social services.⁶² The UASC are not outside the ambit of this hostile environment policy. Under this policy, the airlines and ferry companies must conduct pre-departure checks and examine the visa status of the passengers before allowing them in the carriers and failure to comply with this provision will lead them to face penalty.⁶³ This provision was challenged by a carrier on the ground that it restricts the freedom of movement but was not successful.⁶⁴ Moreover, it becomes the responsibility of the employers to check the immigration status of the employees and their right to work in the UK, otherwise fine or imprisonment or a civil penalty will be imposed.⁶⁵ In *Baker v Abellio London Ltd*⁶⁶ the claimant was dismissed from his job as he failed to produce his immigration papers. Subsequently, it was held by the Employment Appeal Tribunal that employer is not under the legal duty to conduct checks and it was not fair to terminate an employee on this ground. But, the real scenario is that if the employer

⁵⁸ The Asylum and Immigration Act 1996, The Asylum and Immigration Appeals Act 1993 and Immigration and Asylum Act 1999

⁵⁹ Simon Guentner, Sue Lukes, Richard Stanton, Bastian A Vollmer and Jo Wilding, 'Bordering Practices in the UK Welfare System' (2016) 36 Critical Soc Pol'y 391

⁶⁰ The phrase 'hostile environment' was first used by Theresa May (in her capacity as Home Secretary) in an interview in 2012 with the Daily Telegraph newspaper.

⁶¹ Ruth Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) Human Rights Law Review 772

⁶² Amy Jane Stevens, How Can We Meet the Health Needs of Child Refugees, Asylum Seekers and Unaccompanied Migrants? (2020) Arch Dis Child 192

⁶³ The Immigration (Carriers Liability) Act 1987, The Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002 sch 8, and Carrier's Liability Regulations 2002

⁶⁴ *R v Secretary of State for the Home Department ex parte Hoverspeed* [1999] INLR 591

⁶⁵ Asylum and Immigration Act 1996 s 8, Asylum and Immigration Act 1996 s 8(1), 8(4). Section 8 has been amended by both Section 21 of the Immigration, Asylum and Nationality Act 2006 and Section 35 Immigration Act 2016, Immigration, Asylum and Nationality Act 2006 s 15

⁶⁶ [2017] UKEAT U250-16-0510

fails to check the documents of their employees and subsequently, it has been discovered by the law enforcing agencies, then, they have to face the imposition of fine.

Under the Immigration Act 2014, the private landlords have also the duty to check the immigration status of the future tenants and non-compliance will incur fine. This scheme has been further toughened by the Immigration Act, 2016. By redefining the term ‘homelessness’, the right to get social housing benefits by the asylum seekers has been controlled and restricted.⁶⁷ The similar provision has also been incorporated in the Localism Act, 2011 by which migrants are treated as undeserving. It has been prohibited to open a bank account, if the person does not have valid document to live in the UK.⁶⁸ The marriage referral assessment unit has been formed under the Home Office to identify and report the sham marriages. In addition, the requirement for marriage registrar has also been introduced by the Immigration Act, 2014. The Driver and Vehicle Licensing Agency will have the authority to cancel the driving license if the licensee does not have legal right live in the UK. This provision has been further tightened by the Immigration Act, 2016 which empowers the authority to conduct search and detain a person without having legal papers to stay in the UK.⁶⁹ If a person does not have valid paper to live in the UK, he will be charged for inpatient hospital care and some other services⁷⁰ excluding emergency and accident services. In cases, where the treatment of the patient is not urgent assessed by the clinician, then full payment and 150% of NHS tariff to be paid in advance.⁷¹ In addition, NHS has to share the data of the patients⁷² and their immigration status, on the basis of such data, 5854 migrants were traced by the immigration officer in 2016⁷³ which actually frightened the other illegal migrants to take services from the NHS.

No Recourse to public fund (NRPF) was initially applicable to the students and spouses but from 2012 a new change has been initiated in the immigration rules which impose the NRPF condition also to the migrants who have limited leave to stay in the UK.⁷⁴ Due to hostile environment policy, the application fee for

⁶⁷ Asylum and Immigration Act 1993

⁶⁸ Immigration Act 2014 ss 40-42

⁶⁹ Immigration Act 2016 s 40

⁷⁰ National Health Service Act 2006 s 175

⁷¹ <Gov.UK.NHS entitlements: migrants-health-guide> accessed 20 August 2024

⁷² Health and Social Care Act 2012 s 261

⁷³ Doctors of the World, ‘Closing the gaps in healthcare access: the United Kingdom’ (2017) <<https://www.doctorsoftheworld.org.uk/Handlers/Download,ashx?>> accessed 20 August 2024

⁷⁴ Simon Guentner, Sue Lukes, Richard Stanton, Bastian A Vollmer and Jo Wilding, ‘Bordering Practices in the UK Welfare System (2016) 36 Critical Soc. Pol’y, 397

immigration has been increased. In *Williams, R (on the application of) v The Secretary of State for the Home Department*,⁷⁵ the court referred the para 9 of the Home office Impact Assessment for the Immigration and Nationality (Fees) Regulation 2014 about the increasing of fees which stated that this increased fee will enable the Home Office to operate the asylum and immigration proceedings in a timely manner, accurate and flawless decision making about the status of the immigrants, restricting and removing the illegal immigrants. The Immigration Act, 2014 part II reduced the rights of appeal from seventeen to four which actually confined the Tribunal to allow an appeal on the human rights ground and not on the grounds that the decision was not in compliance with the law or not in consistent with the immigration rules.⁷⁶ Because of huge criticism of the government's different laws and policies relating to hostile environment, the Home Secretary Sajid Javid withdrawn the notices to shut down the bank accounts of alleged illegal migrants and also withdrawn the requirement for NHS staff to collect and supply the data on patients to the Home Office.⁷⁷ All these measures of the hostile environment policy have direct and indirect impact on the wellbeing of the UMC.

4.2 The UMC in the Immigration Detention

In two situations, the immigration authority will have the right to detain people, *first*, they don't have the leave to enter and *second*, when they are waiting for deportation or removal.⁷⁸ In addition, on the national security grounds, a person can be detained by the government.⁷⁹ At the time of waiting to get the decision from home office, an asylum seeker may detain in the immigration detention.⁸⁰ In the asylum and immigration proceedings, detention has been used as sanctions.⁸¹ Although, it has been recommended by the Home Office guidance that a person should not be detained unless it really requires and detention can be justified only on the basis of last resort.⁸² But in practice the immigration authority has used

⁷⁵ [2015] EWHC 1268

⁷⁶ Sheona York, 'The Hostile Environment -How Home Office Immigration Policies and Practices Create and Perpetuate Illegality' (2018) 32 IANL vol 32 issue 4, 363

⁷⁷ Ibid, p 384

⁷⁸ Immigration Act 1971 sch 2 para 16

⁷⁹ ibid, Nationality, Immigration and Asylum Act 2002 s 62 introduced a free-standing power for the Secretary of State to authorize detention.

⁸⁰ Asylum and Immigration Appeals Act 1993

⁸¹ Ala Sirriyeh, 'Sanctuary or sanctions: children, social worth and social control in the UK asylum process', in Malcolm Harrison and Teela Sanders (eds), *Social Policies and Social Control* (Bristol University Press, Policy Press 2014) 81

⁸² Home Office, *Enforcement Instructions and Guidance*, para 55.1.3, <assets.publishing.service.gov.uk> accessed on 20 April 2024.

detention in a regular basis and detained people for a long period of time. The UMC have been placed in the detention on the presumption that they are the abusers of the immigration system and not genuine asylum seekers.⁸³ By virtue of section 55 of the Border, Citizenship and Immigration Act, 2009, the immigration authority will have the responsibility to protect and ensure the wellbeing of the children. So, under the new policy of the government, alternative to detention has been introduced in the name of ‘pre-departure accommodation’ for the UASC. In 2019, 98 children were entering in detention facilities and in 2020, 23 children were reported as entering in detention; the number is low in 2020 because of pandemic situations.⁸⁴

4.2.1 From Ultima Ratio to Outright Prohibition of Immigration Detention

In any form of detention, the main feature is restricting the free movement of persons and immigration detention is not an exception where children have been deprived of the freedom of movement because of their migration status. Whatever the name and location of the facilities and the reasons of such detention which restricts the liberty of the UMC will consider as immigration detention.⁸⁵ Article 37(b) of the UNCRC confirms that immigration detention of children is not prohibited completely but permitted exceptionally on the basis of ultima ratio (last resort) principle.

Where the children are detained, art. 5 of the ECHR, the right to liberty and security, must be interpreted in compliance with arts. 3 and 37(b) of the UNCRC, which state that the use of detention must be for a shortest possible time and such use of detention must be exercised on the basis of last resort principle.⁸⁶ If an immigration officer fails to consider the principles of the UNCRC, then the detention will be unlawful.⁸⁷ At the time of deciding the issue of detention of migrant children, the border agency must consider the child’s representation and the proportionality of

⁸³ Farhat Bokhari, ‘Separated Children in the UK Policy and Legislation’, in Emma Kelly and Farhat Bokhari (eds), *Safeguarding Children from Abroad: Refugee, Asylum Seeking and Trafficked Children in the UK* (Jessica Kingsley 2012) 156

⁸⁴ Leon Feinstein, Yousef Khalifa Aleghfeli, Charlotte Buckley, Rebecca Gilhooly and Ravi K.S. Kohli, ‘Conceptualising and Measuring levels of risk by immigration status for children in the UK’ (2021) *Contemporary Social Science*, 16:5 538

⁸⁵ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 of the Committee on the Rights of the Child: *On the General Principles regarding the human rights of children in the context of international migration*, (16 November 2017) para 29

⁸⁶ Ayesha Christie, ‘The Best Interests of the Child in UK Immigration Law’ (2013) 22 *Nottingham LJ* 17

⁸⁷ *ID & Others vs SSHD* [2005] EWCA Civ 38, [2006] 1 WLR 1003

the detention of the child migrant.⁸⁸ The Committee on the Migrant Workers (CMW) and the Committee on the Rights of the Child (CRC) confirmed that the best interest of the child will never be ensured if they are placed in detention and State parties should take effective measures to eliminate the detention of children for immigration purposes.⁸⁹ When the children are placed in immigration detention it violates the best interest principle and infringes the right to development.⁹⁰ The UNCRC makes it clear that detention of migrant children must not be a general rule rather it can be used on the basis of last resort principle.⁹¹ The United Nations (UN) human rights bodies such as UNHCR (United Nations High Commissioner for Refugees) and the United Nations Children's Fund (UNICEF) are adopting the ultima ratio principle that detention of migrant children can only be used as a last resort. Moreover, they recommend that initiatives must be taken by the States to end the detention of migrant children.⁹² The New York Declaration for Refugees and Migrants, 2016 which also endorsed the same view as the UNHCR and the UNICEF taken in this regard. The Declaration emphasizes to the end of the detention of migrant children and provides it can be used as a last resort.⁹³ Resultantly, in 2018 in an intergovernmental conference, the state parties expressed their commitment to end the detention of migrant children.⁹⁴ Even the other UN treaties i.e. the article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), article 16(4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and Art. 14 of the Convention on the Rights of Persons with Disabilities, article 17 of the International Convention for the Protection of All

⁸⁸ *R (MXL) & Ors v SSHD* [2010] EWHC 2397 (Admin)

⁸⁹ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee on the Rights of the Children, *State Obligations regarding the human rights of children in the context of international immigration in countries of origin, transit, destruction and return*, Committee on the Protection of the Rights of all Migrant Workers and Members of their Families & Committee on the Rights of the Child, (16 November 2017)

⁹⁰ Ciara M. Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 Human Rights Law Review 23

⁹¹ Committee on the Rights of the Child, *General Comment No. 6: The Treatment of Unaccompanied and Separate Children Outside their Country of Origin* (1 September 2005) para 61

⁹² UNHCR, *Guidelines on the applicable criterion and standards relating to the detention of asylum seekers and alternatives to detention*, (2012) at Guideline 9.2, para 51 and UNHCR & UNICEF, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, (2014) 26, UNHCR, *Position regarding the detention of refugee and migrant children in the migration context* (2017) 1

⁹³ UNGA Res 71/1, 19 September, 2016, A/RES/71/1

⁹⁴ Objective 13(h), Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Draft Outcome Document of the Conference, A/CONF.231/3, 10 and 11 December 2018.

Persons from Enforced Disappearance, have referred to the ultima ratio principle regarding the detention of migrant children. The ECtHR in *Rahini v Greece*,⁹⁵ adhered to the ultima ratio principle. Further, in a series of cases the ECtHR taken the view that detention of migrant children can only be allowed in exceptional circumstances and states must take necessary steps to ensure alternative to the detention for child migrants.⁹⁶

4.2.2 Legal Provisions regarding Immigration Detention

For the purpose of examining the UASC’s immigration status, enabling removal or deportation, they are detained in immigration removal centers under chapter 55 of the Home Office Enforcement and Instruction Guidance.⁹⁷ The Home office policy states that UASC can be detained in very exceptional circumstances and cannot be placed in the immigration removal centers in any circumstances.⁹⁸ However, in practice, UASC are sometimes detained in removal centers, in circumstances when their age is disputed, and the UKBA considers them as adults.⁹⁹ Special considerations must be given when it is proposed to detain UASC pending their hand over to a local authority or parents or relatives or to other appropriate adult carers or friends.¹⁰⁰ It is the responsibility of the Home Office’s staff to record the factors which influenced them to take the decisions of detention of the UMC involving UASC. It is further to ensure that detention must be for the shortest possible period of time. Moreover, they have to comply with the statutory guidance under section 55 of the Borders, Citizenship and Immigration Act, 2009 for safeguarding and promoting the welfare of children.¹⁰¹

⁹⁵ Application No 8687/08, Merits and Just Satisfaction, 5 April 2011

⁹⁶ *R.K. and Others v France*, Application No. 68264/14, Merits and Just Satisfaction, 12 July 2016, *R.M. and Others v France*, Application No. 33201/11, Merits and Just Satisfaction, 12 July 2016, *A.B. and others v France*, Application No. 11593/12, Merits and Just Satisfaction, 12 July 2016, *R.C. and V.C. v France*, Application No. 76491/14, Merits and Just Satisfaction, 12 July 2016, *A.M. and others v France*, Application No. 24587/12, Merits and Just Satisfaction, 12 July 2016

⁹⁷ Children’s commissioner, *Children’s Voice, A Review of Evidence on the Subjective Wellbeing of Children in detention in England* (November 2017) <www.cco-review-of-evidence-on-the-subjective-wellbeing-of-children-in-detention-in-england-2pdf> accessed 20 August 2022

⁹⁸ Ch. 55, Home Office Enforcement Instructions Guidance <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf> accessed 20 August 2022

⁹⁹ Migrant Children’s Project Fact Sheet, Age Disputes and Immigration Detention

¹⁰⁰ Ch. 55.1.1, Home office Enforcement Instruction Guidance <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf> accessed 20 August 2022

¹⁰¹ *ibid*

The guidance ensures the fair treatment of the UMC on the basis of the same standard like a British child and provides that the best interest must be the primary consideration, no adverse discrimination can be made, asylum application must be dealt with in a timely fashion.¹⁰² The UASC are spending significant periods of time in detention, indefinite and prolonged detention is amounting to unfair and unjust action.¹⁰³ Section 5 of the Immigration Act, 2014¹⁰⁴ banned the detention of UASC for more than 24 hours at a time. Where the physical presence of the USAC is required for the immigration and asylum purpose, they will be placed in the short-term holding facilities.¹⁰⁵ So, the UMC still can be detained on their arrival and on the accusation of criminal offences and at the time of waiting before removal.¹⁰⁶ The child migrants held in 'pre-departure accommodation centers' where they can hold up to seventy-two hours but in exceptional cases for seven days.¹⁰⁷ Section 62 of the Nationality, Immigration and Asylum Act, 2002 empowers the Secretary of State to detain a person whose decision is pending for entry into UK or removal from UK.¹⁰⁸ Schedule 1 para. 16 of the Immigration Act, 1971 provides when a person is required to be examined further or when such examination is pending or waiting to get the decision, at that time he may be detained by the immigration officer.¹⁰⁹ So, the practice of detention of UASC remains in different names and forms, it cannot be completely eradicated.

4.2.3 Detention and Its Impact on the UASC

Detention even for a shortest period of time would have detrimental impact on the physical and psychological wellbeing of the children. Juan Mendez, the Special Rapporteur of the UN identified the detention of children for immigration purpose is contradictory to the best interest principle of the UNCRC and amounting to torture

¹⁰² <Assets.Publisihing.service.gov.uk/government/uploads/system/attachment-data/file/431346/section-55-v12.pdf> last accessed on 20 August, 2022

¹⁰³ Dan Godshaw, 'Don't Dump me in a Foreign Land Immigration Detention and Young Arrivers' (2017) Gatwick Detainees Welfare Group, 36

¹⁰⁴ <Legislation.gov.uk/ukpga/2014/22/sections/5/enacted> accessed 20 August 2022

¹⁰⁵ Short term holding facility has the same meaning as in Part 8 of the Immigration and Asylum Act 1999

¹⁰⁶ Detention in Children and Families in the UK, Migration Children's Project Fact Sheet, <childrenlegalcentre.com/wp-content/uploads/2017/05/Detention-May.2017.final.pdf> accessed 20 August 2022

¹⁰⁷ Ala Sirriyeh, 'Sanctuary or sanctions: Children, Social worth and social control in the UK asylum process', in Malcolm Harrison and Teela Sanders (eds), *Social Policies and Social Control: New Perspectives on the 'not-so-big society'* (Bristol University Press, Policy Press 2014) 83, Immigration Act 1971 sch 2 para 55.9.4

¹⁰⁸ <Legislation.gov.uk/ukpga/2002/41/section/62> accessed 20 August 2022

¹⁰⁹ <Legislation.gov.uk/ukpga/1971/77/schedule/2/paragraph/16> accessed 20 August 2022

and ill-treatment. The immigration detention is not complying with the principle of necessity and proportionality, consequently, it becomes inhumane, cruel and degrading treatment towards the migrant children.¹¹⁰ The consequences of detention on the migrant children are grave. The detention will cause negative impact on the right to health, development, special protection, assistance and family life. Moreover, they will have the right to enjoy the freedom from inhuman, cruel and degrading punishment or treatment.¹¹¹ The best interest of the children shall be the primary consideration when any institution, court of law, administrative body or legislature has taken decision about the children. But, when the immigration authority has taken decision such as detention of the migrant child which will override the best interest principle as enshrined in the UNCRC. In addition, due to detention, child's physical, psychological, spiritual, social and ethical development also affected. In *Mayeka and Mitunga v Belgium*¹¹², it has been held that detention of migrant children is contrary to article 3 of the UNCRC and such order of detention constituted cruel, inhuman and degrading treatment. It is also evident that because of detention, migrant children are suffering from serious post-traumatic stress disorder.¹¹³ The poor material conditions of the detention centers and a prevalent atmosphere of stress and anxiety also liable to hinder the development of the migrant children. The UASC are facing many difficulties in the immigration detention such as forced searches, aggressive and violent behavior from the staffs, altercation between detainees resulting injuries. In addition, they are deprived from the support of independent guardian, proper educational facilities and prompt disposal of the asylum claims.¹¹⁴ All these matters actually causing serious psychological impact on the UASC. The psychological impact of the immigration detention on the released UASC has been analyzed in a research article which shows that 29% released UASC have been suffering from post-traumatic disorder (PTSD) and 23% released UASC have been suffering from major depressive disorder (MDD).¹¹⁵ So, it becomes clear that the UASC have been suffering from high rates of PTSD, depression and anxiety and the complicated asylum process heavily affects their well-being. There are some

¹¹⁰ UN General Assembly and Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, inhuman or degrading treating or punishment*, A/HRC/22/53, (5 March 2013) para. 80

¹¹¹ Ciara M Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) *Human Rights Law Review*, 19, 23

¹¹² Application No. 13178/03, Merits and Just Satisfaction, 12 October 2006

¹¹³ *Muskhadzhiyeva v Belguim*, Application No. 41442/07, Merits and Just Satisfaction, 19 January 2010

¹¹⁴ Sarah Mares, 'Mental health consequences of detaining children and families who seek asylum: a scoping review' (2021) *European Child & Adolescent Psychiatry* 30:1615

¹¹⁵ Kimberly A Ehntholt, David Trickey, Jean Harris Hendriks, Hannah Chambers, Mark Scott and William Yule, 'Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres' (2018) *Clinical Child Psychology and Psychiatry*, vol. 23(2) 238

barriers which actually debar the UASC from getting psychological support such as mistrust, stigma and lack of cultural awareness on the part of the service providers.¹¹⁶ These situations indicate that the UASC are in dire necessity of mental health services in their facilities for ensuring their well-being.

4.3 Discretionary Form of UASC Leave

Though the UASC discretionary leave is not directly a part of the hostile environment policy but by this leave the well-being of the unaccompanied children has been greatly affected. This temporary leave has been granted when the unaccompanied child is under eighteen years and having no parent or responsible adult to look after him/her and the application for asylum or humanitarian protection is not granted and there is no sufficient reception arrangement in the home country where he/she would be returned if such leave is not granted¹¹⁷. The UASC discretionary leave was introduced in 2013¹¹⁸ and the requirements for a grant of UASC leave have set out in the Immigration Rules¹¹⁹. Before granting such leave, immigration authority will confirm that there is no reasonable ground for regarding the unaccompanied child as a threat to the security of the UK and such child has not been convicted by a final judgement for the involvement of crime of a serious nature. Moreover, it has been ensured that on the date of application, the unaccompanied child was not subjected to a deportation order.

The UASC discretionary leave may be revoked when it is established that the leave was obtained by deception or there are sufficient reception and care arrangements in their home country or there is a change of circumstances i.e. he/she has been joined in the UK by his/her parents. The UASC discretionary leave lasts for 30 months or until the unaccompanied child attains the age of 17.5 years, whichever is shorter. A renewed application for leave to remain can be made by the UASC before reaching 18 years but if such claim is refused or no claims is made to remain in the UK, then he/she is liable to removal from the UK by the immigration authority.¹²⁰ When an unaccompanied child has made an appeal against the refusal and the appeal rights exhausted (ARE), then Home Office will give the papers for over staying and his/her

¹¹⁶ Tal Davies Hayon, Jennifer Oates, 'The mental health service needs and experiences of unaccompanied asylum-seeking children in the UK: a literature review' (2019) *Mental Health Practice*, vol 22 no 6, 13

¹¹⁷ Sheona York and Richard Warren, 'Dilemma and Conflicts in the Legal System', in Sue Clayton and Anna Gupta (eds), *Unaccompanied Young Migrants: Identity, Care and Justice*, (Policy Press 2019) 43

¹¹⁸ Ruth Brittle, A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law, *Human Rights Law Review*, 2019, 19, 773

¹¹⁹ Immigration Rules part 11 paras 352ZC-F

¹²⁰ Immigration and Asylum Act 1999 s 10

status in the UK becomes illegal. There are two ways by which unaccompanied child who becomes illegal can be returned to their home country either removal by the Home office or by voluntary return. The immigration and Asylum Act, Part VII empowers the Immigration Officer to enter into the premises for searching and arresting the illegal migrants. When unaccompanied child has been arrested by the local police, he/she will be taken to the detention center from where he/she will be sent to the home country.¹²¹

The statistics show that a good number of unaccompanied children have been applied asylum in the UK in every year. In 2020, 2229 children were applied for asylum who were under the age of eighteen years and did not have responsible parent to look after them,¹²² among them 64 children were granted UASC leave. In 2020, the total number of UASC living in England were 5000 and in Wales were 50.¹²³ The UASC have been considered by the Home Office as ‘precarious’¹²⁴ and thus their claim for subsequent leave to remain on the basis of right to private life has not been recognized by the judges.¹²⁵ The UASC once reach 17.5 years, they should have taken preparation for the rest of six months to leave UK until attain 18 years. When they will reach 18 years, the best interest principle of the UNCRC shall not be applicable and they shall be the subject to detention and removal.¹²⁶ So, the UASC status will not give a certainty and stability to a child to develop his academic carrier. Such state of precariousness and ‘paradigm of suspicion’¹²⁷ will have huge detrimental impact on the well-being of the child at the time when they are approaching to adulthood. For that reason, UASC status has been identified by the children’s Commissioner for England as more similar to the stay for execution.¹²⁸

¹²¹ Frances Wright, ‘Social Work Practice with Unaccompanied Asylum Seeking Young People Facing Removal’ (2014) *The British Journal of Social Work*, vol 44 no 4, 1034

¹²² Leon Feinstein, Yousef Khalifa Aleghfeli, Charlotte Buckley, Rebecca Gilhooly and Ravi K.S. Kohli, ‘Conceptualising and Measuring levels of risk by immigration status for children in the UK’ (2021) *Contemporary Social Science*, 16:5 538

¹²³ *Ibid*, p 549

¹²⁴ Section 117B of the Nationality, Immigration and Asylum Act 2002 inserted by section 19 of the Immigration Act 2014 which stipulates that judges should accord ‘little weight’ to a private life developed while an individual has a precarious legal status.

¹²⁵ Miah [2016] UKUT 00131 (IAC)

¹²⁶ Home Office, *Processing Children’s Asylum Claims, Home Office Asylum Policy Instructions*, (12 July 2016)

¹²⁷ Francesca Meloni and Rachel Humphris, ‘Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom’, 2019 *Journal of Refugee Studies*, 34

¹²⁸ House of Lords and House of Commons, Joint Committee on Human Rights, *Human Rights of Unaccompanied Migrant Children and Young People in the UK*, (12 June 2013) 4

5. Recommendations

The unaccompanied migrant children are arriving in the UK with a hope to live a safe and sound life. As a State party to the United Nations Convention of the Rights of the Child, the UK is under international obligations to comply with the best interest principle as enshrined in article 3 of the UNCRC. With a view to safeguard and protect the best interest of the unaccompanied migrant children, the Children Act, 1989 and the Border, Citizenship and Immigration Act, 2009 have been amended. In addition, the court has taken very active role by pronouncing that if a decision has been taken without considering the best interest principle of the children, then such decision will be unlawful. The hostile environment policy has been developed to deter the illegal immigrants in the UK but it also affects the unaccompanied migrant children in many ways. The UK government has enacted the Immigration Acts, 2014 and 2016 to take restrictive measures in the immigration proceedings. Because of the hostile environment policy, the UMC have been identified as undeserving and their futures become precarious. Moreover, a series of law have been enacted to make the life of illegal migrants tougher which directly or indirectly affect the UMC. To protect the best interests of the UASC in the prevailing hostile environment, a number of initiatives to be taken to improve their conditions.

First, the UMC can be detained by the immigration officer if the age is disputed and they can also be placed in detention before removal or deportation. To keep the UMC in the immigration detention is causing serious harm to their physical and mental wellbeing. By detaining the UMC, the UK government has violated the international standards set out by the UNCRC. Though the detention is permitted as a last resort but in practice the Home Office has used it frequently. So, initiatives must be taken to make the immigration detention completely prohibited.

Second, an elaborate guideline can be adopted to ensure the welfare of the UASC during their stay in the UK. Moreover, during the immigration process the best interest principle has to be taken into consideration. There shall be a formal method of determining the best interest principle which will expedite the existing decision-making process. A dedicated advisory group comprising the stakeholders such as social workers, researchers and child rights volunteers can be formed to monitor the implementation of the best interest principle efficiently. The provision of the UNCRC on the best interest principle must be the polestar for all future laws, guidelines and policies regarding the UASC in UK.

Third, in fact, the best interest principle has been recognized as a gateway right by which the UMC can challenge the arbitrary and capricious decisions of the Home office. The court of law is the last place from where the remedy can be sought by the

aggrieved persons. Thus, it is expected that the courts in UK will take more steps to ensure the best interest principle by upholding the rights of the UMC in the immigration and asylum proceedings.

6. Conclusion

The UMC have been facing a lot of difficulties in the asylum process due to the draconian effects of the hostile environment policy. As a State party to the UNCRC, the UK has incorporated the best interest principle in the domestic legislation to promote and safeguard the welfare and wellbeing of the unaccompanied migrant children. Unfortunately, the decision-making process of the Home Office in asylum claims undermined the best interest principle in many cases. Consequently, the UMC have challenged those actions before the apex court of the UK and by which protecting their rights and interests. The court has taken a strong position that if any decision maker is not considering the best interest principle of children in decision-making process then such decision will be unlawful. So, the best interest principle has been recognised as a gateway right which actually pave the way to ventilate the grievances and resentments of the UMC against the hostile environment policy.

The hostile environment policy has violated the rights and interests of the UMC. It also violates the international obligation conferred by the UNCRC relating to the safeguarding welfare and promoting wellbeing of the children. Because of this policy many UMC cannot get access to housing, health care, educational and social facilities. Because of the detention of the UMC, mental disorder has been developed among them such as post-traumatic disorder and major depressive disorder. Initiatives must be taken to eliminate detention of the UMC completely rather not to use the detention as a last resort. In addition, UASC leave made the life of the children uncertain and precarious, so that they cannot develop their academic and professional life in a consistent manner. The UASC sensitive pathway plan should be developed to make them understand the consequences of such leave and help them to design their future plan.

International Best Practices and Dealings with Indigenous Land Rights: Lessons for the Santal Community in Bangladesh

Munira Jahan Sumi*

Abstract: As it is with indigenous communities around the globe, indigenous communities like Santals in Bangladesh commonly become a subject of human rights violations and conflicts because of displacement from their land, territories, resources, etc. All the colonial strategies, policies, and actions, that are still followed by the most commonwealth countries, were often designed to systemically destroy the traditional land rights of Santals in Bangladesh. In the first place, by using qualitative legal research methodology, this research study aimed at examining and investigating the best practices for dealing with the land rights claims of Indigenous communities around the globe. Therefore, in light of those exemplary practices, the study further attempted to explore and evaluate the customary land practices of the Santals, a plain land indigenous community in Bangladesh, who are facing similar and distinct effects of historical discrimination and non-recognition of their traditional land rights and management systems. Finally, the research argues that the state authority must acknowledge the inherent relationship between indigenous communities with their land because the indigenous people hold a profound reverence and spiritual connection with their land. Hence, the research recommends the recognition of their traditional land rights according to international principles and standards. It is also contended that the current laws and policies of the country should be reevaluated and revised and reform should consider the traditional customs of the Santal people while adhering to the Constitution of Bangladesh and other laws and land management policies, to safeguard their traditional land rights. The researcher expects that the outcome of this study will open a new avenue, to supplement the struggle of vulnerable Indigenous communities like Santals, by providing some significant guidelines to the concerned Government, policymakers, and development stakeholders.

Key Words: Indigenous Land Rights, Indigenous Communities, Santal Community in Bangladesh, Traditional Land Rights Practices.

1. Introduction

As a country, the uniqueness of Bangladesh in terms of having diverse cultural practices, multiethnic communities, and multilingual and religious views within the country is well known. The Constitution as the supreme law of the country recognizes the diverse cultural practices and religious views. However, under the supreme law of the land, as nation, the people of this country shall be known as 'Bangalee' and no cognisance of such indigenous communities.¹ Thus, despite living

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¹ The Constitution of the Peoples Republic of Bangladesh. Article 6(2). Accessed through <http://bdlaws.minlaw.gov.bd/act-367.html>. [Last Accessed Date 18.10. 2024]

in this country since time immemorial, their ethnic identity as indigenous peoples is denied. Historically, they have been ruled by different administrators including the Mughals of the sub-continent, the British administrators, and Pakistani and Bangalee rulers. Throughout different administrations, especially their land rights were regulated by the indigenous traditional practices. Now, their land rights are regulated or determined by the laws enacted by the State Governments of Bangladesh. By protecting the vested interest of the mainstream people of the country, the indigenous peoples' communal ownership of land has been denied by the Constitution.² Due to their subordinate position in society, indigenous communities like the Santals in Bangladesh cannot seek redress from the Government or to the international community. Globally, land territory within state boundaries is very crucial for every country, and so it is for Bangladesh. This study demonstrates a significant disparity between aspirations and actuality. The research documents have demonstrated that adhering to international norms and standards might facilitate the connection between historical events and present-day land disputes. Hence, focusing specifically on the commonwealth countries, this study examines the potential implementation of International Laws and Common Law Principles regarding the land rights of Santals in Bangladesh. Moreover, by examining exemplary methods employed in other regions, it strives to propose potential advancements and restructuring of the current legal regulations pertaining to the land entitlements of indigenous communities like Santals in Bangladesh.

2. Background of the study

Bangladesh is a distinctive nation characterized by a variety of indigenous communities, which exhibit diversity in terms of their languages, religions, and cultural traditions. The religious diversity in Bangladesh is acknowledged and protected by the Constitution of the People's Republic of Bangladesh and other national legislations,³ but other diversities are not recognized yet. For example, under section 4 of the Citizenship Act, of 1951, the indigenous peoples are recognized as citizens of Bangladesh though their various rights as 'indigenous people' are not recognized yet. Besides, Article 6(2) of the Constitution of Bangladesh declares that 'the people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as 'Bangladeshis'. As a result, the mainstream peoples known as the 'Bangalee community' often neglect and ignore the rights of these indigenous communities as 'indigenous people'.

² *ibid*, Article 13.

³ *ibid*, Article 2A

At present, at least 3 million people from seventy-five Indigenous communities⁴ have been living in the Chittagong Hill Tracts (CHTs) and the plain land areas in Bangladesh.⁵ Nevertheless, there is a significant controversy regarding the exact count of indigenous population.⁶ Official data indicates that the population of indigenous people in Bangladesh is approximately two million, with 1.6 million residing in the low-lying regions of the country. The Poverty Reduction Strategy Papers-II, published in 2009⁷ identified that 45 indigenous communities have been living in Bangladesh though a number of studies and surveys have identified 59 indigenous communities in Bangladesh. The Constitution of Bangladesh acknowledges the list supplied by the Small Ethnic Groups Cultural Institution Act 2010, which identifies 50 communities as indigenous communities residing in the country.⁸

Most of the indigenous communities including the Santals live in the plain land area of the country and speak at least 35 languages besides the official language of the State, Bangla.⁹ It is ironic that the Government of Bangladesh has already recognized 50 indigenous communities as ethnic groups but declined to recognize them as indigenous people.¹⁰ The Santal community is among the seventy-five communities in Bangladesh.¹¹ The Santal people originally resided in Chotonagpur, Santal Pargana of India. It is believed that their forefathers migrated from mainland Australia to India approximately ten thousand years ago. Therefore, they are considered to be among the first residents residing in the northwestern region of Bangladesh, primarily in the 16 districts of Rajshahi Division, including Rajshahi,

⁴ Kamal Mesbah, et.al., Mapping of Multilingual education programs in Bangladesh (the UNESCO Dhaka and SHIKHON Program of the Save the Children in Dhaka, Bangladesh, 2014) Appendix i-iii.

⁵ Parliamentary Caucus on Indigenous Communities, *Recommendations Regarding Constitutional Recognition of Indigenous Communities*, Research and Development Collective (RDC), Dhaka, Bangladesh, 2010); Small Ethnic Group Cultural Institution Act 2010, Bangladesh. 17.

⁶ Note: International Work Group on Indigenous Affairs (IWGIA) in their joint submission to the United Nations Human Rights Committee in 2017, mentioned that there are over 54 indigenous communities domiciled in different parts of Bangladesh. Nevertheless, the Constitution of Bangladesh only recognized only 27 communities listed under the Small Ethnic Groups Cultural Institution Act 2010 which was amended in 2019 by recognising 50 communities. Therefore, the official record only took into account the listed communities as indigenous peoples which results in controversy as regards the actual number of the indigenous population in Bangladesh.

⁷ *Poverty Reduction Strategy Papers-II*, (2009). Peoples Republic of Bangladesh, para- 4.1.3

⁸ *ibid* 5

⁹ The Indigenous World 2023: Bangladesh. Available at <https://www.iwgia.org/en/bangladesh/5110-iw-23-bangladesh.html> [Last access date 15.01.2024].

¹⁰ World Directory of Minorities and Indigenous Peoples. (Minority rights group international, 2019). Available at <https://minorityrights.org/country/bangladesh/>

¹¹ *ibid* 4

Rangpur, Dinajpur, Pabna, and Bogora districts. Additionally, they inhabit Sylhet, Chittagong, and the southwestern region of the Sundarban area.¹²

As per the Bangladesh Population Census of 1991, the Santal population was recorded at approximately 261,746,¹³ which was around two hundred thousand according to the Minority Rights Group International in 2008.¹⁴ For the purpose of this study, it is relevant to share that the latest census counts the total number of indigenous people as 16,50,159 including 1,29,049 Santal peoples. But the community leaders claim their population would be not less than 5 Lac as the Santal people live in different places of the country.¹⁵ Therefore, though this community is the most numerous Community in the plain land area and the second most numerous in the whole of Bangladesh,¹⁶ the state policy of unpeopling the indigenous Santals is clearly evident from this context.

The Santals possess unique language, culture, and social patterns that are obviously distinguishable from those of other tribes. Although the majority of Santals have converted to Christianity, they continue to practice their traditional tribal rituals. Originally, they were nomadic individuals who engaged in hunting and gathering. However, during the British colonial era in India (1757-1947), they relocated to other regions, including Bangladesh. Consequently, the Santals, who once enjoyed affluence and tranquility, now experience significant economic and social deprivation. Currently, the majority of the socially and culturally marginalized Santals are employed as day laborers, either on a permanent or seasonal basis.¹⁷

¹² Smiritikana Das, *Indigenous people's Access to Land in Northern-belt of Bangladesh: A Study of the Santal Community* (LAP LAMBERT Academic Publishing, 2011). 1-120.

¹³ Note: A population census is carried out in Bangladesh every 10 years. As such, following this pattern, after the first-ever census conducted in independent Bangladesh in 1974, the country has carried out population censuses in 1981, 1991, 2001, 2011, and 2022. Due to covid-19 pandemic, the latest one was delayed by one year and as such, this provisional one was published in July 2022.

¹⁴ Minority Rights Group International. *World Directory of Minorities and Indigenous Peoples, Bangladesh: Adivasis*. (2008). Available at: <http://www.refworld.org/docid/49749d5841.html> [Last access date 15.01.2024].

¹⁵ Note: It is pertinent to share here that after 1991, the Government stopped counting the Santals as a separate community. Therefore, the official data on the Santal population was not available after 1991. Nevertheless, the latest Population Census as published in 2022 has included separate data on the Santals though that has been strongly protested by the Santal community people as the claimed number of people is much higher than the published report.

¹⁶ Bangladesh Bureau of Statistics (BBS). *Bangladesh Population Census, 1991: Analytical Report*, BBS, Statistics Division, Ministry of Planning, Government of the People's Republic of Bangladesh, 1991.

¹⁷ Samad M., 'The Santal in Bangladesh: Problems, needs and development potentials' (2006) *Journal of Ethnic Affairs, Ethnic Communitys Development Organizations*, Bangladesh 9.

3. International Legal Developments on the Issue of Indigenous Land Rights

The spiritual connection between indigenous peoples and their land are widely acknowledged as a fundamental underpinning of their identity and existence.¹⁸ They have inherent rights over the lands, territories, and resources, they have traditionally occupied, owned, or used. These rights are enumerated in various international documents, such as the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 concerning Indigenous and Tribal Peoples, etc. On the other hand, the Convention on Biological Diversity (CBD), was introduced in tandem with the process leading to the UN Conference on Environment and Development (UNCED) in Rio, in 1992. Among the different international human rights instruments that apply to indigenous peoples, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of Racial Discrimination (CERD), the CBD takes utmost important place. To be specific, indigenous peoples around the Globe, live in areas that contain around 80 percent of the planet's biodiversity. But they are still struggling against all the discrimination they face to maintain their legal rights to lands, territories, and resources.¹⁹ Nevertheless, in recent decades, numerous countries, including Canada, Australia, New Zealand, Malaysia, and others, have made significant advancements in acknowledging and safeguarding the variety of traditional and customary practices of indigenous peoples. These efforts encompass both the collective and individual rights of these communities, in accordance with international norms.

The advancements on the issue of indigenous people's rights, particularly, their land rights were done through different mechanisms like judicial precedents, settlement through negotiation, legal and constitutional reformation, legal advocacy, and indigenous peoples' initiatives through adopting human rights standards.²⁰ Constructive actions undertaken by the following initiatives can provide inspiration and guidance for Bangladesh to address the difficulties related to land rights for indigenous peoples, particularly the Santal community.

¹⁸ Daes, Erica-Irene A. Indigenous people and their relationship to land (1999). Second Progress Report on the Working Paper. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session Item 7 of the provisional agenda, Available at http://hrlibrary.umn.edu/demo/RelationshipptoLand_Daes.pdf (Last access date 15.9.2024).

¹⁹ Permanent Forum on Indigenous Issues: report on the seventeenth session (16-27 April 2018) (E/2018/43-E/C.19/2018/11), para. 10.

²⁰ *ibid* 18

A. Development through Judicial Precedents

The majority of significant legal disputes and crucial rulings regarding the claims of traditional land rights of Indigenous peoples have originated from the commonwealth nations, specifically the courts of Canada, Australia, New Zealand, and other similar countries. These jurisdictions not only approached the issues from a national adjudication perspective but also relied on extensive comparative analysis of various common law decisions regarding indigenous peoples' land rights over time. Despite its limits, the common law concepts established under Common Law Precedent offer valuable and detailed legal discussions and assistance on the matter of indigenous customary land rights.

Judicial decisions, under the common law system, significantly show that legal thought had evolved with regard to the issue of indigenous people's rights in both the domestic and international arenas. The court is empowered to apply legal provisions of different legal systems, as persuasive authority, as done by the Supreme Court of South Africa. Thus, either directly or indirectly, by applying the law in a new situation court is ultimately developing the law. There are a lot of instances, whereby, legislative reforms are a direct result of court decisions supporting the indigenous peoples and their claim to get recognition of their ancestral lands. Furthermore, these reforms are complementary to the recently developing international standards. In all cases, these reforms are the outcome of the indigenous peoples' long struggle claiming their rights be respected, protected, and recognized. Various significant case references at both the national and international levels have had a combination of positive and negative outcomes. For instance, the *Mabo case* in Australia yielded a favourable outcome by effectively repudiating the notion of *terra nullius*. However, the risk in applying the judicial mechanisms lies in the difference between the national and international level in applying different interpretive tools. High political pressure from and within the state government bodies, and lack of cultural impartiality shown by the governments may influence outcomes.

B. Settlement through Negotiation

Negotiation is a very effective tool that can be applied in a broader aspect to explore the issues like understanding and confidence-building on conceptual and practical aspects relating to indigenous peoples' rights to lands. This can contribute to developing political motivation and building up legal relationships which in the long run affect and construct the relationship between Governments and indigenous peoples. For example, the Government of Canada quite successfully and positively applied this negotiation mechanism for the settlements of indigenous land claims.

The Canadian Government has established this system of negotiation in relation to claims to Aboriginal title by passing the Nisga'a Final Agreement Act, 2000 followed by the Nunavut Land Claims Agreement Act in 1993 and Nunavut Act, 1993.²¹ For example Chief Justice Lamer in *Delgamuukw v. British Columbia* Case²² stated that,

'Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* to be a basic purpose of s. 35(1)–the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown''.

Thus, they clearly pointed out the effectiveness of this tool that land settlements through negotiation open up many opportunities in front of the indigenous peoples to their profound relationship with lands and resources within their traditional territories. The opportunities relating to indigenous land rights include exclusive occupation and full ownership over their long-inherited lands, remedy in the form of compensation, the process of resource, revenue-sharing, facilitating economic development, and control of the management process of natural heritage and natural resources of the settlement area.

C. Development through Legal and Constitutional Reformation

In certain countries, some very crucial developments came, i.e., steps have been taken to recognize and ensure indigenous land rights through the constitutional provisions or by enacting specific legislation to return the land claimed or by forming a framework legislation. For example, to resolve indigenous land rights issues, the Constitution of Brazil, 62 incorporated significant provisions urging the demarcation and protection of indigenous lands. Again, in Australia, the Native Title Act of 1993 followed the decision in *Mabo. No.2* and in Canada, the Constitution Act of 1982, section 35, has provided constitutional protection to the respective aboriginal or indigenous land rights claim by affirming indigenous rights.. References by the courts to s 35 have only strengthened indigenous rights. Recently Canada has also passed a new legislation called, the UNDRIP Act²³ as federal law of Canada to incorporate the provisions of UNDRIP into domestic law.

²¹ Erueti Andrew, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law (2006) 23 *Arizona Journal of International & Comparative Law* 580.

²² *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010 (Canada) 186.

²³ The United Nations Declaration on the Rights of Indigenous Peoples Act, 2021.

D. Advocacy and Indigenous Peoples' Initiatives

The recent advancements in addressing the indigenous issue involve the increasing involvement of indigenous communities themselves in advocating for indigenous rights. Prior to this, only organisations with consultative status were eligible to participate in meetings of the Economic and Social Council and its subsidiary committees. However, the Working Group on Indigenous Populations provided support for indigenous lobbying. This institution has welcomed indigenous communities without considering their official recognition by ECOSOC. Bangladesh applauded this initiative and praised the working group's distinctive and adaptable work practices.²⁴ Besides, the recent growth of indigenous organizations across the globe mirrors the internationalization of indigenous claims. As such the indigenous peoples, all over the globe, have been gaining recognition for their valuable contributions that have eventually, established their prominence in contemporary society.²⁵ The representation by James Anaya in the *Awas Tigni* case is a clear example. The *Enderois* case brought by indigenous peoples in Kenya is another. Therefore, it is the very time that the indigenous peoples should be recognized as a group and develop mutual understanding among the mainstream and indigenous communities.²⁶ Indigenous people should be allowed in the real sense to equally participate in the affairs of the State and enjoy the same rights and responsibilities as mainstream society. In this context, it should be considered indigenous communities like Santals itself that if they should come together as one voice, nobody can dare to ignore them. The national and international bodies have also recognized the fact and urged that there is a need to start a dialogue or channels of communication between the respective parties.

E. Development through Adopting Human Rights Standards

According to International Human Rights Laws, it is very important to abolish racial discrimination and promote universal equality as per international law. The importance behind this lies in the fact that it will place them on the same footing so as to recognize their individual identities and preserve their unique cultures. However, they should have the full liberty to retain their right to be different in spite of achieving equality however, equality does not necessarily mean uniformity among all the citizens of the country.²⁷

²⁴ Barsh, R. 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80(2) American Journal of International Law 369- 385.

²⁵ Smith RK. M, 'The international impact of creative problem solving: Resolving the plight of indigenous peoples' (1998) 34 California Western Law Review 13.

²⁶ *ibid*

²⁷ *ibid*

The application of international standards at the national level will be effective if they are applied as per the needs of the people they protect. Yet, in order to apply such guidelines, it is necessary to analyze whether there are any structural and other kinds of difficulties in the proper and fruitful implementation of those international standards.²⁸ Though the ways to establish the claims of indigenous peoples are manifold under international law and jurisprudence, but for now, it is more important for the lawmakers to recognize the traditional methods of solving disputes even if they may not always be the most effective.²⁹ For this, Recognition of indigenous people as 'indigenous' is a must, because it creates a workable system of protection of indigenous traditions and ways of life.³⁰

F. Development under the Jurisdiction of Public Interest Litigation (PIL)

The right to life is one of the basic structures of human rights as well as one of the guaranteed fundamental rights of the Constitution of Bangladesh. Article 32 of the Constitution states that 'no person shall be deprived of life or personal liberty save in accordance with law'. Here within this constitutional provision on 'right to life', some elements are notably significant. For example, this largely accommodative provision has employed the term 'person' instead of 'citizen' which means every person living within the territory of the country irrespective of citizen has been guaranteed this right. In addition to this large ambit of constitutional dispensation, the judiciary of Bangladesh has also come forward with this 'right to life' conception following the similar jurisdiction of the Indian judiciary. A similar provision incorporated in Article 21 of the Indian Constitution states that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law'. The Indian judiciary has broadly interpreted this provision to include various aspects of human life including the right to live with dignity, the right to livelihood, the right to a clean environment, the right to health, and the right to privacy. The courts of Bangladesh also have been widely utilizing this provision to enforce the socio-economic rights of the people which are otherwise not judicially enforceable. Following the path of the Indian Supreme Court that has enforced the socio-economic rights of the people by expanding the scope of the right to life, the judiciary of Bangladesh has attempted to include almost every human right related to adequate standard of life, dignity and human worth within the ambit of Article 32.³¹ In the Judgement of this benchmark decision, Justice Bhagwati said

²⁸ Swebston Lee and Plant Roger, 'International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations' (1985) 124 International Labour Review 91-106.

²⁹ *ibid*

³⁰ Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 Harvard Human Rights Journal 57-128.

³¹ *Francis Coralie v. Union of Delhi* (1981) AIR SC 746.

“We think that right to life includes the right to live with human dignity and all that goes along with it, namely the basic necessities of life such as adequate nutrition, clothing, and shelter over the and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and corn mingling with fellow human being.”

Moreover, the judiciary of Bangladesh also adopted the interpretation of the Indian Supreme Court in *Bombay Pavement Dwellers Case*³² which declares that the right to life necessarily includes the ‘right to livelihood’ because no person can live without a means of living. In this case Chandrachud CJ. while presenting his view held that

“(T)he sweep of the right to life as conferred by Article 21 is wide and far reaching. It doesn't mean merely that life can't be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because; no person can live without means of living that is the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life the easier way of depriving person his right to life would be to deprive him of his means of livelihood to the point of abrogation.”

Therefore, though a person is not allowed to claim livelihood from the State, at the same it is also a responsibility of the State that it should not by arbitrary or unreasonable law or action cause anything harmful against the existing livelihood of an individual.³³ The Indian court has also expanded the scope of expression ‘right to life’ in the *Maneka Gandhi* case³⁴. In this case, the Supreme Court held that ‘the right to life and personal liberty is not confined to mere animal existence, but it also includes the right to lead a meaningful life. The decision of the case of *Kapila Hingorani v. State of Bihar*³⁵ has laid the foundation for expanding the scope of the right to life beyond its literal meaning. In this case, the court has added another gem to the crown of human rights jurisprudence and reaffirmed that it is the responsibility of the state to protect the fundamental rights of its citizens. The state cannot be dispensed with this responsibility showing the excuse of lack of resources. Thus, the Indian judiciary has been increasingly viewed as an institution of the saviour of people and as such, gained public faith that reposed on it as a last resort.

The realm of the right to life also encompassed the right to live in a healthy environment in India in the case of *Ratlam Municipality case*.³⁶ The extent of the right to life as expanded to the right to live in a healthy environment has been well established in Bangladesh through a series of Public Interest Environmental Litigation (PIEL). For example, in the case of *Dr. Moshiuddin Faruque v. Bangladesh*

³² *Olga Tellis v. Bombay Municipal Corporation* (1981) AIR SC 180.

³³ *ibid*; *Ain O Salish Kendra v. Bangladesh* (1999) BLD 488.

³⁴ *Maneka Gandhi v. Union of India* (1978) AIR 597.

³⁵ *Kapila Hingorani v. State of Bihar*, (2003) 6 SCC 1.

³⁶ *Ratlam Municipality v. Vardichand* (1980) AIR SC 1622.

*and Others*³⁷ otherwise known as (*FAP 20 Case*), B.B. Roy Chowdhury J. declared that ‘the right to life encompasses within its ambit the protection and preservation of environment and ecological balance’. The fact that the then Bangladeshi Constitution has no provision relating to the environment similar to Article 48A of the Indian Constitution did not prevent the court from making this expansion. Again, in the *Environment Pollution Case*³⁸, Dr. Farooque sought writ of mandamus against the 1176 industries polluting the environment of Bangladesh. The petitioner claimed the enforcement of the duties of the concerned industry under the Environment Pollution Control Ordinance 1977 and the Bangladesh Environment Conservation Act 1995. Similarly in the *Two Stroke Motor Vehicle Case*³⁹ the petitioner sought enforcement of the provisions of the Motor Vehicles Ordinance 1983 to reduce the environmental hazards from smoke of motor vehicles and audible signaling giving unduly harsh, shrill, loud, and alarming noise.

Finally, with the continuous pressure of the successive decisions of the judiciary of Bangladesh, the people of Bangladesh found the achievement of extending the dimension of the right to live toward a healthy environment through the insertion of a new provision i.e., Article 18A⁴⁰ in the Constitution of Bangladesh. This new provision provides that ‘*the State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests, and wildlife for the present and future citizens*’.

G. Rights of Indigenous Peoples under Sustainable Development Goals (SDGs)

The SDGs encompass various crucial areas of concern for indigenous communities, such as land tenure, poverty alleviation, social safety nets, ecological sustainability, the advancement of inclusive and harmonious societies, and the mitigation of disparities, among others. Ensuring the acknowledgment and safeguarding of the rights of indigenous peoples to their lands, territories, and resources is crucial in attaining the Sustainable Development Goals (SDGs). Hence, the recent report of the UN Permanent Forum on Indigenous Issues strongly advised and urged States to incorporate the acknowledgment of customary rights or tenure of indigenous peoples to their lands and resources in their statistics on secure land tenure rights in SDG reporting.⁴¹

³⁷ *Dr. Mohiuddin Faruque v. Bangladesh and Ors* (1997) 49 DLR (AD) 1.

³⁸ *Dr. Mohiuddin Farooque (BELA) v. Bangladesh* (2003) 55 DLR (HCD) 69. ABM Khairul Haque J., Para 23

³⁹ *ibid*, Para 1 and 14

⁴⁰ *ibid* 1, Article 18A. Available at <http://bdlaws.minlaw.gov.bd/act-367/section-41505.html> [Last Access Date 18.09.2024]

⁴¹ State of World Indigenous People: Rights to Lands, Territories and Resources. Indigenous peoples’ rights to lands, territories, and resources and the 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT. (2021) 5 United Nations Department of Economic and Social Affairs Division for Inclusive Social Development, New York 149-174.

As a member state of the United Nations, the government of Bangladesh is obligated to adhere to and implement international conventions, legal regulations, and practices. The United Nations Conference on Sustainable Development 2012, also referred to as the Rio+20 Summit, imposes a responsibility on Bangladesh to support the 2030 Agenda for Sustainable Development, generally known as the SDGs. This document offers a collective plan for achieving peace and prosperity for both humanity and the environment, both now and in the future. The core of the initiative consists of the 17 Sustainable Development Goals (SDGs), which serve as a pressing plea for immediate action from all nations, regardless of their level of development, in a collaborative global effort. As a member state of the United Nations, Bangladesh acknowledges the importance of simultaneously addressing poverty and other forms of deprivation, along with implementing initiatives to enhance health and education, decrease inequality, promote economic growth, combat climate change, and preserve our oceans and forests.⁴²

Therefore, the Government of Bangladesh for the protection and promotion of the indigenous peoples like Santals adopted some rules, regulations, and policies. The Government as a policy implementation has initiated some action plans towards the recognition and representation of indigenous communities including Santals in various sectors such as education, healthcare, employment, and decision-making processes. Since the indigenous communities in Bangladesh have faced disparities in terms of land and natural resources rights, socio-economic rights, healthcare, and discrimination on the grounds of religion and ethnicity, therefore, the government has recognized the need for inclusive policies that address these disparities and promote equal opportunities for all the citizens including the indigenous communities like Santals in Bangladesh.

4. Recommendations to ensure the Indigenous Land Rights of Santals in Bangladesh

Finally, the following recommendations are for the formation of a legal framework that may ensure indigenous Santals land rights in Bangladesh. The recommendations, as under, have been discussed by following a thematic approach which will make it easy for the stakeholders to understand the possible scope of doing extensive reform in the existing system.

⁴² ibid

A. Reform in Policy Making

- a) To evaluate government land policies.
- b) To put an end to the political unpeopling of indigenous peoples.
- c) To recognize their indigenous identity.
- d) To give recognition to indigenous traditional land rights.
- e) To recognize their cultural identity.
- f) To take proper plan for National land use policy.
- g) To ensure Indigenous Peoples representation in the local government.

B. Reform in the Implementation Mechanism

- a) To recognize and ratify international legal instruments concerning indigenous peoples' rights.
- b) To ensure the application of Prominent International laws and Common Law Precedents on indigenous laws.
- c) To comply with Constitutional obligations.
- d) To take initiative for land demarcation.
- e) To ensure proper and effective implementation of the provisions of national and international legal documents.
- f) To ensure proper implementation of Section 97 of SAT Act and Vested Properties (Return) Act.

C. Reform through Executive Intervention

- a) To ensure institutional non-discrimination.
- b) To ensure the right to self-identification or self-determination.
- c) To ensure the political empowerment of indigenous communities like Santals in Bangladesh.
- d) To put an embargo on the Government to acquire indigenous land without their consent.

D. Initiation of New Legislative Enactment

- a) To amend all the contradictory provisions that open the door to exploit indigenous communities.
- b) To establish separate Land Dispute Resolution/ Management Committee.
- c) To establish Special Court/Tribunal to settle land-related cases within a shorter time with lower costs.

E. Reform in the Land Administration System

- a) To re-analyze and re-consider the reasons behind land grabbing.

- b) To ensure social mobilization and social integration.
- c) To resolve the question of social identity and status
- d) To bring change in the Political mind set of the Government.
- e) ensure the role of civil society to influence the thought process of the Government.
- f) To ensure drastic action against the land grabbers under any circumstances.
- g) To ensure distribution of Khas land to the landless Indigenous Santal Peoples.

F. Initiation of Awareness Program

- a) To increase the scope of indigenous advocacy and representation.
- b) To raise awareness on land laws and management of the Indigenous Peoples through training and campaign.
- c) Provide legal aid services to the Indigenous Peoples for land litigation.

It is submitted that these recommendations if taken on board, would protect and establish indigenous land rights. Considering the recommendations, the proper authority would find out a way to how the existing land policy of Bangladesh toward plain land indigenous communities, like Santals and others, can be revised in the light of the international laws and common law precedents.

5. Conclusion

From the background of the study, it is clear that the Santals of Bangladesh can validly claim that they also share *spiritual* relationships with their land like other indigenous communities all over the world. They bear similar characteristics, to other indigenous peoples, with a history of subjugation, and an intimate relationship with their lands. Hence, they are entitled to enjoy the rights ensured under their customary tenure and other rights under international legal instruments. Moreover, the latest 15th Amendment of the Constitution of Bangladesh to some extent recognizes the cultural plurality by affording protection to the indigenous culture, ethnic culture, and regional culture.⁴³ So, this is a very good sign on behalf of the lawmakers or the constitutional framers. Though there is a criticism that the Indigenous community has not been fully accorded recognition but, from the lens of the wider ambit of the constitutional dispensation, one can see that within the fundamental rights and socio-economic rights paradigm, the Indigenous rights or the rights of the indigenous people have been accommodated or recognized in the constitution of Bangladesh. For example, in Article 31 right to life, liberty, body, property, and reputation has been recognized. The statement asserts that individuals

⁴³ ibid 1. Article 23A.

cannot be deprived of their life, freedom, physical well-being, possessions, or reputation, except as authorized by the law. As such, if the Government makes any law it must comply with all these formalities and the law itself should be fair and just. So, the government has got a responsibility not to make any law that snatches away the right to life, liberty, body, property, and reputation of the indigenous community. Also, reference may be made to Article 18(1A) which speaks about sustainable development, generation to generation development has been described there.⁴⁴ This legal provision is very much across the line of achieving some of the goals of SDGs especially SDGs 1, 10, and 16. Finally, the present study extracts the view of the State on the point that since land rights and land reform in Bangladesh is a politically elusive issue, any development plan of the Government must center around these fundamental rights and fundamental principles of state policy recognized by the Constitution of Bangladesh.

⁴⁴ *ibid*, Article 18A.

Identification of the Inadequacies in the Legal Mechanisms addressing Workplace Sexual Harassment of Females in the Context of Corporate Bangladesh using Lyotard's Theory of Differend

Nameera Ahmed*

Workplace Sexual Harassment (WSH) of females significantly undermines professional environments and economic progress¹. As such for a majority female populated country² like Bangladesh addressing WSH is pivotal to achieving gender equality and fostering socio-economic development. In Bangladesh, despite global initiatives promoting gender equality, WSH remains inadequately addressed, predominantly due to a focus on the garment industry. The adverse effects of WSH on female workforce participation actively hinders economic progress, as underscored by gender imbalance in employment and management roles. As such addressing WSH is crucial not only for moral reasons but also to achieve the UN Sustainable Development Goals related to gender equality and economic growth. This neglect in terms of addressing WSH is further compounded by the absence of robust legal frameworks and ineffective implementation of existing laws (such as the Penal Code of 1860 and Nari o Shishu Nirjaton Act of 2000), coupled with cultural norms that discourage reporting, perpetuating a cycle of silence.

This study critiques existing legal frameworks, including but not limited to recent legislative amendments and judicial directives have aimed to combat WSH, held to be questionable without specific laws targeting corporate environments, while drawing on empirical and theoretical insights, from surveys and Lyotard's theory of *differend*, to propose reforms aligned with international standards and the lived realities of corporate women. This study champions comprehensive legal reforms, emphasizing proactive prevention and awareness strategies, to cultivate a safer and more equitable corporate environment in Bangladesh.

1. Introduction

Workplace Sexual Harassment (WSH) is a pervasive issue that continues to undermine the professional environment and economic development of Bangladesh, particularly within the corporate sector. Despite global awareness and initiatives aimed at fostering gender equality and building safe workplaces, WSH in

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¹ 'Preventing discrimination and harassment of women at workplace', The Daily Star (Dhaka, 15 March 2020) <<https://www.thedailystar.net/round-tables/news/preventing-discrimination-and-harassment-women-workplace-1877581>> accessed 13 January 2025.

² World Bank, 'Population, female (% of total population) - Bangladesh' (World Bank Data, 2023) <<https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=BD>> accessed 13 January 2025.

Bangladesh's corporate settings remains largely overshadowed by focus on garments industry³, which dominates discussions on labor issues, legally and policy-wise, which interconnects with the lack of corporate focus.

This article considers the absence of robust legal frameworks addressing corporate WSH and the lack of effective implementation of existing laws as exacerbators to the vulnerability of women⁴. Additionally, the article goes on to find in the context of Bangladesh, these unique challenges faced by professional women in corporate environments, are further compounded by cultural barriers and societal norms that discourage victims from reporting harassment incidents, thus perpetuating cycles of silence and inaction.

1.1. Objectives of the Research

The premise of the article, therefore, finds that while recent amendments to laws and judicial directives have attempted to address these issues, their efficacy remains questionable, with the absence of specific legislation aimed at tackling WSH within

³ Akinrebiyo, F., "Bangladesh's leap from poverty to textile powerhouse offers lessons for countries in Africa" (World Economic Forum, February 16, 2024), available at: <<https://www.weforum.org/agenda/2024/02/how-bangladesh-offers-lessons-for-sustainable-industrialization-in-africa/>> (Last visited on May 03, 2024); Amnesty International, 'Garment workers in Bangladesh need justice' (Amnesty International, 1 May 2024) <<https://www.amnesty.org/en/latest/news/2024/05/bangladesh-garment-workers-must-receive-rights-based-compensation-and-justice-immediately/>> accessed 13 January 2025; Md Tareq Mahmud, 'Labor Unrest in the Ready-Made Garment Industry of Bangladesh' (ResearchGate, 2015) <https://www.researchgate.net/publication/271316271_Labor_Unrest_in_the_Ready-Made_Garment_Industry_of_Bangladesh> accessed 13 January 2025; The Daily Star, 'Labour unrest caused \$400m loss in garment industry: BGMEA' (The Daily Star, 15 December 2024) <<https://www.thedailystar.net/business/news/labour-unrest-caused-400m-loss-garment-industry-bgmea-3731066>> accessed 13 January 2025; The Financial Express, 'Why this labour unrest in RMG sector?' (The Financial Express, 10 December 2024) <<https://thefinancialexpress.com.bd/views/columns/why-this-labour-unrest-in-rmg-sector>> accessed 13 January 2025; Md Tareq Mahmud, 'A study of labor market condition on the Bangladesh readymade garment industry' (KDI School of Public Policy and Management, 2015) <[https://archives.kdischool.ac.kr/bitstream/11125/29970/1/A%20Study%20of%20labor%20mark et%20condition%20on%20the%20Banladesh%20readymade%20garment%20industry.pdf](https://archives.kdischool.ac.kr/bitstream/11125/29970/1/A%20Study%20of%20labor%20market%20condition%20on%20the%20Banladesh%20readymade%20garment%20industry.pdf)> accessed 13 January 2025.

⁴ Author Unknown, 'A Review of Legal Frameworks Addressing Workplace Sexual Harassment' (IJNRD, 2024) <<https://www.ijnrd.org/papers/IJNRD2403581.pdf>> accessed 13 January 2025; Shain M and Nassar A, 'Discrimination, Harassment, Abuse and Bullying in the Workplace' [2013] (PMC) <<https://pmc.ncbi.nlm.nih.gov/articles/PMC3884002/>> accessed 13 January 2025; Greenhouse L, 'Harassment, Workplace Culture, and the Power and Limits of Law' (American University Law Review, 2023) <<https://aulawreview.org/blog/harassment-workplace-culture-and-the-power-and-limits-of-law/>> accessed 13 January 2025.

corporate settings⁵ being a significant shortcoming necessitating comprehensive reform and focus on punitive and proactive strategies for prevention and awareness.

Consequently, it aims to synthesize legislative and process gaps with empirical data from corporate women, so as to propose viable solutions to enhance legal protections and workplace safety. Identified theoretical gaps within existing WSH legislation are then identified as a *differend* by applying Jean-François Lyotard's theory of the same and used to establish the pressing need for a new discourse—one that transcends outdated colonial legislation and properly contextualizes the unique cultural needs of Bangladesh. Through this exploration, the research contributes to broader understanding of the challenges⁶ and thereby highlighting the legal shortcomings they face.

In pursuit of these objectives, the study is guided by the following research questions:

1. To what extent do existing legal frameworks and socio-cultural norms in Bangladesh fail to address the unique challenges of Workplace Sexual Harassment (WSH) in the corporate sector?
2. What implications does Lyotard's theory of differend have for the development of more effective legal remedies and preventive strategies?

By addressing these research questions, the study aims to contribute to the broader understanding of legal reforms necessary for fostering a safe and equitable corporate environment in Bangladesh while enabling the development of more effective and contextually relevant legal remedies.

1.2. Scope and Limitations

The study faces potential limitations primarily due to its geographic focus and temporal scope. Since the majority of Bangladesh's corporate headquarters are located in Dhaka, most study participants are likely from this area, which may limit the study's comprehensiveness. Furthermore, the analysis presents a current view of the legal mechanisms governing WSH, recognizing that their effectiveness may evolve as new laws are introduced and judicial interpretations change over time.

⁵ British American Tobacco Bangladesh (BATB) Company Ltd vs. Begum Shamsun Nahar, 66 (2014) DLR (AD) 80.; Advocate Md Salauddin Dolon vs. Government of Bangladesh and others, (2011) 63 DLR 80.

⁶ "Will end life along with son if justice is not done," says Fairuz's mother", *bdnews24*, March 20, 2024, available at: <<https://bdnews24.com/bangladesh/3oiw151dww>> (Last visited on May 04, 2024).

1.3. Methodology

This research adopts a mixed-methods approach, integrating both quantitative and qualitative methods to comprehensively explore the efficacy of legal frameworks addressing WSH in Bangladesh's corporate sector. The quantitative component involves an online questionnaire designed to gather measurable data regarding participants' experiences and perceptions of legal protections. This aspect of the study allows for the identification of patterns and statistical relationships within the data. For the qualitative aspect, the study draws upon existing scholarly studies and literature to provide context and depth. These studies offer valuable insights into the broader socio-cultural and legal landscape influencing the effectiveness of WSH legal mechanisms, which complements the quantitative data.

Due to limited funding, the study utilizes a convenience sampling method for the questionnaire, which while non-probabilistic, is suitable for exploratory research⁷, aiming to gain preliminary insights into WSH in corporate environments. The sample includes 45 respondents, ensuring a diverse representation of experiences. Throughout the research process, ethical considerations are strictly adhered to, with all participants providing informed consent and guarantees of anonymity and confidentiality. This mixed-methods framework, combining empirical data with qualitative insights from literature, enables a comprehensive analysis of the challenges and shortcomings in the current legal frameworks, thereby informing the study's advocacy for targeted legal reforms.

1.4 Structure of the Paper

This article begins with an overview of the issue and the significance of addressing WSH in corporate Bangladesh, along with a brief contextualization of WSH through the theory of *differend*. The methodology section discusses the research design and data collection approach, followed by literature review explores national and international scholarship on WSH, highlights theoretical gaps, explains the theory of *differend*⁸ and contextualizes findings. Following the findings and discussion, legal reforms are proposed to address the identified shortcomings. The article concludes by focusing on the need for specific, targeted legislation and judicial remedy in statute heavy jurisdictions such as Bangladesh, as well as the need for better awareness of rights afforded.

⁷ Jawad Golzar, Omid Tajik and Shagofah Noor, 'Convenience Sampling' (2022) 1 *IJELS* 72, DOI: 10.22034/ijels.2022.162981.

⁸ Tomiche, A. (2017). Lyotard's Differend: Radical and Unresolved Dispute, from the Political to the Literary. *Paragraph*, 40(1), 28–42. <https://www.jstor.org/stable/26418710>

3. Literature Review

Understanding WSH

In workplace history 'Sexual Harassment' (SH) is a relatively new term, with its recognition as an illegal workplace behavior only originating through Catharine MacKinnon, in the 1970's, and the US Equal Employment Opportunity Commission defining it in 1980⁹. WSH In Bangladesh it is newer still, as it was not addressed until the Labour Rules Amendment 2022, whereby Rule 361A¹⁰ was inserted specifically as an outgrowth of the BNWLA V Govt. of Bangladesh and Others, 2009 BLD 415¹¹ case law. For the purposes of this study, the term "corporate workplace" encompasses all companies, including enterprises and agencies, within both the public and private sectors, regardless of their size. This definition explicitly excludes industrial or factory-level work¹²—such as garments or other forms of 'blue-collar'¹³ labor—to concentrate the examination on the distinct challenges encountered by women employed in office settings within corporations, both local and international, in Bangladesh.

The definition of Sexual Harassment, used in the paper relies heavily on the ILO's Violence and harassment at work guide for Employers and extends to include harassment and violence such as sexual assault, rape, indecent exposure, stalking or obscene communication; unwelcome physical contact including patting, pinching, tickling, stroking, kissing, hugging, fondling, brushing up against, cornering, or inappropriate touching; asking intrusive questions about an employee's private life or body; making insulting comments or jokes about someone's gender identity or sexual orientation; repeated asking for dates despite being rebuffed; asking for sexual favours in exchange for jobs or promotion; sharing or displaying sexually explicit pictures, videos, screen savers or posters; sending sexually explicit email or text messages.¹⁴ Significant additions to the definition as per the case law include -

⁹ Joni Hersch, 'Sexual harassment in the workplace' (2015) IZA World of Labor 188, <https://wol.iza.org/articles/sexual-harassment-in-workplace/long>.

¹⁰ Bangladesh Labour Rules 2015, Rule 361A (amended 2022).

¹¹ BNWLA vs. Government of Bangladesh and others, 29 (2009) BLD (HCD) 415

¹² Smith, P. et al., "Workplace Environment and Employee Wellbeing: A review of studies on corporate vs industrial workspaces." 24 (3) (2019), *Journal of Occupational Health Psychology*, pp. 299-308.

¹³ "BLUE-COLLAR | English meaning", (Cambridge Dictionary, n.d.), available at: <<https://dictionary.cambridge.org/dictionary/english/blue-collar>> (Last visited on May 15, 2024).

¹⁴ Tang, M.T., Violence and harassment at work: a practical guide for employers, International Labour Organization (ILO), 2022, pp. 12-14, available at: <<https://www.ilo.org/publications/violence-and-harassment-work-practical-guide-employers>> (Last visited on May 15, 2024).

unwelcome sexually determined behavior (direct or indirect), insults, capturing of photo's videos with the intent of character assassination or blackmail, love proposals, attempt to establish sexual relationship through intimidation, deception or false assurance.

The Need to Address WSH

The Joint General Secretary of the Bangladesh Trade Union Centre has emphasized that failure to ensure harassment-free workplaces could lead to loss of female workers¹⁵. Much like Ragnar Nurkes' Vicious circle of poverty – female empowerment in corporations is also contingent upon various factors such as their ability to remain in the workforce¹⁶, their capacity to perform¹⁷ their roles effectively, and the recognition of their work irrespective of their performance¹⁸.

¹⁵ 'Preventing discrimination and harassment of women at workplace' *The Daily Star* (Dhaka, 15 March 2020) <https://www.thedailystar.net/round-tables/news/preventing-discrimination-and-harassment-women-workplace-1877581> accessed [Last visited on May 15, 2024]

¹⁶ Gutek, B.A., *Sex and the Workplace*, 1985. cited in O'Connell, C.E. and Korabik, K., "Sexual harassment: The relationship of personal vulnerability, work context, perpetrator status, and type of harassment to outcomes", 56 (3) (2000) *Journal of Vocational Behavior*, pp. 299–329, available at: <<https://doi.org/10.1006/jvbe.1999.1717>> (Last visited on May 12, 2024); McLaughlin, H. et al., "The Economic and Career Effects of Sexual Harassment on Working Women", 31 (3) (2017) *Gender & Society*, pp. 333–358, available at: <<https://doi.org/10.1177/0891243217704631>> (Last visited on May 12, 2024).

¹⁷ Fitzgerald, L.F. et al., "The antecedents and consequences of sexual harassment in organizations: An integrated model.", in Keita, G.P. and Hurrell Jr., J.J. (eds), *Job Stress in a Changing Workforce: Investigating Gender, Diversity, and Family Issues*, American Psychological Association, 1994, pp. 55–73, available at: <<https://doi.org/10.1037/10165-004>> (Last visited on May 12, 2024); Hanisch, K.A. et al., "The importance of individuals' repertoires of behaviors: The scientific appropriateness of studying multiple behaviors and general attitudes", 19 (5) (1998) *Journal of Organizational Behavior: The International Journal of Industrial, Occupational and Organizational Psychology and Behavior*, pp. 463–480, available at: <[https://doi.org/10.1002/\(SICI\)1099-1379\(199809\)19:5<463::AID-JOB3899>3.0.CO;2-5](https://doi.org/10.1002/(SICI)1099-1379(199809)19:5<463::AID-JOB3899>3.0.CO;2-5)> (Last visited on May 12, 2024); Willness, C.R. et al., "A meta-analysis of the antecedents and consequences of workplace sexual harassment", 60 (1) (2007) *Personnel Psychology*, pp. 127–162, available at: <<https://doi.org/10.1111/j.1744-6570.2007.00067.x>> (Last visited on May 12, 2024); Chan, D.K.S. et al., "Examining the job-related, psychological, and physical outcomes of workplace sexual harassment: A meta-analytic review", 32 (4) (2008) *Psychology of Women Quarterly*, pp. 362–376, available at: <<https://doi.org/10.1111/j.1471-6402.2008.00451.x>> (Last visited on May 12, 2024); Merkin, R.S., "The impact of sexual harassment on turnover intentions, absenteeism, and job satisfaction: Findings from Argentina, Brazil, and Chile" 10 (2) (2008) *Journal of International Women's Studies*, pp. 73–91, available at: <<https://vc.bridgew.edu/jiws/vol10/iss2/7/>> (Last visited on May 12, 2024); Merkin, R.S. and Shah, M.K., "The impact of sexual harassment on job satisfaction, turnover intentions, and absenteeism: Findings from Pakistan compared to the United States", 3 (1) (2014)

In 2022, statistics from Ain o Salish Kendra highlighted Bangladesh's situation, noting 936 reported cases of rape, and 161 incidents of SH¹⁹. While the Bangladesh Mahila Parishad for the same year spotlighted the same reporting 715 rapes, 226 instances of gang rape, and 163 cases of SH²⁰. The period from January to April 2024 alone saw 152 rapes reported, including 39 gang rapes, 36 attempted rapes, six murders post-rape, and one resultant suicide²¹. Despite, the COVID-19 pandemic further compounding these issues²²SH remains significantly underreported, due to consequent fears such as job loss²³. While the role of law and legal repercussions is to act as deterrents²⁴, the existing laws and safeguards are clearly insufficient²⁵. There is a seemingly cultural factor at play here as well, traditionally in Bangladesh, women

SpringerPlus, pp. 1-13, available at: <<https://doi.org/10.1186/2193-1801-3-215>> (Last visited on May 12, 2024).

- ¹⁸ Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, Australian Human Rights Commission, 2018, at p. 74, available at: <<https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>> (Last visited on May 12, 2024).
- ¹⁹ Akhter, S., "Violence against women goes unabated in Bangladesh", *New Age*, March 07, 2023, available at: <<https://www.newagebd.net/article/196167/violence-against-women-goes-unabated-in-bangladesh>> (Last visited on May 04, 2024).
- ²⁰ Ibid 11.
- ²¹ Ain o Salish Kendra (ASK), "Violence Against Women -Rape Jan-Apr 2024" (Ain o Salish Kendra(ASK), May 07, 2024), available at: <<https://www.askbd.org/ask/2024/05/07/violence-against-women-rape-jan-apr-2024/>> (Last visited on May 10, 2024).
- ²² Tithila, K.K., "Bangladesh: A majority of women workers subjected to sexual harassment during COVID-19, national survey finds" (Business & Human Rights Resource Centre, August 29, 2020), available at: <<https://www.business-humanrights.org/en/latest-news/bangladesh-a-majority-of-women-are-subjected-to-sexual-harassment-in-the-workplace-during-covid-19-national-survey-finds/>> (Last visited on May 05, 2024); Barrett K and Farahany N, 'Sexual Harassment and the Pandemic' (Justice at Work, 2023) <<https://www.justiceatwork.com/sexual-harassment-and-the-pandemic/>> accessed 13 January 2025; K.G. Bevilacqua, 'Sexual harassment before and during the COVID-19 pandemic among adolescent girls and young women (AGYW) in Nairobi, Kenya: a cross-sectional study' (PMC, 2024) <<https://pmc.ncbi.nlm.nih.gov/articles/PMC9577274/>> accessed 13 January 2025.
- ²³ Farhin, N., "Workplace sexual harassment remains unreported, ignored", *Dhaka Tribune*, May 21, 2018, available at: <<https://www.dhakatribune.com/bangladesh/bangladesh-others/146066/workplace-sexual-harassment-remains-unreported>> (Last visited on May 05, 2024).
- ²⁴ Robinson PH and Darley JM, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 Georgetown LJ 957, 960.
- ²⁵ Aurin S and others, 'Nudging bystanders to combat sexual harassment in Bangladesh' (The Behavioural Insights Team, 2021) <<https://www.bi.team/publications/nudging-bystanders-to-combat-sexual-harassment-in-bangladesh/>> accessed 10 May 2024.

in the workplace were usually either very poor or without a male breadwinner²⁶ – which can translate into a type of vulnerability that encourages such behavior.

Till date, Bangladesh's labour force exhibits stark gender imbalance, with 80.2% participation among men compared to only 37% among women, with females only accounting for 9% of senior and middle management²⁷. Given Bangladesh's higher female population, this disparity complicates²⁸ economic progress. Dr. Siddiqi noted that women often hold positions characterized by job insecurity, low pay, poor working conditions, low status, and minimal bargaining power²⁹. These observations closely align with the findings of the *British American Tobacco Bangladesh Company Ltd v. Begum Shamsun Nahar* case³⁰, reinforcing the urgent need to address WSH, especially when reporting harassment frequently results in adverse consequences for victims.

Beyond moral imperatives, tackling WSH is essential for fulfilling the fifth United Nations Sustainable Development Goal (UN SDG), which focuses on gender equality and empowering women and girls. Achieving this goal highlights the significance of addressing WSH in Corporate Bangladesh, as it influences not only human rights and societal issues but also offers economic benefits³¹. Current studies demonstrate that policies promoting female education contribute to empowerment and subsequent economic growth³². As Bangladesh aims to attain upper middle-income

²⁶ James Heintz, Naila Kabeer and Simeen Mahmud, 'Cultural norms, economic incentives and women's labour market behaviour: empirical insights from Bangladesh' (2018) 46(2) Oxford Development Studies 266-289.

²⁷ "Bangladesh", (The World Bank Gender Data Portal, n.d.), available at: <<https://genderdata.worldbank.org/en/economies/bangladesh>> (Last visited on May 12, 2024).

²⁸ Billah, M.M. and Uddin, A.K.M.R., "Workplace Environment for Women: Issues of Harassment and Need for Interventions", Centre for Policy Dialogue (CPD), CPD Dialogue Report No. 65, 2004, available at: <https://www.cpd.org.bd/pub_attach/DR-65.pdf> (Last visited on May 12, 2024).

²⁹ Ibid

³⁰ British American Tobacco Bangladesh (BATB) Company Ltd vs. Begum Shamsun Nahar, 66 (2014) DLR (AD) 80.

³¹ Pervaiz, Z. et al., "Is gender equality conducive to economic growth of developing countries?", 9 (2) (2023), *Cogent Social Sciences*, pp. 1-16, available at: <<https://doi.org/10.1080/23311886.2023.2243713>> (Last visited on May 15, 2024); Sahay, R. et al., "IMF Strategy Toward Mainstreaming Gender", Policy Paper No. 2022/037, International Monetary Fund (IMF), 2022, available at: <https://www.imf.org/en/Publications/Policy-Papers/Issues/2022/07/28/IMF-Strategy-Toward-Mainstreaming-Gender-521344?utm_medium=email&utm_source=govdelivery> (Last visited on May 15, 2024);

³² Esther Duflo, 'Women's Empowerment and Economic Development' (NBER Working Paper No 17702, December 2011) <<http://www.nber.org/papers/w17702>> accessed [Last visited on January 14, 2025]; Farhin, N., "Workplace sexual harassment remains unreported, ignored", *Dhaka Tribune*, May 21, 2018, available at: <<https://www.dhakatribune.com/bangladesh/bangladesh-others/146066/workplace-sexual-harassment-remains-unreported>> (Last visited on May 05, 2024).

status by 2031³³, it cannot afford to overlook these ideals if it intends to meet its development targets.

Distinguishing WSH in Garments Versus Corporate Offices

The notion of WSH varies in between Garments³⁴ and Corporate Offices, due to 3 major reasons. Firstly, the manner in which WSH would occur in Corporate Offices may differ, including emotional and psychological harassment, such as manipulation or isolation tactics, which are not covered in the defined scope³⁵. There is also a façade of addressing the same issues, but gaps in clearly established outcomes, in the context of Rule 361A itself, the SH Committee defined in Rule 361A(2) is not set to act as a replacement of statutory inquiry committee and there is no avenue for a direct dismissal order for misconduct as the same may be susceptible to challenge in labour court under the question of law whether the HC decision can override mandatory statutory procedure prescribed in BLA. Thirdly, even in companies that wish to maintain robust WSH guidelines, to do so they would have to embed the same as part of Service Rules, which would have to be approved by the DIFE. Such requirements engender a challenging process due to governmental hurdles and corruption, deterring companies from yearly compliance.

The Theory of Differend and it's Contextualization in WSH in Bangladesh

The concept of *differend*³⁶, as articulated by Jean-François Lyotard, is instrumental in understanding conflicts that arise from incomprehensible and irreconcilable differences. Disputes as per Lyotard fall either into the category of *differend* or *litigation*, however, while a litigation can be settled with a rule of judgement common to all disputed parties, a *differend* means there is no equitable resolution. Rather it is an instance where a victim suffers a wrong, that is not recognized due to the absence of a suitable discourse within which it can be expressed³⁷. The Lyotard addresses the injustices arising from these impasses, emphasizing the importance of

³³ "Bangladesh Overview: Development news, research, data", (The World Bank, April 11, 2024), available at: <<https://www.worldbank.org/en/country/bangladesh/overview>> (Last visited on May 15, 2024).

³⁴ Dina Siddiqi, 'Do Bangladeshi Factory Workers Need Saving? Sisterhood in the Post-Sweatshop Era' (2009) 91 Feminist Review 154.

³⁵ Sadia Tangem, 'The Effect of Workplace Bullying and Sexual Harassment on Counterproductive Workplace Behavior: A Study on Bangladeshi Private Banks' (2017) 14(5) International Journal of Business, Economics and Law.

³⁶ Jean-François Lyotard, *The Differend: Phrases in Dispute* (University of Minnesota Press, 1988).

³⁷ Prof. Dr. Areej Al-Khafaji, 'Jean-François Lyotard's Différand: Ethics in Political Disputes' (2024) 27(Special Issue) Al-Qadisiyah Journal For Humanities Sciences 91 <http://qu.edu.iq/journalart/index.php/QJHS> accessed [Last visited on January 14, 2025].

acknowledging and addressing such disputes to achieve justice, and famously used Auschwitz³⁸ as an example to illustrate this concept of *differend*.

Lyotard's Theory of Differend, a critical postmodern framework, examines situations where the rules governing discourse systematically disadvantage certain voices. In the context of WSH and highlights the inability of victims to articulate their grievances within existing corporate and legal systems, which often prioritize institutional interests. This theoretical lens underscores the urgency of reforms to empower victims, ensure their narratives are recognized, and dismantle barriers to justice. In Bangladesh, WSH constitutes a *differend* within the corporate sector due to the lack of effective legal frameworks and cultural norms that discourage victims from reporting incidents. The prevailing laws, primarily focus on broader categories of violence and harassment without specifically addressing the nuances of corporate workplace dynamics, contributing to a legal inadequacy that mirrors Lyotard's example of Auschwitz, where the existing linguistic and legal systems failed to recognize and validate the victims' experiences due to an absence of a suitable discourse. Similarly, women in corporate Bangladesh often find their grievances dismissed or trivialized, lacking a supportive and understanding mechanism within the current legal framework which leads to them facing a *differend* where their suffering is not acknowledged or addressed effectively, perpetuating cycles of silence and inaction.

Lyotard's emphasis on acknowledging, bearing witness and addressing these linguistic impasses is particularly relevant here, as it is through such, that we hope to urge policymakers and corporate leaders to develop new discourses and legal mechanisms that can capture and validate the lived experiences of women facing WSH. Recognizing WSH as a *differend* is the first step in calling for comprehensive legal reforms and cultural shifts that prioritize victims' voices and experiences, ensuring justice is not only pursued but also perceived as attainable.

This study thus seeks to illuminate the gaps in legal recognition and protection, while advocating for reforms that align with international standards and better reflect the lived realities of women in Bangladesh's corporate sector so as to underscore the need to create a framework capable of addressing these significant gaps in justice. Such an approach is crucial for fostering an equitable and safe working environment that empowers women and supports socio-economic development.

³⁸ *ibid.*

4. Identification of Standing Inadequacies in the Law

Bangladesh has no standalone, comprehensive law specifically addressing WSH. This lack of specificity can and has led to ambiguities in enforcement and protection, while creating an environment where victims' experiences are not adequately addressed or recognized. This legal void represents a *differend*, where the failure to adapt legal systems to contemporary challenges leaves victims without recourse. Legal proceedings in SH cases cause delays, dissuading victims from pursuing justice. Subsequent lack of legal recourse, by way of specialized courts or fast-track mechanisms, is currently exacerbating the problem.

Additionally, precedents set by High Court directives and rules, and implementation of fragmented laws for WSH has been inconsistent, particularly in smaller workplaces and educational institutions. Cases like *Advocate Salahuddin Dolon v. Bangladesh* exemplifies the significant gap between the issuance of directives and practical enforcement, which also contributes to a *differend*, as victims face barriers to justice due to systemic inefficiencies and lack of alignment with international standards.

The following table illustrates the major international and national legislative instruments and judgements that govern the issue of WSH in Bangladesh and was developed to give a birds-eye-view of the available legal avenues to the reader. A lack of industry specific guidelines is noted, however while theoretically the lack of specified laws could be addressed by ensuring SH Guidelines by the companies, the process of doing so has been connected with Service Rule approvals from the DIFE, an institution known famously for their harassment of Chief Advisor Yunus and has been connected with rampant corruption in the guise of license approvals.³⁹

Law/ Policy	Description	Relevant Case/Notes
International Legal Instrument		
International Covenant on Civil and Political Rights (ICCPR)	Ratified by Bangladesh in September 2000 and effective from December 2000, it provides protections for freedom of opinion and expression under Article 19, with lawful restrictions for national security and public order	Case: H. M. Ershad v. Bangladesh (2001 BLD (AD)69) affirmed the need for national courts to consider international obligations
Universal Declaration of Human Rights (UDHR)	Not legally binding but serves as a human rights cornerstone. Articles relevant to WSH include Article 2	Provides foundational principles that influence national policies and laws regarding human rights,

³⁹ 'DIFE official arrested for taking bribes' The Business Standard (Dhaka, 25 May 2022) <https://www.tbsnews.net/bangladesh/dife-official-arrested-taking-bribes-426734> accessed [15 January 2025]; International Labour Organization, 'Labour Inspection Governance in Bangladesh' (April 2020) accessed [15 January 2025].

	(non-discrimination), Article 3 (right to life, liberty, security), Article 5 (prohibition of torture and inhumane treatment).	including workplace harassment.
Constitution of Bangladesh	Offers protections against sexual harassment: Section 26 (void laws inconsistent with rights), Section 28 (non-discrimination), Section 29 (Equal Employment Opportunity), Section 31 (Legal protection), Section 32 (Right to life and liberty).	Acts as the supreme law of Bangladesh ensuring fundamental rights that can challenge laws and acts that are inconsistent with these rights
National Law/Policy/Legislation		
Penal Code 1860	Addresses sexual harassment and assault: Section 509 (insult to modesty), Section 375 (rape), Section 354 (assault to outrage modesty)	Provides legal grounds for prosecuting acts of sexual harassment and assault, although updates similar to India's post Delhi case are not yet incorporated
Dhaka Metropolitan Police Ordinance, 1976	Section 76 criminalizes indecent exposure and harassment in public places with provisions for imprisonment or fines	Enforces public decency and curbs harassment in public spaces extending protections to women against public indecency
Women and Children Repression Prevention Act 2000	Section 10 targets violence and harassment against women and children, providing protective legal framework and penalties	Strengthens legal measures specifically protect to protect women and children from harassment and violence enhancing judicial responses to these crimes
Labour Rules 2015 [2022 Amendment]	New Rule 361A prohibits sexual harassment and outlines indecent conduct, mandates complaint committees and requires sexual harassment prevention guidelines for employees.	Establishes clear workplace standards against harassment and sets procedural measures such as complaint committees, contributing to a safer work environment
Sexual Harassment in Corporate and Educational Settings	Landmark case BATB v. Begum Shamsun Nahar exemplifies corporate harassment and Advocate Salauddin Dolon v Bangladesh led to directives for complaint committees in workplaces and educational institutions.	These directives aimed to institutionalize the handling of harassment complaints, though implementation varies across institutions, policies can be customized by organization subject to Labour Act 2006 approval

Table 4.1: Overview of Existing Laws, Case Laws and Policies in Bangladesh concerning WSH

While the existing laws and guidelines [Table 4.1], focuses on punitive measures post incident rather than proactive prevention measures, said punitive measures are not harsh enough to ensure corporate deterrence. In a case similar to the *BATB v. Begum Shamsun Nahar*, a payout was reached of about \$200,000, for context in 2016, a year before this judgement a very similar case centered around 21st Century Fox

resulting in a \$20 Million payout⁴⁰. Not only is there a gap in the punitive punishment, but also in awareness of rights. Approximately 58% of the workforce, as per our survey, remain unaware of their rights and the mechanisms available to address WSH. This lack of awareness is a critical barrier to the effectiveness of existing laws, additionally we can see societal norms and cultural barriers⁴¹ also effectively discourage women from reporting incidents of WSH, while fear of stigma, retaliation, and damage to reputation further complicate the reporting process.

A stark example of the ineffective nature of court given directives, are seen in the *Nurul Haque Sarder case*. Here the court dealt with an instance where a monthly pay order or MPO of an Assistant Teacher, and subsequent Headmaster of Shijarpur G.G. Maddhayamik Biddalaya was stopped after he was removed from the post of Headmaster, vide a memo from the school inspector (SI) on 13.07.2016 on the basis of an anonymous complaint filed to Bangladesh Mahila Parishod, bearing allegations of SH, for which the SI of the relevant locality had requested the Upazila Nirbahi Officer to investigate and for which a inquiry report was submitted. At one point the Court then took issue with the 3 year time delay from order issuance and the filing of the Writ, further taking into account the Manpower Structure of Private Educational Institutions (Schools and Colleges) and M.P.O. Policy-2021 noting that in Regulation 18 where the authority of stopping of MPO is concerned any form of cancellation, curtailment, withdrawal or stoppage is limited to instances of furnishing of false information, recruitment of illegal teachers, display of fake branch/false studentship, malpractice in public examination and where the decision of the Appeal and Arbitration Committee of Secondary and Higher Education, Ministry of Education/ Department/Board has not complied. WSH, or any form of sexual harassment does not directly fall within this ambit. This lack of comprehensive detailing in regard to WSH, therefore fails to empower complaint committees, and coupled with the lack proper training, and workplace hierarchies, contributes to the failure to provide an effective remedy to victims.

Furthermore, the efficacy of even existing precedent is oftentimes found to be in question. The Court in the *BATB Case*, clearly laid down the precedent of tortious liability and claim for damages for wrongdoing against both perpetrator and organization to ensure the prevention of SH and bullying of women, and yet unlike in jurisdictions such as America, where the *U.S. Equal Employment Opportunity*

⁴⁰ '21st Century Fox to Gretchen Carlson: We're sorry -- here's \$20M' CBS News (New York, 6 September 2016) <https://www.cbsnews.com/news/21st-century-fox-settles-gretchen-carlson-sexual-harassment/> accessed [15 January 2025].

⁴¹ Abdul Kalam, 'Social Norms and Impediments of Women Development in Bangladesh' (2014) 2 Int'l J Soc Sci Stud 100.

Commission, enables victims of SH to hold abusers and culpable employers responsible to the tune of billions of dollars, the financial recompense is limited.

Challenges of technical alignment of the new Rule 361A with the processing of misconduct or dismissal aside, even penalties prescribed under the Penal Code and other laws are also at times insufficient to deter offences. Particularly as per the law, Penal punishment is only attributable, alongside disciplinary proceedings, upon case closure, with the judgement issued. Not only are the enforcement mechanisms weak, but they are also hard to trigger, which leads to a culture of impunity.

5. Survey Findings

Lack of Trust in Reporting

The Respondent-Victim as per the survey has consistently showcased variations of lack of trust, but such is generally geared to the company, or peers. They also showcase lack of trust in the company's ability and willingness to address wrongs, versus personal preference or bias, which translates over into their fear for job loss and associated social stigma. Victim-Respondents also display a lack of trust in the pre-established system, with many victims not trusting the existing complaint mechanisms due to past experiences or examples of inaction or poor handling of complaints, and conversely taking on immense psychological stress, impacting their professional and personal lives coupled together with the fear of retaliation, this lack of trust can be crippling for victims or potential victims. The inconsistent support from workplace mechanisms and societal attitudes can lead to feelings of isolation and helplessness.

In terms of demography, the respondent behavior is consistent with how age-groups interact with the concept of trust. The incidence of WSH was notably higher among the older age groups, possible due to vulnerability associated with higher levels of trust, but so was the reporting tendency, showcasing higher levels of trust specifically, 48% of individuals in the 25-34 age group, 67% in the 35-44 age group, and 50% in the 45-54 age group reported experiencing WSH. In stark contrast, only 17% of respondents in the 18-24 age group reported such experiences. Given that survey data has also shown that WSH exposure correlates with increasing years of experience, it also gives rise to the question of whether or not familiarity has an impact on the exposure to WSH, given that 56% of the respondents with 0-2 reported not experiencing WSH.

Awareness v Comprehension

Among those who experienced WSH, a significant proportion, approximately 53%, did not report the incidents to their employers or authorities. For those who WSH

exposure was varied with verbal harassment, accounting for approximately 74% of cases while visual harassment and online harassment were indicated by a collective 16% (approximately) of respondents, and physical harassment was reported by approximately 11%.

The predominant reasons for not reporting include fear of retaliation, lack of trust in the reporting system, or the belief that no action would be taken. For those individuals who did report the harassment, the responses from employers varied considerably. Some employers took immediate action or conducted thorough investigations, reflecting a proactive approach. Conversely, other employers dismissed the complaints or took no action, and in some instances, this inaction led to retaliation against the complainant. It is clear however that there is a lack of trust on part of the employee in relation to the employer. Notably, 55.5% of those who reported the harassment stated that they feel safe in their workplaces. This suggests that the act of reporting, and possibly the responses received, positively impact the perceived safety of employees within their work environments.

Furthermore, while 52% report awareness only 67% of those aware, indicate above-average comprehension, the fact that a smaller percentage comprehend these effectively enough to navigate the system is a sign of a disconnect between legal frameworks and lived realities. This gap can be seen as a *differend*, where legal language and systems fail to encompass or validate victims' narratives fully. Additionally, Respondents who were both aware of the WSH laws and had experienced harassment, only 61.5% reported the incidents. The predominant reasons cited for not reporting included fear of retaliation, lack of trust in the reporting mechanisms, and concerns regarding privacy. This data suggests that, despite a high level of awareness and understanding of WSH laws, significant barriers to reporting remain pervasive.

This is further supported by responses to personal experience where 54% allege indirect experiences, highlighting this double bind even further are the comments from victims, who at times describe clear acts of SH at the workplace and then feel the need to clarify that they aren't sure that what they faced fits in with the designated definitions, indicating in turn that existence of these legal frameworks does not equate to their effective application, underscoring a critical need for reforms that align legal discourse with the lived realities of those affected, as articulated by feminist legal theory as well as victim-survivor centered theories of listening so as to both embed this understanding and ensure policies are both actionable and empowering.

Impact of Workplace Policies

Similar disconnects exist with the notion of impact, with 70% saying they feel safe in their current workplaces, but only 26.6% saying that they were not professionally impacted by WSH. Furthermore, approximately 64.4% of respondents rated their workplace policies as effective or very effective. However, among these respondents, 44% reported experiencing some negative impact on their professional life due to WSH. This indicates that, despite perceptions of effective policies, the professional impact reported by respondents suggests that current frameworks do not adequately prevent or address WSH, highlighting inadequacies in the legal and corporate discourse—a classic instance of a *differend*.

5. Proposed Legal Reforms and Final Thoughts on Workplace Sexual Harassment in Bangladesh

While Lyotard in his work never proposed a solution to the *differend*, he has offered a framework. Given the clear *differend* in context of addressing WSH in Bangladesh, this study proposes the same.

We begin by acknowledging and bearing witness the *differend* in question, then as per the survey findings, we showcase a disconnect in the lack of trust in reporting, awareness and comprehension and the impact of the workplace policies. In terms of the legal inadequacies, absence of specific legislation and inconsistent enforcement and precedents stood out.

In the spirit of creating a new discourse we then recommend the development of new frameworks that can accommodate and express the grievances of those involved in a *differend*, in this instance envisioned as comprehensive legal reforms, including the establishment of a Codified Act or specific Ordinance focused exclusively on WSH, that would be integrated with instances of female abuse and adjudicated in *Nari o Shishu Nirjaton Ain* Tribunals to ensure expedited and stringent application of laws. These tribunals could also lead in setting precedents for exemplary compensation clauses and assigning vicarious liability to corporations involved in harassment cases. Additionally, civil liabilities should incorporate income-based fines, similar to practices in Finland⁴², to enhance accountability.

⁴² 'What you pay is what you got: The thing about Finland's pioneering income-based fines' The Economic Times (India, 2023) <https://economictimes.indiatimes.com/opinion/et-commentary/what-you-pay-is-what-you-got-the-thing-about-finlands-pioneering-income-based-fines/articleshow/113466964.cms> accessed 15 January 2025; Alec Schierenbeck, 'The Constitutionality of Income-Based Fines' (2023) 85(8) University of Chicago Law Review accessed 15 January 2025.

6. Conclusion

Despite advancements in laws and protective guidelines, significant challenges persist, including the complexity of microaggressions, the limitations of current legal frameworks that emphasize overt offenses, and the inadequacies of ILO or global regulations unsuitable for local contexts. Cultural and social barriers, coupled with inconsistent enforcement and low awareness, further hinder the creation of safe, equitable workplaces.

Addressing WSH goes beyond moral and human rights imperatives; it is vital for Bangladesh's socioeconomic progress. Empowering women by safeguarding their rights boosts productivity and economic growth. Future research should explore the impact of recommended solutions, such as stringent HR policies, awareness and response training, and character verifications akin to a Sex Abuser Register. These measures are crucial for fostering an environment where WSH is effectively managed and mitigated.

7. Appendices - Survey Questionnaire

Survey Questionnaire: Experiences and Perceptions of Workplace Sexual Harassment in Bangladesh

Section 1: Demographic Information

1. Email Address:
2. Your Age Group:
 - 18-24
 - 25-34
 - 35-44
 - 45-54
 - 55+
3. Which industry are you a part of?
 - Finance
 - Healthcare
 - Information Technology
 - Manufacturing
 - Education
 - Retail
 - Other: _____

4. Your Position Level:

- Entry Level
- Mid Level
- Senior Level
- Management
- Executive

5. Years of Experience you possess:

- 0-2 years
- 3-5 years
- 6-10 years
- 11-15 years
- 16+ years

Section 2: Awareness and Understanding

6. Are you aware of any laws or policies that address Workplace Sexual Harassment in Bangladesh?

- Yes, how did you learn about these laws or policies? [Open-ended Response]
- No

7. How would you rate your understanding of the existing Workplace Sexual Harassment laws and policies?

- Very Good
- Good
- Average
- Poor
- Very Poor

Section 3: Personal Experiences

8. Have you ever experienced sexual harassment at your workplace?

- Yes
- No

9. If yes, how frequently have you experienced WSH in your current workplace?
- Once
 - Occasionally
 - Frequently
 - Constantly
10. What type of Workplace Sexual Harassment have you experienced? (Select all that apply)
- Verbal harassment (e.g., jokes, comments)
 - Physical harassment (e.g., unwelcome touching)
 - Visual harassment (e.g., inappropriate visuals)
 - Online harassment (e.g., emails, messages)
 - Other: _____

Section 4: Reporting and Response

11. Did you report the incident(s) to your employer or any authority?
- Yes
 - No
12. If no, why did you not report it? (Select all that apply)
- Fear of retaliation
 - Lack of trust in the reporting system
 - Belief that nothing would be done
 - Unawareness of how to report
 - Concern for privacy
 - Other: _____
13. If yes, how did your employer or the authority respond to your report? (Select all that apply)
- Took immediate action
 - Investigated thoroughly
 - Dismissed the complaint
 - Does not apply

14. How satisfied were you with the response and resolution of your complaint?

- Very Satisfied
- Satisfied
- Neutral
- Dissatisfied
- Very Dissatisfied

Section 5: Perception of Safety and Effectiveness

15. Do you feel safe and protected from Workplace Sexual Harassment in your current workplace?

- Yes
- No
- Unsure

16. In your opinion, how effective are your workplace's policies in preventing and addressing Workplace Sexual Harassment?

- Very Effective
- Effective
- Neutral
- Ineffective
- Very Ineffective

17. What impact has Workplace Sexual Harassment had on your professional life? (Select all that apply)

- Decreased job satisfaction
- Increased stress and anxiety
- Considered leaving the job
- Reduced productivity
- Felt empowered by the support received
- Other: _____

Section 6: Recommendations and Improvements

18. What improvements do you think are necessary for Workplace Sexual Harassment legislation and policies to be more effective? (Select all that apply)

- Better awareness programs
- Regular training sessions
- Stronger enforcement of laws

- Stronger enforcement of company policies
- Increased confidentiality and protection for complainants
- More supportive reporting mechanisms
- Other: _____

19. How seriously do you believe companies in Bangladesh take Workplace Sexual Harassment?

- Very Seriously
- Seriously
- Neutral
- Not Seriously
- Not Seriously at All

20. Any other comments or suggestions regarding Workplace Sexual Harassment in your workplace or in general?

- [Open-ended Response]

Restorative Justice in Bangladesh for the Victims of Sexual Offences

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Abstract: Sexual offences have a complex impact on victims, going beyond physical and financial harm to affect their reputation, morality, and psychological wellbeing. The traditional criminal justice system often underestimates these far-reaching consequences, focusing mainly on penalizing offenders without addressing emotional and social toll on victims. A purely punitive approach fails to heal the psychological trauma and stigma victim face, which can persist throughout their lives due to patriarchy and victim blaming culture. Restorative justice (RJ), a healing and reformatory justice model, offers transformative approach by empowering victims to communicate directly with offenders and express the impact of crime on their lives. This face to face interaction allows victims to confront their offenders and the community, facilitating their emotional healing. RJ highlights reparation of harm, accountability, and reintegration, making it an effective model for addressing sexual offences in Bangladesh. This paper argues that RJ conferencing can be a valuable model for empowering victims and ensuring a more comprehensive approach to sexual offence cases.

Keywords: Restorative Justice, Sexual Offence, Traditional Justice, Victim Empowerment, Trauma Healing, Bangladesh, Patriarchy, Victim Blaming, Reparation of Harm

1. Introduction

The emerged in the 1970s as an alternative approach to the traditional justice system, focusing on the rights of victims. Unlike the conventional criminal justice system, that emphasizes punishment, RJ views crimes as a violation of interpersonal relationships, requiring healing and repair. The RJ considers crime as violation of people and their interpersonal relationship and therefore, it emphasizes on restitution and creates an obligation to put things right. The victims have greater involvement in the RJ process where restitution is used as compensation for losses caused by the victims. The RJ gives the victims a voice to explain the real impacts of the offence done to them by the offenders and aims at ensuring accountability of the offenders, reparation to the victims, reducing the likelihood of future offences, reintegrating the offenders and victims to the society. Offence does not only cause injury to the victims it also affects

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the community. Even to some extent the offenders and their family often suffer injuries for the punishment awarded by the court. Therefore, RJ is a process of face-to-face dialogue among all the allies, i.e., the victim, the offender, and the community to repair injuries caused to each of them.

Sexual offences, due to their sensitive and traumatic nature, require a justice system that goes beyond punitive approach. The harm and scar caused by this offence affect the victim so deeply that makes her whole life traumatized. But the traditional justice system fails to address such effect on interpersonal relationship and troubled psychology and it cannot get the victims out of psychological breakdown. The victims of sexual offences often want to evade the traditional proceedings due to some sort of discomfort and fear. In fact, thanks to the sensitivity and horrific experience, often victims let sexual offences remain blurred and compromised in their life. For such crimes RJ considers the sensitivity of the victim, gives them a sense of empowerment offering a platform to tell their story, emotion and to seek answers from the perpetrator. The RJ is a pathway in helping the victims to deal with offenders in a more practical way to find the solution. Whereas, punishing offenders is often ineffective, RJ encourages to heal and put things right.⁴ RJ is designed not only to repair the harm but also to empower the victim and to insulate a sense of responsibility in the offender in order to regulate the repetition of offence. This paper focuses on the role of RJ in addressing sexual offences, advocating for its potential in Bangladesh to help victims reclaim their lives and contribute to the reform of offenders.

2. Functional Aspects and Approaches of Restorative Justice

RJ represents a collaborative justice process focusing on repairing harm through dialogue and collective action. It maintains collaboration between all stakeholders where victim and offender acceptingly face each other and discuss the incident from their own point of views. All of them get directly involved in responding to the offence and repairing the harm together for the betterment of themselves and society at large. Although no consensus has been made to date to define RJ,⁵ it is however basically regarded as a process that arranges a face-to-face dialogue for the stakeholders.⁶ RJ generally comprises two stages: storytelling and outcome discussion. The storytelling phase offers the members a scope to discuss “what

⁴ Zehr, H., *The Little Book of Restorative Justice* (New York 2002)

⁵ Daly, K., ‘What is restorative justice? Fresh answers to a vexed question’ (2016) 11(1) *Victims and Offenders* 9, Wood, W. R., & Suzuki, M., ‘Four challenges in the future of restorative justice’ (2016) 11(1) *Victims & Offenders* 149

⁶ *ibid*

happened and how the offence affected them.” The next phase, outcome discussion, leads the discussion into an advanced stage where “how to repair the harm caused by the offence” is discussed.⁷ RJ particularly emphasizes on “reparation, healing, rectification, rejuvenation, participation and most significantly forgiveness if it deems appropriate”.⁸ RJ in its process and operation involves stakeholders as many as possible who have direct or legitimate interest in the offence so committed.⁹ It encourages the participants (victim, offender and affected members of the community) to collectively address harm, needs and obligations, in order to heal and restore things to the extent possible and to get actively involved in responding to the offence.¹⁰ It is an unconventional method of justice because it observes justice as a healing process with an aim to mend the harm happened or revealed by criminal behavior.

The core concept of RJ is founded on the three central pillars and they are; harms and needs, obligations, and engagement.¹¹ The central focus of the RJ program is to make justice more healing, more reformatory and more satisfactory where the decisions are actually made by those who are significantly affected by the offence.¹² The aim of RJ is bipartite: firstly, it takes into account the needs of victims and makes them feel empowered and secondly, it motivates the offender with a sense of responsibility to repair the harm and not to repeat the offence. Hence, this justice system aims to bring transformative changes to the lives of both victim and offender. To that end, it is required that the stakeholders should attend and be sincerely involved in the RJ process, the offenders take responsibility to put things right by understanding the effects of their actions against the victims. RJ carries the responsibility to empower the victim and support the offender to reintegrate them in the community as a healed individual. Putting things right does not require addressing harm only but addressing causes for offences as well. In RJ, it is the obligation on the part of the offenders to address the causing factors of their own actions which usually cannot be done alone without the help of the community. Even though, when crime is committed against an individual, RJ considers crime committed against the state and that is why the state stands beside the victim.

⁷ Daly, K., & Hayes, H., ‘Restorative justice and conferencing in Australia’ (2001) 186 Trends and Issues in Crime and Criminal Justice 1

⁸ Pavlich, G. C., *Governing paradoxes of restorative justice* (London 2005)

⁹ Zehr, H. n(4)

¹⁰ Zehr, H., and Mika, H., ‘Fundamental Concepts of Restorative Justice’, 1 (1997) 1 Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice 47

¹¹ Zehr, H. n(4)

¹² Sharpe, S., *Restorative Justice: A vision for Healing and Change*, (Edmonton Victim Offender Mediation Society 1998)

Overall, RJ affords to address the needs of the victims, offenders and the community seriously and works on putting the things right.

2.1 Different Models of Restorative Justice and Its Operational System

Various RJ models offer different frameworks for victim-offender dialogue and harm repair. The RJ process follows different types of models namely "Victim-Offender Mediations (VOM)", "Family Group Conferences (FGC)", "Community Mediation", "Sentencing Circles", "Reconciliation Commissions", and "Informal Tribunals".¹³

Victim-offender mediation (VOM) was the very first model of RJ introduced in Ontario, Canada in 1974.¹⁴ This process is different from the traditional court system as the parties are not 'disputants' rather they are referred to as 'victim' and 'offender'. In this process, an impartial mediator assists the victim and offender either direct or indirect mediation.¹⁵ In direct mediation, preparing the parties is pivotal where the mediator holds at least one separate discussion with the victim and the offender to prepare the participants for the mediation and to inform them about the process and their role during the process. Then the participants are brought before a face-to-face encounter where a victim explains how he has been emotionally, physically and financially affected by the action of the offender and the offender explains to his side what he did and why. This is like a question-answer and story-telling session and when it ends, the mediator helps the parties to consider how to put things right. Though, direct mediation is considered as 'ideal', nonetheless indirect mediation is sometimes found appropriate as there are some victims who are unwilling to encounter the offenders directly but accept letters of apology, damages or some information via third parties.¹⁶ In this indirect mediation, the mediator needs to perform his responsibility as a messenger of presenting messages accurately and constructively. While implementing VOM, it is important to maintain the sensitivity and safety of the victim. The VOM tends to result in healing the victim, allowing the offenders to learn the consequences and their responsibilities, and supporting both victim and offender to develop a fair plan addressing a mutual solution.

¹³ Castella, K. D., Platow, M. J., Wenzel, M., Okimoto, T., & Feather, N. T., 'Retribution or restoration? Anglo-Australian's views towards domestic violence involving Muslim and Anglo-Australian victims and offenders' (2011) 17 (5) Psychology, Crime & Law 403

¹⁴ Suzuki, M., & Dr Hayes, H., 'Current Debates over Restorative Justice: Concept, Definition and Practice' (2016) 224 Prison Service Journal 7

¹⁵ Liebmann, M., *Restorative Justice: How It Works* (London 2007)

¹⁶ *ibid*

Family Group Conferencing (FGC) is defined as a legal process which brings together the families, and professionals in a family-led decision-making forum.¹⁷ It includes family members or other individuals whose presence is significant for the process because it intends to assist the offenders in recognizing their responsibilities and reforming their behavior.¹⁸ Thus, ensuring collective responsibility of the victim, offender, family members and supporters is the main focus of this model. This model differs from the traditional justice system because an independent coordinator aims to address and re-address the power imbalance between the professionals and families. In the procedure, the facilitator or coordinator prepares, and explains the process and provides sufficient information about one another to the victim and offender and invites them to the conference. They are also asked to select the members whom they want to be present and participate in the process in order to support them. Then the conference begins with the victim, offender, and chosen members by describing the whole incident and its impacts on their respective lives. After thorough discussion of the incident and its impact, it is asked to the victim about his or her desired outcomes from the FGC. In this stage, the family members may discuss in private the solution which will meet the needs of the victim and address any concerns that may have been raised, any other solutions and how to implement, monitor, and review the outcomes.¹⁹ Thus, with the help of all the participants, the obligation of the offender is identified and how the harm might be repaired is shaped. Finally, an agreement is signed between the parties clarifying the solution or outcomes of this process and responsibility of the offender.

Another model of RJ is Peace-Making Circle (PMC) which is more wide-ranging than any other model of RJ. It involves community members along with victims and offenders. Any member of the community may participate if he has an interest in this process. In this process, the issues in the community which ignite the scope of offence, the obligations and responsibility of the community to address the causes and consequences of offence and the support required for victim and offender from the community are addressed. This model is an upgraded variety of sanctioning and healing practices of aboriginal peoples in Canada and some parts of the U.S. Within the circles of this process, the victims, offenders, friends, families, social service personnel, and personnel from justice department express their feelings and opinion about the offence and this process continues until a resolution is reached. This process ensures the satisfaction of all the stakeholders. When the circle is for sentencing, a judge who is also a participant of the circle imposes a sentence against

¹⁷ *ibid*

¹⁸ Zehr, H. n(4)

¹⁹ Liebmann, M. n(15)

the offender by using the consensus reached in the circle²⁰ and within two successive circles if a consensus is not achieved, the matter goes back to the court which passes a sentence based on the discussion made, and information shared in the circles.

The RJ models may also be blended together in a single case. However, participation must be voluntary in every model which is ensured by a neutral facilitator or mediator. In the RJ process, having minimum knowledge of guilt or responsibility is a prerequisite because if the offender denies his responsibility, all of the efforts of RJ go in vain. The best outcomes of the RJ process may not be achieved if the victim or offender is forced or unwilling to join the process.

3. Restorative Choices for Victims of Sexual Violence Opposed to Criminal Justice System

Reportedly, victims of sexual violence often hesitate to seek redress through the traditional criminal justice system and resorting to RJ process is increasing in recent times. In Canada, only one in twenty (5%) of all sexual assaults is reported to police despite the fact that overall one in three (31%) victimizations is reported to police.²¹ In fact, as many as one in four victims of sexual assault are interested in RJ in Canada.²² In England and Wales, police referrals of serious sexual offences to the Crown Prosecution Service (CPS) decreased by 37% between 2015 to 2016 and 2019 to 2020.²³ After witnessing low rates of reporting sexual violence, the New Zealand Law Commission probed the issue and completed a report titled *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (2015).²⁴ It was proposed in the report that victims of sexual violence should have the option of an alternative process alongside criminal justice system where victims may wish to meet with a perpetrator to tell their story and seek redress (for example reparation, an apology or undertaking to complete a treatment programme).²⁵ The justification of this reform proposal applied to both victim and perpetrators where victims would achieve the sense of justice and perpetrators would achieve the sense of responsibility for their actions, to give redress of possible and to address the causes

²⁰ ibid

²¹ Perreault, Samuel *Criminal Victimization in Canada* (Ottawa: Statistics Canada 2015)

²² ibid

²³ George R and Ferguson S *Review into the Criminal Justice System: Response to Adult Rape and Serious Sexual Offences in England and Wales* (London: HM Government 2021)

²⁴ *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Wellington: New Zealand Law Commission 2015)

²⁵ *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Wellington: New Zealand Law Commission 2015) chapter 9

of their actions.²⁶ New Zealand introduces significant reform to their sentencing procedure which allows adjournments for RJ process in certain cases under the Sentencing Act of 2002.

3.1 Positive Impact of Restorative Justice Approach on Victims: Reported Case Studies

Joanne Nodding was one of the survivors of sexual violence in the UK who chose to meet face-to-face with her aggressor. Despite the conviction of the offender, she did not feel any ease, and therefore, for the next five years, she struggled to obtain permission to meet her attacker. A significant aspect of her persistence to confront the criminal was the judge's closing statements in court about how the criminal had devastated her life. Such comments made her feel entirely stripped of power and having 'lost autonomy' over her life. Joanne was determined not to let her attacker have control over her life, and this changed only after she participated in a restorative justice (RJ) meeting. During that process, the perpetrator made an apology, and in her turn, Joanne also forgave him. This is what she considers to be the most powerful in helping her achieve closure in such a circumstance; so that the two parties could finally to move forward.²⁷

In another case study, RJ was utilised after the police opted not to move farther than cautioning the defendant who admitted guilt. The victim, Lucy, was an adult who had survived childhood rape and sexual assault at the hands of a young male family member. Lucy was dissatisfied with the police approach to her case, believing that they had failed to keep her informed, and she did not accept their decision not to prosecute. Lucy believed that the restorative conference (held in North of England) had helped her put the past behind her and move forward with her life. She said that after the session, she was able to stop hating herself for what had happened and instead blamed the abuser. She proposed that having the offender explain why he had done it was a key part of the conference.²⁸

Project Restore²⁹, an incorporated society, emerged to address the frustrations of sexual violence survivors who sought justice through the conventional justice system. This project drew inspiration from RESTORE program in Arizona, USA, as well as the research conducted by Dr. Shirley Jülich and counselors from Auckland

²⁶ *ibid*

²⁷ Williams, Z., 'Restorative justice: Why I confronted the man who raped me', *The Guardian* (2011)

²⁸ McGlynn, C., Westmarland, N. and Godden, N., 'I just wanted him to hear me': Sexual violence and the possibilities of Restorative Justice (2012) 39(2) *Journal of Law and Society* 213

²⁹ Dr. Shirley Jülich Dr. John Buttle Christine Cummins Erin V. Freeborn, '*Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (AUT University: New Zealand 2010)

Sexual Abuse Help (ASAH), who have occasionally assisted victims to find justice through various alternative means including civil proceedings and facilitated face to face meeting.³⁰ In this initiative, RJ conferencing was presented as a substitute for traditional justice in instances of felony and misdemeanor sexual offenses. It is significant to highlight that all cases were referred by prosecutors. Throughout the project's duration, there were a total of 66 referrals, leading to 22 conferences, which accounted for 91% of the instances where both the victim and offender agreed to engage in the program.³¹ The majority of survivors believed that they had achieved a sense of justice through their involvement in the program, and notably, there was a decrease in post-traumatic stress symptoms from intake to post-conference.³²

4. Prospects of Restorative Justice in Bangladesh to Address Sexual Offence

Sexual offence is any sexual act or attempt to obtain a sexual act, unwanted sexual comments or otherwise directed by using force or coercion against a person's (children, teens, adults and elders) sexuality by any person irrespective of any relationship with the victim in any setting, including but not limited to home and work.³³ Sexual offence occurs when someone forces or manipulates another into unwanted sexual activities without his/her consent which may take in different form such as, harassment, rape, molestation, unwanted sexual touch, sexual assault, sexual exploitation etc.

4.1 Factors Instigating Sexual Offence in Bangladesh

Radical advancement of science, civilization and culture, the complexities of life etc. have enormously multiplied and created serious problems in life. As a result of these complexities, and modernization, offences have also increased. In the same way, countless reasons for sexual offence can be addressed. But it must be acknowledged that sexual offenders are influenced by some particular reasons which contribute to their behavioral disorder. Lack of family education, lack of sex education, degradation of moral values, broken family, bad parenting, mental conflict, patriarchy, victim blaming culture etc. are some of the emerging causes of sexual offence over which offenders usually have no control.

³⁰ Koss, M., 'The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes (2014) 29 (9) *Journal of Interpersonal Violence* 1623

³¹ *ibid*

³² *ibid*

³³ Etienne G. K., Linda L. D., James A. M., Anthony B. Z., and Rafael L., *World Report on Violence and Health* (WHO 2002) 149

Parents are now so much busy with their electronic gadgets and careless about the movements, and behavior of their children.³⁴ Children tend to imitate the behavior and activities of the elders that barely change even after growing up. They hardly get any access to family education and values. Broken family also affects the psychology of children leading them to be psychologically imbalanced towards perverted sexual desire. Besides that, families often place their pride and honor before the betterment of their child which gives wrong message to the children and contributes sexual violence. Bad parenting with little empathy towards children and domestic violence between parents negatively affects the children which increases the risk of sexual violence.³⁵

Sex education shapes one's behavior and guides what is right and what is wrong but it is still taboo in our country due to some misconceptions. Nevertheless, it is very essential tool to learn the biological, psychological, and sociological aspects of human beings³⁶ and it helps to reduce sexual violence. Young people with a curious mind are attracted towards the opposite sex and porn. Due to lack of sexual knowledge, they receive confusing and conflicting information about relationships and sex. These views are carried from childhood to adulthood and broaden the scope of sexual violence. Moral values are now degrading due to progressive modern civilization that has taken a dangerous turn causing great impacts on the lives of many. Children, youth, even elders lack moral values and standards that lead them from an ethical path to moral degradation.³⁷ Due to this moral degradation they tend to be offenders of social evils, lack of mutual respect, and sexual offence.

In patriarchal social order and male dominating power structure of Bangladesh, sexually intimidating behavior is often entertained and tolerated as usual social incidents. In fact, the patriarchal culture considers the lifestyle and dress of the victim instigative to the sexual violence. In today's world there is also a common tendency of victim-blaming. Conservative religious outlooks play a significant role for victim blaming. Religious superstition and bigotry often connect unveiled women (who do not cover their body and wear hijab) with sexual violence. It is presumed that women showing their body prelude the evil gaze of men and

³⁴ Haque, M., A., 'Eve Teasing in Bangladesh: Causes and Impact on Society, A Study from Islamic Perspective' (2016) 15 *The International Journal of Social Science* 4

³⁵ *ibid*

³⁶ Khan, J., J., "Why sex education is important, now more than ever", *The Daily Star*, March 12, 2021 available at: <<https://www.thedailystar.net/toggle/news/why-sex-education-important-now-more-ever-2059109>> (Last visited on March 27, 2023)

³⁷ Rahman, M., Younus, M., Uddin, M., 'Crisis of Morals and Values: A Bangladesh Perspective' (2018) 6 *International Journal of Social Science Studies* 26

negative incidents such as rape, illicit sex, sexual gesture etc.³⁸ In the sensational Banani rape case 2017, the two victims were victim-blamed because they attended a birthday party wearing 'western clothing' at late night.³⁹ There are many women who have been raped in spite of their full body being covered with clothes. For example, Sohagi Jahan Tonu, the second-year college student was raped and killed by 'unknown assailants' who used to wear hijab and still her character was put on trial by social media and some newspapers too.⁴⁰ Thus, it does not make any sense that sexual violence is occurred or permitted when they wear western clothes. In the victim blaming culture, the victim therefore ends up as the accused and sometimes it is presumed that the victim gives implied consent to the violence through her get up and approach.

Dr. Sigmund Freud (1923) explains criminal behavior in light of the functional deviations and mental conflicts in the personality of the individuals in his *Theory of Personality: Id, Ego, and Superego*. Freud explains that the sense of ego and superego within an individual makes him conscious that a strong personality satisfies his sexual desire in a virtuous manner and who fails to do so ultimately lowers his self-esteem as a human being.⁴¹ Therefore, it is the sense of self-consciousness (ego) and self-criticism (super-ego) which keeps every individual in the right track. However, those who lack such senses generally tend to indulge in the offence of sexual violence.⁴² For example, children who witness the abusive relationship between their parents also suffer severe mental breakdown or clinical depression. They do not know how to cope up with negative emotions, negative feelings but copy negative examples. Because of this adverse environment they try to oppress the powerless by means of sexually aggressive behavior that eventually provides a short term feeling of power and control over the victim.

RJ attempts to uproot the hidden behavioral anomalies and mental conflict of offenders which provoked them for sexual offences. RJ involves telling stories by the victims about what happened to them before the offender. The whole process is

³⁸ Hamid, H., 'Exploring Victim Blaming Attitudes in Cases of Rape and Sexual Violence: The Relationship with Patriarchy' (2021) 6 Malaysian Journal of Social Sciences and Humanities 273

³⁹ Huda, T., "How the Banani rape verdict exposes the rape culture in our courtrooms", *The Daily Star*, November 16 2021 available at: <<https://www.thedailystar.net/opinion/justice-practice/news/how-the-banani-rape-verdict-exposes-rape-culture-courtrooms-2230941>> (Last visited on April 18, 2023)

⁴⁰ Amin, A., "Victim blaming is a crime. Who are its abettors", *The Daily Star*, May 6, 2021, available at: <<https://www.thedailystar.net/opinion/no-strings-attached/news/victim-blaming-crime-who-are-its-abettors-2088893>> (Last visited on April 20, 2023)

⁴¹ Paranjape, N., *Criminology & Penology with Victimology* (Dhaka 1998)

⁴² *ibid*

therapeutic through which the offenders can have the knowledge of the effects of their actions and behaviors.

4.2 Consequences of Sexual Offence in the Society of Bangladesh

Sexual offence leaves a scar in the life of the victim. Victims of sexual abuse often know their perpetrator and being victimized by someone familiar can be more upsetting and disturbing than being victimized by a stranger.⁴³ Harm caused by sexual violence is more psychological than physical. It results in psychological trauma where women on the first hand, feel disgraced and victimized by herself, and on the other side, feel stigmatized by the society if they report what has been done to them.⁴⁴ It also causes serious physical, sociological, and mental health issues.

Depression is considered as an inevitable psychological effect of any kind of sexual offence.⁴⁵ Along with depression, some other common after-effects of sexual violence are Post-Traumatic Stress Disorder (PTSD) symptoms, along with difficulties, falling or staying asleep, nightmares, flashbacks, increased startle responses etc.⁴⁶ A woman who faces sexual violence frequently also thinks of committing suicide as she finds it almost impossible to share her mental trauma with anyone else, even with the close one. Numerous macabre incidents of sexual harassment along with the resultant suicide have been reported in *Bangladesh National Women Lawyers Association (BNWLA) v Government of Bangladesh*.⁴⁷ It was reported in the Daily Sangbad on 04.11.2010 that a youth named Shahriar had been teasing/stalking Iti (a Junior School Certificate candidate) for two years and by harassing made her lose mental balance.⁴⁸ In another report of the Daily JonoKontho on 14.12.2010, Shagor was in an affair with Choity and took her pornographic videos, threatening to upload them on the internet. Choity suffering mental trauma in fear of family reputation committed suicide.⁴⁹ In fact, many victims feel so traumatized that they never feel close to others.⁵⁰ Their silence for the sake of family and social prestige makes them helpless.

⁴³ Langton L and Truman JL, Socio-emotional Impact of Violence Crime, Bureau of Justice Statistics Special Report, U.S. Department of Justice Office (2014)

⁴⁴ Raquel Martí De Mejía v. Perú, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 at 157 (1996)

⁴⁵ Ullman SE and Peter-Hagen LC, 'Longitudinal Relationships of Social Reactions, PTSD, and Re victimization in Sexual Assault Survivors' (2016) 31 Journal of Interpersonal Violence 1074

⁴⁶ Jo-Anne Wemmers et al, 'Restoring Victims' Confidence: Victim-centred Restorative Practices' (2023) 29(3) International Review of Victimology 466

⁴⁷ 2011 BLD (HCD) 31

⁴⁸ 2011 BLD (HCD) 31, para 5

⁴⁹ ibid

⁵⁰ Nancy, M., Shields and Christine R., Hanneke, 'Comparing the Psychological Impact of Battering, Marital Rape and Stranger Rape' (1992) 10 Clinical Sociology Review 18

Sexual offence becomes a tool of humiliation for women themselves which leaves a victims' life sociologically vulnerable. Victims of sexual offences get humiliated even while seeking justice. For example, to file a rape case the victim receives suspicious inquiry from the police officers regarding any kind of affair or consensual sex with the offender, they are asked if they went to the offender on their own or if they were paid.⁵¹ Sometimes the victims are even labeled as professional sex workers.⁵² Thereby, it undermines the self-respect and confidence of the victims in a society. The offenders may also suffer vulnerable psychological effects from the abuse they inflict, they may not be able to control their anger in any other way which leads them to create a mess in their own family where they become unwelcome and even hated by family members.⁵³ The children witnessing sexual abusive relationships at home are more likely to be involved with the offence after growing up. This unhealthy environment causes serious mental breakdown, or clinical depression. Needless to say, it adversely affects the overall harmony of a family and society.

4.3 Traditional Justice v. Restorative Justice in Addressing Sexual Offence of Bangladesh

The traditional criminal justice system often fails to effectively respond to the cases of sexual violence.⁵⁴ Bangladesh has stringent legislation to protect violence against women. But Bangladeshi women tend to avoid legal proceedings fearing the harassing experience of police stations and court corridors.⁵⁵ Moreover, traditional justice system only ensures that the offenders get the punishment they deserve for their actions. There is hardly any scope to make them understand about the harm caused to the victims for their actions and thereby, the legal process tends to discourage responsibility. It is to be well noted that responsibility does not only mean punishing the offenders, rather it involves facing up to what he has done to the victims. On the other hand, in RJ the stakeholders join together in order to resolve the matter between them and to mitigate the factors and consequences of the offence for the future. In the traditional justice system, the stakeholders' needs often remain

⁵¹ Tahmina, Q., and Asaduzzaman, "Rape Victims to Struggle to Seek Justice", *The Daily ProthomAlo*, April 23, 2018 available at: <<https://en.prothomalo.com/bangladesh/Rape-victims-struggle-to-see-justice>> (Last visited on April 20, 2023)

⁵² *ibid*

⁵³ Suhita, B., Ratih, N., Priyanto, K., 'Psychological Impact On Victims of Sexual Violence: Literature Review' (2021) 10 STRADA Jurnal Ilmiah Kesehatan 1412

⁵⁴ Wemmers et al n(39)

⁵⁵ Ahmed, Rashed and Tarannum, Nishat, 'A Critical Review on Women Oppression & Threats in Private Spheres: Bangladesh Perspective' (2019) 1 (2) American International Journal of Humanities, Arts and Social Sciences 98

unfolded and they feel unheard, unseen, and ignored.⁵⁶ Victims need real information about the offence from the offenders which is rarely addressed by formal plea or legal argument in court. The goal of RJ is not only to address harm but also to address causes. Again, restitution by offenders even if partially plays an important role in meeting the victims' need as their harm is recognized.

Sexual offences involve complex social relations. Sexual offences are so sensitive in nature that they often get ignored by the society and compromised by the victim. The RJ can be effectively implemented in dealing with sexual offences because RJ does not only deal with the offences but addresses causes and consequences of the offences. The sensitivity of the victim is well addressed in RJ and they get a platform to share their story of emotional breakdown due to this offence and seek answers from the offenders. This opportunity gives the victims a sense of empowerment. The RJ also helps to repair the harm caused and develop the sense of morality and ethics of the offenders so that future offences can be eliminated which cannot properly be achieved by the traditional justice system.

This paper takes into account different forms of sexual offence in different stages of society as following and attempts to justify the positive impact of RJ on victim's life in comparison to traditional justice system.

a) Workplace Sexual harassment, Victim Blaming Culture and Restorative Justice

Sexual harassment in workplaces is a common phenomenon in Bangladesh but women barely take any action under traditional justice system in fear of securing the job, professional reputation. Sexual harassment in workplace affects their physical, mental, and psychological wellbeing as women find such workplace hostile, degrading, offensive, embarrassing, and humiliating. In *British American Tobacco Bangladesh (BATB) Company Ltd v. Begum Shamsun Nahar* (66 DLR (AD) 80), the honorable court found that Begum Shamsun Nahar had been sexually harassed by her two colleagues, yet no initiative had been taken by the company to help her even after receiving complaints against the offenders. Rather she had been fired by the company. That means taking any step against sexual harassment leads to victim's termination of service. However, the victim can go to the court corridor to seek justice and under the traditional justice system, the offender gets sacked or punished with fine, imprisonment. But in the culture of victim blaming, the victim can never be as comfortable as earlier in the office environment; rather she senses insecurity from other colleagues which eventually leads to depression and finally quitting the job. Sexual harassment in workplace leads women to psychological pressure and

⁵⁶ Zehr, H. n(4)

economic crisis also. So mere criminalization of sexual harassment to punish the offender is not sufficient relief for the victimized women. The victim should be given the opportunity to share her pain, suffering with the offender and other employees who victim-blamed her and fired from office. In another perspective, the offender along with his family can also turn into victim as after the punishment process, the offender may not find any new job and may not be able to run his family anymore which will lead the offender also to depression and his family to suffer unnecessarily. The same offender if finds a new job may create an unhealthy working environment and commit sexual offences further. Therefore, there is no such outcome under the traditional justice system except punishing the offender.

Depreciation of moral value generates sexual offences in the workplace that eventually causes depression, sufferings, and insecurity of the victim. Whereas, traditional justice system is less caring about such psychological and mental trauma, in RJ process (for example, PMC model) the stakeholders i.e., the victim, the offender and the community (here representative from the office) join together and collectively address the causes and consequences of the offence in order to repair the harm caused to the victim. In the traditional justice system, the offender may claim his innocence and blame the victim even after getting punished. On the other hand, RJ ensures that the offender has admitted his crime and apologized to the victim. The RJ will attempt to develop the sense of moral value in the offender and to make the victim feel empowered again and comfortable before the offender himself along with the whole office which will ultimately restore both victim and offender successfully contributing to the productivity of the workplace.⁵⁷

b) Domestic Sexual Abuse, Patriarchy and Restorative Justice

Sexual abuse from family members is a curse but often gets buried for saving relationship, family reputation etc. For example, offensive sexual gestures or behavior from younger brother-in-law to a newly married bride often goes unnoticed. Even if the offender in this case is taken before the traditional justice system, either he will be punished or he may not be punished due to some legal loopholes of traditional justice system.

Whatever happens to the offender, thanks to patriarchy the victim may not be supported by her in-laws or even by her own husband, own family. In the case of sexual abuse, whereas the victim needs support and security from her family

⁵⁷ Eva, M., and Urbi, J., "Restorative Justice to Deal with the Causes and Consequences of Sexual Harassment: Bangladesh Context", *Dhaka Law Review*, November 2, 2021, available at <<https://www.dhakalawreview.org/blog/2021/11/restorative-justice-to-address-the-causes-and-consequences-of-sexual-harassment-bangladesh-context-5742>> (Last visited on April 28, 2023)

members, most of the time the mother-in-law and husband impliedly support the offender and pressurizes the victim to compromise with the offence. RJ hence includes family members also in its operation where needed so that the victim can be re-integrated into the family. For example, an FGC can be arranged to address this issue where the victim, offender, victim's family, offender's family, especially those who support the offenders will participate. The victim will explain to the offender how the offense affected her. She will be given the opportunity to ask him about the offense, to have him apologize, and to be reassured that he wouldn't repeat the same. The victims will have the floor to express all her emotions such as, how traumatized she was and how insecure she felt in her own home. The victims will directly talk to the offender and the family members while her voice was hushed up for a long time at the home. Victim's emotional story-telling will affect the offender and family members. Most importantly, the offender's family members can make him understand that he did wrong to the victim and he should regret what happened. Therefore, FGC helps in restoring the family relationship, ensuring comfort zone for the victim, and enabling the offender to change his behavior and take responsibility.

c) Eve Teasing, Lack of Sex Education and Restorative Justice

Eve teasing is a social disease and a threat for women. Due to this social problem most of the girls are reported to get dropped from study and to get married. Teenage boys in most cases within local areas get involved with this offence for the lack of proper sex education both from the family as well as from the school. However, the traditional justice system is less caring about educating the ignorant teenage boys, rather treats them just as offenders under the Penal Code of Bangladesh. This treatment never helps the young teaser realize the real pain they inflicted on the victim. Here, RJ will focus on repairing the harm of the victim to get her back with confidence and also share the burden with the community to educate the eve teasers so that he can restore himself with shining personality in the same community.

Public acknowledgement can be gained by story-telling in significant settings which is neglected in traditional system. The victims of sexual violence frequently feel that they have no control over their bodies, emotions, dreams etc. also, the offenders feel embarrassed and de-motivated to face the society and family. Therefore, complete engagement in their own cases through RJ is an essential step to give the victims a sense of empowerment and the offenders a sense of responsibility. For example, a VOM can be effective for both the eve-teaser and victim. The VOM can be arranged in a local mosque in the presence of a mediator where the victim and offender will talk for a certain time. The two parties will hear each other's stories and the offenders will try to understand the impacts of the crime done by him. The victim

can directly tell the offender how the harm has affected her. The offender can also explain what was wrong with him and he can feel the tears of the victim personally before his eyes. Although it is not necessary for the victim to forgive the eve-teaser, she will feel less angry and fearful after learning more about the offender and the details of the crime.

5. Challenges and Prospects of Restorative Justice Dealing with Sexual Offence in Bangladesh

The concept of RJ is often misunderstood as merely a path to forgiveness through mediation or reconciliation. However, participation in RJ is completely voluntary for victims, and it does not replace the legal system or stand in opposite to retributive justice. Instead, RJ underscores balanced processes and meaningful outcomes, engaging victims, offenders, and the community, while legal professionals serve as facilitators.⁵⁸

In spite of its potential, implementing RJ in cases of sexual offences in Bangladesh faces considerable challenges. In a patriarchal society, victims may be pressured by their families or workplaces to consent to RJ, potentially undermining their autonomy. Some may struggle to advocate for themselves, feel uncomfortable facing their offenders, or reject the outcome altogether. In extreme cases, victims might even be discouraged from pursuing legal action against the offender, coerced into accepting an apology they perceive as insincere. However, every step of the RJ process is outlined so meticulously that is appropriately adequate to deal with any challenge arising in addressing sexual offences.

Firstly, the RJ approach only comes into consideration when the victim survivor agrees to initiate the process. For example, nobody else from family or office can delegate the victim in opening the process. Hence, there is no such pressure on the victim for taking part in this process. For example, the VOM meeting starts only after both the victim and offender agree to proceed. Skilled and experienced facilitators with complete training and specific expertise in sexual harm are appointed to lead the RJ process with safety and transparency.⁵⁹ They will scrutinize the suitability of the process for each particular case. If they decide to go ahead with the process for any case, they will also take the responsibility to keep the survivor safe throughout and even after the process.

⁵⁸ Karzon, S., *A Handbook of Criminology, Criminal Justice, Victimology and Restorative Justice* (Dhaka 2016)

⁵⁹ MacCold, P., "Restorative Justice: The Role of Community", Academy of Criminal Justice Sciences Annual Conference, Boston, March 1995

Secondly, this process gives the victim a chance to attend the process with a friend or family member as her support. For example, in FGC, the victim's family is invited and the families are free to suggest who should be present in the conference. RJ approaches are victim oriented in the sense that they consider victims' experiences as survivors and they focus to hold the offenders accountable for their offensive conduct.⁶⁰ Most importantly, RJ engages victims directly in the outcome discussion stage after dealing with their own offenders with the support of family and community members to reduce repetition of offences.⁶¹ Thus the RJ provides a unique platform to the victim to get actively engaged in the discussion of the offense and in the decision making process where the facilitator is always supposed to be supportive with the decision of the victim. That's how RJ always makes sure that the participation of victims in the process is free from any kind of fear and pressure from others.

Finally, RJ initiates its process only after the offender has admitted to the commission of offence.⁶² For example, in VOM, the consent to participate from both of the offender and victim is ensured first and then the mediator plays his/her role to minimize anxiety between the victim and offender so that the two parties can comfortably involve in face to face conversation.⁶³ RJ never sets aside the criminal justice system and if the offender has already been once convicted, then a restorative interference does not affect the sentence. In fact, the RJ service can be accompanied by a prison sentence. For example, the FGC model involves justice officials in case of yielding any legal outcome.⁶⁴ Even after the RJ process, the punishment process under the traditional justice system keeps available and the court corridor always welcomes the victim to render appropriate justice to her if she chooses.⁶⁵ RJ itself also includes a sentencing model. For example, when the circles of the PMC model are for sentencing, the participant judge of the circle imposes a sentence against the offender based on the consensus reached in the circle.⁶⁶ Also, the issue goes back to

⁶⁰ Islam, M., Suzuki, M., Mazumder, N., & Ibrahim, N., 'Challenges of implementing restorative justice for intimate partner violence: An Islamic perspective' (2018) 37 *Journal of Religion & Spirituality in Social Work: Social Thought* 277

⁶¹ *ibid*

⁶² Van Camp, T., 'Understanding victim participation in restorative practices: Looking for justice for oneself as well as for others' (2017) 14 *European Journal of Criminology* 79

⁶³ Umbreit, M., 'Humanistic mediation: A transformation journey of peacemaking' (1997) 14 *Mediation Quarterly* 201

⁶⁴ John J. Wilson, 'A Comparison of Four Restorative Conferencing Model', [2001] *Juvenile Justice Bulletin*, US Department of Justice, Washington

⁶⁵ Van Ness, D., 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Criminal Law Forum* 251

⁶⁶ Liebmann, M. n(15)

the court if the circles cannot be concluded consensually and the court passes a sentence based on the discussion made and information shared in the circles.⁶⁷

Overall, the RJ system highly maintains the comfortable environment for the parties. The system ensures that each stakeholder attends the process voluntarily without any kind of pressure or influence. Even the outcome of the process is not binding on the parties until they accept it with consent.⁶⁸ Parties are also allowed to leave the process any time if they feel unsatisfied with the process.⁶⁹ RJ provides a floor to the victim to release all her depression, psychological trauma, scars and nightmares before the offender and his family. The emotional story-telling of the victim helps the offender to realize the consequences of his wrongdoing which motivates him to take the responsibilities of his misconduct.⁷⁰ Unlike the traditional justice system, RJ does not only focus on punishing the offender rather concentrates on educating offenders about the harm they caused to others. At the same time, RJ prioritizes victims' active dialogue with the offenders to ensure their psychological satisfaction.⁷¹

6. Conclusion

Retributive justice focuses on punishing offenders but often fails to heal victims. On the other hand, RJ adopts a in reformative approach, addressing harm through offender accountability and victim empowerment. By acknowledging wrongdoing and engaging in face-to-face- dialogue, offenders take responsibility, while victims find a space to share their pain and seek healing.

In order to empower the victim and bring reformative change into the offender's life, admission of the offence by the offender, ensuring equity between victim and offender and addressing the future intention of the offenders must happen. Acknowledgement of the offence by the offenders takes place in a face-to-face encounter between the victims and offenders. Restitution of equity is only possible when the offenders realize their responsibilities to redress their wrongs and move on with life accordingly so that further offences can be eradicated and future intention of the offenders to maintain a safe environment in the society can be assured. All these can be possible only through the RJ process where "who"- the stakeholders and "how"- the process are very important. In the RJ process, "who" means who are involved (the offender of sexual offence), who are affected by (the victim of sexual offence) or who have direct legitimate interest in the offence (family members,

⁶⁷ John J. Wilson n(49)

⁶⁸ Eva, M., and Urbi, J. n(42)

⁶⁹ Zehr, H., and Gohar, A., *The Little Book of Restorative Justice* (Pennsylvania 2003)

⁷⁰ Eva, M., and Urbi, J. n(42)

⁷¹ John J. Wilson n(49)

community). The process is communal and comprehensive where outcomes are not imposed on the stakeholders rather than mutually agreed upon. RJ has the potential to affirm both victims and offenders of sexual violence to help them towards the positive journey of transformation in their lives.

Sexual offences are delicate in nature and often neglected thanks to patriarchy, victim blaming etc. in Bangladesh. RJ attempts to give a floor to the victim to share her pain and trauma before the offender himself and also before the community. That's how, RJ motivates offenders to hold accountability of their own wrong, helps for behavioral reformation and brings down the tendency to repeat offences. Finally, it provides a comfortable environment and ultimate solace of mind to the victim to make her feel empowered in life once again.

In a society where sexual offenses are frequently dismissed due to patriarchal norms and victim-blaming, RJ provides victims with a voice, restoring dignity, and promotes lasting change. By facilitating open dialogue, repairing broken relationships, and fostering accountability, RJ empowers victims to reclaim their lives and helps offenders embark on a path of genuine transformation.

Addressing Medical Negligence in Bangladesh: Need for a Comprehensive Medico-legal Framework

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Abstract: The rising number of medical malpractice cases become a paramount concern in the health service sector in Bangladesh. Despite the growing number of malpractice incidents, the current medicolegal framework in Bangladesh is insufficient, lacking clear regulations, standardized protocols, and effective enforcement mechanisms to address malpractice adequately. Therefore, by empirically investigating the root causes of medical malpractices in Bangladesh, this paper is designed with the purpose of exploring the challenges and gaps in the existing legal framework. To serve the intended purpose, a two-phase non-doctrinal study was conducted in combination with statistical and face-to-face interview data analysis techniques. A total of six variables for medical negligence cases were selected through intensive desk research and then tested by the participants (*patients, i.e., inpatient, outpatient, and attendants*) in the first phase of the study. In the second phase, the opinions of the medico-legal experts (*academicians, lawyers, and judges*) were dissected to find out the flaws in medical negligence laws and difficulties arising in medical court proceedings. The percentage of misdiagnosis and malpractices in pathology tests was found high. The causes of those crises at the peak are the absence of specific legislation, lack of effective control mechanisms, and lack of ethical standards among physicians. On the flip side, in the second phase, the experts pointed out six specific flaws in medical negligence laws and five types of difficulties in court proceedings. The paper concluded by suggesting that one of the best approaches to combat clinical dysfunction is to enact a medical negligence law and strengthen the control gear against transgression in the health sector. Furthermore, the difficulties that arise in medical negligence court proceedings can be minimized by establishing a separate judicial forum, i.e., a medical negligence tribunal.

1. Introduction

The ambivalent relationship between a doctor and patient is regulated and controlled by medical ethics as well as legal principles. This relationship imposes a 'guarantee towards a patient that a doctor would not abuse his or her superiority in the relationship'. The medical profession is mainly based on four fundamental ethical principles: the principle of non-maleficence, the principle of beneficence, the principle of autonomy, and the principle of justice. The principle of non-maleficence prevents a doctor from causing any harm to the patient seeking care, while the principle of beneficence imposes an obligation on a doctor to do medical treatment for the benefit of the patient. The autonomy principle ensures the patients'

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autonomy at the time of giving consent for any medical intervention. Lastly, the justice principle emphasizes the physician's responsibility to society and requires that he discharge his duty without discrimination. Thus, a doctor's fundamental role should be to render medical assistance to save a patient's life. In pursuance of that, they must maintain the highest standard of professional conduct. Conversely, deviation from such professional conduct will amount to medical negligence. Medical negligence or malpractice causes immense suffering to a patient. This makes a deteriorating relationship between a doctor and a patient at the end. In this situation, legal obligation or medical negligence law may play a strong safeguarding role. Furthermore, the law is one of the mechanisms through which a physician's responsibility to his patients, family, and society is exposed and enforced. In Bangladesh, the medical profession is governed by multiple numbers of statutes without explicitly addressing the issues of negligence. Moreover, the absence of any specific legislation on the one hand, and the existence of immunity clauses of the physicians on the other hand allows them to take full advantage of their professional indemnity and deviates them from any legal obligation. Consequently, transgression in medical practice is going up. In Bangladesh, almost every month, the incidence of medical malpractice can be detected through electronic and print media. Ain O Salish Kendra (ASK) has collated the medical malpractice occurrences published in newspapers from 2008 to 2016. According to their report, over the period of eight years, a total number of 517 medical malpractice incidents have been reported. Of them, 466 people caused death, and about 22 patients lost their organs due to the careless medical treatment of physicians and hospitals. The report claims that 377 doctors, 42 staff, and 58 hospital authorities are responsible for such misfeasance. Another report asserts, over 550 patients died from 'wrong medical treatment' and 'negligence of doctors' across the country in the last six years (2010 - 2017). The number of such deaths was 69 in 2017, 65 in 2016, 104 in 2015, 122 in 2014, and 53 in 2013.² Thus, the increasing number of medical malpractices represents an alarming reality for Bangladesh.

Taking the present context into consideration along with the existing facts of medical negligence and deceptive medical practices in the country this empirical study mainly focuses on two specific points, the first is analyzing the prevalent multidimensional medical negligence in Bangladesh, and the second is investigating legal lacuna in the medical profession. The survey was carried out among 80 patients, i.e. inpatients and outpatients from six hospitals in the eastern part of Dhaka city. On the other hand, a total of 20 legal experts, i.e. academicians, advocates, and judges were interviewed to evaluate the efficiency of medical

² Md Solamain, '554 die from wrong treatment in 6 years' *The Daily Sun* (Dhaka, 19 December 2017).

negligence laws in Bangladesh. However, the main component of the study was to analyze the causes of medical malpractices, and on the legal analysis part, the study demonstrates the factors leading to the obstacle of judicial function in medical negligence cases. Eventually, it proposes some safeguarding recommendations against medical malpractice in Bangladesh.

2. Conceptual Framework

2.1. Diagnosing the Definition of Medical Negligence

Negligence simply implies ‘breach of a legal duty’ whereas negligence by professionals connotes failure to perform respective duties imposed on that particular profession to the required level of standard.³ In the medical profession, the term negligence bespeaks as ‘the failure of a medical practitioner to exercise a reasonable degree of skill and care in the treatment of a patient’.⁴ Thus, negligence, whether in a general sense or from a professional context, denotes the breach of the required standard of duty. Another essential facet that constitutes negligence is ‘breach of duty results in damage or injury’. However, the lexicon negligence can be best explained by assessing its three commonly agreed requirements. The standards are cumulative, and failure to comply with any of them results in legal action. The prerequisites of negligence are (a) duty of care, (b) breach of duty, and (c) consequential damages.⁵

Duty of Care: A duty of care is a legal obligation on the part of an individual or organization to prevent actions or omissions that could reasonably be anticipated to cause harm to others. The requisite, therefore, is further posing three essential queries: when does the question of duty of care arise? who is the subject to the duty of care? and when does the duty of care constitute negligence? In responding to the first question in the leading case of *Donoghue v. Stevenson*⁶ cites ‘a duty of care arises where a person could foresee that his act or omission would cause harm to another person’.⁷ The aforesaid *foreseeability test* in the *Donoghue v. Stevenson*⁸ case is further illustrated by Lord Atkin’s ‘neighbor’ principle.⁹ The principle articulates ‘a person should take reasonable care to avoid acts or omissions that s/he can reasonably foresee as likely to cause injury to the neighbor’. Hence the proposition claims that ‘if it can be reasonably

³ Michael Aondona Chiangi, ‘Principles of Medical Negligence: An Overview of the Legal Standard of Care for Medical Practitioners in Civil Cases’ (2019) 4(4) Miyetti Quarterly Law Review 53.

⁴ *ibid.*

⁵ *Bouygues (Nig) Ltd v O. Marine Services Ltd* [2013] 3 NWLR (Pt 1342) 441; *U.T.B Ltd v Ozoema* [2007] 3 NWLR (Pt 1022) 488; *Anyah v Imo Concorde Hotels Ltd* [2002] 18 NWLR (Pt 799) 377.

⁶ [1932] AC 562.

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

foreseen that a party's act or omission would injure his neighbor, then the courts would hold that such a party is under a legal duty to avoid such acts or omissions'. Another grill (who is a neighbor?) sticks to the 'neighbor' principle clarify the second pump, who is the subject to the duty of care? Neighbor includes all persons who are so closely and directly affected by the act that the actor should reasonably think of them when engaging in the act or omission in question.¹⁰ Thus, in the medical profession, neighbors refer to all patients attended by the doctor. To decorate the last question (when does the duty of care constitute negligence?) of duty of care the second component of the negligence needs to be decoded.

Breach of Duty: The second essential requirement of establishing a negligence case is that the defendant breached the relevant standard of care. The standard of breach of duty can be illustrated by the principle of 'the reasonable person test' laid down by Alderson B in the *Blyth v. Birmingham Waterworks*¹¹ case as follows:

Negligence is 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.

Hence, the 'reasonable man standard' in case of breach of duty of care posits 'a person has acted negligently if she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances'.¹² In case of negligence by professionals, the reasonable man must possess the requisite level of skill for performing the particular tasks in that respective profession.¹³ In the medical profession, the 'Reasonable Man Standard' has been coined in the '*Bolam Test*', which is further re-examined and well-shaped in the '*Bolitho*' and '*Montgomery*' tests.

'*Bolam test*' originates from the case of *Bolam v Frien Hospital Management Committee*¹⁴ mainly assesses negligence by medical professionals. *Bolam test* recognized the standard of duty of care prevailing between the doctor or nurse and the patient, and any breach of that standard will have amounted to negligence. However, the test further imposed a criterion to prove medical negligence: 'there is no breach of the standard of care if a responsible body of similar professionals support the practice that caused the injury, even if the practice was not the standard of care'.¹⁵ Thus, to prove medical negligence, the standard or practice must be tested by another

¹⁰ *ibid.*

¹¹ [1856] 11 EX.781.

¹² <<https://legal-dictionary.thefreedictionary.com/The+Reasonable+Person>> accessed 16 December 2024.

¹³ *Jacob Mathew v State of Punjab*, [2005] SCC 1 (AIR) 3180.

¹⁴ [1957] 1 WLR 582.

¹⁵ *ibid.*

medical professional. The principle is further recontextualized in the '*Bolitho*'¹⁶ and '*Montgomery*'¹⁷ tests. In the '*Bolitho test*,' Lord Browne Wilkinson restricted the boundaries of the *Bolam test* by stating that in medical negligence cases, the opinion of the other medical professionals would not be counted as 'reasonable' without first assessing whether such opinion is susceptible to logical analysis.¹⁸ On the other hand, in '*Montgomery*'¹⁹ tests the court imposes 'a general duty on doctors to disclose risk(s) inherent in any treatment'.²⁰ Thus, in the medical context, negligence connotes the failure of a medical practitioner to exercise a reasonable degree of skill and care in the treatment of a patient which has resulted in harm to the patient.

In Bangladesh, the medical profession is also regulated by law. The principal statute for the regulation of medical practice in Bangladesh is the Bangladesh Medical and Dental Council Act, of 2010. The prime objective of the Act is to constitute a Council (the Bangladesh Medical and Dental Council - BM&DC) as a regulatory body for the registration of medical practitioners and to take disciplinary action in case of misconduct. Furthermore, the paramount obligation of the Council is to 'protect, promote and maintain the public's health and safety'.²¹ In addition to the above, The Council has the authority to impose disciplinary sanctions on physicians and dentists who engage in professional misconduct or unethical behavior. This role is essential because it aids in the maintenance and promotion of professional decorum, responsibility, and discipline.

Consequential damages: The requirements of the duty of care and the breach of duty are not enough to establish a negligence case. The plaintiff must prove that he suffered damage or injury as a result of the breach of duty of care. In the context of the medical profession, some examples of losses a patient can incur amount to damage or injury may include loss of earnings, expenses incurred due to the damage, loss of faculty, limb, or any part of the body, mental or physical suffering, and death which may be actionable for the benefit of dependent relatives.²²

Instances of Medical Negligence in Bangladesh Context: The nature of medical negligence in Bangladesh is many. Every day the print and electronic media have reported several malfeasance cases in the health care sectors of Bangladesh. It involves misdiagnosis in the medical center, errors in surgery, unnecessary medical tests,

¹⁶ *Bolitho v. City & Hackney Health Authority* [1997] 4 All ER 771.

¹⁷ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

¹⁸ *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771.

¹⁹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

²⁰ *ibid.*

²¹ The Bangladesh Medical and Dental Council Act, 2010.

²² *Igbokwe v University College Hospital Management Board* [1961] WNLR 173.

improper medication, childbirth negligence, and fatal accidents during anesthesia, to name just a few. Patients and their families undergo unprecedented misery by dint of malpractice. Medical service providers such as physicians, doctors, medical interns, surgeons, dentists, nurses, medical assistants, and pharmacists are mainly responsible for this ongoing malpractice.

2.2. Medical Negligence Laws in Bangladesh

2.2.1. Statutes Governs Medical Profession in Bangladesh

Constitutional Safeguard: The Constitution of Bangladesh does not provide express protection against medical misconduct. Yet, several guidelines have been established by the apex court of Bangladesh to ensure the right to health clause. Firstly, the constitution of Bangladesh recognized the 'right to health' as a basic necessity of human life, and make a positive obligation towards the state to 'raising of the level of nutrition and the improvement of public health'.²³ The highest judicial authority of Bangladesh gave the protection of the right to health and appropriate medical care under the shade of the fundamental right to life.²⁴ In another case, where medical professionals went on strike from hospitals, the court found the strike unlawful, stating that the doctors' purposeful absence from their duties amounted to a threat to the public's life and body, and so had no legal effect.²⁵

The Medical and Dental Council Act 2010: Medical practice in Bangladesh is governed by the Medical and Dental Council Act 2010. A Council is formed under the Act to regulate the registration of new doctors, grant medical licenses, and administer medical educational programs.²⁶ Besides, the Council also takes punitive measures against unregistered medical practitioners and physicians liable for professional misconduct. A comprehensive code of medical ethics was also adopted under the enactment.

The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982: The purpose of this regulation is to administer the medical practice of private clinics and laboratories. The ordinance specifies certain criteria to establish a private clinic, as well as it prohibits a registered medical practitioner from carrying on private medical practice during office hours.²⁷ The ordinance also empowers the Director-

²³ The Constitution of Bangladesh, Article 15 and 18.

²⁴ Dr. Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) Contemporary South Asia 405.

²⁵ *Dr. Mohiuddin Farooque v Bangladesh & others*, [1996] 48 DLR (HCD) 438

²⁶ The Medical and Dental Council Act 2010, s 5.

²⁷ The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982, s 9.

General of Health to inspect any chamber of a registered medical practitioner, private clinic, private hospital, or pathological laboratory.²⁸

The Consumer Rights Protection Act, 2009: From the context of consumer protection rights, a victim of medical negligence can have safeguarding rights as a consumer under the Consumer Rights Protection Act 2009. This is because a medical patient is considered as a consumer and the medical institutions or professionals are as a service provider. As a result, if hospitals, clinics, or any physician as a service provider causes damage or injury to the health or life of a service receiver (patient) by negligence, he will be punished under the Act.²⁹ However, this regulation does not specifically address medical negligence in the physician-patient relationship.

National Health Policy: National Health Policy (NHP) serves as a guiding principle to improve health care service in Bangladesh. The specific aims of the policy are as follows: ensure accessibility of primary health care for all, upgrade the quality of health care service, and increase community demand for health care considering rights and dignity.³⁰ The policy also includes expanding an awareness-building program concerning the right to health for everyone. The decentralization of medical administration, human resource development, and ensuring an adequate supply of essential drugs are other goals to achieve enshrined in the policy.³¹

2.2.2. Consequences of Medical Negligence

In Bangladesh, the legal ramifications of medical malpractice fall into three categories: (a) criminal liability, (c) civil liability, and (c) departmental action.

Criminal liability: The specific provisions of medical negligence have not been entailed under the criminal laws of Bangladesh. However, the victim can appeal for criminal action under the Bangladesh Penal Code, 1860 against a medical practitioner for causing medical injuries. For instance, injuries by an act to cause miscarriage; death, or causing hurt by negligence on the part of a medical professional.³² Besides the above, criminal action can be brought against any person who adulterates drugs or does any negligent conduct with poisonous substances. The code provides that any person will be liable for penal action who adulterates any drugs or medical preparation, to sell or be used for any medical purpose or

²⁸ The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982, s 11.

²⁹ The Consumer Rights Protection Act 2009, s 45, 52 and 53.

³⁰ <http://www.mohfw.gov.bd/index.php?option=com_content&view=article&id=74&Itemid=92&lang=en> accessed 16 December 2024.

³¹ Munzur-E- Murshid, and Mainul Haque and Others, 'Hits and misses of Bangladesh National Health Policy 2011' (2020) 12(2) Journal of Medicine and BioAllied Science 83-93.

³² The Penal Code 1860, s 304A, 312, 323, 325.

knowing likely that it will be used or sold for any such purpose, in such way that has decreased the effectiveness or changed the function of such medicine or medical preparation or made it poisonous.³³ Yet, under criminal law, medical practitioners enjoy certain immunity protections. The medical service providers will not be liable for causing harm if the act was done with good faith for the benefit of the victim and the victim has expressly or impliedly given consent to take the risk of the harm.³⁴ In addition to that, criminal investigation is being hampered due to the lack of experts on the medical negligence investigation. Also, in criminal law, *mens rea*, or a guilty mind, is a prerequisite for establishing a crime, and proving the wrongful intentions of a medical practitioner is difficult in the context of medical litigation.

Civil liability: A civil action is a common practice in cases of medical negligence in Bangladesh. An action seeking imposition of the civil liability, i.e., monetary compensation on the erring medical professional can be brought before an appropriate civil court or consumer forums. In recent years, the Supreme Court of Bangladesh has imposed monetary compensation against several hospitals and physicians for causing endless suffering due to delayed medical treatment, false medical certificates, fatal surgical errors, or leaving pieces of gauge inside the patient's stomach during the survey.³⁵ A civil action can also be brought for medical negligence before the Consumer Rights Protection forum. In Bangladesh, the rights of a consumer are protected under the Consumer Protection Act 2009. Medical treatment falls under the domain of 'service' as defined in the Act.³⁶ Thus, patients receive services from doctors or hospitals; so, they are consumers as they consume medical services. The statute imposes punishment and monetary compensation if hospitals or physicians fail to provide promised service instead of payment.³⁷ However, due to the lack of expertise and development of tort law in Bangladesh, lawsuits for compensation for medical malpractice are not usual in civil courts. Furthermore, the lengthy process of civil litigation and over-burdened litigation costs discourage the victim from filing a civil suit.³⁸

Departmental action: The imposition of sanctions as a response to departmental action is another alternative repercussion of medical negligence. In Bangladesh, professional misconduct by medical practitioners is regulated by the Medical and Dental Council Act 2010. The Council, formed under the Act 2010, is empowered to

³³ The Penal Code 1860, s 274, 276, 284.

³⁴ The Penal Code 1860, s 88, 92.

³⁵ Faria Ahmad, 'Medical negligence and duty of care' *The Daily Star* (Dhaka, July 24, 2018)

³⁶ The Consumer Protection Act 2009, s 2(22).

³⁷ The Consumer Protection Act 2009, s 45.

³⁸ Md Rafiqul Islam Hossaini, 'Medical negligence in Bangladesh: criminal, civil and constitutional remedies' (2017) 59(6) *International Journal of Law and Management* 1109-1115.

take disciplinary action when any medical practitioner or dentist is found guilty of misconduct. The Council has the power to refuse to permit the registration of the convicted. Furthermore, in case of misconduct, the Council may suspend or remove the name of the practitioner from the medical register.

2.3. Medical Negligence Combating Model Around the Globe

Around the world, the regulatory mechanisms for addressing medical negligence vary significantly, but they typically rely on a combination of civil litigation, regulatory bodies, and in some cases, alternative dispute resolution mechanisms.³⁹ These systems aim to ensure accountability, provide fair compensation to victims, and prevent future negligence while balancing the interests of patients, healthcare providers, and the broader healthcare system.

In the USA, the tort litigation system is followed for medical negligence malpractices, on the other hand, the no-fault system combating system works for medical negligence issues in Sweden.⁴⁰ Under the USA-tort litigation system, once medical malpractice has been proven, damages will be awarded.⁴¹ The tort litigation system requires that situations involving medical negligence have to be determined by the threshold of 'standard of care', which is assessed by expert testimony, medical texts, and occasionally other authoritative materials like Clinical Practice Guidelines.⁴² On the other hand, in the Swedish tortious legal framework, compensation is given to victims of medical injuries under the 'no-fault system' without requiring proof of negligence on the part of a healthcare professional. The 'Patient Compensation Insurance (PCI)' program acted for the said system. The PCI is a voluntary insurance program providing compensation to victims of medical injuries without proof of provider fault.⁴³ However, the PCI does not handle the discipline of medical providers. That responsibility is given to the Medical Responsibility Board (MRB). Also, patients, if not satisfied with the compensation, retain the right to pursue it in court.⁴⁴

³⁹ Gowtham S S, 'An Analysis of Medical Negligence Law' [2022] 2(3) Indian Journal of Integrated Research in Law

⁴⁰ World Bank, 'Medical Malpractice Systems around the Globe: Examples from the US- tort liability system and Sweden- the no-fault system' (2010) World Bank Working Paper, Report Number 29011, 1, <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/421621468779085220/medical-malpractice-systems-around-the-globe-examples-from-the-us-tort-liability-system-and-the-sweden-no-fault-system>> accessed 18 December 2024

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

In India, there are mainly two forums where patients injured by medical malpractice can seek redress, viz, sue in a consumer forum, or sue in civil court.⁴⁵ The Fatal Accidents Act allows plaintiffs to file a malpractice lawsuit in India's civil courts, compensating the relatives of individuals who died by an 'actionable wrong', which is defined as death brought on by a 'wrongful act, neglect, or default'.⁴⁶ Complaining to India's consumer forums referred to as Consumer Disputes Redressal Agencies (CDRAs) is the second way to address medical misconduct. However, it serves as a substitute for civil courts generally, not as a setting for settling cases involving medical misconduct.⁴⁷ In Mexico arbitration agency, as an alternative forum, would act as a medical negligence remedy forum within Mexico's Ministry of Health. Conamed, like India's consumer forums, was intended to be a less expensive, more effective, and more accessible substitute for civil courts. Conamed, in contrast to India's consumer forums, was created especially to resolve disagreements over medical treatment—a function that developing nations may want to adopt.⁴⁸ In Australia, healthcare provider negligence obligation follows the common law pattern, meaning that a plaintiff must establish duty, breach, and causation of damage that is not too remote.⁴⁹ In Australia, there is a reporting system for medical negligence issues commonly known as Sentinel events.⁵⁰ It is a nationwide system for reporting major medical errors or incidents in Australia. Under the system, any medical incident that results in significant injury or death will be recorded as an

⁴⁵ Nathan Cortez, 'A Medical Malpractice Model for Developing Countries?' [2011] 4(217) *Drexel Law Review* 217-241

⁴⁶ *ibid.*

⁴⁷ *ibid*

⁴⁸ *ibid*

⁴⁹ John Devereux, *Medical Negligence Law in Australia*. in VeraLúcia Raposo (ed), *Medical Liability in Asia and Australasia* (Springer, Singapore 2021) 1-12

⁵⁰ All states and territories have agreed to the 10 categories of sentinel events which include: (1) Surgery or other invasive procedure performed on the wrong site resulting in serious harm or death, (2) Surgery or other invasive procedure performed on the wrong patient resulting in serious harm or death, (3) Wrong surgical or other invasive procedure performed on a patient resulting in serious harm or death, (4) Unintended retention of a foreign object in a patient after surgery or other invasive procedure resulting in serious harm or death, (5) Haemolytic blood transfusion reaction resulting from ABO incompatibility resulting in serious harm or death, (6) Suspected suicide of a patient in an acute psychiatric unit or acute psychiatric ward, (7) Medication error resulting in serious harm or death, (8) Use of physical or mechanical restraint resulting in serious harm or death, (9) Discharge of an infant or child to an unauthorised person, and (10) Use of an incorrectly positioned oro- or naso- gastric tube resulting in serious harm or death

Australian Sentinel Event (SE or ASE). These incidents are well-defined and acknowledged as avoidable with the right precautions.⁵¹

3. Materials and Method

3.1. Data Collection and Synthesize

The author conducted a *non-doctrinal study* using the '*identificatory research model*'. The approach is principally concerned with two issues: *analyzing the nature of multifaceted medical malpractice and exploring the potency of prevailing medical malpractice-related laws to address the issue in order to minimize patient suffering*. At the bottom, the study is based on the hypothesis that streaming legislation is ineffective in combating pervasive medical malfeasance. In doing this empirical analysis, the investigation process is segmented into two phases. And, the research data were dissected employing IBM SPSS Statistics, version 15.

First Phase: The prime objective of the phase-one study is to investigate multifarious medical malpractice or negligence in Bangladesh. A total of six (6) categories of medical negligence were ripped for the examination. The enumerators developed those variables based on the existing literature in Bangladesh. In addition to the above, to make an effective ameliorative recommendation list, two other peripheral issues were also observed by the researcher: *who can be held responsible for medical negligence activities?* and *what are the common causes of medical malpractice?*

The first phase of the study was reconnoitered around the eastern part of *Dhaka* city. As most of the studies on medical negligence in Bangladesh covered the southern as well as northern parts of *Dhaka* city, the eastern part is still hidden from observation. Thus, the author purposefully selected the aforesaid area. Empirical data were collected from seven (7) hospitals and diagnostic centers namely *Farazy Hospital, Advance Hospital Ltd., Al-Razi Hospital, American International Hospital Ltd, Unity Aid Hospital, Banasree Adhunik Diagnostic and Consultation Center, General Physician Center* between February to December of 2021. A *structured questionnaire* technique was used to collect survey data. The work was performed on a sample unit of 80 patients based on convenient random sampling techniques. During the survey work, three categories of patients participated namely inpatient, outpatient, and attendant. The patients were selected after considering the following benchmark: (a) the age of the participants were above 18 years; (b) the inpatient participants spent at least two more days in the health care institutions; (c) patients were chosen randomly; (d) oral consent was taken from each participant just before carrying out the interview. The

⁵¹ IHPA, 'Pricing and funding for safety and quality: Sentinel events' <https://www.ihaipa.gov.au/sites/default/files/2022-08/sentinel_events_fact_sheet.pdf> accessed 18 December 2024

participants were informed that the information they supplied would be used purely for research purposes, that the confidentiality of their responses would be rigorously preserved at all times, and that their personal information would never be shared with any third parties. Additionally, a few recent medical malpractice incidents in renowned hospitals in Dhaka and Chittagong were examined to enhance the study's worth and try to depict the actual suffering of healthcare service seekers. Those reports were collected from national daily newspapers.

Second Phase: The second phase of the research looked into the reasons for inefficiency underpinning the existing laws in deterring chronic medical malpractice. The task was accomplished by delving into two conundrums: *flaws in existing medical malpractice laws* and *difficulties encountered during medical negligence court proceedings*. The data for the second phase were assembled from legal experts (*academicians, lawyers, and judges*) by using the purposive sampling technique. A total of 20 experts were interviewed.

4. Findings and Analysis

4.1. Descriptive Analysis

A total of 100 participants have participated in the present study with 80 attending in the first phase (Table 1) to investigate multifarious medical malpractice or negligence in Bangladesh and 20 attending in the second phase (Table 2) to look into the reasons for inefficiency underpinning the existing laws in deterring chronic medical malpractice. The results in Tables 1 and 2 represent descriptive statistics on participant's character: the mean age and the mean gender of the participants in both phases were almost similar.

Table 1: Demographic character of total participants of the first phase survey work (total participants of the first phase survey work were 80)

		Frequency	Percent	Valid Percent	Cumulative Percent
Participant	Inpatient	30	37.5	37.5	37.5
	Outpatient	30	37.5	37.5	75
	Attendant	20	25.0	25.0	100
	Total	80	100.0	100.0	

		Frequency	Percent	Valid Percent	Cumulative Percent
Gender	Male	53	66.3	66.3	66.3
	Female	27	33.8	33.8	100.0
	Total	80	100.0	100.0	

		Frequency	Percent	Valid Percent	Cumulative Percent
Age	18 to 25	14	17.5	17.5	17.5
	25 to 35	34	42.5	42.5	60.0
	35 to 45	17	21.3	21.3	81.3
	Above 45	15	18.8	18.8	100.0
	Total	80	100.0	100.0	

Source: Author's research project titled '*Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study*' funded by Jagannath University Research Center, 2020-21

Table 2: *Demographic character of total participants of the second phase survey work (total participants of the second phase survey work were 20)*

		Frequency	Percent	Valid Percent	Cumulative Percent
Gender	Male	13	65.0	65.0	65.0
	Female	7	35.0	35.0	100.0
	Total	20	100.0	100.0	

		Frequency	Percent	Valid Percent	Cumulative Percent
Profession	Academician	6	30.0	30.0	30.0
	Judge	5	25.0	25.0	55.0
	Advocate	9	45.0	45.0	100.0
	Total	20	100.0	100.0	

		Frequency	Percent	Valid Percent	Cumulative Percent
Age	18 to 25	01	05.0	05.0	05.0
	25 to 35	09	45.0	45.0	50.0
	35 to 45	06	30.0	30.0	80.0
	Above 45	04	20.0	20.0	100.0
	Total	20	100	100	

Source: Author's research project titled '*Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study*' funded by Jagannath University Research Center, 2020-21

In both phases of the study, the highest number of participants belongs to the age group of 25 to 35 years i.e., 42.5% and 45.0% in the first and the second phase respectively (Table 1 and 2). While the smallest number of the respondents are from the age group of 18 to 25 years i.e., 17.5% in the first phase and 05.0% in the second phase. Again, from the context of gender, in both phases, the male remains the topmost in number i.e., 66.35% in the first phase and 65% in the second phase of the study. On categorizing the respondents in the first phase by their nature, it is depicted that 75% of respondents are patients i.e., inpatients and outpatients account

for 37.5 percent of the total (each) and 25% of respondents are attendants of the patients. The occupation status of the respondents in the second phase demonstrates that the advocate category accounts for the greatest number (45%), which is followed by academicians (30%) and judges (25%).

4.2. Statistical Report on Medical Malpractice in Bangladesh (Eastern Part of Dhaka City)

4.2.1. Victim and Accuser Statistics of Medical Malpractice

The fundamental responsibility of a person or institution concerned with the medical profession towards their patients is to ensure proper care and positive patient satisfaction. And, digression from that obligation amounts to negligence. The underneath data analyses the frequency of the victim and accuser respecting the occurrence of medical malpractice.

Table 3: *Frequency of the victim of medical malpractice*

Have you been a victim of medical malpractice?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Victim Frequency	Yes	76	95.0	95.0	95.0
	No	4	5.0	5.0	100.0
	Total	80	100.0	100.0	

Source: Author's research project titled 'Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study' funded by Jagannath University Research Center, 2020-21

Among the participants of the present study, the researcher found that ninety-five percent of respondents replied in favor of the occurrence of medical negligence, while five percent of respondents answered negatively (Table 3). The mode value indicates the same direction (Table 3).

Table 4: *Frequency of the accuser responsible for medical malpractice*

Who can be held responsible for medical malpractice?				
		Responses		Percent of Cases
		N	Percent	
Accuser Frequency	Hospital	45	22.1%	61.6%
	Doctors	50	24.5%	68.5%
	Surgeon	30	14.7%	41.1%
	Nurses	43	21.1%	58.9%
	Other Medical Service Providers	36	17.6%	49.3%
Total		204	100.0%	279.5%

Source: Author's research project titled 'Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study' funded by Jagannath University Research Center, 2020-21

In the context of the accuser for medical malpractices, the statistical data encounter Doctors the highest percentage (68.5%). The trend is followed by hospitals (61.6%) and nurses (58.9%). Surgeons and other medical service providers accounted for 41.1% and 49.3% respectively (Table 4).

4.2.2. Nature of Medical Malpractice

The researcher labeled six (6) categories of medical negligence to examine. The strains were chosen after a thorough assessment of the literature in the field. A variety of instances that fall under the specific category were also selected to define that particular malpractice more precisely and elaborately (Table 5). The mean and standard deviation grades were calculated to justify the respondent's responses in comparison to the victim and accuser frequencies (Tables 3 and 4).

Table 5: Frequency of medical malpractice cases

Category of medical negligence	What does a medical malpractice case involve? Instances of Negligence	Responses		Percent of Cases
		N	%	
(1) Misdiagnosis	Irrelevant clinical examination and overlooking important findings; Diagnosis without performing necessary tests; Prescribing without carefully listening to the patient Fails to recognize a patient's symptoms; Neglects a patient's medical history.	71	19.6%	89.9%
(2) Errors in surgery	Infection of the surgical incision; Injuries during surgical intervention; Wrong maneuver leading to dislocation of the prosthesis; Wrong epidural injection; Wrong-site surgery; Damage to surrounding nerves and/or organs; Leaving surgical equipment inside a patient.	41	11.3%	51.9%
(3) Malpractice in pathology test	Unnecessary test; Delay; Extra charge; Wrong report; Unwilling to do tests although the tests were available.	66	18.2%	83.5%
(4) Negligence by medical staff	Inappropriate behavior (Insufficient interaction, Expecting monetary incentive, Arrogance, Distant attitude, Disrespect); Lack of information/informing deficiency.	64	17.7%	81.0%
(5) Delayed	The patient left unsupervised;	58	16.0%	73.4%

diagnosis	<i>Delay in transferring the patient; Delay in examining the patient (waiting too long in the waiting room); Delay in child delivery.</i>			
(6) Low consultation hour	<i>Less than two (2) minutes</i>	62	17.1%	78.5%
Total		362	100.0%	458.2%

Source: Author’s research project titled ‘Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study’ funded by Jagannath University Research Center, 2020-21

The presented statistics show that, out of the six categories of medical malpractices, several misdiagnoses rank the highest (89.9% of respondents agreed) (Table 5). The study identified the following categories of medical errors that fall under the heading of misdiagnoses: prescribing without paying close attention to the patient, failing to identify a patient’s symptoms, ignoring a patient’s medical history, and conducting unnecessary tests without conducting a relevant clinical examination. Malpractice in pathology tests and negligence by medical staff represent an almost similar curve, 83.5%, and 81.0% respectively (Table 5). Pathology test malpractice involves unnecessary testing, delays, extra costs, incorrect reports, and refusals to perform tests even when they were offered, on the other hand, medical staff negligence entails inappropriate behavior (such as insufficient interaction, expecting financial incentives, arrogance, distant attitude, and disrespect), as well as a lack of information or a deficiency in informing. The other two variables, delayed diagnosis and low consultation hours expose the response rate of more than three-quarters (73% for the former and 78.5% for the latter) tendency regarding medical malpractice cases. Lastly, just above fifty percent of respondents answered in favor of numerous surgical errors, e.g., infection of the surgical incision, injuries during surgical intervention, wrong maneuver leading to dislocation of the prosthesis, wrong epidural injection, wrong-site surgery, and so on.

4.2.3. Analysis of Recent Medical Malpractice Cases

Case One: *Misdiagnosis during C-section at Central Hospital, Dhaka: June 2023*

Mahbuba Akter Akhi, an expectant mother, was admitted to Central Hospital on June 14, 2023, with the hope of having a normal delivery under the supervision of Dr. Sangjukta Saha, a renowned gynecologist of the same hospital. Dr. Saha, who was supposed to perform the surgery, was absent in the labour room where Akhi was trying to have a normal delivery, which the hospital administration purposefully kept from her family. Over several hours, her health gradually deteriorated, and medical staff neglected to take prompt action, including checking

her vital signs or doing a cesarean section. When her health deteriorated further and her baby began showing signs of severe distress, medical staff delayed the decision to proceed with surgery, citing staff shortages and overburdened facilities. The mother ultimately arrived at a critical stage following several hours of protracted labor and deteriorating symptoms. She was eventually rushed into surgery which was performed by Dr. Saha's two assistants, Dr Muna Saha and Dr Shahazadi Sultana, along with other medical staff who lacked the necessary skills to carry out the surgery. The mother eventually had a bungled C-section, which caused the death of both the mother and the child.⁵²

Case Two: *A Fatal Endoscopy Procedure at Labaid Hospital, Dhaka: July 2023*

Raahib Reza, who was dealing with bloating, discomfort, and chronic stomach pain, was admitted for the endoscopy procedure on July 17, 2023, at Labaid Hospital, Dhaka, following a detailed consultation with a gastroenterology team at the Hospital. However, as the endoscopy was performed, several serious errors occurred including providing local anesthesia to numb his throat without a prior examination of his test reports, using an unsterilized endoscope, lack of proper monitoring of Raahib's vital signs during the procedure like heart rate, oxygen saturation, and blood pressure, and performing the procedure without recognizing the perforation of the stomach. After the procedure, Raahib was moved to the recovery room, where nurses observed signs of distress. After a while, Raahib began experiencing severe abdominal pain, high fever, and difficulty breathing. Within 24 hours of the endoscopy, on July 18, 2023, Raahib Reza tragically passed away.⁵³

Case Three: *Circumcision Tragedy at United Medical College Hospital, Dhaka: December 2024*

A five-year-old boy Ayan Ahmed was admitted to United Medical College Hospital, a reputable private clinic in Dhaka, on December 31, 2024, to undergo circumcision. Ayan was circumcised under full anesthesia without her parent's consent. He did not regain consciousness a few hours post-operation. As a result, he was hurried to transfer to another branch of the same hospital. After seven days of keeping him on life support in the pediatric intensive care unit, eventually, the doctors declared Ayaan dead. In the same year, a 10-year-old boy Ahnaf Tahmin Ayham underwent circumcision at a private hospital in the capital. The boy also tragically died during a routine circumcision procedure at City Hospital. It was claimed that the procedure was to be performed under local anesthesia, which would numb the area of the penis

⁵² Moudud Ahmmed Sujon, 'Botched C-Section: Doctor Failed to Assess Patient's Condition' *The Daily Star* (Dhaka, 11 August 2023).

⁵³ Saddif Ovee, 'Death after Endoscopy: Family Alleges Negligence, Doctor Blames Missing Records' *Dhaka Tribune* (Dhaka, 20 February 2024).

without affecting the boy's consciousness. However, the anesthetist made a grave error by administering an incorrect dosage of anesthesia. The concerned doctor mistakenly administered an excessive amount of anesthesia, which was intended for a much larger patient.⁵⁴

Case Four: *Cases of Tragic Misdiagnosis at Max Hospital, Chittagong: July 2018*

Rafida Khan Raifa, a two-year-old girl, was admitted to Max Hospital, Chittagong, Bangladesh for throat pain. Rafida was given an antibiotic at the hospital, which caused her body to convulse. She was then given an injection, which ultimately killed her. In the same year, 2018, a 60-year-old patient Abu Sayeed, who had a snake bite, was admitted to the hospital's emergency department at Tangail, a local hospital in Dhaka division. The elderly man later passed away as a result of failing to get an anti-venom vaccine. It was claimed that if a correct diagnosis was made promptly, the patient might have survived.⁵⁵

In addition to the terrible outcomes of healthcare seekers mentioned above, which were documented between 2023 and 2024, there have been numerous shocking reports of medical malpractice causing tragic deaths of patients from 2013 to 2018. For instance, a survey report has claimed that over six years (from 2013 to 2018) about 413 people died due to medical malpractices, on the other hand, another survey has reported that over 550 patients died from 'wrong medical treatment' and 'negligence of doctors' across the country in between 2010 and 2017.⁵⁶ As per data from Ain O Salish Kendra (ASK), 466 persons died as a result of medical malpractice between 2008 and 2016.⁵⁷

4.2.4. Causes of Medical Malpractice

There are multiple factors leading to medical negligence. The following data scan the common causes primely responsible for medical malpractice in Bangladesh. In doing so, the researcher has chosen seven different categories of causes after conducting an in-depth desk study.

⁵⁴ 'Child's Death: DGHS shuts down United Medical College' *The Daily Star* (Dhaka, 15 January 2024); '10-yr-old dies during circumcision at city hospital; 2 doctors arrested' *The Daily Star* (Dhaka, 21 February 2024).

⁵⁵ 'Probe report: Rafia Died due to Medical Negligence' *Dhaka Tribune* (Dhaka, 7 July 2018).

⁵⁶ Md Solamain, '554 die from wrong treatment in 6 yrs' *The Daily Sun* (Dhaka, 18 December 2017)

⁵⁷ Md. Rabiul Islam, 'Negligence in Government Hospitals of Bangladesh: A DangerousTrend' (2015) 4(5) *International Research Journal of Social Sciences* 12.

Table 6: Frequency of causes regarding medical malpractice cases

What are the common causes of medical malpractice?					
			Responses		Percent of Cases
			N	Percent	
Causes Frequency	1	Absence of specific law	43	14.48%	53.7%
	2	Lack of effective control mechanism	32	11.0%	41.6%
	3	Limited public facilities (Public Hospitals/ Clinics/ Medical Test Centers/etc.)	57	19.6%	74.0%
	4	Unavailability of health workforce (Doctors/ Nurses/ Service Providers/etc.)	49	16.8%	63.6%
	5	Misuse or misappropriation of resources (Medicines/ Medical Equipment/ Infrastructures/etc.)	27	9.3%	35.1%
	6	Lack of ethical consideration of the medical service providers	47	16.2%	61.0%
	7	Weak health information system	43	14.8%	55.8%
Total			291	100.0%	377.9%

Source: Author's research project titled '*Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study*' funded by Jagannath University Research Center, 2020-21

It is clearly observed from the present data that more than half of the respondents specify four specific reasons behind the occurrence of medical malpractice. Among the respondents, the highest number (74.0%) of the respondents stated that limited public facilities i.e., inadequate public hospitals and medical test centers, and insufficient medicine are the main causes to intensify medical malpractice (Table 6). On the other hand, an average of around 60% of the respondents mention the other three types that trigger medical malpractice namely the absence of specific medical negligence law, unavailability of the health workforce, and the lack of ethical consideration of the medical service providers (Table 6). Lastly, lack of effective control and misuse or misappropriation of resources stand lower in position, 41.6% and 35.1% respectively (Table 6).

4.3. Bottleneck of Medical Negligence Laws and Difficulties on Court Proceedings relating to Medical Negligence Cases

After analyzing multiple causes of medical negligence, the second phase of the study examines medical negligence laws and their shortcomings responsible for the increasing rate of medical malpractice in Bangladesh. The present study found that the absence of specific medical negligence law stands as the third most common

factor that endangers the medical profession (half of the respondents answered in favor of the unavailability of medical negligence law expanding malpractice in healthcare service) (Table 6). Besides the above, the multiplicity of legal proceedings on medical malpractice cases is another hurdle to addressing the issue properly. Additionally, in Bangladesh, medical negligence cases are dealt with in different statutes, which creates confusion among the redress seekers. The present study in the second phase analyses the major legal lacuna in medical negligence laws along with the difficulties that arise during court proceedings. In doing so, researchers took the qualitative approach to collect data from the experts in this arena. An unstructured questionnaire method was used during the survey work.

Table 7: *Frequency of shortcomings in medical negligence-related laws*

What are the flaws in the existing medical negligence-related legislation?					
			Responses		Percent of Cases
			N	Percent	
Shortcomings Frequency	1	Absence of specific legislation	19	18.8%	95.0%
	2	Lack of constitutional safeguard	15	14.9%	75.0%
	3	Higher Court Fee	13	12.9%	65.0%
	4	Ineffective medical regulatory bodies	16	15.8%	80.0%
	5	The complexity of action under the consumer protection law	11	10.9%	55.0%
	6	Lack of public awareness	18	17.8%	90.0%
	7	Any other flaws	9	8.9%	45.0%
Total			101	100.0%	505.0%

Source: Author's research project titled '*Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study*' funded by Jagannath University Research Center, 2020-21

The expert replied that the absence of specific legislation and lack of awareness regarding medical rights is the prime reason for increasing the rate of medical malpractice in the health sector of Bangladesh (Table 7).⁵⁸ Around 80% of the expert of the present study have responded that the ineffectiveness of medical regulatory bodies and the lack of constitutional safeguards encourage medical staff to take unethical practices in their services (Table 7). Furthermore, the higher court fee and

⁵⁸ More than 90% of the respondent on the second phase of the present study mention two specific flaws with respect to medical legislation in Bangladesh responsible for the increasing of medical malpractices, absence of specific medical negligence laws and lack of public awareness regarding medical rights.

the complexity of action under the consumer protection law upset the redress seeker to go before the judicial forum (Table 7).

Table 8: *Frequency of difficulties arising during court proceedings on medical negligence cases*

Why does it become difficult to prove medical negligence in court?					
			Responses		Percent of Cases
			N	Percent	
Procedural Difficulties Frequency	1	Complexity in the investigation procedure	13	22.4%	65.0%
	2	Lack of experts in medical negligence laws	18	31.0%	90.0%
	3	Difficulties regarding proof of medical negligence	20	34.5%	100.0%
	4	Any other difficulties	7	12.1%	35.0%
Total			58	100.0%	290.0%

Source: Author's research project titled '*Medical Negligence in Bangladesh and an Urges for a Separate Medical Negligence Law: An Empirical Study*' funded by Jagannath University Research Center, 2020-21

In Bangladesh, medical negligence court proceedings are surrounded by several adversities. The justice-seekers against medical negligence cases are always getting disappointed due to the perplexity of court proceedings. The legal experts, attending the second phase of the present study, highlighted four main challenges that victims commonly confront during court hearings. Among the difficulties, all experts agreed that proving negligence in a medical negligence case is one of the most challenging tasks for the petitioner (Table 8). The lack of medical negligence experts in a judicial case, according to the experts (90% of respondents replied in favor), makes the process more arduous and time-consuming (Table 8). The complexity of the investigation procedure is another hurdle to continuing the court proceeding in a medical negligence case. In addition, 35% of respondents in the second phase noted additional types of challenges that made the hearing more challenging, like the unethical practice of the lawyer, pressure from the influential body to the victim, difficulty in the evidence collection process, and unwillingness to support from the health care centers (Table 8).

5. Discussion and Recommendations

Medical malpractices claim in Bangladesh have increased rapidly.⁵⁹ The lack of accountability of healthcare providers and doctors in public and private medical care institutions makes the situation more acute. The present study concentrated on the analysis of medical negligence practice and causes of Bangladesh focusing on the medical institution in the eastern part of Dhaka city. The empirical analysis proceeded on the hypothesis that the absence of specific legislation and difficulties in medical negligence litigation is one of the prime causes of increasing the rate of medical malpractice in Bangladesh. The research data also make the same inference. The data suggest that the absence of specific legislation and the shortcomings of the existing laws on medical negligence practice encourage medical service providers to take unethical practices in their service (53.7% and 95% of patients and legal experts of the present study replied respectively in favor).

According to current study data from the eastern region of Dhaka, more than fifty percent of respondents hold several entities liable for medical negligence practices, e.g., hospitals, doctors, surgeons, nurses, and other medical service providers. Ain O Salish Kendra (ASK), a human rights-based legal aid organization, has reported a total of 517 medical malpractice incidents from 2008 to 2016. The report claims that 377 doctors, 42 staff, and 58 hospital authorities are responsible for such misfeasance. The present study also found that hospitals and doctors are mainly responsible for medical misfeasance (more than 60% of respondents claim that hospitals and doctors are mainly liable for unethical practices in the medical profession).

Most of the malpractice incidents covered misdiagnosis like irrelevant clinical examination and overlooking the important findings, diagnosis without performing necessary tests, and failure to recognize a patient's symptoms, to name just a few. Malpractice in the pathology center took second place, while malpractice by the medical staff was in third place. *Md. Islam* has found a similar trend, e.g. 34.15% of respondents have claimed different categories of misdiagnosis like a wrong treatment, wrong advice, unnecessary tests, and low-quality drug prescribed, while 25.20% of respondents reported the inattentiveness of the physicians during providing health services.⁶⁰ Misbehavior by health service providers is another kind of unethical practice frequently faced by health service seekers, the study shows that

⁵⁹ Faria Ahmad, 'Medical negligence and duty of care' *The Daily Star* (Dhaka, 24 July 2018); MIR M. D. AMTAZUL and Fazle Rabbi Chowdhury, 'Medical Malpractice: in Quest of an Effective Legal Protection in Bangladesh' (2018) 9(2) *Journal of Medicine* 87-89.

⁶⁰ Md. Rabiul Islam and Shekh Farid, 'Negligence in Government Hospitals of Bangladesh: A Dangerous Trend' (2015) 4(5) *International Research Journal of Social Sciences* 12-18.

the majority of the respondents, which constitute 81% of the total respondents, accused the nurses and other health assistants of misbehaving with them.

As to the causes of medical negligence, the majority of the respondents, which constitutes 53% of the total respondents in the first phase of the study and 95% of the total respondents in the second phase of the study, argued that the absences of specific legislation and the drawbacks of existing legislations accelerate the medical malpractice incidence in Bangladesh. *Khandakar Kohinur Akter* contended on the same line; according to her the absence of specific medical negligence laws against medical wrongdoers causes hindrance to the redress seekers' victims.⁶¹ In the case of medical negligence litigation, all of the legal experts who have participated in the second phase of the study unanimously agreed that the difficulty of proof of medical negligence in a court proceeding is the topmost cause that daunted the victim to proceed with medical negligence case before the judicial forum. *Khandakar Kohinur Akter* profitably mentioned that the petitioner of the medical negligence case mainly faced three different types of difficulties: the first one is the liability of burden of proof in a medical negligence case, while the second one is relating to the expert's opinion on medical negligence contention.⁶² In the first situation, the petitioner bears the liability of burden of proof in a medical negligence lawsuit, and if he fails to produce relevant evidence in his favor, no legal remedy will be offered.⁶³ Turning to the second one, in medical negligence litigation, a doctor is required to prove the negligence of another doctor against whom a negligence charge has been brought. Unfortunately, the reality is that a doctor is not willing to provide information against another doctor because of their professional field. The third hurdle is that medical institutions are always unwilling to provide necessary documents to the victims. As a result, in the absence of the necessary evidence, the proof of medical negligence becomes more difficult.⁶⁴

The scholarly publications and the current study on medical negligence issues clearly show that it is currently one of the big challenges for Bangladesh. However, different ameliorative approaches have been recommended by scholars to tackle the prevalent predicament in the health sector. *Sheikh Mohammad Towhidul Karim and Others* have suggested two reform proposals to address the problem, namely the

⁶¹ Khandakar Kohinur Akter, 'A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices' (2013) IV *The Northern University Journal of Law*.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

enactment of a new law and setting up a medical review bureau.⁶⁵ Karim proposed that three particular issues should be focused on new legislation: a code of medical ethics for the health service providers, a judicial forum against medical malpractice cases, and an expanding awareness program through campaigns, seminars, and workshops on patients' rights and ethical standards for the medical professionals.⁶⁶ Karim also recommended that an alternative dispute resolution forum be established under a medical review bureau that will work outside the courtroom. He further suggested that the medical review bureau should co-exist with the tribunal, which can set a proper balance between doctor and patient.⁶⁷ Khandakar Kohinur Akter,⁶⁸ Md. Aktarul Alam Chowdhury,⁶⁹ Zelina Sultana⁷⁰ also proposed a similar recommendation in their scholarly articles. The current study interviewed experts to assess preventive strategies to confront medical malpractice incidents in Bangladesh.

Table 9: Frequency of proposed recommendations

What recommendations do you have for combating medical malpractice?					
Recommendation			Responses		Percent of Cases
			N	Percent	
Frequency	1	Enact new legislation relating to medical malpractice	17	54.8%	89.5%
	2	Reform existing medical negligence-related laws.	8	25.8%	42.1%
	3	Any other recommendations	6	19.4%	31.6%
Total			31	100.0%	163.2%

The majority of the respondents (twenty legal experts attended the second phase of the study), who constitute 89.5% of the total respondents, proposed to enact new legislation to ensure the patient's rights and prevent unethical practices in the healthcare sector (Table 9). A second approach was also suggested by almost half of the experts: reform existing laws to address medical negligence cases properly and effectively. In the end, 31.6% of participants suggested some other ameliorative

⁶⁵ Sheikh Mohammad Towhidul Karim and Others, 'Medical Negligence Laws and Patient Safety in Bangladesh: An analysis' (2013) 5(2) Journal of Alternative Perspectives in the Social Sciences 424-442.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Khandakar Kohinur Akter, 'A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices' (2013) IV The Northern University Journal of Law.

⁶⁹ Md. Aktarul Alam Chowdhury and Md. Hasnath Kabir Fahim, 'Medical Negligence and Deceptive Medical Practices in Bangladesh Health Segment: an Appraisal' (2018) III(II) BiLD Law Journal.

⁷⁰ Zelina Sultana, 'Medical Negligence in Bangladesh: An Argument for Strong Legal Protection' (2019) 12(2) Asia Pacific Journal of Health Law & Ethics 69-94.

measures to deal with the issue like awareness-building programs on patient's rights, strengthening the ethical standard of the medical service providers, amendment of the consumer protection laws to address the medical service, and creating alternative dispute resolution forum for the redress seeker against the wrongdoer.

Limitations: Two fundamental limitations on methodology were found by the researcher in this study, as well as three other specific delimitations concerning the scope of the study. First, a key limitation was the use of self-reported data. The research data only demonstrated the patient's perceptions through a structured questionnaire approach. Second, another limitation was time constraints. Because of the limited time frame, the opportunity to collect sufficient data was limited. It would have been more productive to devote additional time to data collection. Concerning the delimitation of the study, it covered a limited area of Dhaka city, the eastern part of the metropolitan area. The main reason behind such an approach was the existing pandemic situation prevalent all over the globe, the COVID-19 crisis. In addition to that, from the broader prospect, the study was delimited only to legal perception. The shortcomings of medical negligence law were the main focus of the study. Lastly, the study is confined to a convenience sample of medical negligence incidence in the eastern region of Dhaka city.

6. Concluding Remarks

The medical profession is primarily based on two fundamental principles: the first one is to protect and promote a patient's best interest and the second one is to maintain an ethical standard of beneficence during treatment. However, regrettably, healthcare providers persistently deviate from their obligations and engage in diverse malpractices. This is so because of the commercialization of health services, lack of accountability, improper control mechanisms, indifferent attitude of the government toward this sector, and finally the absence of specific legislation on medical negligence. The patient and their relatives faced unprecedented suffering due to these prevalent malpractices in the healthcare sector. Legal obligation and their proper implementation can be instrumental in addressing this predicament properly. But in Bangladesh judicial forum faced two major challenges to deal with medical malpractice cases. First and most importantly there is no particular law to deal with medical negligence litigation. Secondly, the scattered civil and criminal laws on different statutes relating to medical negligence issues are surrounded by multiple shortfalls, for instance, higher litigation fees, the complexity of investigation procedure, difficulties in collecting evidence against the wrongdoer, lack of expert on medical negligence case, and unsupportive attitude of the health service providers. On the one hand, this scenario encourages medical service providers to engage in unethical practices, while on the other hand, it discourages victims from

going before the court to ensure justice. The findings of the present study recommended that the government should enact new legislation encompassing an effective judicial mechanism against the medical wrongdoer. It also suggests that the new legislation addresses the ethical code of medical professionals. On second thought, the reformation of the existing legislation and its hindrances should be removed to make easy access for the justice seeker against the malefactor.

Prospects in Using Artificial Intelligence in Bangladesh's Maritime Security through the Lens of Ethical Issues

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Abstract: Artificial intelligence (AI) is revolutionizing various fields, including marine security, by enabling real-time data analysis, pattern recognition, and predictive capabilities. This enhances situational awareness and operational effectiveness, enabling the detection of suspicious vessels, illegal activities, and prompt response to emerging threats. The Bay of Bengal, a region in Bangladesh, faces various maritime security challenges, including piracy, human trafficking, drug smagglings, illegal fishing etc. Bangladesh, a developing country, has historically relied on human experience and traditional security measures to address maritime challenges. However, the country's National Strategy for Artificial Intelligence in March 2020 neglected the potential of AI in maritime security. Thus, the paper's main aim is to explore the prospects of using AI for maritime security based on a secondary literature review and focus on the progress of Bangladesh in using AI through the policy analysis method. In doing so, this also highlights the ethical issues that Bangladesh should address in applying AI at the ocean level and why. After an in-depth study of different scholarships in related fields, it finds that Bangladesh is far from using AI in protecting marine areas which increased its security threats both maritime and national arena. The paper suggests that Bangladesh should introduce AI technology while considering ethical norms to control maritime threats and security challenges in the Bay of Bengal.

Key Words: *Artificial Intelligence (AI), Maritime Security Challenges, Prospects of AI, Ethics of AI, Bay of Bengal*

1. Introduction

Maritime security concept is widely discussed in present-day, an integral part of national security and a major concern for all countries including Bangladesh.² As 90% of external trade relies on sea routes, it is important for continuing the current economic growth and trade relationships.³ Maritime logistics plays a vital role in global trade, with millions of tons of cargo transported by ships annually. Intelligent approaches, driven by artificial intelligence, can unlock the value of data collected from ships, opening new possibilities for the maritime sector. Like international

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² Christian Bueger and Timothy Edmunds, 'Beyond Seablindness: A New Agenda for Maritime Security Studies' (2017) 93(6) *International Affairs* 1293.

³ Rear Admiral Md. Khurshed Alam (Retd.), 'Blue Economy: Development of Sea Resources for Bangladesh' (Ministry of Foreign Affairs, 31 October 2019) <https://mofa.gov.bd/site/page/8c5b2a3f-9873-4f27-8761-2737db83c2ec> accessed 10 October 2023.

trade, this security is crucial to protect marine resources such as hydrocarbon deposits, fisheries, biodiversity and potential mineral reserves. In addition, maritime security measures are essential to prevent illegal activities like smuggling, human trafficking, arms trafficking, and piracy, thereby safeguarding national security.⁴ So, maintaining maritime security, environmental hazards such as oil spills, illegal waste dumping, and overfishing can be minimized, preserving marine ecosystems and coastal communities.

With the advent of time, the Maritime security concept has significantly changed globally. Two international Organizations, The Security Council of United Nations and the International Maritime Organization (IMO) play pivotal roles in promoting maritime security.⁵ Between 2018 to 2023, the IMO plans to incorporate latest technologies into the regulatory structure to enhance safety, security, impact of the environment, trade facilitation, industry costs, and personnel effects.⁶ Bangladesh, a member of the International Organization of Merchants (IMO), has been prioritizing maritime security since 1971. Initially, the focus was on avoiding naval warfare and border security issues, but now it is promoting cooperation among countries to achieve common maritime security goals.⁷

Bangladesh faces marine risks like illegal fishing, oil and gas exploration, poaching, and pollution. The digital sector is shifting from manual to digital threats, necessitating digital control. AI technology is being used in the fishing industry to monitor illegal activities and maintain trade. Autonomous vehicles are aiding in search and rescue operations, while Australia is using AI-powered drones for shark detection.⁸

AI is expected to significantly enhance information and intelligence management, particularly in Maritime Domain Awareness (MDA).⁹ This technology integrates

⁴ Aleeze Moseley, 'The Implementation of International Maritime Security Instruments in CARICOM States' Thesis, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, The United Nations New York (2009) 13

⁵ *ibid*

⁶ T. Luangwilai, 'Improving Maritime Security via Automatic Navigational Monitoring' (2023) 1(1) Contemporary Issues in Air and Space Power 2

⁷ James J Kraska, 'Grasping the Influence of Law on Sea Power' (2009) 62(3) Naval War College Review 10 <<https://digitalcommons.usnwc.edu/nwc-review/vol62/iss3/9>> accessed 11 October 2023

⁸ Dr. Abul Kalam Azad 'Security of Bangladesh: Facing the Challenges of Non-Traditional Threats' (Paper presented at the Seminar on Maritime Security of Bangladesh, organized by the Bangladesh Institute of International and Strategic Studies (BISS), Dhaka, 12th February 2009).

⁹ B. L. Aylak, 'The Impacts of the Applications of Artificial Intelligence in Maritime Logistics' (2022) Special Issue (34) European Journal of Science and Technology 217-225.

data from multiple sources and advanced cloud services, enabling vessel tracking, cargo identification, and monitoring shipping company behavior. An ideal AI-based MDA architecture would use radar, vessel monitoring systems, satellite-supported systems, UAVs, drones, imagery, and open-source intelligence to generate data, providing automated threat assessments, early warnings, risk quantification, and timely alerts.¹⁰

Legal and ethical concerns regarding autonomous lethal systems are increasing due to challenges in digital technology use. Article 36 of the 1977 Additional Protocol I mandates states to review weapons, but these reviews lack international oversight.¹¹ As AI-based combat technology emerges, strict international law provisions are needed to distinguish between military and civilian vessels. This new inventory use needs consideration of some ethical issues like bias in the algorithm, ethical dilemmas in making decisions and others. This paper aims to address the prospect of AI use in maritime security in Bangladesh with the lens of ethical consideration based on secondary data by using qualitative research methodology. For that purpose, the paper offers a general examination of the concepts of maritime security and AI (Section 2) followed by an analysis of the prospects and progress of the use of AI to enhance maritime security in Bangladesh, focusing, in particular, on certain crimes and activities, such as piracy, humans trafficking, drug smugglings, illegal fishing and maritime terrorism (Section 3). After that, the paper address the ethical consideration and challenges of using AI (Sections 4 and 5), before providing some recommendations and concluding observations (Section 6).

2. Understanding Maritime Security and AI

The concept of maritime security has several understandings. Maritime security is a complex concept, that involves both national and international laws, and it must be viewed from a broader geopolitical perspective. This part tris to clarify the concepts of maritime security and AI, as relevant for the purposes of this examination.

2.1 The Concept of Maritime Security

The phrase "maritime security," which is a relatively new addition to the field of international security, was coined in the 1990s and has gained more attention since 2000 as a result of attacks by pirates and maritime terrorism, particularly in the

¹⁰ Dr. Susanna Grech Deguara, 'AI and Maritime Law A new era for Yachting' (Chetcuti Cauchi, 26 Jun 2023)

<<https://www.ccmalta.com/publications/ai-and-maritime-law>> accessed 20 October 2023.

¹¹ Vincent Boulanin, 'Implimenting Aricle 36 Weapon Reviews in the Light of Increasing Autonomy in Weapon Systems' (2015) 2015/1, SIPRI Insights on Peace and Security, 2

Indian Ocean.¹² Maritime security is a complex issue involving public and private activities, sometimes with opposing interests, and no universally agreed definition exists.¹³ Port authorities, ship owners, operators, and other marine organizations use different necessary measures to protect against seizure, sabotage, piracy, pilferage, annoyance, or surprise.¹⁴ In that respect, IMO notes that:

Maritime safety means preventing accidents at sea caused by things like bad ships, untrained crews, or mistakes by operators. Instead, *maritime security is about protecting against illegal and intentional actions* (emphasis added).¹⁵

Maritime security is a multidisciplinary concept involving police, military, domestic and international laws, and geopolitics. It includes five interconnected aspects: maritime domain security, maritime borders protection, ocean governance, military activities at sea, and maritime transportation system regulation. The United Nations Convention on the Law of the Sea regulates maritime spaces and activities, including unlawful military, research, illegal fishing, and marine pollution.¹⁶

The United Nations Secretary-General highlighted seven activities that are seen as threats to maritime security.¹⁷ Those are:

1. Piracy and armed robbery against marine vessels and ships;¹⁸
2. Terrorist acts involving ships and maritime interests;¹⁹
3. Illicit trafficking in arms and weapons of mass destruction by sea;²⁰
4. Illicit trafficking in drugs;²¹
5. Trafficking and smuggling of people by sea;²²
6. Illegal, unreported, and unregulated fishing (IUU fishing) at sea; and
7. Intentional and unlawful damage to the marine environment.

¹² Supra note 4

¹³ T. Kelly, 'Maritime Security, Sea Power and Trade' (U.S. Department of State, 24 June 2015) < <https://2009-2017.state.gov/t/pm/rls/rm/2014/223921.htm> > accessed 5 October 2023.

¹⁴ Max Mejia Jr, 'Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence' (2003) 2(2) Journal of International Commercial Law 153, 155

¹⁵ Natalie Klein, 'Maritime Security and Law of the Sea' (Oxford University Press 2011) 8

¹⁶ Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes, and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 347, 348-9.

¹⁷ UNGA, 'Oceans and the Law of the Sea: Report of the Secretary-General' (10 March 2008) UN Doc A/63/63, para 39. The definition of maritime security was not revisited in the Secretary-General's 2009 Report to the General Assembly

¹⁸ *ibid*, para 62

¹⁹ *ibid*, para 63

²⁰ *ibid*, para 72

²¹ About 70% of confiscated drugs are seized during or after transportation by sea

²² *ibid*

The concept of maritime security has evolved to include both conventional and non-conventional threats, considering global and regional geopolitics. Non-traditional threats originate from human security-development nexus and are more broader, impacting states, individuals, and humanity.²³

What is more, non-traditional security threats are challenging because they transcend national borders²⁴ and can be perpetrated by non-state actors government groups²⁵ like small-scale pirates, radical religious organizations, and multinational criminal entities.²⁶ Non-conventional threats in developing countries like Bangladesh, characterized by low-intensity conflicts with international implications, require cooperation and interaction between enforcement agencies on land and at sea.

2.2 Meaning of Artificial Intelligence (AI)

AI has gained significant momentum in recent years, driven by advancements in machine learning (ML) and deep learning (DL). These technologies have led to advancements such as face recognition and Go games. ML and DL algorithms, often known as self-learning algorithms, have the ability to recognize data patterns, in contrast to previous methods.²⁷ The term AI was first defined in 1955 by John McCarthy, one of the pioneers in this field, noting that 'the goal of AI is to develop machines that behave as though they were intelligent'.²⁸ In this definition the term intelligent is a vague word because every computer has large memory that can save a long text, known as intelligent performance of a computer which is a part of AI system. This dilemma is solved sophisticatedly by the following definition by Elaine Rich,²⁹ observing that 'Artificial Intelligence is the study of how to make computers do things at which, at the moment, people are better.'³⁰ Rich concisely characterizes what AI researchers have been doing for the last 50 years, although that alone does

²³ R. Aswani, 'Non-Traditional maritime security threats in the Indian Ocean Region: Policy alternatives' (2020) September 2020, J Public Affairs

²⁴ *ibid*

²⁵ Non-state actors include organizations and individuals that are not affiliated with, directed by, or funded through the government. These include corporations, armed resistance groups etc.

²⁶ Lim Kyunghan, 'Non-traditional Maritime Security Threats in Northeast Asia: Implications for Regional Cooperation' (2015) 22(2) *Journal of International and Area Studies* 135-146.

²⁷ Joost N. Kok, Egbert J. W. Boers, Walter A. Kusters, Peter van der Putten and Mannes Poel, 'ARTIFICIAL INTELLIGENCE - Artificial Intelligence: Definition, Trends, Techniques and Cases' (2002) 1 *Encyclopedia of Life Support Systems (EOLSS)* 1095-1107 <<https://www.eolss.net/Sample-Chapters/C15/E6-44.pdf>> accessed 20 October 2023.

²⁸ *ibid*

²⁹ Elaine Rich, 'Artificial Intelligence and the Humanities' (1985) 19(2) *Computers and the Humanities* 117-122. <<http://www.jstor.org/stable/30204398>> accessed 20 October 2023.

³⁰ *ibid*

not solve the underlying problem surrounding the conceptualization of AI, as reflected in a number of different AI definitions, including the following reported by Kok (et al.):

- “AI is an area of study in the field of computer science, concerned with the development of computers able to engage in human-like thought processes such as learning, reasoning, and self-correction.
- AI concept is that machines can be improved to assume some capabilities normally thought to be like human intelligence such as learning, adapting, self-correction, etc.
- AI is an extension of human intelligence through the use of computers, as in times past physical power was extended through the use of mechanical tools.
- In a restricted sense, AI is the study of techniques to use computers more effectively by improved programming techniques.³¹

Artificial intelligence is a technology that enables machines to mimic complex human abilities. The European Commission's AI HLEG defines AI as systems that display intelligent behavior by analyzing their environment and taking actions to achieve specific goals.³²

3. Prospects of AI in Maritime Security

AI models for the maritime industry are able to evaluate events in the sea independently and forecast the dangers involved. Bangladesh has a great prospect for using AI in different maritime security purpose. Some of them have been introduced in the following sub-sections. Those are connected with the security threat mentioned in the previous section of this paper.

3.1 Controlling Piracy and Other Crimes with AI

The Bangladesh Coast Guard has enhanced its international shipping protection capabilities, providing enhanced security for fishermen and coastal seafarers, despite resource limitations.³³ Bangladeshi ships primarily use navigation radars for safe sea lanes navigation, but they struggle to detect small boats and pirate-missed low-lying skiffs.³⁴ In addition to this, the human cannot see well in darkness, rain, and fog

³¹ Supra note 27

³² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe, Brussels, 25.4.2018 COM(2018) 237 final <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341>_accessed 25 October 2023

³³ ibid

³⁴ Aditi Chatterjee, 'Non-traditional Maritime Security Threats in the Indian Ocean Region' (2014) 10(2) Maritime Affairs: Journal of the National Maritime Foundation of India, 77-95.

which gives pirates an advantage to hide. Here the use of AI can enhance the security measures of Bangladesh.

However, using Track-Before-Detect (TBD) radar technology, these low-lying skiffs can be clearly tracked and detected. Advanced digital signal processing and DL data analysis are used to counter piracy by providing real-time situational overviews to seafarers. This technology helps to detect pirate movements, such as direct boarding, loitering, and sudden changes in direction.³⁵ It can identify suspicious behavior from pirates disguised as fishing boats and differentiate their aggression from unsuspecting boats and provide accurate threat alerts, preventing unnecessary distractions for crew members. Once threats are detected, multiple deterrent systems, for example search beams, surveillance cameras and long-range acoustic devices, functioned integrated and automatically warn off hostile vessels and collect videos as evidence for follow-up enforcement action.

Above all, detection of unprecedented piracy attacks, and observing the threats, risks, and vulnerabilities are nearly challenging for the crew members by using traditional technologies. With the new sense-making possibilities by quickly generating insights through deep analysis of data and relaying critical information, AI creates fully automated piracy alerts within a few moments which can potentially save lives of seafarers.³⁶ AI helps to identify the characteristics of a pirate with the behavioural analytics, providing important and insightful information with early warning to the crew, so that they have response time to prepare their defences against the impending threat.³⁷ By observing AI data and motion in detail within the vicinity of a vessel, the crew members are able to identify the number of boats, other neighbouring ships within the same waters, the routes and crossing speed of the suspected boats, distinct patterns of the paths of such boats and unknown correlation.³⁸

The "blackbox" recording system on a pirate ship should be preserved and handed over to maritime law enforcement for better continuation investigation and

³⁵ Durluk and others 'Navigating the Sea of Data: A Comprehensive Review on Data Analysis in Maritime IoT Applications' (2023) 13(17) Applied Sciences. <<https://doi.org/10.3390/app13179742>> accessed 20 October 2023.

³⁶ Gan Yeow Beng, 'Steering With Artificial Intelligence To Combat Maritime Piracy' (Public Security | Maritime Systems, January 2021) <<https://innovd.stengg.com/insights/public-security/steering-with-artificial-intelligence-to-combat-maritime-piracy/>> accessed 21 October 2023.

³⁷ *ibid*

³⁸ *ibid*

prosecution of hijacking attempts.³⁹ This is crucial to contain the piracy scourge, as it provides reliable video footages and radar tracks, which are crucial pieces of information for the authorities where they can analyse these with AI to take better enforcement action.

3.2 AI to combat Human Trafficking

Artificial intelligence (AI) simulates human intelligence with the help of machine learning process to analyze vast amounts of training data finding correlations and patterns, making predictions and tracing complex relationships between data points, making them more actionable. Machine learning has opened doors for law enforcement agency in human trafficking investigations.⁴⁰

AI engine, Traffic Jam, uses facial recognition and geospatial software to identify runaways and missing people advertised online. These apps are major tools in helping law enforcement officers find and save human trafficking victims.⁴¹

AI in digital forensics allows law enforcement officers to quickly filter through images and videos found on mobile or computer devices, drugs, weapons and identifying people by grouping faces into categories like infants, toddlers, children and adults.⁴² This technology aids in the fight against human trafficking in the sea speedily and allowing agencies worldwide to collaborate.

Tech giants like Windward are using advanced AI technology and over 10 billion data points to analyze vessel behavior, reducing false positives and providing predictive intelligence for informed decision-making.⁴³

3.3 AI and Control of Drug Smuggling

³⁹ *ibid*

⁴⁰ Aubrey Calaway, *Intelligence and the Fight Against Human Trafficking*, Centro de Información sobre Empresas y Derechos Humanos, 12 December 2021. <<https://www.business-humanrights.org/es/blog/artificial-intelligence-and-the-fight-against-human-trafficking/>> accessed 10 February 2024.

⁴¹ Mondira Dutta, 'Role of Technology in Combatting Human Trafficking', *История. Философия*. No 4(100)2020 57 <<http://rmebrk.kz/journals/6014/66586.pdf#page=58>>

⁴² Aly Franklin 'How AI Is Helping Law Enforcement Combat Human Trafficking', *ADF News* (25 January, 2023) <<https://www.adfsolutions.com/news/how-ai-is-helping-law-enforcement-combat-human-trafficking>> accessed on 10 February 2024

⁴³ Greg Nichols, 'The state of maritime monitoring hasn't changed much in generations. Pirates beware; AI is changing that' (*Hashish and pirates: How AI is cleaning up the high seas*, *ZDNET/Innovation*, 1 April, 2022) <<https://www.zdnet.com/article/hashish-and-pirates-how-ai-is-cleaning-up-the-high-seas/>> accessed on 11 October 2023.

AI can enhance drug smuggling detection by analyzing vast amounts of data to identify patterns, predict smuggling routes, and improve surveillance systems. Additionally, AI-powered algorithms can assist law enforcement agencies in identifying suspicious activities and intercepting drug shipments more effectively. AI-based maritime surveillance systems like SatShipAI can help to address intrusion cases in the Bay of Bengal, including drugs, IUU fishing, arms trade, marine resource protection, sea-borne robbery, piracy and human trafficking, particularly in Cox's Bazar and the south-western belt of Bangladesh.⁴⁴ SatShipAI, a Nodalpoint Systems spin-off, uses artificial intelligence and satellite imagery to detect and track vessels, providing timely security interventions between Bangladeshi fishing boats and Burmese trawlers, supported by Copernicus Accelerator, nVidia Inception Programme, Blue Growth, and EMODnet. With the help of nearby stations, Sentinel-2 data collecting may generate photos in ten to fifteen minutes, allowing for near real-time surveillance.⁴⁵ Behavior patterns, vessel patterns, and interaction spots can all be found with the use of this data. AI-powered algorithms can assist law enforcement in identifying suspicious activities and intercepting drug shipments more effectively. Additionally, AI can contribute to developing new strategies, leveraging machine learning for predictive analysis, and improving coordination between agencies to create a more robust anti-smuggling framework.

3.4 Illegal Fishing Controlling with AI

Illegal, Unreported, and Unregulated (IUU) fishing refers to a variety of fishing activities conducted in violation of national or international laws⁴⁶. Illegal fishing involves activities conducted by national or foreign vessels in waters under a State's jurisdiction without permission or violating its laws and regulations.

AI can significantly enhance IUU fishing prevention which can play a crucial role in augmenting Bangladesh's efforts against IUU fishing by:⁴⁷

⁴⁴ Ahmadul Hassan, 'Bangladesh becomes a transit for cocaine smuggling' *Daily Prothom Alo* (Dhaka, 8 Feb 2024)

⁴⁵ Sadhli Roomy, 'Geospatial AI for Maritime Surveillance: Deeper look at the Bay of Bengal and exploring solutions to thwart intrusion cases using artificial intelligence and deep learning' (Acme, 2018)
<<https://www.acmeai.tech/insight/geospatial-ai-for-maritimesurveillance#:~:text=AIS%20works%20via%20VHF%20transceivers,to%20track%20and%20monitor%20vessels>> accessed 16 October 2023.

⁴⁶ Illegal, Unreported and Unregulated (IUU) fishing, FAO, UN
<<https://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/>> accessed on 11 February 2024.

⁴⁷ ibid

1. Utilizing AI for advanced satellite monitoring to detect suspicious fishing activities.
2. Processing large datasets to identify patterns and trends related to IUU fishing.
3. Enabling real-time monitoring of fishing vessels and tracking their movements to ensure compliance with regulations.
4. AI algorithms predicting potential IUU fishing hotspots for targeted enforcement.

AI-driven surveillance systems can combat IUF fishing, revolutionizing data-driven decision making across industries like fishing. AI's ability to identify and report suspicious operations is promising⁴⁸. And based on it, the Nature decision-making (TNC) has launched a contest on Kaggle to develop artificial intelligence software to combat illegal fishing.⁴⁹ TNC plans to use electronic monitors on fishing boats to identify specific fish species, reducing review time by up to 40% and increasing boat monitoring, despite auditors only being found on 2% of commercial boats.⁵⁰ Existing facial recognition software for tracking fish faces challenges due to blurry images from boat cameras, but technology companies can develop accurate software for spotting protected species in high seas.⁵¹ San Francisco-based startup Pelagic Data Systems has developed technology to reduce illegal fishing by installing solar-powered radios on small commercial fishing boats, generating heat maps to identify heaviest activities and estimating fish quantity and size.

Developing nations, including Europe, are implementing strategies to combat illicit fishing, focusing on improving catch composition accuracy and recording/reporting, which is crucial for effective conservation and management measures. Bangladesh needs to examine and implement the following AI measures as like as different developed countries.

⁴⁸ Dr. V. Nagajothi, 'Artificial intelligence (AI) possesses the capacity to fundamentally transform various aspects of fisheries management and operations' (2023) 2(8) International Journal of Scientific Research in Modern Science and Technology (IJSRMST) 10-15, <<https://ijsrmst.com/6437395>> Accessed on 15 October 2023.

⁴⁹ Mary Catherine O'Connor, 'The latest weapon in the fight against illegal fishing? Artificial intelligence' The Guardian (London, 20 November 2016) C3 <<https://www.theguardian.com/sustainable-business/2016/nov/20/artificial-intelligence-illegal-fishing-tuna-sharks>> accessed on 1 November 2023.

⁵⁰ *ibid*

⁵¹ *ibid*

- Dutch researchers and the fishing industry have developed an AI-based tool for Fully Documented Fisheries (FDF) to improve data accuracy in catch reporting.⁵²
- In Australia, AI interventions address issues like poor species identification and underreporting.⁵³
- The rise of AI in aquaculture is evident globally, with startups and research institutions optimizing production.⁵⁴
- Thailand has developed a Deep Learning technique to transform fishing vessel data into global features, achieving an average accuracy of 97.50%.⁵⁵ TNC plans to own the intellectual property of software to reduce labor costs and improve species identification accuracy.⁵⁶
- Australian marine reserves and Indonesian explosive fishing are monitored using robotic camera technology and underwater hydrophones, providing real-time alerts for investigations into illegal fishing and sustainable fisheries management.⁵⁷

3.5 Controlling Maritime Terrorism with AI

In present world the AI technology has been using for controlling marine terrorism and other co-related activities. The AI system can identify and track vessel which are engaged in terrorist activities. This system may be used in risky maritime zone in Bangladesh. For this, Bangladesh needs to develop AI-based technological knowledge and expertise. Again, AI system can be helpful for security operations. Besides, it can easily detect potential threats in marine areas and thus can take initiatives. The United States, China, Russia, and India have integrated artificial intelligence systems into their militaries, enhancing performance, cybersecurity,

⁵² W. Macbeth and Others, 'Improving reliability of species identification and logbook catch reporting by commercial fishers in an Australian demersal shark longline fishery, (2018) 25 Fisheries Management and Ecology 186-202.

⁵³ *ibid*

⁵⁴ Prof. C Greg Lutz, The Rise of AI in Aquaculture, The Lutz Report, (1 March 2023) <<https://thefishsite.com/articles/the-rise-of-ai-in-aquaculture-artificial-intelligence>> accessed on 10 February 2024

⁵⁵ B. Chuaysi and S. Kiattisin, 'Fishing Vessels Behavior Identification for Combating IUU Fishing: Enable Traceability at Sea' (2020) 115 Wireless Personal Communication 2971-2993 <https://www.researchgate.net/publication/339273277_Fishing_Vessels_Behavior_Identification_for_Combating_IUU_Fishing_Enable_Traceability_at_Sea> accessed on 10 November 2023

⁵⁶ *ibid*

⁵⁷ 'Utilizing Artificial Intelligence to detect Illegal Fishing' (CSIRO 26 June 2020) <<https://www.csiro.au/en/research/technology-space/it/ai-technologies-iuu>> accessed 6 November 2023.

logistics, and operational costs. AI systems have been integrated into warfare platforms across land, water, space, and air, enhancing performance with less human input.⁵⁸ AI tools, including Artificial Neural Networks and Social Network Analysis, are used for facial recognition and analyzing terrorist networks.

Bangladesh needs to establish advanced AI-based data collection systems as like as India, with the combination of the National Intelligence Grid, Crime and Criminal Tracking Network, and Lawful Intercept and Monitoring, to track and develop countermeasures.⁵⁹ The US has vast terrorism data over 20 years, and since 2018, the government has integrated data-science, machine learning, and AI-driven approaches into its national security enterprise.⁶⁰

Singapore's Maritime Crisis Centre (SMCC), which was created after the 2008 Mumbai terror attacks, aims to ensure effective intelligence data sharing and coordinated responses to identify threatening ships in real time.⁶¹ The system uses information from local and foreign sources, including crew criminal records and ship routes, to determine threat levels and allows for faster information sharing among the law enforcement agencies.⁶² Bangladesh can use AI technology to identify terrorists both in marine border as well in land border and also need to establish Maritime Crisis Center to co-ordinate the functions of different concern forces with effective use of AI like Singapore, USA and other developed countries.

AI and robotics systems are expected to intensify the war against terrorism, but risks and ethical issues must be studied and mitigated. Safeguards must be enforced to ensure control and prevent misuse.⁶³

⁵⁸ Ashok Kumar Reddy Nadikattu, 'How Military Use Artificial Intelligence and Robotics in Fighting Terrorism' (2020) 7(11) JETIR 968. <<https://www.jetir.org/papers/JETIR2011408.pdf>> accessed 10 October 2023.

⁵⁹ *ibid*

⁶⁰ Don Ressler, Commentary: Data, AI, and the Future of U.S. Counterterrorism: Building an Action Plan, (2021) 14(8) Combatting Terrorism Center, <<https://ctc.westpoint.edu/commentary-data-ai-and-the-future-of-u-s-counterterrorism-building-an-action-plan/>> accessed 12 October 2023.

⁶¹ 'New AI system identifies terrorist threats in Singapore waters in real time' *The Straitstimes*, (Singapore, 12 November 2023)

⁶² 'New AI system identifies terrorist threats in Singapore waters in real time' *The Straitstimes*, (Singapore, 12 November 2023)

⁶³ Ashok Kumar Reddy Nadikattu, 'How Military Use Artificial Intelligence and Robotics in Fighting Terrorism' (2020) 7(11) JETIR 968. <<https://www.jetir.org/papers/JETIR2011408.pdf>> accessed 10 October 2023.

4. Ethical Challenges and AI in Maritime Security

Ethics are moral principles that dictate a person's conduct or behavior.⁶⁴ AI ethics is concerned with how humans should develop, produce, and operate AI systems in order to reduce ethical risks to society. Artificial Intelligence in the maritime security may pose significant challenges to humanity, including job displacement, social impact, economical, and potential of safety and security. These ethical issues are unprecedented and may open up a Pandora's box. Humans have an unparalleled power to destruct themselves, and AI should not handover the most fundamental understanding of morality.⁶⁵ Those are, in particular:

4.1 Bias and Fairness

AI faces a significant ethical challenge due to potential bias and discrimination. AI systems can perpetuate or exacerbate biases if the data used to train them is biased, as systematic bias often occurs when machine learning applications are trained on data that only reflects certain demographic groups or societal biases.⁶⁶ Certain tasks, like the 14.1 million image facial recognition app Image Net Roulette, have shown bias in data training sets and have a significant potential for error because of their quick sorting. Because AI apps are frequently depends on "black boxes,"⁶⁷ it might be challenging for users to assess how fairly the data was handled. Fair, accountable, and transparent machine learning is the goal of recent research activities conducted by some developed countries(USA, Japan, UK etc.), with more favourable for the better interest of general public.⁶⁸ Due to their bias, machine-learning models which are frequently reliant on data supplied by humans can result in injustice and

⁶⁴ Emmanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1997)

⁶⁵ Dana Daher, 'AI Escapes Pandora's Box: The Imperative for Ethical Control and Responsibility' (*LinkedIn*, 18 May ,2023) <https://www.linkedin.com/pulse/ai-escapes-pandoras-box-imperative-ethical-control-dana-daher?utm_source=rss&utm_campaign=articles_sitemaps> accessed on 10th November, 2023.

⁶⁶ 'Utilizing Artificial Intelligence to detect Illegal Fishing' (CSIRO 26 June 2020) <<https://www.csiro.au/en/research/technology-space/it/ai-technologies-iuu>> accessed 6 November 2023.

⁶⁷ AI 'black boxes' are invisible AI systems with internal workings, allowing users to input and receive output but not examining the code or logic. Machine learning is the dominant subset of artificial intelligence.

⁶⁸ Amit Datta, Michael Carl Tschantz, and Anupam Datta, 'Automated Experiments on Ad Privacy Settings – A Tale of Opacity, Choice, and Discrimination' (2015) 1(1) *Proceedings on Privacy Enhancing Technologies* 102 <https://www.researchgate.net/publication/276083030_Automated_Experiments_on_Ad_Privacy_Settings> accessed 11 November 2023.

prejudice.⁶⁹ Trust in AI requires fair and impartial decisions, as AI becomes increasingly involved in various tasks. However, making algorithms fair is challenging due to the difficulty in identifying what neural networks are learning from data. For example, the COMPAS algorithm, which evaluates violent crime likelihood, was found to discriminate against black individuals. Transparency is crucial in AI, as understanding the decision-making process which is challenging due to the complexity of neural networks used in many AIs.⁷⁰

4.2 Privacy, Human Rights and Dignity

AI's impact on privacy is significant, necessitating careful consideration of users' privacy and dignity in port facilities through cyber security service and others maritime security issues. AI in maritime security relies on large amounts of data, often including sensitive personal information. Safeguarding privacy and ensuring secure data handling practices are vital. Big Data is another aspect of AI in maritime security that affects privacy, leading to the loss of the assumption of anonymity by obscurity. Machine learning can transform seemingly innocent data into sensitive personal information, affecting privacy and anonymity both online and offline.⁷¹ Ethical issues arise regarding data control, privacy, and preventing identity theft.⁷²

The use of interconnected cameras, vision-based drones, robots, and wearable cameras in marine vessels and patrolling AI boats and aircraft, rapidly expanding, potentially exposing individuals to constant surveillance in port and offshore areas as well as different zones within state jurisdiction. The technology is being utilized for spying, with data collected by devices like Amazon Alexa devices potentially serving as evidence.⁷³ Governments might not, however, always put the needs of their people first. This was demonstrated in China, when more than a million people were sent to reeducation camps for showing their Muslim identity.⁷⁴ Advanced hybrid AI technology is being used by law enforcement organizations in India to digitize criminal records, identify violent conduct in public spaces using trained

⁶⁹ C. O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Publishers, USA, 2016)

⁷⁰ Supra Note 66

⁷¹ E. Selinger and W. Hartzog, 'Obscurity and privacy' In: Pitt, J. and Shew, A. (eds.). *Spaces for the Future: A Companion to Philosophy of Technology*, (New York: Routledge, 2017)

⁷² M. Veale, 'Algorithms that remember: model inversion attacks and data protection law' (2018) *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*. 376 (2133).

⁷³ Micheal Chukwube, 'The Role of UAVs in Border Security and Maritime Surveillance' (*Readwrite*, 3 April 2023)

⁷⁴ 'Eradicating ideological viruses': China's campaign of repression against Xinjiang's Muslims' (*Human Rights Watch*, 9 September 2018)

drones, and forecast and identify criminal activity using facial recognition.⁷⁵ This type of programs aimed at reducing crime, managing public spaces, improving safety, and enhancing maritime security can be beneficial, but monitoring and sharing public behavior without consent violates human rights and privacy.

4.3 Accountability and Transparency

Decision-makers must recognize how AI technology differs from people in the way it makes decisions. Accountability makes ensuring that the creator, developer, or company selling the AI may all be held accountable if it makes a mistake or hurts someone. Algorithmic accountability pertains to assigning blame for losses that arise from judgments made using algorithms.⁷⁶ Given that there have already been catastrophic mishaps involving automated vessels and self-driving cars, this is particularly crucial. Even while statistics said that autonomous boats are safer than those operated by humans.⁷⁷

Deep learning-based AI systems in particular raise serious concerns about transparency, especially when it comes to maritime security. The lack of access to information and records of crimes like piracy, smuggling, illegal trade, and seafaring fishing is a source of concern for many security forces. 'Black boxes' and other AI systems are hard to verify because of their capacity to alter behavior. The New York University-based AI Institute has recommended pre-release trials and monitored address biases and flaws in AIs. It has encouraged government authorities to outlaw black box AIs.⁷⁸

4.4 Employment Disruption

Robotics and AI are expected to decimate employment and permanently harm the labor sector. There is a general worry, nevertheless, that in the next 20 years, AI and related technologies may result in mass unemployment.⁷⁹ Artificial Intelligence has already become a commonplace in a number of industries, including finance, space exploration, advanced manufacturing in the shipping industry, transportation,

⁷⁵ S. Seth, 'Machine Learning and Artificial Intelligence Interactions with the Right to Privacy (2017) 52(51) Economic and Political Weekly, 66-70

⁷⁶ Robyn Caplan, Joan Donovan, Lauren Hanson, Jeanna Matthews, 'Algorithmic Accountability: A Primer' (*Data & Society*, 18 April, 2018) <https://datasociety.net/wp-content/uploads/2019/09/DandS_Algorithmic_Accountability.pdf> accessed on 8 November 2023.

⁷⁷ Supra note 66

⁷⁸ AI Now Institute, *AI Now Report*. (December, 2018). <https://ainowinstitute.org/AI_Now_2018_Report.pdf> accessed on 8 November 2023.

⁷⁹ Carl Benedikt Frey and Michael A. Osbor, 'The Future of Employment: How Susceptible Are Jobs to Computerisation?' (2013) January, *Technological Forecasting and Social Change* 114

including automated maritime transportation, energy consumption and development, automation port management and cargo handling, and all aspects of security, including maritime security.⁸⁰ More employment will be impacted by computers becoming more advanced, and certain positions will become obsolete.

Some contend that the workforce is already changing significantly as a result of technology, with some crew members need specialized skills from automated port operations and ships, and that fewer personnel are needed for maritime fuel and surveillance, which has been shown to be more successful in ensuring maritime security globally. Others, meanwhile, think that human inventiveness will lead to the creation of new businesses and occupations. The 'digital gap' and the necessity of a balanced approach to AI development and implementation are highlighted by the disparities in Approach about the development and implementation of AI depends and vary according to age, geography, and educational background of people in different parts of the world. To mitigate this 'digital divide' the necessity of a balanced approach is crucial.

4.5 Safety and Security

AI systems can cause harm if not developed and deployed securely. Sustainability in AI projects includes social impacts and technical safety, especially in maritime activities. Unethical algorithms, which fail to operate as intended, are distinguishable between design and operation errors. Achieving intended behavior doesn't guarantee the absence of errors or harmful actions, emphasizing the ethical aspects of AI systems.⁸¹

4.6 Algorithmic Accountability

Holding AI systems accountable for their actions is challenging but crucial. Determining responsibility when AI systems make errors or cause harm is a complex issue that requires establishing clear legal frameworks and mechanisms for redress.

5. Addressing the Challenges Posed by AI

The EU and OECD (the Organisation for Economic Co-operation and Development) are major international frameworks for AI governance. The OECD's principles, adopted by 42 countries, offer five fundamental principles and practical recommendations for governments.⁸² The G20 adopted its own human-centered AI

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² How can we ensure that AI benefits society as a whole? (OECD Home, November 2023)

principles. The European Commission supports the OECD Principles with its strategy, including investment plans, socio-economic changes, and ethics guidelines.⁸³

5.1 Ethical Decision-Making

AI systems face ethical dilemmas in decision-making, particularly in autonomous vehicles and healthcare applications. Addressing ethical issues is a significant challenge, with potential impacts on social, psychological, financial, legal, and environmental domains.⁸⁴

5.2 Addressing Ethical Issues

Emerging economies in South Asia and Southeast Asia focus on industrialization, productivity, and investment in AI research. AI initiatives in developing economies promote cross-border collaboration and aim to reduce inequalities. Legal responsibility for AI actions is complex, with grey areas and maritime security issues.⁸⁵

5.3 Gaps in AI frameworks

The OECD acknowledges AI's importance in conserving natural habitats, but its ethical rules focus on preventing harm to the environment and living things. The EU Communication on AI does not address environmental concerns or the psychological effects of AI. The EU's ethical rules prioritize diversity, nondiscrimination, and justice, while the OECD's principles prioritize inclusive growth, sustainable development, and well-being.⁸⁶

<<https://www.oecd.org/digital/artificial-intelligence/>> accessed on 12 November 2023.

⁸³ *ibid*

⁸⁴ *Supra* note 66

⁸⁵ Bernd Carsten Stahl and Tonii Leach, 'Assessing the ethical and social concerns of artificial intelligence in neuroinformatics research: an empirical test of the European Union Assessment List for Trustworthy AI (ALTAI)' (2023) 3 *AI Ethics* 745-767

⁸⁶ Tambiama Madiega, 'EU guidelines on ethics in artificial intelligence: Context and implementation' (2019) September, European Parliamentary Research Service PE 640.163

5.4 Final Control with Big Red Button

Researchers suggest a "big red button" to prevent AI systems from becoming uncontrollable and dangerous, but concerns arise about AI systems predicting and defending themselves.⁸⁷

6. Recommendations and Concluding Remarks

As a developing country Bangladesh can use AI in maintaining marine security. Although it will be challenging for this country to initiate AI, but it is not an impossible task to initiate. For using AI in marine security Bangladesh can focus on:

- A. Present research of using AI in marine security protection and allocate necessary funds for this work and
- B. In using AI, the State should concern on the ethical issues.

For any nation, including Bangladesh, maritime security is an integral component of state security. In addition to failing to solve Bangladesh's maritime security, the century-old cascade marine security maintenance program also tends to encourage unlawful activity that poses a harm to the marine environment and fishing industry. This article's definition of marine security and artificial intelligence (AI) focused mostly on the potential applications of AI in addressing maritime security concerns in Bangladesh. The secondary literature review has found that AI can be used in lots of prospective fields related to maintain marine security issues. However it is also found that Bangladesh is using some technologies to protect marine environment and security which needs a positive shift to modern AI technology use. The use of modern AI technology requires research, funds and ethical considerations. This article discussed the ethical perspective of AI used and the necessity of using AI technology considering some general ethical obligations. Additionally, it has been discovered that the deployment of AI will harm both state and marine security if ethical obligations are ignored. The future of AI therefore depends on how we manage them while taking ethical issues into account.

⁸⁷ 'Google Developing "Kill Switch" to Stop Renegade AI Robots' (ALVEXO, 14 June 2016) <<https://blog.alvexo.com/tech/google-developing-kill-switch-stop-renegade-ai>> accessed on 12 November 2023.

Institutional Framework to Ensure Child Development and Alternative Care under the Children Act 2013: An Overview

Shuvra Chowdhury¹

Abstract: The main aim of the institutional framework dealing with the children in conflict with law is to provide care, protection, rehabilitation and reintegration of the children into the society. The institutional framework includes the probation officer, Child Affairs Police officers (CAPO), Child Welfare Board, Child Development Centers and the certified institutes. Moreover, the Children Act, 2013 incorporates the provisions of alternative care to avoid the incarceration of children. At present, the most significant problem in the juvenile justice system is the inadequate functioning of the institutional framework dealing with the children in conflict with law. The Children Act, 2013 clearly provides the powers, functions and duties of the each of the components of the juvenile justice system. Unfortunately, these legal obligations are not duly respected by the concerned agencies, consequently, children become the victim of unfair treatment. This article explores the institutional mechanisms to ensure the child development and alternative care and assesses the activities of these components that are working with the children in conflict with law. Finally, necessary recommendations have been given for the proper functioning of the relevant institutions to ensure the best interests of the children in the juvenile justice system of Bangladesh.

1. Introduction

Juvenile justice system is not a single but multiple inter-connected justice systems. The child-affairs police officers, prosecutors, judges, lawyers, social case workers, probation officers and officers in the child development centers and certified institutes are core components to the system. Each one is a relatively autonomous bureaucratic unit within the government, with its own objectives. Thus, the approach has to involve all actors from the outset and lay special emphasis on cooperation and coordination between relevant agencies. When a juvenile commits an offence, he first comes in contact with police officers. Then the court enters into the scene to determine the age and settle the actual fate of the children. Then the child development centers and certified institutes are come into play. The Children Act, 2013 clearly provides the powers, functions and duties of the each of the components of the juvenile justice system. Unfortunately, these legal obligations are not duly respected by the concerned agencies, consequently, children become the victim of unfair treatment. This article explores the institutional mechanisms in dealing with children and assesses activities of major components that are working with the children either in conflict with law or in contact with law.

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2. Probation Officers

The first law relating to Probation was adopted in 1960 namely, the Probation of Offenders Ordinance, which came into force in 1962, subsequently, a rule was framed in 1971 i.e. the Probation of Offenders Rules. So, these laws are guiding and regulating the probation service in Bangladesh. The probation for the children in conflict with law was recommended by the Children Act, 1974 and its corresponding rules of 1976. The Act of 1974 has been repealed and a new law was enacted in 2013 for the children in conflict with law and in contact with law. Bangladesh is a signatory country to the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), 1990 which confers obligations upon the government to initiate alternative measures to imprisonment such as probation. Rule 1.5 of the Tokyo Rules provides:²

“Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”

The purposes of probation in Bangladesh are the prevention of offences and recidivism as well as fostering rehabilitation, reintegration, non-stigmatization of offenders, and, in some cases, restitution to the victims.³ The High Court Division has also articulated the purpose of probation in *Abdul Khaleque v Hazera Begum and another*⁴ as follows:

“... the penal system of Bangladesh is essentially reformatory in character as opposed to retributive. The Probation of Offenders Ordinance is a prime example of such a policy. If a sentence of probation is imposed for a period of time, then it is likely to be more of a deterrent and will have a rehabilitating effect which will fulfill the intention of the legislature”.

A manual developed for the Probation Officers by the Canadian International Development Agency (CIDA) describes the role of Probation Officers in relation to a child being placed in the community on probation as follows⁵: explain to every child placed under their charge the terms and conditions of the probation order and

² <<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf>> last accessed on 23 October, 2024

³ Development and Use of the Probation System in Bangladesh, Bangladesh Legal Aid and Services Trust (BLAST) & Penal Reform International (PRI), 2013

⁴ *Abdul Khaleque v Hazera Begum and another* 58 DLR (2006) 322.

⁵ Ministry of Social Welfare, *Juvenile Justice Probation Officer Best Practices and Procedures Manual*, Bangladesh Legal Reform Project-Part B, (Prepared by DSS with Canadian Juvenile Justice Specialist, 2008) 10

ensure the child's compliance with the order; meet the guardian and other relatives of the child frequently; regularly visit the place of employment or school attended by the child; encourage the child to take opportunities offered by social welfare organizations; try to improve his or her conduct and conditions of life; check with police stations regarding children's cases; meet with the magistrates, judges, lawyers as necessary and visit the child in jail, JDC or custody placement as required; and endeavour to find suitable employment for the child if reasonable and strive to improve his or her conduct and general living conditions.

2.1 Appointment of Probation Officer

For performing functions under the CA, 2013, the Government shall appoint one or more Probation Officers in every district, upazila and metropolitan area, as the case may be. If any person is appointed as a Probation Officer under any other existing law immediately before the commencement of this Act, he shall continue to work as a Probation Officer under this Act until further direction is given as if he had been appointed as a Probation Officer. Until a Probation Officer is appointed for any area, the Government may delegate the responsibilities of the Probation Officer to any Social Services Officer or any other officer of similar rank working in the Department or in different districts or upazilas under the Department.⁶

2.2 Duties and responsibilities of a Probation Officer

2.2.1 Duties at Police Station

When a child in conflict with law is brought before a police station, it becomes the responsibility of the probation officer to meet with the child first, then to ascertain the reason for bringing the child in the police station. After assuring the child, the probation officer will communicate and coordinate with the Child affairs police officer (CAPO) to categorize the case or complaint. Then, the probation officer has to find out the parents of the concerned child and communicate with them. To assess the possibility of bail and to undertake the diversion upon the immediate assessment of the background of the concerned case shall be conducted by the probation officer. After bringing into the police station and before producing the child to the Children's Court, the child must be kept in the safe home and such arrangement must be made by the probation officer. If such arrangement cannot be made then, the child must be sent to diversion or release him on bail.

⁶ Section 5 Children Act, 2013

2.2.2 Duties at Children's Court

When a child in conflict with law has been produced before the children's court, the probation officer shall give company during the trial and in every stage of the proceedings so far possible. After conducting necessary field inquiry, the probation officer will prepare a social inquiry report about the child and will submit it to the children's court. Children are not in a position to appoint a lawyer to represent them in the court, so the probation officer will contact with the District Legal Aid Committee to provide legal aid and ensure legal representation in the children's court.

2.2.3 Duties at Child Development Centers or any certified institute

If the child in conflict with law has been sent to the Child Development Centre or any certified institute, the probation officer will keep separate file for each child and will comply with the procedures as enshrined in section 84 of the CA 2013. The probation officer will meet with the child in regular interval or when it has been demanded by the child. In addition, the probation officer will look after whether the parents or member of the extended family or legal guardian are complying with the conditions of supervision of the child. A child in the development center must be given formal and vocational education which has also been supervised by the probation officer. For submitting the court, the probation officer will prepare a report containing the development of the child and the effectiveness of the measures taken. In case of children in contact with the law or in conflict with the law, where applicable to observe the conditions for diversion or alternative care; and to discharge such other duties as may be prescribed by rules.⁷

2.3 Insufficient care of children by the probation officers

The Probation Service is one of the smallest divisions of the Department of Social Services (DSS) under the Ministry of Social Welfare. Administratively, Probation Officers are accountable to the Director of the DSS. They are legally accountable to perform monitoring, supervisory and reporting duties as directed by the Court regarding any particular probationer. There are 44 positions for Probation Officers nationwide at the district level. The number implies that there are many districts where there are no Probation Officers, since there are 64 districts in Bangladesh. Social welfare officers at the district level and the upazila level are responsible for carrying out the duties of Probation Officers in addition to their regular duties in the absence of Probation Officers. The probation process for children is supposed to be initiated by police officers through contacting the nearest available Probation Officer.

⁷ Section 6, *ibid*

In practice however, police officers appear reluctant to inform Probation Officers. This was well illustrated in the case of *Fahima Nasrin Vs. Government of Bangladesh*.⁸

“They also failed to inform the child’s parents, as required by section 13 and did not inform any Probation Officer, which is a violation of the mandatory requirement of section 50 of the Act. There is nothing on record to show that [R]’s parents/ guardians were ever informed or that a Probation Officer was ever appointed during the course of the trial.”

It was held in *State Vs. Metropolitan Police Commissioner*⁹, that the court dealing with custody of a child would have recourse to report of the probation officer who in turn would ascertain from, locality as well as from persons involved in case and relatives of alleged girl herself and will then decide as to what may be in best interests of the child. It is important to point out that her views on issue of her custody must be sought and respected, so far as practicable and reasonable keeping in mind her age and mental development. This is in consonance with international covenants and treaties dealing with children and juveniles. At the end of the day it will be up to the Magistrate conducting trial to decide what will be in the best interests of the child, bearing in mind all circumstances reported to him and brought before him by way of evidence and report, particularly of the probation officer.

The necessity of the presence of the probation officer in the station round the clock has been emphasized by the HCD in *The State vs The Secretary, Ministry of Home Affairs*.¹⁰ It was held in that case that the order sheet of the learned Magistrate does not indicate that he considered contacting the parents of the children or that he took any steps to contact the probation officer or any other person with a view to sending the children to a place of safety. If he had done so, then these matters ought to have been reflected in his order sheet. On the other hand, the probation officer is required to be on duty round the clock and must be available on call at all times. It is the failure of the Department of Social Welfare if it is true that the probation officer was unavailable at the weekend.

It was further reiterated in *State vs Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others*¹¹, that to make probation Officers available on call round the clock in all parts of the country to enable proper and effective implementation of section 50 of the Children Act, 1974. Similarly, places of safety must be set up, at least one in

⁸ *Fahima Nasrin Vs. Government of Bangladesh*, 61 DLR (2009) 232

⁹ *State Vs. Metropolitan Police Commissioner*, 60 DLR (2008) 660

¹⁰ *State vs The Secretary, Ministry of Home Affairs*, 30 BLD (HCD) 2010, 265

¹¹ *State vs Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others*, Suo Motu Rule No. 5621 Of 2009, Decided On: 03.09.2009

every district and local health clinics must be empowered for the purpose of medical examination of victims so that the need to detain victims in custody will be considerably reduced. It was also directed by the HCD that Police officers should work in close cooperation with Probation Officers, the safe homes and NGOs working in the field in the local area so that protection, safety and well-being of a victim child can be provided without any delay.

There is an instance where the HCD has ordered the replacement of the Probation Officer as he was failed to comply with the court order. It was held in *Mainul Islam Chowdhury and Ors. vs. Rumana Foiz and Ors*¹², the engaged probation officer was not complying with the order of this Court and failed to take the children to the house of their mother as directed. Consequently, the court directed that the probation officer be replaced by the Deputy Director from the Department of Social Services, Chattogram.

3. Child Welfare Boards

The three levels of Child Welfare Boards i.e. national, district and upazila are a new concept in Bangladesh introduced by the CA, 2013. Their powers are extensive and cover all aspects of childcare and protection, including rehabilitation and reintegration of all disadvantaged children with their families and the community. In addition, they have supervisory power over the child development centers and approved institutions where the children reside.

3.1 National Child Welfare Board and its functions

There shall be a 'National Child Welfare Board' chaired by the Minister of the Ministry of Social Welfare. This board is the apex authority to ensure the best interest of the children in Bangladesh. The board members are delegated from national parliament, executive bodies as well as social organisations.¹³ The National Child Welfare Board shall supervise, coordinate, monitor and evaluate the activities of the Child Development Centres and the certified institutes. The Board will look after the disadvantaged children and children in contact with the law and in conflict with the law by giving direction to all concerned in formulating policies, making and implementing plans regarding reintegration and rehabilitation in the family and social life and by providing necessary advice to the Government for the purposes of welfare and development of children, by ascertaining the gender-based number of

¹² *Mainul Islam Chowdhury and Ors. vs. Rumana Foiz and Ors* (2018) Civil Petition for Leave to Appeal Nos. 571 and 646 of 2018, Decided On: 08.10.2018

¹³ Section 7 of the Children Act, 2013 provides the composition of the National Child Welfare Board.

such children and by collecting data and information about their ways of living; and by determining the ways of necessary diversion or alternative care, where applicable, and to assess the data and information of children under such process or care. The board shall approve the recommendations made by the District Child Welfare Boards; and for the District and Upazila Child Welfare Boards. The Board will formulate policies and, if necessary, to make recommendations and provide directives; and call for reports on their activities from time to time and, for the purpose of coordinating their activities, if necessary, to arrange for inter-Board coordination meetings.

3.2 District Child Welfare Board and its functions.

In each district there shall be established a board to be called the 'District Child Welfare Board¹⁴' The District Child Welfare Board shall visit the Child Development Centre or, as the case may be, the certified institute or any other institute for children, if any, and to inspect the jail and to supervise, coordinate, monitor and evaluate the activities undertaken by those institutes. The District board will determine the method of necessary alternative care for the disadvantaged children and for children in contact with the law and, where applicable, send them for alternative care and to analyse the data and information of the child under such care. They will implement the directions of the National Child Welfare Board and to approve the recommendations made by the Upazila Child Welfare Board or, if necessary, to forward them to the National Child Welfare Board for approval. The District board will call for report from the Upazila Child Welfare Boards, from time to time, on their activities and, if necessary, to organise inter- Board meetings for coordination of their activities. They will discuss on the information provided by the Child Development Centres, certified institutes or, as the case may be, jail authority and to take necessary measures or initiatives for the welfare of the children; and to take such other measures as may be necessary to discharge the aforesaid duties and functions.

3.3 Upazila Child Welfare Board and its functions

In each Upazila there shall be established a board to be called the 'Upazila child welfare Board¹⁵.'The Upazila Child Welfare Board shall supervise, coordinate, monitor and evaluate the activities undertaken by the certified institutes situated in the concerned upazila and to determine the method of necessary alternative care for the disadvantaged children and children in contact with the law and, where applicable, send them for alternative care and to analyse the data and information of

¹⁴ Section 8 of the Children Act, 2013 provides the composition of the District Child Welfare Board

¹⁵ Section 9 of the Children Act, 2013 provides the composition of the Upazila Child Welfare Board

the child under such care. The Upazila Board will implement policies adopted and directions given, from time to time, by the National Child Welfare Board or, as the case may be, the District Child Welfare Board and to send the report called for and to discharge such duties as may be prescribed by rules; and to undertake such other measures as may be necessary to discharge the aforesaid duties and functions.

3.4 Non-functionality of Child Welfare Board

Though the Children Act, 2013 has enshrined the provisions for the child welfare board at different levels but unfortunately, they are not functional. It has been observed by Justice Imman Ali that: “Unfortunately, so far only the National Child Welfare Board has been established by law and is yet to undertake any activity. We are waiting for the Government to take steps to activate the District and Upozila Child Welfare Boards”.¹⁶

4. Child Affairs Desk and Child Affairs Police Officer (CAPO)

The children in conflict with law have been brought before the police station by the police officer. So, a child first meets with the police officer who arrested him for the alleged commission of an offence. It is the duty of the concerned officer to comply with the provisions of the children act, 2013. In addition, international legal instrument i.e. the Beijing Rules¹⁷ confers upon the police officer to promote the best interest of the children and to protect them from any evil of the formal investigation process. Moreover, the police must have sufficient training to understand the needs and demands of the children found themselves in the police station.¹⁸

Children are vulnerable, especially those who have derived from the poor socio-economic background. After arrest, the common practice in the police station is that to conduct interviews and try to elicit information from the children even by applying different methods of tortures. Due to the rigorous interview techniques, children are sometimes forced to confess the guilt even though they have not committed the alleged offence.¹⁹ To protect the children from this abusive process, the Children Act, 2013 provides the appointment of child-friendly police officer in

¹⁶ Luis Aguilar Esponda, Interview with Honourable Justice Muhammad Imman Ali, Judge of the Supreme Court of Bangladesh, Institutionalised Children Explorations and Beyond, Volume 3, Number 2, September 2016 pp. 130

¹⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

¹⁸ United Nations Guidelines for the Prevention of Juvenile Delinquency. (The Riyadh Guidelines)

¹⁹ Erika Rickard, “Paying Lip Service to the Silenced Juvenile Justice in India” (2008) 21 Harv Hum Rts J 155

every police station known as Child Affairs Police Officer (CAPO) who will be preferably female and not below the rank of the sub-Inspector.

The Ministry of Home Affairs shall set up a Child Affairs Desk in every police station, by assigning its responsibilities to an officer, not below the rank of Sub-Inspector.²⁰ If there is any female Sub-Inspector working in the concerned police station, the female Sub-Inspector shall be given preference to assign the responsibility of the desk. The officer in charge of the 'Child Affairs Desk' as mentioned shall be called the Child Affairs Police Officer.

4.1 Duties and functions of Child Affairs Police Officer (CAPO)

The Child Affairs Police Officer shall²¹ maintain separate files and registers for the case concerning children. If any child comes or is brought to the police station the CAPO shall inform the Probation Officer; the parents of the child or, in the absence of both of them, the guardian or the authority in supervision of the child, or legal or lawful guardian or, as the case may be, any member of the extended family, and to notify them about the date of producing the child before the court along with detailed information. The CAPO shall provide immediate mental support and to arrange for first aid and, if necessary, to send the child to a clinic or hospital. In addition, the CAPO shall take necessary measures to meet the basic needs of the child.

4.2 Inefficiency of the Child Affairs Police Officer (CAPO)

The role of the child affairs police officer in the administration of juvenile justice is in constant metamorphosis. The main duty of the police is to enforce law, however, investigation, crime detection, prevention are the other aspects of the police's work. A police officer when dealing with a child in conflict with law or in contact with law, he has to uphold the best interest of the child. As a first responder, police become the important stakeholder in implementing the CA, 2013. The Ministry of Home Affairs appointed 597 Child friendly police officers in police stations to provide specialized services as stipulated in Children Act, 2013. The Ministry Also introduced community policing programme for involving community people to protect rights of women and children as well as aware people regarding their rights.²²

²⁰ Section 13, The Children Act, 2013

²¹ Section 14, *ibid*

²² Implementation of the Convention on the Rights of the Child, Written replies of the Government of the People's Republic of Bangladesh to the list of issues (CRC/C/BGD/Q/5) prepared by the Committee on the Rights of the Child in connection with the consideration of the Fifth Periodic Report of Bangladesh (CRC/C/BGD/Q/5)

It is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is a need to set up meaningful Child Affairs Police Unit comprising all the child affairs police officers appointed in every police station. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and Officers and wherever necessary, guidance from the available expertise, either the Bangladesh Police Academy or the Police Training Centers and Police Staff College. The Bangladesh Police Academy must consider including child rights as a part of their curriculum on a regular basis and not as an isolated or sporadic event.²³ The importance of training of the police officials and to establish a separate branch of police unit to deal with children have been reiterated by the HCD in *State vs Metropolitan Police Commissioner*²⁴ in the following words:

“Authorities concerned are directed to take appropriate steps for training their officials on compliance with legal provisions relating to children. Police authorities may further consider setting up special units in every police station with officers properly framed and sensitized to deal with child offenders and children generally.”

The objective of the juvenile justice system can be achieved properly with the support and assistance of the police officer. As a first responder, it is the responsibility of a police officer to treat an accused child not as a criminal rather to treat him accordingly considering the tender age and legal obligations. The accused child shall not go through the formal interrogations rather diversion, conferencing, and alternative care which are the appropriate methods for a child as recommended by the CA, 2013. In this regard, Suhail Sharma rightly identified as follows:

“A perfect balance between punitive and reformatory resettlement measures by the police systems in juvenile justice may be a game-changer in promoting public safety, reducing recidivism, building on demographic dividends, and unburdening the criminal justice system.”²⁵

5.5 Child Development Centers and Certified Institutes

The Government shall establish and maintain required number of Child Development Centers (CDC) and may permit any person, institute or organization to establish and run non-government institutes as certified institutes, subject to fulfillment of prescribed conditions.

²³ *Sampurna Behura Vs. Union of India (UOI)* and Ors. (2018) 45C C 433

²⁴ *State vs Metropolitan Police Commissioner*, 60 DLR (2008) 660

²⁵ Suhail Sharma, *Juvenile Justice System, Reforms and Policing System in India: Origin, Dialectics, Comparisons, and Way Forward*, *International Annals of Criminology* (2021), 59, 179

5.5.1 Establishment of Child Development Center

The Government shall establish and maintain required number of Child Development Centers (CDC), based on gender disaggregation for accommodation, correction, and development of the children ordered to be detained in the judicial proceedings and for the children under trial²⁶. The Government may, at any time, certify any of its institute or establishment as appropriate for the placement of children charged with any offence for the purpose of accommodation, correction, development, maintenance and administration of the children. The Supreme Court of India in *Jitendra Singh v. State of U.P.*²⁷ considered various aspects of child rights jurisprudence in the context of the International Convention on the Rights of the child and the Beijing Rules. The Hon'ble Supreme Court emphasized on the rehabilitation and reintegration of the children in the society and ruled that:

“in all decisions taken within the context of administration of justice, the principle of best interests of a juvenile shall be the primary consideration. ... The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort.”

Before sending a child to the child development centers, the court must consider first whether he/she has parents to look after. It was reiterated in *State vs Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others*,²⁸ that if the child has a parent or guardian fit and capable in the opinion of the Court of exercising proper care, control and protection, then the custody of the victim girl is to be given to her parents and that would obviate the need for the Court even to consider the other two alternatives, namely committing her to a certified institute or approved home or committing her to care of a relative or other fit person. Children have been identified as national asset and it becomes the duty of the State not to incarcerate children in the prison. In this regard the Indian court directed in *Sheela Barse II v. Union of India*²⁹ that on no occasion should children be kept in jail and if a State Government does not have sufficient accommodation in its remand homes or observation homes for children, they should be released on bail instead of being subjected to incarceration in jail.

It was reminded by the Supreme Court of Bangladesh not to keep the children in the police station or in prison and stated in the *State vs The*

²⁶ Section 59, The Children Act, 2013

²⁷ *Jitendra Singh v. State of U.P.*, (2013) 11 SCC 193

²⁸ *State vs Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others*, 29 BLD (HCD) 2009, 656

²⁹ *Sheela Barse II v. Union of India*, (1986) 3 SCC 632

Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and Others³⁰, that whenever any child is apprehended, an alternative place of custody is available for her/him in the immediate vicinity, so that even at the weekend or any odd hour of the night children may be placed in a place of safety in accordance with law, rather than in the police station or in the prison in breach of law. Keeping children in a prison in so-called 'safe custody' is not contemplated by the law and must at all times be avoided.

5.5.2 Establishment of certified institutes at private initiatives

The Government may permit any person, institute or organization to establish and run non-government institutes as certified institutes, subject to fulfillment of prescribed conditions.³¹ Every institute, established and run publicly or privately, as the case may be, shall report to the Department by writing mentioning the name, sex and age of every child and the reasons for receiving the child with date by fifteenth day of every month and shall also be bound to provide all other information to the Department as may be required by it.³²

5.5.3 Minimum standards of care

The Government shall determine the minimum standards of proper care for the children staying in the certified institutes, and the certified institutes shall maintain the minimum standards of care.³³ The children staying in the certified institutes shall be classified into different classes and kept separately in consideration of the degree or nature of the offences committed by them and the age of the children. For the purpose of section 82 of the Penal Code, no child below the age of nine years shall be kept in a certified institute. If any child below the age of nine years, who does not have any guardian, is found anywhere, he should be sent to the Department or to any of its nearest office, and the Department upon notifying the concerned Board in this regard shall consider the child a disadvantaged child, and, where applicable, shall take the subsequent necessary measures according to the provisions of section 84 or 85 of the CA, 2013. The certified institutes shall protect the best interest of every child staying therein and ensure their fulltime monitoring, humane behaviour and vocational training including proper education.

³⁰ *State vs The Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and Others* 30 BLD (HCD) 2010 265

³¹ Section 60, The Children Act, 2013

³² Section 62, *ibid*

³³ Section 63, *ibid*

5.5.4 Inspection of certified institutes by the Government or its representative

The Government or any representative empowered by it and the Director General of the Department or any other person or institution authorized by him may inspect any certified institute, with the objective of collecting information for any purpose, official or special, and may advise the Government for taking necessary measures on the basis of information so received.³⁴ If any certified institute fails to maintain the minimum standards of care determined by the Government for proper care of the children staying in that institute, the Government may declare that the concerned certification has been withdrawn from the date mentioned in the notice.³⁵

The ambiances of the certified institutes are not satisfactory in most of the cases as noticed by the Indian courts and observed in *Sampurna Behura vs. Union of India (UOI) and Ors.*³⁶ that many of them are housed in run-down buildings and are hardly conducive to comfortable living even to a minimum degree. The court emphasizes that the Governments must appreciate that they are not doing any charity by putting up children in Child Care Institutions, rather they are merely performing their statutory and constitutional obligations. There is, therefore, an urgent need to make an evaluation and assessment of all the Child Care Institutions in every district to ascertain their condition, the infrastructure requirements and staffing requirements. Children live in these Institutions, not because they want to but because they have no other option, since most of them are children in need of care and protection. The obligation of society is to provide solace and comfort to these children and adherence to the minimum standards of care.

The importance of constant monitoring of the child rights institutes by the government authorities have been reiterated by the High Court of Patna in *Sanat Kumar Sinha vs. The State of Bihar and Ors.*³⁷ and directed to provide adequate finances for immediate renovation and future repairs of buildings of the certified institutes. The court provided a detailed guideline in this case for all the stakeholders of the certified institutes.

6. Alternative Care

The concept of alternative care has evolved from the rehabilitative support provided to juveniles and adult offenders exiting from reformatory schools and institutions

³⁴ Section 64, *ibid*

³⁵ Section 67, The Children Act, 2013

³⁶ *Sampurna Behura vs. Union of India (UOI) and Ors* (2018) 4 SC C 433

³⁷ *Sanat Kumar Sinha vs. The State of Bihar and Ors*, Criminal Writ Jurisdiction Case No. 182 of 1988, Decided On: 05.04.1990

and gradually, it then expanded to cover the rights of neglected children. There are two contrasting models relating to the administration of juvenile justice, one is welfare model and another is justice model. The welfare model identifies the deviance as a manifestation of intense maladjustment resulting from an unfavourable environment where welfare of the child is pre-dominant. On the other hand, the justice model views deviance as a matter of choice as a result, sanctions and controls serve as legitimate responses to validate and sustain the norms endorsed by society.³⁸ Institutional mechanisms are discouraged by the international standards³⁹ as well as welfare model of the juvenile justice.

6.1 The aim of Alternative Care

The main aim of the institutional mechanism is to provide care, education, rehabilitation and reintegration of the children. To prevent unnecessary institutionalization of vulnerable children, the Children Act, 2013 introduced the provision to facilitate referral to parents programmes for providing counselling, financial and other required assistance. A full chapter on alternative care has been introduced in the Children Act, 2013 which reaffirms the principle of the best interests of the child in any decision related to the placement of a child. Family or extended family options are given priority if not detrimental to the child. Accordingly, the Department of Social Services, under the Ministry of Social Welfare, is implementing a project titled “Child Sensitive Social Protection”, which is addressing the concerns of alternative care and listing conditions in alternative care for children separated from parents and children deprived of family care.⁴⁰

6.2 Provisions of Alternative Care

Alternative care may be initiated in order to ensure the overall welfare and the best interest of the disadvantaged children and the children in contact with the law for whom special protection, care and development need to be ensured upon consideration of their familial, social, cultural, financial, ethnic, psychological and educational background. Before sending to alternative care, the complete report regarding assessment of the child shall be considered. The Probation Officer or the

³⁸ Sumaiya Khair, ‘Juvenile Justice Administration and Correctional Services in Bangladesh: A Critical Review’, *The Dhaka University Studies*, Part-F Vol. XVI (2), December 2005; p.26

³⁹ Sumaiya Khair, ‘Street Children in Conflict with the Law: The Bangladesh Experience’, *Asia-Pacific Journal on Human Rights and the Law*, vol. 2, no. 1, 2001, p. 55.

⁴⁰ Implementation of the Convention on the Rights of the Child, Written replies of the Government of the People’s Republic of Bangladesh to the list of issues (CRC/C/BGD/Q/5) prepared by the Committee on the Rights of the Child in connection with the consideration of the Fifth Periodic Report of Bangladesh (CRC/C/BGD/Q/5)

Social Worker shall assess the child in the manner prescribed by rules after placing him in any institute or in any other 'Safe Home' and shall take necessary measures to ensure his overall development. The Probation Officer or the Social Worker shall find out the parents of the child or, in the absence of both of them, the caregiver or the authority in supervision or legal or lawful guardian or, as the case may be, members of the extended family as well as the actual conditions of the child.⁴¹

While deciding the means and types of alternative care, the reintegration of the child with the parents shall be accorded with priority.⁴² If it is not possible to re-integrate the child with the parents, the child may be re-integrated with the extended family or, in absence of the parents, may be sent to the caregiver or the authority in supervision or legal or lawful guardian or any other appropriate person for the purpose of community-based integration. If these measures are not possible to be taken, the concerned child may be sent to any institute authorized by the government.

In *State vs. Metropolitan Police Commissioner*⁴³ the HCD referred art. 20 of the UNCRC relating to alternative arrangements which provides as follows:

"A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious, cultural and linguistic background."

The HCD finally observed that the Court may consider the alternative, i.e. placement with any close relatives who might be willing to take the girl into their custody. Failing that, the Court would look to other distant relatives/any other benevolent person, who might agree to take the girl into their custody at their risk and responsibility. In this respect fostering might be a realistic alternative. Where the best interests of the child demand its separation from its parents, special protection and assistance must be provided and there must be alternative care for the child.

The similar view has been expressed by the Supreme Court of India and observed in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu vs. Union of India*

⁴¹ Section 92, The Children Act, 2013

⁴² Section 84, *ibid*

⁴³ *State vs. Metropolitan Police Commissioner* 60 DLR (2008) 660

(UOI) and Ors.⁴⁴ that in the context of rehabilitation and social re-integration, institutionalization of children is not necessarily the only available option. This submission finds support in Article 20 of the UNCRC. The Article obligates the State Parties to provide special protection and assistance to children temporarily or permanently deprived of family environment. The Article illustrates alternate care in the form of foster placement, adoption “or if necessary placement in suitable institution”. It is clear that the first option exercised by the authorities should not be institutionalization of a child in need of care and protection and the same is a measure of the last resort. Article 40(4) of the UNCRC pertaining to children accused of violating the law also states that the State Parties shall ensure “care, guidance, supervision, counseling, probation, foster care, education and vocational training and other alternatives to institutional care”. The Court directed that it is time that the governments must consider de-institutionalization as a viable alternative. It is not necessary that every child in need of care and protection must be placed in a child care institution. Alternatives such as adoption and foster care need to be seriously considered by the concerned authorities. Indeed, in keeping with the spirit of the UNCRC, the CA, 2013 Act itself encourages alternative care.

The Children Act introduced the provision to facilitate the referral of parents to programmes providing counselling and financial and other types of assistance to prevent the unnecessary institutionalization of children in vulnerable situations. However, it is concerned about the limited number of probation officers and social workers to perform this task. It also remains concerned about the situation of children from single-parent families and those from disadvantaged and marginalized groups. The Children Act reaffirms that in decisions related to the placement of the child, family or extended family options are given priority if in the best interests of the child. It is, however, concerned about the continued widespread use of institutionalization and the poor conditions of a number of children placed in alternative care centres. It is a matter of deep concern that there is lack of an independent complaint mechanism for children placed in alternative care centres and it is evident from the reports that several violent incidents have taken place in those institutions.

6.3 Institutional care for the disadvantaged children.

The Department shall ensure the institutional care through any of the following institutes in light of the policy formulated by the Government in this behalf for the

⁴⁴ *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu vs. Union of India (UOI) and Ors*
AIR 2017 SC 2546

disadvantaged children⁴⁵ for whom the parental care or non-intuitional care may not be ensured. The institutions are namely: government children homes (*Sharkari Shishu Paribar*); baby homes (*Chotomoni Nibash*); training and rehabilitation centres for the destitute children; government shelter homes.⁴⁶ The Government may take necessary measures in the manner prescribed by rules for the purposes of ensuring special protection, care and development of the disadvantaged children.⁴⁷

6.4 Establishment of alternative care measures by the Department of Social Service (DSS)

The Child Welfare Board or the Probation Officer shall determine the most appropriate means of alternative care for the child considering the best interest of the child.⁴⁸ The Department shall take the measures for the purpose of alternative care under the CA, 2013.⁴⁹ The measures will include: to take projects or programmes for providing financial and other assistance including counseling to the parents or, in the absence of both of them, the caregiver or the authority in supervision or legal or lawful guardian or, as the case may be, members of the extended family to ensure proper care of children; to undertake appropriate and reasonable steps including counseling in order to arrange vocational training, determine the means of livelihood of the child and re-integrate with parents; to undertake any other relevant step for carrying out the purposes of the CA Act, 2013.

The government has taken several noteworthy and effective initiatives in regard to alternative child care in Bangladesh. The Department of Social Services, under the Ministry of Social Welfare, has a major programme named Child Welfare and Child Development in order to provide access to food, shelter, basic education, health

⁴⁵ The following children shall be considered as disadvantaged children, namely: the child whose parents, any one or both, have died; the child without legal or lawful guardian; the child without any particular home or residence or without visible means of living; the child engaged in begging or anything against welfare of the child; the child dependent on the parents imprisoned or living in the prison with the imprisoned mother; the child victim of sexual oppression or harassment; the child staying with or going usually to the residence or workplace of any person or offender engaged in prostitution or anti-social or seditious activities; the child disabled of any type; the child with unnatural behavioural disorder caused by drugs or any other reason; the child who has fallen into ill company, or who may face moral degradation or who is at the risk of entering into the criminal world; the child residing in slum; the homeless child residing on the street; the effeminate child (*hijra*); the gypsy and the untouchable (*harijan*) child; the child infected with or affected by HIV-AIDS; or any child considered by the Children's Court or the Board to be in need of special protection, care and development.

⁴⁶ Section 85, The Children Act, 2013

⁴⁷ Section 89, *ibid*

⁴⁸ Section 86, The Children Act, 2013

⁴⁹ Section 87, *ibid*

services and other basic opportunities for hapless children.⁵⁰ The government is operating a total of 91 child care centres across the country. Out of these centres, 85 are named as '*Shishu Paribar*' (children family) where vulnerable and orphan children aged between seven and eighteen are kept. The rest six child care centres are called '*Choto Moni Nibash*' (residence of infants) where infants up to the age of seven are catered for.⁵¹

6.5 Duration of alternative care and follow-up

For the protection of the best interest of a child, the duration of alternative care may be either short term or long term. The Probation Officer shall, taking into consideration the opinion of the child and of his family, periodically review the adopted alternative care arrangement. As part of the periodical review, the Probation Officer shall on a regular basis inspect the alternative care arrangement of the child and shall inform the matter to the District or Upazila Child Welfare Board or, as the case may be, the Department. On the basis of review, the Probation Officer may recommend the Department to consider about taking any other appropriate measures under this Act.⁵²

7. Recommendations:

This article shows that the condition of the institutional framework for the rehabilitation and reintegration of the children is not child-focused. The existing CDCs and certified institutes are to some extent not complying with the international standards. This study suggests that implementation of the effective institutional framework and alternative care will improve the conditions of the children who have violated the law. The following suggestions may help to establish the child-focused institutional framework for children in Bangladesh.

First, the Court dealing with the child in conflict with law will grant bail and give custody of the child, taking into account report of probation officer, views of parents and relatives as well as child herself and any other materials available before him and deciding custody of child, choosing whichever avenue might be in the best interests of the child. Authorities concerned are directed to take appropriate steps for training of the probation officials in compliance with legal provisions relating to

⁵⁰ Islam, M.R. (2020). Alternative Care for Children in Bangladesh: Challenges and Interventions. In: S.M., S., Baikady, R., Sheng-Li, C., Sakaguchi, H. (eds) The Palgrave Handbook of Global Social Work Education. Palgrave Macmillan, Cham, p.1102

⁵¹ Md. Enamul Haque, Alternative Child Care in Bangladesh, The Daily Observer, 30 March 2019 <https://www.observerbd.com/news.php?id=190746ln>. last accessed on 21 July, 2024

⁵² Section 88, The Children Act, 2013

children. All expenses incurred by probation officer for the purpose of the case will be borne by Department of Social Services. The presence of the probation officer in the station round the clock must be ensured.

Second, the National Child Welfare Board has been established but the District Welfare Board and the Upazila Child Welfare Board have not been established yet. The Children Act, 2013 conferred the responsibility upon the government to establish the District and Upazila Boards throughout the country. It is recommended to establish the boards as soon as possible and to make them functional to ensure the best interests of the children in conflict with law.

Third, to understand properly the statutory duties and functions of CAPO as enshrined in the CA 2013, necessary training shall be provided under the auspices of the Bangladesh Police Academy, Police Staff College and Police Training Centers. The importance of training of the child affairs police officer was appreciated by the Patna High Court in the *Matter of Letter of Sanant Kumar Sinha (Chief Coordinator), Bal Sakha vs. The State of Bihar through the Chief Secretary, Government of Bihar and Ors*,⁵³ where a child was handcuffed by a police officer during his transit from the police station to the chief judicial magistrate court for his appearance and also disclosed the identity of the child contrary to the provisions of the Act of 2000 (India). The court observed that such a situation ought not to have occurred at all and could have been avoided through proper training and sensitization.

Fourth, children who have been in conflict with law must receive necessary education and vocational training which is central to their future. Therefore, quality of education imparted in CDC should be improved and scope of higher education of the CDC inmates should be ensured. Vocational skills taught to children in rehabilitation should be relevant, of good quality, competitive and linked to market needs to ensure that children are well adjusted and have a chance to find employment in the future. Vocational training given to any children must be followed by an award of certificate.

Fifth, the conduct of matrons, superintendents and other staff of the CDS and the certified institutes to be kept under strict surveillance and such persons should also be subjected to frequent transfer to avoid any misuse of position by them and immediate steps should be taken to provide such personnel who can impart education and vocational training to the inmates. The Civil Surgeons and Assistant Civil Surgeons, qualified for specific kind of ailment, must visit, institutions every

⁵³ *The Matter of Letter of Sanant Kumar Sinha (Chief Coordinator), Bal Sakha vs. The State of Bihar through the Chief Secretary, Government of Bihar and Ors.*, Criminal Writ Jurisdiction Case No. 182 of 1988, Decided On: 05.04.1990

week for complete check-up of each of inmates and prepare report which should be maintained, in a register signed by doctor and inmate, it will be more advisable if Assistant Civil Surgeons are posted specially in each of such institutions or one for two institutions if there are two in one city and all necessary medicines must be provided immediately when required. Adequate fund should be made available for providing food, wearing apparels bedding etc. and toilet requisites for each of the inmates forthwith. Each meal should consist of the barest minimum food at least wholesome that can keep body and soul together and if any inmate, indisposed, requires special diet, that should be provided. The building must be renovated time to time and the authority must keep the ambience clean, health and comfortable.

Sixth, the Beijing Rules draw attention to the need for specialized training for all law enforcement officials who are involved in the administration of children justice.⁵⁴ The Rules stress that professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with the children cases.⁵⁵ Similarly, the *UN Guidelines for Action on Children in the Criminal Justice System*⁵⁶ prescribes:

“All persons having contact with or being responsible for children in the criminal justice system should receive education and training in human rights, the principles and provisions of the Convention and other United Nations standards and norms in juvenile justice as an integral part of their training programmes. Such persons include police and other law enforcement officials, judges and magistrates, prosecutors, lawyers and administrators, prison officers and other professionals working in institutions where children are deprived of their liberty, and health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice.”

In Bangladesh, currently juvenile justice training is generally being conducted on an ad hoc basis and numerous duplicative training manuals and training programmes have been developed with the support of various NGOs, INGOs and donor agencies. It is recommended that juvenile justice training be standardized, institutionalized and more systematic. In particular, training programmes should be based on participatory techniques that promote sensitization and behavioural change. Building the capacities of persons concerned and their understanding of child rights and sensitivity towards children must be carried out on a large scale. It should not be a one-time training programme but should be a regular and continuous process.

⁵⁴ Rule 12.1, The Beijing Rules

⁵⁵ Rule 22.1, *ibid*

⁵⁶ Recommended by ECOSOC res. 1997/30 of 21 July, 1997

Seventh, Rehabilitation programmes should be introduced for the juveniles. There is no specific programme in the rehabilitation centers for trauma victims, psychological cases, drugs and alcohol addicts. Significant improvement should be made through community-based rehabilitation programmes. Proper rehabilitation of juveniles and their reintegration into the society should be ensured. Foster care and adoption must be promoted to ensure the adequate care of the children in conflict with law.

Eighth, there should be independent monitoring and investigating bodies with full access to the institutions for children in conflict with law. Child rights commission can be established with a view to monitor the activities of the stakeholders of the juvenile justice system. The judiciary, executive and legislative branches should establish mechanisms to investigate and redress the allegations of violence against juveniles.

Ninth, Socialization and integration process of all juveniles, in particular through the family, community, peer groups, schools, vocational training as well as through voluntary organisations should be improved. Social values and awareness can prevent delinquency and enquire their normal life. Due importance should be given to the proper personal development of juveniles and they should be accepted as full and equal partners in society.

8. Conclusion

The juvenile justice system involves several inter-linked stages and many different actors at every level of its administration such as police, judges, prosecutors, probation officers etc. Coordination among those actors is therefore important to ensure the effective implementation of the Children Act, 2013. It is the duty of the agencies, while dealing with children to keep in mind that the best interest of the children must be considered first. But it has been seen that the attitudes and behaviours of these personnel towards juvenile are not sincere and proactive. They are inadequately sensitized to the needs of the children. Sufficient manpower and logistics support can help to overcome the existing shortcomings of the probation services. The child welfare board at every level must be sensitized about the best interest of the children. The number of child development centers and certified centers must be increased to accommodate the children in conflict with law. The police officer specially child welfare police officer must be properly trained and sensitive about the children. Alternative care must be adopted to reduce the pressure on the formal institutional set-up. So, the ultimate goal of the juvenile justice system is to protect the best interest of the children and help them to rehabilitate into the society.

Access to Mental Healthcare in Bangladesh: Analyzing the Prisoners' view

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Abstract: Prisoners, due to their confinement, are in a particularly vulnerable position. The harsh conditions of imprisonment can lead to significant mental health issues. Besides, many prisoners may already have pre-existing mental health conditions before entering prison, or their mental health can deteriorate in prison due to overcrowding, physical abuse, and lack of social interaction. Despite this, mental healthcare is often insufficient or altogether absent in many Bangladeshi prisons. The denial or inability to provide proper healthcare, particularly mental healthcare, to prisoners is a human rights violation with far-reaching consequences for both individual well-being and the broader society. This paper examines the critical issue of mental healthcare access for prisoners in Bangladesh, offering a unique perspective by shedding light on the barriers they encounter. The study also emphasizes the necessity for pro-active policymaking guaranteeing access to mental healthcare with improved coordination between legal and medical systems, to create a more human, rehabilitative environment, and to call for a rights-based approach to prisoners' well-being in Bangladesh.

1. Introduction

Although the right to health, including mental wellbeing, is incorporated in the Constitution of Bangladesh,¹ it typically receives less importance in the context of continuing attempts for overall development due to low budgetary support for health, insufficient medical facilities, inadequate financing, and lack of reliability.² In line with this, the existing criminal justice system places less importance on the prisoner's mental health. In Bangladesh, crime rates tend to be higher than developed countries³ and every year a large number of people are imprisoned.⁴

Compared to the number of prisoners the facilities for rehabilitation and accommodation in the prison are not being increased. In Bangladesh, there are 68

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¹ The Constitution of the People's Republic of Bangladesh, art 18.

² Finance Division, Ministry of Finance, 'Bangladesh Economic Review 2024' (published on 06 June 2024).

³ 'Global Organized Crime Index 2023' <<https://ocindex.net/report/2023/0-3-contents.html>> accessed 21 December 2024

⁴ Kamrul Hasan and Munni Khatun, 'The Investigation of the Rising Crime and the Reason for People to Indulge in the Crime in Bangladesh' (2020) 10 *Advances in Applied Sociology*, 421.

prisons, of which 13 are central and 55 are local. According to the National Prison Administration, the total number of prisoners (including criminal and civil prisoners)⁵ is 53831 up to 15 October 2022⁴ where the jail system's actual capacity is 42887.⁶ Prison mental health in Bangladesh is a neglected domain with the highest prevalence (66.4%–100%) of psychiatric morbidity in the absence of a mental health system.⁷ Compared to the number of prisoners having mental health issues in Bangladesh, hospitals are insufficient to meet the demand. There are only 11 jail hospitals in the country⁸, and for the nearly 81200 prisoners, there are a total of 9 doctors accessible. No jail has any mental health care giver though there is a post for that at each jail.⁹ Only 0.49 psychiatrists are present in Bangladesh for every 100,000 people.¹⁰ The National Institute of Mental Health (NIMH) is the only hospital in Bangladesh with a forensic psychiatry section. Bangabandhu Sheikh Mujib Medical University (BSMMU) Hospital also offers substantial treatment to individuals with forensic mental health issues. Additionally, the psychiatry departments of 36 public medical institutions across the nation are equipped to offer treatments related to forensic mental patients. However, they lack psychiatry professors or the capacity to set up a medical board on their premises.¹¹

According to Bangladesh WHO Special Initiative for Mental Health 2020,¹² the government of Bangladesh has recognized mental illnesses as one of the ten most urgent health issues in the nation. However, the Bangladesh government now spends only 0.44% of its entire health budget on mental health, with 67% of that amount going to mental hospitals, and fewer than 0.11% of its citizens receiving access to free necessary psychotropic drugs.¹³ In the new budget for the 2024-25

⁵ The Prisons Act 1894, s 3(3, 4).

⁶ World Prison Brief, 'Institute for Crime & Justice Policy Research' <<https://www.prisonstudies.org/country/bangladesh>> accessed 20 December 2024.

⁷ SM Yasir Arafat and Others, 'Prison mental health in South-East Asia: A narrative review' (2024) 14 (8) *Brain and Behavior*.

⁸ Ravinder Barn, 'Ethnicity, gender and mental health: Social Work Perspectives' (2008) 54(1) *International Journal of Social Psychiatry* 69.

⁹ Rozina Islam, 'Only four physicians for around 83,000 inmates' *Daily Prothom Alo* (Dhaka, 9 October 2022) <<https://en.prothomalo.com/bangladesh/2sw4r2cj3f>> accessed 12 March 2024.

¹⁰ Mehadi Hasan, 'An Analysis on the Mental Health Act 2018' *The Daily Star* (Dhaka, 2 Feb 2021) <<https://www.thedailystar.net/law-our-rights/news/analysis-the-mental-health-act-2018-2037885>> accessed 12 March 2024.

¹¹ Sayedul Ashraf Kushal and Others, 'Situational Analysis of Forensic Mental Health in Bangladesh' (2022) 3 *Forensic Science International: Mind and Law*.

¹² WHO, 'Special Initiative for Mental Health Country Report: Bangladesh' (2020).

¹³ Md Mahmudul Hasan and Others, 'The current state of mental healthcare in Bangladesh: part 2 - setting priorities' (2021) 18 (4) *BJPSYCS International* 82.

fiscal year, taka 41,407 crore has been allocated to the health sector, which is 8.8% of the total budget. But in real terms, it has been decreased compared to the previous fiscal year if inflation is considered. Every year it is found that the expenditure towards the improvement of mental health is lower than physical health.¹⁴ Compared to normal people prisoners do not receive a minimum standard of health support let alone mental healthcare facilities.

2. Understanding the Right to Mental Health

Health refers to a condition of total physical, mental, and social well-being in contrast to simply being free from illness or infirmity.¹⁵ The ability to manage life's challenges, recognize one's potential, perform well in school and at work, and give back to one's community are all signs of mental health.¹⁶ Mental health issues include psychosocial impairments, mental disorders, and other mental states, but in true sense, it is more than the absence of these conditions. Mental health is a vital component without which there can be no physical health, and having good mental health goes far beyond the absence of mental disorders.¹⁷ Individuals with mental health concerns are more susceptible to developing various physical health issues because mental health is connected to physical health, and the two cannot be seen as separate entities. The well-being of the mind plays a significant role in maintaining and improving physical health, while physical health issues can, in turn, impact mental well-being.

Mental health, as a broader field, encompasses three primary components: cognitive health, emotional health, and behavioural health. Cognitive health relates to how we think, learn, and process information. Emotional health involves the regulation and expression of emotions, while behavioural health focuses on the actions and habits that affect an individual's well-being. Another concept associated with mental health is the entitlement to forensic mental healthcare. Forensic refers to or is connected with legal matters. People with mental illnesses, who have committed crimes or are in danger of doing so, can receive examination and treatment from forensic health services. These services ensure such individuals undergo comprehensive

¹⁴ *ibid.*

¹⁵ Frank P Grad, 'The Preamble of the Constitution of the World Health Organization' (2002) 80 (12) *Bulletin of the World Health Organization*.

¹⁶ *ibid.*

¹⁷ UNHCHR, 'Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' A/HRC/RES/32/18.

assessments and receive the necessary treatments to support their rehabilitation and reduce risks to society.

The World Health Organization's constitution considers health as a condition of total physical, mental, and social well-being instead of the absence of sickness or disability. It also demands the extension of knowledge to the people regarding the benefits of medical and psychological treatments essentiality.¹⁸ The UN Charter acknowledges that good health is a cornerstone of a peaceful and prosperous world. The UN General Assembly takes a proactive approach by initiating studies and making recommendations. This research identifies areas where international cooperation is most needed, such as developing vaccines, sharing medical knowledge, or providing resources to underserved regions. The recommendations can then guide member states in implementing effective healthcare policies that respect human rights.¹⁹ In addition, to establish stable circumstances for peaceful and amicable relations among nations based on the concept of equal rights and self-determination, the United Nations shall encourage solutions to worldwide health and health-related challenges.²⁰ The Sustainable Development Goals contain the right to mental health to give it the utmost significance.²¹ This inclusion elevates mental health from a neglected issue to a top priority, highlighting its ripple effect on achieving other goals like education and equality. It fosters increased investment and challenges stigma, promoting a holistic approach to development where mental well-being is just as crucial as physical and economic factors.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes the enjoyment of the best possible state of both mental and physical health as a human right, despite the International Covenant on Civil and Political Rights (ICCPR) not specifically mentioning the right to health.²² According to the Convention on the Rights of the Child (CRC), children have a right to the best possible standard of health as well as access to facilities for medical treatment and health restoration.²³ Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD) also binds the state parties to provide and ensure the right to the enjoyment of the best possible level of health without any form of prejudice. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) emphasizes that access to specialized knowledge about education, such as

¹⁹ Charter of the United Nations 1945, art 13, (1) (b).

²⁰ *ibid* art 55(b).

²¹ UNGA A/RES/70/1 (21 October 2015) Goal 3.9.

²² UNGA Treaty Series, vol. 993, p 3 (16 December 1966) art 12.

²³ UNGA Treaty Series, vol. 1577, p 3 (20 November 1989) art 24.

information and assistance on family planning, can help secure the physical and mental well-being of families.²⁴ Regarding mental health, article 12 of the Convention states the right to enjoy the appropriate level of physical and mental health, availability of health care services, and health-related information. In addition, the right to access appropriate information, education, and services in connection with their health²⁵ has taken place in the document.

3. Legal Framework for Prisoners' Mental Healthcare

Irrespective of any country or jurisdiction, prison system inherently illustrates an ambience that can intensify or even create mental health issues. There may lack of freedom, social isolation, exposure to violence, and the overwhelming stress of imprisonment. Consequently, these may contribute to the high prevalence of mental health disorders among inmates such as depression, anxiety, post-traumatic stress disorder (PTSD), and personality disorders. Additionally, many prisoners with pre-existing mental health issues were either untreated or inadequately managed. The legal framework for prisoners' mental healthcare plays a vital role in safeguarding the rights of incarcerated individuals while ensuring that their mental health needs are met in a manner that aligns with both human rights standards and ethical principles.

3.1. International Standards

The Standard Minimum Rules for the Treatment of Prisoners²⁶ (also known as the Nelson Mandela Rules) were first adopted by the United Nations (UN) in 1955 and have since been revised and updated. These rules are a set of guidelines aimed at ensuring the humane treatment of individuals incarcerated in prisons and correctional facilities worldwide. The rules provide international standards to safeguard prisoners' dignity, health, and rights, ensuring that they are not subjected to inhumane or degrading treatment. Discrimination based on race, religion, or any other status is strictly prohibited. Furthermore, the focus is not solely on punishment, but also on rehabilitation. The rules call for environments that promote positive adjustments and equip prisoners with the skills and resources necessary to successfully reintegrate back into society upon release. This means providing opportunities for education, work training, and access to healthcare to foster a sense of purpose and hope for a future beyond prison walls.²⁷

²⁴ UNGA Treaty Series, vol. 1249, p 13 (18 December 1979) art 10.

²⁵ *ibid* art 14(b).

²⁶ UN DOC A/RES 70/175 (2015) 1 at 10.

²⁷ *ibid*.

According to Rule 22 every jail must provide services for mental diagnosis and, if necessary, therapy. Rule 26 assigns the medical officer the critical task of maintaining health standards. This officer conducts regular inspections, evaluating factors like food quality, sanitation, and living conditions. They then advise the director on any necessary improvements. This comprehensive approach ensures that the jail environment fosters not only mental well-being, but also physical health and safety for all inmates. Healthcare professionals are not allowed to carry out any conduct that could harm a prisoner's health or offer their consent to such acts.²⁸

Besides, there are various international instruments such as resolutions, conventions, agreements, norms, and principles which deal with proper healthcare system for prisoners. Among the principles, the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and other Cruel, Inhuman or Degrading Treatment (1982), Principles for the Protection of Persons with Mental Health Care (1991), the WHO Technical Standards (Mental Health Care Law: Ten Basic Principles and Guidelines for the Promotion of Human Rights of Persons with Mental Disorders) of 1996 are noteworthy. Along with the Second Optional Protocol on the Abolition of the Death Penalty (1989), the Third Geneva Convention Relating to the Treatment of Prisoners of War (1949), the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), and others, emphasize the critical importance of protecting the mental health of prisoners and detainees, recognizing that incarceration can significantly impact individuals' psychological well-being. They assert that prisoners should not be subjected to torture or inhumane treatment, as such conditions can worsen mental health issues. The principles advocate for ensuring access to adequate mental health care, recognizing that a substantial number of detainees already suffer from mental health disorders. Furthermore, they stress that the prison environment itself can exacerbate these conditions, highlighting the need for appropriate treatment, support, and protection of prisoners' human rights. These international agreements promote the provision of mental health services, the prevention of harm, and the upholding of human dignity in prison settings.

By 2030, the global goal is for 80% of nations to have created or updated their mental health policies or plans following regional and global human rights standards.²⁹ 194

²⁸ Tom L. Beauchamp and James F. Childress, *Principle of Medical Ethics* (Oxford University Press 2001) 454.

²⁹ WHO, Report on 'Political declaration of the third high-level meeting of the General Assembly on the prevention and control of non-communicable diseases' (13 January, 2021) EB 148/7.

Member States endorsed the plan with an effort to establish nationwide coverage for psychological services and to prevent disorders of mental health of vulnerable people. This not only ensures basic human rights are protected but also aims to prevent further suffering for prisoners and potentially improve their chances of successfully reintegrating into society upon release.

3.2. National Standards

Bangladesh is one of the states that adopted the Mental Health Action Plan of World Health Organization (WHO) for implementation. It has endorsed the National Mental Health Policy 2022 and developed a Separate Operational Plan for Mental Health, Substance Use Disorders, and Disabilities under the 5th Health, population, and Nutrition sector programme. In Bangladesh, there are a lot of existing laws to deal with prisoners but among them only a few address provisions regarding forensic mental health.

3.2.1. The Prisons Act, 1894

The Prisons Act of 1894 places significant emphasis on favourable circumstances for prisoners and for the basic needs of convicts, including separate living spaces for different types of prisoners, employment for prisoners, access to medical services, etc.

The medical officer plays a dual role in prisoner well-being. Section 13 tasks them with overseeing prison sanitation, and ensuring a clean environment to prevent illness. Section 14 adds a mental health safeguard. The medical officer must report any situation where a prisoner's mental state seems negatively affected by prison rules or treatment, acting as a watchdog for the psychological health of those incarcerated. Prison rules aim to segregate prisoners. Men and women are kept apart, while young male inmates are separated by age. In addition, if the prisoners are kept in a cell for longer than 24 hours, the medical officer or other medical subordinates must visit the prisoner at least once a day, whether as a form of discipline or not.

Besides, when it appears to the government that a person detained or imprisoned according to a court order or sentence is mentally ill, the government may, through a warrant stating the reasons for the belief that the person is mentally ill, order his removal to a mental hospital or other places of safe custody within Bangladesh, where he will be kept and treated as the government directs for the remainder of the term for which he has been ordered or sentenced to be detained.³⁰ When it appears

³⁰ The Prisoners Act 1900, s 3.

to the government that the prisoner has regained mental capacity, the government may, by a warrant addressed to the person in charge of the prisoner, remand him to the prison from which he was removed, to another prison within Bangladesh, or may order his release if the prisoner is no longer required to be kept in custody. In case of illness of the prisoners, the officer in charge of the prisoners must report them to the Jailer if they need medical attention. The Jailer must also follow written directions from the Medical Subordinate regarding alterations in discipline or treatment under section 37. To ensure the maintenance and monitoring of the prisoner's health and well-being Medical Officers' directions to prisoners are to record in the prisoner's history-ticket or other government-direct record following section 38. According to section 39, every prison must have a hospital or other suitable facility to receive sick prisoners.

3.2.2. The Prisoners Act, 1900

Only section 30 of this Act states about how the lunatic persons shall be dealt with in the prison. Under this section, the government can order the removal of a person of unsound mind to a lunatic asylum or safe custody within Bangladesh. The asylum will be maintained and treated as directed by the government. If a medical officer certifies the need for further detention, the prisoner will be detained until discharged. If the prisoner becomes of sound mind, they can be remanded to the original prison or discharged. Here a huge power has been vested in the government to deal with the lunatic offenders.

According to rule 1029 of the Jail Code, the jail superintendent may place a prisoner in a separate cell for medical monitoring if the medical officer determines that the prisoner does not have a mental condition but is beginning to exhibit signs of mental health distress. In addition, regulation 1030 specifies that the Superintendent must submit a report to the Inspector General after confirming the disorder to request a government directive authorizing the transfer of the individual to a mental hospital. Rule 1033 of the Jail Code states about the female patient. The clause states that a female coordinator or aide must always accompany female forensic mentally ill patients. Additionally, it controls how inmates are managed, housed, and treated, including those who are mentally ill, and how punishment is upheld. After being imprisoned by authorities or a court based on a criminal charge, a person with mental illness will have their rights upheld following the rules of the jail code.

The court may order an accused individual to regain his soundness if it is determined that he has temporarily lost it, and the trial will be suspended while this is done. During that period the accused is handed over to the jail authority and orders the civil

surgeon to check out whether he is insane or not. If found insane then the accused is sent for psychiatric treatment by an order named reception order.

3.2.3. The Children Act, 2013

All human rights protections afforded to adults are to be extended to children.³¹ According to CRC and the Beijing Rules, children who have been imprisoned must be handled in a way that promotes their sense of value and dignity, makes it easier for them to reintegrate into society, represents their best interests, and considers their needs.³² In Bangladesh, the treatment of juvenile offenders is guided by the Children Act of 2013. The Act has provided some new and good provisions in line with international documents for the better treatment of juvenile offenders in prison. Section 7 states about the establishment of the national, district, and upazila child welfare boards. Under section 13 in every police station, there shall be a child affairs desk. Besides, section 6 states about the duties and responsibilities of the probation officer for the best interest of the children. Considering the sensibility, the Act deals with the establishment of children's courts, the establishment of child development centers and certified institutes, alternative care, and institutional care for disadvantaged children. The Act has also given priority to the safe custody of juvenile offenders during trial. Regarding punishment, no child shall receive a death sentence or a life sentence, according to section 33(1) of the Act 2013. The Children's Court has the authority to order a kid to undergo treatment between three and ten years in a child rehabilitation centre if that child is found guilty of an offense that carries a death or life sentence. In addition to punishment, there are also measures such as probation, parole, and education and training programs aimed at rehabilitation and reintegration into society.³³ Though the Children Act does not explicitly encompass any provision regarding the treatment of mental health issues of children; however, juvenile offenders can receive social, psychological, and educational support, and the state is required to give them an environment conducive to their physical and mental development.³⁴ The ultimate goal behind this type of punishment is to promote rehabilitation, reintegration, and social adaptation.

³¹ UDHR 1948, art 1 and art 25(2).

³² CRC, 1989, art 3, 37, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (adopted 29 November 1985) rules 1, 5 and 6, p. 19.

³³ Ahmed, Islam 'Treatment of Juvenile Offenders: Bangladesh Perspective' (2010) <<http://www.researchgate.net/publication/368291290>> accessed 5 October, 2024.

³⁴ *ibid.*

3.2.4. The Code of Criminal Procedure, 1898

The Code of Criminal Procedure, 1898 specifies the procedures for mentally sick patients in chapter XXXIV. Section 464- 475 deals with various circumstances that may arise during the pendency of a criminal case and also states the way to manage the situation. For example, procedures of the trial of the accused being lunatic, the release of lunatic during the pendency of the investigation or trial, custody of lunatic, the situation when an accused becomes insane during the trial, the judgment of acquittal based on mental illness, the inability of the mentally sick patient to present a defence and its result, the treatment of such patients have been outlined here in detail.

3.2.5. Mental Health Act, 2018

In 2018, Bangladesh passed a new Mental Health Act which replaced the outdated Lunacy Act, 1912. This act is a special law that has an overriding effect over other existing laws.³⁵ It aims to better protect the rights of those with mental illnesses, as well as those with intellectual disabilities and substance abuse problems. The act also ensures that patients receive proper treatment, care, and rehabilitation. It speaks about the administration of patients' services and medical care. Section 6 guarantees the fundamental human rights of individuals diagnosed with mental illness. Sections 7 and 15 specifically address criminal justice patients by mandating separate units within mental health hospitals for those undergoing trial or already convicted. Admission for such individuals is contingent upon a reception order. It further emphasizes the need for establishing regulations to operationalize these sections. Additionally, it encompasses a broader scope, including offenses related to mental healthcare administration, judicial investigations, associated penalties, guardianship of mentally ill patients, rehabilitation programs, and the management of healthcare facilities.

4. Mental Healthcare Accessibility: A Practical Approach

The existing prison system places less importance on the mental health rights of the prisoners. In the case of Challa Ramkrishna Reddy³⁶ the Indian Apex Court states that a prisoner retains his humanity while in custody, regardless of whether he is convicted, on trial, or detained. He continues to exercise all of his fundamental rights, including the constitutionally guaranteed right to life, even when imprisoned.

³⁵ Md Mahbub Hossain and Others, 'New Mental Health Act in Bangladesh: unfinished agendas' (2019) 6 (1) The Lancet Psychiatry.

³⁶ State of Andhra Pradesh vs Challa Ramkrishna Reddy and Ors [2002] AIR SC 2083.

Again, when a person is found guilty of a crime and has had their freedom taken away under the legal process, they still have access to all of their remaining fundamental, constitutional rights. In many judgments, the Supreme Court of Bangladesh has affirmed that convicts are likewise protected by fundamental rights under our constitution. Furthermore, the Appellate Division of the Supreme Court of Bangladesh made a crucial observation regarding the issue of a prisoner's human rights in the case of *Bazlul Huda v. The State* (2000).³⁷ It was stated that the issue of a prisoner's fundamental human rights should not be overlooked because an inmate's guilt for a crime does not render him a non-person. The prison system suffers from overcrowding, delays in judicial proceedings, poor living conditions, and a lack of necessary skills and training among staff.³⁸ Sometimes the treatment is worse enough to make a prisoner mentally and physically ill. Compared to the number of prisoners there is an acute shortage of minimum facilities on the health side. It is to establish a hospital in every prison, but this option is mostly unavailable. In the absence of formal psychiatric services for prisoners from the government, some prisons rely on third-sector organizations for support.³⁹ This assistance is directed towards enhancing the employability of inmates upon release and addressing drug addiction issues. In Bangladesh, a peculiar practice is observed where psychiatrists do not visit prisons. Instead, prison staff escort inmates with mental health issues to appointments outside the prison.

4.1. Treatment in Police Custody

Atin Biswas (29), a carpenter, was arrested by police based on suspicion during the investigation of a murder case. Because of his friendship with the prime suspect, he found himself swept into the investigation. The court allowed a five-day remand, a period that has turned into a nightmare. Instead of physical brutality, Atin endured a relentless mental assault, sleep deprivation, isolation, and the constant pressure to confess chip away at his resilience. Proper medical facilities have been denied to him.

4.1.1. Rationale Behind the Custody and Denial of Mental Healthcare

The Constitution of the People's Republic of Bangladesh guarantees the right to protection under the law and protection from actions detrimental to life, liberty,

³⁷ *Bazlul Huda vs The State* [2000] 18 BLT (AD) 03.

³⁸ 'Global Organized Crime Index 2023' <<https://ocindex.net/report/2023/0-3-contents.html>> accessed on 21 December 2024.

³⁹ David Skuse, 'Current Concerns about Mental Health in Bangladesh' (2021) 18(4) BJPSYCS International.

body, reputation, or property, except by the law under Article 31. Furthermore, the right to life does not mean only life with taking breath but also means life with dignity, life in a healthy environment, and life with reasonable medical facilities, right not to eat unhealthy food,⁴⁰ right to live in a pollution-free environment,⁴¹ right to get medical tools without VAT.⁴² Article 35(5) states that no person can be subjected to cruel, inhuman, or degrading punishment or treatment which includes torture. The provision does not affect the operation of any existing law that prescribes a punishment or procedure for trial,⁴³ which means without the operation of existing law all have the right of protection from cruel, inhuman, degrading treatment. Arbitrary detention, remand torture and cruel behaviour to Atin during the remand are the deprivation of personal liberty and life guaranteed by the constitution.

Section 167 of the CrPC, 1898 governs the procedures for remand. The police must establish reasonable grounds for needing remand, and courts must assess whether such remand is essential. While producing a person arrested without warrant before the Magistrate, the police officer must state reasons why the investigation could not be completed within 24 hours and what are the grounds for believing that the information received against him is well-founded. Remand of Atin granted on the absence of firm logic and only for suspicion fails the necessity test of section 167. Besides, under section 169 investigating officer is under an obligation to release such person, who is in custody on executing a bond with or without sureties, if evidence is not sufficient and/or there are no reasonable grounds of suspicion to forward such person to the Magistrate. This section provides the police officer ample power to deal with the suspect. In the case of Atin, though the ground was suspicious and no evidence of his involvement was found, he was granted remand that constitutes the violation of this provision. Torture and Custodial Death (Prevention) Act, 2013 criminalizes torture during custody and provides penalties for officers found guilty. Despite this, its enforcement remains weak, and mental torture is often overlooked. Similarly, in the case of Atin the mental torture during the remand by the officer was overlooked.

⁴⁰ Dr. Mohiuddin Farooq vs Bangladesh and others [1996] 48 DLR 438.

⁴¹ Dr. Mohiuddin Farooq vs Bangladesh and others [1997] 49 DLR AD 1

⁴² Adv Zulhas Uddin Ahmed and Manjil Morshed vs Bangladesh [2010] 15 MLR (HCD)

⁴³ Constitution of the People's Republic of Bangladesh, art 35(6).

In the Rubel Killing Case⁴⁴ the Supreme Court of Bangladesh ensures that police's powers to arrest without warrant and magistrate's power on remand should be consistent with constitutional safeguards on arrest and the prohibition on torture. The Appellate Division issued 10-point guidelines to the law enforcement agencies and 9-point guidelines to the Magistrates, Judges, and Tribunals having the power to take cognizance of an offense. These guidelines include ensuring that the accused is presented before a magistrate and that remand is not misused. Besides, the High Court emphasized the duty of law enforcement agencies to maintain detainees' dignity and ensure that their treatment complies with constitutional protections⁴⁵. Although custodial guidelines are in place to protect detainees' rights, the case of Atin Biswas highlights the police's indifference to these rules. These actions not only violate the spirit of custodial guidelines but also emphasize a shift toward more covert forms of abuse that leave fewer physical marks but cause significant mental trauma.

As a signatory of the United Nations Convention Against Torture (CAT), Bangladesh is obliged to take steps to end torture within their borders and ensure that torture is a criminal offense. It must prevent other cruel, inhuman, or degrading treatment or punishment in all forms, including psychological abuse, and provide remedies for victims. Besides, there is an obligation to report on progress to the Committee Against Torture and the measures it has taken to fulfill obligations. Bangladesh passed the Torture and Custodial Death (Prevention) Act in 2013 to criminalize torture. However, Human Rights Watch has reported an increase in torture and other human rights violations in Bangladesh. Article 7 of ICCPR prohibits torture or cruel, inhumane, or degrading treatment, while Article 10 ensures humane treatment of detainees. Without recourse to justice or compensation cases like Atin violate the international obligation which was to be ensured by the Bangladeshi criminal justice system. Besides, detention in overcrowded, unsanitary conditions, coupled with mental torture, contravenes these principles.

Instead of following protocols that ensure humane treatment, Atin faced psychological torture, isolation, and deprivation of basic needs, violating the principles of justice and human rights; therefore, there is no justification of his denial of mental healthcare.

⁴⁴ Bangladesh Legal Aid and Services Trust (BLAST) and others v Bangladesh and others [2003] 55 DLR 363.

⁴⁵ State v. Md. Mohsin and Others [2012] 64 DLR 364.

4.2. Treatment of a Mentally Unstable Prisoner

Fazlu (52), a mental patient, was arrested by traffic police under sec 54 of CrPC and sent to jail with the intervention of Court in 1993. Police submitted a report under the then Mental Health Act against him. Despite a court order in 2002 mandating his release and a police report acknowledging his mental state under the Mental Health Act, the jail authorities have inexplicably kept him incarcerated for 30 years. This prolonged detainment not only denies him his freedom but also subjects him to a harsh reality. He has been imprisoned in the general prison ward, exposed to the potential dangers and hardships faced by the regular prison population. Despite his mental illness, he has not received proper psychological treatment, only basic medical care within the jail's limited resources.

4.2.1. Justification for the Detention and Absence of Mental Healthcare

Fazlu's continued incarceration, despite the court order for his release, constitutes a grave infringement of his fundamental right to life and personal liberty as guaranteed under Article 32 of the Constitution. Article 33 of the Constitution protects individuals from arbitrary arrest and detention. His detention beyond the court-mandated release date amounts to arbitrary detention, directly contravening this protection. Furthermore, this case highlights discrimination in the application of laws, as his mental health condition should have necessitated specialized care and treatment under the law. Denying him such care and treating him as a regular prisoner violates the principle of equality before the law. The Constitution guarantees that no individual shall be deprived of legal protection, and they must be treated with dignity under Article 31. The lack of adequate psychological treatment and placing Fazlu in a general prison ward exposes him to undue suffering and indignity, violating his fundamental rights. While not directly enforceable, the Directive Principles emphasize state responsibility to ensure proper healthcare and welfare for all citizens, including those with mental health issues. The state's failure to provide Fazlu with appropriate care and rehabilitation goes against these principles.

Section 54 of CrPC gives the widest powers to the police in cognizable cases, and the only limitation is the requirement of reasonability and credibility to prevent the misuse of powers. Reasonable complaint or suspicion varies from fact to fact but it must be founded on some definite facts tending to throw suspicion on the person arrested, and not merely on a vague surmise or information. If a person is arrested on 'reasonable suspicion', the police officer must record the reasons on which his suspicion is based. If the police officer justifies the arrest only by saying that the person is suspected to be involved in a cognizable offense, such a general statement

cannot justify the arrest. In this regard, the court condemned the misuse of section 54 of CrPC and emphasized safeguards to prevent arbitrary detentions.⁴⁶ Moreover, in a subsequent case, the need for due process in detentions under section 54 was reinforced.⁴⁷

When this provision is misapplied, it raises significant concerns regarding the concept of necessity. This concept requires that any detention or restriction of liberty be essential and not excessive. In the case of a mentally ill person, detaining them under section 54 without considering their mental state violates the necessity requirement. It's crucial that such detentions be avoided unless absolutely necessary, and alternatives, such as medical care or treatment, should be prioritized. CrPC, moreover, empowers the court to release an accused person if he is found to be of unsound mind and unable to defend themselves on security and the security must ensure that the accused is properly cared for, prevented from harming themselves or others, and appears in court when required.⁴⁸

According to the Mental Health Act, 2018 a person suffering from mental illness must be assured of health, property, dignity, education, and other rights.⁴⁹ Local government representatives or local police officers have the authority to transfer or send mentally ill patients who are homeless or do not have a guardian or relative available to them to a nearby public mental institution.⁵⁰ The hospital will be in charge of the patient's care and promptly forward pertinent documentation to the local government or police station. These provisions have not been maintained in case of Fazlu.

The Prison Act, 1894 imposes responsibility upon medical officers to adequately report on the accused's mental condition and failure to submit a report represents a breach of the duty under this Act.⁵¹ This provision underscores the need for accurate documentation of detainees' mental health to ensure their proper treatment. Under the legal framework, individuals diagnosed with mental health conditions may be exempt from criminal liability because of the absence of mens rea, i.e., the mental state or intent accompanying the act. The absence of mens rea due to a mental health condition negates the culpability of the accused, as the essential mental element

⁴⁶ [2003] 55 DLR 1

⁴⁷ [2006] 58 DLR 319

⁴⁸ CrPC 1898, s 466.

⁴⁹ The Mental Health Act 2018, s 6.

⁵⁰ *ibid* s 17.

⁵¹ The Prison Act 1894, s 14

required for establishing criminal liability is absent. Thus, arbitrary detention of the mentally sick person is a clear violation of the existing legal framework.

As a signatory country of the Universal Declaration of Human Rights (UDHR), Bangladesh is under the obligation to uphold the principles which include freedom of thought, equal protection under the law, prohibition of torture and inhumane treatment,⁵² protection against arbitrary detention.⁵³ Specifically, in the case of Fazlu the aforementioned standards have not been maintained in treating an accused who was under mental disability. Bangladesh is obliged to ensure that individuals with disabilities, including mental illnesses, are treated with dignity and provided with necessary accommodations and to take all appropriate measures to eliminate discrimination based on disability by any person, organization, or private enterprise under CRPD.⁵⁴ However, treatment towards Fazlu was not in line with the Convention's mandate. Instead of receiving specialized care and support, he was treated as a regular prisoner, disregarding his mental health needs. This failure to accommodate his condition not only violated his dignity but also perpetuated systemic discrimination against individuals with psychosocial disabilities. The absence of adequate health care and rehabilitation further highlights a lack of compliance with the obligations under the CRPD.

4.3. Treatment in a Juvenile Correction Centre

Manjurul (27), a vagabond, was accused of committing abatement of the suicide of a school girl when he was only 14 in 2010. He was thrust into the unforgiving world of adult criminals during his trial. After the trial, he was sent to a juvenile detention centre in Jashore, a place intended for rehabilitation. However, the following four years became a period of further trauma. He has experienced low-grade food, irregularities in serving food, and medicine, extreme punishment for violation of discipline, so-called counselling, and the worst behaviour of the officers. The so-called counselling, he received didn't help, and the officers treated him badly. Throughout all of this, Manjurul experienced deep mental trauma and was never given proper access to mental healthcare, which made his suffering even worse.

4.3.1. Justification for the Rehabilitation and Lack of Healthcare Accessibility

In Manjurul's case, the provisions of the Children Act, 2013, meant to protect the rights and well-being of children, were not upheld, leading to significant

⁵² UDHR 1948, art 5.

⁵³ *ibid*, art 9

⁵⁴ UNGA RES/61/106, 24 January 2007, art 4.

psychological trauma. According to Section 26, children should be separated from adult offenders, but Manjurul was placed with adult offenders during his trial, exposing him to harsh conditions that worsened his mental state. Though he was sent to a juvenile home but did not provide the rehabilitation and care he needed as per section 34.

In addition, section 36 emphasizes the use of age-appropriate language, but the punitive measures he faced, such as extreme punishment and the use of terms like 'offender', likely deepened his emotional strain. Section 44 also prohibits the arrest or detention of children under nine in handcuffs or restraints, but Manjurul's experiences show how the law's protections were not followed. The failure to separate him from adults, as required by section 63, exposed him to further negative influences and left him without proper mental healthcare or support, exacerbating his psychological trauma. Additionally, section 84 of the Children Act stresses that alternative care initiatives should be taken to ensure the welfare and best interests of children in contact with the law, considering their unique psychological, social, and educational needs. This lack of adherence to legal safeguards contributed to the long-lasting emotional and psychological scars that Manjurul endured during his time in detention.

The case of Bangladesh Legal Aid and Services Trust v. Bangladesh further emphasized the importance of humane treatment for prisoners, including children, and their right to healthcare and rehabilitation in line with constitutional guarantees and international standards.⁵⁵ In Nazrul Islam v. Bangladesh, the court underscored the state's obligation to provide adequate facilities for juvenile inmates, ensuring their mental and physical well-being.⁵⁶

Despite these legal protections, violations of children's rights, such as the failure to provide rehabilitation, separation from adults, and access to family visits, are unfortunately common. The case of Manjurul illustrates the serious mental health risks posed to children in the justice system due to the non-maintenance of these provisions.

The failure to maintain the safeguards outlined in the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the CRC had a severe impact on Manjurul's mental well-being. As a child placed in the adult criminal justice system, Manjurul was exposed to harsh conditions that violated his right to separation from adult offenders. This not only heightened his vulnerability but also

⁵⁵ [2010] 62 DLR 313.

⁵⁶ [2012] 64 DLR 34.

subjected him to harmful influences, leading to feelings of fear, isolation, and trauma. The lack of adequate care and rehabilitation, as mandated in Rule 26 of the Beijing Rules, meant that his emotional and psychological needs were ignored. Instead of receiving therapeutic support, he endured extreme punishment and mistreatment, exacerbating his psychological trauma.

Furthermore, his deprivation of access to proper healthcare, including mental health support, left him without the necessary resources to cope with his experiences. The failure to let him stay in touch with his family, a right protected by the CRC, meant that he lacked emotional support, which is crucial for his well-being. Without these important protections, Manjurul was denied the chance to heal, and his emotional wounds worsened, keeping him stuck in a cycle of suffering. This lack of mental health services means prisoners might not get proper diagnosis or treatment for depression, anxiety, or PTSD.

5. Recommendations

Though Bangladesh has taken initiatives and adopted laws acknowledging the international core documents, all these have loopholes by which human rights are being violated regularly in a grievous way. The following recommendations can be looked into to ensure human rights of the prisoners so that they do not forget that they are also human beings:

Regarding Legal Reform: The current system of ‘remand’, where individuals are held pre-trial without conviction, needs a significant refurbish. Stricter laws are essential to ensure this practice is used judiciously. Besides that, beyond who gets locked up, we need to focus on what happens to them. International standards for prison mental healthcare should be enshrined in law, guaranteeing access to qualified professionals for every prisoner. This would ensure personalized treatment plans and necessary medications. Furthermore, the laws themselves should address the post-remand mental health challenges.

Regarding Hospital Management: Ideally, prison hospitals should mirror the level of care available outside, with resources allocated based on individual needs. Moreover, prioritizing a psychology department is essential. The stress of imprisonment often enhances mental health issues, and qualified professionals can provide therapy, counselling, and addiction treatment programs. Investing in both physical and mental health within prison hospitals creates a healthier environment, not only for inmates but also for correctional staff.

Regarding Prison System: Separate cells should be made for mentally sick. Mentally ill individuals should be housed in separate facilities with varying levels of care

depending on the severity of their illness. Additionally, stricter guidelines are needed to prevent unnecessary detentions based on mere suspicion. Furthermore, increasing the number of juvenile courts will expedite the legal process for young offenders. Specialized police officers trained to interact with children can ensure their rights are protected while addressing conflicts with the law.

Regarding Recreational Activities: To combat the negative mental health effects of imprisonment, prisons should offer scheduled recreational activities for a certain time. These activities provide stress relief through enjoyment, foster social connection to combat isolation, introduce structure for a sense of control, stimulate cognitive function, and even boost self-esteem through achievement and significantly improve the mental well-being of prisoners.

6. Conclusion

In Bangladesh, there is a tendency to disobey the rules and regulations. Following the socioeconomic perspective and capacity, Bangladesh is unable to ensure quality medical treatment to the general people and for the disadvantaged prisoner, there is little opportunity to ensure their mental health rights let alone the general detainees. The mismanagement and the indifference of the employees the detainees are deprived of the right to life enshrined in the Constitution. The prisoners are deprived of the protection of the mental health right regularly and this scenario is found in cases of both normal detainees and mentally sick detainees who are supposed to get extra care. It is urgent in our criminal justice system to incorporate laws regarding minimum psychiatric diagnosis, checking of proper health standards by medical officers, and doctor's regular inspections complying with the economic condition are basic needs to ensure the mental health of the prisoners. Besides, juvenile offenders are presumed to have the potential for reform and they can be reintegrated into society.⁵⁷ Untreated mental health issues can worsen over time, leading to increased suffering, self-harm, and even violence. This not only affects the individuals and their families but also has societal implications, including financial costs and increased risk of recidivism.

To bridge the present gap, it is crucial for Bangladesh to prioritize mental health services in prisons, aligning with the Mandela Rules and international standards. By prioritizing the well-being of all inmates, Bangladesh can move towards a more just and effective prison system. However, it is a complex issue that involves not just the prison system, but also the wider health and social care systems. This attempt

⁵⁷ Kudrat E Khuda, 'Juvenile Delinquency, Its Causes and Justice System in Bangladesh: A Critical Analysis' (2019) 7(3) *Journal of South Asian Studies* p 109.

requires a multi-faceted approach involving systemic changes, resource allocation, and societal commitment which may make the comprehensive mental health services in prisons a complex and budget-intensive process. While some challenges are undeniable, the potential benefits ranging from improved inmate well-being to a reduction in crime make this a critical area of focus for policymakers and stakeholders.

Legal Dynamics of World Health Organization (WHO) and United Nations (UN) in Securing Global Health during the COVID-19 Pandemic: An Assessment Surrounding the Traditional vs. Non-Traditional Security Debates

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Abstract: The global prospect of security, historically dominated by traditional concerns embedded by the Westphalian Treaty of 1648, has witnessed a transformative shift towards non-traditional security issues in the twenty-first century. Following the consequences of World War II, there was a decrease in conflicts between nations. The emergence of non-traditional threats, such as climate change, poverty, and health security, has become paramount in contemporary security discourse. The outbreak of the COVID-19 pandemic has further increased the significance of non-traditional security, revealing the vulnerabilities of nations that prioritized traditional security in their policy frameworks. This article focuses on the dialogue surrounding the comparative analysis of traditional and non-traditional security, delving into the critical Securitization theory to elucidate the complexities of the COVID-19 pandemic. The primary objectives are twofold: firstly, to examine the impact of COVID-19 as a non-traditional security issue in the modern context, and secondly, to critically assess the role of the World Health Organization (WHO) in global health governance in the post-COVID-19 era from a legal perspective.

Keywords: COVID-19, Traditional Security, Non-Traditional Security, Global Health Governance, WHO.

1. Introduction

Amidst the historical trajectory of security studies, one of the most pivotal moments was the establishment of the Westphalian system in 1648³. This system is often considered the foundation of the modern state-centric international order. It emphasized the sovereignty of individual nation-states and laid the groundwork for the prevailing concepts of territorial integrity and non-interference⁴. In this

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³ 'Peace of Westphalia (1648) - International Relations - Oxford Bibliographies' (obo) <<https://www.oxfordbibliographies.com/display/document/obo-9780199743292/obo-9780199743292-0073.xml>> accessed 12 December 2023.

⁴ Fulvio Attinà, 'Traditional Security Issues', *China, the European Union, and the International Politics of Global Governance* (Palgrave Macmillan US 2016) <http://dx.doi.org/10.1057/9781137514004_10> accessed 8 December 2023.

framework, security primarily revolved around protecting state borders from external military threats⁵, shaping the discourse of international relations for centuries⁶. However, the aftermath of World War II ushered in a new geopolitical landscape. The devastating consequences of the war prompted nations to reconsider the effectiveness of traditional security measures⁷. In 1945, the establishment of the United Nations (UN) reflected a collective acknowledgement that addressing global challenges required a more collaborative and inclusive approach⁸. The UN, with its emphasis on diplomacy, conflict resolution, and international cooperation, marked a departure from the unilateral and militaristic approaches that dominated the pre-World War II era. Despite these developments, traditional security concerns persisted through the Cold War era⁹. Nuclear arms races and proxy wars are typical examples of the traditional security paradigm with a focus on military might as a deterrent¹⁰. However, the conclusion of the Cold War witnessed a significant shift. The late twentieth century witnessed a growing recognition that security was not solely defined by military threats¹¹. Non-traditional security challenges, including environmental degradation, infectious diseases, economic inequality, and cyber threats, gained prominence¹². The concept of 'security' expanded beyond military capabilities to encompass a broader range of issues affecting human well-being and global stability. This evolution in security studies paved the way for critical securitization theory, which challenges traditional security approaches by

⁵ Shahar Hameiri and Lee Jones, 'The Politics and Governance of Non-Traditional Security'¹ [2012] *International Studies Quarterly* 462 <<http://dx.doi.org/10.1111/isqu.12014>> accessed 12 December 2023.

⁶ Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' [1999] *The International History Review* 569 <<http://dx.doi.org/10.1080/07075332.1999.9640869>> accessed 12 December 2023.

⁷ 'Great Responsibilities and New Global Power | The National WWII Museum | New Orleans' (*The National WWII Museum | New Orleans*, 22 October 2020) <<https://www.nationalww2museum.org/war/articles/new-global-power-after-world-war-ii-1945>> accessed 12 December 2023.

⁸ United Nations, "History of the United Nations | United Nations" (*United Nations*) <<https://www.un.org/en/about-us/history-of-the-un>>.

⁹ Barry Buzan, 'New Patterns of Global Security in the Twenty-First Century' [1991] *International Affairs* 431 <<http://dx.doi.org/10.2307/2621945>> accessed 12 December 2023.

¹⁰ *Ibid.*

¹¹ Lynn H Miller, 'The Idea and the Reality of Collective Security' [1999] *Global Governance: A Review of Multilateralism and International Organizations* 303 <<http://dx.doi.org/10.1163/19426720-00503003>> accessed 12 December 2023.

¹² 'About Non-Traditional Security - NTS-Asia' (*NTS-Asia*) <<https://rsis-ntsasia.org/about-nts-asia/>> accessed 12 December 2023.

highlighting the socially constructed nature of security issues¹³. Critical securitization theory argues that “security is not an objective reality but a subjective perception influenced by political, social, and cultural factors”¹⁴. This theoretical framework becomes particularly relevant when examining the response to non-traditional security threats like pandemics.

Not long ago, the COVID-19 pandemic brought to light the vulnerabilities of traditional security-centric approaches. Nations with robust military capabilities found themselves grappling with a microscopic adversary that transcended borders without regard for military might¹⁵. The pandemic has forced a reexamination of global security priorities, prompting a critical reassessment of the balance between traditional and non-traditional security concerns. As the virus spread globally, it revealed stark disparities in preparedness, response strategies, and resource allocation¹⁶. Developed nations, often at the forefront of traditional security pursuits, faced the challenge of recalibrating their strategies to combat an invisible enemy. On the other hand, many developing countries, burdened by limited resources and historical prioritization of traditional security, found themselves disproportionately impacted by the health crisis¹⁷. This research aims to delve into the heart of this paradigmatic shift, focusing on the impact of COVID-19 as a non-traditional security threat. By employing critical securitization theory as a lens, the study seeks to dissect how the pandemic has deconstructed the traditional vs. non-traditional security debate. Furthermore, it aims to scrutinize the role of global institutions, particularly the World Health Organization (WHO) and the United Nations, in navigating the complexities of global health governance in the aftermath of the pandemic.

¹³ Catherine Charrett, ‘A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security’ [2009] SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.1884149>> accessed 12 December 2023.

¹⁴ Ibid.

¹⁵ Mely Anthony and Jose Ma Luis Montesclaros (eds), ‘Non-Traditional Security Concerns in the New Normal - World | ReliefWeb’ (*ReliefWeb*, 4 October 2022) <<https://reliefweb.int/report/world/non-traditional-security-concerns-new-normal#:~:text=Beyond%20its%20direct%20impact%2C%20COVID,and%20disaster%20relief%2C%20among%20others.>> accessed 13 December 2023.

¹⁶ Ahmad Z Al Meslamani, ‘Advancing towards a Worldwide Healthcare System in the Post-COVID-19 Era: Benefits and Barriers to International Collaboration in Healthcare’ [2023] *Journal of Medical Economics* 679 <<http://dx.doi.org/10.1080/13696998.2023.2207423>> accessed 13 December 2023.

¹⁷ Ian Bremmer, ‘The Best Global Responses to COVID-19 Pandemic, 1 Year Later | Time’ (*Time*, 12 June 2020) <<https://time.com/5851633/best-global-responses-covid-19/>> accessed 13 December 2023.

2. Background of the Research

Security studies have undergone a profound evolution, reflecting the changing nature of global challenges and the need for adaptive frameworks in understanding and addressing these challenges. The traditional approach to security, rooted in the Westphalian model, predominantly focused on the protection of state borders from external military threats. However, the post-World War II era marked a departure from this singular focus while during the Cold War, security studies were largely shaped by the ideological rivalry between the United States and the Soviet Union. The emphasis was on military capabilities as a deterrent against nuclear conflict, leading to a preoccupation with traditional security concerns. Notable works from this period include Kenneth Waltz's "Theory of International Politics," which laid the groundwork for neorealism, emphasizing "the anarchic nature of the international system and the role of states in ensuring their security through power"¹⁸. The conclusion of the Cold War marked a fundamental change in perspective, prompting scholars to widen the scope of security studies. Barry Buzan's "People, States, and Fear" (1983) was influential in this regard, introducing the concept of 'sectors' of security beyond the military realm¹⁹. Buzan argued for the inclusion of societal, economic, and environmental dimensions in the understanding of security, challenging the traditional "state-centric approach". The concept of human security, emphasizing the safeguarding of individuals from a spectrum of threats extending beyond military aggression, was introduced in the 1994 Human Development Report²⁰. This holistic approach, encapsulated in the report's definition of security as "freedom from want" and "freedom from fear," expanded the definition to include issues such as economic deprivation, disease, and environmental degradation. After that, the post-9/11 era brought renewed attention to traditional security concerns but also underscored the interconnected nature of global challenges²¹. The 1983 article by Richard Ullman titled "Redefining Security" argued for a comprehensive

¹⁸ Kenneth N Waltz, 'Kenneth N. Waltz's *Theory of International Politics*' in Richard Little, *The Balance of Power in International Relations* (Cambridge University Press 2007) <<http://dx.doi.org/10.1017/cbo9780511816635.006>> accessed 5 October 2023.

¹⁹ Barry Buzan, 'New Patterns of Global Security in the Twenty-First Century' [1991] *International Affairs* 431 <<http://dx.doi.org/10.2307/2621945>> accessed 12 December 2023.

²⁰ 'Human Development Report 1994 | Human Development Reports' (Home | Human Development Reports, 1994) <<https://hdr.undp.org/content/human-development-report-1994/>> accessed 13 December 2023.

²¹ Muhammad Ijaz Latif and Rehman Afzal Khan, "Tackling Terrorism: Traditional Security Approaches" (2011) 64 *Pakistan Horizon* 21 <<https://www.jstor.org/stable/24711175>> accessed 13 December 2023.

view of security that included economic, political, and societal dimensions²². The events of 9/11 and subsequent discussions on terrorism further fueled debates on the evolving nature of security threats.

Buzan and Waever's seminal work explores the structure of international security by introducing the concept of regional security complexes²³. Their framework challenges traditional notions of security by emphasizing regional dynamics and non-military factors that contribute to security considerations. Similarly, Acharya focused on the concept of a security community in Southeast Asia, emphasizing the role of non-traditional security issues in shaping regional order²⁴. Collins provides a comprehensive overview of security studies²⁵. The text critically examines the expansion of security studies beyond traditional military aspects to include non-traditional security challenges, such as environmental issues and global health threats. Floyd's work explores the securitization of environmental issues, illustrating how non-traditional security concerns become framed as existential threats²⁶. By applying securitization theory, the book provides insights into how issues like climate change transition into the realm of security discourse. Furthermore, Duffield's examination of development, security, and perpetual war highlights the interconnectedness of traditional and non-traditional security concerns²⁷. The book discusses how development initiatives intersect with security policies, illustrating the evolving nature of security challenges. Walt's classic work on the origins of alliances provides insights into traditional security considerations by examining the motivations behind states forming military alliances²⁸. The book helps contextualize the historical foundations of traditional security thinking.

Critical Securitization Theory, rooted in “the Copenhagen School of Security Studies”, offers a critical lens through which scholars analyze the construction and framing of

²² Richard H Ullman, ‘Redefining Security’ [1983] *International Security* 129 <<http://dx.doi.org/10.2307/2538489>> accessed 13 December 2023.

²³ David Skidmore, ‘Security: A New Framework for Analysis. By Barry Buzan, Ole Weaver, and Jaap de Wilde. Boulder, CO: Lynne Rienner, 1998. 239p. [1999] *American Political Science Review* 1010 <<http://dx.doi.org/10.2307/2586187>> accessed 13 December 2023.

²⁴ Amitav Acharya, *Constructing a Security Community in Southeast Asia* (3rd edn, Routledge 2014).

²⁵ Alan Collins, *Contemporary Security Studies* (Oxford University Press 2022).

²⁶ Rita Floyd, *Security and the Environment* (Cambridge University Press 2010) <<http://dx.doi.org/10.1017/cbo9780511730146>> accessed 21 October 2023.

²⁷ Alex Kirkup, ‘Development, Security and Unending War: Governing the World of Peoples’ [2008] *The Journal of Development Studies* 1557 <<http://dx.doi.org/10.1080/00220380802496067>> accessed 13 December 2023.

²⁸ Stephen M Walt, *The Origins of Alliances* (Cornell University Press 2013).

security issues²⁹. The foundational work by Buzan, Waever, and de Wilde introduces the concept of securitization, emphasizing the process through which actors define issues as security threats³⁰. The book lays the theoretical groundwork for Critical Securitization Theory, exploring the role of "language, identity, and power in shaping security" discourses. Waever's essay explores the intricacies of securitization and desecuritization, highlighting the significance of speech acts in framing issues as security concerns or excluding them from the security agenda³¹. The work is crucial in understanding the performative aspects of securitization. Balzacq's article provides a nuanced perspective on securitization, introducing the concepts of political agency, audience, and context³². It enriches Critical Securitization Theory by highlighting the complexities of how actors securitize issues in various political and social contexts. Furthermore, Huysmans' work contributes to the Critical Securitization Theory by exploring the conceptual depth of security³³. The article emphasizes the importance of understanding security as a "thick signifier" that carries diverse meanings, challenging simplistic notions of security.

With a sound understanding of traditional and non-traditional security trends, their evolution, and concepts surrounding the critical securitization theory, the transition into the discussion of global health governance in the COVID-19 context makes more sense. The historical analysis of global health governance has evolved alongside the changing nature of health challenges and the international community's response. Fidler's work provides an early examination of the challenges in global health governance³⁴. It highlights the complexities of coordinating responses to transnational health issues and the need for a more robust governance framework. Kickbusch's article contributes to the understanding of global health governance by

²⁹ Luiza-Maria Filimon, 'An Overview of the Copenhagen School's Approach to Security Studies: Constructing (in)Security through Performative Power' [2016] *The Romanian Journal for Baltic and Nordic Studies* 47 <http://dx.doi.org/10.53604/rjbns.v8i2_4> accessed 13 December 2023.

³⁰ Skidmore (n 21).

³¹ Matt McDonald, 'Securitization and the Construction of Security' [2008] *European Journal of International Relations* 563 <<http://dx.doi.org/10.1177/1354066108097553>> accessed 13 December 2023.

³² Thierry Balzacq, 'The Three Faces of Securitization: Political Agency, Audience and Context' [2005] *European Journal of International Relations* 171 <<http://dx.doi.org/10.1177/1354066105052960>> accessed 13 December 2023.

³³ Jef Huysmans, 'Security! What Do You Mean?' [1998] *European Journal of International Relations* 226 <<http://dx.doi.org/10.1177/1354066198004002004>> accessed 13 December 2023.

³⁴ David P Fidler, 'The Challenges of Global Health Governance | Council on Foreign Relations' (*Council on Foreign Relations*) <<https://www.cfr.org/report/challenges-global-health-governance>> accessed 13 December 2023.

offering a conceptual framework³⁵. It explores the evolving theories and practices that have shaped global health governance structures. Gostin's comprehensive book explores the intersection of law and global health governance³⁶. It provides insights into the legal frameworks that govern global health and the challenges faced in ensuring effective governance across borders. Frenk and Moon's article examines governance challenges in global health, emphasizing the need for adaptive and collaborative approaches³⁷. It addresses the tension between national interests and the collective responsibility for global health. Katz et al.'s article introduces the concept of health diplomacy within this context³⁸. It explores how diplomacy can play a crucial role in addressing health challenges on a global scale. Understanding the role of the World Health Organization (WHO) and the United Nations (UN) post-World War II is essential for contextualizing their contributions to global health governance. Fidler's work outlines the challenges faced in global health governance and examines the evolving role of the WHO³⁹. The book provides a foundational understanding of the complexities involved in coordinating international responses to health issues. Kickbusch's article critically examines the development of international health policies, focusing on the accountability of global health institutions such as the WHO⁴⁰. It provides insights into the institutional dynamics shaping global health governance. Gostin's work explores the potential of a Framework Convention on Global Health, outlining the role the WHO could play in addressing basic survival needs⁴¹. The article contributes to discussions on

³⁵ Ilona Kickbusch and Austin Liu, 'Global Health Diplomacy –Reconstructing Power and Governance' [2022] *The Lancet* 2156 <[http://dx.doi.org/10.1016/S0140-6736\(22\)00583-9](http://dx.doi.org/10.1016/S0140-6736(22)00583-9)> accessed 13 December 2023.

³⁶ Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014) 511.

³⁷ Julio Frenk and Suerie Moon, 'Governance Challenges in Global Health' [2013] *New England Journal of Medicine* 936 <<http://dx.doi.org/10.1056/NEJMr1109339>> accessed 13 December 2023.

³⁸ REBECCA KATZ and others, 'Defining Health Diplomacy: Changing Demands in the Era of Globalization' [2011] *Milbank Quarterly* 503 <<http://dx.doi.org/10.1111/j.1468-0009.2011.00637.x>> accessed 13 December 2023.

³⁹ David P Fidler, "Architecture amidst Anarchy: Global Health's Quest for Governance" [2006] ResearchGate <https://www.researchgate.net/publication/241811894_Architecture_Amidst_Anarchy_Global_Health's_Quest_for_Governance>.

⁴⁰ Ilona Kickbusch, 'The Development of International Health Policies – Accountability Intact?' [2000] *Social Science & Medicine* 979 <[http://dx.doi.org/10.1016/S0277-9536\(00\)00076-9](http://dx.doi.org/10.1016/S0277-9536(00)00076-9)> accessed 13 December 2023.

⁴¹ Lawrence O Gostin, "'Meeting Basic Survival Needs of the World's Least Healthy People: Towa" by Lawrence O. Gostin' (*Scholarship @ GEORGETOWN LAW*, 2007) <https://scholarship.law.georgetown.edu/fac_lectures/11/#:~:text=Basic%20survival%20needs%20include%20sanitation,vaccines%2C%20and%20functioning%20health%20systems.> accessed 13 December 2023.

strengthening the WHO's mandate in the post-World War II era. For the most updated scenario recent statistics and reports by WHO provide invaluable insights⁴². Ooms et al.'s work explores access to AIDS treatment and the role of different actors in addressing non-traditional health security challenges⁴³. It provides insights into the intersection of health, human rights, and global governance. Labonté and Gagnon's article delves into the framing of health in foreign policy, highlighting the growing recognition of health as a key diplomatic concern⁴⁴. The work contributes to understanding the broader context of non-traditional health security. Margaret Chan's article discusses the International Health Regulations as a global framework for detection and response to health threats⁴⁵. It signifies a shift towards a more coordinated and comprehensive approach to global health security. Fidler's work on SARS explores the governance challenges posed by the globalization of infectious diseases⁴⁶. It sheds light on the need for a paradigm shift in addressing health security concerns beyond traditional measures.

Puaschunder et al.⁴⁷ endeavour to comprehend the contemporary Zeitgeist, aiming to establish a historical milestone outlining how pandemics can impact individual decision-making, societal composition, national governance, economic frameworks, and the broader international milieu. The disparities in global responses to COVID-19 are emphasized to contemplate prospective developments in global public healthcare. Presently, COVID-19 has attained global pandemic status and is officially designated as a non-natural disaster, potentially implicating citizens' right to health as stipulated by statutory law. Utama posits that legal culture, integral to legal system theory, remains a pertinent factor in managing the pandemic⁴⁸.

⁴² World Health Organization, *World Health Statistics 2023* (World Health Organization 2023) 119.

⁴³ Dr Jo Thomas, 'Access to Treatment in Developing Countries: A Global Issue of Equity and Human Rights' [2002] *AIDS Analysis Asia* Volume 4 (2) <<https://pubmed.ncbi.nlm.nih.gov/12293619/>> accessed 1 December 2023.

⁴⁴ Ronald Labonté and Michelle L Gagnon, 'Framing Health and Foreign Policy: Lessons for Global Health Diplomacy' [2010] *Globalization and Health* 14 <<http://dx.doi.org/10.1186/1744-8603-6-14>> accessed 13 December 2023.

⁴⁵ Lawrence O Gostin, Mary C DeBartolo and Eric A Friedman, 'The International Health Regulations 10 Years on: The Governing Framework for Global Health Security' [2015] *The Lancet* 2222 <[http://dx.doi.org/10.1016/s0140-6736\(15\)00948-4](http://dx.doi.org/10.1016/s0140-6736(15)00948-4)> accessed 13 December 2023.

⁴⁶ David P Fidler, *SARS, Governance and the Globalization of Disease* (Palgrave Macmillan 2004).

⁴⁷ Julia M Puaschunder, Martin Gelter and Siegfried Sharma, 'COVID-19-Shock: Considerations on Socio-Technological, Legal, Corporate, Economic and Governance Changes and Trends' [2020] *SSRN Electronic Journal* <<http://dx.doi.org/10.2139/ssrn.3679326>> accessed 13 December 2023.

⁴⁸ I Made Arya Utama, 'Do Indonesian Laws and Policies on Covid-19 Countermeasures Action Reflect Legality?' [2020] *Udayana Journal of Law and Culture* 211 <<http://dx.doi.org/10.24843/ujlc.2020.v04.i02.p05>> accessed 12 December 2023.

The World Health Organization's (WHO) activities are determined and scrutinized at the World Health Assembly (WHA) through instructions and endorsements from official delegations authorized by Member States⁴⁹. Certain global health challenges, including the recent COVID-19 pandemic, have prompted criticisms of the WHO and the United Nations as a whole and instigated discussions about its future in the post-pandemic era⁵⁰.

3. The Legal Framework and Role of WHO in Global Health Governance

The World Health Organization (WHO) stands as a pivotal international institution, holding a primary position in the governance of global health. Understanding the historical context of its establishment and subsequent evolution provides insights into the WHO's role in addressing health security challenges, including its response to the COVID-19 pandemic. The post-World War II era marked a fundamental transformation in international relations, culminating in the formation of the United Nations. Acknowledging the necessity for a dedicated agency addressing global health concerns, the World Health Organization (WHO) was established on April 7, 1948⁵¹. The organization's creation was informed by the understanding that “health is a fundamental human right and essential for sustained peace and security”⁵². The early mandate of the WHO encompassed a broad spectrum of health issues, aiming “to achieve the highest possible level of health for all people”⁵³. Its functions included coordinating international health work, providing technical assistance, conducting research, and formulating international health regulations⁵⁴. The WHO's constitution reflected a holistic vision that extended beyond mere absence of disease to encompass “complete physical, mental, and social well-being”⁵⁵. In subsequent

⁴⁹ Turan Buzgan and Öner Güner, ‘The Effectiveness of the World Health Organization in Pandemics and the Future of the Post-Pandemic Era’, *Reflections on the Pandemic in the Future of the World* (Turkish Academy of Sciences 2020) <<http://dx.doi.org/10.53478/tuba.2020.029>>.

⁵⁰ ‘Lacking Resources & Authority, WHO Was Too Slow To Act Against COVID-19 - Says Independent Review Panel - Health Policy Watch’ (*Health Policy Watch*, 19 January 2021) <<https://healthpolicy-watch.news/lacking-resources-authority-who-was-too-slow-to-act-against-covid-19-says-independent-review-panel/>> accessed 12 December 2023.

⁵¹ Kirsten Lundberg, ‘Credible Voice: WHO-Beijing and the SARS Crisis | Credible Voice: WHO-Beijing and the SARS Crisis’ (*Columbia CTL | Columbia Center for Teaching and Learning*, 2003) <https://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/112/casestudy/www/layout/case_id_112.html> accessed 13 December 2023.

⁵² ‘Constitution of the World Health Organization’ (*World Health Organization (WHO)*) <<https://www.who.int/about/accountability/governance/constitution>> accessed 13 December 2023.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

decades, the WHO embarked on ambitious global health initiatives. Notable among these were efforts to eradicate smallpox, which culminated in the successful eradication of the disease in 1980⁵⁶. Additionally, 'the Alma-Ata Declaration of 1978' underscored the significance of primary health care as the cornerstone of achieving health for all, marking a significant milestone in the evolution of global health strategies⁵⁷. The latter part of the 20th century saw the WHO's mandate expand to address emerging health challenges. The organization responded to the HIV/AIDS pandemic⁵⁸, advocated for tobacco control⁵⁹, and addressed issues such as maternal and child health⁶⁰. The shift toward a more comprehensive approach reflected the evolving nature of global health threats and the need for adaptive strategies⁶¹.

'The International Health Regulations (IHR)' of the World Health Organization (WHO), initially adopted in 1969 and subsequently revised in 2005, established a framework for "the prevention and control of the global dissemination of diseases"⁶². The International Health Regulations (IHR) underscored the significance of prompt detection, reporting, and response to public health emergencies, serving as a foundational element for delineating the World Health Organization's (WHO) responsibilities in the management of pandemics. In the 21st century, the WHO faced unprecedented challenges, including "the emergence of new infectious diseases, antimicrobial resistance, and the increasing interconnectedness of global health". The 2003 SARS outbreak served as a wake-up call, prompting a renewed emphasis on global health security. WHO adapted its strategies to address emerging threats and fostered international collaboration. WHO's role in pandemic preparedness gained prominence in the 2009 H1N1 influenza pandemic⁶³. The organization played a key role in coordinating the global response, disseminating

⁵⁶ WHO, 'History of Smallpox Vaccination' (*World Health Organization (WHO)*) <<https://www.who.int/news-room/spotlight/history-of-vaccination/history-of-smallpox-vaccination>> accessed 13 December 2023.

⁵⁷ 'Declaration of Alma-Ata' (*World Health Organization (WHO)*) <<https://www.who.int/teams/social-determinants-of-health/declaration-of-alma-ata#:~:text=The%20Alma%20Data%20Declaration%20of,goal%20of%20Health%20for%20All.>>> accessed 13 December 2023.

⁵⁸ 'World Health Organization: WHO and World Health Organization': WHO, "HIV and AIDS" (July 13, 2023).

⁵⁹ "Global Tobacco Report 2023" WHO (December 4, 2023).

⁶⁰ World Health Organization: WHO, "Maternal Health" (September 23, 2019).

⁶¹ Theodore M Brown, Marcos Cueto and Elizabeth Fee, "The World Health Organization and the Transition from 'International' to 'Global' Public Health" (2006) 96 *American Journal of Public Health* 62.

⁶² "International Health Regulations" (*PAHO/WHO | Pan American Health Organization*).

⁶³ Erik Bækkeskov, "Pandemic Preparedness and Responses to the 2009 H1N1 Influenza: Crisis Management and Public Policy Insights" (2020) *Oxford Research Encyclopedia of Politics*.

information, and facilitating equitable access to vaccines. The experience underscored the need for an enhanced global health architecture to respond effectively to pandemics⁶⁴.

The COVID-19 pandemic starting in late 2019, tested the resilience and capabilities of global health governance more seriously. The WHO, at the forefront of the response, declared COVID-19 a “public health emergency of international concern” in January 2020⁶⁵. It provided guidance, facilitated research collaboration, and worked to ensure fair vaccine distribution through initiatives like COVAX. The pandemic highlighted both the significance of international cooperation and the challenges in achieving a coordinated global response⁶⁶. The pandemic also exposed shortcomings in the global health governance framework⁶⁷. Criticisms of the WHO's response, funding challenges, and geopolitical tensions raised calls for reform⁶⁸. Discussions around strengthening the WHO's mandate, ensuring adequate funding, and improving the coordination of international responses gained momentum⁶⁹. As the world grapples with ongoing health challenges and the spectre of future pandemics, the WHO faces both challenges and opportunities. Strengthening the organization's capacity, enhancing global collaboration, and addressing the root causes of health disparities are crucial for building a more resilient and equitable global health system.

4. The Legal Framework and Role of the United Nations (UN) in Global Health Governance

The United Nations (UN) plays a crucial role in influencing international health priorities through its various agencies, programs, and initiatives. Understanding the UN's involvement in global health governance provides insights into the collective international response to health challenges⁷⁰. The WHO operates as a specialized

⁶⁴ “5 Reasons the World Needs WHO, to Fight the COVID-19 Pandemic” (*UN News*, April 9, 2020).

⁶⁵ “WHO Declares Public Health Emergency on Novel Coronavirus” (PAHO, WHO, Pan American Health Organization).

⁶⁶ Sarah Joseph, ‘International Human Rights Law and the Response to the Covid-19 Pandemic’ [2020] *Journal of International Humanitarian Legal Studies* 249 <<http://dx.doi.org/10.1163/18781527-bja10004>> accessed 13 December 2023.

⁶⁷ Armin von Bogdandy and Pedro Villarreal, ‘Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order’ [2020] *SSRN Electronic Journal* <<http://dx.doi.org/10.2139/ssrn.3600058>> accessed 13 December 2023.

⁶⁸ *ibid.*

⁶⁹ Carsten Weerth, ‘International Response to COVID-19: Initiatives and Declarations by the UN, WHO, WCO, WTO and Other Stakeholders on World Trade, Customs Law and Solidarity in a Human Emergency’ [2020] *LEX HUMANITARIAE* 9.

⁷⁰ United Nations, “Advancing the Global Health Agenda | United Nations” (*United Nations*).

agency of the United Nations, reflecting the recognition of health as a fundamental component of human well-being and global security. This institutional arrangement places the WHO at the heart of the UN's efforts to address health issues on a global scale⁷¹. The UN's commitment to global health is prominently articulated in the Sustainable Development Goals (SDGs), particularly Goal 3: "Ensure healthy lives and promote well-being for all at all ages."⁷² This goal underscores the interconnected nature of health with broader development objectives and emphasizes the importance of addressing health disparities on a global scale. Beyond the WHO, various UN agencies contribute to global health governance. UNICEF (United Nations Children's Fund) focuses on maternal and child health, nutrition, and immunization⁷³. UNAIDS (Joint United Nations Programme on HIV/AIDS) addresses the global HIV/AIDS pandemic⁷⁴. These agencies collaborate to tackle specific health challenges, contributing to a comprehensive and coordinated UN approach to health.

The UN convenes high-level meetings and conferences to address global health issues, fostering international collaboration. Notable examples include the High-Level Meeting on Universal Health Coverage in 2019⁷⁵ and the UN General Assembly Special Session on COVID-19 in 2021⁷⁶. These gatherings provide platforms for member states, UN agencies, and other stakeholders to discuss strategies, share best practices, and make commitments to advance global health goals. The Global Fund, a public-private partnership, is a key instrument in the UN's arsenal to combat major infectious diseases. Founded in 2002, it mobilizes and invests resources to support programs that address AIDS, tuberculosis, and malaria⁷⁷. The Global Fund exemplifies the collaborative nature of UN-backed initiatives in responding to global health challenges. The United Nations, operating through the World Health Organization (WHO), assumes a vital role in the

⁷¹ *ibid.*

⁷² "SDG Goal 3: Good Health and Well-Being - UNICEF DATA" (*UNICEF DATA*, September 20, 2023) <<https://data.unicef.org/sdgs/goal-3-good-health-wellbeing/>>.

⁷³ 'About UNICEF | UNICEF' (*UNICEF*) <<https://www.unicef.org/about-unicef>> accessed 13 December 2023.

⁷⁴ 'About UNAIDS | UNAIDS' (*UNAIDS*) <<https://www.unaids.org/en/whoweare/about>> accessed 13 December 2023.

⁷⁵ "UN High-Level Meeting on Universal Health Coverage" 23 September 2019, UN headquarters, New York.

⁷⁶ "Special Session of the General Assembly in Response to the Coronavirus Disease (COVID-19) Pandemic | General Assembly of the United Nations".

⁷⁷ Dominique Kerouedan, "The Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria Five-Year Evaluation Policy Challenges" (December 17, 2010) <<https://journals.openedition.org/factsreports/635>>.

formulation and execution of the International Health Regulations (IHR). These regulations establish a framework for averting and addressing the worldwide transmission of diseases, underscoring the significance of early detection, notification, and coordinated responses.⁷⁸ The IHR manifests the UN's dedication to global health security⁷⁹.

5. Effectiveness of WHO and UN in Securing Global Health

The effectiveness of global institutions in addressing health challenges is a subject of ongoing scrutiny and debate⁸⁰. Global institutions, including the WHO and various UN agencies, have achieved significant milestones in advancing global health. Eradicating smallpox, reducing maternal and child mortality, and progress in the fight against infectious diseases demonstrate the tangible impact of international collaboration. Initiatives like Gavi, the Vaccine Alliance, have expanded access to vaccines, contributing to improved public health outcomes⁸¹. The UN's role in facilitating coordination and information sharing during health emergencies is crucial. Through mechanisms like the Global Outbreak Alert and Response Network (GOARN), the UN enables the rapid sharing of information and expertise to enhance global preparedness and response⁸². The COVID-19 pandemic underscored the importance of such coordination mechanisms in managing health crises.

Global institutions face challenges and criticisms that impact their effectiveness. Funding constraints, geopolitical tensions, and issues of transparency and accountability have been cited as impediments to optimal performance⁸³. The WHO, in particular, faced scrutiny during the early stages of the COVID-19 pandemic, prompting calls for reforms to strengthen its capacity and governance structures. The COVID-19 pandemic revealed gaps in global pandemic preparedness⁸⁴. Despite existing frameworks and institutions, the world grappled with challenges in vaccine

⁷⁸ 'International Health Regulations' (*World Health Organization (WHO)*) <https://www.who.int/health-topics/international-health-regulations#tab=tab_1> accessed 13 December 2023.

⁷⁹ *ibid.*

⁸⁰ Alya Nabila and Kandi Kirana Larasati, 'The Role of International Organizations in Handling Covid-19 Pandemic' [2022] SASI 397 <<http://dx.doi.org/10.47268/sasi.v28i3.1027>> accessed 13 December 2023.

⁸¹ 'About Our Alliance' (*Gavi, the Vaccine Alliance*) <<https://www.gavi.org/our-alliance/about>> accessed 13 December 2023.

⁸² 'GOARN' (*GOARN*) <<https://goarn.who.int/about>> accessed 13 December 2023.

⁸³ Norihiro Kokudo and Haruhito Sugiyama, 'Call for International Cooperation and Collaboration to Effectively Tackle the COVID-19 Pandemic' [2020] *Global Health & Medicine* 60 <<http://dx.doi.org/10.35772/ghm.2020.01019>> accessed 13 December 2023.

⁸⁴ *ibid.*

distribution, equitable access to medical resources, and the coordination of international responses⁸⁵. The experience highlighted the need for enhanced preparedness and more robust governance mechanisms to address future health crises effectively.

The evolving nature of global health challenges necessitates continuous adaptation and reform within global institutions. Strengthening the capacity of organizations like the WHO, enhancing coordination mechanisms, and addressing issues of funding and governance are crucial for ensuring the effectiveness of global health governance in the face of complex and interconnected health threats. The effectiveness of global institutions depends on multilateral cooperation and diplomacy⁸⁶. The ability to navigate geopolitical tensions, foster collaboration among member states, and build consensus on health-related priorities is central to the success of global health governance. Diplomatic efforts to secure global cooperation, particularly in the distribution of vaccines and pandemic response, play a pivotal role. Global institutions increasingly engage in public-private partnerships to leverage resources, expertise, and innovation⁸⁷. Collaborations with non-governmental organizations, the private sector, and philanthropic foundations contribute to the effectiveness of global health initiatives⁸⁸. These partnerships demonstrate the importance of a diverse and inclusive approach to addressing health challenges. In conclusion, the UN's involvement in global health governance, particularly through specialized agencies like the WHO, reflects a commitment to addressing health as a fundamental component of international stability and development. While global institutions have achieved significant successes, ongoing challenges and criticisms necessitate adaptation, reform, and diplomatic efforts to ensure their continued effectiveness in navigating complex and evolving global health landscapes.

⁸⁵ Bawa Singh, Jaspal Kaur and Vijay Kumar Chattu, 'Global Vaccine Inequities and Multilateralism amid COVID-19: Reconnaissance of Global Health Diplomacy as a Panacea?' [2022] *Health Promotion Perspectives* 315 <<http://dx.doi.org/10.34172/hpp.2022.41>> accessed 13 December 2023.

⁸⁶ Ulrika Mod  er and Tsegaye Lemma, 'The Value of Strong Multilateral Cooperation in a Fractured World | United Nations Development Programme' (UNDP, 20 April 2023) <<https://www.undp.org/blog/value-strong-multilateral-cooperation-fractured-world>> accessed 13 December 2023.

⁸⁷ *ibid.*

⁸⁸ Mohanna Rajabi, Parvin Ebrahimi and Aidin Aryankhesal, 'Collaboration between the Government and Nongovernmental Organizations in Providing Health-Care Services: A Systematic Review of Challenges.' [2021] *Journal of Education and Health Promotion* 242 <<https://pubmed.ncbi.nlm.nih.gov/34395679/>> accessed 13 December 2023.

6. Traditional vs. Non-Traditional Security Debates in the COVID-19 Context

A. Changes in Security Priorities

The COVID-19 pandemic has wrought profound changes in the global security landscape, compelling nations to reassess and recalibrate their security priorities. This section explores the impact of the pandemic on the traditional vs. non-traditional security debate, focusing on the perceptible shifts in how nations conceptualize and prioritize security in the post-COVID-19 era. The pandemic has exposed the limitations of traditional security paradigms centred around military prowess and territorial defense⁸⁹. As a result, the rigid boundaries between traditional and non-traditional security have blurred, necessitating a more integrated approach. The unprecedented scale and impact of the health crisis have prompted a paradigm shift, with health security emerging as a primary and immediate concern⁹⁰. The virus has demonstrated its potential to destabilize societies, disrupt economies, and strain healthcare systems. Nations are now acknowledging that the ability to safeguard public health is intrinsic to overall national security. Governments worldwide have reassessed their defence budgets and reallocated resources to address health security concerns⁹¹. The emphasis on military preparedness has been tempered by the recognition that investments in healthcare infrastructure, pandemic preparedness, and vaccine research are equally vital components of national security. The global spread of the virus has underscored the interconnected nature of security threats. Nations have come to realize that addressing health security requires collaboration and information sharing on an unprecedented scale⁹². The interconnectedness of global health has prompted a reassessment of nationalistic approaches, with a growing acknowledgement that ensuring health security is contingent on international cooperation.

The impact of COVID-19 on the traditional vs. non-traditional security debate has been transformative. The pandemic has prompted a reevaluation of security priorities, leading to a shift from conventional military threats to a heightened emphasis on health security. This evolution reflects a broader acknowledgement of the interconnected and dynamic nature of contemporary security challenges, requiring adaptive and integrated approaches to ensure the well-being and resilience of nations in the face of unprecedented global crises.

⁸⁹ Siti Nurhasanah, "COVID-19 as a Non-Traditional Threat to Human Security" (*UI Scholars Hub*).

⁹⁰ Anwar Ilmar and others, "COVID-19: A Nontraditional Threat" [2022] *KnE Social Sciences*.

⁹¹ "Military Spending in the Post-Pandemic Era - IMF F&D" (June 2, 2021).

⁹² Terje Aven and Enrico Zio, "Globalization and Global Risk: How Risk Analysis Needs to Be Enhanced to Be Effective in Confronting Current Threats" (2021) 205 *Reliability Engineering & System Safety* 107270.

B. Global Governance Challenges

The COVID-19 pandemic has exposed substantial challenges within the realm of global governance, particularly in managing a crisis that transcends national borders. The need for swift and coordinated responses to a global health crisis has revealed challenges in international coordination and information sharing⁹³. The decentralized and disjointed character of global governance structures has sometimes hindered the timely exchange of crucial information and the implementation of unified strategies⁹⁴. Efforts to strengthen global health governance must address these coordination challenges to enhance preparedness for future pandemics. The pandemic has exposed stark disparities in access to resources, including vaccines, medical supplies, and healthcare expertise⁹⁵. Global governance faces the challenge of ensuring more equitable distribution of resources to address health security threats. Initiatives that promote international collaboration, technology transfer, and capacity-building are essential to mitigate these disparities and build a more resilient global health system. The tension between national interests and international cooperation has been a significant governance challenge. The initial response to the pandemic saw some nations adopting a nationalist approach, prioritizing domestic needs over global solidarity⁹⁶. Balancing national interests with the imperative for international cooperation remains a complex challenge in global governance, requiring diplomatic efforts and strengthened multilateral frameworks.

The distribution of vaccines has become a geopolitical issue, with nations leveraging vaccine diplomacy for strategic influence⁹⁷. Global governance faced the challenge of ensuring fair and transparent vaccine distribution, mitigating the risk of vaccine nationalism, and fostering cooperation to address the global vaccination gap. The pandemic has underscored the need for a more coordinated and equitable approach

⁹³ Raphael Lencucha and Shashika Bandara, 'Trust, Risk, and the Challenge of Information Sharing during a Health Emergency' [2021] *Globalization and Health* <<http://dx.doi.org/10.1186/s12992-021-00673-9>> accessed 13 December 2023.

⁹⁴ *ibid.*

⁹⁵ Deborah Gleeson and others, 'Global Inequities in Access to COVID-19 Health Products and Technologies: A Political Economy Analysis' [2023] *Health & Place* 103051 <<http://dx.doi.org/10.1016/j.healthplace.2023.103051>> accessed 13 December 2023.

⁹⁶ Md Rizwanul Islam, 'The Challenge of Pandemic Governance for Low- and Middle-Income Countries after COVID-19 | Think Global Health' (*Council on Foreign Relations*, 5 January 2022) <<https://www.thinkglobalhealth.org/article/challenge-pandemic-governance-low-and-middle-income-countries-after-covid-19>> accessed 13 December 2023.

⁹⁷ Nataliya Shok, 'Vaccine Diplomacy in the Wake of COVID-19 | New Security Beat' (*New Security Beat*, 8 September 2022) <<https://www.newsecuritybeat.org/2022/09/vaccine-diplomacy-wake-covid-19/>> accessed 13 December 2023.

to vaccine distribution. On top of that, the pandemic has amplified cybersecurity threats and the spread of misinformation (infodemics)⁹⁸. Addressing these challenges requires enhanced international cooperation in developing and enforcing cybersecurity standards, countering disinformation, and promoting digital literacy. Global governance frameworks must evolve to effectively navigate the intersection of public health, technology, and information security. Therefore, the impact of COVID-19 on the traditional vs. non-traditional security debate extends to the reevaluation of national security strategies and the emergence of global governance challenges. The pandemic has prompted nations to adopt more integrated security approaches, emphasizing the importance of health security alongside traditional military considerations. Addressing global governance challenges requires concerted efforts to enhance coordination, mitigate inequities, strengthen international cooperation, and adapt governance structures to the complexities of 21st-century security threats.

7. Evaluation of Bangladesh's COVID-19 Pandemic Responsiveness and Beyond

In Bangladesh, spanning from 3rd January 2020 to 6th December 2023, the World Health Organization (WHO) has recorded 2,046,090 confirmed cases of COVID-19, resulting in 29,477 reported deaths⁹⁹. Up to October 2023, a cumulative total of 362,229,859 vaccine doses have been administered. Further, Bangladesh ranks 95 out of 195 countries as per the 2021 Global Health Security Index whereas India, Nepal and Pakistan rank respectively 66th, 107th and 78th.¹⁰⁰ From public health measures to economic resilience, shedding light on the nation's ability to navigate the complexities of a global health crisis and laying the groundwork for future preparedness is necessary given the extreme turmoil the country has suffered due to the pandemic.

Bangladesh has instituted various public health measures to address the challenges posed by the COVID-19 pandemic. These actions encompass the identification of hotspots, imposition of lockdowns, intensification of public awareness campaigns, and the promotion of healthcare initiatives facilitated by both private entities and

⁹⁸ Tiffany Smith, 'The Infodemic as a Threat to Cybersecurity' [2021] *The International Journal of Intelligence, Security, and Public Affairs* 180 <<http://dx.doi.org/10.1080/23800992.2021.1969140>> accessed 13 December 2023.

⁹⁹ 'Bangladesh: WHO Coronavirus Disease (COVID-19) Dashboard with Vaccination Data | WHO Coronavirus (COVID-19) Dashboard With Vaccination Data' (*WHO Coronavirus (COVID-19) Dashboard | WHO Coronavirus (COVID-19) Dashboard With Vaccination Data*, 4 December 2023) <<https://covid19.who.int/region/searo/country/bd>> accessed 13 December 2023.

¹⁰⁰ 'Bangladesh - GHS Index' (*GHS Index*, 2021) <<https://www.ghsindex.org/country/bangladesh/>> accessed 13 December 2023.

local communities¹⁰¹. Additionally, the government has undertaken measures such as diagnosis, quarantine, isolation, and the provision of financial stimulus packages¹⁰². Nevertheless, the nation encounters obstacles characterized by constraints in resources, including limited diagnostic facilities, insufficient healthcare personnel, and challenges related to public awareness¹⁰³. The impact of the COVID-19 pandemic has given rise to heightened fear, anxiety, and a socio-economic crisis¹⁰⁴. The imposed shutdown has further exacerbated existing socio-economic and health challenges, with the added concern of potential climate change-induced disasters and the prevalence of infectious diseases such as dengue¹⁰⁵. Bangladesh's engagement in international collaboration and diplomacy throughout the pandemic has been promising and helpful. Bangladesh's participation in vaccine distribution initiatives, diplomatic engagements, and partnerships for research and development highlighted the nation's role in the global fight against COVID-19. Bangladesh has engaged in extensive public awareness campaigns to educate its citizens about preventive measures, the importance of vaccination, and the need for collective responsibility¹⁰⁶. The vaccination rollout has been a focal point, with the government working to ensure equitable access to vaccines across diverse populations. In essence, Bangladesh's COVID-19 pandemic responsiveness reflects a dynamic and evolving strategy that intertwines public health, economic considerations, and international collaboration to navigate the complexities of the ongoing crisis.

8. Recommendations for Legal Reform and Conclusion

A. Strengthening WHO's Legal Mandate:

1. Proposals for Amendments to the IHR: Amendments to the International Health Regulations (IHR) address gaps and enhance its capability to respond to

¹⁰¹ Amlan Haque, 'The COVID-19 Pandemic and the Public Health Challenges in Bangladesh: A Commentary' [2020] *Journal of Health Research* 563 <<http://dx.doi.org/10.1108/jhr-07-2020-0279>> accessed 13 December 2023.

¹⁰² Taimur Islam and others, 'Tackling the Covid-19 Pandemic: The Bangladesh Perspective' [2020] *Journal of Public Health Research* jphr.2020.1794 <<http://dx.doi.org/10.4081/jphr.2020.1794>> accessed 13 December 2023.

¹⁰³ Ibid.

¹⁰⁴ Mashura Shammi and others, 'Psychosocial and Socio-Economic Crisis in Bangladesh Due to COVID-19 Pandemic: A Perception-Based Assessment' [2020] *Frontiers in Public Health* <<http://dx.doi.org/10.20944/preprints202004.0398.v1>> accessed 13 December 2023.

¹⁰⁵ Ibid.

¹⁰⁶ Nazmun Nahar and others, 'COVID-19 Vaccination Success in Bangladesh: Key Strategies Were Prompt Response, Early Drives for Vaccines, and Effective Awareness Campaigns' [2023] *Health Science Reports* <<http://dx.doi.org/10.1002/hsr2.1281>> accessed 13 December 2023.

emerging global health threats is a must. The goal is to maintain the IHR as a robust tool for guiding international responses to unforeseen health crises.

2. **Enhancing WHO's Authority:** Genuine efforts are necessary to strengthen the World Health Organization's (WHO) authority in managing global health crises. This involves legal measures to empower WHO in coordinating swift responses during emergencies, addressing legal constraints, and reinforcing its mandate.

B. UN Security Council Reforms:

1. **Improving Responsiveness to Health Emergencies:** There remains a crucial need to enhance the United Nations Security Council's (UNSC) more proactive responsiveness to health emergencies. This involves evaluating existing mechanisms to streamline decision-making processes and ensure a more agile response within the broader security mandate.
2. **Balancing Security Concerns with Public Health Priorities:** Reconciling security concerns with public health priorities, and urging the UNSC to prioritize global well-being in decision-making processes should be made a priority.

The article underscores the transformative impact of the COVID-19 pandemic on global perceptions of security and governance, particularly in developing countries like Bangladesh. It emphasizes the need for a paradigm shift in security priorities, urging a careful balance between traditional security expenditures and the pressing realities of health security. Examining the role of global institutions, especially WHO and the UN, the article acknowledges their successes but calls for adaptive reforms in light of the challenges revealed during the pandemic. It stresses the importance of multilateral cooperation, diplomatic efforts, and a commitment to health as a fundamental human right. Developing countries are urged to draw lessons from the pandemic for future preparedness, focusing on health security, global cooperation, and strategic investments in public health infrastructure. The lessons learned from the crisis provide a blueprint for nations to adapt, collaborate, and fortify their resilience in the face of evolving security challenges. The pursuit of a balanced and inclusive security agenda remains paramount for the well-being and stability of nations worldwide.

Revisualizing the Status of Conflict-induced Eco-crimes as an International Crime: Basis and Barriers

Evnat Bhuiyan¹

Abstract: Ecological environment is the heart of earth and the voiceless victim of any man-made destruction. Armed conflict is the undebated enemy of environment. Environmental destruction from conflicts causes life-threatening, longstanding, and multifarious impact upon the human race, all living creatures and natural resources. This simply posits the war-created environmental destruction in a criminal status. Current academic attempts for enlisting and recognising 'man-made environmental destruction' as crime are sporadic, insufficient and mostly ineffective. This paper aims to examine the status of conflict-generated environmental damage as international crime and its challenges with special focus on ecocide. Through a qualitative approach, the author intends to assess generic history of crimes committed specifically or solely targeting the environment. Five case studies are analysed based on three key points that (1) have the required intent to cause harm to environment, (2) intentionally targeted environment as military objective and (3) inflicted unnecessary vicious harm not related to military necessity or war-winning. Persuading legal reasoning for ecocide as a form of genocide is presented. Existing international legal mechanism on war, environment, international crimes and functions of international authorities like ICC, ILC, UNCC are discussed with recent developments. The author propounds that, failure to create universal definition of environment and identity of ecocide as customary practice; no uniform international law for adjudication, categorization of eco-offence and remediation; fragile compensation model; extreme challenge to detect area, gravity, nature of damage, technological and financial limitations etc. are some of the chief barricades. The author recommends promulgating a Fifth Geneva Convention on wartime environmental protection, establishing International Tribunal for Environmental Atrocity and creating world consensus to recognise this as customary rule can probably uplift ecocide as international crime.

Keywords: Conflict generated ecological destruction, ecocide, environmental harm, eco-crime, herbicide, environmental protection, military necessity, proportionality, armed conflict.

1. Introduction

The etymology of 'environmental crime' is thought to be embedded in the late 20th centuries.² The urge to curb the aggressive human activities to nature through war

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² Nancy K Frank and Michael J Lynch, *Corporate Crime, Corporate Violence: A Primer* (1st edn, Harrow and Heston Publishers Address Ms Marie Harris, 1830 Western Avenue, Albany, NY 12203, United States 1990).

were accelerated by public international law more specifically by International Humanitarian Law (IHL), International Criminal Law (ICL), International Environmental Law (IEL). Numerous works and discussions are there in traditional branch of criminology talking about ordinary crime prevention but there is little to rare sufficient literature on inclusion of ecological destruction during armed conflict as an international crime. Mankind are victims of nature's backlash for example natural calamities, global warming, depletion of ozone layer, climate change etc. but it is the human who commits the destruction to environment by overexploiting its resources which shakes the common safety net of the ecology. Criminalizing environmental atrocity was never truly upheld from the very beginning of ICL. Breach of customary rules on environmental protection has not been formally declared with any specific 'category or name of crime'. In fact, in the present legal context, no actual legal term called 'Crimes against Environment' exists. Protection of environment is urged under various international instruments which evident how important it is to penalize activities done against environment. Due to the complexity of determination of damage, less technological support for appropriate measurement of damage, insignificant legal approach to assess environmental harm as crime, lack of consensus in international community as well as lack of state practice, the violations of customary rules on environment still is not treated or recognised, neither as a separate international crime not even a sub category of war crime (if committed during armed conflict) nor as crime against humanity (if committed in war or peace time). Sometimes it becomes toughened for any incident of environmental destruction to even satisfy the preconditions of being a war crime. This is also a compelling reason why there is no separate international tribunal or body to only try and adjudicate crimes committed solely to environment or as part of other international crime. What we see from the apocalypse of World War II, crimes were severely committed and still have been committing targeting the environment as a method to weaken enemy during a war. Environmental crimes hence, has its deeply greatened historical roots which was never recognised as a distinct category of international crime. From then to now, the modes and ranges of committing environmental crimes have been more vast, structured and organised with inclusion of industrial exploitation and technological advancement with no care to environment, most importantly, with the increase of armed conflicts in last two decades. This study will outpour the status and importance of recognising environmental atrocities through historical lens and will evaporate the encumbrances in its way.

2. Environmental Harm and Environmental Crime

Criminal law views environmental crimes as violations of already-existing laws that penalise unethical activity with criminal penalties and are typically based on environment protection legislation- known as the *nullum crimen sine lege* principle. The challenge to determine what basis and context categorises a 'harm' into a 'crime' is the real crux for criminalising environmental damage. It is because there is no uniform law as to whether all environmental harms are environmental crime or which category of environmental crimes will be international crime. While defining crime it is supposed to refer to man-made destruction in criminological aspect. But environmental criminologists argue that both intentional and non-intentional harm to nature should be considered as environmental crime. Environmental harm can be both active and passive, primary and secondary or direct and indirect. Direct environmental harms are actions that have an influence on the environment directly (i.e., damages to the environment that inflict harms on the species that depend on the environment). For instance, when a species is headhunted, it may result in direct adverse effects on human health and/or the species, as well as indirect damage when the impacted area's natural ecosystem is disrupted and other biota' quality of life is negatively impacted.³ Defining environmental crime has always been the toughest job for criminologists due to the drastic difficulty for unanimous adoption of a definition along with the issue of legal interpretation. It is also crucial to fix whether only direct harms or both direct and indirect environmental harms should be criminalised. Mostly environmental crime is considered as a criminal activity that could have a detrimental effect on the environment.⁴ Advanced manufacturing contamination, carbon emission, corporate malfeasance and its effects on the environment, occupational health and safety violations that have a harmful effect on the environment, complicity of organised criminal acts and pervasive corruption in the illegal disposal of hazardous waste, effects of military activities, their legacy on environment, groundwater, quality of air, and areas inhabited by living things are some of the major instances of environmental crimes or environmental harms. Primal unanimity for listing environmental crimes is gained in crimes like air, land, and water contamination, illegal trade of flora and fauna, illegal discharge or

³ Michael J Lynch and Paul B Stretesky, 'Green Criminology' in Francis T Cullen and Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (Oxford Academic (Oxford University Press) 2012).

⁴ United Nations Office on Drugs and Crime, *Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons; Smuggling of Migrants; Illicit Drugs Trafficking* (Vienna: UNODC 2011).

dumping of waste etc.⁵ Situ and Emmons identifies environmental crime as an illegal action or inaction that contravenes the law and is subsequently prosecutable through criminal sanction.⁶

Clifford and Edwards propagates the crime to be an act carried out with the intention of harming ecosystems and/or biophysical systems or possessing the ability to do so and with the goal of gaining a commercial or private advantage.⁷ Scholars have also showcased how environmental crime like wildfire is conceptualised by states as a means of green business and green economy and its never ending drastic harms on wildlife.⁸⁹ Some researchers argue that the most economically significant international environmental crime is the underground economy in wood products, illegal deforestation, unregulated, and undisclosed overfishing, and whale hunting, improper disposal of hazardous substances, much of the fishing industry, and illicit trade of emission substances etc.¹⁰ The theft and smuggling of a country's natural resource assets is also considered as environmental crime.¹¹ The very basic understanding of crime denotes to some commission of acts that infringes law or causes 'harm' to people, hence, to protect those people from the perils of such harm commission, the person done the act must be subjected to punishment. Environmental crimes denote to crimes that are committed against the environment creating long term adverse impacts upon the lives of human, animals, living creatures and for the whole planet earth. With the word crime comes the terms liability, burden of proof, criminal motive, criminal intent and punishment.

3. Instances of Ecocidal Environmental Atrocity in the History of Armed Conflict

Ecocide is an excellent window through which, the socio-ecological repercussions of exploitative colonialism, the inability of present international governance structures

⁵ Samantha Bricknell, 'Environmental Crime in Australia (Research and Public Policy Series No. 109)' (Australian Institute of Criminology 2010).

⁶ Yingyi Situ and David Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* (SAGE Publications, Inc 2000).

⁷ Mary Clifford and Terry D Edwards, 'Defining "Environmental Crime"' in Mary Clifford (ed), *Environmental Crime: Enforcement, Policy and Social Responsibility* (2nd edn, Gaithersburg, MD: Aspen 1998).

⁸ Janet Stanley, James Ogloff and Jason Thompson, *Feeling the Heat: International Perspectives on the Prevention of Wildfire Ignition* (1st edn, Vernon Press 2020).

⁹ Ines Arroyo-Quiroz and Tanya Wyatt (eds), *Environmental crime in Mexico: A Collection of Case Studies* (Palgrave Mcmillan 2018).

¹⁰ Penny Green, Tony Ward and Kirsten Mcconnachie, 'Logging and Legality: Environmental Crime, Civil Society, and the State' (2007) 34 Social Justice 94.

¹¹ United Nations Office on Drugs and Crime, *The Globalisation of Crime: A Transnational Organized Crime Threat Assessment* (Vienna: UNODC 2010).

to address the ongoing overexploitation of natural resources, pervasive degradation of the biosphere and entire global ecosystem, can be examined and addressed pertinently. To simply put, ecocide denotes to criminal activities committed against the environment by destroying the natural resource, species animals and plants or severely affecting these elements resulting in disturbed ecological equilibrium. An ecocide is defined by Polly Higgins as a large-scale destruction, degradation or loss of the ecosystems of a certain region, either by human action or other causes, to such a degree that peaceful pleasure is drastically impaired for people of the territory.¹²

Due to chemical warfare inflicting tremendous environmental devastation on Vietnam, Cambodia and Laos, the first discussion of ecocide was started. Observing the mass atrocities caused by environmental destruction and vehement unrestricted use of weapons and methods destroying ecological components, human as well as environment faced greater threat of extinction for which international legal community find it necessary to pull the strings. After that, different terms were used by scholars like human ecology, political ecology of water etc. to address excessive State usage of natural resource resulting ecocide.¹³ Professor Arthur Galston was the first to use the word ecocide and to advocate a new international accord to abolish ecocide at the Conference on War and National Responsibility in Washington in 1970, when the phrase was first established.¹⁴ He indicates willful destruction of environment has all essence to be labeled as or be part of 'Genocide'.¹⁵ Acknowledging the same thought, many environment academics think that genocide is likely to be fueled by a rapid loss of species, the destruction of ecosystems, ecological collapse, and the self-evident reliance of the human race on our biosphere according to different research.¹⁶ There are ample instances in history when ecocide occurred. Keeping aside the civilian atrocity, the most predominant wartime atrocity targeted solely to completely or partially destroy the ecological equilibrium or causing severe harm to the environment are the valiant example of

¹² Polly Higgins, *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide* (2nd edn, Shephard-Walwyn 2010).

¹³ Richard Kotter, 'Review on 'Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide'' (2014) 71 *International Journal of Environmental Studies* 228.

¹⁴ Anja Gauger and others, *The Ecocide Project*, vol 1 (Human Rights Consortium, School of Advanced Study, University of London 2012) <https://sas-space.sas.ac.uk/4686/1/Ecocide_is_the_missing_5th_Crime_Against_Peace/>. accessed on 3 November 2021.

¹⁵ *ibid.*

¹⁶ Martin Crook and Damien Short, 'Marx, Lemkin and the Genocide-Ecocide Nexus' (2014) 18 *International Journal of Human Rights* 298.

ecocides, some of the infamous ecocides occurred in past and currently ongoing are discussed below:

3.1. Agent Orange in 1961-1975 Vietnam War

David Zeirler in support of the ecocide narrative used the term 'herbicidal warfare' indicating 'ecological armed conflict' to address the destruction of entire ecosystem in American-Viet Nam war.¹⁷ Operation Ranch Hand conducted by US military force targeted the natural environment of Vietnam as military objective and sprayed various herbicides. Agent Orange defoliant, the most notorious among those, was a chemical US troops used to clean up dense Vietnamese forests so that US military can trace the Vietnamese armies easily and also destroy food crops.¹⁸ Agent Orange and its core element Dioxin is a chemical acutely hazardous typically used in industrial manufacturing.¹⁹ It caused fatal destruction in both US troops and Vietnamese armies and civilians. Apart from civilian casualty of 4.8 million Vietnamese exposed to severe painful disease and 1 million deaths, the geographical damage was shocking too where 7.5 million acres were sprayed affecting nearly 26,000 villages.²⁰ Another research claims, an estimated 49.3 million gallons were sprayed across 2.6 million acres.²¹ Days after application, kilometers of plant and animal life were wiped out, vegetation and wildlife have suffered. Herbicidal war even indicates to a separate type of armed conflict which is waged solely targeting the environment, though the purpose was to weaken Vietnamese military in Viet Nam-US war. It was like rebirth of a new war within an ongoing war. US used environment as the prime target of military attack to gain military advantage. Such targeting was the reason of inventing a new term ecocide to address the atrocity towards environment.

¹⁷ DAVID ZIERLER, 'The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment' (2011) <<http://www.jstor.org/stable/j.ctt46n5dg>> accessed 4 November 2021.

¹⁸ Richard Stone, "Epidemiology. Agent Orange's bitter harvest" 315(5809) *Science* 2007, pp. 176-179. Available at: doi: 10.1126/science.315.5809.176. PMID: 17218503.

¹⁹ J Wade Harper, "Chemical biology: a degrading solution to pollution", 446(7135) *Nature* 2007, pp. 499-500. Available at: doi: 10.1038/446499a. PMID: 17392771.

²⁰ Socialist Republic of Vietnam, Ministry of Defence, 50 years of agent orange/dioxin disaster in Vietnam, available at: <https://mod.gov.vn/en/intro/detail/!ut/p/z0/dYqxDoIwFEW_xvHltVigHWFwMMZEYwx0MYUWqElr2Bg-X6KTMU73nJOLEguUTj1tq4L1TvWLLzK5bLL9kec0I-S0i8ghZ-dYiHTNRlPblG3vq8_VXsdRZihr74KZAxaD1yvyULAsGPdG48CHzkxfAn5qfwJo62fr_nWoOzPYWvUrIIc0CihYCreAlspAy60Al3phpCUC0YTvN9k-QLs57D7/> accessed 16 December 2024.

²¹ Anh D Ngo and others, "Association between Agent Orange and birth defects: systematic review and meta-analysis" 35(5) *Int J Epidemiol* 2006, pp. 1220-1230, available at: doi: 10.1093/ije/dyl038. Epub 2006 Mar 16. PMID: 16543362.

3.2. Oil Spilling in 1990-1991 and 2003 Gulf War

The Persian Gulf war of Iraq war is a significant example of ecocide because the chemicalization occurred in nature is irreparably hazardous which still persists in the combatants, non-combatants and the natural environment of Persian Gulf region States.²² The environmental destruction occurred during the conflict resembled it as ecocide for the deliberate demolishment of 500-700 oil wells of Kuwait by the Iraqi military forces.²³ These oil wells were vandalized, destroyed and many were set on fire which caused 2-6 million oil release every day.²⁴ 50 gas wells were damaged causing release of 24,000 tons SO₂ emission and 130-140 million tons gases every day²⁵ which subsequently elevated to 2-3% of the global annual anthropogenic contribution to CO₂ emission and 10% of global anthropogenic burning.²⁶ The effect was so outrageous and widespread that contaminated neighbourhoods air quality, weather temperature, climate condition, forests, birds especially sea birds, other wildlife, and soil because the oil wells were connected to lakes too and particles of oil and gas well were flown to land by dust, air, weather components which contaminated the entire ecosystem and climate in Kuwait.²⁷ Kuwaiti deserts were covered by Tarcrete, smoke plumes, and Around 2 million tons Petroleum hydrocarbon spills occurred which devastated most of the mangroves, marshes, wetlands, while 50-90% of the fauna of these places killed many sea creatures mostly dolphins, crabs, Amphipoda and shellfishes were killed by the oil spiling in the Iraqi coastline and coastal areas.²⁸ The damage was so widespread that the spill, weathered and underground oil were still present on some beaches after 10 years of the war. An estimated 15,000 seabirds and 1,00,000 waders were killed by this massive well planned determined oil release and oil fire turning the war into the

²² Barth SK, Dursa EK, Bossarte RM, Schneiderman AI. Trends in brain cancer mortality among U.S. Gulf War veterans: 21year follow-up. *Cancer Epidemiol.* 2017 Oct;50(Pt A):22-29. doi: 10.1016/j.canep.2017.07.012. Epub 2017 Aug 4. PMID: 28780478; PMCID: PMC5824993.

²³ Toxigon Infinite, 'Environmental Consequences of the Gulf War: A Comprehensive Guide' (2024) <<https://toxigon.com/the-environmental-consequences-of-the-gulf-war>> accessed 10 December 2024.

²⁴ Greenpeace, *The Environmental Legacy of the Gulf War*, pp. 17 and 38.

²⁵ Kuwait Environment Protection Council, *State of the Environment Report: A Case Study of Iraqi Regime Crimes Against the Environment*, Kuwait, November 1991, pp. 1, 2-3.

²⁶ Olof Linden, Arne Jernelöv and Johanna Egerup, 'The Environmental Impacts of the Gulf War 1991' (2004) Interim Report-04-019/April, International Institute for Applied Systems Analysis Schlossplatz 1 A-2361 Laxenburg, Austria <<https://pure.iiasa.ac.at/id/eprint/7427/1/IR-04-019.pdf>> accessed 10 December 2024.

²⁷ Military Saga, 'The Gulf War and Environmental Damage: A Lasting Impact' (*Military Saga*, 2024) <<https://militarysaga.com/gulf-war-and-environmental-damage/>> accessed 10 December 2024.

²⁸ Linden, Jernelöv and Egerup (n 29).

biggest oil spill manmade disaster in the human history.²⁹ In 1991, the Gulf's seawater temperatures were significantly lower than in prior years. The 1991 spring-summer seawater temperature decline was thought to be more harmful to fish and prawns than the oil leaks.³⁰ Approximately 47 percent of the Iraqi natural forestry was ruined and 2.4 million hectares of terrestrial property was found unfeasible for any agricultural or other usage because of landmines in the war fields and oil fields.³¹

3.3. Anfal Genocidal Gas Attack: Role of Chemical Ali

Before the Iraqi invasion of Kuwait, other scenario of armed hostilities can be seen in Iraq during 1988 known as Anfal campaign, a genocidal operation led by Iraqi General Ali Hassan al-Majid Iraqi Kurds. Majid was judicially held responsible for four biological warfare namely 1980-1988 Iran Iraq war, 1988 Al-Anfal genocidal campaign, 1999 Kuwait war and 2003 Persian Gulf war.³² Majid being the cousin of Saddam Hussein and defence minister of Saddam Baath regime, conducted some of the worst chemical attacks and was condemned to death penalty four times for four different chemical attacks in four-armed conflict instances for which he was nicknamed as Chemical Ali.³³ Chemical Ali during execution of a plan for Anfal military occupation in a high profile Iraqi military officials meeting, has confessed his intention to destroy Kurds with gas and poison.³⁴ He was first sentenced to death in June 2007 for ordering, supervising and conducting Anfal Gas attack; secondly in December 2008 for his part in quelling a Shi'ite rebellion in 1991 after the Gulf War; thirdly in March 2009 for the 1999 deaths of Shi'ite Muslims in Baghdad's Sadr City district including the major shrine city Al-Najaf and fourthly on January 17, 2010 for

²⁹ A short survey of ecological damage is *The Environmental Legacy of the Gulf War*, Amsterdam, Greenpeace, 1992.

³⁰ *ibid.*

³¹ World Bank Group, "Publication: Iraq Reconstruction and Investment: Damage and Needs Assessment of Affected Governorates", Open Knowledge Repository, Working Paper no. 8, 2018 < <https://openknowledge.worldbank.org/entities/publication/8ba990ba-26d9-59aa-bfd6-6591250bb588>> accessed on 14 December 2024.

³² Britannica, 'Ali Hasan al-Majid', available at: <<https://www.britannica.com/biography/Ali-Hasan-al-Majid>> accessed 15 December 2024.

³³ Human Rights Watch, "Who Was Ali Hassan Al-Majid ("Chemical Ali")?", published on 6 April, 2003 available at: < <https://www.hrw.org/news/2003/04/06/who-was-ali-hassan-al-majid-chemical-ali>> accessed 15 December 2024. Chemical Ali was recorded in the audiotape with these words- "I will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! the international community, and those who listen to them! I will not attack them with chemicals just one day, but I will continue to attack them with chemicals for fifteen days." Later it was published by Human Rights Watch as an audiotape.

³⁴ *ibid.*

orchestrating the Halabjah attack.³⁵ Majid is notoriously remembered for the 1988 Halabjah incident where Iraqi jets fired mustard gas and the nerve agents Tabun, Sarin, and VX targeting Kurdish town. It is estimated that over 5,000 people perished in the armed attack making it as the inhumanely wickedest gas assault ever in human history to target civilians, the most of whom were women and children.

The gas assault was a component of the "Anfal" military campaign against the Kurds, which took place between February and August 1988. Majid facilitated Iraqi military and maneuvered a special sort of bioweapons against its own Kurdish civilians, particularly Halabja town and other villages located near Turkey Iran border region under its Anfal campaign killing 100,000 Kurds.³⁶ Halabja's residents continue to bear the long-term psychological and physiological burdens as well as environmental damage caused by the poison gas assault, including contaminated soil and diminished air quality.³⁷

Kurdish Gas Attack survivors reported that the fatal gas bombs left a pleasant fragrance of 'rotten apples' behind them at the spur of the moment they landed on the ground, which actually was lethal scent.³⁸ Analysing these series of events, it was found out that except the capability to cause mass destruction, WMD have low military advantage to be 'war winner' or tackling counter attacks but inputs highly disastrous effect in consequence.³⁹ Biological weapons are proven to have less to contribute in military benefit and more to destroy in battlefield, civilians and environment. German international law expert Dr. Karl Strupp in one of his works of international law on land warfare, believed that banning poison is connected to the spread of pathogenic elements into rivers, wells, and water pipelines.⁴⁰

In the opinion of Robert Jacomet, this is also affiliated to poisoning enemy wells and the spread of infectious illnesses.⁴¹ Gulf war affected several neighbouring States

³⁵ Radio Free Europe/Radio Liberty, Iraq executes 'Chemical Ali', 25 January 2010, available at: <<https://www.refworld.org/docid/4b66e3caa.html>> accessed 15 December 2024.

³⁶ Karin Mlodoč, 'The Indelible Smell of Apples: Poison Gas Survivors in Halabja, Kurdistan-Iraq, and Their Struggle for Recognition', *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, B. Friedrich et al. (eds.) (2017).

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Edward M Spiers, 'The Gas War, 1915–1918: If Not a War Winner, Hardly a Failure', *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, B. Friedrich et al. (eds.) (2017).

⁴⁰ Jesse S Reeves, 'Das Internationale Landkriegsrecht Erläutert by Karl Strupp' (1915) 9 *The American Political Science Review* 789.

⁴¹ Geo .B. Davis, 'Les Lois de La Guerre Continentale . by Robert Jacomet ; M . Louis Renault' (1913) 7 *The American Journal of International Law* 920.

among which Iran suffered the most. Depleted Uranium⁴² from mines, bullets, missiles caused insurmountable damage to Iran's natural environment, livestock, terrestrial, aquatic species etc. due to high radioactivity of uranium.⁴³ Witnessing the unthinkable range of destruction in these two Great wars, international community figured out the steps to bring it under control and put prohibition on usage of chemical weapons i.e., drafting Chemical Weapons Convention (CWC) and establishment of Organization for the Prohibition of Chemical Weapons (OPCW). But nothing seems to work for stopping the dirty game of destruction till today.

3.4. Nova Kakhovka Hydroelectric Dam Collapse in Russia-Ukraine War

The ongoing Russian invasion in Ukraine⁴⁴ is the best example as to why it is high time, we regulated environmental crime as international crime.⁴⁵ On 6 June of 2023 Ukraine witnessed their biggest environmental atrocity disaster where Russian troops attacked the Kakhovka hydroelectric Dam, a significant installation situated at the southern Ukraine. Water equivalent to the Great Salt Lake in the United States was retained by the dam.⁴⁶ Numerous communities were inundated when this enormous volume of water was released downstream along the Dniro River. An estimated 100,000 people were directly impacted by the massive damage from the dam collapse submerging 620 square kilometers of land in four oblasts (Kherson, Mykolaiv, Dnipropetrovsk, and Zaporizhzhia), sweeping away villages, making the farmlands useless with dangerous landmines to the shore including disruption of energy supplies, drinking water, agricultural irrigation, and river transportation also

⁴² Depleted Uranium has huge prolonging radioactive life nearly 4.5 billion years which means lands, rivers and other natural resources contaminated with uranium have a high risk of enormous chronic physical illness.

⁴³ Ali Salahi, *Modern Wars and Their Effects on the Environment and Human Being: Concept, Solution and Experience*, LAP Lambert Academic Publishing, 2024.

⁴⁴ Paulo Pereira and others, 'Russian-Ukrainian War Impacts the Total Environment' (2022) 837 *Science of The Total Environment*. ; Tetiana Gardashuk, 'Environmental Threats of War in Ukraine' (2022) 17 *Envigogika*.

⁴⁵ E Winter, 'The Role of the Environmental War Crime in the Russian Invasion of Ukraine' [2022] *Newcastle University eprints*. ; Martin Laryš, 'Far-Right Vigilantes and Crime: Law and Order Providers or Common Criminals? The Lessons from Greece, Russia, and Ukraine' [2022] *Southeast European and Black Sea Studies*.

⁴⁶ EU Commission, *European Civil Protection and Humanitarian Aid Operations*, A disaster in photos: Nova Kakhovka dam breach in Ukraine, available at: <https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/stories/disaster-photos-nova-kakhovka-dam-breach-ukraine_en> accessed 17 December 2024.

resulted in significant damage to housing, infrastructure, the environment, and cultural sites such as historic buildings and museums.⁴⁷

The collapse of the Kakhovka dam is being referred to as a "new Chernobyl."⁴⁸ Post Disaster Needs Assessment reported an estimated damage cost of 406 million USD. The disruption of irrigation was the main cause of the US\$376.7 million (92%), which was the cost of crop production-related damage and losses in the agricultural sector, US\$31.5 million damage to fisheries and aquaculture, remaining US\$0.24 million was allocated to livestock production-related damages.⁴⁹ Videos indicate that the force of the flowing water tore an ever-widening gash into the dam after the first portion was damaged.⁵⁰ A devastating flood that affected 620 km² of land changing the topology of the river due to dam breach resulted in chemical pollution, habitat destruction, and possible long-term environmental effects.⁵¹ About 150 tons of machine oil were released by the 192 hazardous facilities that were found, 54 of which were considered possible hotspots.⁵² Increased organic matter and biological oxygen demand (BOD) in the Black Sea were observed as downstream surface water pollution, which may have an impact on aquatic life and water quality. Additionally, 11294 ha of forested areas and 330,00 ha of protected areas were affected by the calamity while the majority of approximately 192 dangerous facilities in the zone of flooding are located in Kherson Oblast are situated on both banks of the Dnipro River.⁵³

⁴⁷ UN Ukraine, Kakhovka Dam destruction inflicted US\$14 billion damage and loss on Ukraine: Government of Ukraine-UN report, press release publish on 17 October 2023, available at:<<https://ukraine.un.org/en/249742-kakhovka-dam-destruction-inflicted-us14-billion-damage-and-loss-ukraine-government-ukraine>> accessed 17 December 2024.

⁴⁸ Katerina Sergatskova, "Aftermath of the Kakhovka Dam Collapse", *Focus Ukraine*, published on June 20, 2023, available at:<<https://www.wilsoncenter.org/blog-post/aftermath-kakhovka-dam-collapse>> accessed 17 December 2024.

⁴⁹ UN Ukraine, POST-DISASTER NEEDS ASSESSMENT 2023 Kakhovka Dam Disaster, Ukraine, Report 2023, Balakrishnan Balachandran (eds), available at:<<https://ukraine.un.org/sites/default/files/2023-10/PDNA%20Final%20and%20Cleared%20-%2016Oct.pdf>> accessed 17 December 2024.

⁵⁰ James Glanz and others, Why the Evidence Suggests Russia Blew Up the Kakhovka Dam, *The New York Times*, published on June 16, 2023, available at:<https://www.nytimes.com/subscription/onboarding-offer?EXIT_URI=https%253A%252F%252Fwww.nytimes.com%252Finteractive%252F2023%252F06%252F16%252Fworld%252Fukraine-kakhovka-dam-collapse.html&auth=register-google1tap&campaignId=7JFJX®ister=google1tap> accessed 17 December 2024.

⁵¹ UN Ukraine (n 36).

⁵² Conflict and Environment Observatory, Downstream impact: Analysing the environmental consequences of the Kakhovka dam collapse, 2023, available at:<<https://ceobs.org/analysing-the-environmental-consequences-of-the-kakhovka-dam-collapse/>> accessed 17 December 2024.

⁵³ Ibid.

3.5. Israeli Attack on Gaza

Israeli attack on Gaza is an ideal case study for not only ecocide but also *Eco-Violence*. What a global human crisis looks like and how military necessity is used as a defence to commit ecocide and intolerable, prolonged, unprecedented environmental atrocity might be understood from the ongoing Israeli invasion in Gaza. Gaza becomes a storehouse of violation of customary international laws.⁵⁴

Israel seems to be the God of Violence surpassing the brutality in two world wars. Israel is currently utilising the very international concept of military necessity as a defence to validate their inhuman historic violence on environmental and civilian.⁵⁵ Gaza attack by Israel is the most glaring example of violation of Rome Statute, Geneva Conventions and its Additional Protocols⁵⁶ including the customary principles and laws on IHL, ICL⁵⁷, IEL⁵⁸, IHRL⁵⁹ and what not.⁶⁰ Israeli's vehement violations of Art 35 and 55 is already acknowledged as a crime against humanity and war crime by many experts and environmental specialists.⁶¹ Scholars have

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- ⁵⁴ Tom Dannenbaum and Janina Dill, "International law in Gaza: Belligerent intent and provisional measures." 118(4) *American Journal of International Law* (2024), pp. 659-683; Xavier Pons Rafols, "The war in Gaza and the Israeli-Palestinian conflict: A turning point in the midst of an endless cycle of violence." *PEACE & SECURITY-PAIX ET SÉCURITÉ INTERNATIONALES (EuroMediterranean Journal of International Law and International Relations)* Peace & Security-Paix et Sécurité Internationales, n°12 (2024).
- ⁵⁵ Raphaël van Steenberghe, "The armed conflict in Gaza, and its complexity under international law: Jus ad bellum, jus in bello, and international justice.", *Leiden Journal of International Law* (2024) 1-35.
- ⁵⁶ Amir Hasan and Mohamed Buheji, "A World Losing Its Legitimacy-Gaza from Collective Punish till Ethnic Cleansing & Genocide." 15(1) *International Journal of Management (IJM)* 2024; Oona A Hathaway, "War Unbound: Gaza, Ukraine, and the Breakdown of International Law." 103 *Foreign Affairs* (2024) 84.
- ⁵⁷ Muhammad Derfish Ilyas, "Implications and Analysis of the Crime of Aggression against Gaza: Breach of International Criminal Law amid the Israel-Hamas Conflict." 1(1) *INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL ANALYTICS* (2024); Sefriana Hafara Khoirunnisa and others, "Judaization in Palestine: Is It Genocide According to the 1998 Rome Statute?" (2024).
- ⁵⁸ Kinchit Reddhiyan, "Environmental Injustice and Trampled Human Rights in Relation to Natural Environment During the Israel-Palestine Armed Conflict-Problems and Prospects." (2024).
- ⁵⁹ Hereinafter International Human Rights Law.
- ⁶⁰ Veronika D'Evereux, "Some Insights on Application of the International Law to the Damaged Environment during the War in Gaza." 70(4) *Acta Universitatis Carolinae Iuridica* (2024), pp. 177-194; Ahlam Abuawad and others, From Ecocide to Genocide: A Call to Action for Scientists Globally to Address the Destruction in Gaza, SSRN, (2024).
- ⁶¹ Ninda Soraya, Ali Muhammad, and Suyatno Ladiqi, "ICC Jurisdiction: Against Israeli War and Humanitarian Crimes Targeting Palestinian Civilians 2023." 31(1) *Jurnal Media Hukum* (2024) 59-77; Aryeh Neier, "Is Israel Committing Genocide?." *The New York Review of Books* published on June 6, 2024, available at: <<https://www.nybooks.com/articles/2024/06/06/is-israel-committing-genocide-aryeh-neier>> accessed 17 December 2024.

termed the Israeli aggression against Gaza as a “Crime of the Century” due to its unprecedented nature of unfettered violation of international laws and indiscriminate devastation to environment and severe violence towards civilians.⁶²

Some scholar has termed Gaza atrocity as Crime against environment⁶³, others called it Crime against mankind.⁶⁴ Around 50% of the tree and farmlands are gone, sewage smell and burning of installations, vehicles creating smoke, water and food getting contaminated from explosion and due to air strikes and bombardments, human residences and wildlife habitats are extremely devastated and unlivable. The UN Environment Programme (UNEP) states that prolonged heavy bombardment of populated areas can contaminate soil and groundwater due to the munitions themselves as well as the release of hazardous materials like asbestos, industrial chemicals, and fuel into the surrounding air, soil, and groundwater from collapsed buildings. About 38–48% of Gaza's agriculture and tree cover were destroyed, 48% of the country's tree cover was destroyed or damaged, 70,000 tonnes of solid trash had accumulated since October 7th, at least 60 unofficial waste sites in central and southern Gaza were found and between 50% and 62% of all buildings were either destroyed or severely damaged.⁶⁵ The environmental destruction ongoing in Gaza is so alarming that this single armed conflict is contributing global carbon emission increase alone.⁶⁶ The magnitude of emissions resulting from the actual conflict is noteworthy. The conflict's emissions in the first two months after October 7 were equivalent to burning at least 150,000 tons of coal, generating more greenhouse gases than the yearly carbon footprint of several countries that are vulnerable to climate change.⁶⁷ If normal methods are used to rebuild the 100,000 damaged buildings in Gaza alone, an additional 30 million metric tons of greenhouse gasses might be produced.⁶⁸

⁶² Gökhan AK, ““Crime of the Century”: Israel’s State Terrorism and International Law Violations in Gaza Strip.” 1(1) *Journal of Humanity, Peace and Justice* (2024) 65-95.

⁶³ Yordan Gunawan, "Environmental Devastation in Gaza: Analysing Israeli Attacks through the View of International Environmental Law." 594 *E3S Web of Conferences*, EDP Sciences, 2024.

⁶⁴ Amir Hasan (n 53).

⁶⁵ Kaamil Ahmed, Damien Gayle and Aseel Mousa, ““Ecocide in Gaza’: does scale of environmental destruction amount to a war crime?”, *The Guardian*, published on 29 March, 2024, available at:<<https://www.theguardian.com/environment/2024/mar/29/gaza-israel-palestinian-war-ecocide-environmental-destruction-pollution-rome-statute-war-crimes-aoe>> accessed 17 December 2024.

⁶⁶ Arab, T. N. (2024). Ecocide in Gaza: The Environmental Impact of Israel's War. Available at: <https://www.newarab.com/analysis/ecocide-gaza-environmental-impact-israels-war>> accessed November 29, 2024).

⁶⁷ Amira Shaheen and others, “The war on the Gaza Strip and its consequences on global warming”, 6 *Frontiers*, 2024.

⁶⁸ *ibid*.

4. International Legal System on Environmental Protection During Armed Conflict

4.1. Customary Principles on International Humanitarian Law (CIHL)

Principle of distinction and Principle of Proportionality are CIHL rules that asserts only military objectives can be targeted and attacked and neither techniques nor means of combat that cause undue harm shall be used. International law requires that precautions be taken during armed forces operations. In the 1996 *Advisory Opinion on the Legality of the Threat or use of nuclear weapon*, the International Court of Justice has expressly declared that ecological environment is not constrained to only the physical elements of environment or living organisms, it also has close impact on the quality of human life, human health and the future unborn generations.⁶⁹ Hence the use of weapon especially nuclear weapons are vehemently banned. The International Court of Justice (ICJ) stipulated that,

“States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the necessary elements that go to assessing whether an action is in conformity with the principles of necessity and of proportionality.”⁷⁰

4.2. Article 35 and 55 of Additional Protocol I of 1977 of the 1949 Geneva Conventions

Article 35 and 55 are the first ever legal parameter to invoke prohibition on attack waged on environment.⁷¹ These solid, explicit, customary provisions on environmental protection are the threshold of international legal obligation for States to comply with during armed conflict. Article 35 of the Additional Protocol of 1977 to the Geneva Conventions emphasises the obligation for States to choose their military tactics and equipment only for the military purpose and not to cause fatal unnecessary sufferings to civilians out of animosity to satisfy personal gratification towards enemies. Article 35(1) demonstrates that, in every armed conflict, the parties’ right to elect the strategies or instruments of battle is limited; Art. 35(2) directs that, it is forbidden to utilize weapons, ammunition, and materials, as well as military methods, that are likely to cause undue injury or suffering; and Art. 35(3)

⁶⁹ Advisory Opinion on the Legality of the Threat or use of nuclear weapon, ICJ Reports 1996, 226 (241, para 29).

⁷⁰ *ibid.* pg, 242, para 30.

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (Additional Protocol I), Articles 35 and 55.

redirects the prohibition to utilize techniques or means of warfare that are targeted or may be anticipated to trigger widespread, long-term, and catastrophic harm to the environment.⁷² Article 55 further reinforces the fortification of the ecological environment which clearly illustrates that, during combat, care must be taken to protect the ecological system from *widespread, long-term, and severe* harm. This safety measure includes a restriction on the deployment of wartime tactics or techniques that have been designed or reasonably expected to inflict sufficient harm to the natural environment as to jeopardize the health of the population or existence; and Retaliatory strikes on the natural environment are prohibited explicitly under all circumstances.⁷³ Widespread damage, Long-Term damage, Severe Damage- these are known as the triple threshold of Art 35 for liability of environmental damage in an armed conflict. The triple criteria must be collectively and simultaneously occurred in order to hold any State liable. Widespread will signify the wider terrestrial area destroyed by the attack. Long-Term indicates to a significant number of decades for sustaining the damage in the area although there is academic debate as to what should be the perfect year-span such as ten years or hundred years or thousand years etc. Severe determines to the gravity and seriousness of the damage caused to the living beings of that wider territory for that specified long time. The triple threshold of Widespread, long-term, and severe damage will most likely not be classified within the specialty criteria of Articles 35 and 55 unless the damage parallels to that established by the herbicides employed during the Vietnam War.

4.3. ENMOD Convention

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) seeks to criminalize the widespread use of poisonous defoliants (similar to Agent Orange) and typhoon because it forbids the use of ecological manipulation methods as the weapons of war. In order to specifically preclude the use of nature as a weapon of war, Article 2 of the ENMOD Convention forbids the "deliberately calculated modification of natural forces" that could result in phenomena like hurricanes, tidal fluctuations, changes in the weather, temperature or climatic alterations. The ENMOD Convention's significantly lower threshold of harm, which eliminates the Additional

⁷² ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 35: Basic Rules, *IHL Database*, available at: <<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35?activeTab=>>> accessed 15 December 2024.

⁷³ ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 55 - Protection of the natural environment, *IHL Database*, available at: <<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=>>> accessed 15 December 2024.

Protocol's cumulative norm in favor of a single criterion: "widespread or long-lasting or severe," is one of the main differences between Article 35/55 of the Additional Protocol and ENMOD. In contrast to decades under Additional Protocol I, the term "long-lasting" under ENMOD refers to a season or a period of months. ENMOD convention is the strongest reliable instrument in CIHL till now that prevents the intentional targeting of environment by modification techniques and to stop gaining military advantage causing atrocity.⁷⁴

4.4. CCW Convention and its Third Protocol

The Certain Conventional Weapons (CCW) convention⁷⁵ is a comprehensive code for the weapons not permitted to use during armed conflict due to its hazardous nature of causing unnecessary sufferings for civilians and environment. It has five Protocols. 1st CCW Protocol prohibits the weapons producing nondetectable fragment in human body.⁷⁶ 2nd CCW Protocol bans booby traps, landmines, anti-personnel mines, non-self-deactivating mines and the amended protocol II bans the Improvised Explosive Devices.⁷⁷ 3rd CCW Protocol prohibits incendiary weapons.⁷⁸ 4th Protocol bans laser weapons creating blindness⁷⁹ and 5th Protocol directs reduction of danger, prevention and minimization of unexploded and abandoned explosive

⁷⁴ Joanna Jarose, "A Sleeping Giant? The ENMOD Convention as a Limit on Intentional Environmental Harm in Armed Conflict and Beyond", 118(3) *American Journal of International Law* (2024) 468-511.

⁷⁵ UNGA, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1983, UNTS Vol. 1342, p. 137.

⁷⁶ UNODA, PROTOCOL ON NON-DETECTABLE FRAGMENTS (PROTOCOL I), available at: <<https://geneva-s3.unoda.org/static-unoda-site/pages/templates/the-convention-on-certain-conventional-weapons/Protocol%2BI.pdf>> accessed 16 December 2024.

⁷⁷ UNODA, PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (AMENDED PROTOCOL II), available at: <<https://geneva-s3.unoda.org/static-unoda-site/pages/templates/the-convention-on-certain-conventional-weapons/AMENDED%2BPROTOCOL%2BII.pdf>> accessed 16 December 2024.

⁷⁸ UNODA, PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF INCENDIARY WEAPONS (PROTOCOL III), available at: <<https://geneva-s3.unoda.org/static-unoda-site/pages/templates/the-convention-on-certain-conventional-weapons/PROTOCOL%2BIII.pdf>> accessed 16 December 2024.

⁷⁹ UNODA, PROTOCOL ON BLINDING LASER WEAPONS (PROTOCOL IV), available at: <<https://geneva-s3.unoda.org/static-unoda-site/pages/templates/the-convention-on-certain-conventional-weapons/PROTOCOL%2BIV.pdf>> accessed 16 December 2024.

armaments.⁸⁰ The convention also approaching for lethal autonomous weaponry ban.

5. Basis of Destruction to Environment Amounting to International Crime

5.1. Biowarfare as War Crime

Herbicidal warfare or ecocide or any environmental warfare if committed as part of military activity during an armed conflict can certainly trigger the threshold of war crime. Viet Nam war is the most glaring example though US was not formally tried by international courts or convicted with any such charge. Russell Tribunal, popularly known as International War Crimes Tribunal (IWCT) made an attempt to adjudicate US for Viet Nam destruction and convicted US with war crimes, crimes against humanity, genocide, crime of aggression, experimentation of prohibited weapons etc. But IWCT has many inherent criticisms,⁸¹ for which its verdict was outrightly ignored by US Military. Eventually, ecocide has largely been accepted as a specific form of war crime or crimes against humanity according to many scholars of international law. According to Westing, one solution could be adopting legislative instruments that focus on the type of military operation as well as the nature of the target.⁸² He opined focusing on the target, rather than or in addition to specific weapons and procedures, may be the most effective strategy for averting future military ecocide.⁸³ Furthermore, he calls for the prohibition of any weapon or practice that has the potential to cause widespread devastation.⁸⁴ In case of crimes against humanity, if the necessary elements are satisfied such as- widespread or systematic attack upon civilians and environment it may fulfill the criteria of crimes against humanity.

⁸⁰ UNODA, PROTOCOL ON EXPLOSIVE REMNANTS OF WAR (PROTOCOL V), available at:<<https://geneva-s3.unoda.org/static-unoda-site/pages/templates/the-convention-on-certain-conventional-weapons/Protocol%2Bon%2BExplosive%2BRemnants%2Bof%2BWar.pdf>> accessed 16 December 2024.

⁸¹ The 1966 Russell-Sartre Tribunal was alleged to have a bunch of defects namely- alleged to have no jurisdiction to hear the matter, primarily aimed at giving absolute immunity to Viet Cong and held US responsible solely for their conduct, the Tribunal bench was formed with no judge rather historians, academic scholars and peace workers, alleged to be a biased and non-impartial Tribunal as it investigates only US conduct of atrocities, neither US nor Viet Nam participated in the trial, sponsored by Viet Nam government etc.

⁸² Arthur H Westing, 'Arms Control and the Environment: Proscription of Ecocide' (1974) 30 Bulletin of the Atomic Scientists 26.

⁸³ *ibid.*

⁸⁴ *ibid.*

5.2. Status of Ecocide as Genocide

There is a patchwork of laws of armed conflict based on the Hague and Geneva Conventions (IHL source), Customary IHL (CIHL sources) the Nuremberg Principles (ICL source), United Nations General Assembly decisions and 1951 United Nations Convention against Genocide. The contemporary idea of war crimes and crimes against humanity arose from these norms of war, though they all appear to be affiliated to human in general.⁸⁵ Scholars argued that State has an obligation to protect the environment no matter what circumstances may arise or what law is absent in the existing international mechanism.⁸⁶ The term 'Ecocide' can be called an attempt to make an addition in the list of crimes of killing i.e., homicide, infanticide, ethnocide (ethnic cleansing) or the international crime of genocide. Scholars felt the need of introducing a new narrative so that all atrocious environmental conducts can be termed with one word. Ecocide pertains to point out man-made 'environmental massacres', or every attempt to do so in the name of protecting national sovereignty, industrial revolution or economic development. But whether or not ecocide is considered an unethical human action depends on one's philosophical foundations. Human's position in the biosphere as a life-sustaining system can range from a vague awe or respect for nature (of which human is merely a minor part) to a more anthropocentric view.⁸⁷ In the context of this ambiguity, determining the precise boundaries of ecocide becomes a bit more challenging. Based on growing literature in support of ecocide, attempts were made to recognise ecocide as genocide in a sense that similarly to how a social group of people might be perceived as victims of genocide, the ecosystem can be considered a victim of ecocide or any international crime as part of genocide.⁸⁸ Even a draft convention in 1973 was presented by Professor Richard Falk for UN approval in which ecocide was principally envisioned as a military offense that could be committed at any moment, provided the necessary 'intent' was present.⁸⁹ But finally, it failed to make its way to UN or ICC. The prime reason of unsuccessful endeavour was that- rather than being a result of a predetermined, deliberate and direct attack on the environment, ecocide typically

⁸⁵ Frank J Macchiarola, 'Nuremberg and Vietnam: An American Tragedy by Telford Taylor' (1971) 71 Columbia Law Review 958.

⁸⁶ Mohammad Mamunur Rashid, "Do States Have External Obligations to Protect the Natural Environment during Armed Conflicts?." South Asian Journal of Environmental Law and Policy 2 (2024).

⁸⁷ *ibid.*

⁸⁸ Crook and Short (n 23).

⁸⁹ Jacob Darwin Hamblin (ed), 'H--Environment Roundtable Reviews' (2012) 2 Environmental History 1 <<https://networks.h-net.org/system/files/contributed-files/env-roundtable-2-1.pdf>>.

arises as a byproduct of human economic activities.⁹⁰ Legality of use of force case i.e., *NATO vs Yugoslavia* 1999 is a cult example of how legality is used as a means of political gain to justify undue illegal military intervention causing environmental and civilian atrocity.⁹¹ In *Yugoslavia vs United States* 1999⁹², ICJ stated that, one of the potential ways to carry out acts of genocide is by the use of force. Furthermore, because of the immanent nature of the armed force and it is one of the most effective methods. Excessive use of military force can contribute to "inflicting on the group conditions of life" and to "its physical destruction," especially when it is directed at things and methods that make up everyday life.⁹³ For the sake of assessing the violation of international law, Court insisted that it can consider the genocide convention as part of IHL, the *jus in bello* rules, despite the genocide convention is part of ICL.⁹⁴ In the *Yugoslavia vs US* case, ICJ reiterated that a state of warfare or military operations paradigm presents administrators with an easy excuse to deny a people or group the necessities of life, such as food, medication, clothing, and housing, also it will be claimed that this is causing the group to experience living conditions that are designed to cause its complete or partial physical destruction.⁹⁵ Establishing intent is way tougher in case of ecocide, let alone genocidal intent. This will eventually make the determining process of genocidal intent more complicated because if ecocide is included as a form of genocide, the only way to prove genocide will be confession of the accused, which is near to impossible for ecocide. In the opinion of one of the UN's Special Rapporteurs, an exaggerated expansion of the concept of genocide to situations of ecocide that have only a, very distant connection

⁹⁰ Crook and Short (n 23).

⁹¹ During Kosovo war, NATO conducted military intervention over Yugoslavia for stopping the war but it was without the legal approval of UNSC sparked stern debate as it was a clear violation of UN Charter as well as customary international law. The 1999 NATO attack on Yugoslavia is a complete mess of application of use of force without complying with foundational customary norms and principles of international law, binding treaty obligations and constitutional rules and war regulations.

⁹² Legality of Use of Force (Yugo. v. U.S.), 1999 I.C.J. 916 (Order of June 2).

⁹³ The court very extensively explained the meaning of intent in committing genocide. ICJ opined that, the "intent" question is a very complex one. Despite being a psychological concept and a subjective affair, purpose is also determined by objective conditions in modern criminal law. Legal systems frequently in a criminal case, use *exempli causa* or discretionary inferences, rather than a necessary assumption.

⁹⁴ Dissenting opinion of Judge Kreca, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II). pp. 774-775, para. 108).

⁹⁵ J. Y. Dautricourt, "La prevention du genocide et ses fondements juridiques", *Etudes internationales de psychosociologie criminelle*, Nos. 14-15, 1969, pp. 22-23. Cited in United Nations doc. E/CN.4/Sub.2/415 of 4 July 1978, p. 27.)

to that idea is probable to undermine the Genocide Convention's effectiveness and jeopardize its functioning.⁹⁶ Therefore, despite of having convincing grounds in terms of widespread or severe or long-term destruction, ecocide was not considered as a distinct international crime like genocide. But to be recognised as international crime of other types i.e., war crimes or crimes against humanity, the grounds of ecocide is arguably predominant in nature. Hence, scholars are advocating ecocide as one of the international crimes, like crime against humanity.⁹⁷

5.3. Ecocide: A Crime Against Peace Never Got Reckoned?

Specific criminal activities are listed under the Statute of the International Criminal Court (ICC) in various provisions including ICC Elements of Crime. But in broad sense only four crimes are regarded as international crimes. Codes of early military tribunals like the statutes of the Nuremberg Trial or Tokyo Trial did not recognise environmental crimes in their definition. The International Military Tribunal (IMT) at Nuremberg made the first attempt to discover a list of international crimes namely, Crimes Against Peace, War Crime, Crime Against Humanity and Membership of Prohibited Organisation under IMT statute. The International Military Tribunal for the Far East (IMTFE) at Tokyo added some new forms of crime like 'rape' under the head of war crime and crime against humanity, but IMTFE completely followed the list of major categories of crime enlisted under IMT statute. Later, the tribunal jurisprudence and ICC statute also defined international crimes where 'environmental crimes' were not listed as a distinct category of international crime. Under Article 6 of the Nuremberg Statute, crime against peace was defined as *war of aggression or violation of international treaties*. Definition of war crime under Nuremberg charter included the words '*wanton destruction of cities, towns, villages or devastation not justified by military necessity*'. Environmental atrocities or ecocide was clearly addressed by this definition. Even historically there are ample instances where ecocide was committed to destroy surroundings of environment as a method of defeating the enemy State during the war.⁹⁸ Many scholars agreed on the issue that 'Ecocide is the missing 5th international crime i.e., Crime Against Peace'.⁹⁹

⁹⁶ UN, 'UN Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its 35th Session: Updating of the Study on the Question of Prevention and Punishment of the Crime of Genocide' <<https://www.refworld.org/docid/3b00f0ba3c.html>> accessed 4 November 2021.

⁹⁷ Winter, Elliot. "Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found." 57(1) *Israel Law Review* (2024) 175-209.

⁹⁸ Adigun, Muyiwa. "Ecocide: The 'Forgotten' Legacy of Nuremberg." 84(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* (2024) 44-77.

⁹⁹ Gauger and others (n 21).

Higgins-adopted 2010 UN Proposal demands inclusion of ecocide as 5th crime against peace with the hope that ICC may have jurisdiction over cases of ecocide if the crime is included to the Rome Statute.¹⁰⁰

If we dissect Falk's proposed 1973 draft ecocide convention, potential relevance with ICC Statute war crime or crime against humanity definitions can be found.¹⁰¹¹⁰² Falk asserted ecocide notion if not possible to be part of genocidal act, still had very promising feature to be war crime or crime against humanity because it was inspired by the mass atrocity occurred in Viet Nam focusing the indiscriminate usage of variety of herbicides including Agent Orange and Rome Plow for mass deforestation, acute bombarding and cloud seeding as war method- which in every iota reflect the characteristics of a war crime, crime against humanity, if not for a new crime – crime against environment.¹⁰³ Falk's argument is strongly validated if we look into the background reasoning for Article 35 and 55 of the 1977 Additional Protocol I. The Articles was adopted due to the application of Agent Orange which produced unimaginable environmental disaster in Vietnam war.¹⁰⁴ The core objective of stated Articles was to deter such a disaster from reoccurring again, or at least reduce the conceivable harm needed to obligate the aggressor state to remediate the ecological damage that was inflicted. In Appendix I Article III of the draft, Falk proposes criminalisation of these acts- (a) Ecocide; (b) Conspiracy to commit ecocide; (c) Direct and public incitement to ecocide; (d) Attempt to commit ecocide; (e) Complicity in ecocide.¹⁰⁵ As far as the required intent is concerned,

¹⁰⁰ Higgins (n 19).

¹⁰¹ Richard A Falk, 'Environmental Warfare and Ecocide - Facts, Appraisal, and Proposals' (1973) 4 Bulletin of Peace Proposals 93
<<https://journals.sagepub.com/doi/abs/10.1177/096701067300400105>> accessed 27 February 2024.

¹⁰² *ibid.* The draft outlined ecocide as a military offence that could be committed in times of war or peace, and could include acts such as using:

“(a) weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
(b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
(c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals, or crops;
(d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
(e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
(f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.”

¹⁰³ Falk (n 61).

¹⁰⁴ UNEP, 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law', David Jensen and Silja Halle (eds), (2009).

¹⁰⁵ Falk (n 61).

Higgins argued ecocide to be 'Crime of *No Intent*' rather than a 'Crime of Result'.¹⁰⁶ He indoctrinated the intensity and seriousness of ecocide to be sufficient to warrant penalty without any intent criterion.¹⁰⁷ To draw gravity of the offence, he picked up the 1977 Geneva Convention Additional Protocol I and ENMOD convention i.e., 'widespread, long term or severe'. It only criminalizes 'ascertainable ecocide', that is, harms caused by human action and excludes natural calamities.¹⁰⁸

In the matter of liability, he propounded Strict responsibility;¹⁰⁹ because it lays the burden of harm prevention squarely on the shoulders of the person who caused the injury, knowledge is not an element required and includes both individual as well as corporation or agency. He followed doctrine of "*Let the Master answer*", known as *Respondeat Superior*¹¹⁰ to illustrate criminal liability of ecocide perpetrator which basically has the essence of vicarious liability. He added that the charge of commission of ecocide would be upon any 'Senior Person or entity'.¹¹¹ It accentuates the notion of command responsibility in IHL in terms of war crime prosecution. However, Higgins's definition of ecocide includes crimes committed in both war time and peace time.¹¹² Higgins argument shows ecocide shrinks not only human life but also every living organism – species of plant, animal, fish, bird, insect etc. which is supported by others.¹¹³ In this basis, ecocide may fall within the ambit of crime against humanity too. Hence, ecocide had sufficient reasonable grounds to be considered under ICC jurisdiction i.e., being an international crime¹¹⁴. While the 'Codes of Crimes Against the Peace and Security of Mankind' predecessor to the Rome Statute initially featured a particular Article concerning environmental crimes,

¹⁰⁶ Higgins (n 19).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ A Latin common law doctrine which signifies criminal responsibility of any superior authority for the acts or omission of its subordinates or an agency who have the right, ability or duty to control acts of persons under it whose action causes the crime to be committed.

¹¹¹ Higgins (n 19).

¹¹² *ibid.*

¹¹³ Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30 Fordham Environmental Law Review 1 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr>>. accessed on 10 November 2021.

¹¹⁴ Opinion of Antonio Cassese and his colleagues asserts that, an international crime must meet the following characteristics in order for it to exist: This includes (a) violation of international customary norms and treaty provisions; (b) a violation of values important to the entire international community and binding to all States and individuals; (c) the perpetrator was acting in an official capacity; and (d) a universal interest in repressing those crimes.

this was considerably toned down and subsequently eliminated completely.¹¹⁵ Because of the influence of powerful nations and their concentration on preserving nuclear weapons, it is possible that the offense was not included in the list of crimes.¹¹⁶ One inherent complexity might be the determination of the extent of ecocide- whether it is a transnational crime or crime under international law.¹¹⁷ Scholars of ICL argued that environmental crimes like ecocide, though not recognised under ICL directly, possesses the most indomitable place in the race of becoming international crime and should be promoted to that place because it is a strongly glaring example of both transnational organised crime as well as transnational environmental crime.¹¹⁸

6. Status of Conflict-induced Eco-crimes as International Crime: Way Forward

Scholars has proposed the essentiality of formulating specified Treaty on environmental crimes to bring the perpetrator States under criminal liability and punishment for their acts during armed conflict.¹¹⁹ After World War II and specially experiencing the Viet Nam apocalypse, the outcry for establishing a new crime addressing exclusively the atrocities occurred due to environmental damage has significantly been loud. Several UN agencies, including the Legal Committee of the UNGA and the International Law Commission (ILC) explored how to define and prosecute serious environmental degradation over a period of 40 years.¹²⁰ In the aspect of treaty law, non-ratifying states have no legal obligation under that treaty. But in ICL, State cannot put prosecutorial bar upon any commission of international crime. It means in case of any commissions under Article 7 of the ICC statute, ICC will prosecute the perpetrator individual or State whatsoever with no legal restriction and irrespective of their ratification of the ICC statute.

¹¹⁵ Tim Lindgren, 'Ecocide, Genocide and the Disregard of Alternative Life-Systems' (2018) 22 International Journal of Human Rights 525 <<https://doi.org/10.1080/13642987.2017.1397631>>. accessed on 9 November 2021.

¹¹⁶ Gauger and others (n 21).

¹¹⁷ Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179 <<https://doi.org/10.1007/s10609-020-09393-y>>. accessed on 9 November 2021.

¹¹⁸ Zoi Aliozi and others, *Environmental crimes and International Criminal Law* (Regina M Paulose ed, Vernon Press 2021).

¹¹⁹ TOUKAN ABDULLAH, "THE GULF WAR AND THE ENVIRONMENT: THE NEED FOR A TREATY PROHIBITING ECOLOGICAL DESTRUCTION AS A WEAPON OF WAR." The Fletcher Forum of World Affairs, vol. 15, no. 2, 1991, pp. 95-100. JSTOR, <http://www.jstor.org/stable/45289999>. Accessed on December 10, 2024.

¹²⁰ Crook and Short (n 23).

The International Law Commission (ILC) Draft Principles 2022 recognises environmental protection is a constant process which must be adhered to by any State not only in the continuation of armed conflict but also before the starting and after the ending of any armed conflict, even in peace operations, the State has an obligation to protect environment.¹²¹ Under this principle, States has an obligation to protect environment in armed conflict by undertaking legislative, judicial, administrative and other initiatives necessary for wartime environmental protection like declaring the regions having higher degree of environmental as protected zones, promulgating prevention-mitigation-remedial steps to curb post-conflict environmental cleaning up restoration of ecosystem etc., .¹²² Principle 9 of the ILC Draft Principles directs that, any individual, organisation or any State committing an internationally wrongful act against environment shall be under liability to ensure full reparation to the environmental damage caused during and after the war. Apart from the API Art. 35 and 55 provisional mandates and the ENMOD techniques of not causing widespread, long-lasting, severe unnecessary damage, any State must comply with the four ground CIHL principles- Principle of Distinction, Proportionality, Precaution and Humanity during, before and after the armed conflict.¹²³ The recent 2023 ILC session, the commission did not included the environmental damage during armed conflict as their agenda, yet addressed the concept of State responsibility a bit. Since there is no clear differentiation between international and non-international conflicts, the Commission retitled the topic from "Settlement of international disputes to which international organizations are parties" at this year's session.¹²⁴ By this changed topic, any disputes regarding private or non-international nature will also be included in ILC intervention. These organizations gathered often to debate the aspects and issues involved in establishing such an international crime, including the amount of intent necessary for an offence to constitute 'Ecocide' or 'severe harm to the environment'.¹²⁵ The 'moral necessity' of instituting explicit criminal culpability for environmental devastation must be addressed through criminal prosecution and promoted through the criminal justice system.¹²⁶ The rising awareness of global environmental damage

¹²¹ International Law Commission, Draft principles on protection of the environment in relation to armed conflict, 73rd session, 2022, submitted to the UNGA, A/77/10/ para 58, principle 1 and 7; Yearbook of the International Law Commission, Vol. II, part 2.

¹²² *ibid*, principle 3 and 4.

¹²³ *ibid*, principle 13,14 and 17.

¹²⁴ Charles Chernor Jalloh, THE INTERNATIONAL LAW COMMISSION'S SEVENTY-FOURTH (2023) SESSION: GENERAL PRINCIPLES OF LAW AND OTHER TOPICS, Cambridge University Press, 2024, p. 133.

¹²⁵ *ibid*.

¹²⁶ Greene (n 72).

implies that environmental crime should be classified as an offense under international criminal law, which attempts to give justice for acts that 'strike the conscience of mankind.'¹²⁷ Many Tribunals emphasized that environmental destruction must be engraved with serious consideration and deserve the status of an international crime. One of the most recent attempts of 'Eco crime' movement is the advisory opinion by International Monsanto Tribunal (IMT) who held an enterprise with corporate liability of committing ecocide pressing out the issue of warfare ecology and the need of eco crime's criminal recognition.¹²⁸ International practice of environmental prosecution is insufficient but Rob White points out that New South Wales is an exception because the New South Wales Land and Environment Court (NSWLEC) maintains a database of sentencing information.¹²⁹ Since the court's establishment in 1980, the NSWLEC has regarded environmental planning and preservation as matters of criminal prosecution.¹³⁰ But as this is an opinion tribunal, its observation is not binding. The fact that environmental destruction is committed both in armed conflict and peacetime, makes the concern even more dangerous and equally challenging to address. For armed conflict environmental crimes, there are legal and judicial mechanism for adjudication although there is no record of redress till now that any victim State were able to acquire compensation from UNCC. Yet there are legal provisions to somehow put restraint upon the States to observe the CIHL rule during any armed conflict. ICJ has delivered some landmark judgements on reparations for cases of illegal use of force resulting in civilian, infrastructural damage and destruction to natural environment. The *Congo vs Uganda 2005*¹³¹ case ICJ determined that the Republic of Uganda had been in violation of the principles of non-intervention and non-use of force in international relations by proactively offering the Armed Forces logistical, economic, and financial assistance to unlicensed militias functioning on the DRC's territory.¹³²

¹²⁷ Frédéric Mégret, 'The Case for a General International Crime against the Environment' [2011] Sustainable Development, International Criminal Justice, and Treaty Implementation 50.

¹²⁸ Marco Colacurci, 'The Draft Convention Ecocide and the Role for Corporate Remediation. Some Insights from the International Monsanto Tribunal and a Recent Research Proposal' (2021) 21 International Criminal Law Review 154 <https://brill.com/view/journals/icla/21/1/article-p154_154.xml>. accessed on 22 November 2021.

¹²⁹ Bricknell (n 4).

¹³⁰ Diane Solomon Westerhuis, 'A Harm Analysis of Environmental Crime' in R Walters, DS Westerhuis and T Wyatt (eds), *Emerging Issues in Green Criminology: Critical Criminological Perspectives* (Palgrave Macmillan, London 2013).

¹³¹ Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19th December 2005, International Court of Justice [ICJ].

¹³² A study by a UN Panel of Experts accused the Uganda People's Defence Forces (UPDF) of stealing Congo's gems and other mineral resources during the Second Congolese War (1998-2003), which

The Congolese Army (FARDC) detained four UPDF personnel on suspicion of driving their patrol boat into Congolese waters on Lake Albert. It was held that they failed to do what is required by Article 43 of the 1907 Hague Regulations to do everything within its power to restore and guarantee environmental protection. The Court also believed it had enough reliable information to draw the conclusion that UPDF soldiers had violated human rights and international humanitarian law. The court awarded US\$225,000,000 for damages to people, US\$40,000,000 for damages to property, and US\$60,000,000 for damages linked to natural resources in its judgment on the reparations issue on February 9, 2022.

7. Role of United Nations Compensation Commission (UNCC)

As Iraq had standard income from oil business hence, UNCC attempted to treat the claims made from affected countries of gulf war.¹³³ Among the 2.69 million claims classified relating to harm to businesses and government property, financial losses, personal injuries, deaths of persons, and expenses incurred by neighboring nations in hosting refugees, "F4" subcategory for "Environmental damage and depletion of natural resources" was the final one.¹³⁴ The gulf war oil spilling had an instantaneous grave, and enduring effect on ecosystems, agricultural and aquatic environments, surface and soil quality, and natural resources, endangering human health. However, 'imposing monetary value' on the environment is just as difficult as 'defining' environment. States aimed at reestablishing pre-war environmental conditions in substantially contaminated regions, but they also wanted to cope with the damage to natural assets and land, the impact of the military and refugees, the detrimental health effects of pollution, and even funding for health assessments. Affected countries forwarding UNCC claims were aware that environmental quality was linked to financial, cultural, healthcare, and ecological diversity issues which turned out to be massive compensation claim from each affected States of gulf

was followed by joint charges in October 2003. The conclusion of a case at the ICJ that ordered Uganda to pay over \$10 billion in reparations for wartime atrocities (though the amount nearly unpaid) caused the two countries to clash once more in late 2005.

¹³³ Since the Vietnam disaster of Agent Orange, scholars urged for establishing a permanent UN monitoring agency to deal with infringements and provide compensation, along with a yearly summary report to the General Assembly of the United Nations on the adverse environmental impacts of armed wars. After the gulf war tragedy, UNCC was the first initiative taken for ensuring post conflict remediation and reparation process. UNCC mission was to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait."

¹³⁴ Conflict and Environment Observatory, What the environmental legacy of the Gulf War should teach us, March 18, 2026, available at: < <https://ceobs.org/what-the-environmental-legacy-of-the-gulf-war-should-teach-us/> > accessed 18 December 2024.

war.¹³⁵ Throughout the procedure, it became clear how difficult it was to determine the damage's economic value. Iraq and the UNCC both insisted that assertions be backed up by accurate calculations, thorough cost breakdowns, and unambiguous scientific proof. With initial funds for health evaluation projects, 94% of claims were rejected as a result of disagreements over the amount and caliber of the evidence.¹³⁶

8. Barriers and Challenges

Principle of proportionality depicts that, if the anticipated impact on environment surpasses the value of an attack on military objective, that attack must be dismissed.¹³⁷ But armed conflict necessarily waged for justified reasons like protection of sovereignty must adhere to the basic goal of deterring enemies for which they must attack the military objectives of the area of enemy State. In that sense, if the attack on the military objective is crucial and if not attacked it can pose danger, the higher risk of causing environmental destruction will be justified.¹³⁸ If precautionary steps to protect environment and possible consideration is taken including proportionality, then it will be a legitimate collateral damage.¹³⁹ The concept of military necessity is thus often used, may be not as an excuse to cause detrimental harm to environment but as a way to destroy the enemy by any means. In such calculation ultimately the natural environment is the one to suffer and sacrificed. Some of the core barriers for international recognition are discussed below:

8.1. Defining Environment and Environmental Harm

Without defining the ambit of environment, it is difficult to make claims and bring allegation about which acts or omission will be deemed as environmental harm. Consequential or indirect or passive environmental harms are not penalised. Therefore, the first major challenge for the international authority like ICC or

¹³⁵ Al Salahi was the first Iranian environmentalist to submit the first Iranian claim to UNCC worth 14 billion USD for the damage caused in gulf war by Operation Desert Shield devastation that affected the ecological setting of Iran.

¹³⁶ De Silva, A. L. M. (2014), *Conflict Related Environmental Claims – A Critical Analysis of the UN Compensation Commission*, Faculty of Law, University of Sydney, Australia p70 <http://ses.library.usyd.edu.au/handle/2123/10426>.

¹³⁷ Louise Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International eds. 37 International Review of Red Cross* 1997, pp 35.

¹³⁸ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* 2000, *ILM* 39 (2000), 1257.

¹³⁹ *ibid.*

UNSC¹⁴⁰ to implement would be formulating a common universally accepted definition of environment. For streamlining a study of the idea of harm, how it is described or used in various laws, and the development of a harmonised set of guidelines for measuring damage, the environment must be defined with clear idea which objects will be considered as environmental component. Without defining environment, it would be problematic to ascertain the type of harm, damage assessment and awarding compensation, thus, to establish the identity for environmental destruction as an international crime. For this, a universal definition of environment is inescapable.

8.2. High Threshold set in 1977 Additional Protocol I for Proving Wartime Eco-Crimes

Art. 35 and 55 are incredible, groundbreaking provisions that enable for the preservation of the environment and biodiversity during wartime without causing harm to humans. But these Articles are drafted primarily to deter any chemical warfare similar to that of Vietnam war. The provisions are permanently tethered to environmental disasters resembling those of the Vietnam War. The use of herbicides during armed combat is prohibited but if it does not approach the same scale or level of disaster of its predecessor, or if the concerned harm is inflicted not by herbicide but by a different means of combat, in that case, the environment will not entitle to achieve any legal protection under Art 35 because of the nonfulfillment of the triple threshold. This turns the provision into a stringent impracticable rule. Scholars suggested that the three preconditions "*widespread, long-term, severe*" mentioned in Art 35 are historic but will not be implementable unless dissected into single parameter by replacing the word 'and' with the word 'or' which will simplify the punitive standard breaking the cumulative triple standard.¹⁴¹ Henceforth scholar argue the current version of Article 35 of API failed to ensure environmental protection from armed conflict damage and still remains a not-so-better solution to the vast level mass destruction to environment and natural resources in any State during warfare.¹⁴² If the triple threshold were relaxed by either of the three preconditions, it could have been much easier to bring the perpetrator State under criminal liability and prosecute them.

¹⁴⁰ Hereinafter United Nations Security Council.

¹⁴¹ Stephanie N. Simonds, 'Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform', [1992] 29 Stan. J. Int'l L., 165, 211.

¹⁴² K. Hulme, "War Torn Environment: Interpreting the Legal Threshold", Vol. 7 (International Humanitarian Law Series, BRILL, Leiden, Netherlands, 2004).

8.3. Ambiguity in 1977 API threshold interpretation and application

The core limitation of API Art 35 and 55 is that its applicability, determining and implementation mechanism of the triple threshold is ununiform and unrealistic because the thresholds are not defined clearly. Firstly, *Widespread* refers to the geographical scope of the harm; nevertheless, there is little consensus on how far that scope must extend. Whereas some scholars believe it must cover several thousand kilometers, others feel it can be within a few hundred square kilometers. If even scholars disagree on what the policy means, how can it be accurately enforced? Furthermore, if one accepts that the required damage must be distributed over several thousand kilometers, how is this rule supposed to be implemented in cases of conflict-related environmental damage that is less than several thousand kilometers? In practice, such a criterion would be ineffective in addressing the majority of environmental harm caused by armed conflicts. For the second requisite *Long-term*, The Protocol I drafters used a "scale of decades, twenty or thirty years as being a bare minimum".¹⁴³ But others recommend the harm that lasts more than two years can, in some circumstances, should be considered "long-term".¹⁴⁴ In any case, the process of estimating the "long-term" damage is frequently fraught with scientific challenges since there is currently no reliable method for establishing whether the damage resulted directly from the conflict or as a result of an intervening (*novus actus interveniens*).¹⁴⁵ Lastly, 'severe damage' pertains to the degree of actual damage inflicted, although, like 'long-term' it frequently encounters with academic, factual, scientific and methodological challenges, for how does one determine if the ecological damage generated is a consequence of the armed conflict? Additionally, the harm must be deemed fatal too as common illnesses caused by the herbicide Agent Orange inflicted unprecedented horror and permanent health hazards among the victims, Hulme claims that genetic, transmissible, or carcinogenic defects might qualify for inheritable diseases to be classified as "severe damage."¹⁴⁶ As a result, these sicknesses may fall under the Severe Damage threshold.

8.4. Contradictory and Vague Provisions of Draft ILC Principles

Draft Principle 7 lay out a legal obligation for States and international organizations engaged in peace operations for armed conflicts to evaluate its detrimental effects on the environment and implement, strategies to minimize, mitigate, and eliminate the

¹⁴³ *ibid.*

¹⁴⁴ S. Witteler, "Die Regelungen der neuen Verträge des humanitären Völkerrechts und des Rechts der Rüstungsbegrenzung mit direktem Umweltbezug", *Waffenwirkung und Umwelt II* (1993) 389-95.

¹⁴⁵ *ibid.* pp. 391-392.

¹⁴⁶ Hulme (n 116).

harm. CIL and any international obligations are not reflected in this premise. Canada suggested in its written observations that the verb "shall" be changed to "should." This was a concern shared by the United States, Japan, Germany, and the Netherlands. United States opined that, the commentary does not explain how this obligation reflects customary international law, nor does it cite any treaty provisions. Draft Principle 13 relevant to both IACs and NIACs employs legally enforceable provisions to: (i) "prohibit... the use of methods and means of warfare that are intended, to cause widespread, long-term, and severe damage to the environment;" and (ii) "require that care shall be taken to protect the environment against widespread, long-term, and severe damage." It is based on AP I's art. 55 but it has not gained customary IHL status due to insufficient evidence of State practice and *opinio juris*. Secondly, Principle 13 employs the synonymous terminology as API but only applies to IACs whereas API applies to both IAC and NIAC. Notably, AP I's limitation is absent from Additional Protocol II, which is effective during NIACs.

8.5. Non-eligibility for Qualifying as International Crime

Proving crimes against environment is more complicated than it is in case of crimes against humans. Ordinary crimes are easy to investigate with less resources and equipment and easy to prove compared to environmental crimes. While international crime requires a high threshold of evidential authenticity, sufficient linkage between intent and evidence, vast victim scale, direct association of perpetrator and the suspects, reasonableness in facts, detecting perpetrator, estimating and calculating damage, special skills for the investigating unit, huge manpower support and technological toolkits etc. Evidence authenticity is a major part for international criminal prosecution. It relied on reports from outside sources that tend to demonstrate that the crimes under investigation actually took place, such as those from national law enforcement agencies, epidemiologists, and survey information. In case of environmental crime cases, the list of requirements for prosecution might be even larger added with environmental forensic science, specialised experts and agents, high tech equipment etc. For these major barriers, environmental crimes or ecocide may not be added to the list of four international crimes subject to the Court's jurisdiction for many years, even if the ICC approves the proposal to enter environmental crime as international crime. State practice is also a factor that can push or downgrade the scope of international recognition for ecocide.

8.6. Non-Recognition as Customary Law

Environmental crimes are still not accepted as crime internationally and not observed as *opinio juris*.¹⁴⁷ As part of the ongoing campaign by the NGO *Stop Ecocide* to include environmental damage on the list of international crimes at the International Criminal Court, the definition will be made available for states to consider.¹⁴⁸ If sufficient number of states do not mandate the agenda of inclusion and universal criminal recognition for environmental crimes under ICC statute, it will be a stumbling blockade for environmental atrocity to be an international crime. Though domestic courts are obligated by ICC statute to adjudicate international crimes, in case of a state as a perpetrator this option will be automatically vague. Hence, environmental crime will not possibly be recognised as international crime. That might be a cause why ICL still is confined into the paradigm of criminological aspect of only human atrocity committed towards and by human. It does not directly acknowledge the reverberating character of environmental crime to be suitable to that of international crime. Lack of collaborative state effort and cooperation among states is responsible for non-formulation of environmental harms as international crime.¹⁴⁹

8.7. Setting Environment as a Victim and Awarding Compensation

Victimization of environment was never approached by any legal arena rather than environmental criminology. Environment is yet to get recognised as a victim of human barbarism and ICL primarily concerns about harms committed to human being. UNCC failed to recompense the Kuwaiti environmental atrocity in gulf war because proving damage without sufficient scientific evidence will dismiss the claims. The financial effect of long-term health issues and the additional deaths anticipated as a result of breathing in the toxic fumes from the oil fires were Submitted to UNCC, however, failed because it was difficult to fulfill the evidentiary criterion that injuries must be "the direct result of the invasion and occupation."¹⁵⁰

¹⁴⁷ In *Barcelona Traction case*, the ICJ held that any principle, before being recognised internationally must be recognised as a generally accepted in the domestic legal system. It means that, environmental principles before being internationally observed must start with statutory legislation which will be obliged in domestic level. But paradigm of environmental crime is not penalised domestically in full sense, thus, yet not bloomed to be globally accepted.

¹⁴⁸ Sean Fleming, 'What Is Ecocide and Can It Be Prosecuted by the International Criminal Court?' (*World Economic Forum*, 2021) <<https://www.weforum.org/agenda/2021/07/ecocide-environmental-harm-international-crime/>> accessed 30 June 2022.

¹⁴⁹ Grant Pink and Rob White, 'Collaboration in Combating Environmental Crime – Making It Matter' [2016] *Environmental Crime and Collaborative State Intervention* 3.

¹⁵⁰ *Conflict and Environment Observatory* (n 129).

Hence, the UNCC model is an unsuccessful approach to ensure environmental compensation.

8.8. Complexity to Formulate and Enforce Uniform International Code

Absence of an internationally mandated and enforced law of ecocide in order to protect the planet, ecosystem, dependent variables and creatures upon the environment is the vital lacuna for non-recognition of environmental crimes.¹⁵¹ If the environmental harm becomes international crime there will be contradiction of punishing perpetrators if no uniform code is there to prosecute environmental harm and sanctioning environmental offenders. By promulgating a specific law for dealing with international environmental crime may serve the purpose. But environmental harms are done at various levels and the consequences are different too. Environmental crimes in war are committed but in different stages such as in mass level (during armed conflict) as well as in prolonging level (pollution, post war effect on environment etc.) in vast level (transboundary harm, illegal trade of forest, marine or aquaculture industry etc.) and in minor level (excessive exploitation of living creatures like fishing, whale hunting etc.). Hence, the impact is also different which means allegation and penalty will be according to the degree of offence. Hence, it would be quite a gargantuan task to formulate a comprehensive international code for environmental crime. Such categorizing international environmental crime is yet another hefty task.

8.9. Insufficiency of Technological Use and Environmental Forensic Studies

Data and technology are essential for upending the networks of environmental crime. Legal financial institutions and intricate stock ownership models are frequently used by crime syndicates to conceal their nefarious activities. It will be essential for public and private sectors to collaborate more and work more effectively together. To face the challenge, a big push would be needed to bring together major corporations, authorities, officials, and nonprofit organisations. It would also necessitate that these various organisations, which frequently operate in isolation, unite behind a common global mission.

¹⁵¹ Ascensión García Ruiz, Nigel South and Avi Brisman, 'Eco-Crimes and Ecocide at Sea: Toward a New Blue Criminology' (*International Journal of Offender Therapy and Comparative Criminology*, 2022) 407 <[https://repository.essex.ac.uk/29044/3/Eco-crimes and Ecocide at Sea-- accepted.pdf](https://repository.essex.ac.uk/29044/3/Eco-crimes%20and%20Ecocide%20at%20Sea--%20accepted.pdf)> accessed 27 February 2024.

8.10. Legal Juncture of Introducing Separate Judicial Mechanism

ICL concerns with the state security of individual state while green criminology aspires to establish safety to not only one state but the whole world. This vastness of the object often becomes a barrier to recognise the environmental crime as environmental crime as it is too broad for any international mechanism to materialise. Another difficulty is determining criminal responsibility in case of environmental crimes. Building a distinct international court or quasi-judicial body to try and adjudicate environmental harm single handedly sounds amazing to think but impractical and unfeasible in reality. Such attempt will give rise to further legal jurisdictional contradiction requiring huge expenditure, resources and manpower. A strong argument could be made for expanding the court's jurisdiction to include ecocide committed in pre-wartime, post wartime and in times of peace, as described in the OTP 2016 policy paper, if the ICC OTP is able to bring successful prosecutions in the areas of illegal natural resource exploitation, environmental damage, and land grabbing.¹⁵² But that is similarly not possible to materialize due to absence of comprehensive code to declare environmental crime, burden of proof and liability test, evidence method and punishment. Although the OTP's 2016 strategy statement looks promising, so far it is impossible to build a compelling argument for extending the court's jurisdiction over ecocide on prosecutorial and jurisprudential procedures.¹⁵³

9. Recommendations

9.1. Reformation to Article 35 of the 1977 API and Adopting 5th Geneva Convention

There must be a thorough revision of the Article to include the triple threshold as single precondition to be fulfilled and not as a cumulative precondition. By making this, if any State causing widespread environmental destruction, it will be sufficient to held the State responsible and there will be no necessity to prove the other two precondition i.e., long term and severe. But still the ambiguity of triple condition remains the same. Hence, a new convention for environmental damage is a great option to clear this problem. Environmental casualties are not given its due importance with a separate convention except in an Additional Protocol. The definition of Protected person must not be limited in the current three Geneva Conventions revolving around different categories of civilians and institutional identities serving the injured in wars. There is no formulation of environment i.e.,

¹⁵² Pereira (n 76).

¹⁵³ *ibid.*

animals, wildlife, flora, fauna, living organisms, forests and wetlands etc. in the list of protected persons during armed conflict. A *fifth Geneva Convention on the Protection of Environment during Armed Conflict* can possibly lead to the enlistment of environment as a protected person which will also work as a catalyst for international community to control indiscriminate usage of chemical bioweapons and reducing human casualties due to environmental destruction as well as minimizing the post war health hazard upon the civilians of respective war affected zones. Instead of having scattered provisions in API, ENMOD, or Draft ILC, the 5th GC will be specifically designed for environmental crimes in case of armed conflict with specificity in definition, scope, nature of environmental crimes, provisions having binding effect and in line with customary norms of IHL, ICL, and IEL, as well as military guidelines specifically designed for protecting pre stage, ongoing and post stage of warfare in case of both IAC and NIAC. The reparation and damage provisions will also be addressed with clear concept of list of activities considered as ecocide. If such convention can attain the status of jus cogens, it will be a powerful step towards ecocide recognition as international crime.

9.2. Establishing International Tribunal for Environmental Atrocity (ITEA)

Creating a separate judicial body is linked with the idea of 5th Geneva Convention on conflict based environmental protection. The establishment of an International Tribunal for Environmental Atrocity will be part of 5th Geneva convention and violation of the convention will be the subject matter jurisdiction of this tribunal. The tribunal will have its own formation like ICJ or ICC but having specialised Judges with specialization on environmental science and environmental governance. An advisory body consisting veteran environmental specialists, advocates, scientists, technological experts, researchers and academics and other relevant expert on IHL, ICL and IEL can be formed to assist the Judges. The tribunal will work simultaneously with ICC as well on disputes regarding conflict induced or generated or created or produced ecocidal acts done by contracting States of 5th GC as well as non-contracting States.

9.3. International Environmental Compensation Fund (IECF)

Due to the mammoth nature of expenses required to compensate the losses out of environmental destruction and due to the vast characteristic of eco-crime, an international compensation fund can be a good option. By the indictment of the International Tribunal for Environmental Atrocity (ITEA), the convicted States will be bound to deposit the awarded amount of compensation declared by the tribunal for its 5th GC violation committing ecocide. Thus, the process of legalization,

adjudication and remediation will be completed in making the conflict induced ecocides as an international crime.

10. Conclusion

To initiate prophylactic steps, future encounters military confrontations must take precedence environmental conservation. This includes more robust restrictions for the use of chemical weaponry, greater administration of crude oil supplies, and increasing efforts to rehabilitate the environment following battles. Once the structure of what acts constitute environmental harm is determined with universal consensus by an International Court or such institution, it will be easy to fix the criteria for international environmental crime. Recognising environmental crime as international crime will make each nation more cautious about their environmental obligation and hold them accountable for their breach of rights of the nature and aggression to environment. To invoke the abidingness of environmental principles strongly, the status of environmental crimes must be recognised as international crime. To be an international crime, environmental atrocity must receive vote of acceptance as international crime by a good number of States. Status of being an international crime will highly make the States incumbent to avoid and minimize environmental destruction in any armed conflict. Expected realisation of environmental principles during warfare is largely dependent on the prosecuting nature of crimes against environment and further necessity to create obligation erga omnes for the States. Therefore, facilitating a separate body to try, investigate and prosecute crimes against environment is a crying need for the world. Global cooperation is also necessary for confronting the environmental consequences of war. Lack of uniformity in laws and decision among the world leaders and big nations to ensure strict cogent implementation of domestic environmental legislations and international environmental laws are the core lacuna that hinders the road to recognition for the environmental crimes. The ultimate step necessary to criminalise environmental damage is the intention and consensus of the world leaders in formulating to incorporate laws punishing for acts and acts amounting to environmental damage. The international community of legal fraternity including international courts and international law commission must come forward to formulate a distinct international law for Ecocide and recognise it as international crime as they did for genocide. Only then the facets of state practice on criminalising environmental atrocities will broaden the road to international crime. As Peter Thomas Rohrbach in his book *Conversation with Christ: An Introduction to Mental Prayer* (1965) pointed out that “Real change in our attitude will only occur when we change the central object of our attention”, the emergence of ‘right attitude’ to enhance ‘real change’ will be to bring preservation of Mother earth as ‘central object

of our attention'. Only this way we could save the humanity and the nature from the clowns of destruction and extinction. Positive relationships, appropriate cohesive techniques, and the particular cooperative approach taken by States involved and States concerned are all necessary for collaborative state intervention to be successful in reducing environmental crime.

Access to Justice in Rural Bangladesh: A Study on Selected Village Court in Rajbari Sadar Upazilla

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Abstract: The formal judicial process in Bangladesh is characterized by exorbitant costs and an extensive timetable. It is apparent that Shalish represents a highly informal manifestation of local judicial procedure, heavily swayed by individuals affiliated with the ruling class in rural communities. Due to the major population of our country reside in rural area it becomes a relevant issue to a bigger portion's judicial rights but basic civic utilities are still limited to village residents. The study aims to find out the existing challenges of village court system and suggests necessary steps to encourage the people to participate their judicial rights. To conduct the study, survey method has been used for collecting data covering five union parishads from Rajbari Sadar upazilla along with the qualitative method for secondary data. Essential result shows that there are some institutional drawbacks and lack of knowledge among the citizens but there is a high chance to be achieved the fundamental rights by using proper implementation of Village Court Act 2006 (Revised 2013) that leads to ensure village court ruling must adhere to. Rural justice system generates the massive contribution in national judicial justice system by solving the majority people's disputes from rural local area which helps the excessive pressure from district magistrate court.

Keyword: Village court, Justice system, Evaluation, Shalish,

1. Introduction

Limited access to official courts poses a significant challenge for impoverished rural populations in Bangladesh, as around 80% of the country's inhabitants reside in rural areas, while the majority of formal court facilities are concentrated in metropolitan centers. Due to the fact that the lowest formal court operates at the district level, individuals from rural areas who are economically disadvantaged are compelled to endure the financial implications associated with travel and logistics. Consequently, this situation imposes supplementary hardships upon them¹. The Local Government Ordinance was promulgated by the Government of Bangladesh in 1976. The Union Parishad was granted forty functions, including a set of limited judicial

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¹ Siddiqi, M. D. (2003), Shalish and the Quest for gender justice: An assessment of Strategic intervention in Bangladesh, Research Initiative Bangladesh.

responsibilities, by the implementation of this Ordinance. The Village Court Ordinance granted each Union with the fundamental power to adjudicate issues through the utilization of village courts. Consequently, the establishment of village courts was intended to address minor legal matters. The primary aims of implementing village courts were to resolve both criminal and civil problems of villagers. The Village Court Act 2006² was activated initially as an experiment. In order to put the Act into effect and activate village courts, the government follows a policy of gradual implementation. In the beginning, during the first phase of the 'Activating Village Courts in Bangladesh (AVCB)' project, the Government of Bangladesh chose 500 Union Parishads (UPs) out of a total of 4,500 Union Parishads (UPs) in order to activate Village Courts³. After this, the number of UPs was decreased to 350⁴. An amendment of "The Village Court Act 2006" was made in 2013 (Village Courts amendment Act 2013⁵) for incorporating several new clauses. After determining that the program was going to be successful in its early stages, the second phase of the AVCB project (2016-2019) was launched in 2016⁶, with the goal of reaching 21 million individuals in 1080 different unions. Phase two extended to 2022 due to its succession⁷. Supporting village courts in Bangladesh as a successful local dispute resolution mechanism is the goal of the Activating Village Courts in Bangladesh (AVCB) Phase III Project. In the pilot initiative, the LGD (Local Government Division) has been in charge of activating Village Courts in 3041 new UPs and supporting the maintenance of VCs in the 1,416 UPs that have previously been active⁸.

2. Objectives

The main objective of this study is to identify constraints to effective functioning of the village court. The study focuses on effective and practical recommendations to

² Government of Bangladesh (2006), Village Court Act 2016. Available at <http://www.dwatch-bd.org/village%20court%20act%202006.pdf> (Accessed on 30 June 2018)

³ Talukdar, M. R. I. (2016). The Village Courts in Bangladesh: Review and Analysis

⁴ *ibid*

⁵ Government of Bangladesh (2013), Village Court (Amendment) Act 2013. Available at <http://www.bd.undp.org/content/dam/bangladesh/docs/Projects/Village%20Court/2016/Under%20Law-%20VC%20act%20amendment%202013.pdf> (Accessed on 1 July 2018)

⁶ Government of Bangladesh (2018), Activating Village Courts in Bangladesh Phase II Project Local Government Division, Ministry of Local Government, Rural Development & Co-operatives, GoB. Available at <https://www.villagecourts.org/case-statistics>

⁷ Bhuiyan, M. S., Islam, M. S., & Salam, M. F. (2019). Access to Justice through Village Court for Rural Poor: The Case of Bangladesh. *International Journal of Publication and Social Studies*, 4(1), 1-10. <https://doi.org/10.18488/journal.135.2019.41.1.10>

⁸ <https://www.undp.org/bangladesh/projects/activating-village-courts-bangladesh-phase-iii>

remove obstacles and strengthen village court. To attain the broad objective, the research has identified some specific objectives:

1. To find out the difficulties of village court in real life experience.
2. To encourage people to go to the village court instead of Judicial court for minor issues.
3. To recommend the necessary suggestions for strengthening the village court system.

3. Methodology

The study conducted on a mixed approach including both qualitative and quantitative method. For data collection survey method both structured and non-structured and face to face interviewing with the respondents have been used. Survey method considered as the best option to collect the opinion from the root level target people regarding the village court experience. Respondents are in two categories; a) mass people and b) litigants. 256 respondents from the villages were covered as subject for survey from 5 union parishad of Rajbari Sadar namely Panchuria, Alipur, Khankhanapur, Basantapur and Barat Union Parishad. All the respondents selected from Rajbari sadar upazila because this territory was the part of the past two phases of AVCB. Moreover, one of the authors belong to this locality which leads to more authentic data collection for being familiar with the local people. Both primary and secondary data have been collected in research area to analyze the real scenario and create better pathway to enhance the village court system.

4. Literature Review

There are several literatures upon the issue of judicial system and only very few papers are available on rural are village courts dispute resolution management in Bangladesh. Considering all of these odds and even selected literatures are as below;

It was noticed that due to poverty and social hardship, rural people had little contact with the formal court system⁹. Village Courts in Bangladesh were created to administer justice locally without the delays and high costs of regular legal systems. At present, the village court provides justice to rural impoverished people. They focused on Village Court difficulties and possibilities in Bangladesh and offered a comprehensive approach to strengthen it. A lack of training and staffing, corruption,

⁹ Bhuiyan et al, (2019). Access to Justice through Village Court for Rural Poor: The Case of Bangladesh. International Journal of Publication and Social Studies, 4(1), 1-10.
<https://doi.org/10.18488/journal.135.2019.41.1.10>

bias, local political disturbance, and other factors hinder the Village Court system's realistic functioning.

It was found that, Bangladesh's only state-sponsored local justice system is village courts. Village courts are said to be the most accessible, affordable, convenient, and realistic option for grassroots communities¹⁰. Although flawed, village court has helped marginalized people get justice and resolve minor local problems, reducing the official legal system's workload. Access to local justice is now essential for human rights, effective governance, inclusive and sustainable development, and fighting poverty, inequality, lawlessness, and prejudice.

It was stated that, village courts in rural Bangladesh combine formal and informal dispute resolution system. The Bangladesh government has taken steps to enhance village courts to help rural people access justice¹¹. They studied the court's shortcomings, impediments, and effectiveness. They believe village courts can save money and time while relieving the formal judicial system, but they still have legal, institutional, and logistical issues. The study evaluated government benefits and possibilities in a specific area.

Bangladeshi rural courts' efficacy was examined in another study. It emphasizes grassroots rural government, known as Union Parishad. The UP is the most important rural local government layer. A UP has 10-20 villages. No village-level administrative units exist in Bangladesh. Initially, the Village Court Act of 2006 partially worked because grassroots people had simple access to justice and the court's ruling helped resolve local disputes¹². UNDP introduced "Activating Village Court Projects" in 2009 to provide grassroots democracy to people. About 4550 Union Parishads were excluded from the program, however 350 village courts were established. Our study will compare village court performance in project and non-project areas.

There are three important studies, namely baseline survey for the village court 2010, review of social barrier and limitation of village courts 2012 and mid-term review of village court project 2013¹³. Where it has been observed the status quo of the previous cases during the time of shalis and fatwa board in our rural local society

¹⁰ Uddin, N. (2019). Rationale for Access to Local Justice Systems: The Case of Village Court in Bangladesh. *Public Affairs And Governance*, 7(2), 160.
<https://doi.org/10.5958/23212136.2019.00012.2>

¹¹ Islam, S., & Alam, S. (2018). Access to Justice in Rural Bangladesh: A Review on Village Court and its Effectiveness. *Asian Studies*, 37.

¹² Rasul, G., & Islam, T. (2017). Performance and Effectiveness of Village Court in Bangladesh: A Comparative Study in Two Unions Between Project and Non-Project Area

¹³ Talukdar, M. R. I. (2016). *The Village Courts in Bangladesh: Review and Analysis*.

where justice being questioned due to lack of legal jurisdiction. The study focuses the contemporary situation and long-term necessary changes to bring a dynamic change and ensure justice in our society through village court.

It was studied Bangladesh's judicial system and concluded that case backlog has prevented it from outperforming. The Village Court Act has always been in effect, however not all Bangladeshi Upazilla Parishads (UPs) have village courts due to budget constraints. Partner institutions use EU and government funds to implement and monitor village courts in 338 of 350 envisaged UPs¹⁴. Village courts may increase justice access, they added. Since such operations refer many cases from the District Court, case backlog is reduced. They expect the financial sector to prosper, boosting competitiveness and growth. Provisions and finances will lead to a strong suggestion to improve rural Bangladeshi village court culture.

There was another study about Bangladesh's official structure for local conflict resolution includes the ancient process of shalish, civil society efforts to improve it, and a somewhat underutilized option for gram adalat or village courts. In addition to these two options, Alternative Dispute Resolution (ADR) ¹⁵ can help people resolve legal issues before going to court. ADR uses a neutral, an impartial third party, to resolve disputes. Negotiation, mediation, and arbitration dominate Bangladeshi ADR. It has been added that ADR cannot replace formal courts in all circumstances because some require comprehensive investigation and legal responsibility. The ADR method cannot easily settle such concerns. According to the authors, ADR has a poor track record, thus the project will improve dispute settlement by improving remote village court systems¹⁶.

It was studies about Bangladesh's rural informal and formal justice systems, particularly the Union Parishad-led Village Court, and argued that it could be a better alternative to the formal system for rural residents if properly activated and reformed. It has been noted that, the Union Parishad (UP)'s village court administration issues. This included reviewing the related Policies, Procedures, Acts, and Rules, the supervising authority's monitoring/oversight mechanism, UP officials' and rural people's legal awareness, competencies, resources, support mechanisms/legal aid from NGOs, and community members' socio-cultural and

¹⁴ Hossain MS and Zaman N, 2016. Cost-Benefit Study on Implementing Village Courts in Union Parishads of Bangladesh, Bangladesh Priorities. Copenhagen: Copenhagen Consensus Center

¹⁵ Ahmed, B., & Islam, M. T. (2013). The Role of Union Parishad in Rural Dispute Resolution in Bangladesh: An Evaluation in the Light of People's Perception. 3(1).

¹⁶ ibid

legal norms¹⁷. Finally, policy implications for improving Village Court performance were suggested. Proper implementation can create a good and drastic shift in conflict resolution. The study will include mass-people understanding of their rights and panchayet or village court decision makers in a formal legitimate system.

5. Legal Framework for Village Court

As per the provisions outlined in the Constitution of Bangladesh, a key objective of the State is to achieve a society characterized by the principles of rule of law, fundamental human rights, equality, and justice. The enactment of the Village Courts Ordinance of 1976¹⁸ and the establishment of the Village Courts Rules in 2016¹⁹ with the aim of ensuring equitable access to justice for individuals residing in rural areas who are economically disadvantaged and socially marginalized. The objective of the Village Court was to resolve local civil and criminal conflicts within the local community. The branch of government known as the "judiciary" is in charge of interpreting and implementing the law with the goal of saving the disagreeing parties from the tiresome process of litigation. There is a practice in the judiciary that aims to increase efficiency and lower costs, which will ultimately lead to better access to the legal system. Simultaneously, during a certain period, there was a prevailing belief that the numerous cases of comparable nature and significance which the resolution of these matters is delegated to the Village Court, a significant portion of which would have otherwise been handled by the standard judicial system. The implementation of additional courts would effectively alleviate the burden on the judiciary. The Village Courts Ordinance encompassed the essential elements of the Village Courts, including its composition, function, and jurisdiction. The procedural regulations, on the other hand, described the precise steps and paperwork needed for these courts to operate. Prior to being replaced by the Village Courts Act of 2006, the Village Courts Ordinance was still in force. It should be mentioned, though, that the Village Courts Rules are still in force. Bangladesh's Village Courts were created to settle issues listed in the Schedule, which covers both civil and criminal lawsuits.

¹⁷ Hossain, S.M.B., 2012. Dispensing justice locally: A study of two village courts in Bangladesh. Department of General and Continuing Education, North South University, Bangladesh. pp: 29. Available from: http://www.mppgnsu.org/attachments/396_14.%20Belayet.pdf.

¹⁸ Bangladesh Gazette dated on 22nd November 1976.
https://legislativeportal.gov.bd/sites/default/files/files/legislativeportal.gov.bd/page/f6053f58_1c99_44b6_9821_b4481a56094c/469.pdf

¹⁹ Government of Bangladesh (2016), Village Court Rules, 2016, Available at <http://www.bd.undp.org/content/dam/bangladesh/docs/Projects/Village%20Court/2016/Under%20Law-%20VC%20Rules%202016.pdf> (Accessed on 1 June 2018)

The establishment of Village Courts is mandated by the Village Courts Act of 2006, which was subsequently revised in 2013. All human beings are born free and equal in dignity and rights²⁰ Article 35(3) states that, “Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law”²¹. These courts possess the authority to address a diverse array of small criminal cases and civil issues through the utilization of conciliation, mediation, and arbitration methods. Additionally, they hold the right to grant compensation of a maximum value of Tk. 75,000. Furthermore, it is worth noting that while every Union Parishad has the technical entitlement to establish and operate a Village Court upon the request of a party seeking redress, the number of functional Village Courts remains relatively low. However, it is important to highlight that the Government, in collaboration with the European Union and UNDP, is currently implementing a project aimed at providing assistance to Union Parishads in establishing and effectively operating Village Courts. All citizens are equal before law and are entitled to equal protection of law²². In jurisdictions where the judicial system functions efficiently, there is a favorable level of accessibility for marginalized populations. The majority of respondents expressed the belief that women, individuals from low backgrounds, victims of crime, and those facing criminal charges do not experience significant obstacles while seeking justice through these courts. If individuals belonging to this group do come into any challenges, it is probable that these difficulties will align with those faced by other individuals, such as discrimination or unjust treatment, as well as interference or bias stemming from individuals with significant wealth. According to the UNDP report 2015, there is a secondary source basis analysis showing that

The poll participants who possessed knowledge about the Courts expressed their perception that the judgments and procedures employed by the Courts are equitable, with 58% affirming this viewpoint. Additionally, 55% of the respondents indicated that the Courts handle problems promptly, while 53% believed that the Courts are cost-effective. Furthermore, a mere 9% of the participants identified corruption as a prevalent issue within the Courts. Furthermore, a majority of participants hold the belief that there has been a noticeable improvement in the accessibility of justice within these courts within the last three years, both in general and specifically for women and individuals of lower status²³. The pie chart can be compared with the current data for analysis basis. Data analysis chapter shows from the chapter 7

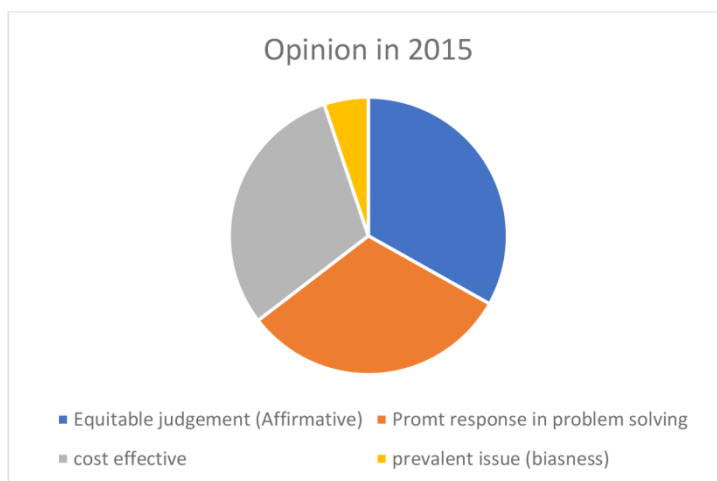
²⁰ Article 1, UDHR (1948)

²¹ Article 35(3), Bangladesh Constitution

²² Article 27, Bangladesh Constitution

²³ UNDP, 2015

progress in a positive way for the first three indicators and biasness issue got mixed on the basis of other variables.



6.Current System for Village Court

1976 saw the enactment of the Local Government Ordinance by the government of Bangladesh²⁴. The Union Parishad was bestowed with forty responsibilities, including restricted judicial duties, by virtue of this Ordinance. The Village Court Ordinance granted each Union the fundamental jurisdiction to have cases adjudicated by the village courts. Consequently, trivial disputes were assigned to the village tribunals. The primary aims behind the establishment of village tribunals were to adjudicate criminal and civil disputes involving villagers.

Established by	The Village Court Act, 2006 (Previously The Village Court Ordinance 1976)
Location of Village Court	Union Parishad Complex
Offence types	Both Civil and Criminal
Jurisdiction	75,000/- taka. The Village Court Act (amendment) 2013.
Panel members of Village Court	UP chairman, two UP members, two persons from parties
Appellate authority	Magistrate 1 st class/ Assistant Judge

²⁴ Bangladesh Gazette dated on 22nd November 1976.
https://legislativediv.portal.gov.bd/sites/default/files/files/legislativediv.portal.gov.bd/page/f6053f58_1c99_44b6_9821_b4481a56094c/469.pdf

Due to the fact that this court is legally obligated to use an informal procedure of trial or conflict settlement, the application of the Code of Civil Procedure, the Code of Criminal Procedure, and the Evidence Act is precluded²⁵. It has put a stop to the appointment of legal representatives. Nevertheless, the decisions of these courts are legally binding in the same way that the decisions of any other official court in the country are.

In accordance with the Village Court Act, it is required for Village Courts (VC) to adhere to specific formal procedures such as conducting trials or settling disputes. This entails the application of relevant legal codes, namely the Code of Civil Procedure, Code of Criminal Procedure, and the rules of evidence. As shown in the table, the proceedings began when the application was received and ended when the decision was carried out.

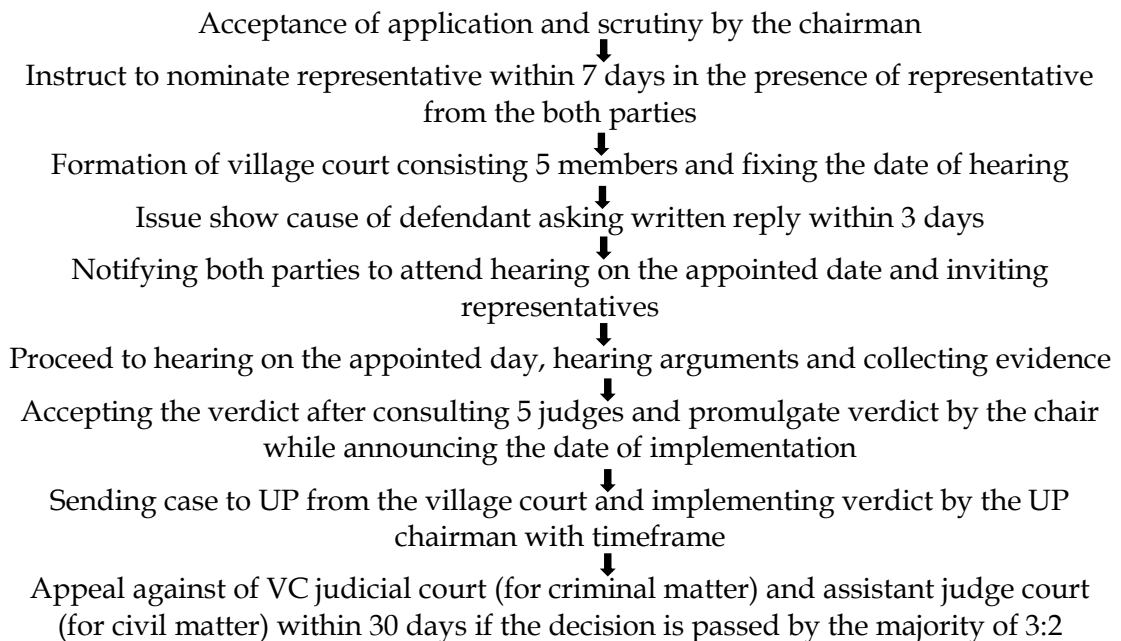


Table: Village Court Flowchart²⁶

²⁵ *ibid*

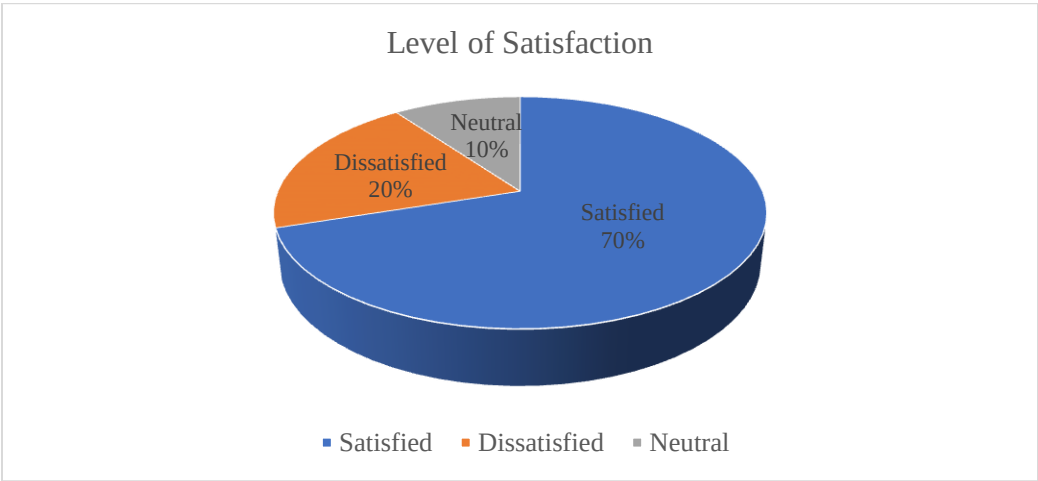
²⁶ Hossain, S.M.B., 2012. Dispensing justice locally: A study of two village courts in Bangladesh. Department of General and Continuing Education, North South University, Bangladesh. pp: 29. Available from: http://www.mppgnsu.org/attachments/396_14.%20Belayet.pdf.

7. Data Analysis and Presentation

As a respondent from the villagers 256 people have been included in the survey. They are directly or indirectly involved in the village court proceedings; some are beneficiary and some are spectator who are well known about the culture of village court system in union parishad level. Demographic information and their analysis are given below;

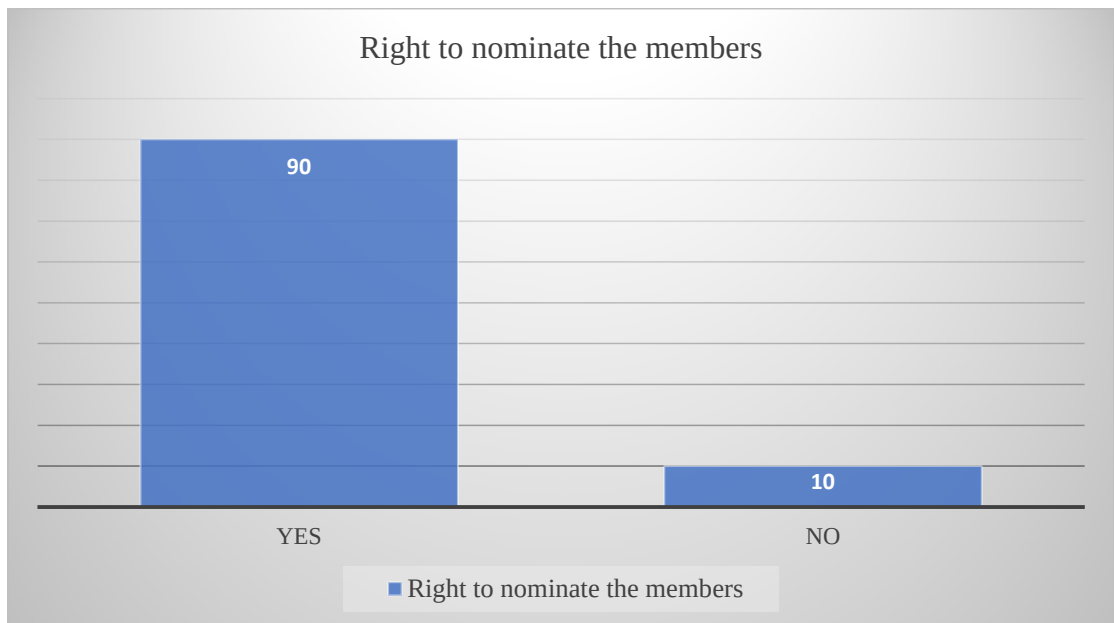
Category	Number and info
Male respondent	182
Female respondent	74
Total respondent	256
Union Parishad (Rajbari Sadar)	Panchuria, Alipur, Khankhanapur, Basantapur and Barat

Figure 1: Level of satisfaction on jury board



The graph depicts that most of the people from the targeted respondent are satisfied about the formation of the jury board for the village court. Only one fifth people are dissatisfied with the jury, it happens sometimes their own reflection get restriction due to other stakeholders’ choice during the operation of entire process. A minimum number of people remained silent because they don’t belong the any side who are the direct beneficiary with the process.

Figure 2: Right to nominate own representative during court proceedings



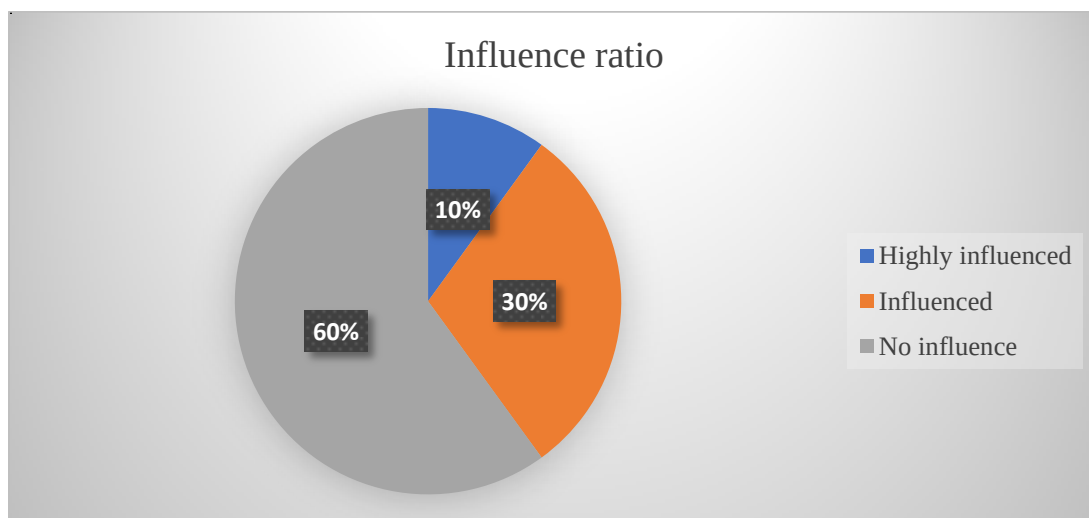
The graph is clearly showing the picture of realistic situation as opined by the respondents. Almost near about the entire population is set to free to choose their nominated person into the jury board as law gives them one person in each side.

Graph 3: Level of satisfaction on verdict



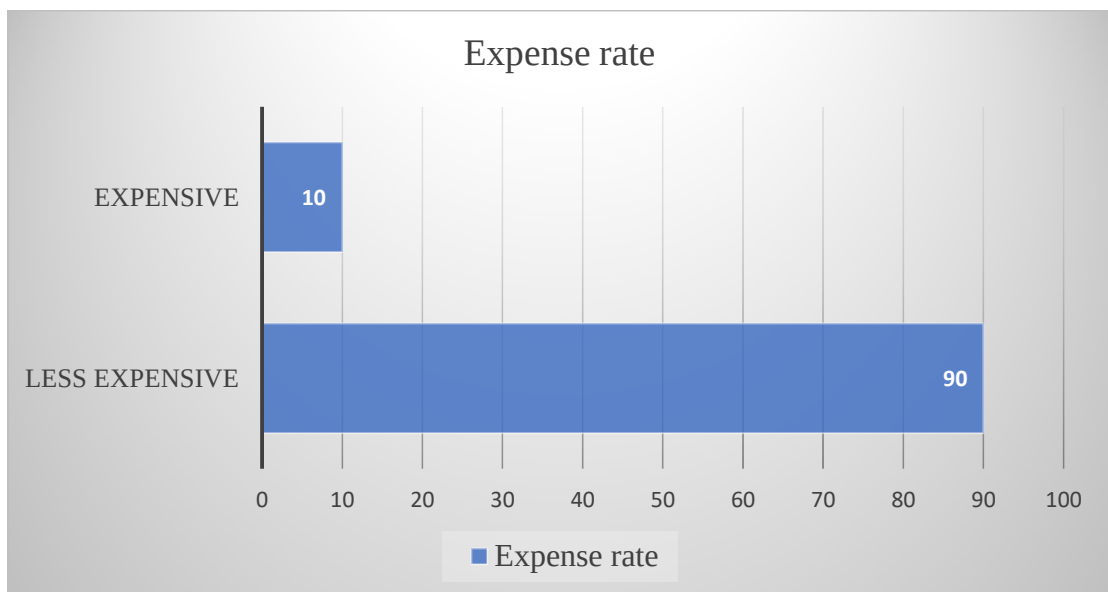
On the basis of human instinct satisfaction is a relative thing. Where this data is representing a large number of respondents almost more than half of the population expressed their satisfaction regarding the verdict comes from the village court. More than one fifth of the total respondent are not happy about the verdict and they are likely to go for the next station which is district court for appellate division.

Figure 4: Level of influence on the basis of party politics



Party politics was not an issue before 2015. Nowadays political partisan situation moreover always there are two different side in favor and against of elected up chairman and member could be a factor during the village court system. In this particular case almost more than half of the total respondents gives their opinion that there is no biasness or influence in the entire proceedings of village court. On the contrary around 40% are saying that there is room for influence in the judicial procedure of village court system.

Figure 5: Level of expense in village court system



As it discussed earlier village court initiated with an aim to reduce the expenses and with a limited time it will deliver the justice to the local people. It will be helpful to reduce the pressure of the district judicial system. The figure is showing the highly positive review in favor of less expensive option. Remaining people who are claiming it as expensive they belong to pro poor category where a minimum amount is turning into a burden for them.

8. Prospects and challenges

The vast majority of those who were polled from the specific response are pleased with the way the jury panel for the village court has been assembled. Only one in five people are unhappy with the jury. During the course of the operation of the entire process, it is possible for some people's personal reflection to become constrained as a result of the choices made by other stakeholders. A small number of individuals have maintained their silence due to the fact that they do not belong to any party that is the directly connected to the process. The field report paints an accurate picture of the current situation based on the opinions of the people who were asked. Because the law allows each side to have one representative, virtually the entire public is given the opportunity to select the individual they want to serve as their representative on the jury panel. On the basis of human instinct, satisfaction is something that varies from person to person. Whereas the survey report is representative of a vast number of respondents, almost more than half of the

population stated their satisfaction with the decision that was handed down by the village court. More than one fifth of all respondents are unhappy with the result, and it is possible that they will go to the next step, which is the district court for the appeal division.

Before 2015, there was no contention over party politics. The political partisan scenario that exists in today's society, in addition to the fact that there are always two distinct camps arguing for and against the election of a chairman and members, may be a factor in the operation of the village court system. In this specific instance, almost more than half of all respondents provide their view that there is no bias or influence in any of the processes that take place in the village court. On the other hand, somewhere in the neighborhood of forty percent of people believe that there is opportunity for influence in the judicial process of the village court system. As was mentioned before, the establishment of a village court was motivated by the desire to cut costs and, within a constrained amount of time, to bring justice to the residents of the surrounding area. It will be beneficial to alleviate some of the stress that is being placed on the district justice system. According to the results of the survey, the alternative with the lower cost has received very positive feedback. The remaining people who are complaining that it is too expensive are in the pro-poor category, which means that even the smallest payment is becoming difficult for them to manage.

Simply having a government is not sufficient in any circumstance, however, and this is especially true in the context of Bangladesh. Throughout the years, the government has launched a large number of beneficiary projects and programmes; however, there are instances in which the return does not meet the expectations of those who make decisions. Whenever individuals do not possess sufficient awareness and do not have a strong desire to realize their own rights, the initiative loses its significance. Despite the fact that this initiative is now being implemented as a pilot programme, there is still a significant lack of funds to operate the village court proceedings. Additionally, there is a lack of suitable logistic support, a lack of competent human resource, and the necessary infrastructure, all of which have made it more difficult to operate this system in an appropriate manner. The chairman can be nominated from any political party, and the election is made by the use of the universal adult franchise. The chairman of this village court is responsible for everything relevant to his or her designated role. There are times when a great number of requests and statements are restricted or cannot be fully expressed as a result of the power exercise from the chairman of the UP. This is not a good sign for the entire procedure that is intended to ensure that justice is served to the people who live in rural areas. The jury board members who are working in the village

court do not have any judicial training and do not have the appropriate expertise when it comes to the penal law, which increases the likelihood that justice will not be served. Furthermore, the officials who are working for it, such as the UP secretary and other secretaries, do not have the appropriate training for operating the process. In addition to this, they have their regular duties, which makes it difficult for them to run the process in an appropriate manner. The absence of proper supervision by higher authorities, such as the Upazilla parishad or the district judicial representative, is a significant problem that can easily result in corruption and a lack of accountability to the authority. As a result, the road map that leads to justice for the masses of people will be blocked. Last but not least, the local court does not have a favorable attitude towards women. Despite the fact that there are still some topics that are extremely sensitive from the standpoint of women, the atmosphere should be entirely hospitable to women in order to guarantee their rights. However, there are times when the overall scenario is not able to guarantee the appropriate environment and safety for delicate issues. This is something that needs to be solved in order to enrich the culture of the village court in rural areas of our country.

Analysis of the Existing Village Court

Every innovation in regard to implement the service, either it could be new dimension or modification of something already exist in the society. This village court has some different aspect to analysis from the perspective of SWOT analysis which can reflect perfectly more than any other angle to describe. It has been discussed into four different dimensions after analyzing the records from previous years²⁷.

Strength: The rules and procedures for the village courts are very specific and well defined. The jury board is formed from the elected member and there is an openness for each party to include their representatives. There is an effort to ensure the justice through well defined jurisdiction. There is an option from the state patronization through district courts for instance, sometimes district court delegate the small disputes to the village court jurisdiction. Have a relatively active and permanent local level paternal institution like union parishad. It has a certain level of assistance at least in project areas.

Weakness: The jury board are not well trained and inexperienced in terms of judicial system. There has been a lack of logistic support and proper monitoring mechanism. In order to operate the village court there is no distinguished human resource,

²⁷ Bhuiyan, M. S., Islam, M. S., & Salam, M. F. (2019). Access to Justice through Village Court for Rural Poor: The Case of Bangladesh. *International Journal of Publication and Social Studies*, 4(1), 1-10. <https://doi.org/10.18488/journal.135.2019.41.1.10>

existing work force of union parishad has to deal with the issue. Although during the phases some NGOs provided additional work force on a contract basis. There has been a male dominant scenario found in reality.

Opportunity: It has been created an easy access to justice specially for rural people. Moreover, the village court creates a speedy trial and verdict where less costly in compared to urban centric formal judicial access. It also reduces the pressure of formal justice system which helped in maintaining role on social peace. It created a great deal to flourish the leadership development in the field of dispute resolution.

Threats: There has been a possibility of biasness in judgement which is completely abuse of power and authority²⁸. Among the jury board there could be conflict which doesn't have a formal way out, it has to be done by themselves. Sometimes it leads to unfinished decision which creates a number of pending cases.

9. Conclusion with recommendations

Village Court jurisdiction must be increased from 75000/- to 1 lack or more than this for the betterment of dispute resolution. The government and non-governmental organizations (NGOs) require to set aside funds or provide help in order to build "Court Rooms" and other forms of logistical assistance for all of the UPs. Under the ACVP project government has to appoint a special duty officer to manage the official paperwork and schedule for the village court. Chairman and UP secretary have their own routine work, it's becoming burden for them to do the necessary task before the final court proceedings. If each case is successfully resolved, the chairman and members of the VC must be received an additional honorarium as a reward for their hard work. Building UP's capacity as well as increasing its efficiency and improving its officials' knowledge and skills is also highly important for the administration of justice through UP.

The Village Court needs to have its own distinct and sufficient financial budget allocated by the government. The government must fill the position of honorary magistrate in the Village Court with a retired public servant, such as a former member of the local army or police force, or an educator who has previously worked in the area. To ensure that the Village Court is both active and functional, a select few additional members should be nominated for terms ranging from three to five years and awarded honoraria. For the purpose of bringing the concept of village

²⁸ Government of Bangladesh (2012), "Review of Social Barrier and limitation of Village Court", Activating Village Court in Bangladesh Project (AB), Local government Division, Ministry of Local Government, Rural Development and Cooperatives, GoB.

courts to the attention of the general public, the government has to launch a comprehensive public relations and advocacy campaign across both print and electronic media. The activities that take place in the Village Court must be supervised and monitored on a consistent basis by the appropriate authority. In addition to the United Nations Organization, the supervision of the Village Court has to include the Deputy Director of Local Government and the Chief Judicial Magistrate. The monitoring authority ought to offer the official from the village court some form of technical help. To strengthen the capabilities of UP chairmen, UP members, secretaries, and other local elites who are frequently nominated as a representative of the Village Courts once a year, the government has to organize appropriate training programs on the Village Courts system. These programs must be designed to educate participants on how the Village Courts system works. In addition to these training classes, the secretaries also have to receive supplementary training for the management of records.

In rural Bangladesh, dispute resolution through local government is crucial for citizens, particularly the impoverished who lack access to formal courts. Transformation of local justice is key. Enhancement of inclusiveness and equity as part of Bangladesh's larger local government reform. By providing fair arbitration that ensures justice and human safety, the local court can help bridge Bangladesh's informal and official legal systems. To improve the impartiality of village courts, policymakers have to consider restricting the authority of the UP chairperson, implementing refusal rules, public advertising of sessions, and allowing parties to dismiss panelists. Consistently applying formal law to village courts may be impractical and unwise. Fairness can be achieved by defining fundamental rights that village court rulings must adhere to. A pilot programme is being implemented by the government to enhance the effectiveness of village courts. This programme aims to train UP members, expand village court jurisdiction, streamline decision enforcement, establish proactive judicial supervision, and provide administrative assistance for court operations. Village court programme pilot phase will be expanded to enable all UPs to activate village courts within their jurisdictions. We must reassess rule of law and decentralization movements to harness new energy and resources for local justice improvements. All parties the government, civil society, NGO, UN and donor agencies must collaborate to establish village courts in each Union to promote fairness in conflict resolution and defend the human security of rural people in Bangladesh.

