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CONTENTS

Title / Author(s)	Pages
Gambia's Genocide Claim against Myanmar: An Appraisal on Jurisdiction of International Court of Justice (ICJ) ATM Enamul Zahir Dr. Sayeeda Anju	1-11
Dowry Statutes: A Vain Venture Dr. Begum Asma Siddiqua	12-28
Legal Response to Activate the Village Courts in Bangladesh: Prospects and Challenges Dr. Md Abdur Rahim Mia	29-49
Settlement of Disputes under International Civil Aviation Organization Dr. Md. Sahal Uddin ATM Enamul Zahir	50-62
Reforms in Juvenile Justice Laws: Bangladesh Perspective Dr. Nahid Ferdousi	63-77
Development of Laws Regarding Transfer of Property in Bangladesh: An Appraisal KMS Tareq	78-93
Cell Tower Radiation and International Standards on Limiting Exposure: A Critical Appraisal Md. Raisul Islam	94-118
Cybercrime Against Women in Bangladesh: Issues, Challenges and Legal Response Md. Safiullah Md. Abdur Rahim	119-135
Reintegration of the *Hijra* People into the Mainstream of Society in Bangladesh: A Socio-Legal Study Md. Salauddin Saimum	136-148
Post-Divorce Maintenance of a Muslim Woman: A Critical Analysis in the Perspective of Indian Sub-Continent Md. Tasnim Ferdous Md. Nadir Khan	149-163
Assessing Legal and Institutional Framework for Natural Gas Extraction in Bangladesh Mst. Momotaz Khatun	164-189
A Critical Analysis of Parents' Maintenance Act, 2013 in Bangladesh Mst. Rezwana Karim	190-206
The Prevention and Suppression of Human Trafficking Act, 2012: A Critical Analysis Uzma Shukrana Nasmin Jabin Noor	207-224
বাংলাদেশে মুসলিম উত্তরাধিকার আইনে পুত্র ও কন্যা সন্তানের অধিকার: একটি পর্যালোচনা মোহাম্মদ হেদায়েতউল্লাহ	225-246

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Gambia's Genocide Claim against Myanmar: An Appraisal on Jurisdiction of International Court of Justice (ICJ)

ATM Enamul Zahir*
Dr. Sayeeda Anju**

Abstract

Gambia, being a party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention), brought a case against Myanmar (also a signatory to the Convention), before the International Court of Justice (ICJ) on November 11, 2019. The aim of this paper is to focus on the jurisdiction of ICJ based on arguments forwarded by both parties and findings of the ICJ with reference to cited cases and relevant international law. The cusp of discussion of this article is how the Court liberally interpreted certain core aspects of its jurisdiction in order to entertain the application forwarded by Gambia; whether Gambia without being directly affected, has *locus standi* and *prima facie* standing to bring, and whether, the ICJ having considered the same has the *prima facie* standing to entertain, the matter having special regard to the fact that Myanmar reserved certain core articles of the Genocide Convention relating to jurisdiction.

Keywords: Jurisdiction of ICJ, Interpretation, Affected Parties, Treaty Compliance

1. Introduction

On November 11, 2019, Gambia instituted a case against Myanmar before the International Court of Justice (ICJ) the principal judicial organ of the United Nations (UN) requesting for the indication for provisional measures in the backdrop of the violence of Myanmar Security Forces towards the Rohingyas.[1] The case is about the

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[1] Available at-https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf accessed on 21. 05.2020

application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948.
ICJ is concerned with international civil cases. It has a twofold role, to settle legal disputes between disputing signatory States and to give advisory opinions on legal questions referred to it only by duly authorized UN organs and specialized agencies.[2] The International Criminal Court (ICC) created by Rome Statute[3] was running from 2002 to deal with most serious international crimes and crime of Genocide is one of them. Myanmar is not a party state to Rome Statute and the place of occurrence of the referred incident is within Myanmar therefore the ICC will not entertain a case against Myanmar except for a specific reason like- the matter send by the Security Council to it[4] or the prosecutor initiated the investigation *proprio motu* (on its own initiative)[5] on the basis of any information.[6]

Initially, this created an issue as to why a criminal matter was taken at hand by an inherently Civil Court and whether Gambia had the *locus standi* to bring the matter forward. The ICJ took the present case under Article IX of the Genocide Convention[7] treating it as a contentious one. The ICJ applying the 'common interest' principle clarified the issue stating that signatory parties are entitled to invoke compliance of treaty provisions by other signatories although the seeker is not directly affected. Consequently redress against the breach of a treaty obligation, being a purely civil matter may be sought for by a signatory State against any other although that alleged breach led to possible international criminal offences such as alleged Genocide in this case. Hence, the matter at hand as rightly forwarded by Gambia and accepted by the Court is not of a criminal matter, but ensuring compliance for treaty provisions.

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2 Article 96 of the United Nations Charter

3 Rome Statute was signed in 1998 and the Court began to operate from 2002

4 Article 13 of the Rome Statute of the International Criminal Court 1998

5 *Ibid*, Article 15

6 However, prosecutors of ICC got permission to make investigation in 14.11.2020. For detail see,https://www.icc-cpi.int/Pages/item.aspx?name=pr1495 accessed on 16.11.2020

7 Any ratified States entitled to forward a dispute to the International Court of Justice to verify the implementation status of the provisions of the Convention which is mostly created to establish humanity and to end impunity

Gambia, based on information of UN Fact-finding mission,[8] accused Myanmar of Genocide which the latter vehemently denies to this day.[9] However, this being a trial matter is beyond the scope of the article. Besides, the provisional tasks directed by the ICJ to Myanmar to take necessary actions for prevention of destruction and ensuring consideration of relevant information related to allegations of acts under the Genocide Convention and to report back to the ICJ at directed intervals are outside the scope of this article as well.[10] The paper is based on documentary sources especially the submissions of the parties and findings of the ICJ collected from internet resources.

2. Nature of the Case and Jurisdiction of ICJ

The petition filed by Gambia before the ICJ claiming that Myanmar's role to protect a group called Rohingya reflects non compliance for the vested obligation of the Genocide Convention. Gambia, being state party to the Treaty since 1978, conveyed the message before the ICJ under Article IX of the Convention.[11]

On plain reading of the said article it appears that only contracting parties to dispute may seek redress from the ICJ under this Convention. However, as per a Fact-Sheet about The Genocide Convention, available on the website of "United Nations Office On Genocide Prevention And The Responsibility To Protect", ICJ maintains that the obligations under Genocide Convention have a supervisory ability in that those contracting parties who have competency to convince others are duty-bound to apply promising

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[8] The Independent International Fact-Finding Mission on Myanmar established by United Nations Human Rights Council in March 2017 and ended in September 2019. The reportis available at- https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx., accessed on 6.5.2020

[9] Md. Rizwanul Islam, 'Gambia's Genocide Case Against Myanmar: A Legal Review-A look at the prospects for the ICJ case, based on past precedent and international law' *The Diplomat* November 19, 2019 available at: https://thediplomat.com/2019/11/gambias-genocide-case-against-myanmar-a-legal-review., accessed on 05.05.2020.

[10] Kawser Ahmed, 'What is next in *The Gambia v Myanmar*?' Law and Our Rights, *The Daily Star*, February 25, 2020

[11] *Supra* 7

possible preventive measures against, including but not limited to, other party states.[12]

Myanmar being one of the early signatories to the Genocide Convention has never been contended on the Rohingya issue which has been continuing for decades as an international concern[13] until now. Gambia here used the extraterritoriality of the obligations under the Convention to bring Myanmar before the ICJ which entertained the same imposing interim preventive measures.[14]

Essentially, the ICJ entertained Gambia's application via Article 36(1) of the Statute of Court which allows for such petitions to be accepted regarding the Conventions and Treaties in force coupled with Article IX of Genocide Convention which enshrines established general customary international legal principles relating to genocide and which none of the parties had reserved.

The *Gambia v Myanmar* (2020) Case has brought to light manifold academic anomalies regarding the applicability of Genocide Convention and its prescribed duties for ratified states along with scope of applicability of the governing Statute of ICJ. This article is only appraised with the jurisdictional aspects of ICJ and focuses mainly on the points raised by both parties to the dispute on that matter and the finding of the ICJ wherever it is available.

2.1 *erga omnes* and *ergaomnes partes*

These two doctrines of international customary law enshrine the idea that certain duties establishing certain rights globally are owed by all states towards all states. The doctrines have been discussed in this case in details to find out the *locus standi* of Gambia to institute this case. Arguments for and against Gambia's standing and the court's findings are summarily discussed in this section.

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12 https://www.un.org/en/genocideprevention/documents/Genocide%20 Convention-FactSheet-ENG.pdf., accessed on 02.09.2020.

13 The Annan Commission's final report that was released in 24.08. 2017, available at: https://www.kofiannanfoundation.org/mediation-and-crisis-resolution/rakhine-final report, accessed on 06.07.2020

14 International Court Of Justice, Press Release, Unofficial No. 2020/3, 23 January 2020 available at: https://www.icj-cij.org/en/press-releases, accessed on 03.07.2020

2.1.1. Gambia

The Gambia has maintained in its application that the failure of Myanmar to prevent Genocide amounted to violation of *jus cogens* quoting the ICJ which acknowledged the norm prohibiting genocide as a basic part of international law.[15] Besides, the obligations under the Genocide Convention are owed *erga omnes* and *ergaomnes partes*.[16]The Gambia specifically alleged that Myanmar's steps against the Rohingyas amounts to a serious breach of the norms and protocols of its own signed commitments.

2.1.2. Myanmar

Myanmar in its submission challenged *locus standi* of Gambia as it is not directly affected asserting the *locus standi* of Bangladesh for the same reason which perhaps amounts to an indirect admission of the allegations brought against it. Practically, Myanmar intends to strike out Gambia on technical grounds subject to the doctrines of *erga omnes*[17] and *erga omnes partes*.[18]

To that end, Myanmar tried to differentiate the doctrines of *erga omnes* and *erga omnes partes* by citing the judgment given by the ICJ in the *Barcelona Traction Case*[19] where the court contrasted the rights which

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15 Enforcement of Basic law created for the sake of humanity *(Bosnia and Herzegovina* vs *Serbia and Montenegro),* Judgment of 26 February 2007, *ICJ Reports* 2007, p. 111, para. 161 *referring Congo armed conflict between Congo andRwanda, ICJ Reports* 2006, p. 32, See paragraph64 of the *Gambia vs Myanmar* case

16 Paragraph 20 of Gambia's submission of the case referring to – implementation of provisions of Genocide Convention *(Croatia* vs *Serbia), Judgment, ICJ Reports* 2015, pp. 45-47, paragraph 85-88 (citing compliance of the norms of basic law of war *(Bosnia and Herzegovina* vs *Serbia and Montenegro), ICJ Reports* 2007 (I), pp. 110-111, paragraph 161

17 *Erga omnes* means towards all or towards everyone coming from Latin term https://en.wikipedia.org/wiki/Erga_omnes, accessed on 4.6.2020

18 International Law Commission interpreted, an *erga omnes partes* obligation is 'due to a set of States' and used as shown collective views of a cluster. See, Marco Longobardo, Genocide, Obligations *Erga Omnes*, and the Responsibility to Protect: Remarks on a Complex Convergence, *The International Journal of Human Rights*, 19(8), 2015, pp. 1199-1212, DOI: 10.1080/13642987.2015.1082834

19 *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain),* ICJ Reports 1970, p. 32, para. 33

entered "into the body of general international law" [20] and those which were the obligations owed both to the state and international community as a whole.

Myanmar further stressed the traditional consensual jurisdiction of the ICJ confining its jurisdiction to matters brought before it only by consenting parties while warning that entertaining Gambia's petition would substantively broaden the jurisdiction of the ICJ.

Moreover, in all the cases cited[21] by Myanmar apart from the *Barcelona Traction Case,* in favour of its submission, the applicants were directly affected States – referring to Article 42 (1) (b) of the International Law Commission Report on Responsibility of States for Internationally Wrongful Acts, 2001.[22] The provision included there that 'a group of state including that state' that means the case forwarder state must had to face anything along with other state and at present it alone come to file the case on behalf of all. And hence such cases, unlike the present one, did not manifest *actio popularis.*[23]

Although in ICJ its decided cases has no binding force rather carry only persuasive value Myanmar repeatedly claimed that no previous precedent can be showed in favour of applying similar type *actio popularis.*All of the previous cases directly or indirectly had an interest which supports them to forward a matter before the Court.

Conclusively, Myanmar strongly maintained, if the Court allowed *actio popularis* that definitely would unlock the floodgates.

On the point of Gambia's standing seeking provisional measures, Myanmar maintained, referring to Article 41, paragraph 1, of the

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[20] *Ibid.*, para. 34, here referred Advisory opinion of ICJ on the question of legality of reserving of a core article of a Convention, ICJ Reports 1951, p. 23

[21] *Pakistan* v. *India* 11 May 1973; *Bosnia and Herzegovina* v. *Serbia and Montenegro,* 20 March 1993, *Croatia* v. *Serbia*; *Democratic Republic of the Congo* v. *Rwanda* 28 May 2002

[22] Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. accessed on 25.5.2020

[23] *Actio popularis* is one types of public interest litigation filed by one on behalf of others, the notion came from Roman penal law. Available at- https://www.google.com/search?client=firefox-b-d&q=actio+popularis accessed on 08.09.2020

Statute of ICJ, that the ICJ has only authority to indicate temporary measures in order to preserve either party's rights respectively.

2.1.3. The Court

The ICJ, after hearing both parties, coincided with Gambia, [24] paradoxically, opening the flood-gate. Substantively, the interpretation of the doctrines has been broadened. Possibly, setting a new precedent, the Court here has taken a purposive approach to interpretation as opposed to Myanmar's literal one.

3. *Prima Facie* Standing of the Court

Generally, a case is filed by a state has any directly affected reason to proceed before the world court as part of contentious issue. Unlike this case did not able to demonstrate any connectivity therefore always a matter of discussion.

3.1.1. Gambia

On the point of *prima facie* standing of the Court to entertain the petition, Gambia instituted the proceedings under Article IX[25] because Myanmar reserved Article VI[26] barring any international penal tribunal to try a crime of Genocide within its territory. Moreover, it also reserved Article VIII[27] disallowing parties of the treaty to knock the UN for prevention and suppression of genocide. The only way opens before party states to take assistance from the world court to ask another party state about justification of its performance.

3.1.2. Myanmar

Myanmar contended that since it reserved Article VIII, the pathway to invoke Genocide Convention by any [emphasis added] the contracting party is strictly legally not open. Moreover, since Gambia invoked Article IX, the prerequisite is to be a disputing party, which is not the case here. Thus, Myanmar here again confined itself to the black and white letter of the Convention without having any regard to the intention behind the formulation of the Convention.

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[24] Press release declared their standing with Gambia (paras 39-42), Supra note 14

[25] *Supra* 7

[26] Allegation of Genocide shall be tried by Tribunal

[27] Seeking interference of the United Nations

Myanmar maintains that in order for the ICJ to accept the case the former has to give voluntary and unequivocal indication in an indisputable manner to the latter on that matter.

3.1.3. The Court

According to the author's view the Court interpreted Article IX to entertain Gambia's petition under the same, the core prerequisite of that, as contended by Myanmar, being firstly, whether there was a dispute connecting to the application, interpretation and fulfillment of provisions of the Genocide Convention and secondly, whether there is a *prima facie* notion of dispute involving the contracting parties. The Court's observation that since the UN Fact-Finding Mission report – which perhaps is universally accepted - alleged violation of provisions of the Convention, Gambia, being a contracting party, has a *prima facie* dispute relating to the application, interpretation and fulfillment thereof and as a result the Court has power to accept such a petition throughArticle IX.

4. Background of Presenting Petition – Financial and other Support

Usually, it is not seen to forward a petition by one party backed or financially or in any other way supported by an international institution. In this particular litigation another most interesting topic marked before an international community that when an organization which is not a party may prepare a state to go forward to raise a point of complying of an obligation of a Treaty.

4.1. Gambia

Before coming to the ICJ, Gambia was, in fact, inspired by its position in the Ad hoc Ministerial Committee[28] of OIC.[29] That formed on an allegation of ignoring the basic liberty of a group named Rohingya by Myanmar. UN Fact-Finding Mission, further adding to Gambia's

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[28] Submission of Gambia referring to Resolution of OIC, Number 4/46-, available at: https://www.oicoci.org/docdown/?docID=4447&refID=1250, para. 11(a).accessed on 08.08.2020

[29] Organization of Islamic Cooperation is an inter-governmental organization of Muslim majority states consisting of 57 members, https://www.oic-oci.org/home/?lan=en – accessed on 08.08.2020

positive zeal, praised the efforts of Gambia and the logistical support of OIC to encourage and lead a case against Myanmar to the ICJ under the Genocide Convention. Subsequently, as a prerequisite to file a case and with an intention to seek redress before the ICJ, on 11 October 2019, The Gambia's Permanent Mission to the UN send to the Diplomats of Myanmar a *Note Verbale* [30] which is the direct communication between the two parties.[31]

4.2 Myanmar

Myanmar tried to brush off Gambia as a nominal applicant since the latter has been tasked and voluntarily funded by the OIC to bring about the claim. It also asserted that Gambia who chaired in the ad hoc committee of OIC for Rohingya, acted in a representative capacity to the OIC in this matter. Myanmar strongly argued that it is never happened that a State invoked contentious jurisdiction of the Court as a substitute or on behalf of an international organization and tried arguing that Gambia brought the case not as a contracting party to the Genocide Convention. Myanmar consequently warned the Court that it is over of the margins of Article 34[32] of the Statute which allows only for States to invoke the contentious jurisdiction of the Court.

4.3. The Court

Regarding Gambia acting as a 'proxy' the Court simply emphasised that it instituted the proceedings directly by mentioning own name admitting its rights as a contracting party to a multilateral Convention, that is, the Genocide Convention. The Court added that the fact that Gambia may have collected favour of whatever nature from other whose hearts bleed for the same that does not mean that Gambia is unable to enforce its legal rights under the Genocide Convention.

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[30] https://www.merriam-webster.com/dictionary/note%20verbale, accessed on 08.08.2020

[31] Thomas Van Poecke, Marta Hermez and Jonas Vernimmen, 'The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya', EJIL:TALK! *Blog of the European Journal of International Law*, November 21, 2019, available at: https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-Rohingya/accessed on 08.09.2020

[32] The Court is allowed to hear contentious petitions when the parties are States. The Court can receive relevant information from Public International Organizations but party must have to be a State

5. Findings and Observations

Although both the parties to the case have ratified the Genocide Convention, issue arose at the time of instituting the proceedings to test the compliance of a contracting party by another, on grounds of direct effect, whether the petitioner had standing or not having regard to the fact that Myanmar has not voluntarily and unequivocally accepted ICJ's jurisdiction wholly by reserving core articles of the Convention. The Court in dealing with the issue applied and interpreted *egra omnes* and *egra omnes partes* in this case on the basis of golden rule of interpretation which is in line with an assertion made by Gambia and contrast with those forwarded by Myanmar.

It seems that Myanmar made a gross mistake of not reserving Article IX which according to the ICJ is the operative part of the Convention to invoke jurisdiction of the ICJ.

Both Gamibia and Myanmar argued about the interpretation of the terms 'any party' and 'dispute between contracting parties' to bring the case in their favour. The Court, in its findings, did not discuss the term 'any party' since Myanmar reserved Article VIII.[33] The Court treated non-compliance of the Convention as a dispute between the contracting parties. Besides, since Gambia is not directly in the dispute with Myanmar the Court used the Fact-Finding Report to establish a *prima facie* dispute of non-compliance of Convention.

Gambia is backed by the OIC in this case which is unique in nature in international phenomena. Therefore, contracting parties may seek help from 3rd party international organisations. Although Myanmar rigorously raised the issue of OIC backing, the Court rejected the contention on the ground that the petition was submitted by Gambia in its own name.

Basing Myanmar's contention that, Bangladesh, being directly affected, has a legal footing as opposed to Gambia, could have brought the claim had it not reserved Article IX. However, it is opined that

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[33] Article VIII of the Convention inserted provisions to hammer the organs of UN to solve a crisis by any state party. Myanmar reserved it and present case was granted through Article IX hence the Court did not light upon Article VIII

Bangladesh still has recourse, if it wishes to join this ongoing proceeding, under Article 62 of the Statute[34] of the Court.[35]

6. Conclusion

Contrary to the widely held popular belief and/or practice, that ICJ has no jurisdiction over international criminal allegations, the ICJ, in this case, entertained Gambia's application from a purely civil point of view, namely, whether Myanmar has breached its commitment under a renowned international treaty based on the notion that every contracting parties are responsible for other contracting parties to ensure that compliance of Conventions in force. In reality, it cannot be said that it does not have implications from a purely criminal point of view. Nevertheless, the powers of the ICJ in entertaining the matter varies considerably from that of a purely criminal one such as the ICC in that the former would likely fail to impose any action on the administration of Myanmar which could be directly accused to have been actors behind the alleged breach. Regardless, what this case, in fact, does from a purely academic point of view is that it likely widens the scope of ICJ in its contentious jurisdiction in that any breach of provisions of the Convention may be challenged by any and all contracting parties against the accused without the latter voluntarily accepting the jurisdiction of the ICJ in that matter. Although, this rather bold legal attempt, paradoxically, has the possibility of opening flood-gates as warned by Myanmar, it might also act as a deterrent factor in the international pane in that states are likely to be more vigilant about the compliance of its international obligations a dire need of time regardless of the outcome of the case. In other words, the order may be a message for the states make unnecessary reservation to the operational articles of treaties that sometimes situation may be beyond calculation.

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34 Article 62 facilitates the State(s) which has an interest of a legal naturewhich may be any how exaggeratedby the judgment, toconvince the Court to be a part of that running proceeding

35 Law Interview: Failures by Myanmar to fulfill its obligations will be breaches of the UN Charter, Law and Our Rights,*The Daily Star*, January 28, 2020, https://www.thedailystar.net/law-our-rights/news/failures-myanmar-fulfil-its-obligations-will-be-breaches-the-un-charter-1859962

Dowry Statutes: A Vain Venture

Dr. Begum Asma Siddiqua*

Abstract

Parliament has enacted the Dowry Act, 2018 there by repealing the Dowry Act, 1980. The two Acts have been compared and the new law has been examined thoroughly. The purpose of the enactment of the new law and repealing of the old is neither clear nor justifiable. Rather unfounded enactment has resulted into an anomalous situation in interpretation and implementation of the law. The amendment made in section 11(c) of the *Nari o Shishu Nirjatan Daman Ain*, 2000 as directed by the High Court Division to make the offence compoundable is praiseworthy but it has also given rise to an anomaly in dowry related law. All the anomalies must be addressed to make the law effective.

Keywords: Dowry, systematic amendment

1. Introduction

The people have witnessed and experienced two dowry laws in their social life, the Dowry Prohibition Act, 1980[1] now repealed by the Dowry Prohibition Act, 2018[2] along with anti-dowry provisions enunciated in (the Prevention of Women and Child Repression Act, 2000)[3] and supplemented by the Domestic Violence Act, 2010.[4] The

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1 Act no. XXXV of 1980 was amended in 1982, 1984 and 1986 by the Dowry Prohibition (Amendment) Ordinance, 1982 (Ordinance No. XLIV of 1982), the Dowry Prohibition (Amendment) Ordinance, 1984 (Ordinance No. LXIV of 1984) and the Dowry Prohibition (Amendment) Ordinance, 1986 (Ordinance No. XXVI of 1986)

2 Act no. 39 of 2018

3 Act 8 of 2000 commonly known as *Nari O Shishu Nirjatan Daman Ain*, 2000; the present law was enacted during the Awami League Government. It repealed the earlier law titled *Nari O Shishu Nirjatan (Bishesh Bidhan) Ain1995* [the Oppression of Women and Children (Special Provisions) Act, 1995, Act no. 18 of 1995] enacted during BNP government; which repealed another earlier law titled Cruelty to

presence of dowry law from the 1980s seems to have misfired in both ways. It has failed to protect the victim women as well as prevent the abuse use of the law. It does not seem that the new law in the 2018 would be able to bring any better result as it is a rearrangement of the provisions of the 1980 dowry law.

The preamble of the new Dowry Act, 2018 does not declare to consolidate old laws. There is no substantial reenactment. The only objective is to enhance punishment to check the crime. It appears that this law purports to send a political message to the people of a welfare government rather than being one. A statute needs to be read as a harmonious whole whenever reasonable, with separate parts being interpreted within their broader statutory context which is oblivious in the Dowry Act, 2018. The Dowry Acts, the former or the latter is meant for protection of brides and preservation of family and the enjoyment and appreciation of the social structure. These Acts should have been of utmost importance for the general health, safety, and welfare of people and property. The enactment of second Dowry Act in 2018 does not make it a more effective legislation, neither there was a demand to enact a new one. An amendment in the existing Dowry Act, 1980 would have sufficed the need of the present day deliberations on dowry.

The Dowry Act, 1980 did not prove effective and the new Act with a supposed full force will also not be fruitful since this menace is given a socio-cultural validation by the society. This law is made to curb a social malaise by legal means but failed to make any impact on the parties to marriage from either obligation to pay or the right to demand dowry.

It is pertinent to mention that this article neither intends to delve into dowry, a forced demand of money, a social perturbation, generally seizing from the wife by the husband; and nor dower, also known as

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Women (Deterrent Punishment) Ordinance, 1983 (LX of 1983) promulgated by HM Ershad. The present law titled Prevention of Women and Child Repression Act, 2000 has been amended bythe Prevention of Women and Child Repression Act (Amendment) Act, 2003 and finally amended in 2020.

[4] Act 58 of 2010

Mahr or *Mahrana*, a compulsory consideration of Muslim marriage proceeding from the husband to the wife.

The aim of this paper is to make a comparison between the new and the old Dowry laws thereby showing the oblivious frame of mind of the law makers who failed to address the crux of the problem; and the anomaly resulted from the addition of a sole provision in the Dowry Act, 2018.

2. A Comparison of the two Dowry Acts

A comparison has been made for a proper understanding of the two dowry laws, the Dowry Prohibition Act, 1980 and the Dowry Prohibition Act, 2018.

2.1 Preamble

The Dowry Act, 1980 simply declared that to prohibit the taking or giving of dowry in marriages the law was enacted; whereas the Dowry Act, 2018 declares that it is expedient and necessary to enact a new law to reflect the demand of time considering its provisions at marriage or before or during continuation of marital life. To this end, the Dowry Act, 1980 was repealed. The Dowry Act, 2018 is quiet on its intention to amend or consolidate the old laws, statutory and precedent.

2.2 Dowry

Section 2 of the Dowry Act, 1980 defined dowry as any property or valuable security given or agreed to be given either directly or indirectly

by i) one party or ii) the parents of either party to a marriage or iii) any other person

to i) the other party to the marriage or ii) any other person

at i) the time or ii) before or iii) after the marriage as consideration for the marriage of the said parties;

An explanation was given with regard to a gift of the value of not more than five hundred taka by any person other than a party to the marriage should not have been deemed to be dowry unless they were made as consideration for the marriage of the said party.

A distinction was drawn between dower and dowry mentioning that dower was lawful for the Muslims.

Section 2 of the Dowry Act, 2018 clarifies the word party mentioning that it means groom or bride or groom or brides parents or in their absence groom or brides legal guardian or any other person directly connected with the marriage.

It defines dowry as any property or valuable security given or agreed to be given either directly or indirectly

by i) one party to a marriage

to i) the other party to the marriage

at i) the time or ii) before or iii) after the marriage as consideration for the marriage of the said parties.

The section further clarifies that dowry does not include gifts given at the marriage to any party by the relatives, friends and well wishers of any party to the marriage .

It also draws a distinction between dower and dowry mentioning that dower is lawful for the Muslims.

The Dowry Act, 2018 has lifted the bar of dowry against a gift of any value. The Dowry Act, 1980 had been specific that a gift of more than five hundred taka was not to constitute a dowry.

2.3 Penalty for demanding dowry

Section 4 of the Dowry Act, 1980 penalized a person who demanded dowry, directly or indirectly, from the parents or guardian of a bride or bridegroom, with imprisonment which may have extended from one to five years, or with fine, or with both.

Section 3 of the Dowry Act, 2018 penalizes any party who demands, directly or indirectly, from the other party to the marriage any dowry, with imprisonment from one to five years, or with a fine which may extend to 50,000 (fifty thousand) taka or with both.

The Dowry Act, 2018 has distinctively mentioned the amount of fine which may extend to fifty thousand taka.

2.4 Penalty for giving or taking dowry

Section 3 of the Dowry Act, 1980 sanctioned a person who gave or took or abetted the giving or taking of dowry, with imprisonment which may have extended from one to five years or with fine, or with both.

Section 4 of the Dowry Act, 2018 sanctions a party who gives or takes or abets to give or take or makes agreement with the intention to give or take dowry, with imprisonment which may extend from one to five years or with a fine, which may extend to 50,000 (fifty thousand) taka or with both. The amount of enhanced fine is categorically mentioned.

2.5 Agreement for giving or taking dowry to be void

Section 5 of the Dowry Act, 1980 declared any agreement for the giving or taking of dowry should have been void.

Section 5 of the Dowry Act, 2018 also declares any agreement for the giving or taking of dowry shall be void.

2.6 Penalty for false institution of cases

Penalty for false institution of a case was not available in the Dowry Act, 1980 but it was later inserted in section 17 of the*Nari O Shishu Nirjatan Daman Ain*, 2000 which in fact existed for more than one and a half century in section 211 of the Penal Code, 1860.

Section 6 in the Dowry Act, 2018 Act reiterated the same provision with an enhanced penalty. It says, a person who with intent to cause injury to any person, institutes or causes to institute a case or a complaint under the Dowry Act, 2018 against that person, knowing that there is no just or lawful ground for such case or complaint against that person, shall be punished with imprisonment which may extend to five years or with a fine, which may extend to 50,000 (fifty thousand) taka or with both.

2.7 Nature of Offence

Section 8 of the Dowry Act, 1980 declared every offence as non-cognizable, non-bailable and compoundable.

Section 7 of the Dowry Act, 2018 differs with the Dowry Act, 1980 in declaring a dowry offence as cognizable offence whereas the Act of 1980 placed within the category of non-cognizable offence; the other two nature of the offence remaining as non-bailable and compoundable.

2.8 Cognizance of the Offence

Section 7 of the Dowry Act, 1980 ascertained thata magistrate of the first class or any other court superior to it shall try any offence under this Act; such court could take cognizance on a complaint made within one year from the date of the offence; and it was made lawful for a magistrate of the first class to pass any sentence authorised by the Act of 1980 on any person convicted of an offence under this Act.

Section 8 of the Dowry Act, 2018 simply declares the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) applicable for the investigation, trial, appeal and all other related matters for offences committed under the Dowry Act, 2018.

In effect section 8 of the Dowry Act, 2018 reproduced the equivalent to the Dowry Act, 1980 because section 32 (1) of the Code of Criminal Procedure, 1898 authorizes only a Magistrate first class or any Court superior to it to prescribe punishments endorsed in the Dowry Act, 2018.

2.9 Power to make Rules

Section 9 of the Dowry Act, 1980 expressed that the Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act. It laid down that such rule should be subject to parliamentary control.

Section 9 of the Dowry Act, 2018 expresses in the same tone as the earlier Act that the Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

The new Act escaped the provision of parliamentary control keeping it wide open for the executive body to make rules without any direct supervision.

The Dowry Prohibition Act, 2018 was supposed to be a comprehensive law if a new law on dowry was the demand of time as claimed in the

preamble of the new Act. Unfortunately, the Act of 2018 is only a rearrangement of the Dowry Act, 1980. The Dowry Act, 1980 was a complimentary version of the Dowry Prohibition Act of 1961 applicable to India. Amendments to the Dowry Act, 1980 have been made following the steps of the Act of 1961. The parliamentary debate on the Dowry Act, 1980 or the Dowry Act, 2018 has not been made available online. Only this much could be learnt with regard to the Dowry Act, 2018 that the State Minister for Women and Children Affairs, Meher Afroze, placed the Bill which was sent to the parliamentary standing committee on women and children for further examination. The committee has been asked to submit its report within 30 working days.[5] It is not clear from the report as to what was the issue for further examination of the bill.

3. Examining the new Statute

Examination of the Dowry Act, 2018 reveals differences in four areas, the Preamble, definition of dowry, enhancement of punishment and institution of false cases. The areas mentioned are examined to justify the changes brought.

3.1 Preamble

The Preamble states the purpose, aims, and justification of the Act. The Preamble of the Dowry Act, 2018 runs as, 'Whereas it is expedient and necessary to enact a new law to reflect the demand of time by repealing the Dowry Prohibition Act, 1980 (Act No. XXXV of 1980) considering its provisions at marriage or before or during continuation of marital life; therefore it is enacted as follows'

Since there was no parliamentary debate available it is not clear why was it expedient and necessary to repeal the Dowry Act, 1980. Who demanded, where and when to repeal the Dowry Act, 1980 and to enact the Dowry Act, 2018 is also not clear. Usually the Preamble says that the Act is made to define, consolidate and amend a law when a former Act was in existence. In case of a new Act on a new subject it is made to define, amend and codify. The Dowry Act, 2018 has no intention, as it appears, of doing any of these.

[5] Star Online Report 'Dowry prohibition bill placed at parliament' June 25, 2018

3.2 Definition of Dowry

Dowry does not include gifts given at the marriage to any party by the relatives, friends and well-wishers of either of the party to the marriage.[6] The definition of dowry has been narrowed down. Whereas it was important to widen the definition of dowry to protect the society, the Act seems very exuberantly made shifting towards gift instead of dowry. It is pertinent to remark whether exclusion of gifts from the definition of dowry by relatives, friends, and well-wishers of the parties is an intentional omission or not. It is more relevant to ask as the Dowry Act, 1980 had a restriction on the value of such kind of gift not exceeding five hundred taka. The Dowry Act, 2018 has lifted the ban on the value of gift. Now, gift of any amount will not constitute dowry under the Dowry Act, 2018.

3.3 Revising of Punishment

The punishment for demanding, directly or indirectly[7] or giving or taking, and also anybody abetting to give or take or making agreement to give or take[8] dowry shall be liable to punishment which may extend to five years and not less than one year or with a fine which may extend to 50,000 (fifty thousand) taka or with both. Fifty thousand taka fine has also been imposed in the new edition of section 6 for institution of a false case for dowry. Enhancing fine to 50,000 (fifty thousand) taka is the only addition in the Dowry Act, 2018.

3.4 Penalty for false institution of cases

A new provision against false institution of case has been introduced in section 6 of the Dowry Act, 2018. If the Dowry Act, 2018 has now included a provision against false accusation of dowry complaints in section 6, it could as well include suicidal deaths and hurts so often practised upon the wives by the husbands or the in laws. Penalty for such offence is provided in section 11 of the *Nari O Shishu Nirjatan Daman Ain*, 2000

[6] Last part of Section 2(b) of both Dowry Act, 1980 and Dowry Act, 2018

[7] Section 3, Dowry Act, 1980

[8] Section 4, Dowry Act, 2018

This provision was not included in the Dowry Act, 2018.[9] Keeping in line with sections 3, 4 and 6 of the Dowry Act, 2018, section 11 of the*Nari O Shishu Nirjatan Daman Ain*, 2000 should have been rewritten in the new Dowry Act, 2018. Section 11 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 (Prevention of Repression of Women and Children Act, 2000) provides,

"if the husband of a woman or husband's father, mother, guardian, relatives or any other person of the husband's side causes death or attempt to cause death to that woman for dowry or causes grievous hurt or simple hurt to that woman that husband, husband's father, mother, guardian, relatives or persons –

a) shall be sentenced to death for causing death or shall be sentenced to imprisonment for life for attempting to cause death and in both cases shall also be liable to fine,

b) shall be punishable with lifelong rigorous imprisonment or maximum twelve years or minimum five years rigorous imprisonment and shall also be liable to fine for causing grievous hurt,

c) shall be punishable with maximum three years, but minimum one year rigorous imprisonment and shall also be liable to fine for causing simple hurt."

Dowry deaths are now dealt with by the High Courts under section 106 of the Evidence Act, 1872 shifting the burden of proof to the husband to show how the wife met with the death while they were enjoying the company of each other.[10] Following the High Court Division decision by an executive legislation amendment has been brought into section 11(c) of the *Nari O Shishu Nirjaton Daman Ain,* 2000

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[9] In 2019 the High Court released the full text of a judgment directing the government to amend the *Nari O Shishu Nirjaton Daman* Act-2000 in six months for making the offences under its Section 11 (Ga) compoundable, Star Online Report, 'Nari O Shishu Nirjaton Daman Act: HC releases full text of its judgment' May 12, 2019

[10] Section 106 of the Evidence Act, 1872 is applied for all cases where one of the spouses meets with while in the company of the other

to make the offence compoundable.[11] It is interesting to note that this amendment will not totally conform with the Dowry Act, 2018. The amendment will allow bail for a harsh offence under *Nari O Shishu Nirjaton Daman Ain,* 2000 whereas bail will be denied in a comparatively lenient offence under the Dowry Act, 2018. This is discussed in Section 5 of this article.

Section 6 of the Dowry Act, 2018 has introduced a similar provision as mentioned in section 211 of the Penal Code, 1860 and section 17 of the*Nari O Shishu Nirjatan Daman Ain*, 2000.

It was comprehended, after the introduction of the Domestic Violence Act, 2010, a forum had been opened to give relief to the sufferers' family abuse. Abuse in a family is mostly done by a husband against the wife in marriage, the root cause being dowry.[12] As the DV Act, 2010 failed to release the resentment of the wife against the husband, there was always possibility of institution of a case against such anguish under the Dowry Act. This may or may not be an institution of a false case. The Dowry Act, 2018 has addressed the issue to save the husband and left the wife to suffer. The new Dowry Act, 2018 seems to tilt to one side of the society ignoring the women, the other half of the society. The new venture must fail if a holistic approach is not undertaken to free the society from the evils of dowry. An anomalous situation has arisen due to the introduction of section 6 in the Dowry Act, 2018. The inconsistency in the law among section 211 of the Penal Code, 1860, Section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 and section 6 of the Dowry Act, 2018 has been discussed under section 5 of this article.

3.5 Few More Amendments

A few more amendments have been identified in the area of nature of the offence, taking cognizance of the offence and to make Rules.

[11] By section 4 ofthe *Nari O Shishu Nirjatan Daman (Shongshodhon) Audhadesh* 2020 (Ordinance no. 4 of 2020) section 19(1) of the *Nari O Shishu Nirjatan Daman Ain*, 2000 was amended to make the offence compoundable under section 11(c)

[12] Shahnaz Huda, *Five Years after Bangladesh's Domestic Violence (Prevention and Protection) Act, 2010 Is it Helping Survivors ?* Plan International, Dhaka, 2016, p.10

3.5.1 Nature of Dowry Offence

Section 7 of the Dowry Act, 2018 stated a dowry offence shall be cognizable, non-bailable and compoundable whereas section 8 of the Dowry Act, 1980 declared a dowry offence to be non-cognizable, non-bailable and compoundable. The original Dowry Act, 1980 stated the offence as cognizable, non-bailable and compoundable. Section 4 of the Dowry Prohibition (Amendment) Ordinance, 1986 (Ordinance No. XXVI of 1986) substituted the word cognizable to non-cognizable. Section 7 of the Dowry Act, 2018 has made a parabolic journey to reinstate the original version of the nature of offence. Acognizableor a non-cognizable offence can be reported to an officer in charge of a police-station. No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class.[13] The shift made in changing the word from non-cognizable to cognizable is a better provision provided the police does its duty efficaciously.

3.5.2 Regarding cognizance of an offence of dowry

Section 8 of the Dowry Act, 2018 provides that the provisions of the Code of Criminal Procedure shall be applicable for the investigation, trial, appeal and all other related matters. The Dowry Act, 1980 contained the same rule regarding cognizance of a dowry offence. It said a Magistrate first Class will only try an offence of dowry under the Dowry Act, 1980. In addition, the Dowry Act, 1980 fixed a time for the complainant of one year from the date of commitment of the offence for the Magistrate to take cognizance.

3.5.3 Power to make Rules

Section 9 of the Dowry Act, 2018 states that the Government may by notification in the official Gazette make Rules to for implementing the provisions of the Act.

Section 9 of the Dowry Act, 1980 had the same words in its sub section 1 followed by the requirement of parliamentary control in subsection 2 over the proposed Rule to be executed.[14] The parliamentary provision on making Rules was a better provision but the Dowry Act, 2018

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[13] See for details sections 154-156, Part V Chapter XIV, Code of Criminal Procedure, 1898

[14] Section 9(2) of the Dowry Act, 1980

4. Justification for rewriting a new law

Rearrangement of sections with a few imprecise additions does not justify enactment of a new Act. The new contribution by the Dowry Act, 2018 has been made in the four areas as stated above. The explanation given at the beginning of the Dowry Act, 2018 for the reasons of its enactment is vague and the objectives the Act seeks to attain is absent.

It seems that encouragement to give gifts without restriction is realization of the Legislature of the reality of the society that people are not yet prepared to abrogate the social evil. It is obvious because the Dowry Act, 1980 restricted the value of gifts to differentiate it from dowry. Yet to lift the restriction on the value of gift is a kind of encouragement to allow dowry in another form.The Act has only enhanced the fine to fifty thousand taka keeping the other parts of the section intact. On the one hand fine has been increased, but on the other hand, the definition of dowry has been restricted.

Though not mentioned in the preamble, the introduction of penalty for false institution of cases seems to supply the Dowry Act, 2018 with the intention to consolidate the laws. Otherwise, this provision would be redundant as the same provision is available in the other two laws, namely the Penal Code, 1860 and the *Nari O Shishu Nirjatan Daman Ain*, 2000 as stated above. Considering the fact that the Dowry Act, 2018 could have been intended to consolidate the laws, then the difficulties confronted by the fair gender from their counterpart and his family causing death must have been addressed. This issue has been totally ignored.

From among the new four changes discussed here none of them are worth against the hard reality of the society. The Preamble has failed to focus on the intention of the Act. The definition of dowry has been turned into a pygmy and at the same time people are deceived with the enhancement of fine. The provision of false institution of cases is redundant as the Dowry Act, 2018 was not intended to consolidate. The legal justification for overriding the Dowry Act, 1980 is yet to be discovered. Moreover, section 6 of the Dowry Act, 2018 will somehow cause anguish among the lawyers and the judges to comprehend and apply the law evenly as mentioned in the Anomaly Situation Section of this article.

It apparently appears that the Legislature has successfully enacted an Act which does not intensify the implementation of the law neither it reflects any creativity in the drafting of the law. It appears to be a failed or a redundant statute. The argument in favour of this statement is that not many changes were made in the Dowry Act, 2018. The four areas of changes could have been done by amending the Dowry Act, 1980. A new Act with no objective to attain seems to lurk in the air. It may not be wrong to say that the function of the Dowry Act, 2018 will not be any better than or may be worse with respect to the definition of dowry when it will be appraised in a Court of law. It seems that the Dowry Act, 2018 was passed from political stance to show the activities of the Parliament to uphold and enact law to save the common people. Perhaps the draft of the law has been made by a jubilant draftsperson devoid of the realities of social enigma and that with the same force passed by the Parliament. Whatever may be the reason behind the enactment of the Dowry Act, 2018, the Act has failed to address the social reality. There is still scope for amendment of the Act to address the social paradoxes blended with the curse of dowry.

5. Anomalous Situation

The introduction of section 6 of the Dowry Act, 2018 has given rise to an anomalous situation in the existing laws. The offences under the Dowry Acts of 1980 and 2018 are non-cognizable, non bailable and compoundable; and cognizable, non bailable and compoundable respectively. Thus, institution of a false case under section 6 of the Dowry Act, 2018 is cognizable, non bailable and compoundable. It is interesting to note that institution of a false case under section 211 of the Penal Code is non cognizable, [15] but bailable [16] and not compoundable.[17] Section 25(1) of the *Nari O Shishu Nirjatan Daman Ain*, 2000 mentions that in the absence any legal requirements to the contrary, the provisions of the Code of Criminal Procedure, 1898 shall

[15] Offence under Section 211 of the Penal Code, 1860 has been mentioned in 2nd schedule of the Code of Criminal Procedure,1898 as non-cognizable

[16] Offence under Section 211 of the Penal Code, 1860 has been mentioned in 2nd schedule of the Code of Criminal Procedure,1898 as bailable

[17] Offence under Section 211 of the Penal Code, 1860 has not been mentioned in section 345 of the Code of Criminal Procedure,1898 as compoundable

be applicable which means institution of a false case under section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 will have the same consequence as section 211 of the Penal Code, 1860, that is, the offence will be non-cognizable, bailable and not compoundable. The nature of the offence is completely opposite in section 6 of the Dowry Act, 2018 compared to section 211 of the Penal Code, 1860 and section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000.

Section 211 of the Penal Code,1860 states, [18]

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, [2][imprisonment] for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

A similar provision insection 17 of the*Nari O Shishu Nirjatan Daman Ain*, 2000 states,

"Whoever, with intent to cause injury to any person, institutes or causes to institute a case or a complaint under any other provision of this Act against that person, knowing that there is no just or lawful ground for such case or complaint against that person, shall be punished with rigorous imprisonment which may extend to seven years and in addition shall be punished with fine."

Section 6 of the Dowry Act, 2018 declares,

"Whoever, with intent to cause injury to any person, institutes or causes to institute a case or a complaint under this Act against that person, knowing that there is no just or lawful ground for such case or complaint against that person, shall be punished with imprisonment

[18] Section 211, False charge of offence made with intent to injure, Chapter XI, Of False Evidence And Offences Against Public Justice,Penal Code, 1860

which may extend to five years or with a fine, which may extend to 50,000 (fifty thousand) taka or with both."

Section 211 has two parts. For the first part the punishment is less, that is, "whoever, with the intention of causing injury to any person, either institutes any criminal proceeding against that person or causes the same to be instituted against him or falsely charges any person that he has committed an offence with the knowledge that any just ground or any lawful ground does not exist for such proceeding or charge against that person, shall be punished with simple or rigorous imprisonment for a term extending up to two years, or with fine, or with both.

For the second part the punishment is more, thatis if such criminal proceeding is instituted on a false charge of an offence punishable with death, imprisonment for life, or imprisonment for seven years or more, shall be punishable with simple or rigorous imprisonment for a term extending up to seven years, and shall also be liable to fine.

Section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 and section 6 of the Dowry Act, 2018 hold on to the first part of section 211 of the Penal Code,1860 but the punishment is more and also different. It seems, therefore, that for the same offence three different statutory laws have three sets of punishments and the nature of offence is also different.

For the same offence under section 211 of the Penal Code, 1860, section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 and section 6 of the Dowry Act, 2018 the punishment is simple or rigorous imprisonment upto two years or fine or both; rigorous imprisonment upto seven years and fine; and imprisonment upto five years or fine upto fifty thousand taka or both respectively.

The amendment made by the government to section 11(c) as directed by the High Court Division will also result in an anomalous situation. After amendment, an offence under section 11(c) will be non cognizable, bailable and compoundable, whereas all dowry offences under the Dowry Act, 2018 will be cognizable, non bailable and compoundable.

6. Suggestion for Amendment

From the discussion above it is apparent that the Dowry Act, 2018 needs amendment.

It is imperative for the Dowry Act, 2018 to reinstate the definition of dowry mentioned in the Dowry Act, 1980.

The Dowry Act, 2018 should include dowry death or suicidal death caused or instigated by the groom or members of his family. In case of such death amendment must be made to shift the burden of proof to the groom or his family members at the first instance following section 106 of the Evidence Act, 1872.

Since the Dowry Act, 2018 and the *Nari O Shishu Nirjatan Daman Ain*, 2000 are both special laws, and both the Acts are inconsistent regarding the nature of the offence with regard to dowry, it should be the responsibility of the Court, it is submitted, to interpret the law harmoniously when it comes into conflict. It is, therefore, suggested to make an amendment to remove the difference.

Section 6 of the Dowry Act, 2018 and sections 11(c) and 17 of *NariO Shishu Nirjatan Daman Ain*, 2000 should be amended to conform to each other.

Domestic Violence Act, 2010 should be fortified with amendment to allow substantive relief to the victim, specially to the victim of dowry.

7. Conclusion

The Dowry Act, 2018 has been enacted repealing the Dowry Act, 1980. Adjustments are made in four areas only, the preamble, definition of dowry, enhancement of punishment and institution of a false case. These modifications could have been done in the Dowry Act, 1980 without repealing it. The modifications in the new Dowry Act, 2018 which is in effect a rearrangement in the Dowry Act, 1980 do not justify enacting a new law. Any alterations made in any law must be clear, well-defined and easy to implement. It is perplexing that the Dowry Act, 2018 has restricted the definition of dowry and enhanced the punishment.

The nature of the offence in the Dowry Act, 2018 is inconsistent with the dowry provision enunciated in the *Nari O Shishu Nirjatan Daman Ain*, 2000. Introduction of institution of a false case in section 6 of the Dowry Act, 2018 has raised more questions than solutions. This section is inconsistent with section 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000 and also section 211 of the Penal Code, 1860. Amendments suggested by the High Court Division in 2019 to make section 11 (c) of the *Nari O Shishu Nirjatan Daman Ain*, 2000 compoundable will not make the law consistent with the Dowry Act, 2018. Dowry offence under section 11 (c) will be bailable whereas dowry offence under Dowry Act, 2018 will non bailable.

It is incumbent upon the Legislature to study the Dowry Act, 2018, section 11(c) and 17 of the *Nari O Shishu Nirjatan Daman Ain*, 2000, Domestic Violence Act, 2010 and the section 211 of the Penal Code, 1860 to make a comprehensive systematic amendment considering all the issues related to these provisions to present a law capable of implementation.

Legal Response to Activate the Village Courts in Bangladesh: Prospects and Challenges

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Abstract

The Village Court (VC) plays an important role in resolving small rural disputes and helps formal courts reduce its pressure of cases. The current VC system has been established in accordance with the provisions of the Village Courts Act (VCA), 2006 and its subsequent revision of 2013. As a state-led rural justice system, the VC is allowed to assess a specific nature of civil and criminal disputes. Though the enactment of the VCA is a good initiative of the Government, it has some loopholes and shortcomings which hamper smooth functioning of the VCs. Therefore, bringing reforms in VCA is urgently required at the present moment.

Keywords: Village Court, Litigant, Union Parishad, Trial, Mediation

1. Introduction

The current judicial system of Bangladesh is overloaded with cases and suffers from a lack of judges and courts from the lowest to the highest level of the judiciary.[1] Litigants have to bear high cost of litigation in Bangladesh. In such a scenario, the Village Court (VC) is an effective avenue for the village litigants. The present form of VC is based on the provisions of the Village Courts Act (VCA), 2006 and its subsequent

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[1] Mohammad Rafiqul Islam Talukdar, *A Review of the Village Courts in Bangladesh*, BRAC Institute of Governance and Development, BRAC University, Working Paper Series, No. 22, December 2014

revision of 2013.[2] The Government of Bangladesh first set up the VC in the country's village areas by proclaiming the Village Courts Ordinance (VCO) in 1976 and the Village Courts Rules in 1976 to confirm access to justice for people living in rural areas. The purpose of the VC was to resolve disputes locally and outside of the formalities of the governmental agencies and court-room process of judiciary. The concept of the VC was to relieve the parties to the dispute of the cumbersome process under the judiciary in order to save time and money and thus enable better access to justice.[3] As a rural justice system the VC is empowered to try some civil or criminal disputes.[4] The VCA was enacted to establish VCs in every *Union Parishad* (UP) of Bangladesh and to provide easy and speedy trial procedure of village disputes.[5] The VC system is a very effective initiative of the Government of Bangladesh, but there are many loopholes and shortcomings in the VCA which hamper the smooth functioning of the VCs. There are also some issues in the VCA, such as inadequate financial scheme, scope of political intervention, summons, mediation, time limit, limited scope of appeal, monitoring mechanism, etc which can lead to the possibility of losing credibility and gaining a lowest level of trust among the rural citizen demanding justice from VCs.[6] Furthermore, the limited types of litigation that will be rectified

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[2] It promulgated a new legislation called the Village Courts Ordinance (VCO), 1976, which established VCs to deal with minor criminal and civil disputes in rural Bangladesh. In 2006, the government repealed the VCO and Parliament passed a new law called the 'Village Courts Act (VCA), 2006.'The present architecture of the VCs is based on the provisions of the VCA and its subsequent revision - *the Village Courts (Revision) Act*, 2013. The revision of the law in September 2013 has strengthened the provision of mediation for compromise under the *Village Courts Rules*, 2016 (see revision section 6B of the law). The revised Act also empowers the village courts with power of awarding compensation/decree/property worth of *taka* 75,000

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

[4] Schedule of *theVillage Courts Act, 2006*

[5] Kamal Siddique, *Local Government in South Asia: A Comparative Study,* UPL, Dhaka, Bangladesh, 1992, p.37

[6] Rassel Rafi, 'Village Court: Need Reformation to Ensure Justice', *The Daily Sun,* 13 January 2019

by VCs under the two VCA schedules have reduced the work environment of VCs in certain respects.[7] Much more can be achieved from the VC mechanism if certain changes are brought into the VCA. This article reviews the laws relating to VCs and focuses on the weaknesses of existing laws and limitations of VCs which obstruct the expected functioning of the forum. The article is analytical in nature. In this article, both primary and secondary sources are used.

2. Functions and Activities of the Village Court

The existing legal framework of the VCA describes the functions, jurisdiction and formation of a VC. The VCA was enacted to try or settle rural disputes easily and quickly under UP's jurisdiction. Though the VCA has some legal loopholes yet it addresses almost all important aspects of an effective justice system.[8] The main features of VCA are as follows:

2.1 Jurisdiction and Powers

According to the VCA, all cases related with the disputes or crimes listed in Part I[9] and issues specified in Part II[10] of the Schedule are triable by VCs[11] and these crimes and disputes cannot be tried by any other formal courts of Bangladesh.[12] A VC cannot judge any case related with a crime under Part 1 of the Schedule if the defendant had been convicted earlier for a cognizable offence. A VC can no longer try a dispute listed under Part II of the Schedule if:

(a) Minor's interest is attached with the dispute;

(b) Arbitration agreement exist to settle the dispute between the parties; and

(c) Any party to the case is a government service holder.[13]

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[7] *Ibid*

[8] Zahidul Islam Biswas, 'Village Court: A Neglected but Potential Justice Forum,' in Law and Our Rights Section, *The Daily Star*, Issue No. 79, 1 August 2008

[9] See Schedule of *theVillage Courts Act, 2006*

[10] *Ibid*

[11] Section 3, *The Village Courts Act, 2006*

[12] Zahidul Islam, *Strengthening State-led Rural Justice in Bangladesh: Views from the Bottom*, 2nd Edition, CCB Foundation, Dhaka, 2015, p. 142

[13] Section 3(2), *The Village Courts Act, 2006*

Each VC has the authority to judge a case only if the parties to the conflict live within the area of the union in which the crime is committed or the cause of the lawsuit arises.[14] The Village Courts (Amendment) Act, 2013 fixed pecuniary jurisdiction of the VCs at *taka* 75,000 instead of the previous limit of *taka* 25,000.[15] Expansion of financial limit in line with changing socio-economic environment means to entrust greater power with the VC for resolving disputes and to ebb pressure on lower judiciary.[16] The VC enjoys power to order the defendant to pay compensation up to a maximum amount of *taka* 75000.[17] The VC can also-

a) reject application on a reasonable ground;[18]

b) issue summons to any person to provide evidence or to produce a document;[19]

c) enable the party to be represented by a duly authorized representative;[20]

d) refer matters relating to public interest and justice to the regularcourts without making a decision;[21] and

e) reclaim compensation or fine under the Public Demands Recovery Act, 1913 and deposit it into the UP account.[22]

According to the VCA, if any person: a) uses any insulting or violent words to one of the VC members during the time of the trial; or b) disrupts the work of the court; or c) does not provide or serve a

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[14] If one of the parties to the dispute lives in the Union where the offence was committed or the cause of action arose and the other party lives in another Union, the VC must be established in the place where the offence was committed or the cause arose. See Section 6, *The Village Courts Act, 2006*

[15] Section 7, *The Village Courts (Amendment) Act*, 2013

[16] Md Al Ifran Mollah, 'Administration of State Sponsored Local Justice System: An Appraisal on the Legal Framework of Village Courts in Bangladesh', *International Journal of Legal Information*, Vol-44.3, 2016, pp. 235–240

[17] Section 7(1), *The Village Courts (Amendment) Act, 2013*

[18] Sections 4(1) and 5(5), *The Village Courts Act, 2006*

[19] *Ibid*, Section 11

[20] Section 15, *The Village Courts Act, 2006*

[21] *Ibid,* Section 16

[22] *Ibid,* Section 9

document to the court; or d) does not answer to the question of the court; or e) does not take an oath or sign a statement made by him, s/he will be liable for contempt of court. In such cases the VC may penalize him with a fine of *taka* up to 1000.[23]

2.2 Constitution and Composition

To constitute a VC, an application is to be submitted to the UP Chairman against the offences listed into Part I and Part II of the Schedule.[24] This application must be written in a specified form and properly signed by the petitioner in accordance with the VCR.[25] Thereupon, the UP Chairman examines application to determine the jurisdiction of the VC and he takes over and registers the candidacy if the dispute or offence is triable by the VC. A date and time are set and the respondent is asked to be present on the day to the VC. If the Chairman rejects the application, he must write down the causes of rejection on the register book.[26]Any party aggrieved by a dismissal order may go to the Assistant Judge Court to consider the case. The Assistant Judge is empowered to settle the case within 30 days of the application placed before him[27]or he can order the UP Chairman to constitute the VC. The VC is consisted of a Chairman and four members appointed by the parties to the case.[28] Two nominated members must be the members of the UP, and other two who are the residents of the UP must be selected by the parties outside the members of UP. The VCA prescribes a mandatory provision for the appointment of a female member from the two nominated members of each participating party, when a woman or minor is a party to the case.[29] According to the VCA, the UP's Chairman will constitute a VC and he himself will be the Chairman of the court. If he cannot act as Chairman for reasonable cause or he is found biased, any UP member other than those appointed by the parties to the dispute shall be the

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[23] Section 11, *The Village Courts (Amendment) Act, 2006*
[24] Section 4, *The Village Courts Act, 2006*
[25] *Ibid*, Rule 3
[26] *Ibid,*Section 4; Rule 4(3), *The Village Court Rules, 2016*
[27] *Ibid,*Section 4(3), *2006;* Rule 6
[28] *Ibid,* Section 5
[29] Section 5, *The Village Courts (Amendment) Act, 2013*

Chairman of the VC.[30] Before constituting the VC, the UP Chairman asks both parties to appoint their representatives within seven days.[31] After receiving the name of four nominated persons from two parties, a VC is constituted.

2.3 Issue of Summons

After completing the registration, the UP Chairman fixes a date for first meeting and issues a summons for the presence of the parties and witnesses.[32] The summons is weighted on the defendant's Form 2 and the witness on Form 3.[33] The Chairman appoints a Village Policeman to carry the notice to both parties for assuring presence on due date and time. The assigned Village Policeman takes signatures of both parties' as a proof of acceptance of summons. According to the VCA, if a person who has been summoned by the VC or the Chairman to appear or produce documents before the court, disobeys summons intentionally, the VC can impose on him a fine not exceeding *taka* 1000 after giving him opportunity to be heard.[34]

2.4 Mediation Process before Trial

The addition of mediation-related provisions which was missing in the VCA, 2006 is another special feature of the 2013 amendment to the Act. [35] This good innovative provision of formal mediation starts immediately with application to UP Chairman, describing the offence/ disputed issues. The application is to be submitted within thirty days from the date of incidence.[36]According to the VCA, the first meeting of the VC must take place within fifteen days from the date of constituting the VC. In this session the VC hears both the parties and takes initiatives for mediation.[37] The VC gets thirty days for mutual

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30 Section 5(2), *The Village Courts Act, 2006*
31 Rule 10, *The Village Court Rules, 2016*
32 Section 10, *The Village Courts Act, 2006*
33 Rules 8(1) and 8(2), *The Village Court Rules, 2016*
34 Section 10(2), *The Village Courts (Amendment) Act, 2013*
35 *Ibid,* Section 6(B), *2013*
36 *Ibid,* Rule 6(A)
37 *Ibid,* Section 6(B) (2) and 6(C) (1)
37 *Ibid,* Section 6(B) (1) and 6(C) (1)

resolution of the cases/complaints. The purposes of this inclusion into the Act of 2013 are:

(i) to settle the dispute in friendly environment
(ii) to recognize the informal dispute resolution system
(iii) to reduce the workload of the VCs.[38]

VC can close the case if the plaintiff does not appear before the VC intentionally,[39] and it can hear the reported case/complaints when the respondent does not appear before the court.[40] After the completion of hearing, the VC declares a decision and the Chairman of the VC keeps record of the decision into the register book.[41] The mediation process must be completed within thirty days from the date of commencement otherwise the VC can start trial.[42]

2.5 Procedure of the Trial and Judgment

Adjudication process in the VC system is largely informal. To submit the application, the petitioner must pay *taka* 10 and *taka* 20 for criminal and civil cases respectively as court fees.[43] Initially, the parties and witnesses need to take oath. The VC is empowered to fix up a date for inquiry to form a just decision on the case. The Chairman of the VC declares the judgment in an open court, and this judgment is recorded in the register by him.[44] This record indicates the unanimity of the judgment. Where the judgment is not unanimous the quantitative relation of the majority of that judgment is put down. The judgment which is taken by majority members of the VC (i.e. 4:1 or 3:1 ratio) is binding for each party.[45]

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[38] Md Al-Ifran Mollah, 'Administration of State Sponsored Local Justice System: An Appraisal on the Legal Framework of Village Courts in Bangladesh', *International Journal of Legal Information*, Vol 44.3, 2016, p.234

[39] Rule 17(1), *The Village Court Rules, 2016*

[40] Rule 18, *Ibid*

[41] Rule 19, *Ibid*

[42] Section 6(B) (2) and 6(C) (1), *The Village Courts (Amendment) Act, 2013*

[43] Section 3(3), *The Village Court Rules, 2016*

[44] Section 19, *Ibid*

[45] Section 8(1), *The Village Courts Act, 2006*

2.5.1 Time Limit for Trial

A strict deadline has been set for VC to resolve any suit. The VC is allowed to dispose of any case within ninety days from the date of the registration if no fruitful result comes out of mediation/settlement process. An additional thirty days is allowed on sufficient grounds. In this process, the VC gets one hundred and twenty days to finalize the proceedings, if not, the court will be automatically dissolved and then stakeholders can bring their cases to the competent formal court.[46]

2.5.2 Applicability of Statutory Laws

According to the VCA, the provisions of the Code of Criminal Procedure (CrPC),1898 the Evidence Act, 1872, and the Code of Civil Procedure (CPC),1908 (except sections 10 and 11) are not applicable, but sections 8, 9, 10 and 11 of the Oaths Act, 1873 are applicable to all proceedings before the VCs.[47] The VCA declares that no lawyer is allowed to act into the VC proceedings for any party,[48] and the VC can allow a *pardanashin* lady to be represented by an authorized representative.[49] The involvement of any lawyer has been restricted to ensure informal atmosphere in the VCs.

2.5.3 Transfer of Cases

The VCA permits to transfer cases. According to the VCA, a District Magistrate can withdraw a case from the VC and send it to the formal Court for trial if he is satisfied that such withdrawal and transfer is necessary for ensuring justice.[50]On the other hand, if a VC is satisfied that the pending case is related with public interest it can send the case to the judicature.[51] The VC cannot stop the police investigation of a cognizable case if the case is related to an offence under Part I of the Schedule, but if such a case is brought before a court, the court may, if it deems it necessary, order that the case be referred to a VC.[52]

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[46] *Supra* 38; Section 6(C), *The Village Courts (Amendment) Act, 2013*
[47] Section 13, *The Village Courts Act, 2006*
[48] *Ibid,* Section 14
[49] *Ibid*, Section 15
[50] *Ibid*, Section 15(1)
[51] *Ibid*, Section 15(2)
[52] *Ibid*

2.6 Appeal against the Decisions of the Village Court

Whether a VC's decision is made unanimously or with a four to one majority or in the presence of four members with a three to one majority, the decision of VCA is enforceable. [53] If the judgment of a VC is taken by three to two majority, the aggrieved party may appeal tothe formal court within thirty days from the pronouncement of the judgment.[54]Appeal relating to, civil matter goes to the Court of an Assistant Judge, andcriminal offence goes to the Court of the First Class Magistrate. The First Class Magistrate Court or the Assistant Judge Court may change the decisions or refer the disputes to the VC for review.[55] The decision given by the VC must be signed by the Chair and recorded on Form 2 of the VCR.[56] When the VC passes a decree, or gives decision for compensation or a fine, it must be recorded in the specific registers. For recovering the said compensation or fine, the Chairman of the VC as UP Chairman will use the provisions of the Local Government (UP) Act, 2009 in line with section 9(3) of the VCA.

2.7 Enforcement of Decree

According to the VCA, if the VC decides to grant compensation or orders the delivery or possession of property, it can issue a decree accordingly.[57] When cash or property or possessions are delivered in the presence of the VC in compliance with the decree, it must record the actual payment or delivery in the register. [58]If a decree is passed for payment of compensation and in a specified time the amount is not given, the Chairman of the VC can recover cash as arrears according to the Public Demands Recovery Act, 1913.[59] It may also order the compensation to be paid in installments.[60] If fine is not paid timely, the Chairman may refer this record to the Magistrate who has the authority to recover.[61] The Magistrate shall proceed to recover the money as though the order of fine was made by him and he may

[53] Section 8(1), *The Village Courts Act, 2006*
[54] *Ibid* Section 8(2), *Ibid*
[55] *Ibid* Section 8(3),
[56] Rule 19, *The Village Court Rules, 2016*
[57] Section 9(1), *The Village Courts Act, 2006*
[58] *Ibid* Section 9(2),
[59] *Ibid* Section 9(3),
[60] *Ibid* Section 9(5),
[61] *Ibid* Section 12(1),

punish the accused with imprisonment for non-payment of fine.[62] Any fines paid to a VC or collected on behalf of a VC form part of the funds of the UP.[63]

3. Weaknesses and Shortcomings of the Law

According to the VCA, the VC is empowered to settle a dispute through mediation and it can also try a case by awarding compensation only. The fees of VC cases are very low and parties are not permitted to have legal representatives. Arbitration decisions are legally binding and enforceable and can only be challenged in district courts if the committee is divided by three to two majority. The VCA is no doubt a good initiative of the legislature but some loopholes into the Act restrict the VC to perform its work properly. These loopholes are pointed out in the following headings.

3.1 Composition of the Court

According to the VCA, a VC is consisted of a Chairman and 4 members, and a UP Chairman will be treated as the Chairman of the VC. Despite the increasing number of women involved as petitioners and accused in VC cases, the appointment of women members for VC panel is given less priority. There should be a minimum of one female member in each VC panel. According to the VCA, when respondent fails to nominate panel members, the Chairman of the UP can give a certificate to the petitioner for going to the district court.[64] There is no penal provision for the respondent or accused for showing negligence or denial to the process to attend the court after getting summons. This provision requires alteration. The VCA reveals that if the panel members of the VC are not appointed within the specified period, the VC may be constituted without them and may perform its function legally.[65] Formation of VC exclusively by the Chairman of UP where parties are indifferent in nominating members, and appellate provision

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62 *Ibid* Section 12(2),

63 *Ibid* Section 12(3),

64 *Ibid* Section 5(5) (A) and (B),

65 Section 5, *the Village Court Act, 2006*

regarding sole decision to be taken by the Chairman of UP as head of VC must be explicitly inserted in the VCA.[66]

Nothing can improve the success of VCs except appointing experienced and knowledgeable individuals who have shown both courage and prudence in their activities. The UP Chairman, while serving as Chairman of the VC, is treated as a judge to decide each case impartially. In accordance with the Local Government (Union Parishad) Act (LGA) 2009, every Chairman candidates are nominated by registered political parties of the country prior to election.[67] As a Chairman is elected from political party, it is obvious that he cannot judge neutrally.[68] On the other hand, a Chairman is an executive officer of the lowest local government unit of the government in power. Section 19A of the LGA is apparently contrary to the spirit of the Bangladesh Constitution and the doctrine of independence of Judiciary[69] Under current atmosphere in Bangladesh, where political strife among politicians is endemic,[70] one can hardly expect neutral action from these political representatives while occupying judicial post in the VC. As the LGA gives opportunity to the uneducated people to be elected as Chairman; most of the VCs are equipped with such types of Judges. These partisan judges are not expected to have the sanctity of the judiciary or guarantee the independence of the VCs.[71] It is suggested that the judges panel for each UP is configured in the following manner for 3 to 5 years with a honorarium to make VC active and functional one:

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[66] Md. Mahboob Murshed, *Review Report on Village Courts Legal Framework*, Activating Village Courts in Bangladesh Project, Local Government Division, Ministry of Local Government of the People's Republic of Bangladesh Dhaka, 2012

[67] Section 19A, *the Local Government (Union Parishad) Act* , 2009 (amended in 2015)

[68] Preeti Sikder, 'Village courts: A dilemma within.', in Law & Our Rights Division, *The Daily Star,* 05 April 2016

[69] The Constitution of the People's Republic of Bangladesh clearly states that every accused person has the right to a speedy and public hearing by an independent and impartial Court (Article 35). In addition, the executive bodies of the state must be separated from the judiciary to ensure this independence and impartiality (Article 22). These provisions are seriously violated by the existing legislation relating to VCs.

[70] *Supra* 68

[71] *Ibid*

a) One Chairman (with an educational qualification of at least BA degree)
b) A vice-president (female members of UP, rotation basis for one year)
c) Two members appointed by the parties (at least one member of UP from each party)
d) Two members appointed by the UNO.

A certain formal procedure must be followed for constituting the VC. The present VCA does not contain any provision where the UP Chairman does not constitute or fails to constitute a VC in time. So, the VCA and the VCR need to be amended in this regard.

3.2 Jurisdiction

In many cases the VC applies the judicial spirit, but its limited jurisdiction has forced the villagers to withdraw the cases from the VCs or avoid the VC proceedings.[72]The pecuniary jurisdiction of the VC is not adequate for running the court.Rural areas have innumerous land disputes and they are not always tried in the VC, because the highest financial jurisdiction of the VC is *taka* 75000 and the prices of most disputed properties are much more than that. At present, the value of a few decimals of land is more than *taka* 100,000 in many places of Bangladesh. Due to this limitation, such cases cannot be processed in VC. The Chairman or members of the UP advise the applicant party to lodge the case to the district courts or to resolve the matter through *shalish*.[73] Therefore, a section must be inserted in the VCR to increase the monetary ceiling on a regular basis in line with the increasing value of the property.

A research study focused on the fact that a major portion of disputes in the VCs are related to marital deception, violence against children and

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[72] Abul Barkat, *Review of Social Barrier and Limitation of Village Courts*, Local Government Division (LGD), Ministry of Local Government, Rural Development and Cooperatives, Government of Bangladesh under Activating Village Courts in Bangladesh Project, LGD, Dhaka, 2012, p.46

[73] In such cases, villagers will inevitably go to the Shalish, which according to many studies is biased and cannot do justice. Since there are no financial or licensing restrictions on Salish, all possible cases are handled there. See for more Abul Barkat, *Ibid*, p.47

women, the abandonment of wife by husband, polygamy without the consent of previous wife/wives, etc.[74] Such disputes are settled in the village *shalish* or in the regular courts. These disputes are not maintainable under Part I and Part II of the Schedule of the VCA. Disputes involving absolute possession and permanent injunction, village *hats* and *bazars*, restoration of conjugal rights, unlawfulassembly, riot etc are covered by VCA Schedule.[75] Civil matters dealt with by the VC have been shown in Part II of the Schedule. The VC cannot hear the suit involving title of an immovable property. In the case of *Abdul Hoque vs. Mokbul Hossain Mollah,*[76]the Court said that,

> 'though the VC cannot try the case relating to title of property, but possession of that property may be recovered by the VC subject to establishment of title by an independent suit as indicated in section 3(3) of the Act. So, if we want to relieve the pressure of the formal courts to a great extent, jurisdiction of the VCA should be extended.'

According to Part I of the Schedule of the VCA, the VC can try the offence of theft. It would be appropriate for the VC to try offences under section 448 of the PC, such as criminal house trespass, trespass. Otherwise it will not be realistic for VC in trying the offence of theft in dwelling house without being empowered to try the criminal house trespass.[77] It is not possible to steal something from a dwelling house without house trespass. A workshop[78] held with some Judicial Magistrates advised to insert the compoundable offences which are stated in the CrPC to Part I of the Schedule of the VCA. Such amendment would certainly reduce the number of cases in the formal

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

[75] *Ibid*

[76] *(1980) 32 DLR 8*

[77] *Supra* 66

[78] The workshop titled, "The Criminal Trial at VC and the Role of Judicial Magistracy" held on 23 December 2010 at Bhandaria, Pirojpur; *Supra* 66, 2012

courts and the empowerment of the VC would pave the way for access to justice for the poor and the disadvantaged at a very low cost.[79]

3.3 Summons

The Chairman of the VC issues summons with the help of the Village Policeman. No specific rules and directions have been prescribed by the VCA. It does not prescribe punishment in case of failure of serving summons. There is no strong or mandatory provision into the VCA to bring the respondent before the VCs. A strong penalty instead of a simple fine should be imposed on those who are negligent or who do not follow the court's reminder or summons. The refusal of the UP notification by suspects and witnesses, as well as their lack of punctuality to be present in the court affect the smooth functioning of the VC. It is suggested that if either party rejects summons or shows negligence to attend the VC, it should send the case to the police station consequently the police can take necessary steps to support the court.

3.4 Mediation

The term 'mediation' or 'VC-led-shalish' refers to all facilitated conciliation and negotiations in which the parties are encouraged to negotiate prior to trial.[80] The mediation process of VC was inserted in 2013.[81] Though section 6(B) of the VCA relating to mediation represents a formal structure of *shalish* under the VC, this mechanism is randomly used in an informal way. A research study shows that only 20-25 percent of the cases and disputes come to the UP to be tried in the VCs.[82] In spite of diverse limitations, most village people believe that the UP led VC can play an effective role in resolving local disputes with just proceedings. In Bangladesh society, for any kind of dispute, the victim or petitioner approach the village elders for getting remedy. If the village elders cannot settle the dispute in village *shalish*, the

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[79] *Supra* 66

[80] Md. Abdullah Chowdhury Oli, 'Village Court: Bringing Justice to the Grassroots', *The Daily Star*, 19 June 2010

[81] *The Village Court (Amendment) Act,* 2013

[82] UNDP, 'Informal Systems and Village Courts': Poor People's Preference" in *Human Security in Bangladesh: In search of Justice and Dignity,* UNDP Bangladesh, Dhaka: 2002. pp. 91-100

petitioner then brings his/her case to the UP, *thana* or district court. A failed settlement in the *shalish* led by VC also allows petitioner to bring the case to the district court. It is not necessary that the UP always resolve village disputes through a VC. Often the UP arranges *shalish* out of the VC mechanism due to some procedural difficulties, for example, absence of any provision in the law.Often villagers simply want solution with an informal effort of the UP Chairman.

Village *shalish* is an informal mechanism whereas VC led *shalish* or mediation is a formal mechanism and legally recognized. Unwillingness of petitioners to go to the VC for settlement of disputes or somehow failure of VC led *shalish* creates pressure on judiciary because in these situation petitioners bring the cases to the police stations or formal courts for getting remedy. If VC led *shalish* is successful, it must reduce the backlog of the formal judiciary and encourage people to come to it. Section 6(B) of the VCA does not provide a clear and precise mechanism of fruitful mediation. The law itself should contain a special provision for ADR in conjunction with sections 89 A, 89 B and 89 C of the CPC, the reconciliation before and after the court's procedure under sections 10 and 13 of the Family Courts Ordinance,1985 and pre-trial mediation in the appeal phase under the Money Loan Courts Act 2003. By bringing change in the VCA a successful mediation mechanism can be provided between the parties for both pre and post-trial situation of the VC. The VC panel will perform here as arbitrators/mediators.

3.5 Relationship between VC and Formal Courts

As mentioned, VC has the power to impose a specific fine and can award compensation. According to the VCA, the mechanism as to recovery of fine is not satisfactory. If a fine is imposed by a VC, for failure to comply with the order, the VC has to forward the order of fine to the concerned Judicial Magistrate with a request for recovering the money. It is seemingly a good provision but rarely implementable because the amount of such fine is only *taka* 1000. As a Magistrate deals with so many grave crimes, a case for recovery of *taka* 1000 gets little importance to him and he does not take the case seriously. This legal provision should be changed so that the VC itself can recover the fine. It may be recoverable by the UP as an arrear tax. In addition, the

amount of fine should be increased. Under the Public Demands Recovery Act (PDR), 1913, the process of recovering money of compensation is cumbersome and costly. The PDR allows recovering fines and financial penalty. Under this Act, the UP can recover only after obtaining a certificate of the judgment from Collector, *Upazila* Magistrate, or UNO. In some cases, the implementation of VC decisions becomes difficult. As there is no jail system for perpetrators under the VC system, most of the UP Chairmen at village level fear for their safety. Defendant or accused often resorts to various means (obstruction, migration, etc.) to avoid paying compensation, and the Chairman sometimes tries to avoid interfering into the execution process of a judgment with the hope of getting elected next time.

3.6 Time Limit

According to the VCA, the VC has to settle every dispute or conclude the trial process within one hundred and twenty days from filing of the application; otherwise after expiry of the said days if VC fails to resolve dispute, the court will dissolve *per se*.[83] This provision gives opportunity to the accused and also to the Chairman to delay the process. There is no penal provision into the VCA against the Chairman if he delays the process intentionally or cannot co-operate for being overloaded with clerical job. Since there is no clerk for VC, the Chairman himself is to concentrate on documentation and office work. As administrative head of the local government body, the Chairman has to carry out 38 regular functions according to the LGA. After carrying out so many responsibilities, it is simply impossible for the Chairman to give time to conduct the functions of the VC.[84]If the UP Chairman is unable to form VC timely, power of appointing a member of the UP as a Chairman of the VC should be given to the UNO.

3.7 Appeal

The VCA imposes restriction on the right to appeal in the decisions on a ratio of four to one and five to zero of the VC panel. This rule is not

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[83] Section 6 (B), *The Village Courts Act*, 2006

[84] *Supra* 82; See sections 30, 31, 32 and 33 of the Local Government *(Union Parishads)* Ordinance, 1983 to learn the functions of a Union Parishad

applicable in the formal judicial proceedings of Bangladesh. It is a lacuna of the VCA. There are some shortcomings in the appeal provision, especially when the judgment is declared in the presence of four members and their votes are divided into two to two. Due to political involvement of the members and Chairman of the VC, it is hardly possible to pass neutral judgment by the VC. Therefore, VC's judgment or decision should be checked or revised, and the right to appeal should be allowed for the aggrieved party even in the event of a unanimous decision by a VC. If VC is treated as a court it should follow the unique rule of the formal judiciary. An appeal is treated as a continuation of a trial.[85]In a landmark judgment,[86] the Supreme Court of India ruled that a judgment passed by the Court of Appeal should be interpreted as a decision of the Court of First Instance. In an appeal, Appellate Court rehears the same matter of the original court and possesses the same powers and duties as the original Court. Where an appeal is provided by law and is filed against a decree and order of a lower Court, the decision of the Appellate Court will be the operative decision.[87] So, appeal should be allowed against every decision of the VC.

3.8 Weak Punishment

A low penalty, equivalent to a fine of *taka* 1,000 for contempt of the court and *taka* 1,000 for disobeying a summons, are the main causes of the VC's poor success. *Taka* 1000 is a very small amount in the context of current socio-economic condition of Bangladesh. It should be increased. The VC can only impose fine but cannot impose punishment. Even if fine is imposed, its execution process is very difficult.

3.9 Supervision and Monitoring

There is no specific provision relating to monitoring and supervision system of the VCs into the VCA. Rule 27 of the VCR, 2016 suggests that every Chairman of the UP shall send a return in a prescribed form of

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[85] *Dilip vs. Mohammad Azizul*, 3 SCC (2000) 671

[86] *Ramakuntury ,vs. Avara*, 2 SCC (1994) 642(645)

[87] Md AH Siddiqee, 'Of Appeal and Execution in Family Court Ordinance, 1985', available at *www.bdlawnews.com,* accessed on 30 November 2019

the work of the VCs after every 3 consecutive months to the UNO. This return form has some columns where the Chairman mentions the case numbers filed, disposed of, pending and decided, and the fees realized, fine imposed and realized etc. After examining the form by the researcher, it is seemed that this statistical accountability did not work as a safeguard against the malpractice in the VCs. The VC must have an appropriate and systematic monitoring system for ensuring its transparency and accountability. There is no authoritative control or oversight over the VC's impartiality. According to VCA section 16 (1) the CJM, and section 16 (1) (A) the District Judge (DJ), can withdraw a case from the VC and send it to the appropriate Criminal Court and to Assistant Judge Court respectively for trial and disposal. These two sections do not clarify the basis on which the CJM or DJ may take such decision. Along with the UNO, the mentioned sections make the CJM and the DJ a supervisory authority and the statement of the VC must also be sent to the CJM and the DJ. Moreover, if the UNO visits the VC on regular intervals as his routine work then, VC members and officials will be careful and more responsible about their activities. If VC panel act impartially, public confidence on the VC will be increased. A follow-up cell with exclusive competence may be established under the administration of *Upazila*. This cell will act as the local VC controller.

3.10 Honorarium and Budget

The members of the VC do not get allowance or remuneration for their judicial functions. The Prime Minister (PM) has promised that Judges of the VCs would be paid a 'fair honorarium'.[88] To ensure PM's commitment, a fee should be set for VC's chairman and members for a successful disposition of each case.[89]Since there are no separate funds or government credits for the UPs, there is no separate budget for the operation of the VCs. Ensuring justice at the village level through the VC depends on the availability of local income under the UP. There is no rule to provide the cost of issuance of summons. Specific rules should be made in this regard.

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[88] Tabibul Islam, 'Bangladesh: Village Courts to Ensure Justice for Poor', available at *www.ipsnews.net/,* last accessed on 12 December 2019

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

3.11 Applicability of Laws

Though the VCA states that the VC shall not follow the Evidence Act, the CrPC and the CPC, but the VCA is silent on the question of what material law the VCs will follow. It appears that in the absence of express provision the constitution, the existing statutory and customary laws are followed by the VC. To avoid conflict between legal provisions of the VCA and Specific Relief Act, 1877 regarding period[90]of lodging suits amendment must be made in the VCA by inserting standard period of limitation for filing cases to VCs.

4. Suggestions

Loopholes of the VCA always restrict VCs to perform properly. Therefore, it is the duty of the concerned authority to amend the VCA and VCR for making VCs more effective. Upon the findings of the article researcher places the following suggestions:

(a) Provision must be inserted into the VCA for the Chairman to be authorized to constitute a VC when parties fail to appoint members of the VC. The Government may take initiative to set up Panel of Judges for every UP for three to five years period with an honorarium as stipulated in page 11 of this article.

(b) The criminal jurisdiction of the VC needs to be expanded, and compoundable offences subject to CrPC must be dealt with by the VC. A new clause containing provision regarding increment of monetary ceiling on periodical interval must be introduced into the VCR. Pecuniary jurisdiction of the VC should be increased from *taka* 75,000 to 200,000. The following disputes should be brought under the jurisdiction of the VC:

(i) Disputes relating to injunction and possession of the property
(ii) Disputes relating to criminal house trespass.
(iii) Disputes under the jurisdiction of the mobile courts

[90] There is a two-month time limit for filing a case to the VC for eviction, compared to a six-month time limit under section 9 of the Specific Relief Act of 1877 for the same category of suit

(c) The VCA should have strong penal provision for those persons who disregard the notice or summons of the court instead of imposing a fine. For disregarding summons, the VCA should have power to report to the police station whereupon the police will take steps to assist the court. There is no need to keep section 5 (5) (b) of VCA.

(d) An effective mediation mechanism for settling disputes between the parties can be established by amending the VCA. The VC Panel in this case will act as arbitrators. Section 6B (I) should be amended accordingly:-

"After 15 days of the composition of the court, the VC must give its first sitting. In the first meeting, the VC must propose both the parties to settle the case either through mediation or trial. If both parties decide to settle the case through a conciliation process, the VC must appoint a panel of five mediators to mediate the case with the approval of parties. The appointed mediator (s) will determine date, time, place, and notify both parties."

(e) The amount of fine should be increased by amendment and provision should be inserted to authorize the VC torealize it. In the case of failure UP shall be authorised to recover that as arrear tax.

(f) A mechanism should be inserted to review or check the judgment or decision of the VC. Restrictive clause of appeal should be deleted and aggrieved parties should have the right to appeal against all decisions of the VC.

(g) An honorarium should be fixed for the members of the panel on settlement of every caseby amending VCA. The VCA can also be reformed ensuring mandatory court session at least once in a week. The provision relating to appointment, qualification and responsibilities of a Court Assistant can also be incorporated in the VCR.

5. Conclusion

The aim of establishing the VC was to ensure justice for the people of rural areas and to decrease the pressure of the formal courts. The VC was expected to be an easy alternative to an expensive and lengthy formal court for the rural people, but the VC is still hiking behind its

main purpose due to some legal flaws. Due to legal weaknesses mentioned in this article, the UP Chairman is often reluctant to constitute VC in many places or avoid the proceedings of VC. The VCA can be a turning point of the state-run justice delivery system in Bangladesh and pave the way for state-sponsored justice in a practical, cost-effective and equitable way. In order to strengthen the VCs, legal weaknesses which have been focused in this article should be taken into consideration. Otherwise, people will be deprived of enjoying the success of the VCs.

Settlement of Disputes under International Civil Aviation Organization

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Abstract

The peaceful settlement of disputes is the primary function of law. The International Civil Aviation Organization (ICAO)is assigned to deal with the dispute regarding compliance of the Convention. The objective of this study is to focus on the forms and means of dispute resolution between the member States. The study also makes an effort to know the solution of controversies related to the implementation of the provisions on the different International Conventions related to International Civil Aviation. This article also focuses the laws that establish right and liability part in this sector.

Keywords: Dispute settlement mechanism, Role of Civil Aviation

1. Introduction

The development towards a peaceful settlement of international disputes is essential for the world to deal with in this age of nuclear weapons and space technology. World War II conclusively proved that aviation has enormous probabilities for good and evil. It is both a warning and an assurance. It can and has administered immense destitution to mankind; it can also continue to bring new aspirations and opportunities to the residents of the world. If used wisely, aviation can be the best way to encourage apprehension among peoples. The Convention on International Civil Aviation is the result of a multinational effort by 52 countries gathered in Chicago in 1944.The Preamble to the Convention on International Civil Aviation manifests that the nations assembled in Chicago believed in civil aviation as a powerful benefactor to the conservation of world peace. As an international organization (ICAO) it must have conclusive rules for the

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determination of the discrepancies that may arise between the constituents of the Contracting States because the main task of the said organization is to encourage the rule of law in international affairs. ICAO has established comprehensive rules for dispute settlement.

1.1 Background and Features of Chicago Convention

The ICAO as a specialized agency of the United Nations is responsible for harmonizing international air travel. The Convention on International Civil Aviation, drawn up in 1944 by fifty-four nations, was established to encourage collaboration and friendly relation among the globe. More commonly known today as the Chicago Convention, formed to set forward codes for international air transport and resulted in the creation of the specialized agency that has overseen the Organization of the international civil aviation (ICAO). The ICAO Constitution is the Convention on International Civil Aviation, drawn up by a conference in Chicago in November and December 1944, to which each ICAO Contracting State is a party. In October 1947, ICAO became a specialized agency of the newly created United Nations.

2. Dispute Settlement under Chicago Convention

Convention on International Civil Aviation, 1944 has the interest for the resolution of disputes arising among states, because it charges the ICAO Council (the governing body of the ICAO) with judicial powers. If remedy of the state governments exhausted the dispute, may fall within the jurisdiction of the Council.[1]

2.1 General Rules

As per the provisions of Article 84 of the said Convention, Council has the power to upheld the correct rules if there is a difference of views between the State regarding clarification of a written rule. The disputed parties must be refrained from exercising voting rights on that very topic. The International Court of Justice (ICJ) is the Apex body over the ICAO Council for hearing the matter if the parties are

[1] Chapter XVIII of the Convention on International Civil Aviation (CICA), 1944

not satisfied. However it needs to conform the assent to follow the jurisdiction of ICJ.

2.2 Arbitration

According to Article 85 of the Convention, the circumstances in which a State party to a dispute in which the Council's decision is appealed can put forward the matter to arbitration. If the contracting parties cannot agree on the choice of the arbitral tribunal, each of the disputing states appoints an arbitrator from a list of arbitrators as an 'arbitrator' maintained by the ICAO Council. The President of the Council has the power to finalize the name of the arbitrators whenever the parties failed to select withing 3 months, usually it is from the list preserved in the panel.

If, within 30 days, the arbitrators cannot concur on an arbitrator, the President of the Council will designate an arbitrator from the above-mentioned list. The arbitrators and the arbitrator will then jointly constitute an arbitral tribunal.

2.3 Appeal

Article 86 of the Convention instructs settlement of the body as to the operation of airline with the provisions of the Chicago Convention shall remain in force unless reversed on appeal and if the issue challenged, until finalize will be seize to operates. Award of the assign arbitration body or observation of the ICJ upon the contentious issue will be the last resort for the parties.

2.4 Sanctions

Chapter XVIII of the said Convention stipulates some fairly precise penalties for failure to comply with the decisions prescribed under its provisions.

The sanctions are :[2]

(i) Embargo of allowing airline operation for noncompliance of the order,

(ii) seizingexercising thefranchise power.

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[2] Article 87 and 88 of the CICA, 1944

3. The Rules of Procedures for the Settlement of Disputes

The Chicago Convention has Rules of Procedure for the Settlement of Disputes[3] (the Rules) which leads the procedures for a State to put forward a request to the Council. This judicial institution allowed written submission, then upon oral hearing 6611makes its decisions. The body gives emphasis given to mediation and conciliation.[4] For example, Article 14 of the Rules of Procedure states that any party that put forward a disinterest to the Council for resolution must reveal that negotiations to resolve the disagreement have been carried out between the parties but have not been successful.[5] In addition, at any stage of the procedure, the Council may request the parties in dispute to enter into direct negotiations in order to resolve the dispute or determine the issues.[6] In addition, the Council has an opportunity to form conciliation body.[7] According to Professor Milde, this distinctly departs from judicial functions because it encourages mediation and conciliation by the Council as well as allowing for the good offices of the President.[8]Another interesting aspect of the Rules is the fact that they are closely aligned with the Rules of the International Court of Justice which may be a reason of a nomaly,[9] as the ICJ is a legal figure and runs rigorously as a tribunal. Hence, the provision made by the council are avoided by a political body that does not function according to the traditions of a court of law. In this sense, some have recently spoken in favor of a revision of these Regulations by the

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[3] ICAO, Rules for the Settlement of Differences, ICAO Doc 7782/2. Canons are approved in 1957, and revised in 1975

[4] R C Hingorani, "Dispute Settlement in International Civil Aviation" (1959) 24.

[5] *Supra* 3, Article 2 (g), Rules

[6] *Ibid*, Article 14 (1), Rules

[7] *Ibid*, Article 14 (3), Rules

[8] Milde, Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), in Settlement of Space Disputes 87, 88 (1980) https://www.mcgill.ca/iasl/files/iasl/occasional_paper_iv_settlement_of_disputes.pdf accessed on 16 August 2018.

[9] Michael Milde, International Air Law and ICAO, 2e ed, the Hague: eleven international publishing, 2012) 197

Council, which could be a good chance to take into account the political meticulousness of this body.[10]

4. Authority of the ICAO Council to Mitigate Clashes

The Council may resolve disputes regarding the exposition and application of the Chicago Convention. There have been five disputes under Article 84 since the Chicago Convention came into force. In addition to its command for dispute resolution, the Council, under Article 66 of the Chicago Convention, also has jurisdiction over the settlement of disputes under the International Air Services Transit Agreement[11] and the International Air Transport Agreement.[12] Moreover, the Assembly entrusted the Council, during its first session in 1947, to act as an arbitration body for controversy between Contracting States in relation to international civil aviation matters, when all parties to said dispute explicitly request it.[13]

The Council also duty bound to update the Assembly of any contravention of the Chicago Convention, along with compliance of suggestions or findings of the body relating to the Convention alluded to it by any Contracting State.[14] Lastly, if the parties feel they can use

[10] Jon Bae, "Review of the ICAO Dispute Settlement Mechanism" (2013) 4:1 JIDS 65 available at. https://academic.oup.com/jids/articleabstract/4/1/65/2193481?redirectedFrom=PDF accessed on 18 August 2018

[11] International Air Services Transit Agreement, 7 December 1944, 84 UNTS 389, 59 Stat 1693, TIAS No 487 Available at: https://www.bing.com/search?q=International+Air+Services+Transit accessed on 18 August 2018

[12] International Air Transport Agreement, 7 December 1944, 171 UNTS 387, 59 Stat 1701, TIAS No 488. Available at: https://www.bing.com/search?q=International+Air+Services+Transit accessed on 18 August 2018

[13] ICAO Assembly Resolution A1-23. Nevertheless, we should note that since the entry into force of the Chicago Convention, no dispute was ever referred to the Council for arbitration under the terms of such resolution

[14] Article 54(j), Chicago Convention

Council as an authority to make investigation on air navigation incident and can publish that reports.[15]

5. Adjudication by the ICAO Council

From among the resolved disputes by ICAO the three disputes are briefly discussed here for convenience of this paper.

5.1 *India v. Pakistan* (1952)

It was a complaint by India against Pakistan, filed with the Council in April 1952. India claimed that Pakistan's denial to permit Indian aircraft to fly over its territory to and from Afghanistan constituted a breach of the Chicago Convention.[16]India also claimed non-compliance with Article 5 (right to non-scheduled flights) and Article 9 (prohibited area) of the Chicago Convention by Pakistan. The basis for the claim was Pakistan's decision to prevent Indian aircraft from flying over Pakistani territory on their way to/from Afghanistan. Pakistan erected a no-go zone along its western border for Indian planes, but the Indian airline was allowed to fly over the same route. Using a political means of solution, the ICAO Council achieved an amicable settlement of the dispute between the opposing Parties. Although the ICAO Council did not act as a judicial body, its good offices made it possible for the Parties to negotiate and overcome their differences by establishing corridors over the prohibited area. In 1953, both the parties had reached a harmonious settlement of the dispute and reported the Council.[17]

5.2 *United Kingdom v. Spain* (1969)

This issue was raised by the United Kingdom against Spain alleging the noncompliance of the Convention by the establishment of a prohibited zone near Gibraltar. United Kingdom claims that the no-go

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[15] *Ibid*, Article 55 (e)

[16] Bin. Cheng, *the Law of International Air Transport* 31 (1962). 101 https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://www.google.com /&httpsredir=1&article=3145&context=jalcaccessed on 16 August 2018.

[17] For details, Exchange of Notes Constituting an Agreement between the Government of India and the Government of Pakistan Regarding the Operation of Air Services to Afghanistan by Indian Aircraft April 22, 1953.

zone constituted a violation of air traffic rights to and from Gibraltar airport, which also constituted a violation of Article 9 of the Chicago Convention. On the contrary, Spain claimed the right to establish the prohibited zone is within its sovereign territory.[18]

Allegations were made at the time of bilateral talks between the parties taking place at the United Nations. In November 1969, the President of the ICAO Council reported that the parties had informed him that they wanted the complaint deferred sine die.[19]Consideration was deferred indefinitely.No further advance was achieved in the last fifty years and it seems that this issue will not be challenged any further as history taken its own course in the last half century. The United Nations regards Gibraltar as a Non-Self-Governing Territory administered by the United Kingdom[20] whereas European Union do not consider Gibraltar as part of UK and wants Spain's consent for EU to enter into dealings with Gibraltar.[21] On 31 December 2020, Spain and the United Kingdom reached an agreement under which Gibraltar would join the European Union's Schengen Area.[22]

5.3 *Pakistan v. India* (1971)

Among the three disputes most interesting was the third complaint, filed by Pakistan against India in February of 1971. The dispute was stimulated by the adjournment of Pakistani flights by India over its territory after two Indian nationals hijacked an Indian plane, took it to Pakistan and flew it, reportedly with the complicity of the Pakistani government. The adjournment of service effectively cut off East and West Pakistan from practicable air transport.[23]

The adjournment of the overflights frustrated air connections between East and West Pakistan and contravened the Chicago Convention and the Air Traffic Agreement. To resolve the debate, Chapter XVIII was

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18 *The Guardian*, Manchester, Thursday, April 13, 1967

19 Annual Report of the Council to the Assembly for 1969-ICAO Available at: https://www.icao.int/annual-reportaccessed on 20 August 2018

20 "A/AC.109/2016/8", United Nations. 29 February 2016.

21 *Boffey, Daniel; Jones, Sam* "Brexit: May gives way over Gibraltar after Spain's 'veto' threat," *The Guardian*, Accessed on 11December, 2020

22 EU Passport free zone; at present 26 European countries

23 www.icj.org>case retrieved on December, 2, 2020

supplicated. The complaint alleged violations of Article 5 of the Chicago Convention and Article 1 of the Transit Agreement, by virtue of which contracting parties are granted the privilege of flying over or stopping without traffic in the territories of other contracting parties, nevertheless whether international air services are scheduled or unscheduled. Initially, the proceedings before the Council experienced a hurdle. India filed a set of protestations on May 28, 1971, challenging the jurisdiction of the Council. India argued that the two states had suspended the Chicago Convention and the Transit Agreement in 1965: air traffic between them was administered instead by the Special Agreement under the Tashkent Declaration.[24] But the ICJ confirmed the jurisdiction of the Council to hear the case.
In 1976, India and Pakistan settled the dispute by issuing a collective articulation concluded the proceedings before the ICAO Council."

6. Dispute Settlement Machinery in other Multilateral Treaties

6.1 The International Air Services Transit Agreement and the International Air Transport Agreement-

The Transit Agreement, also popularly known as the "Agreement of the Two Freedoms", was signed on December 7, 1944 by thirty-two States. The Agreement seeks to create a traditional right of innocent passage for scheduled international flights, permitting Contracting States the first so-called "Two Freedoms" (that is, passage without landing and landing for non-commercial purposes).

The Transportation Agreement, also known as the "Five Freedoms Agreement," was signed on December 7, 1944 by twenty states. Signatories include the United States of America, but not the United Kingdom or any other member of the Commonwealth. This Agreement represented an effort to achieve the essential freedoms of air trade on a multinational basis. In addition to the "Technical Freedoms" of transit and stopovers for non-commercial purposes, it contains the three "Commercial Freedoms" (unloading passengers and cargo in a foreign

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[24] Tashkent Declaration was a peace declaration in between India and Pakistan signed on Januray10, 1966

country, loading them in a foreign country and transporting them from one foreign country to another).

With regard to the resolution of disputes, these two agreements contain a similar clause that requires the submission of disputes regarding their interpretation and application, which cannot be resolved through negotiation, to the machinery provided[25] for in Chapter XVIII of the Chicago Convention.

6.2 The International Convention Relating to Cooperation for the Safety of Air Navigation (EUROCONTROL)

The International Convention on Cooperation for the Safety of Air Navigation was signed in Brussels on December 13, 1960 and entered into force[26]on 1 March 1963.

In the matter of settlement of disputes it requires[27], as the first step in the process of settling a dispute, direct negotiation or discourse between the parties concerned. As a second step, disputes that cannot be settled through direct negotiation are submitted to arbitration. The principle of allowing each party to appoint an arbitrator is maintained. The arbitrators must agree to the nomination of a third umpire and if they do not appoint him in the specified time, at the request of either party, the President of the ICJ may make the selection.[28] Furthermore, the arbitral tribunal is authorized to determine its own procedure. Finally, and most importantly, the court's decision is not subject to appeal and therefore will be final and binding on the parties concerned.[29]

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[25] Section 2 of Article II of the Transit Agreement and Section 3 of Article IV of the Transport Agreement

[26] The Euro control Convention was signed by West Germany, Be1gium, France, the United Kingdom, Luxembourg and the Netherlands. For the text see 523 U.N.T.S. 117 (1965)

[27] The International Convention Relating to Cooperation for the Safety of Air Navigation, 1960 Article 33

[28] *Ibid* Article 33 para 2

[29] *Ibid* Article 33 para 3

6.3 Convention Establishing the Central American Air Navigation Services Corporation COCESNA)

The "Central American Air Navigation Services Corporation" (COCESNA)[30]has the exclusive authorization for air traffic services and aeronautical telecommunications services and radio aids for aeronautical navigation in the territories of the Contracting Parties. The principal objective of the Convention was to avoid replication of services and promote a rational integration of services so that Contracting Parties could meet their international obligations.

Regarding dispute resolution, it establishes: "Any dispute between the Contracting Parties or one or more of the Contracting Parties and the Corporation regarding the interpretation or application of the Agreement that cannot be resolved through direct negotiations will be resolved by an arbitration tribunal composed of as follows: each of the Contracting Parties shall establish and maintain a list of three judges belonging to its Supreme Court of Justice. Within the 6 months following the entry into force of this Convention, said list shall be notified to the Secretary of Central American States.

"The Secretary General of the Organization of Central American States will draw in each litigation to select from among the complete list of nominees the arbitrators, each of a different nationality, who will make up the tribunal. The decision will be dictated by majority vote and will be res judicata with respect to interested parties'.[31]

7. Weaknesses of the ICAO's Dispute Resolution Mechanism

Till to date, the ICAO Council received few complains for resolution under Chapter XVIII. Among the reasons first, there is the formation of the Council itself: it is a political body made up of government representatives appointed for their scientific, managerial or tactful skills, rather than their legal skills. And as such, they do not possess that measure of independence and autonomy from a neutral and

[30] Convention Establishing the Central American Air Navigation Services Corporation was signed on 26 February 1960 (at Tegucigalpa, by the P1enipotentiaries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua)

[31] *Ibid* Article 25

impartial decision-maker that is generally predicted of a judge.[32] For example, during the second *Pakistan v. India* proceeding, several Council members requested postponement of a vote while they consulted their respective governments to obtain instructions. [33] Beyond the problem of the absenteeism of an impartial decision maker is the prospective cost of lengthy court proceedings that consume time and money for the parties.[34]The size of the ICAO Council (thirty-three members) would increase the probability of a lengthy evidence and decision process. Furthermore, it would be possible to have up to sixteen separate dissenting opinions.

Moreover, the Council itself has not shown eagerness for deciding cases under Chapter XVIII.[35] The delay in the process has allowed the parties to resolve the dispute in a friendly and consistent manner in the cases. Good offices and discussion are preferred then formal legal steps in the 1957 Rules and ICAO preferred informal mechanism for mitigating disputes.[36]Dr. Gertler has pointed out that, despite ICAO's limitations, it is not entirely understandable why States have not advanced towards ICAO regarding some discriminatory practices, such as complaints about landing rates, given the clear mandate of Article 15 of the Convention. By setting a decision-making precedent, the ICAO Council could gain attraction as a platform of mitigating controversies relating to international air conveyance business than is possible in outlying mutual settings through unilateral national shielding actions.[37]

8. Observations and Conclusion

Dispute resolution is generally a very complex matter and it is quite difficult to reach its depth and boundaries. The aim of this analysis is to

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[32] *Supra* 9 Third Edition, ISBN-13: 978-9462366190

[33] *Ibid*

[34] T. Buergenthal, Law-Making in the International Civil Aviation Organization 4 (1969) 124

[35] *Ibid*

[36] J. Murphy, The United Nations and the control of International Violence 203-05 (1982)

[37] Gertler, *Bilateral Air Transport Agreements: Non-Bermuda Reflections* (1976) 803-4. https://scholar.smu.edu/cgi/viewcontent.cgi?article=2155&context=jalc accessed on 18 August 2018

highlight the main elements of the structure of legal and political policies and laws regarding disputes in international trade of air services. This analysis undertook to reappraise our conventional ideas about aviation disputes and methods of its resolution as well as to review some of the crucial documents which govern international air policy. Further, the basic conflicts in civil aviation are analyzed in order to discover, if possible, how it may best be resolved. Attempting to achieve that goal, functions of various international organizations and trade alliances were outlined.

The factors which seem to dictate the attitude of States towards international adjudication can be listed as follows:

(a) No State is willing to submit its vital interests in security or economics to the uncertainties of a third-party decision, and the areas considered to belong to the category of "vital" interests are steadily increasing.

(b) In certain cases where questions of national prestige are involved, States generally do not wish to risk a defeat in a tribunal.

(c) All too often a State will act on the premise that its political, economic and military power-base provides adequate guaranty for settling a dispute in its favor without the intervention of an unpredictable third party.

(d) Finally, there is, of course, the lack of confidence in the impartiality or even the competence of judicial authorities.

e) According to Article 84 of the Chicago Convention, the Council's decision is appealable within 60 days of receipt. Therefore, it is implied that an appeal to the judicial organ of UN or to a tribunal formed for the time being must be filed within the same 60 day period. Due to the complicated nature of some disputes that might arise, it would be impossible to file an appeal of a Council decision with the ICJ or an ad hoc arbitral tribunal within the same 60-day period. Therefore, it is recommended that article 84 be modified in order to establish, in addition to the term for notification to the Council, a term of six months or even one year.

f) In case of Sanction for non-compliance by the airline with the Council's decision, it is recommended that the sanction be less severe

in the case of the airline and that an air service not be suspended in case of non-compliance with a decision on a minor matter. In serious cases, the Organization would have more power to take direct action against the State whose airline is in default. Said State might have to face difficulties to continue membership by the action taken by Assembly on the recommendation of the Council or by the Council if the Assembly is not in session.

g) An arbitration clause may be referred as mandatory to the parties so that the dispute can be mitigated in a reasonable time.

Air travel has become one of the most desired means of transport in today's world. So, the Council of ICAO needs to be transformed into a more dynamic body in settling aviation disputes.

Reforms in Juvenile Justice Laws: Bangladesh Perspective

Dr. Nahid Ferdousi*

Abstract

All the States in the world made commitment to make specialized arrangement for child justice with their ratification of the United Nations Convention on the Rights of the Child (UNCRC), 1989.Bangladesh ratified the UNCRC in 1990 and incorporated the international norms in the domestic legal system for reforming juvenile justice. After the independence of Bangladesh in 1971, the Children Act, 1974 was enacted for protection and treatment of youthful offenders.. But many of the provisions of the 1974 Act became obsolete as a result of the adoption of the UNCRC. As commitment made by the government to uphold the juvenile justice principles as per with the international standards, the Children Act 2013 was passed. Now in Bangladesh, the Juvenile Justice System (JJS) is regulated by the 2013 Act. The law creates potentiality to establish separate children courts and reform the institutional set up of child-oriented justice system. This article critically reviews the present situation of juvenile laws in Bangladesh along with there forms made for the youthful offenders within the juvenile justice system.

Keywords: Juvenile Justice, Law, Reforms, International Standards

1. Introduction

Bangladesh, being a high populated country with approximately 68 million children are under 18 years which is around 45 percent of the total population.[1] Like many other commonwealth nations, Bangladesh

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[1] Third and Fourth Periodic Report *on Convention on the Rights of the Child*. Dhaka: Ministry of Women and Children Affairs Bangladesh, 2007. See also, in: 2011 on the Basis of Population and Housing census, the total population has been increased in 149 million, the projected population in 2012 has been made 152 million, Bangladesh Bureau of Statistic, Population and Housing census, 2013.

inherited a legal system that is in many ways influenced by the British-India colonial regime (1757-1947).[2]Later, during the Paksitan period (1947-1971), few laws played an important role towards the juvenile justice.[3] Since its independence in 1971, Bangladesh's government enacted a number of laws to support and strengthen JJS. Bangladesh's Constitution of 1972 is the most important legislative document for safeguarding and securing the rights of its citizens. The Constitution of Bangladesh confirms equality before law[4] for all citizens, which is to be positively interpreted to make special arrangements to protect the interest of children.[5] Therefore, the Children Act 1974 was enacted modifying and consolidating the old British-Indian laws for protection and prevention of cruelty to the offender children. The Juvenile Justice System (JJS) was primarily initiated in Bangladesh by the 1974 Act with the Children's Rules 1976. The 1974 Act rendered an outline to create juvenile courts and juvenile development centres.[6] However, the 1974 Act had some major drawbacks, including the failure to comply with some UNCRC guidelines, ambiguity on age of criminal responsibility and lack of alternative and diversion programs.[7] There was no provision for children aged between 16 to 18 in the 1974 Act for which they were treated like adults under the Penal Code[8] and special statutes for specific offences;[9]and adversely suffered in that justice system.

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2 Cyndi Banks, "The Discourse of Children's Rights in Bangladesh: International Norms and Local Definitions", *The International Journal of Children's Rights,* Vol. 15, No. 3-4, 2007, pp. 391-414.

3 Nahid Ferdousi, "Juvenile Justice for the Best Interest of the Children in Bangladesh: A Legal Analysis," *Journal of Law, Policy and Globalization*, Vol. 18, 2013, pp. 22-32.

4 Article 27 of the Constitution of Bangladesh declares that all citizens are equal before law and are entitled to equal protection of law. So, children are no exception to the constitutional guarantee.

5 The Constitution of the People's Republic of Bangladesh 1972, Article 28.

6 M. Rezaul Islam and Md. Anwarul Islam Sikder, "Effectiveness of Legal and Institutional Framework forJuvenile Justice in Bangladesh: A Critical Analysis",*Social Research Reports,*Vol. 26, 2014, pp. 66-81.

7 Mohammad Bulbul Ahmed and Camellia Khan, "Juvenile Justice System in Bangladesh: A Critical Appraisal", *ASA University Review*, 2010, pp. 225-237.

8 The Penal Code 1860, Sections 53 and 54.

9 The Ministry of Women and Children Affairs (2007), Third and Fourth periodic report of the Government of Bangladesh under the Convention on the Rights of

In 1990, after ratification of UNCRC[10] juvenile justice issue has been focused in the judiciary. Therefore in order to improve the JJS, the High Court Division has implemented a range of juvenile justice guidelines focused on extensive child-friendly services, age, security, basic needs and minimum standard of care, death penalty prohibition and capital punishment.[11] Though the UNCRC[12], the Beijing Rules[13], the Havana Rules[14] and the Riyadh Guidelines[15] have all put a restraint on imposing any kind of corporal punishment on children, Bangladesh lacked the concept of separate juvenile courts. As a result, most of the children and juveniles were sentenced to imprisonment by the ordinary courts[16] and even been punished to lifetime sentences.

In establishing juvenile laws, Bangladesh is one step behind many other countries in Asia. In Asia, Vietnam was the first country to ratify the UNCRC in 1990 and made remarkable achievements in promoting JJS including separate juvenile courts and child-oriented institutional structures as per the UNCRC.[17]India has adopted the UNCRC in 2000 and enacted the Juvenile Justice Act, 2000 and the Juvenile Justice Care

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the Child, p. 65; In January 2000, there were four children under 15 serving life sentences in *Tongi* Child Development Centre (CDC), and in August 2007 there was one child under 15 serving a life sentence in *Jessore* CDC.

[10] The Convention on the Rights of the Child (UNCRC) adopted by the United Nations, General Assembly, 20 November 1989, The Convention came into force on 2 September 1990 in Bangladesh.

[11] 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, pp. 55-76.

[12] Article 37.

[13] Rule 17.

[14] Rule 67.

[15] Rule 54.

[16] In: *Fahima Nasrin vs Government of Bangladesh and other*, (61 Dhaka Law Reports 2009, p. 232) the High Court Division held: "Sentence passed by the judge of the children court does not reflect a correct interpretation of the provisions of the Children Act 1971 (sic) and the sentence of imprisonment passed in respect of accused children is erroneous. Children are not liable to be sent to prison upon attaining the age of 18 years only and the impugned order of the Ministry of Social Welfare is erroneous and without lawful authority."

[17] Thi Thanh Nga Pham, The Establishment of Juvenile Courts and the Fulfilment of Vietnam's Obligations under the Convention on the Rights of the Child, *Australian Journal of Asian Law,* Vol. 14, No. 1, 2013, p.4.

and Protection Act, 2015. India has made considerable progress in conforming their juvenile justice idea with UNCRC, and the concept of child-friendly justice. However, there is no specific juvenile justice friendly law in Bangladesh. The Children Act 2013[18] is the most significant achievement of JJS in the country. The 2013 Act is a statutory venture to introduce a contemporary justice system, resettlement and the promotion of initiatives to deal with the juvenile offenders. This article attempts to critically analyse the reforms of juvenile justice laws and judicial system in Bangladesh and also identifies the best practices prevalent in the country.

2. Juvenile Justice Reforms

The most important document of Bangladesh's JJS is the Children Act 2013. Some of the significant initiatives in the 2013 Act for children are: the formation of welfare boards at different levels of the state, introducing child's affairs desk at the police stations, appointing dedicated police officer for child affairs, probation officers, establishing children courts, institutional care, diversion programs and provisions for providing legal support. Thus, the 2013 Act contains a number of protective[19] and welfare provisions[20] for the best interest of the offender children which are described below:

2.1 Age Determination of a Child

The definition of a minor was not the same in the entire legal system of Bangladesh till 2013. Various statutes mentioned differing age criteria. The range of age in these statutes were from 12 to 18 years. Due to the differences in ages, the children were prone to deprivation of fair justice and basic rights. The Children Act, 2013 has addressed the variance of age of child by raising the age to 18 years. At present, the minor's age has been recognised to be below 18 years in Bangladesh. There is a irrebuttable presumption of innocence for a child below the

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18 The Children Act 2013 (Act no. 26 of 2013).

19 Protective provisions such as; the prohibition on joint trial, prohibition on public trial, child affairs desk at the police stations etc.

20 Welfare provisions such as; diversion, family conference, establishment of child development centres and certified institutes and restrained imposition of punishment etc.

age of 9 years[21] and subject to their capacity to understand the nature and consequences of their action a rebuttable presumption of innocence exist for children between the ages of 9 to12 years.[22]

2.2 Expansion of effective Probation Service

The concept of probation officer (PO) existed in previous 1974 Act. However, the 2013 Act has the provision for PO, his appointment, duties and responsibilities elaborately.[23] PO is the key person to support justice involved juvenile as per the 2013 Act.[24] Duties of a PO include providing legal assistance, contacting parents and family members, coordinating police officers, exploring diversion programs and arranging placement in child development centre. Moreover, the PO must be full time present during the trial to assist the child, does a field inquiry and submit the report on child's conditions to the children's court.[25] In any case the child is transferred to a Child Development Centre (CDC) or any certified institute, it is POs responsibility to set up an individual file for each child for documentation, to follow the procedure for the new institutionalised social support system.[26] In this way probation service has been expanded in the field of juvenile justice.

2.3 Incorporating the Child Affair Police Desk

The most innovative feature of the 2013 Act is the inclusion of Child Affairs Police Officers (CAPO). According to the 2013 Act, CAPO is the first contact person when a juvenile encounters him in the police station.[27] CAPO's duties are to contact the PO, inform parents and

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[21] Section 82, Penal Code, 1860; The word "nine" was substituted, for the word "seven" by section 2 of the Penal Code (Amendment) Act, 2004 (Act No. XXIV of 2004)

[22] Draft of the 5th Periodic Report Convention on the Rights of the Child (CRC); Section 83, Penal Code, 1860; The word "nine" was substituted, for the word "seven" by section 3 of the Penal Code (Amendment) Act, 2004 (Act No. XXIV of 2004)

[23] *Supra* 18, section 5.

[24] M. Imman Ali, *The Children Act 2013: A Commentary by Justice Imman Ali,* Dhaka: Penal Reform International and Bangladesh Legal Aid and Services Trust, 2013.

[25] *Supra* 18, section 6.

[26] *Ibid*, section 84.

[27] *Ibid*, section 10.

family members, and arrange clinic or hospital visits, if necessary. CAPO is also responsible for supervising procedures to determine the child's age. Most importantly, CAPO in consultation with PO, are responsible for exploring appropriate diversion programs for justice involved children and juvenile upon instruction from the children court.[28]

2.4 Establishment of Child Welfare Board

The 2013 Act has incorporated the provision of Child Welfare Board (CWB) at national, district and city levels. The Act provides detailed information on the appointments, roles and activities of the CWB. It is responsible to supervise and evaluate the activities of CDCs; provide proper guidelines for reintegration with the society; and review the development and implementation of all programs related to offender children. The CWB or the PO is responsible for finding out the suitable alternative care and ensuring the children's best interest.[29] The CWB is also responsible to support, supervise and coordinate with district and city CWBs.[30]Only the national level CWB has the mandate to provide guidance and instruction. The district and city level boards only have supervisory power. The national, district and city level CWB have no function of adjudication with delinquent children.

2.5 Right-based Approach in Arrest and Bail

According to the 2013 Act, police cannot arrest any children under 9 years old. If needed so, police cannot use handcuff and ropes in the 2013 Act. If it is established by the police that a child from 9 to 12 years has the capability to understand the nature and consequences of its actions., then the police can arrest the child only if there is reasonable evidence that the child is the perpetrator or the associate of the offence. The 2013 Act sets out the clear procedures of arresting a child. If a child is not released nor sent to a rehabilitation centre nor produced before any court soon after the arrest, the CAPO may release the child on bail with or without conditions or surety under the supervision of the rightful guardian or PO. Where the child does not get the bail, the CAPOs must bring the child in person to the nearest children's court

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28 *Ibid*, section 52(4).

29 *Ibid*, section 8.

30 *Ibid*, section 9.

within 24 hours.[31] The children's court, may allow bail or order for his/her custody in any safe home or a CDC.[32] However, for the first time new provision regarding bail has been explored by the 2013 Act.

2.6 Children's Court and Trial System

The 1974 Act provided legal framework to establish juvenile courts. Although only three juvenile courts were established since then, 2013 Act provides the legal foundation to establish children court in every district and metropolitan area. Accordingly, by gazette notification[33] dated 24 April 2014, the first children's court was selected as the additional session's judge court.[34] The declaration of age of the child by the children court shall be final.[35] The 2013 Act retains the prohibition on joint trial[36] and allows a period of 360 days from the day of child's first appearance to the completion of the trial. If it is not possible to finish the trial within the given period of time for any reasonable cause, the court shall classify reasons. In those cases, the court may allow an extra 60 days. Cases in which extension of time is required and the charge is not of a serious nature, the court shall discharge the child.[37]

2.7 Detention in the Child Development Centres (CDCs)

The main objective of CDC is to support justice involved children with rehabilitation and reintegration via case management, counselling and improving the quality of their education. and productive capabilities of these youths in terms of skills and competencies[38] Three CDCs and a

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31 *Ibid*, section 52 (4).

32 *Ibid*, section 52 (5).

33 Notification issued by the Ministry of Law, Justice and Parliamentary Affairs on 24 April 2014 for establishment of 'Children Court'. See more: http://www.bdchronicle.com/ detail/news/32/ 6352#sthash.trhltDTR.dpuf.

34 M. Imman Ali, 'Justice for Children and the Law: The Past, Present and the Future,' 2014, <http://www.blast.org.bd/content/report/06-09-2014-jfc-and-law.pdf> accessed on 18 May 2016.

35 *Supra* 18, section 21 (4).

36 M. Imman Ali, 'Justice for Children in Bangladesh: The 2013 Act-Brief Commentary,' http://www. supremecourt.gov.bd/ resources/contents/ Children_ Act_2013-Brief_Commentary_v4.pdfaccessed 19 March 2018.

37 *Supra* 18, section 32.

38 Department of Social Service (DSS), Official Documents of Department of Social Service, the Ministry of Social Welfare, Dhaka: Government of Bangladesh, 3 October 2016.

juvenile court under the 1974 Act was a significant institutional development for JJS in Bangladesh. There are two institutions for boys, one at Tongi established in 1978 for 300 boys and another at Jessore District established in 1995 for 150 boys. One is established in 2002, for girls at Konabari, Gazipur District, with a capacity of 150 girls. One more will be set up at Joypurhat, with a capacity of 300. The 2013 Act provides more comprehensive outlines for the establishment; certification and operational producers of CDCs.[39] As per the 2013 Act the order of detention must come through the children's court. Where a child is charged with a very grave offence, the children's court may sentence the child to confinement for any period between three to ten years.[40] For other offense, the court can order to detain the child in a CDC for not more than three years. In certain circumstances if the court, or the government, if any of them considers proper, may release a child.[41]

2.8 Moderate the punishment system

The 2013 Act does not allow a child to be sentenced to death or imprisonment for life by any court. Also, sentence of imprisonment must not exceed period of imprisonment stated in the 2013 Act. The court may order confinement of such youthful offender to remain confined in a certified institute until the age of majority. During the days of confinement, the child will not be not be allowed to associate with any adult person.[42]The 2013 Act introduces sentence for child offenders to imprisonment in extreme cases which conforms the international standards.

2.9 Recognition of diversion, family conference and alternative measures

The 2013 Act provides some provisions which were not recognized by the 1974 Act, such as, diversion program, family conferencing, restorative justice and alternative dispute resolution.[43] PO and CAPO are assigned to take necessary steps to arrange family conferencing, if

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39 *Supra* 18, section 59-69.

40 *Ibid*, section 34 (1).

41 *Ibid*, section 35(2).

42 *Ibid*, section 33.

43 *Ibid*, section 48.

they deem it appropriate.[44] The Department of Social Service (DSS) is mandated to design and implement diversion programs and family conferencing. All communication in diversion programs, family conferencing and Alternative Dispute Regulation (ADR) remain confidential and cannot be used as legal document in court proceedings.[45]

However, the 2013 Act focuses on the institutionalization of juvenile justice, such as establishment of children court, child development centres and child welfare board is the prime example of this. There is also emphasis on diversion programs, family conferencing and restorative justice. UNCRC, Beijing Rule and global awareness on child rights contributed most to the development of the 2013 Act.

3. Challenges of Juvenile Justice Reforms

The 2013 Act introduces a wide range of juvenile supports which includes special judicial mechanisms and institutional residential care, like, alternative care and diversions for the protection of child offenders. However, there are some serious concerns of the implementation of the Act. Thus, protection of youthful offenders remains central challenge in Bangladesh. In practice, some encounters may hinder the process of the development and wellbeing of the children in present JJS in Bangladesh.

3.1 Lack of Implementation of Law

The 2013 Act recognizes some supportive institutions and mentions their responsibilities for protecting the children for their justice.[46] Nonetheless, there are doubts if the 2013 Act will be implemented at all. Establishment of child affairs police desk, child welfare board, family conferencing and other diversion programs seem to be most challenging tasks.[47] CDC is insufficient in Bangladesh, as there are only

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44 *Ibid*, sections 37, 38.

45 *Supra* 24

46 Nahid Ferdousi, "The Children Act, 2013: A Milestone of Child Protection in Bangladesh," *The Daily Star,* 24 September 2013, p. 12.

47 M. Rezaul Islam and Md. Anwarul Islam Sikder, "Effectiveness of Legal and Institutional Framework forJuvenile Justice in Bangladesh: A Critical Analysis," *Social Research Reports*, Vol. 26, 2014, pp. 66-81.

three CDCs for sixty-four districts for the development of juvenile offenders. As a result, the juvenile offenders cannot do regular communication with their parents. Sometimes it is found that children are kept in prisons due to insufficient CDC and this is violation of the rights related to keeping them in jail.[48]

3.2 Absence of Children Rules

There is a huge implementation gap in all sectors of JJS in Bangladesh. There is no clear guideline or rules about the diversion or how the intercession would be made at the execution level. Absence of Children Rules poses difficulty in implementation of juvenile justice administration.[49]

3.3 Lack of special children court

Presently, except the three special children courts, no other court could secure the segregation of juveniles from the adults although the litigation.[50] From 2014, the additional session judge court works as a children's court at the district level and metropolitan area in the country. Empowerment of all the additional session judges with the jurisdiction of the children's court is only burdening it with extra workload as the additional session judge courts are the busiest criminal courts. Therefore, an exclusive court should work as children's court.

3.4 Insufficient Resources in CDCs

Juvenile detention centres must have facility to promote the social responsibility and human development of all juvenile offenders.[51] The existing CDCs governance is not developed in accordance with the 2013 Act as well as international standards. There are not enough resources in CDCs to protect the fundamental rights of child offenders.

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48 M. Enamul Hoque, *Best Interest of the Children,* Dhaka, 2009, p. 18.

49 The Children Act, 2013 has authorized the government to frame rules for attaining the objectives of the Act.

50 Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, Dhaka: Save the Children UK, 2008, pp. 66-67.

51 According to Beijing Rule 26 the objective of institutional treatment is to provide care, protection, education and vocational skill, with a view to assisting the juvenile to assume a socially constructive role in society.

As a shortage of manpower, the districts' social welfare officer usually act as the probation officer.[52] The Third and Fourth periodic report of UNCRC Committee shows that the CDCs need better management, security, support and amenities; and stated that "there are shortages of training facilities for children, and the general physical conditions of the children and overall atmosphere are not up to the mark".[53]

3.5 Legal ambiguity

The 2013 Act clearly prohibits capital punishment and it's equivalent for children.[54] but this is provision is not applicable to the juvenile offenders sentenced under the previous 1974 Act. The 2013 Act says only a children's court can hear cases of a child. Women and Children Repression Prevention Act, 2000 and the Acid Violation Prevention Act, 2002 states that if the accused person is a child, the trial should take place in tribunals only. There are some ambiguities about which court shall hear these cases. On August 14, 2016 during hearing bail petitions, the High Court ordered secretaries to the Ministry of Law and Justice; and legislative and parliamentary affairs divisions under the law ministry and the Ministry of Social Welfare to clear the "ambiguity" in the 2013 Act over the holding a trial of an adult under this law.[55] This unclear provision of the 2013 Act is detrimental for the children.

After reforms of juvenile justice law, lack of proper implementation of the 2013 Act, creates many limitations among key actors in the justice administration. Consequently, often children are not getting fair and friendly justice from the reformed judiciary.

4. Way To Frame Child-Friendly Justice

The Bangladesh juvenile justice system has much improved, but it needs much more improvement for mending juvenile deviant. The

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[52] Official records of DSS, 2015-2016.

[53] UNCRC Committee (2008), 'Third and fourth periodic reports of Bangladesh submitted to the Convention on the Rights of the Child,' UNCRC/C/BGD/4, 23 October 2008, p. 31 (accessed on 19 March 2018).

[54] *Supra* 18, section 33(1).

[55] Draft on amendment of Children Act placed to High Court, *The Daily Star,* 15 January 2018.

present JJS needs a wide range of tools to achieve the child-oriented justice and wellbeing of the children. The government is required to take initiatives relating effective JJS. To create a child-friendly justice in our country, we need to address following critical issues:

4.1 Legal Initiative

A holistic approach is needed for the development of Bangladesh JJS in needs a total reformation in the area of legal, social, financial, psychological aspects both for the juveniles offenders in custody and the custodians; and strong motivation of the State in terms of proper implementation of all reformation. It is of utmost importance that the government should frame rules for attaining the objectives of the 2013 Act. Therefore, the minimum age for criminal responsibility of children should be at least 12 years old and the rebuttable presumption of innocence should be raised to 18 years. After the enactment of the 2013 Act, current pursuit at governmental and community plane suggests that rules regarding restorative justice is important element in mainstream of the juvenile justice practice.[56]

It is high time that the government seriously concentrates in framing the Children Rules keeping in mind the non-custodial sanctions mentioned in the General Comment of the Committee on the Rights of the Child 2007 and the Council of Europe Guidelines. The preamble of the Act 2013 mentions in explicit words that it is enacted to implement UNCRC and with that aim the Act has added many of the new concepts such as diversion, family conferencing, alternative care, dispute resolution, none of which can be practiced properly without the Children Rules. The need for child affairs desks in the police station and independent national child welfare boards to be setup in each district is yet to come true. In 2017, one district level child welfare board has been established with the collaboration of DSS and UNICEF. Five more child welfare board are schedule to be completed in five *upazillas* of two districts 2018.[57]

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56 Md. Abdul Kader Miah, Mahmuda Akter and Md. Kamruzzaman, 'The Effectiveness of Restorative Justice Practice in Bangladesh: An Analysis,' *Humanities and Social Sciences*, Vol. 5, No. 5, 2017, pp. 176-183.

57 BSAF (Child Rights Forum of Bangladesh) Report, December 2017.

4.2 Administrative Initiative

The government should prepare a yearly progress report on the situation of the JJS of the country. The police have a meaningful role in dealing with a juvenile offender for it is only he arrests an offender and produces her/him before the court. Thus, adequate number of CAPO in the police stations should be recruited. It needs to be mentioned here that the Ministry of Home Affairs (MoHA) has appointed 597 child affairs police officers in many police stations to provide specialized services as stipulated in the 2013 Act. This is not sufficient for the whole country. For speeding up the probation service, the post of probation officers should be duly filled in by the government. Development of children court, child and welfare board, CDC and diversion programs is a necessity to make the Act of 2013 meaningful. In order to shift the old punitive parenting style, the CDC should provide workshops for parents involving children. Along with the enactment of the Act 2013 all the constituent parts mentioned in this Act and as discussed here must be brought to the surface for proper implementation of the JJS.[58]

4.3 Institutional Initiative

At present at least one CDCs must be established in each of the divisional head-quarter in the country. More NGOs can render their service to the government by setting up certified institutes.[59] Additionally, independent children courts in each divisional city should be established and situated in such a way that children do not have to visualize the criminals and prison vans in the Court. The suggested children courts should be given wide jurisdiction similar to session courts. After establishment of the children court in eight divisional cities, the government should make an endeavour to establish children courts in all districts, to meet several of the

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[58] 'Justice for Children', *Penal Reform International,*2014,<http:// www.penalreform.org/ themes/ juvenile-justice>.

[59] Abu Noman Mohammad Atahar Ali, Zafrin Andalleb and Abu Saleh Md. Tofazzel Haque, 'Towards a Proper JJS in Bangladesh from a Cluttered One: An Analytical Overture on Focusing Human Rights Perspective,' *Journal of Human Rights Summer School,* 2008,pp. 241,251.

standards for juvenile justice set forth in the UNCRC and other international legal instruments. Side by side child-oriented and child-freindly training should be imparted to the concerned agencies responsible for the implementation process of a case from the first day of arrest to the last day of after-care service. Police, probation officers, social caseworkers, court assistants and most importantly the judge will be needed for the operation of children's courts. These sectors can play important role for bringing a change in the overall juvenile justice system in Bangladesh.[60]This court should maintain simple procedures, a flexible approach and homely atmosphere with in camera trials.

4.4 Wellbeing initiative

Alternative measures are promoted by the 2013 Act and also by the court practice. Rehabilitation programs offering education, counselling, physical and mental exercise, employment, adjustment in society, etc., may be introduced to restore the delinquent back to normal living and develop his personality. At any time, diversionary measures upon an offender child after arrest should be introduced immediately. Since best interest of the child is the main consideration, to reintegrate the children in conflict with law regulated diversion based on restorative justice seems to be the best solution to fix the damaged state of affairs. Application of restorative justice involves many people, time, venue and logistic support. The government should take initiative for institutional set up in each divisional headquarters for fair justice.

5. Conclusion

Though the 2013 Act is not direct juvenile justice care and protection law but the law raised the age of juvenile offenders from 16 to 18; it aspires appointment of one independent judge in every district with such jurisdiction as it considers proper; it aims in introducing child friendly policing; non consideration of detention of children; introduction of probation of good conduct; complete removal of death penalty and life imprisonment with a possibility to release for children.

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60 Nahid Ferdousi, 'The establishment of children's courts in Bangladesh: from principle to practice,' *Oxford University Commonwealth Law Journal*, Vol. 15, No. 2, 2015, pp. 197-221.

All these efforts will not work if the enacted law is not appropriate or cannot be enforced. In the above discussion, it is clear that it has failed to lead to any dramatic improvement within the management of juveniles in the country. The demand is the proper performance of the law. It is important to set up child help desk in police stations. Founding of independent children's courts and Children Rules is necessary. The 2013 Act cannot be turned into practice without floating all the postulations archived in it. Moreover, the government and public attention is needed on this issue. Indeed, it is presumable that without corresponding steps to provide child-friendly protective and welfare measures, the JJS in the country would not be successful.

Development of Laws Regarding Transfer of Property in Bangladesh: An Appraisal

KMS Tareq*

Abstract

In Bangladesh, the core law relating to transferring properties is the Transfer of Property Act 1882. The Act was amended in 2004 and it brought some significant changes in the procedure of transferring, in particular, immovable properties. Therefore, this article has focused on the development of laws regarding the transfer of properties after passing the amending enactment. The doctrinal research approach is adopted to this study. The paper finds, on the one hand, the amending Act has developed the contemporary laws regarding transfer of property, and on the other hand, it has contradicted with several provisions of the existing law. The study also exposes the amending Act itself suffers from serious limitations. The prime conclusion inferred from the research is that although the amending provisions aim to ease the complexity of the transfer of immovable properties, it has brought some difficulties. The paper suggests making the transfer of immovable property more effective through correcting the identified loopholes.

Keywords: Amending Act, Authorised Person, Authority to Transfer, Immovable Property, Transferor

1. Introduction

In Bangladesh, the core law relating to transferring properties is the Transfer of Property Act.[1] The Act was passed in 1882 along with some other enactments concerning properties.[2] Although both movable and immovable properties can be transferred under the Act, it deals mainly with the transfer of immovable property.[3] Despite the Act is more than

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[1] Transfer of Property Act 1882 (Act No IV of 1882) (hereinafter the Act or TPA).

[2] The Trust Act, Easement Act and Power of Attorney Act were enacted in 1882.

[3] TPA, s 5(n 1).

one hundred and thirty years of age, it had been amended notably for twice in its long journey. In 1929 the Act was examined exhaustively for the first time and the most recent substantial changes were brought into the Act in 2004.[4] The Transfer of Property (Amendment) Act 2004 has advanced the law of transfer of property by adding as well as omitting provisions from the Act. In particular, it has added independent provisions concerning contract for sale,[5] requirement of latest *Khatiyan,*[6] requirement of written consent in some cases,[7] and support of affidavit[8]. It has further added a proviso in respect of the power of sale by mortgagee.[9]Moreover, the amending Act has inserted a new paragraph regarding gift[10] and omitted some phrases from the provisions of part performance,[11] sale,[12] and *mortis causa.*[13] Although the amending Act has brought some significant developments with regard to laws of transfer of properties, it is worth noting that along with clerical errors, a range of considerable limitations are also identified in the amending Act. That is to say that on the one hand, the modified provisions protect the rights of a transferee of immovable properties and on the other hand, the law is contradictory with many other provisions of the Act concerning the authority of a transferor especially when a person other than the owner transfers a property.

The objective of this study is to assess the development of laws regarding transfer of a property after passing the Transfer of Property (Amendment) Act 2004 andthus, the relevant provisions of the Act will be scrutinised in the light of the amending Act. Since no field work is necessary to achieve the objective of this study, it follows the doctrinal research methodology analysing the statutes and relevant judgments as primary sources. Moreover, the study has investigated journal articles and books as secondary sources.

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4 Act no XXVI of 2004.
5 TPA, s 53B (n 1).
6 ibid s 53C.
7 ibids 53D.
8 ibids53E.
9 ibids 69.
10 ibids123.
11 ibids 53A.
12 ibids 54.
13 ibid s 129.

To develop arguments, the paper has been divided into four sections. In the first section, the authority of the transferor will be examined. The second section assesses the cases where a property is transferred by a person other than the owner of the property. The third section analyses the amended provisions to expose developments and limitations of the law of property.Finally, it will provide suggestions to overcome the identified inconsistencies.

2. Authority to Transfer a Property: Setting the Scene

The revised provisions have primarily contradicted with the sections concerning the authority of a transferor to transfer a property and therefore, it is necessary to investigate the authority of a transferor to set the scene of the paper. The relevant provision of the Act is as follows:

> Persons competent to transfer: Every person *competent to contract* and *entitled* to transferable property, or *authorised* to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.[14]

The transferor, in accordance with the provision mentioned above, is required to have two qualities to be competent to transfer: one, the person must be a qualified person to enter into a contract to make a transfer; and second, he/she has to own the property or to be authorised to transfer the subject of the conveyance. Since the Act deals with only transfers by act of the parties[15]which are limited to *inter vivos*,[16] the transferor is again required to be a living person. In addition to natural persons, companies, associations or bodies of persons are treated as living persons under this Act.[17]

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14 TPA,s 7 *emphasis given*(n 1).

15 As there are two modes of transfer of property: i. Transfer by act of parties and ii Transfer by operation of law, this Act deals with transfer by act of the parties as stated in its preamble.

16 TPA, s 5(n 1).

17 ibid s 5 proviso.

Concerning the first essence, it is*sine quo non* for a transferor to be competent to enter into a contract.[18] A person who is of the age of majority, of sound mind and is not disqualified to make a contract by any law, is competent to enter into a contract.[19] Notably, a person, domiciled in Bangladesh, under eighteen years of age is a minor.[20]However, when before completing his/her eighteen years of age a guardian has been appointed for his/her person or property or for both by a court or every minor of whose property the superintendence has been assumed by Court of Wards, every person shall attain his/her majority when he/she completes the age of twenty-one years.[21]Again, about the prerequisite of soundness of mind, a person is said to be of sound mind for the purpose of making a contract, if, at the time when he/she makes it, he/she is capable of understanding it and of forming a rational judgment as to the effects upon his/her interest.[22]Finally, the third essence, a person who is disqualified from contracting by any law to which he is subject is incompetent to enter into a contract. Thus, after fulfilling the above three essences a person becomes competent to enter a contract.

Regarding the essence of entitlement and authorisation, a person has to own or to be authorised to transfer a property. The ownership is a right of a person upon a property, and actually, the ownership signifies a bundle of rights. To illustrate, when the property is an immovable one, it is impossible to prove ownership through a single deed or possession only. Rather the right of ownership can be demonstrated through possession and a number of documents including the deed of the property,[23] *Khatiyan,*[24] Map,[25] Duplicate Carbon Receipt

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[18] According to s 4 of the Act, the chapters and sections related with the Contract Act 1872 shall be taken as part of the Contract Act.

[19] Contract Act (CA) 1872, section 11.

[20] Majority Act (MA) 1875, section 3.

[21] ibid.

[22] CA, s 12 (n 9).

[23] A deed is an instrument made, sighed and registered in accordance with law for the purpose of transferring immovable property. In Bangladesh, a deed is prepared under the Registration Act 1908.

[24] *Khatiyan* is a document relating to land management prepared by the government by way of survey or mutation.

[25] Map is called *Naksha* in Bangla meaning the demography portrayed by surveyor during survey. Normally map is prepared considering *mouja*[block] as a unit.

(DCR),[26]*Dakhila*[27]and some others. The most significant thing in case of ownership of immovable property is the chain of the documents from owner to owner. At present, the chain of ownership for at least twenty-five years is required by law to transfer an immovable property.[28]Furthermore, a person other than the owner of a property is qualified to transfer if he/she is authorised to do so. Notably, the authorisation might be conditional or absolute, to the extent and in the manner allowed and prescribed by law.

Summing up, a person can transfer a property if he/she becomes the owner of the property or is authorised to transfer the property. In addition, the owner or the authorised person needs to be competent to become a party to a contract. The aspect of authorisation is analysed in detail in the following section examining the relevant sections of the Act.

3. Transfer of Properties by a Person Authorised by Law

As it has been analysed, a property can be transferred by the owner of a property or by a person other than the owner who is authorised to transfer the property. In most circumstances, it seems that a person has been authorised to transfer means he/she has been authorised by the owner of the property. The case is, however, not always the same. The transferor is authorised either by the owner of a property or by law. That is say that on the one hand, a person might be authorised by the owner of a property and in these cases the person has been given the power of attorney and at present, this is governed by the Power of Attorney Act 2012.[29]On the other hand, there are many cases where statutes make provisions by dint of which a person can transfer the property.[30]Since this type of authorisation arises from the provisions of law, this paper addresses them as persons authorised by law. As the study is restricted to the Transfer of Property Act, now the relevant provisions of the Act where the transferor is authorised by law, i.e. by the Transfer of Property Act, would be examined.

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[26] DCR is a receipt as the proof of fees paid to land offices in respect of mutation or any other matters other than Land Development (LD) Tax.

[27] *Dakhila* is the receipt of payment of LD Tax.

[28] Registration Act 1908 (RA), s 52A.

[29] Act No XXXV of 2012.

[30] TPA, ss 35, 38, 41 and 43 (n 1); Guardian and Wards Act 1890, ss 27, 29; Trust Act 1882, ss 11-12; Succession Act 1925, s 307.

The doctrine of election is the prime case where a person is authorised by lawto transfer a property of which he/she is not the owner.[31] Actually, the doctrine of election was originated by the House of Lords in the case of *Cooper v Cooper*.[32] Lord Hatherley explains the principle underlying that '[T]here is an obligation on him who takes a benefit under a will or other instruments to give full effect to that instrument under which he takes a benefit'.[33] This doctrine is recognised in Bangladesh under the law of transfer of property[34] and in this case a person is allowed to transfer both movable and immovable property of which he/she is neither the owner nor has been authorised by the owner of the property. Rather, the authorisation has derived from the provision of the law. By way of example, Ms A and Ms B are the owners of the properties X and Y respectively. Ms A transfers Y property to Ms C although Ms A is neither the owner nor authorised by its real owner, Ms B, to transfer the property.However, in consideration of the transfer of Y property of Ms B, Ms A transfers a benefit, for example X property, to Ms B. The transferswill take effect only when Ms B elects in favour of the whole transfer. Here, a person (A) transfers two pieces of properties (X and Y), one (Y) to a stranger (C), although the transferor is not the owner of the property transferred, and confers a benefit (X) on the actual owner (B) of that property (Y) in lieu of the transfer made by the transferor in earlier.

The second example of transfer by an authorised person is evidenced in a case of the existence of certain circumstances.[35]This provision of the Act is based on the leading case of *Hunnooman Persaudv Baboor*[36] and particularly on the following passage:

> The purposes for which a loan is wanted are often future as regards the actual application. Their Lordships do not think that bona fide creditor should suffer when he has acted honestly and with due caution but he himself is deceived.[37]

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[31] TPA, s 35 (n 1).

[32] (1874) LR 7 HL 53.

[33] G C Venketa Subbarao, *Lectures and Comments on Transfer of Property Act (*Abridged 6th edn, C Subbiah Chetty & Co 1967) 168-169.

[34] TPA, s 35 (n 1).

[35] ibid s 38 (n 1).

[36] (1856) 6 M I A 393.

[37] SM Hasan Talukdar, *Unlocking Law of Transfer of Property: Theory and Practice* (1st edn, Law's Empire 2017) 75.

In this case, a person, is neither entitled to nor authorised by the owner to transferthe property.However, he/she transfers the property for consideration arguing the existence of a special circumstance, and this would be a valid transfer.[38]Hence, the transferor is authorised by the law to transfer a property satisfying the conditions of existence of the required circumstances.

The third case regarding transfer by a person other than the owner is related with the transfer of property by an ostensible owner.[39] In this case a transfer for consideration is permitted by a person who is not the real owner of the property; however, he/she transfers it ostensibly with the express or implied consent of the actual owner. Since the transferor is not expressly authorised by the actual owner of the property, he/she is allowed to transfer the property by the provision of law and thus, the transferor is authorised by law to transfer a property.

The fourth instance of transfer by a person other than the owner is the case of feeding the grant by estoppel. The decision of the Privy Council in *Luchmim v Kullichurn*[40] case explores the nature of ostensible ownership. Sir Barnes Peacocck remarks in the case thus:

> It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase money was her *stridhan*, and in all his acts, both public and private, during his life time, representing that the property is of his wife's. After that representation on the part of the father, his heirs were no more entitled to recover than the father, would have been in his lifetime...[41]

The Act speaks here about the transferby a person other than the owner who subsequently acquires interest in the property transferred.[42] In this case of feeding the grant by estoppel doctrine, a person who transfers immovable property fraudulently or erroneously has no title on the property to do so.However, he/she acquires interest in the propertysubsequently, and thus, the transfer is allowed under

[38] ibid.
[39] TPA, s41 (n 1).
[40] (1873) 19 W R 292.
[41] Subbarao,190(n 33).
[42] TPA, s 43 (n 1).

law. Hence, the transferor is not authorised by the owner of the property under the Power of Attorney Act, rather this provision has given the transferor an authority to transfer the property. A similar provision is also found in the Specific Relief Act[43] although the basic provision of the doctrine of estoppel is incorporated in Evidence Act.[44]

Finally, in the case of mortgage and lease the example of the handover of an immovable property by a person other than the owner is exposed. Among the five modes of transfer of property under the Act,[45] only a certain interest is transferred under mortgage and lease. However, the mortgagee and leasee can further transfer the property mortgaged or leased to them respectively. Although a leasee can be retrained absolutely from further transferring, such kind of restriction is not allowed in case of mortgage.[46]It is worth noting that the transfer of an immovable property is seen in the case of availing the remedies by a mortgagee.There are three remedies opened before the mortgagee namely suit for foreclosure,[47] suit for mortgage money,[48] and sale.[49] Under the Act, a mortgagee can sell the mortgage property without the intervention of court in three specified cases satisfying two conditions.[50] In these cases the mortgagee is allowed to sell the mortgaged property without being authorised by the mortgagor; rather he/she is authorised by this provision of law. At the same time, the leasee may transfer the whole or any part of his/her interest in the propertyby way of mortgage or sub-lease, and any transferee of such interest may again transfer it. The leasee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.[51]

In sum, the usual way of authorisation occurs when the actual owner of a property authorises the transferor to transfer the property.

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[43] Specific Relief Act (SRA) 1877, s 18.
[44] Evidence Act 1872, ss 115-117.
[45] Under the Act, there are five modes of transfer of property; sale, mortgage, lease, exchange and gift.
[46] ibid s11 (n 1).
[47] ibid s 67 (n 1).
[48] ibid s 68 (n 1).
[49] ibid s 69 (n 1).
[50] ibid.
[51] ibid s108 (B) (j) (n 1).

However, in the cases of election, special circumstances, feeding the grant by estoppel, transfer by ostensible owner and a transfer by a mortgagee or leases, the immovable property is transferred by a person who is neither the owner nor authorised by the owner; rather he/she is authorised by the Act to transfer the property. As there exists a daunting hazard of transferors as well as transferees respectively to transfer and receive immovable properties in above cases, the government of Bangladesh has passed the amending Act of 2004. However, this law has made a mess with the provisions regarding a transfer by a person authorised by law.

4. Analysis of the Amending Act to Expose Advancements and Limitations

As the foregoing analyses have underlined the issue of the authority to transfer and the cases of transfer by an authorised person, this section underscores the development and limitations of provisions regarding transfer of properties investigating the amending Act of 2004 from two perspectives: the inherent shortcomings of the amending Act and the contradictions it creates with other provisions of the Act.

4. 1 Provision of Contract for Sale

The notable innovation brought under the amending Act is the provision regarding contract for sale. The provision is as follows:

> Immovable property under contract for sale not to be transferred: No immovable property under a contract for sale shall be transferred except to the vendee so long the contract subsists, unless the contract is lawfully rescinded, and any transfer made otherwise shall be void.[52]

To keep pace with this provision of the Act, in 2004, sections 21A[53] and 17A[54] were added to the Specific Relief Act and the Registration Act respectively. It is noteworthy that the contract to transfer immovable property is specifically enforceable because the breach of such a

52 ibid s53B (n 1).
53 Specific Relief (Amendment) Act 2004 (Act no. XXVII of 2004), s 21A.
54 Registration (Amendment) Act 2004 (Act no XXV of 2004), s 7A.

contract cannot be adequately relieved by compensation in money.[55] Again, the provisionsof Registration Actand the Transfer of Property Acthave required to execute a contract for sale in writing and to register it compulsorily as well.[56]Moreover, the analogous provisionof Specific Relief Act stipulates the enforceability of the contract for sale specifically under certain conditions.[57] Thus, after inserting the provision in the Act, the right of the person who enters a contract for sale has been guaranteed. However, there are several limitations of this revised provision. First, the paragraph five of section 54, Definition of Sale and Contract for Sale, states that a contract for sale does not, of itself, create any interest in or charge on such property.[58] However, this amended section 53B has vibrantly underlined an interest in and charge on the property in question as it has mentioned that the property cannot be transferred to a person other than the person with whom the vendor enters a contract for sale. On the one hand, the amended provision requires the transferor to transfer the land only to the transferee of the contract for sale and on the other hand, the other provision states the transferee of the contract for sale has no interest in the property. As such, these two provisions are contradictory to each other and the concerned paragraph of section 54 needs to be omitted to bring conformity with the new provision.

Secondly, the amended provision again contradicts with the illustration of section 40 which states:

> A contracts to sell Ulipur to B. While the contract is still in force, he sells Ulipur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.[59]

While the section 53B emphasises 'so long the contract subsists' any transfer made otherwise will be void, this illustration allows a transfer 'while the contract is in force'. In other words, after incorporating section 53B, the transfer, in the above illustration, by A to C is void and the illustration consequently has become vividly contradictory with the

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55 SRA, s 12 (explanation) (n 43).
56 RA, s 17A (n 28); s54A (n 1).
57 SRA s 21A (n 43).
58 ibids 54 (n 1).
59 TPA, s 40 illustration (n 1).

amended provision. Therefore, the illustration is required to be replaced by a fresh and correct one which will be compatible with the newly inserted provision.

Finally, the provision regarding contract for sale is exclusively related with sale. It is notable that there is a separate chapter titled "CHAPTER III OF SALE OF IMMOVABLE PROPERTY" and consequently, this provision 53B is required to be placed in chapter III. Ignoring the jurisprudential similarity andconsidering the alphabetical similarity, the amended section 53B is placed mistakenly after the section 53A which was inserted in 1929.

To sum up, the ultimate object of incorporating the provision in respect of contract for sale is to ensure the rights of the transferee under a contract for sale. However, the revised provision is inconsistent with some other portions of the Act. By way of example, Ms A enters into a contract for sale to transfer an immovable property to Ms B, but later she transfers it to Ms C. According to the amended section, the contract between Ms A and Ms C is void ab initio. However, under section 40 Ms B may enforce it against Ms C if Ms C has notice of the transfer between Ms A and Ms B. Again, under the paragraph five of the section 54, Ms B has no interest and charge upon the property. Thus, the three provisions have made a mess regarding a transfer of immovable properties under a contract for sale.

4.2 Provision Requiring Latest Khatian

The other revised provision of the amending Act is relating to *Khatian* and it encloses as follows:

> Immovable property without *Khatian* not to be sold: No immovable property shall be sold by a person unless his name, if he is the owner of the property otherwise than by inheritance, or his name or the name of his predecessor, if he is the owner by inheritance, appears in respect of the property in the latest *Khatian* prepared under the State Acquisition and Tenancy Act 1950, and any sale made otherwise shall be void.[60]

The provision requires for the latest *khatian* to make a transfer and this will reduce various complexities in transferring immovable properties.

[60] ibid s 53C (n 1).

For example, the requirement of latest *khatian*will prevent more than one transfer of lands or transfer of immovable property of others.

The meaning of the latest *khatian*is crucial to apprehend the provision. Notably, a *Khatian* is the identity card of a piece of land and it is an important document for the ownership of an immovable property. It consists of all particulars relating to a piece of land including its address, the name and address of the owner, the class of the land and some others.[61] Generally, a *Khatian* is prepared either by way of survey or by way of mutation. In the history of land laws of Bangladesh, the first survey was conducted from 1888 to 1940 under the Bengal Tenancy Act 1885.[62] The *Khatian* prepared under the survey is known as Cadastral Survey *Khatian* or CS *Khatian*. After the acquisition of the interest of rent-receivers which is popularly coined as abolition of zamindarship, the second survey was carried out from 1956 to 1962 under the State Acquisition and Tenancy Act[63] and as such, another *khatian* is prepared. This *Khatian* is known as State Acquisition *Khatian* or SA *Khatian* in short. The recent survey *Khatian* is the Rivisional Survey *Khatian* or RS *Khatian* which is prepared by the government at any time.[64] These CS, SA and RS *Khatian*s are survey *Khatians* of Bangladesh to date. Furthermore, the other type of *Khatian* is known as mutation *Khatian* which is prepared by the Revenue Officer in case of transfer of ownership of land. Notably, a *Khatian* is the prima facie proof of possession and possession is the proof of ownership. Therefore, the ownership is incomplete in absence of a *Khatian*. A *Khatian* is required to comply with the concerned map of the land otherwise it carries no weight. In a word, the combination of a *Khatian* and its map is called Record of Rights (ROR). While the transferor possesses the property during the survey, popularly these persons are known as *recordiyo malik,*the latest *Khatian*then means the RS *khatian*. Alternatively, when the property is transferred from the *recordiyo malik* or from any other persons, the latest *Khatian*then signifies the mutation *Khatian*. Whatever the nature of the *Khatian*- RS or mutation - the amended provision requires the latest *Khatian* to make a transfer.

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[61] State Acquisition and Tenancy Act (SATA)1950, ss 17-19.
[62] Bengal Tenancy Act 1885, s 101.
[63] SATA, ss 17-19 (n 61).
[64] ibids 144.

Although there are many positive aspects of the revised provisions, the section 53C has made some other provisions of the Act redundant. Firstly,among the five modes of transfer of property – sale, mortgage, lease, exchange and gift, the right of ownership is transferred by way of sale, exchange and gift. However, the amended section has required updated *Khatian* in the case of sale only. What the case would be in other two modes of transfer – exchange and gift where the ownership is transferred is unanswered. The section should be revised substituting 'sale' by the word 'transfer' or at least by the words 'sale, exchange and gift' to apply to all cases where the ownership of the property is transferred.

Secondly, it is shown that there are many sections in the Act which permit to transfer a property by a person who is not the owner of the property. Where a person other than the owner is allowed to transfer an immovable property, how the requirement of updated *Khatian* in his/her own name or in the name of his/her predecessor could be ensured. To illustrate, a transfer under the doctrine of election, the transferor transfers at least two pieces of property of which he/she is the owner of one piece only; and in lieu of transferring another property of any other person, he/she bestows a benefit to the owner of the property. This doctrine is equally applicable for both movable and immovable property and in case of immovable property it becomes inconsistent with this new amended section directly. Besides, a transfer of immovable property by ostensible owner or under the doctrine of estoppel has afforded the opportunity to transfer immovable property of others. The amended section has made these provisions almost ineffective; however, nothing has been explained in relating to these provisions in the amending Act.

Thirdly, the provision has required the latest *Khatian* by the transferor 'in his own name or in the name of his predecessor' when the transferor inherits the property. It means a person can transfer a property which he/she owns by way of inheritance before preparing and registering the partition deed and mutation.[65] This might cause no hazard while the transferor becomes the sole heir of the deceased. However, when there is a number of heirs, certainly it will be unwise to allow anyone of them to transfer the property without updating

[65] The process of mutation based on partition deed is enclosed in the s 143B (n 61).

their names in the mutation *Khatian*. There is a provision as to apply for mutation on the basis of a partition deed preparing it on the basis of compromise or partition suit.[66] It is argued that this option of transferring predecessor's land without updating the *Khatian* in the name of the transferor is causing problems in respect of ownership and possession. Again, almost all partition suits are the by-product of the shortcoming of this provision.

In summary, the relevant sections of the Act which allow a person to transfer a property without a *khatiyan*need a revisit to keep pace with the newly amended section. Again, it is also urgent to fulfil the inherent loopholes of the amended provision since this type of transfer is the breeding house of creating unexpected complexities relating to the ownership and possession of the land. Finally, it is suggested to amend the provision removing the opportunity of transferring immovable properties in the name of the predecessor.

4.3 Provision as to Supporting a Transfer by Affidavit

The amended provision requiring affidavit as to ownership is:

> Instrument of transfer to be supported by affidavit: Every instrument of sale, gift, mortgage and declaration of heba of any immovable property shall be supported by an affidavit by the executant affirming that he has lawful title to the property.[67]

Keeping pace with other revised provisions, section 53E has also protected the rights of the transferee of immovable properties. In this case, it is done by way of guaranteeing and identifying the appropriate transferor. As the transfer by false and fake owner of land is very usual in our country, this provision has obliged the transferor to declare that he/she is the owner of the property, in case of a false statement, he/she has to face criminal prosecution for giving false evidence.[68]

However, there are at least two limitations of this provision: firstly, in addition to sale, gift, mortgage and declaration of heba, there are two other modes of transfer of immovable property under the Act namely lease and exchange.Whereas the ownership is transferred through exchange, a certain interest is transferred under lease. It is, however,

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[66] SATA, s 143B (n 61).
[67] TPA, s 53E (n 1).
[68] Penal Code 1860, s 193.

pointless to exclude the exchange and lease from the paradigm of the provision although other modes of transfer are mentioned in the provision.

Secondly, the amended provision requires an affidavit by the executant concerning the lawful title to the property transferred. However, along with the owner a person who is authorised by provisions of law can transfer a property. This provision has erroneously required an affidavit as to lawful title by the executant of the instrument. In other words, since the instrument can be executed by the actual owner of the property or the person authorised, how a person authorised can give the affidavit as to lawful tile as he/she is not the owner, merely he/she is authorised to transfer. By way of example, the Act has permitted to transfer a piece of land, left by her husband, by a Hindu widow on the ground that the income of the property is insufficient for her maintenance.[69] In cases alike, the Act has not addressed the matter how the transferor provides affidavit affirming her lawful title.

To recap, the provision argues for an affidavit regarding the title of the owner. However, it fails to consider other modes of transfer without any reason and, it also requires an affidavit of title in each case of transfer which is neither possible nor practicable.

5. Suggestions

The amending Act has become unsuccessful to perceive the relationship of the revised provisions with other provisions of the Act. As such, the Act needs a revisit to accommodate the following suggestions.

Concerning the right of a transfereeof a contract for sale of immovable properties,the present Act has simultaneously accepted and rejected the right of the transferee. That is to say that on the one hand, under section 54, it is stated that the transferee of a *Bayana* contract has no right. Conversely, section 53B underlines the right of the transferee mentioning that unless and until the *Bayana* contract is legally rescinded, any further transfer of the property is void. Again, the section 53B needs to be positioned in the Chapter III and it should be section 54B as it is exclusively related with sale of immovable property.

[69] TPA, s 38 Illustration (n 1).

With regard to the latest *Khatian*, it has been emphasised that whilst the Act allows a person other than the owner to transfer a property under the doctrine of election, ostensible ownership, estoppels and some other, the amended section 53C ha required updated *Khatian* in the own name of the transferor. This requirement is vividly contradicting to the existing provisions of the Act. Therefore, sections 35, 38, 41, 43 and 108(B)(j) should be amended adding the clause 'Subject to section 53C' and then, the provisions would be consistent and meaningful. Besides, the amended provision has kept open the opportunity to transfer any immovable property by a person when the name of his/her predecessor appears in the latest *Khatian* in the case he/she inherits the property. This prospect must be amended substituting the name of predecessor by the own name of the transferor only.

In respect of the requirement of an affidavit, section 53E requires a revisit inserting two other modes of transfer – lease and exchange – under the purview of the provision. Moreover, the provision is essential to rewrite requiring affidavit by the owner as to his/her lawful title or affidavit of authorised person as to his/her due authorisation or both, as the case requires. In addition, a specific guideline is required in the cases of transfer by the person authorised by law since in these cases there is neither the question of affidavit of lawful title nor the letter of authorisation.

6. Conclusions

The paper has aimed to assess the progress of laws regarding transfer of property analysing the Act and the amending Act. Following the doctrinal research methodology, it has been established that the inclusion of the provisions by the amending Act 2004 in respect of a contract for sale, updated *Khatian* for transferors, and supporting the instrument of transfer by the affidavit of lawful title are really very good innovation in the law and these would help remove or reduce the complexities in transfer of land. However, it has been evident the amending provisions have failed to address other relevant provisions of the Act and they themselves suffer from some sorts of limitations as well. As such, to get the actual benefits of the development of the laws concerning transfer of property, the suggested corrections are necessary to bring immediately; otherwise this will cause unexpected and new types of hazards in transferring immovable property.

Cell Tower Radiation and International Standards on Limiting Exposure: A Critical Appraisal

Md. Raisul Islam*

Abstract

The tremendous rise in cell phone usage over the last two decades has led to an increase in the number of cellular towers worldwide to provide effective connectivity. It has triggereda public concern as to whether the impact of invisible electromagnetic field (EMF) radiation emitted from cell towers is hazardous for the human well-being and environment. The study endeavours to determine whether the EMF radiation from the communication facilities poses a risk to the environment and human beings, which may affect the right to life and whether the existing international standards on limiting exposure regarding such radiation are adequate. A common criticism is that the existing international safety standards for non-ionising EMF radiation have not considered long-term non-thermal epidemiological evidence in assessing the effects. The analysis of international scientific studies indicates that such standards are sufficiently supported by junk science of telecom-funded studies and cannot be considered scientifically reliable. The paper suggests adopting precautionary measures and re-evaluating the existing international standards on limiting exposure in the light of independent scientific research in this arena.

Keywords: Cell tower radiation, non-ionising radiation (NIR), electromagnetic field (EMF), exposure (safety) standards, carcinogenicity.

1. Introduction

Throughout the last two decades, the cell phone has turned into the foundation of correspondence in our community. It has evolved into not just a handset but also a virtual computer that fits in the pocket. The advanced cell phones available in the marketplace not exclusively

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can transmit voice but also send texts, electronic mails, images, videos, stream data from the internet in seconds all over the world. The enormous spike in cell phone usage has stimulated an upsurge in the number of cell towers to meet the regulatory desires and burgeoning interest of teeming users for effective communications. It has triggered public concern as to whether the electromagnetic radiation emitted from the cell towers is unsafe. The electromagnetic radiations also familiar as electro-smog, which cannot be visible, smelt or felt and even one could no longer realise their potential harm over long periods of the exposure until they are apparent in the shape of biological disorders.[1] The international standards on limiting exposure regarding such radiation are premeditated merely to shield from the short-term immediate thermal effects of radio frequency electromagnetic fields (RF-EMF) and not concerned with contemporary epidemiological evidence of long-term non-thermal chronic exposures associated with numerous cell towers. Thus, the issue of cell tower radiation is featured by uncertainty, as numerous scientific communities and media uphold that there is no sufficient proof, while others have taken the opposite stance claiming that cell towers are undeniably death traps.[2]As a result, the timeserving telecom industries are using the murky margins of scientific evidence as a defensive shield to battle off opponents. With the lack of scientific certainty regarding the potential health hazards of cell tower radiation, the common man seems to be at a transition point, particularly people living in the vicinity of cell towers because scientific uncertainty does not denote to safe in this regard. Consequently, it is a prompt and significant moment for sustainability to deal with the issue of the impact of cell tower radiation.

This study scrutinises the existing international exposure (safety) standards for non-ionising EMF radiation and the position of international organisations working for such standards, especially the

[1] Sivani S & Sudarsanam D. 2012. Impacts of Radio-Frequency Electromagnetic Field (RF-EMF) from Cell Phone Towers and Wireless Devices on Biosystem And Ecosystem - A Review. *Biology and Medicine*. 4(4): 202-216, at p. 202.

[2] Siddoo-Atwal C. 2018. Electromagnetic Radiation from Cellphone Towers: A Potential Health Hazard for Birds, Bees, and Humans. In: Tutar Y. ed. 2018. *Current Understanding of Apoptosis - Programmed Cell Death*. London: IntechOpen. Ch 8: 137-150, at p. 137.

WHO, IARC, ICNIRP and IEEE. The focus is on the safety implications of the human being and the environment. By and large, a comprehensive collection of literature, research journals, articles, texts, reports, relevant legislation and documents along with reported and unreported cases are examined and analysed in order to gather the data for the factual description of the cell tower radiation issues. Sources also include reference books, national and international journals, various census reports, survey reports, newspaper, statistical handbooks and theses.

2. Basic of Cell Tower Radiation

A cellular system consists of multiple contiguous and individual 'cells', each of which covers a specific area of the broadcast. Each cell has its own 'base station', consisting of antennas and associated electronic equipment, which send and receive signal or information to and from cell phones. Notably, cell tower antennas transmit signals around a tower in the shape of 'blossom petal'.[3] Usually, a cell tower with one antenna covers an area of 120 degrees and in order to address the entire 360-degree circle significantly around the cell tower, a tower with 3 antennas is required.[4] Such a 360-degree rotation around a tower is referred to as 'cell' and this is the thing that the expression 'cell' in cell phone means.[5] When the phone is in a 'cell', one gets a good response and when it is not in a 'cell', one gets an inadequate response. Therefore, cell towers and antennas are required to be placed throughout the country so as to the 'cells' intersect with each otherto provide uninterrupted coverage. That is the reason why cell towers and antennas are so pervasive. For the necessity of complete coverage, the antennas are installed in such a large number of spots like rooftops,

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[3] Arulmani M &Latha VRH. 2013. Human is a roam free cell phone?!... (A New Theory on EMR and Antenna). *International Journal of Innovative Research & Development*. 2(9): 213-232, at p. 230.

[4] Boobalan P, Krishna P, Udhayakumar P & Santhosh A. 2013. Design of a Routing Mechanism to Provide Multiple Mobile Network Service on a Single SIM Card. *International Journal of Engineering and Innovative Technology (IJEIT)*. 2(8): 99-104, at p. 99.

[5] Heddle J & Brangan MB. 2006. *Towers of Babble, Bags of Gold: Cells, Lies and the Wireless Revolution*. [Online]. Available at <http://www.rainbow-cambridge.org.uk/eco/no-to-mobile-phones.htm#RFR>. Accessed on 04.04.2019.

fire stations, schools, temples and churches. The transmitting antenna itself is a primary source of electromagnetic radiation since the transmitting antenna regulates the propagation of the electromagnetic field near a transmitting station. Radiation from the primary lobe becomes stronger when it is transmitted horizontally. Secondary lobes also emit radiation in the horizontal direction, which varies from medium to very low ranges as seen in Figure 1. The most intense radiation is exposed when the primary lobe lies directly along the antenna axis. When one moves from the antenna axis to its side lobes, the radiation levels are comparatively tapered.

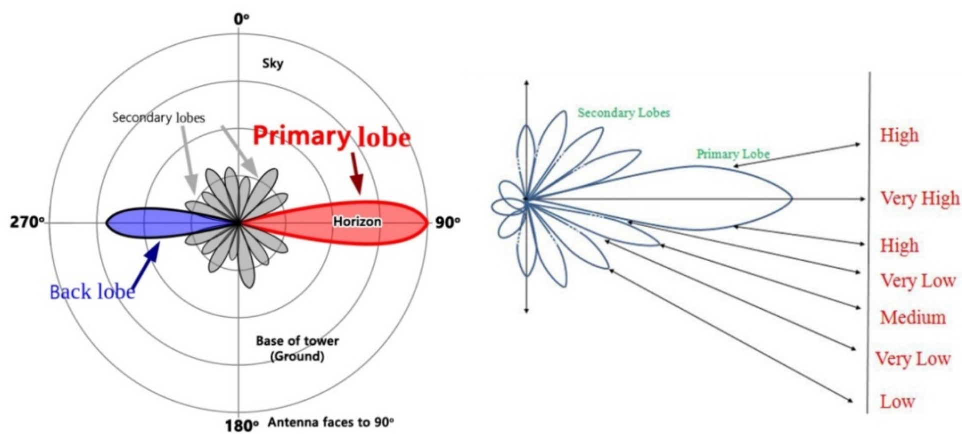

Figure 1: Radiation Pattern of a Cell Tower Antenna[6]

However, the electromagnetic spectrum can be partitioned into an ionising and a non-ionising segment. Ionising radiation is the radiation at higher frequencies which carries adequate energy to extract intensely bonded electrons from the atomic orbit during an encounter with an atom and thereby ionising or charging the atom,[7] such as

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6 Sharma AB &Lamba OS. 2017. A Review: Source and Effect of Mobile Communication Radiation on Human Health. Advances in Wireless and Mobile Communications. 10(3): 423-435, at p. 428.

7 National Research Council US (NRC), Committee on the Biological Effects of Ionizing Radiation (BEIR V). 1990. *Health Effects of Exposure to Low Levels of Ionizing Radiation*. Washington (DC): National Academies Press (US). At p. 9. [Online]. Available at <https://www.ncbi.nlm.nih.gov/books/NBK218702/>. Accessed on 03-04.2019.

ultraviolet rays, X-rays, gamma rays, cosmic rays, etc.[8] In contrast, antennas used for wireless communication emit radio frequency radiation (RFR) which is low frequency, non-ionising radiation, incapable of breaking the chemical bond. The non-ionising radiations are found in a frequency ranging from 1 to 1000's of THz, which include extremely low frequency (ELF), microwave (MW), infrared ray (IR), visible light (VL) and ultra-violet ray (UV).[9] Notably, the parameters used in measuring the radiation are power density and specific absorption rate (SAR).[10] Power density is articulated in watts per square metre (W/m^2), whereas SAR is specified to express the soaking up RF-EMF radiation in the organism. SAR is typically the amount of radiated energy consumed by a segment of tissue estimated in watts per kilogram (W/kg) of a tissue.[11] It is assessed either on the entire body or on a limited amount of tissue, generally between the 1 gram and 10 grams of tissue on average.[12]

Again, radiation impacts are isolated into thermal and non-thermal impacts. Thermal impacts are resembled that of baking in the microwave oven, whereas non-thermal impacts are not clearly documented but are reported to be three or four times more detrimental than thermal impacts.[13]Non-thermal impacts of RFR are

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[8] Telecom Regulatory Authority of India (TRAI). 2014. *Information paper On Effects of Electromagnetic Field Radiation from Mobile Towers and Handsets*. [Online]. Available at <https://main.trai.gov.in/sites/default/files/EMF_Information_Paper_30.07.2014.pdf>. Accessed on 03.04.2019.

[9] Zamanian A & Hardiman C. 2005. Electromagnetic Radiation and Human Health: A Review of Sources and Effects. *High Frequency Electronics*. 16-26, at p. 16.

[10] Hoque A K M F, Hossain MS, Mollah AS &Akramuzzaman M. 2013. A Study on Specific Absorption Rate (SAR) due To Non-Ionizing Radiation from Wireless/Telecommunication in Bangladesh. 1(3): 104-110, at p. 105.

[11] Panagopoulos DJ, Johansson O & Carlo GL. 2013. Evaluation of Specific Absorption Rate as A Dosimetric Quantity for Electromagnetic Fields Bioeffects. *PloS one*. 8(6): 1-9, at p. 1. [Online]. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672148/pdf/pone.0062663.pdf>. Accessed on 04.04.2019.

[12] Zhang M & Alden A. 2011. Calculation of Whole-Body SAR from a 100 MHz Dipole Antenna. *Progress in Electromagnetics Research*. 119: 133-153, at p. 137.

[13] Kumar G. 2010. *Report on Cell Tower Radiation*. Department of Electrical Engineering, Indian Institute of Technology Bombay (DEE-IITB). December 2010. At p. 3.

aggregated over time and the incremental risks are mostly noticed following quite a long while of introduction.[14] The impacts are not perceived initially since the body has several defence components and stress proteins, especially the 'Heat Shock Proteins' (HSPs).[15] If the stress continues for quite a while, the cells are less protected against the damage and drop-off in response.[16] Consequently, even at a significantly lower intensity, prolonged or chronic exposures can be extremely hazardous. This study addresses the non-ionising segment of the spectrum, i.e. ranges of frequencies as far as 300 GHz,which are also known as the low-frequency fields and cover the areas used for wireless communications.

3. International Organisations Working for Exposure (Safety) Standards

Two distinct sets of RF standards, at least, are reportedly in use to meet the specific exposure requirements. The Institution of Electrical and Electronics Engineers (IEEE) and the International Commission for Non-Ionising Radiation Protection (ICNIRP) are the leading international bodies developing such standards.[17] Wherefore, the IEEE is a US-based organisation and the secretariat for the ICNIRP is in Germany, there are some region-based variations, the majority of which appear to be used officially.[18] However, the variants between the

[14] Department of Electrical Engineering, Indian Institute of Technology Bombay (DEE-IITB). 2011. *Report on Cell Phone Towers Radiation Hazard.* At p. 17.

[15] Leszczynski D, Joenväärä S, Reivinen J &Kuokka R. 2002. Non-Thermal Activation of the hsp27/p38MAPK Stress Pathway by Mobile Phone Radiation in Human Endothelial Cells: Molecular Mechanisms for Cancer and Blood-Brain Barrier Related Effects. *Differentiation*. 70(2-3): 120-129, at 125.

[16] Megha K, Deshmukh PS, Banerjee BD, Tripathi AK &Abegaonkar MP. 2012. Microwave Radiation Induced Oxidative Stress, Cognitive Impairment and Inflammation in Brain of Fischer Rats. *Indian Journal of Experimental Biology*. 50(12): 889-896, at p. 894.

[17] Zradzinski P. 2016. A Comparison of ICNIRP and IEEE Guidelines to Evaluate Low Frequency Magnetic Field Localised Exposure. In: The Institution of Electrical and Electronics Engineers (IEEE). *17th International Conference Computational Problems of Electrical Engineering (CPEE)*. Sandomierz, Poland. 14-17 September 2016. At p. 1.

[18] Rautio J &Penttinen JTJ. 2015. EMF - Radiation Safety and Health Aspects. In: Penttinen JTJ. ed. 2015. *The Telecommunications Handbook: Engineering Guidelines for*

standards are relatively minor for the ranges of frequencies used for telecommunications. Additionally, while the document of the IEEE is referred to as 'standards' and that of the ICNIRP as 'guidelines', the variation in terminology is of little significance because both entities consider their function as providing advice to competent legislative or regulatory institutions to adopt all or part of this advice and based on the same approach and rationale.[19]

3.1 Institution of Electrical and Electronics Engineers (IEEE)

The root of the IEEE was dated back to 1884 when electricity had become a significant social influence.[20] The practices of the IEEE Standards were predominantly initiatedat first by the American Institute of Electrical Engineers (AIEE) and subsequently, by the Institute of Radio Engineers (IRE).[21] The AIEE was founded in 1884, while the IRE was established in 1912 with the assistance of two organisations, i.e. the Wireless Institute (TWI) and the Society of Wireless Telegraph Engineers (SWTE).[22] The IRE was patterned on the AIEE but was initially dedicated to radio and afterwards largely to electronics. Although the AIEE was larger initially, the IRE grew faster and more efficiently in the early 1940s[23] and it became the largest group in 1957.[24] On 1 January 1963, the AIEE and the IRE unified to promote the IEEE.[25] The IEEE has its headquarters in New York City

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Fixed, Mobile and Satellite Systems. West Sussex, UK: John Wiley & Sons, Inc. 24:853-881, at p. 859.

[19] Paljanos A & Munteanu C. 2015. An Overview of Standards and Regulation Concerning Exposure to Radiofrequency Fields. *Scientific Bulletin*. 20(1): 145-150, at pp. 146-147.

[20] Mason PA, Murphy MR & Petersen RC. 2001 IEEE EMF Health & Safety Standards. In: *Proceedings of the Asian and Oceanian Regional EMF Scientific Meeting*. 2001: 1-6, at p. 1.

[21] Sage AP. 1999. Electrical Engineering Education. In: Webster JG. ed. 1999. *Wiley Encyclopaedia of Electrical and Electronics Engineering*. Hoboken, New Jersey: John Wiley & Sons, Inc. At p. 2.

[22] *Ibid*, at p. 2.

[23] Hochheiser S. 2009. 125 Years of IEEE History. 2009. 125 Years of IEEE History. *IEEE Potentials*. 28(3):6-9, at p. 7.

[24] *Ibid*, at p. 8.

[25] Bastiaans M J. 2012. Researching the Roots of IEEE Region 8. In: IEEE. *2012 Third IEEE History of Electro-Technology Conference (HISTELCON)*. Pavia, Italy. 5-7

and its working centre in Piscataway, New Jersey.[26]As of 31 December 2019, it is the largest professional association for electronic engineering and electrical engineering (and related disciplines) with more than 4,19,000 members in over 160 countries around the world. (IEEE 2019a).

However, the IEEE safety standards for RF/microwaves have been updated with a long track record andprocess. The first project of structured standards was introduced in 1960 whenever the American Standards Association (ASA)[27] approved the project on Radiation Hazards Standards (Bailey et al. 2019: 171346). Under the co-sponsorship of the United States Department of the Navy and the then IRE (now the IEEE), the project formed the Committee C95 to develop RF/microwave safety standards through an open consensus process.On 8 February 2019, the IEEE has revised and combined the standards of the IEEE Std C95.1-2005 and the IEEE Std C95.6-2002 into a single measure, as the IEEE Std C95.1-2019 (IEEE 2019).The IEEE Std C95.1-2019 specifies dosimetry reference limits (DRLs) and exposure reference levels (ERLs) for exposure to electric, magnetic, or electromagnetic fields, which are defined to protect against painful electrostimulation in the frequency range of 0 Hz to 5 MHz and to preclude the potential detrimental repercussions on human beings exposed to RF-EMF within the scope of frequencies from 100 kHz to 300 GHz. As per the IEEE Std C95.1-2019, only electrostimulation limits are applicable below 100 kHz, while only thermal limits are applicable above 5 MHz and both sets of limitations are applicable between 100 kHz and 5 MHz in the transition area.[28]In the transition area of 100

September 2012. At p. 5. [Online]. Available at <doi:10.1109/histelcon.2012.6487560>. Accessed on 13.02.2020.

[26] Osepchuk JM & Petersen RC. 2003. Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES). *Bioelectromagnetics*. 24(S6): S7-S16, at p. S11.

[27] In 1966, the American Standards Association (ASA) became the United States of America Standards Institute (USASI) and It took on its current moniker as the American National Standards Institute (ANSI) in 1969.

[28] IEEE Std C95.1. 2019. *IEEE Standard for Safety Levels with respect to Human Exposure to Electric, Magnetic, and Electromagnetic Fields, 0 Hz to 300 GHz*. New York, USA: The Institution of Electrical and Electronics Engineers (IEEE), 2019. [Online]. Available at <doi:10.1109/ieeestd.2019.8859679>. Accessed on 13.02.2020.

kHz to 5 MHz, both electrostimulation and tissue heating can occur. For frequencies above 6 GHz, the effect being protected against is tissue surface heating.

3.2 International Commission on Non-Ionising Radiation Protection (ICNIRP)

The ICNIRP is a self-reliant scientific commission formed by the International Radiation Protection Association (IRPA) to improvenon-ionising radiation (NIR) safety and security for the human health and the environment.[29]It is composed of 14 members along with 4 scientific standing committees concerning biology, dosimetry, epidemiology and optical radiation as well as many other consulting experts.[30] The ICNIRP primarily functions as an independent advisory entity in cooperation with the WHO but it is also expressly accredited by the ILO and the EU as a non-governmental organisation for NIR safety and security.[31]It was founded in 1992and incorporated in January 1994 as a charitable, non-profit society in Germany.[32] It usually provides scientific guidelines and recommendations for NIR safety and security, promotes scientifically validated independent guidelines, along with NIR exposure restrictions and represents the global NIR safety and security profession through its strong collaboration with the IRPA.[33]

In November 1997, the ICNIRP for the first time approved the guidelines for frequencies up to 300 GHz and published the guidelines in 1998.[34] The Commission involved 17 scientists and 11 external

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29 International Committee on Non-ionizing Radiation Protection (ICNIRP). 2020. ICNIRP Guidelines for Limiting Exposure to Electromagnetic Fields (100 kHz to 300 GHz). Health Physics. 118(5): 483–524, at p. 457. [Online] Available at <https://www.icnirp.org/cms/upload/publications/ICNIRPrfgdl2020.pdf>. Accessed on 22.09.2020.

30 Daniels DJ. 2009. *EM Detection of Concealed Targets*. Hoboken, New Jersey: John Wiley & Sons, Inc. At p. 10.

31 *Supra note*, 29, at p. 457.

32 Repacholi MH. 2017. A History of the International Commission on Non-Ionizing Radiation Protection. *Health Physics*. 113(4), 282–300, at pp. 282, 289.

33 *Ibid*, at pp. 287-289.

34 International Commission on Non-Ionizing Radiation Protection (ICNIRP). 1998. ICNIRP Guidelines for Limiting Exposure to Time-varying Electric, Magnetic and Electromagnetic Fields (Up to 300 GHz). *Health Physics*. 74 (4): 494-522.

experts representing 12 distinct nations, i.e. the United States, Sweden, Poland, Germany, Great Britain and Australia, in drafting the guidelines.[35] The basic restrictions of the 1998 ICNIRP guidelines, interms of whole-body, averaged SAR are the same as those of the IEEE C95.1, although the reference levels (derived limits) differ slightly.[36]

The ICNIRP guidelines for limiting exposure to EMF published in 1998has been extensively adopted around the world. The Bangladesh Telecommunication Regulatory Commission (BTRC) mandates the ICNIRP guidelines in Bangladesh as well.[37] The ICNIRP reaffirmed the EMF safety guidelines in 2009, 2010 and 2020.[38]Under the ICNIRP guidelines, the maximum limits of the general public (human exposure) to radiofrequency fields in the frequency range of 100 kHz to 10 GHz are 4 W/kg for limbs as localised SAR, 2 W/kg for head and trunk as localised SAR and 0.08 W/kg for whole-body over 10 gm of adjacent tissue.[39] Moreover, all the SAR values must be averaged for any 6 minutes in compliance with the ICNIRP Guidelines 1998.

A simple estimation may be marked to calculate the power absorption of the human body if subjected to the prescribed safe radiation standard adopted in Bangladesh of power intensity that is 10 W/m^2 for

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35 Osepchuk J & Petersen R. 2001. Safety standards for exposure to RF electromagnetic fields. *IEEE Microwave Magazine*. 2(2): 57-69, at p. 63.

36 Mazar HM. 2019. *EMF, New ICNIRP Guidelines and IEEE C95.1-2019 Standard: Differences and Similarities. In: International Conference: EMF and the Future of Telecommunications*. Warsaw, Poland: 3-4 December 2019. [Online]. Available at <https://www.researchgate.net/publication/337815714_EMF_New_ICNIRP_Guidelines_and_IEEE_C951-2019_Standard_Differences_and_Similarities>. Accessed on 13.02.2020

37 Bangladesh Telecommunication Regulatory Commission (BTRC). 2018. *Public Consultation on Guidelines for Limiting Exposure to Radiation of Electromagnetic Fields (Up to 300 GHz)*. 8 February 2018. At p. 10. [Public Notice, Online]. Available at <http://www.btrc.gov.bd/notice-board/public-consultation-guidelines-limiting-exposure-radiation-electromagnetic-fields-300>. Accessed on 22.03.2018.

38 International Committee on Non-ionizing Radiation Protection (ICNIRP). 2020. ICNIRP Guidelines for Limiting Exposure to Electromagnetic Fields (100 kHz to 300 GHz). *Health Physics*. 118(5): 483–524, at p. 483.

39 *Ibid*, at p. 10.

3G/4G.[40] If the human body is modelled as a cylinder, it is 1.436 square meters in the area (if the average height is 5′6″equal to 1.67 meters and the average waist is 34″similar to 0.86 meters).[41] So, the power received by the human body in one second would be power density×area = 15.42 Watts^{-sec}. The absorption of microwave power in one hour would be 15.42 × 3600 = 55.51 KW^{-sec}. The absorption of microwave power in one day would be 55.51 × 24 = 1332.24 KW^{-sec}. However, a standard microwave oven has a performance rating ranging from 600 W to 1500 W.[42]With 60% efficiency, if it can be taken into account thatthe output of a microwave oven is roughly at 600 W,[43]which indicates that the human body can be stored in a microwave oven safely and securely for a period of1332.24 KW^{-sec}/600 W = 2220 seconds = 37 minutes per day. The question may arise as to how many people worldwide are eager to position themselves, their unborn children and their family members in an open microwave oven for 37 minutes per day. Furthermore, this value is for just one source; it will increase accordingly for multiple sources. [44] However, the usage of cellular phones is a personal preference but the concern is that radiation is being exposed 24/7directly to the individuals who are residing in the proximity of cell towers. Although the cell-phone operators arrogate that tower

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40 The exposure limits adopted in Bangladesh are based on the values released in 1998 by the International Commission on Non-Ionising Radiation Protection (ICNIRP).

41 Here, perimeter of the circle is 0.86 m. We know that perimeter of a circle = $2\pi r$. So, $2\pi r = 0.86$ and r = 0.13 m. Again, if $\pi = 3.14$, r = 0.13 m and h = 1.67 m, then the area of a cylinder = $2\pi rh + 2\pi r^2$ or 1.436 + 0.106 or 1.542 square meter.

42 Dadwal N. 2011. Industry: Things to keep in mind before you buy a microwave oven. *The Economic Times*. 10 October 2011. [E-Paper, Online]. Available at <https://economictimes.indiatimes.com/industry/cons-products/durables/things-to-keep-in-mind-before-you-buy-a-microwaveoven/articleshow/10278334.cms?from= mdr>. Accessed on 13.02.2020

43 More watts mean more heat, while lower power means longer cooking time(Dadwal 2011). Some have reported that a hefty portion of cell towers are radiating power outputs in the 900 to 1000 watts range (Quiring 2008).

44 If multiple carriers are being used and multiple operators are present on the same roof top or tower, then the above values will increase manifold. However, radiation density will be much lower in the direction away from the main beam. One should know actual radiation pattern of the antenna (which unfortunately is not made public) to calculate exact radiation density at a point.

radiation is less penetrating than the sun's rays but the fact is that the radiation of the cell tower is continuous and different within the means it impacts the body. The people are not extensively aware of such information. Therefore, a vast number of people use cellular phones for over than one hour every day without reckoning the potentially detrimental repercussions on the health and environment.

3.3 WHO-EMF Project

The WHO is the leading and facilitatingentity within the United Nations for public health. In 1996, the WHO initiated a global EMF Project at the headquarters of the WHO in Geneva, Switzerland due to its mandate to ensure the safety of public health and in responding to public concerns.[45] The mandate of the International EMF Project is to scrutinise the potentially detrimental repercussions on human public health and environment subject to static and time-fluctuating EMF within the range of frequencies up to 300 GHz.[46] The project involves the Family, Women's and Children's Health (FWC) Cluster, the Environmental and Social Determinants of Health (PHE) and the Department of Public Health of the WHO. There are several influentialorganisations, including the ICNIRP and the IARC, which counsel the WHO with regard to the EMF. The EMF Project has an active and frequently updated home page[47] with news, forthcoming meetings, publications or reference to where they may be obtained. A series of the WHO Fact Sheets on various topics related to health effects from EMF exposure are now available in many common languages on the project home page.[48] One of the essential activities of the EMF Project is developing WHO's EMF Research

[45] World Health Organisation (WHO). 1996. *WHO Launches New International Project to Assess Health Effects of Electric and Magnetic Fields*. Press release WHO/42. 4 June 1996.

[46] Repacholi MH. 2000. International EMF Project. In: Klauenberg B J and Miklavcic D. ed *Radio Frequency Radiation Dosimetry and Its Relationship to the Biological Effects of Electromagnetic Fields*. NATO Science Series. 82(3): 21-28, at p. 21. Switzerland: Springer Nature.

[47] http://www.who.int/emf/

[48] World Health Organisation (WHO). 2016. *The International EMF Project*. Progress Report. June 2015-2016.

Agenda.[49] Development of this research agenda has focused the attention of EMF scientists and funding agencies on the specific gaps in knowledge that need to be filled if the WHO and the International Agency for Research on Cancer (IARC) are to improve health risk assessments of EMF exposure.[50]

3.4 International Agency for Research on Cancer (IARC)

The IARC is an entity of the WHO and its primary task is to facilitate and carry out research on the issues that cause human cancer and enhance science-based approaches for prevention and mitigation of cancer.[51] In the series of the IARC Monographs, the expression 'carcinogenic risk' refers to an agent that can cause cancer.[52]The agents include chemical compounds, complex mixtures, processes, behavioural or cultural practices, environmental or occupational exposures, physical substances and biological organisms.[53]However, the IARC encourages the Working Groups of leading scientists to assess the indication for any cancer threat affiliated with the specified agents. In order to endorse statistical evidence for the agents in question that cause carcinogenesis in humans (that exposure may pose a cancer risk), the ultimate consensus evaluations of the IARC are placed in any one of the five categories, e.g. Group 1: Carcinogenic to Humans, Group 2A: Probably Carcinogenic to Humans, Group 2B: Possibly Carcinogenic to Humans, Group 3: Not Classifiable or Group

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[49] World Health Organization (WHO). 1997. *International EMF Project: Health Effects of Static and Time Varying Electric and Magnetic Fields: WHO's Agenda for EMF Research*. WHO/EHG/98.13. At p. 11.

[50] Repacholi MH. 1999. WHO's International EMF Project. *Radiation Protection Dosimetry*. 83(1):1-4, at p. 2.

[51] International Agency for Research on Cancer (IARC). 2018. *Latest Global Cancer Data: Cancer Burden Rises to 18.1 Million New Cases and 9.6 Million Cancer Deaths in 2018*. IARC Press Release N° 263. 12 September 2018. At p. 3.

[52] IARC Working Group on the Evaluation of Carcinogenic Risk to Humans. 2012. *Biological Agents: A Review of Human Carcinogens (IARC Monographs on the Evaluation of Carcinogenic Risks to Humans)*. Volume 100B. Lyon, France: International Agency for Research on Cancer (IARC). At p. 1.

[53] IARC Working Group on the Evaluation of Carcinogenic Risk to Humans. 2010. *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans*. Volume 98. Lyon, France: International Agency for Research on Cancer (IARC). At p. 10.

4: Probably not Carcinogenic to Humans. Over than 1000 substances have been assessed since 1971, of those, over than 400substances have been reported as carcinogenic, probably carcinogenic, or possibly carcinogenic to humans.[54] In the particular scenario of NIR, the IARC takes into consideration the cell phones in May 2011 by assessing the credible indications of RF-EMF.[55]

4. Criticism on the activities of IARC, WHO, ICNIRP and IEEE

There is an on-going discussion as to whether any health effect is caused by cell phone or cell tower radiation. The IARC reported in its 'World Cancer Report 2008', "long-term and severe use of cell phones may be associated with moderately increased risks of *gliomas*, *parotid tumour* and *acoustic neuromas*." [56] Accordingly, an interdisciplinary specialist Working Group of 30 scientists representing 14 nations convened at the IARC in May 2011 categorised radio frequency radiation (RFR) associated with telecommunication devices as 'Group 2B on the IARC scale' (possibly carcinogenic to humans) due to an intensified threat of *glioma*.[57]Such categorisations of the IARCposed an intriguing obstacle to the 'standards' setters of the ICNIR Powing to the interaction between the IARC and the WHO. Such affiliations indicated that the recommendations and the standard-setting strategies of the WHO/ICNIRP could be challenged by the EMF activists, deliberately referencing the excerpts of the 'Press Release' of the IARC

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54 Texas A&M College of Veterinary Medicine & Biomedical Sciences (Texas A&M). 2019. *Rusyn-Chaired Group evaluates Human Carcinogenic Hazards for International Cancer Research Agency*. Press release. 2 December 2019. [Online]. Available at <https://monographs.iarc.fr/wp-content/uploads/2018/06/mono98.pdf>. Accessed on 13.02.2020

55 IARC Working Group on the Evaluation of Carcinogenic Risk to Humans. 2013. *Non-Ionizing Radiation, Part 2: Radiofrequency Electromagnetic Fields* (*IARC Monographs on the Evaluation of Carcinogenic Risks to Humans)*. Volume 102. Lyon, France: International Agency for Research on Cancer (IARC). At p.187.

56 Boyle P & Levin B. ed. 2008. *World Cancer Report2008*. Lyon, France: International Agency for Research on Cancer (IARC). At p.170.

57 International Agency for Research on Cancer (IARC). 2011. *Non-Ionizing Radiation, Part II: Radiofrequency Electromagnetic Fields/IARC Monographs Working Group on the Evaluation of Carcinogenic Risks to Humans*. 102: 1-429, at p. 419. Lyon, France.

that also incorporated the WHO logo and endorsement.[58]Perhaps this is why, shortly after the categorisation of the IARC in May 2011, a'Fact Sheet' from the WHO had been released in June 2011 affirming that "to date, no adverse health effects have been established as being caused by mobile phone use".[59] Technically, the statement in the 'Fact Sheet' of June 2011 does not entirely contradict the statement of the IARC. Basically, a 'Group 2B carcinogen' is considered by IARC where there is a limited indication of carcinogenicity in individuals and less than sufficient indication of carcinogenicity in experimental animals.[60]Hence, although the statement in the 'Fact Sheet' of June 2011 is literally consistent with the categorisation of the IARC, it circuitously refers to the complete dismissal of the arguments of hazards. Remarkably, the WHO/ICNIRP and the most international and national entities have continued to maintain the categorisation of ELF/EMF as a 'Group 2B carcinogen' that the Working Group of the IARC assessed.[61]

Again, the basic safety limits for EMF radiation exposure of the IEEE are almost the same as those of the ICNIRP. Both the standards of the IEEE and the ICNIRP are mainly based on acute thermal effects. The greater part of the short-term studies that fundamentally scrutinise the thermal impacts of exposure to electromagnetic radiation (EMR) on biological structures, has not been able to detect any scientifically significant changes in biological processes, nor have they been able to reveal any acute impact on health at current exposure levels.[62]Whenever living beings are exposed to radio frequency, it can cause tissue heating that is widely considered dangerous, even in very

[58] Mercer D. 2016. The WHO EMF Project: Legitimating the Imaginary of Global Harmonisation of EMF Safety Standards. *Engaging Science, Technology and Society*. 2: 88-105, at p. 94.

[59] World Health Organization (WHO). 2014. *Electromagnetic Fields and Public Health: Mobile Phones*. Fact sheet No. 193. 8 October 2014.

[60] *Supra note* 53, at p. 53.

[61] Ramazzotti P, Frigato P & Elsner W. ed. 2012. *Social Costs Today: Institutional Analyses of the Present Crises (Routledge Frontiers of Political Economy)*. New York, USA: Routledge, Taylor & Francis Group. At p. 212.

[62] Hoskote SS, Kapdi M & Joshi SR. 2008. An Epidemiological Review of Mobile Telephones and Cancer. *Journal of the Association of Physicians of India (JAPI)*. 56: 980-984.

short-term dosages.[63] Therefore, thermally-based limits are significant for persons whose occupations usually involve working in the field of radar equipment and radio frequency welding or for persons installing and operating the mobile antenna. Previously, engineers and scientists formulated standards for exposures to electromagnetic radiation by assessing either the heating of tissues or the currents induced in the body. Their primary concern was determining how long and how much non-ionising radiation a human could endure without causing harm. However, throughout the past few years, it has been evidenced that bio-effects and several health complications turn out at far lower dimensions of RF and EMF exposure where no heating (or induced currents) takes place at all; some effects are made known to persist at a million time lower dimensions than that of the traditional public safety limits where heating is implausible. [64] Long-term non-thermal researches have reported alarming perceptions, detecting negative outcomes on health, safety, reproductive success, behaviour, communication, co-ordination and ecological niche, especially of species and communities.[65]

In 2018, scientists at the famous Ramazzini Institute (RI)[66] of Italy documented that an increased risk of precancerous situations, i.e. *schwannoma*[67] is reported in both the male and female rats as well as an increased risk of malignant brain (*glioma*) tumours are reported in the female rats. Simultaneously, such animals are exposed lifetime in the laboratory to the environmental dimensions of cell tower radiation.[68]

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63 Foster KR & Morrissey JJ. 2011. Thermal Aspects of Exposure to Radiofrequency Energy: Report of a Workshop. *International Journal of Hyperthermia*. June 2011. 27(4): 307-319, at p 312.

64 Sage C & Carpenter D. ed. 2012. *Biolnitiative Report:A Rationale for a Biologically-Based Public Exposure Standard for Electromagnetic Radiation*. USA: Sage Associates. At p. 6.

65 Levitt BB & Lai H. 2010. Biological Effects from Exposure to Electromagnetic Radiation Emitted by Cell Tower Base Stations and Other Antenna Arrays. *Environmental Reviews*. 18: 369-395.

66 This is the largest long-term (in over 40 years) study ever accomplished in rats on the health effects of RFR, including 2448 animals.

67 A *schwannoma* is a tumour of the peripheral nervous system or nerve root.

68 Falcioni et al. 2018. Report of Final Results Regarding Brain and Heart Tumours in Sprague-Dawley Rats Exposed from Prenatal Life Until Natural Death to Mobile

The reasonably similar erratic results, *cardiac schwannoma* in male rats, have also been demonstrated by a $25 million US National Toxicology Programme (NTP) study when rats are allowed to be exposed to substantially higher dosages than cell phone radio frequencies.[69] In November 2018, the US National Toxicology Program (NTP) released its final report.[70] In conjunction with the human trials, such indications have been categorically demonstrated to have an elevated threat of cancer with long-term RF-EMF exposure. Unfortunately, the WHO and its associated agencies, especially the ICNIRP and the IEEE have not taken action yet to alert about the potential non-thermal health implications from such EMF radiation, nor have they developed adequate protective exposure requirements. In contrast, the WHO-EMF Project has frequently derogated the safety concerns caused by the non-ionising EMFs by claiming that EMFs at prescribed intensities generated from cellular communication devices do not trigger tissue heating.[71]Most interestingly, the WHO-EMF project has also backed the safety guidelines for EMF exposure of the ICNIRP calling on all the nations to consider such criteria to ensure the global harmonisation of the EMF safety standards. From an economic standpoint, telecom service providers and wireless equipment suppliers would be benefitted, if individual nations adopt these guidelines.

However, the Consultants to the International EMF Scientist Appeal, on behalf of 248 scientists representing 42 nations, appealed directly to the United Nations on May 2015 to protect the people from hazardous

Phone Radiofrequency Field Representative of a 1.8 GHz Gsm Base Station Environmental Emission. *Environmental Research*. 165: 496–503.

69 National Institute of Environmental Health Sciences (NIEHS), USA. 2018. *High Exposure to Radio Frequency Radiation Associated with Cancer in Male Rats*. [Press Release, Online]. 1 November 2018. Available at <https://www.niehs.nih.gov/news/newsroom/releases/2018/november1/index.cfm>. Accessed on 04.12.2018.

70 Smith-Roe. et al. 2019. Evaluation of the Genotoxicity of Cell Phone Radiofrequency Radiation in Male and Female Rats and Mice following Subchronic Exposure. *Environmental and Molecular Mutagenesis*. 61: 276-290, at p. 288. [Online]. Available at <doi:10.1002/em.22343>. Accessed on 13.02.2020.

71 World Health Organization (WHO). 2014. *Electromagnetic Fields and Public Health: Mobile Phones*. Fact sheet No. 193. 8 October 2014.

electromagnetic radiation exposure.[72] The scientists pointed out that 'any system that emits below the existing safety limits is deemed safe' may be deceptive and there is no accreditation that the existing safety limits protect all the subscribers and the general public from anything other than thermal effects. They claimed that the WHO promoted the ICNIRP guidelines, which are merely based on thermal effects and ignored numerous recent scientific publications demonstrating biological changes and adverse health effects with no heat impact. The Appeal of International Scientists is further compounded by both the NTP studies and the Ramazzini studies. In view of the recent indications for potentially carcinogenic risks in rodents as a consequence of chronic exposure to cellular communication frequencies, scientists have urged for re-classifying the carcinogenicity of the IARC assessment for cell phone and cell tower radiation. Several WHO-IARC scientists who had been WHO advisors and served on the WHO-IARC working group of 2011 currently state, however, that new scientific evidence suggests that wireless radiation should be re-classified at least as a 'Group 2A: Probably Carcinogenic to Humans', if no longer possible to specify as a 'Group 1:Known Human Carcinogen'.[73]Many researchers are no longer of the opinion that the evidence demonstrates 'possible carcinogenicity'. As evidence has been improved, they update their views on the issue.

The main concern is that the WHO-EMF project is overlooking the scientific indication sofdetrimental repercussions. Moreover, the project promotes the EMF recommendations and guidelines introduced by the ICNIRP, whose members are directly or indirectly funded by the telecom industries. [74] Though the WHO's Monographs/Fact Sheets, the ICNIRP guidelines or the IEEE standards

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[72] Hardell L. 2017. World Health Organization, Radiofrequency Radiation and Health - A hard Nut to Crack (Review). *International Journal of Oncology*. 51(2): 405-413, at p. 408-409.

[73] Environmental Health Trust (EHT). 2018. *Comments on the National Toxicology Program Bioassay on RF GSM- and CDMA-Modulated Cell Phone RFR*. 12 March 2018. [Online]. Available at <https://ehtrust.org/science/whoiarc-position-on-wireless-and-health/>. Accessed on 13.02.2020.

[74] Pascual GD. 2013. Not Entirely Reliable: Private Scientific Organisations and Risk Regulation - The Case of Electromagnetic Fields. *European Journal of Risk Regulation*. 4(1): 29-42.

regarding the maximum limits of the general public (human exposure) to radiofrequency fields are non-binding and merely directives for the countries, it lays some significant features in the legal arena. Exclusively, the courts simply refer to the scientific criteria of the ICNIRP, or the IEEE or the WHO to decline the claim when the courts intend to rule on legal claims brought by the persons affected by electromagnetic waves generated by the telecommunications companies.

Facts show that the Australian biophysicist Michael Repacholi was the first chairman of the ICNIRP in 1992 who suggested in 1995 that WHO should start the EMF project.[75] The WHO adopted the project in 1996[76] and Dr Michael H Repacholi was incharge of the WHO study programme on electromagnetic fields of the WHO-EMF project from 1996 to 2006.[77] He promptly formed a strong alliance between the WHO and the ICNIRP (being key personnel of both organisations) hosting the military institutions as well as telecommunications and electric industries to group meetings. He also arrangeda hefty portion offunds for the WHO-EMF project from the GSM Association and Mobile Manufacturers Forum that is currently renowned asMobile & Wireless Forum, the lobbying organisation of the telecom industries.[78] Dr Repacholiseemed to represent the telecom industry while being responsible for the WHO's EMF Project.[79] Although Dr Repacholi resigned from the WHO in June 2006 (passing the position to Emilie van Deventer), he has consistently exerted his influence as an Emeritus Member of the ICNIRP; it should be noted here that the WHO works with a strong collaboration with the ICNIRP.[80] Dr Repacholi recruited Dr T Emilie van Deventer-Perkins, an electrical engineer (with no professional or previous experience in biology,

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75 *Supra note* 72, at p 406.

76 *Supra note* 45.

77 *Supra note* 72, at p 407.

78 Leloup D. 2007. *Mobile Telephony: Influence Peddling at the WHO?* 26 January 2007. [Online]. Available at <https://www.agoravox.fr/tribune-libre/article/telephonie-mobile-trafic-d-18299>. Accessed on 13.02.2020.

79 Microwave News. 2005. *Time to Stop the WHO Charade*. 5 July 2005. [Online]. Available at <https://microwavenews.com/news/time-stop-who-charade>. Accessed on 13.02.2020.

80 *Supra note* 58, at p 90.

medicine or epidemiology) to the WHO-EMF project in 2000.[81]Notably, she had been a long-standing member of the IEEE, while the IEEE, for decades, has been giving priority to global lobbying practices, mainly driven by the WHO.[82]Indeed, Dr Repacholi has propagated 'only the thermal effects paradigm' of health hazards associated with RF-EMF exposure across the world for almost 20 years rejecting numerous scientific publications that demonstrate the non-thermal effects or carcinogenicity in human.[83]

There have been credible reports that the WHO has obtained financial interests from the electrical and telecom industries (which has contributed up to 50% of the EMF project funds) to manipulate the direction of EMF studies and policy formulation.[84] The most crucial point is that the WHO does not intend to replace the core community of experts assorted with the ICNIRP. It gives the ICNIRP complete access to the Monograph and versatile opportunities for manipulating it. Considering the immense commercial interests enshrined in the guidelines of the ICNIRP and the connections of many of its expert members with telecom industries, there is no doubt that it is a significant conflict of interest that severely brings into question not only the integrity of the RF Radiation Monograph but also the integrity of the WHO as a forerunner of global healthcare. The critics have often used *ad hominem* claims to argue that the EMF Project was a project of the WHO which did not indicate that its operations should not be subject to inspection.

Moreover, according to the statutes of the ICNIRP, no member of the Commission can undertake a job that could threaten its scientific

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81 *Supra note* 72, at p 407.

82 International Committee on Electromagnetic Safety (ICES). 2016. *Safety Levels with Respect to Human Exposure to Electric, Magnetic and Electromagnetic Fields, 0 Hz to 300 GHz*. Approved Minutes, TC95 Committee. 12 January 2016. [Online]. Available at <https://www.ices-emfsafety.org/wp-content/uploads/2016/10/Approved-Minutes-TC95-Jan_16.pdf>. Accessed on 13.02.2020

83 *Supra note* 72, at p 407.

84 Maisch D. 2006. Conflict of Interest and Bias in Health Advisory Committees: A Case Study of the WHO's EMF Task Group. *Journal of Australasian College of Nutritional and Environmental Medicine (JACNEM)*.21(1): 15-17.

independence from the view of the Commission.[85] However, the members of the ICNIRP and its Scientific Expert Committee most frequently pronounce that they have served or have been involved in the telecom industries but do not clarify the acts what they have done or are being paid for. It is unclear how the ICNIRP controls the reliability of decisions of its expert committee members when the 'pronouncement of interest' does not include the most contentious aspects of their biographical details in most scenarios. In fact, despite its on-going efforts to control conflicts of interest, the ICNIRP has long been in close proximity to the telecom industry.[86]

In addition to the position held by the various organisations responsible for EMF standards/guidelines, several international scientific journals are also engaged in conflicts of interests that contribute to manipulate and fabricate data concerning the effects of EMF, such as '*Bioelectromagnetics.* Supplement 6.2003', one of the leading scientific publications on EMF applications and biological effects. However, the journal was instructed by the 'Radio Frequency Committee' of the IEEE to clarify upholding the ICNIRP exposure limits.[87] The '*Bioelectromagnetics*. Supplement 6. 2003' comprisesa collection of seven monographs sponsored by the US Navy and the US Air Force as well as published by their staffs who retain that RF has nodetrimental repercussions.[88] *Radiation Research*, another renowned journal in this arena, brought out 21 publications on the genotoxic impacts of RF from 1997 to 2006; of those17 (81%) exposed negative findings which were sponsored by the telecom industries (10 publications were financed by Motorola, whereas the US Air Force were funded for the rest 7publications).[89]The most shocking thing is that the 'Fact Sheets' concerning the 'EMF Project' released by the WHO since 1998 have been sponsored jointly by the electricity network

[85] International Commission on Non-Ionizing Radiation Protection (ICNIRP). 2008. Statutes of the International Commission on Non-Ionizing Radiation Protection (ICNIRP). Approved at the Commission Meeting in *Rio de Janeiro*, Brazil. 13–14 October 2008. At p. 5.

[86] *Supra note* 84.

[87] *Supra note* 61, at p. 241.

[88] *Ibid*.

[89] *Ibid*.

operators and mobile telephony companies.[90]Remarkably, an analysis of the scientific studies revealed that most studies funded by telecom industries had not found any adverse effects, whereas most independent types of studies found detrimental effects of RF-EMF radiation.[91] More importantly, Henry Lai, Bioengineering Professor Emeritus at the University of Washington, analysed 2033 scientific studies on RF/ELF-EMF radiation as of August 2020; of which biological effects were reported in 1637 (more than 80%).[92]

Thus, the cellular industry is likely to be a gigantic plotter. The wireless industry has been accused of directly or indirectly manipulating research results by funding the research projects or researchers and contaminating the collection of scientific databases to muddy the water in the arena. In order to perpetuate the profits, vendors and network operators may indeed be involved in the research profession and the cellular industry may have bribed officials all over the world to conceal evidence that poses health risks to its products. It should be borne in mind that it took 50 years for the tobacco industry to acknowledge the risks[93]and 70 years to eliminate lead from paint and petrol.[94]In reality, vested interests dominate the health debate significantly.

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90 *Supra note* 61, at p. 254.

91 The findings of 307 studies have been analysed by Henry Lai as of 2006, Bioengineering Professor Emeritus at the University of Washington (93 have been supported by industries; 214 were not). Among the industry-funded studies, biological effects were found in 27 of them (29%), while in studies that were not industry-funded, biological effects were found in 147 of them (69%). See, Huss et al. 2007. Source of Funding and Results of Studies of Health Effects of Mobile Phone Use: Systematic Review of Experimental Studies. *Environ Health Perspect*. 115: 1–4, at p. 1.

92 Lai H. 2020. Reported Biological Effects: Henry Lai's Research Summaries. In: Sage C & Carpenter D. ed. 2012 (as updated 2014-2020). *BioInitiative Report:A Rationale for a Biologically-based Public Exposure Standard for Electromagnetic Radiation*. USA: Sage Associates. Section 6 (2020 Supplement). [Online]. Available at <https://bioinitiative.org/research-summaries/>. Accessed on 12.09.2020.

93 Cole HM & Fiore MC. 2014. The War Against Tobacco: 50 Years and Counting. *JAMA*. 311(2): 131–132, at p. 131. Available at <doi:10.1001/jama.2013.280767>. Accessed on 03.04.2019.

94 Needleman H & Gee D. 2013. Lead in petrol 'makes the mind give way'. *Late Lessons from early warnings: science, precaution, innovation*. Copenhagen, Denmark:European Environment Agency (EEA). Report No. 1/2013. At p. 62.

In such a scenario, precautionary activities are warranted immediately to decrease exposures and notify the community of the possible risks associated with cell tower radiation. The essence of the precautionary principle is that caution is the proper course of action if one is not sure what may happen. The precautionary approach states that if an action or a policy has a potential risk of causing harm to the public or to the environment, preventive measures should be encouraged until there is complete scientific proof of a risk. In the absence of scientific consensus, the principle implies that there is a social responsibility to protect the public from potential harm. It is a 'better safe than sorry' or 'caution in advance' principle that applies both to human health and to environmental protection. Precautionary steps that may be considered to minimise exposure, such as banning all cellular towers from public hospitals, school premises and playgrounds, keeping the phone apart from the body, preferring hands-free or fixed phones, restricting the duration of calls over cell phones, making conversations with high network signals, using a low SAR phone.

5. The Way Forward

Cell phones are a fascinating human-digital connection nowadays. It is therefore impractical to take out the cell phones from the market. However, in order to lessen the impacts on various components of the environment, findings of the study suggest that

1. The IARC should form a new working-group of specialist scientists under its Monographs Project to update RF-ELF categorisation based on current scientific findings. There should be no conflict of interests among the new working-group members and any industry must not sponsor the funding of the project. The IARC rating needs to be at least be expanded to 'probable' (Group 2A) if no longer 'known' (Group 1)to evaluate the carcinogenic risk from RF-EMF of cellular communication devices. If the IARC can do so, then international organisations, such as the ICNIRP, the

[Online]. Available at <http://www.eea.europa.eu/publications/late-lessons-2>. Accessed on 09.04.2019.

IEEE and other national organisations, will be obliged to review their standards or guidelines.

2. It is imperative that national and international organisations, mostly the WHO, pay attention to this substantial public health issues seriously and make viable recommendations for defensive measures to diminish exposures. It is particularly required for children, adolescents, pregnant women and other vulnerable people at large. The WHO should accomplish its long-standing comprehensive RFR analysis project considering the non-thermal epidemiological evidence through strong contemporary scientific approaches. Correspondingly, regional and national healthcare institutions ought to enhance their consciousness so as to provide significant precautionary recommendations for the public to reduce future health risks.

3. The WHO and the IARC should be kept accountable for their respective obligations in evaluating the carcinogenic risk from RF-EMF emitted from cellular communication devices. It is suggested that the United Nations Environmental Programme (UNEP) convene and finance an independent multidisciplinary committee to examine the pros and cons of alternatives to existing practices of the WHO and the IARC, as there is controversy over the justification for setting standards and plenty of complaints against the WHO for the repeated acquisition of funds from telecommunications industries. Sucha committee should be transparent and impartial. Although it is required for the telecom industries to participate and collaborate in this phase but the industries must not be allowed to skew its processes or findings. In addition, to co-ordinate prudent activity, this committee ought to focus on providing its review report to the UN and the WHO.

4. The arena needs attention, particularly in Bangladesh, due to dearth of study. In addition, the Government of Bangladesh should conduct awareness drives with a significant level of visibility in all sorts of media and regional languages to make people aware of distinct issues in relation to cell towers and EMR hazards. Such notes should be circulated widely and significantly displayed in all

specially protected wildlife regions and zoos. It is also absolutely crucial for all sectors of the community to be conscious, in particular the medical professionals, education professionals and the general public at large regarding cell towers radiation hazards and the initiatives that can be conveniently adopted to reduce exposure and to minimise the dangers of potential harms.

6. Conclusion

The world underwent a chemical revolution in the early part of the 20thcentury and many new chemicals were invented to encourage plant growth (nitrogen), destroy pests (DDT), keep our food cold (CFCs) and avoid overheating of transformers (PCBs). Science has established following quite a while of utilisation that all of these chemical substances have miserable side effects including polluting water, killing birds and placing holes in the ozone layer. Now, the use of these substances is strictly regulated or banned. Accordingly, the world underwent an electromagnetic revolution in the second half of the 20thcentury and many advanced frequencies were utilised for radio, television broadcasting, radar and cell phones as well as for a variety of wireless appliances. After decades, studies have reported that such type of electromagnetic waves of radio frequencies also have significant side effects. The continuation of business as usual by deploying emerging technologies, that generate ELF and RF radiation exposures, is imprudent from the point of view of the safety and security of public health as long as we realise that the bio-effects and adverse health effects occur at far below the reference limit prescribed by the ICNIRP and the IEEE. Studies reveal that current safety standards are sufficiently supported by junk science of the telecom-funded studies and cannot be considered scientifically reliable. Research in this arena, therefore, requires to be enhanced. In the meantime, the precautionary principle should prevail and the standards and recommendations on limiting exposure should be revised in the light of independent scientific research in this arena.

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Cybercrime Against Women in Bangladesh: Issues, Challenges and Legal Response

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Abstract

In the twentieth century, there were unbelievable inventions and technological enlargements most of which were not even imaginable in earlier ages. These progresses have gone through in all aspects of people's lives enabling the women to communicate with others and make easier access to information. In addition to this advancement, such technological development and evolution of Internet has created severe problems by exploiting such tools for criminal purposes that is referred to "Cybercrimes" and that victimized a significant number of peoples specially women. As the occurrences of cybercrimes and cybercrime victims are gradually escalating, it becomes indispensable to find out the factors that are playing vital impact causing victimization in cyberspace, and also examining the concerned laws that are in operation to eradicate the crimes effectively. This article focuses the problem related to cybercrime in aspects of victimology, process of victimization, victims' sufferings and their restoration into the society. It also analyzed the process how to make sure justice and healing the women victims of cybercrime, and thus restoring their rights, dignity and role in the society.

Keywords: Cybercrime, Victimization and Protection

1. Introduction

The growth and development of digital technology in this 21st century has brought enormous benefits in communication and in development of the society. Along with these new benefits, it has also brought some risks and negative impact in different cases. The prospects produced in 'cyberspace' have also enriched the ability for criminal initiatives to

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activate more proficiently and meritoriously in home and abroad. The awful rapid development of digital machineries and e-commerce in this subcontinent has transpired such a pace that law enforcement agencies in many cases have been inept to retort successfully.[1]It has been exposed that the Internet is used in many ways to harass, insult, threaten, and stalk to female and male internet users. Because this type of communication takes place in cyberspace a moderately unidentified atmosphere cyber aggression stances new challenge to the safety and security of these users.[2] Rationally the ratio of victimization of women through cybercrimes is on the rise and women have been expressively offended in the cyber arena. Some culprits try to harass women by referring offensive e-mails, irritating women by abusing technological platforms, making obscene videos without their consent to make pornographic contents etc. The sex-offenders look for their victims on social network websites, and also on job or marriage websites where people pole their personal information for better prospect. The enlightening of personal information has made women an additional victim of.[3] The most familiar method of online irritation against women is painting the odd and obscene picture of the victimized women through forged and belittling distinctiveness through social websites like Face book and grown websites.[4]

According to Association of Mobile Telecom Operators of Bangladesh (AMTOB)[5], there are about 60.68 million internet users in Bangladesh.[6]

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1 Broadhurst, R., & Grabosky, P. (2005). Cybercrime: the *challenge in Asia* (Vol. 1). Hong Kong University Press, P-1-2.

2 Miceli, S. L., Santana, S. A., & Fisher, B. S. (2001). Cyber aggression: Safety and security issues for women worldwide. Security Journal, 14(2), 11-27.

3 Saha, T., & Srivastava, A. (2014). Indian women at risk in the cyber space: A conceptual model of reasons of victimization. International Journal of Cyber Criminology, 8(1), 57.

4 Halder, D. (2013). Assessing the Applicability of Indecent Representation of Women (Prevention) Act, 1986 in the View of Cyber Victimization of Women in India.

5 AMTOB stands for Association of Mobile Telecom Operators of Bangladesh

6 Available at: https://www.google.com/search?client=firefox-b-d&q=Available+in%3A+http%3A%2F%2Fbdnews24.com%2Fbangladesh%2F2017%2F03%2F09%2F73-percent-women-subject-to-cyber-crime-in-bangladesh. Accessed on June 18, 2017.

Of which 21 percent use Facebook and 36 percent use YouTube. Among them 84 percent of the net users are aged between 18 and 34. Some 41 percent school students also suffer from cyber-bullying. State Minister for Post and Telecommunications said at the two-day international workshop titled 'Digital Bangladesh: Cyber-crime, internet and broadband' held in city hotel that *"around 73 percent women who use the internet in Bangladesh are subject to cyber-bullying or another form of cyber-crime and 23 percent of them do not make any complaint"*.[7]

Though the state has codified laws dealing with cybercrimes to protect the victims, ironically this system has failed to protect the victims. The situations have become worsened due to denial of justice for the problem of criminal justice system. Moreover, it has paved the way for secondary victimization. According to the above mentioned statement, the present study intends to scrutinize the trends of cybercrimes and the protection of victims through legal system in Bangladesh using some questions. Such as:

1. What are the factors for victimization of women through cybercrimes in Bangladesh?
2. Why does the criminal justice system as well as the law become a failure to aid the victims in certain cybercrimes cases?
3. What could be done to end this harassment and ensure the rights of the cyber victims?

This article is an attempt to respond the inquiries in the light of socio-legal perspective of the current situations in Bangladesh.

2. Concept of Cybercrime

Cybercrime in ordinary sense is the misuse of data, computers, information systems, and cyberspace for economic, personal, or psychological gain.[8] However, there is no authoritative definition or description of cybercrime. Dr. Debarati Halder and Dr. K. Jaishankar defined cybercrimes as such *"Offences that are committed against an*

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[7] Available in: http://bdnews24.com/bangladesh/2017/03/09/73-percent-women-subject-to-cyber-crime-in-bangladesh. Accessed on June 18, 2017.

[8] Arief, B., Adzmi, M. A. B., & Gross, T. (2015). Understanding cybercrime from its stakeholders' perspectives: Part 1--attackers. IEEE Security & Privacy, 13(1), 71-76.

individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm or loss to the victim directly or indirectly using modern telecommunication networks such as internet (chat rooms, emails, notice boards or groups) and mobile phone (SMS/MMS).'' [9] With the advent of technology, cyber-crime and victimization of women are on the high and it poses as a major threat to the security of a person as a whole.[10]

3. Certain Forms of Cybercrime Against Women

Cyber criminals generally attacked the man and woman internet users but there are certain cybercriminals who always target women through different cybercrimes. These cybercrimes include harassment via e-mails, cyber-stalking, cyber pornography, cyber defamation, morphing, e-mail spoofing, cyber bullying and abetment.[11]

3.1 Harassment via e-mails: It is not a new idea rather old aged one. It has relation to irritating through letters. Harassment through e-mails contains blackmailing, threatening, bullying, constant sending of love letters in anonymous names or regular sending of embarrassing mails to one's mail box.[12]

3.2 Cyber-stalking: Cyber Stalking is one of the most extensive online crimes in the new world. According to Wikipedia, "Cyber Stalking is the use of the internet or other electronic means to stalk or harass an individual, a group of individuals or an organization". It may include the making of false accusations or statements of the fact, monitoring, making threats, identity theft, damage to data or equipment, and the solicitation of minors for sex, or gathering information that may use to

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[9] Halder, D., &Jaishankar, K. (2011) Cybercrime and the Victimization of Women: Laws, Rights, and Regulation. Hershey, PA, USA: IGI Global.

[10] Halder, D., & Jaishankar, K. (2012). Cyber Crime against Women and Regulations in Australia. In Cyber Crime: Concepts, Methodologies, Tools and Applications (pp. 757-764). IGI Global.

[11] Quazi MH Supan "Cyber Crimes: Are women the main target?," *The Daily Star*, Dhaka, Bangladesh. Available in: http://www.thedailystar.net/law-our-rights/cyber-crimes-70592. Accessed July 18, 2018.

[12] Bocij, P. (2004). Cyber stalking: Harassment in the Internet age and how to protect your family. Greenwood Publishing Group,p 6

harass.[13]Cyber Stalking affects both men and women but women are being excessively targeted in many countries including Bangladesh. Women are at countless peril than men for stalking victimization. However, women and men were equally likely to experience harassment.[14]

3.3 Cyber Pornography: The growth of technology has been a common cause of manifold complications in everyday life for male and female all over the world. At present internet has become a tool for the assistance of many crimes like pornography. It means to the display of sexual substance on the websites. Then the offenders from time to time commit forced physical relation, harass or tease woman and confine it on video. Later on the captured video is spread out through the net for public. These happenings are becoming violently widespread not in cities but also in the urban and local areas of Bangladesh.[15]

3.4 Cyber Defamation: Internet at present is used excessively to spread misinformation for defaming any person either male or female. The defamation is basically a defamatory and false statement that incurs a negative impact on a character. Users can easily post defamatory messages without verification by moderators or authority. Cyber tort is another common crime against women.[16]

3.5 Cyber Morphing: Morphing means the changing or alteration of one image or video to another by means of computer simulation methods. Its name is cyber obscenity. It has linked with cyber pornography. It happens by changing a photo which makes embarrassing see to all.[17]

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[13] Babita, B. (2015). Cybercrime: certain forms and some suggestions to tackle cybercrimes. Edu-Psycatia- An International Journal of Education and Psychology, Vol. 2, No.2, p 6-11

[14] Bureau and Justice Statistics (BJS), 2016. Available in- https://www.bjs.gov/index.cfm?ty=tp&tid=973Accessed July 18, 2018

[15] Supon, supra note 11.

[16] Kaushik, N. (2014). Cyber Crimes against Women. Global Journal of Research in Management, 4(1), 37.

[17] Halder, D., & Karuppannan, J. (2009). Cyber socializing and victimization of women.

3.6 E-mail Spoofing: It is a fraudulent email activity using sender's e-mail address and other parts of the email in such a way that it seems that the email was sent by someone else.[18]

3.7 Cyber Bullying: This is happened using the electronic message to bully a person. For example; sending an intimidating or threatening message to anyone. It is the use of technology to harass, threaten, embarrass, or target another person. Actuallycyber bullying is the performance of information and communication technology i.e. the mobile phones and the internet intentionally to make a person at a distressed position.[19] Frequently the student sectors are also being attacked by such kind of intimidation. Many of them admitted that they had been the victim of hacking and threatening.[20]The criminals mostly target the women. Some women who use the internet in Bangladesh are subject to cyber-bullying but very few make any complaint as they do not get any legal protection.[21]

4. Trends of Cybercrime Against Women in Bangladesh

Recently the people around the world have given a great attention in using the cyber in all cases of daily life. Most of the countries of the world have made a standard of ranking of using the cyber.[22] Cybercrime against women is a horrible phase now specially for the young generation. Anyone can circulate contents though cyber in the form of text, images, videos and sounds and this circulation becomes very hurtful for women. Recently it is shown by various reports that

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[18] Halder, D., & Jaishankar, K. (2010). Cyber Victimization in India: A Baseline Survey Report (2010).

[19] Marczak, M., & Coyne, I. (2010).Cyberbullying at School: Good Practice and Legal Aspects in the United Kingdom. Australian Journal of Guidance and Counselling, 20(02), 182-193.

[20] Vandebosch, H., & Van Cleemput, K. (2008). Defining cyberbullying: A qualitative research into the perceptions of youngsters. Cyber Psychology& Behavior, 11(4), 499-503.

[21] Tarana Halim, "Bangladesh has to work more for cyber security says," *The Daily Sun*.Available in: http://www.daily Sun.com/post/210833/Bangladesh-has-to-work-more-for-cyber-security-says-Tarana-Halim. Accessed on March 2017.

[22] Grobler, M., & Dlamini, Z. (2012). Global cyber trends a South African reality.

women are receiving emails containing obscene video or harassing statement.[23]

There are many series of cybercrimes used by cybercriminals to make a target the female than the male. The criminals generally used cyber stalking, cyber harassment, morphing and obscene publication, email or profile hacking, spoofing, cyber pornography including revenge porn, internet voyeurism, cyber defamation, cyber bullying, e-mail harassment, cyber blackmailing, threatening, emotional cheating by impersonation, intimate partner violence against the women through internet and abetment of such offences. The young girls newly familiarized with the internet reasonably inexpert in cyber world are being the victim of different types of cybercrimes in Bangladesh. The hidden target of the cybercriminals is to demolish the individual status, fashion fear for bodily protection and also financial losses.[24]

To identify the trends of cybercrimes, actual number of registered and disposal of the cases a study has been made in Cyber Tribunal of Bangladesh in July 2017. The report of the study has been disseminated by describing the following two figures.

It has been seen in figure-1that the Cyber Tribunal started its journey in 2013 with three cases. In the next year, the number increased to 140 and in 2015 it was 152 then it was 233 in 2016. In total the number of cases within June 2017 is more than 300. Among these numbers of cases, more than 200 are women related cases and rest of the cases are related with others cybercrimes. Overall case disposal rate is very low in each year. During the interview, public prosecutor of the cyber tribunal Adv. Nazrul Islam said that a large number of the cases under section 57 of ICT Act were filed for posting indecent pictures or videos of women on Social Networking Websites (SNWs).

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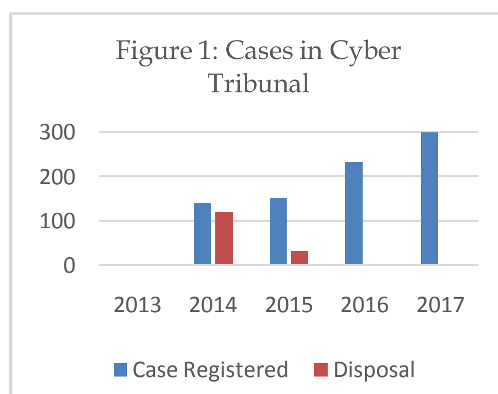
23 Bindia, Rising Trends of Cyber Crime: Targeting Women, International Journal of Emerging Technologies in Engineering Research (IJETER) Volume 4, Issue 4, April (2016). Available in: www.ijeter.everscience.org.Accessed on January 8, 2020.

24 Supon, supra note 11.



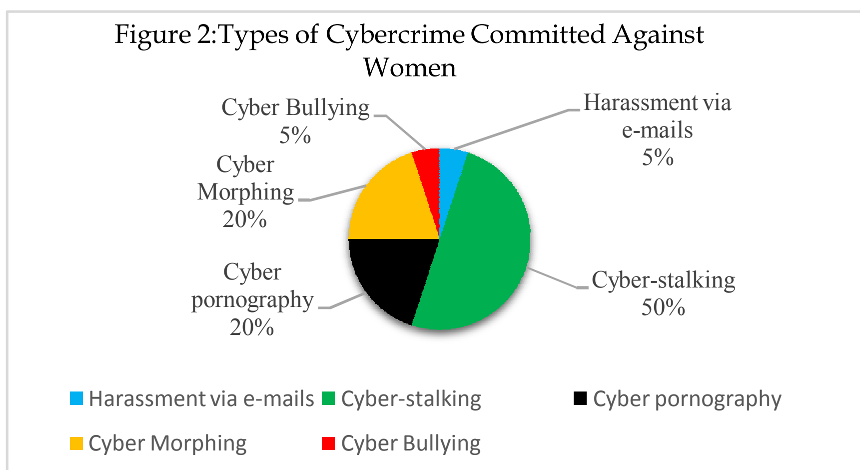
Source: The figureis made by the author [25]

Figure-1

From the above figure it is clear that cybercrime has been increasing dramatically in very recent years in Bangladesh. The ratio of cases has risen more than 200 times. Most of the cases were lodged under section 57 of the Information Communication Technology (Amendment) Act 2013.

In figure-2, the study shows that the percentage of cyber-stalking related crime is the highest i.e. 50 percent (approximately 100 cases) of total numbers of registered crime in Cyber Tribunal. According to the study, 20 percent (approximately 40 cases) of total numbers of registered crime are related to cyber morphing, another 20 percent (approximately 40 cases) are cyber pornography. The percentage of cyber bullying and harassment via e-mail is 5% (approximately 10 cases) of each, which are considered the least amount of total number of registered crime.

[25] This figure has been made by using Microsoft Word chart tools to indicate the registered and disposal of cases through information collected from Cyber Tribunal of Bangladesh in between 2014-17.



Source: The figure is made by the author[26]

Figure-2

5. Process of Victimization of Women in Bangladesh

The criminologists have invented two common theories which actually show the process actually how the victims are frequently victimized in society; one is 'Lifestyle' theory and another is 'Routine Activity' theory.[27] Recent researchers have discussed that the lifestyle-routine activities theory may be able to explain the increasingly significant phenomenon of computer and cybercrime. Both the theories are account for victimization in cyberspace, and especially for cyber abuse. In criminology, it is observed that lifestyle theory focuses on two main points that is it describes 'how' a victim is victimized by maintaining their own choices and 'in where' victims are persecuted frequently. This theory has been developed by Hindelang, Gotfredson, and Garofalo. It tries to prove that not alone the criminals but also the victim herself is also part of process of victimization and plays a vital role as a contributing factor. Routine activity theory is one of the most

[26] To collect information, author physically visited the Cyber Tribunal and talked to the official personnel as well as the prosecutor during that tenure.

[27] Safiullah M. (2014). Legal Safeguards for Victimized Women in Bangladesh: An Empirical Study. DIU Journal of Humanities and Social Science, volume-2.

important theories of "environmental criminology". This theory has been developed by Marcus Felson and Lawrence E. Cohen in the United States 1947 - 1974.[28]According to factsheet prepared by the State of New South Wales (NSW) through the Department of Attorney General and Justice in 2011, it is known a crime generally occurs when three necessary elements i.e. accessible target; the absence of capable guardians that could intervene; and the presence of a motivated offender come together in any given spaces and time.[29]

In the area of victimology, these two theories are applied concomitantly and are named as the lifestyle/schedule actions hypothesis (hereafter LRAT) and it is usually cherished that they are theories of both persecution and crime.[30]Predominantly according to the investigation on offline persecution, the study discloses that appealing in online hazardous behaviors and activities such as downloading free games and free music at mysterious websites, aperture of nameless email attachments and clicking on pop-up messages significantly enlarge the probability of online victimization.[31] The proof exposes that minimally spending further time on the laptop does not swell oppression risks rather joining in online activities and expending huge times with the unknown even in some cases known persons in an explicit perspective greatly amplified the likelihood of being victimized. [32] In Social Networking Websites (SNWs) the consumers could effortlessly generate their individual "profiles"

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[28] Cohen, Lawrence E.; Felson, Marcus (1979). "Social Change and Crime Rate Trends: A Routine Activity Approach". American Sociological Review. 44 (4): 588–608. CiteSeerX 10.1.1.476.3696. doi:10.2307/2094589. JSTOR 2094589.

[29] State of New South Wales (NSW), a factsheet has been prepared by State of New South Wales (NSW) through the Department of Attorney General and Justice, 2011. ISBN 978-1-921301-65-0. Available at: http://www.crimeprevention.nsw.gov.au/agdbasev7wr/_assets/cpd/m660001l2/routineactivityfactsheet_nov2011.pdf, accessed on 07-09-2014.

[30] Ngo, F. T., & Paternoster, R. (2011). Cybercrime victimization: An examination of individual and situational level factors. International Journal of Cyber Criminology, 5(1), 773.

[31] Choi, K. (2008). Computer crime victimization and integrated theory: An empirical assessment. International Journal of Cyber Criminology, 2(1), 308-33.

[32] Nigo, supra note 30, P.780.

attaching and giving their names, dwelling, education and academic information, likes and dislikes to discover innovative associates or to relocate long vanished acquaintances. These social websites are ruthlessly magnetized teens and women. As a result they fall into the jeopardy of unidentified sexual predator or evils of solitude but many of them remained unconscious of the fact that their personality could be exposed for the most evil running them to the probable fatalities for sexual mugging in online, stalking, identity theft, cyber harassment, internet infidelity not only that, in many cases it leads to the domestic fighting between distrustful spouse or even ex-spouse.[33]

6. Factors Leading to Victimization of Women in Cybercrimes

The outstanding expansion of computers and the internet have made the people easier to keep in touch across the long distances. The vulnerability and safety of women is one of the biggest concerns of for any person and for this reason some special penal laws are enacted but unfortunately women are still defenseless in cyber space.[34]There are multiple causes of cybercrime against women. Among them the main causes for the growth of cybercrime against women in Bangladesh are as follows:

6.1 Easy availability of victims' (women's) personal information:

Globalization has provided a lot of space and facility of viciousness against women all over the world including Bangladesh.[35]In some families the male counterparts remain very busy in their profession and the female feels depressed and lonely.[36] To overcome depression and loneliness now a day's women tend to find a support outside their family circle. At large such women become cosset in discussion, exchange their views with friends or family members but frequently

33 Halder, supra note 18

34 Supan, supra note 11.

35 Radford, L., & Tsutsumi, K. (2004, February). Globalization and violence against women—inequalities in risks, responsibilities and blame in the UK and Japan. In Women's Studies International Forum (Vol. 27, No. 1, pp. 1-12). Pergamon.

36 Saha, T., & Srivastava, A. (2014). Indian women at risk in the cyber space: A conceptual model of reasons of victimization. International Journal of Cyber Criminology, 8(1), 57.

they become failure to unearth any seal companion. So the women involve in talking with outsiders to get rid of this confinement.[37]

6.2 Ignorance and negligence of the users:

In the computer literacy, it does not only contain browsing the internet through google or the utilize of social networking websites like Facebook, Twitter, or Orkut but also comprise solitude guard, fortification from emissary ware, internet viruses like Trojans, tracking cookies etc,. Recently there are large quantity augments in computer users but faultily saying that a large fragment of people are still unconscious of the safe and secured procedure of computers.[38]

There are many sites and options in the net to be involved different odd activities. Majority of the women join the social networking sites without checking any safety measures.[39] Many women are less proficient in using technology. So the use of computer and internet by them as an instrument for gathering knowledge, support, looking for empowerment will facilitate them to fall in to victim.[40]However, in this regard it is proved that they become a victim for their negligence.

6.3 Victims' precipitation:

In 1940, the victim precipitation theory firstly is brought to light by Hans Von[41] which stands for explaining the growth of cybercrime against women. This theory suggests that the victim herself is responsible for victimization either actively or passively.[42] Active precipitation attracts crimes when women victims knowingly visit dating sites or adult sites and display their real information to the

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[37] Halder, D., & Jaishankar, K. (2011b). Cybercrime and the Victimization of Women: Laws, Rights, and Regulations. Hershey, USA: IGI Global.

[38] Halder, D., &Jaishankar, K. (2010). Cyber victimization in India: a baseline survey report. Tirunelveli, India: Centre for Cyber Victim Counselling.

[39] See more in Halder D. (2007) Cybercrime against women in India, CyberLawTimes.com, Monthly Newsletter, Vol 2, No 6, June 2007

[40] Shalhoub-Kevorkian, N., &Berenblum, T. (2010). Panoptical web: internet and victimization of women. International Review of Victimology, 17(1), 69-95

[41] Tark, J. Y. (2007). Crime victims. Retrieved on July 10, 2009, from http://www.fsu.edu/~crimdo/TA/ JONGYEON/finalvictim.htm

[42] McGrath, J. (2009). Theories of victimization: Victim precipitation, lifestyle, deviant place and routine activities. April 29, 2009.

'visitors'. The victims truly come to know when the victims find their altered pictures and fake profiles in various sites which are not created by them. Such nuisances are often created by the perpetrator for experiment his technical knowledge. However, the theory of active precipitation may not stand good for certain offences. Further, it is not a blame for the victim but attention is the lack of cyber awareness of the female victims which encourages active precipitation.[43]

6.4 Easy process to veil one's factual individuality under disguised profiles

Presently cybercrime is attractive to the cybercriminals because of the anonymity and privacy technology. A person can easily skin his distinctiveness to make difficult and to define the real identities. The social media sites like Facebook and Twitter are increasingly popular and are being integrated into various websites as a result it has become difficult to separate one's real and virtual identities. Some forms of cybercrime such as bullying and harassment may become more difficult to perform due to the perception that their actual identity may be identified.[44] The SNWs permit a customer to revolutionize his simulated name and address at a standard hiatus for assistance the constituents to modify their substantial and geological scene and reduction themselves from such perpetrators but in due course it has buoyant the perpetrators to commend a misdeed and cover under a original uniqueness. This short of funny games played by the dangerous criminals increases the risk for the female members in social networking websites.[45]

6.5 Vacuum of legal actions in advancement with the technology

Lack in legal safety is one of the major and noticeable causes and loopholes for the growth of cybercrimes against women in the modern stage. The rights of women in cyber world should be sponsored

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[43] Halder, D., Jaishankar, K., &Jaishankar, K. (2012). Cybercrime and the victimization of women: laws, rights and regulations. Information Science Reference.

[44] Attrill, A. (2015). Cyber psychology. Oxford University Press (UK), p- 139

[45] Jaishankar, K. (2008) Space Transition Theory of Cyber Crimes in: F. Schmallager, M. Pittaro (eds.) Crimes of the Internet. Upper Saddle River, NJ: Prentice Hall, pp. 283-301.

basically of the lethargic styles of the administration in performing the equality and justice among the genders in the name of fundamental rights.[46] The laws related with cyber in many countries are connected with the increase of electronic commerce. It is evident that these legal machineries have also protected the business and monetary transgressions which include hacking, deception etc. In Bangladesh, the Information and communication Technology Act, 2006 is mainly applied to control freedom of expression and media but not to control the women harassment.

7. Loopholes in the Current Legal System and Laws Relating to Cybercrime in Bangladesh

The Information Communication and Technology (ICT) Act was passed in 2006 and amended in 2013 with the aim of implementing the National and Communication Technology Policy 2002. The policy was taken in 2002 to draw attention for legislation to protect against cybercrimes and to ensure the security of data and to ensure the freedom of information. Though later on the Act was enacted to protect the cyber victims, it doesn't cover the whole things of cybercrimes. This study has explored especially the cybercrimes against women in Bangladesh. This Act also wasn't prepared in compliance with international standards like the Council of Europe Convention on Cybercrime (Budapest Convention).

The ICT Act has contained a number of offences, procedure of prosecution and trial. Among these offences, only sections 57 and 66 indicate about cybercrime against women but doesn't clearly define and discuss the matter. Section 57 provides the punishment for publishing fake, obscene or defaming information in electronic form. Section 65 provides the punishment for using computer, e-mail or computer network for committing an offence mentioned in this Act. Both the sections don't cover clearly about the harassment of women i.e. via e-mails, cyber-stalking, cyber pornography, cyber defamation, morphing, e-mail spoofing, cyber bullying and abetment of such offences. A question rose that whether the offences mentioned above will be tried under either in Cyber Tribunal or in Criminal Court or

[46] Halder, supra note 38, P. 56.

other ordinary laws. It has been observed that most of the cases about the harassment of women via e-mails, cyber pornography and cyber defamation are lodged in ordinary criminal court. For this reason, women are not getting effective remedies against the offences. The number filling the cases the Cyber Tribunal is very marginal level not adequate.

Nowadays, women are frequently harassed over the internet or through mobile phones. Regrettably, there is no comprehensive law adequately dealing with sexual harassment in social media and other digital platforms, albeit cases can be filed under the Women and Children Repression Prevention Act, 2000, the Information and Communications Technology (ICT) Act, 2006, and the Pornography Control Act, 2012 or any other ordinary laws.[47] As Mr. Quazi MH Supan mentioned," *we have several laws to deal with cybercrimes and among them two enactments are important for practical purposes: the Information and Communication Technology Act, 2006 (ICTA) and the Pornography Control Act, 2012 (PCA). Cyber pornography can be prosecuted by section 8 of the PCA and also by section 57 of the ICTA. It will be extremely difficult to prosecute an act of morphing if the morphed image/video does not fall within the meaning of pornography. Acts of cyber stalking will probably continue to be immune from legal process as these laws do not specifically define them and our trial judges will rationally be reluctant to convict a person for acts not defined as crimes".*[48]

Lastly, Secondary Victimization is another problem by which victims are victimized repeatedly in current criminal justice system either in police station or court. Secondary victimization consists of "victim-blaming attitudes, reactions, behaviors and practices by service providers that result in further violation of victims' rights and/or additional trauma".[49] This process starts after the victim begins intermingling with friends, her family, and society as a whole. It has

[47] An article written by FarzanaHussain in the daily newspaper -the independent titled Sexual harassment and the law on 25 November, 2016. Available: http://www.theindependentbd.com/home/printnews/69721.Accessed on 12 October, 2017.

[48] Supan, supra note 11.

[49] Campbell, R., & Raja, S. (1999). The secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. Violence and Victims,14 (3), 261–275.

been observed that sometimes the police may refuse to register a case of cyber gender harassment like gender bullying, name calling, and leaking personal information on the Internet are often treated with less seriousness.

8. Effectivenessof Current Legal Protection to Women Victims of Cybercrime

In Bangladesh, as per the government commitment and initiative to make the country 'Digital Bangladesh', the development of technological facilities is growing up very rapidly. Side by side, the offences in cyber space are also increasing alarmingly. To control the cyber victimization the stakeholders should have to draw attention on the following things:

Firstly, apart from the usual characterizations of cyber offences, it is needed to employ very exact definitions for the most universal cybercrimes against women in the technological mode.[50]

Secondly, the production of digital proof and evidence in the court of law is urgent and sine qua non to effectively impeach and provide punishment to a digital offender but it is a matter of sorrow that no initiative has been taken to use and make sure the digital evidence protocols in place. So the people of Bangladesh have not seen a successful trial of a cybercrime.[51]

Thirdly, to remove the hesitation on filing any case, the govt. should enact a unique cyber laws related to women where all the cybercrimes against women will be defined. Simultaneously punishment and legal remedies should be clearly mentioned to make the process very easy.

Fourthly, the Government, private sectors, and NGOs need to work together and make an integral plan to stop the threat of technology against women. In this plan, a policy should be made to include the offenders into punishment and the ways of removing the psychological stress of the victim with rehabilitation.

Fifthly, Government needs to form a Center for Cybercrime Women Victim Counseling (CCWVC) which will work for reducing the victim stress as well as rehabilitating in the society.

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[50] Supan, supra note 11.

[51] *Ibid.*

Finally, the Bangladesh government should implement the laws strictly regarding the cybercrimes. It should be ensured that the perpetrators must be punished for the cyber crime. The ICT Act 2006 demands amendments of certain Acts for incorporation of internet into Bangladesh's legal framework. There is still a long way to go before the Bangladeshi legal system to incorporate and accept the internet fully. In this case, the Evidence Act 1872 shall also be amended as the Evidence Act is an age old Act which did not include the electronic evidence as evidence. [52] It is matter of pleasure that recently Government has enacted the much-debated Digital Security Act, 2018 to curb cybercrimes efficiently. Though there are some debates regarding section 8,21,25,28,29,31,32 and 43 of this Act, hopefully, we can say that within earliest possible time it would be visible mentionable steps to control cybercrimes by ensuring the different legal mechanisms as well as to keep cyber space safe and secure for women.

9. Conclusion

Over the last ten years, cybercrime has become a widely debated issue in the world as well as in Bangladesh. It is very clear that the development of technology and availability of Internet gives the offenders an opportunity to commit such crimes which victimized the women both physically and psychologically. In Bangladesh, cybercrime against women is mostly used to cover sexual abuses in the internet, such as morphing the picture and using it for purposes of pornography, irritating women with sexually blackmailing via e-mail, messages or cyber stalking. The rate of reporting to the law enforcement agency is also very low as existing legal structure failed to provide justice rather women are victimized with secondary victimization. We need specific enacted laws and courts regarded to cyber abuse to control cyber crimes and its application very smoothly. Also we need to take awareness program as women can stand against the sexual harassment in cyber space and report to the law enforcement agency for bringing the offenders under punishment.

[52] Ehasanul K., Shuvra Chowdhury (2014) Media and Cyber Laws in Bangladesh. P-448

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Reintegration of the *Hijra* People into the Mainstream of Society in Bangladesh: A Socio-Legal Study

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Abstract

The most neglected human group since time immemorial is the *hijra* community. Even though they are human beings, their minimum human rights have not been established yet. It's an axiomatic truth that the *hijra* community is one of the most maltreated sectors of society who still faces the identity crisis. Although Bangladesh is a multi-cultural country where a significant number of gender diverse people reside, these people are extremely subdued and subjugated. Social acceptance, recognition and rehabilitation is very urgent for this under privileged population. For building up an ideal pluralistic society in Bangladesh it's an utmost obligation to bring these people into the mainstream of the society. The study focuses the social inclusion initiatives for *hijra* people in Bangladesh which is a time befitting need.

Keywords: *Hijra* Community, Pluralistic Society, Social Inclusion, Legal Approach

1. Introduction

The *hijra* community is one of the most vulnerable sectors of Bangladesh and still faces low social standing. This community's horrific situation is increasing day by day. They are treated as the worse-born human being. The *hijra* are always socially undermined and neglected. Society still maintains a negative view upon their existence. It's a matter of great regret that even civilized people also inhale them as untouchable. Their unbounded agony unravels the society's mental penury. Every individual possesses the right to enjoy life irrespective of his or her gender identity. The Government should work to ensure a dignified life for sexual minority like *hijra*[1] by

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protecting their inconvincible and inalienable human rights, adequate healthcare including sexual and reproductive health, access to social services and justice. In order to solidify the social dignity of the *hijra* community their human rights needed to be uplifted. The key objective of the study is to find out *hijra* people's reintegration and adaptation process to the existing society. To reach the goal the legal impediments and circumstantial barriers are focused in the study. Moreover, the study also critically evaluates the current situation of human rights of *hijra* in Bangladesh.

2. *Hijra*: An umbrella Term

There is no precise meaning of the term *hijra*. Very often this term is used as a misnomer. To date, no universally accepted or exhaustive definition of *hijra* has been found. The word "*Hijra*" is Urdu, derived from the Arabic root "hjr" in its sense of 'leaving one's tribe'.[2] The term *hijra* used for genitally indistinct persons who experience gender dysphoria.[3] *Hijra* are those who are by birth intersexed and can live as both male and female.[4] *Hijras* do not conform to conventional notions of male or female gender but combine or move between the two.[5] Rehan and Shah[6] describe the word *hijra* as "an umbrella term used for those men, who are transgender, eunuch, hermaphrodites, bisexuals or homosexuals". *Hijra* are biologically males but they refuse their

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1 *Hijra* are neither male nor female but contain elements of both. *See,* Serena Nanda (1986) *The Hijras of India: Cultural and Individual Dimensions of an Institutionalized Third Gender Role*, Journal of Homosexuality, Volume 11,Page 35-54, Available at: https://www.tandfonline.com/doi/abs/10.1300/J082v11n03_03), Accessed on: 17 November, 2020.

2 Mohammad T. Alhawary and Elabbas Benmamoun, *Perspectives on Arabic Linguistics XVII-XVIII*, John Benjamins Publishing Company, Amsterdam, 2005, p.97, Available at: https://benjamins.com/, accessed on: 18 November, 2020.

3 Hahm, Sonya Caroline. "Striving to Survive: Human Security of the Hijra of Pakistan". *Conflict, Reconstruction and Human Security (CRS)*, 2010. available at: http://hdl.handle.net/2105/8652, accessed on: 15 November, 2020.

4 *Ibid*

5 Agrawal,Anuja, "Gendered Bodies: The Case of the 'Third Gender' in India," Contributions to Indian Sociology 31 (1997): 273–97. available at: https://journals.sagepub.com/, accessed on: 12 June 2019.

6 Rehan N, Chaudhary I, Shah S.K. *Socio-sexual behaviour of hijras of Lahore*, Journal of Pakistan Medical Association. 2009;59(6):380-384. available at: https://jpma.org.pk/, accessed on: 17 November 2020.

masculine identity. Their sexual identity is one of the most controversial issue. Due to the complexity of determining their gender, they are commonly referred as people of diverse gender group. In Bangladesh *hijra* is a person who have all the principal features of both genders, male and female.[7]

3. *Hijra* Community in Bangladesh

The biggest problem of the *hijra* community is their identity crisis. Although the state recognized them[8], the society never fully recognized them. These people are living in utter neglect all over Bangladesh. Society sees them as inferior people. Socially they are still despised. No clear social position has been created for them till date. In present practice, the individual who is neither a male nor a female is commonly known as *hijra* in Bangladesh. The *hijra* people has been socially excluded for a long period. No state measure was taken to count the actual number of the *hijra* population. As there is no national census on the *hijra*, therefore it can't be said about the actual number as per the geographical location. According to the Department of Social Services, the number of *Hijra* in Bangladesh is around 11,000.[9]

In Bangladesh *hijras* face many hurdles. Despite of being connected to a family, a *hijra* is virtually alone. In every step, they are being deprived of human rights. Upon rejection from the mainstream society, they build up a distinct society where they develop their own cultures and customs. The *hijra* community maintain a strong bond among their members. Actually they form this bond in order to survive in the society. Their clan's leader is called as *guruma*[10]. In each distinct *hijra*

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[7] Hyder and Rasel (2019), Legal Protection of Third Gender (Hijra) in Bangladesh: Challenges and Possible Solution, BiLD Law Journal, Volume IV, Issue II, p. 134-156.

[8] *Hijra* refers to those people who are not considered as male and female for physical or genetic reasons. See http://www.dss.gov.bd/, accessed on: 14 November, 2020.

[9] Department of Social Services, Government of the People's Republic of Bangladesh, http://www.dss.gov.bd, Accessed on: 19 November, 2020.

[10] Known as the leader of the *hijra* community in a particular locality who is considered as the mother of every *hijra* in that community. See also : Ghosh, Banhishikha. (2016). The institution of motherhood among the Hijras of Burdwan. Motherhood – Demystification and Denouement (189-196). Kolkata: Levant Books. 2016.

community there is a *guruma,* and of that community every *hijra* is under the control of such person. When a *hijra* meets a *hijra guruma*, becomes a *chela*[11] of that *guruma*.

Since childhood *hijra* people are excluded from formal elementary education due to their extraordinary gender attitudes.[12] In the current perspective of Bangladesh regular education facilities is still unavailable to this group. Due to their defective and abnormal sexual identity they experience rejection from their families, from their nearest and dearest people. Finding a safe living place is always a difficult task for a *hijra*. Many *hijras* live at slums and very frequently they are evicted too. They had to change living arrangements for an unending search for a suitable place where they could live safely and with dignity. While the *hijra* community is excluded from the mainstream social life, civil society is not giving enough attention to this issue.[13]

Hijra community in Bangladesh lives in extreme margin of exclusion having no socio-political space where they can lead life with dignity.[14] They have to bear the tyranny of social stigma. Their vulnerabilities, frustrations and insecurities have been historically overlooked by mainstream society. No such effective initiative has been taken for the employment of the *hijra* community. Instead of making them economically self-sufficient, they are being pushed away from the mainstream of society. *Hijras* have been removed from the mainstream of the labor force. The *hijra* community is a poor part of the society. They do not have any specific employment. There is no institutional job opportunity available for them. As a result, they are forced to take part in various unrecognized works. Many times, in the pursuit of life and livelihood they have to choose a hateful profession. It is an irony of

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[11] *Ibid*. The *hijra* who stay directly under the control of *guruma* and considered as the daughter of the *guruma*.

[12] Husain, S. A. M., 2005. Tritio Prokriti: Bangladesher Hijrader Arthoshamajik Chitro (Hidden Gender: Socio-economic status of Hijra community of Bangladesh). Dhaka: Sararitu.

[13] *Ibid*

[14] Khan, S.I., Hussain, M.I., Parveen,S., Bhuiyan, M.I., Gourab, G., Sarkar, G.F.,et al.(2009), *Living on the Extreme Margin: Social Exclusion of the Transgender Population (hijra) in Bangladesh*,Journal of Health, Population and Nutrition," 27(4),441–451, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2928103/, accessed on: 16 November, 2020.

fate that the main source of income of *hijras* in Bangladesh is begging and prostitution. They usually collect alms, perform at birth and marriage ceremonies, and engage in sex work to survive and adapt to the larger society.

Society has always maintained distance from this *hijra* people. This distance is the distance of exclusion, this distance denies their existence. They create strict prohibition and bar upon the access of *hijra* to social institutions, resources and services. As a result, the helpless and powerless *hijra* people are totally unable to mix up with the society and fail to adapt with it. So, the participation of *hijra* people in social, economic, cultural and political activities have become a long-cherished aspiration for them. The conventional social system has never established good relations with the *hijras*.

Nowhere in the world exists such a *hijra* social system like in Indian sub-continent. In western countries the *hijras* live together with their families and get full support.[15] But in our society, the *hijra* community are totally excluded and thus they form a separate sub-society with a different way of life with no intention of coming back to their origin. Social rejection is the major impediment towards the inclusion of *hijra* into the mainstream society. It is high time to accept this vulnerable sector into the society. It is hard to say that even the *hijra* individual left back their beloved family to uphold the dignity of their family. The civil society talk too less on the *hijra* issue. Even the death of *hijra* does not end their disgrace.[16] There is a need to ensure good governance and build a discrimination free society, after then the civil society can move forward with these people together.

4. Reintegration process of *Hijra* people in the Society of Bangladesh

In order to include the *hijra* community in the mainstream of society, long-term developmental measures need to be taken. It is important to remember that the *hijras* are not born in a *hijra* family or community.

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[15] Habib,Tahmina, *A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh*, University of Gothenburg, 2012, available at: https://gupea.ub.gu.se/bitstream/2077/32545/1/gupea_2077_32545_1.pdf., accessed on: 23 November 2020.

[16] *Ibid*

They join in the community from outside. They are forced to join the *hijra* community in order to survive. So, they have to learn to adapt with the civic society. They need fullest support and cooperation from us.

Social acceptance becomes a major concern for the *hijras*. Holistic approaches are required for the sustainable development of the *hijra* population. Various rehabilitation programs have already been taken by the Bangladesh Govt. for the *hijras* including stipend for students, skill training for the youths, old-age allowances, and rehabilitation grants.[17] Furthermore, the government is also going to take the plan to recruit *hijras* for the traffic police department like neighboring country India.

Through the initiatives of Social Welfare Ministry of Bangladesh, during 2012-2013 fiscal years around 72,17,000 (seventy two lakh seventeen thousand) taka allocated for the rehabilitation program of the *hijra* people and the program was primarily launched in 7 districts of the country which include Dhaka, Chittagong, Bogra, Dinajpur, Patuakhali, Sylhet and Khulna.[18] It is pertinent to mention here that, Iqbalur Rahim, a whip of the Bangladesh Parliament, built a shelter house called "Manab Palli" for *Hijra* people under his constituency(Dinajpur-3) which runs since 2012. A total of 80 *hijra* families have been rehabilitated in the shelter house.[19] In the 2019-20 fiscal year in order to improve the living standard of these underprivileged minority groups around 5 crore 56 lakh taka is also allocated.[20]

There is indomitable talent among the *hijra* community of Bangladesh. With proper opportunities and training, they will be able to move forward like any other group. The representation of the *hijra* community in the Human Rights Commission is also noticeable.[21]

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[17] Living standard development Program for Hijra community, available at: https://msw.gov.bd/, accessed on: 14 November, 2020.

[18] Available at: https://msw.gov.bd/, accessed on: 13 November, 2020

[19] Available at: https://www.observerbd.com/(23 February 2017), accessed on 20 November 2020.

[20] *Ibid*

[21] Tanisha Yeasmin Chaity has become the first transgender official in the National Human Rights Commission (NHRC) who is now a front desk executive at NHRC.

Besides the Govt. of Bangladesh different non-govt. organizations work for the welfare of the *hijra* people. NGO's such as Shocheton Shomaj Sheba *Hijra* Shongothon (SSSHS), Bondhu Social Welfare Society (BSWS), Badhan *hijra* Sangha, Lighthouse, Diner Alo *hijra* Sangha, Ashar Alo have a significant impact on the development and empowerment of *hijra* community.

BSWS is one of the leading organizations which works towards ensuring social security and justice for sexual minorities like *hijras* in Bangladesh.[22] It's already taken numerous development initiatives for the effective integration of *hijra* people in the mainstream of society. Over the last couple of years BSWS has been pro-actively working with government of Bangladesh and other relevant stakeholders on issues regarding health and human rights of the *hijra* population of Bangladesh.[23]

The *hijra* children should be treated like other normal children for their schooling. The backward *hijra* society should be taken forward and to do so the first thing is to enlighten them with the light of education. Therefore, they should be given the opportunity to participate in the conventional education system. Instead of special schools for transgender children, they should be given the opportunity to get admitted in the existing schools.In India, the *Sahaj International School* in the southern state of Kerala is run by six *hijra* activists since 2016.[24] In 2018 school for *hijra* children was also established in Pakistan named *The Gender Guardian School*.[25]

5. Legal Steps to Reintegrate *Hijras* in Bangladesh

In Bangladeshi society the *hijras* are extremely marginalized people having very low social and legal status. They are excluded from the

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See: https://www.asiapacificforum.net/news/transgender-human-rights-officer-hopes-bring-new-beginning/, accessed on: 12 November 2020

22 Bandhu Social Welfare Society, https://www.bandhu-bd.org/about-2/mission-vision, Accessed on: 24 October, 2019.

23 *Ibid*

24 https://www.dw.com/, accessed on 23 September 2019

25 *See,*The Express Tribune, April 14th, 2018, https://tribune.com.pk/story/1686041/first-kind-schools-transgender-persons-set-educate, accessed on: 11 November, 2020

mainstream social, cultural, religious, professional and political life. They are largely deprived of their basic human rights. Their access to justice is extremely limited. They are under legal protection both in the domestic and international arena. So the issue of their special constitutional protection as a backward and neglected sector cannot be ignored in any way.

Various international conventions and charters recognize the human rights of the *hijra* people. Universal Declaration of Human Rights (UDHR) is one of the most important legal instruments regarding protection of human rights. It also covers the human rights of the *hijra* people. Article Two of this instrument stated that any sorts of discrimination based on sex is strictly prohibited. Beside this, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) has also prohibited discriminations upon the *hijra* community and given the state party some responsibilities to protect their rights. The *Yogyakarta Principles*[26] of 2006 is another safeguard for the human rights of the sexualy diverse people like the *hijra* community. As a notable international instrument, it somehow preserves the human rights of the *hijra* community. It contains the right to legal recognition without reference to sex, gender, sexual orientation, gender identity, gender expression or sex characteristics.[27]

Constitutionally there is no room for creating any discrimination among the citizens of Bangladesh. It is so because the essence of Bangladesh Constitution is to ensure the protection of fundamental rights of every citizen. Hence it is mentionable that Article 27 of the Constitution says that all citizens are equal before law and are entitled to equal protection of law. Article 28(1) provides that the state shall not discriminate against any citizen on the basis of religion, race, caste or sex. Therefore, *hijras*, the third gender citizens of this country, have every right to live as the common citizens and may avail themselves of all kinds of educational, professional, legal and political facilities.

[26] The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. It is an outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. See: https://yogyakartaprinciples.org/, accessed on: 20 November, 2020

[27] *Ibid,* Principle 31 of *Yogyakarta Principles* (2017)

The right to inheritance of *hijras* is still a most neglected issue in Bangladesh. At present there is no statutory law or policy for the inheritance rights of *hijras*. As a result, they are now excluded from all forms of inheritance. Although there is scope of inheritance of *hijra* children in Islam, but due to absence of statutory laws Muslim *hijra* people in Bangladesh are deprived of the right to fair inheritance. According to *Fiqah* or Islamic jurisprudence, the one having both male and female multiplicative organs is called *Khuntha* or *hijra*.[28]There is a provision to give property as male if there is more masculine nature in the physical appearance and behavior of *hijras* and to give property as female if there is more female nature.[29] There is no express prohibition on giving property to a *hijra* child through a will or *wasiyat*.[30]

Hijras do not have the opportunity to inherit under Hindu law. According to Hindu Shastras, *hijras* have been provided with social status, respect and dignity. Most of the hindu people residing in Bangladesh are governed under *Dayabhaga* school. According to the traditional *Dayabhaga* school, based on gender, male and female are capable to inherit of the deceased's property.[31] As the *hijras* are not categorized either as male or female, they are being excluded from receiving property. As per the general rules of Hindu Law of inheritance, an heir will be excluded from inheritance due to blindness, deafness, dumbness and for want of any limb or organ, provided the defect is both congenital and incurable.[32] Thus the rights and opportunities of acquiring property by a *hijra* through inheritance is not recognised in Hindu law. Constitution confers the right to property for all people but the *hijra* people are deprived from this fundamental right[33] which can't be exercised by them just because of their peculiar gender identity.

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[28] Uddin, Mohi. (2017). Inheritance of Hermaphrodite (Khuntha) under the Muslim Law: An Overview. Beijing Law Review. Vol.08., p. 226-237, available at:https://www.scirp.org/journal/paperinformation.aspx?paperid=77360, accessed on: 21 November, 2020

[29] M Uddin, Muslim Law of Inheritance and Practice (2000) Dhaka, Kitabmohol 100

[30] *Ibid*

[31] Mulla, D.F.(1946). Principles of Hindu Law, Eastern Law House,p.102

[32] Haque, M. A. (2014) "Hindu Law in Bangladesh: Theory and Practice, University Publications. "First Edition, p.200

[33] Article 42 of the Bangladesh Constitution

As a leading common law country, in UK a landmark judgment in *Christine Goodwin v. The United Kingdom*[34] case, the rights of transgender people is recognized. It said that a test of biological factors could no longer be used to deny recognition of transgender.[35]

In Bangladesh still there is no such remarkable precedent seen in the field of protection of legal rights of *hijra* people. India and Pakistan are advanced in this regard. In *Khaki v. Rawalpindi case (2009)*[36], Pakistan Supreme Court ensured the right of inheritance of the *hijras.*

In *National Legal Services Authority v Union of India (2014)*[37] the Supreme Court of India has ruled that *hijra* persons have a right to be legally recognized. Failure to provide such legal recognition amounts to a breach of the right to equality before the law, non-discrimination on basis of sex and the right to life and liberty with dignity.

The supreme court of Nepal prohibited the discriminations against *hijra.* The Court ordered the Government of Nepal to make the necessary arrangements, including making new laws or amending existing laws, to ensure that people of different gender identities and sexual orientations could enjoy their rights without discrimination.[38]

Although in Bangladesh numerous statutes are promulgated for the development and protection of the people, there is no specific strong statute yet enacted regarding the protection of the *hijra* community. In 2013 Bangladesh Government adopted a policy for the optimum development of the *hijra* people. The policy recognized the *hijra* as a sexually disabled people. It created a negative impact upon the mind of this *hijra* community.

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[34] Grand Chamber judgments of July 11, 2002 (application no, 28957/75) available at: https://hudoc.echr.coe.int, accessed on: 17 November, 2020

[35] Sindhe, U. (2012). Gender Justice and Status of Eunuch, International Journal of Humanities and Social Science Invention, Vol.1(1) p.. 1-6, available at: https:// www.ijhssi.org, accessed on: 25 November, 2020

[36] *Constitution Petition no 43 of 2009.*

[37] *National Legal Services Authority v. Union of India, (SC) 5 (2014) 438.*

[38] *Sunil Babu Pant v. Government of Nepal , Writ no. 917 (SC) 2007,* available at: https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/, accessed on: 22 November, 2020

The *hijra* people are not protected under the ambit of the *Nari O Shishu Nirjatan Daman Ain 2000*[39] of Bangladesh and the Penal Code 1860. Present laws deal with males and females. The *hijra* community therefore lag behind in getting proper legal redressal and the matter of access to justice remains beyond their reach.

The government has officially declared the Hijra community of Bangladesh as *hijra* Sex on 26th January 2014 in a gazette.[40] According to Human Rights Watch, legal recognition and social inclusion initiatives for *hijras* are crucial for achieving basic rights and dignity.[41] This is a milestone for the legal empowerment of the *hijra* community. But there was no clarification how to recognize them in the state apparatus and how to mainstream this group. The recommendations of the law commission on equal participation, protection of rights and full participation of various marginal classes frame the *hijra* alongside various occupational, ethnic and religious minorities, including female sex workers, sweepers and so on.[42]

BSWS initiated *Bandhu Panel Lawyers* in 64 districts of Bangladesh with an objective to provide *hijra* community members with an easy access to information and assistance in legal issues through them. At present 203 lawyers work as panel lawyers to provide legal aid.[43] BSWS also initiated legal help line titled "Ain Alap[44]" in 2013. So far, a total of 3171 complaints are recorded, of them 434 cases are of sexual harassment, 331 of domestic violence and 827 of property and monetary dispute. *Ain Alap* ensures case investigations and refers the cases to other organizations including the National Human Rights Commission (NHRC) based on the need of the case.[45]

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39 Women and Children Repression Prevention Act 2000

40 Government of the People's Republic of Bangladesh, Ministry of Social Welfare, Bangladesh Gazette, No. sokom/work-1sha/Hijra-15/2013-40.

41 Human Rights Watch, https://www.hrw.org/news/2016/12/23/bangladesh-gender-recognitionprocess spurs-abuse, Accessed on: 06 September, 2019.

42 Adnan Hossain (2017) The paradox of recognition: hijra, third gender and sexual rights in Bangladesh, Culture, Health & Sexuality, 19:12, 1418-1431, available at: https://www.tandfonline.com/doi/full/10.1080/13691058.2017.1317831, accessed on: 18 November 2020

43 https://www.bandhu-bd.org/, lastly accessed on 24 October 2019.

44 The term 'Ain Alap' is Bangla. Its English synonym is 'Law Conversation'

45 *Ibid*

6. Steps to be Taken

From time immemorial, the *hijra* people are socially neglected, oppressed and persecuted. Its high time to undertake proactive and effective steps for the ultimate and utmost development of this community of Bangladesh. It is the sacred duty of the civil society, media, NGOs to come forward for the betterment of the sexual minority *hijras*. In order to ensure a people oriented and proper democratic humanist country long-term and efficacious steps must be taken by the govt. For the sustainable development of the *hijra* people the government must come forward with its helping hands. The following steps and measures can be taken in Bangladesh in this regard-

a) *Hijra* Community Development Policy 2013 should be implemented properly.
b) *Hijra* option along with male and female can be included in National Legal Aid application form. Legal Aid Service Act, 2000 can be reviewed in order to include *hijra* community under this Act.
c) The government has to strengthen social security module for the *hijras*.
d) Monitoring cell needs to be established to provide proper legal aids to the *hijra* people.
e) At the initiative of the government, *hijra* census program at the national level has to be taken very soon.
f) *Hijra* student quota should be maintained in Universities
g) Equal opportunity of work for the *hijras* should be maintained.
h) A permanent fund like '*Hijra* Welfare Fund' may be created by the government.
i) Engagement of government panel lawyers for the *hijra* population should be ensured
j) In order to provide more legal assistance to the *hijra* community, the scope of pro- bono lawyering service should be increased.
k) Govt. may allocate *khas* land for *hijra* community prioritizing elderly *hijra*.
l) The government must promulgate statutory laws regarding inheritance of *hijras*.
m) It is necessary to establish a psycho-social counseling center for the *hijra* population.

7. Concluding Remarks

Common people have a negative perception of the *hijra* community. This mentality is playing a crucial role in separating these stigmatized people from mainstream society. As they are scattered in the country and are also part of the society it is not rational to keep them out of development. They deserve to be treated cordially and respectfully. It is important to change the outlook towards *hijra* community. Everyone should come forward to do something for them and bring the suggestions mentioned into effect.

Post-Divorce Maintenance of a Muslim Woman: A Critical Analysis in the Perspective of Indian Sub-Continent.

Md. Tasnim Ferdous*
Md. Nadir Khan**

Abstract

Islamic law permits divorce to make the Muslim marriage more congruent and liberal for the followers. Hence, the *Shariah* law furthers the protection to the divorcee for specified period in such a way that she should not be in a distressed situation. The responsibility for providing maintenance to wife is absolutely vested upon the husband as a consequence of a valid marriage. 'Post-divorce Maintenance' is the most discussed and debated issue of the present era. There is no debate or controversy among Islamic scholars in respect of the provision of maintenance to the wife during her *iddat* but there is no unanimity of view in respect of 'post-divorce maintenance' beyond the *iddat* period, although support to a divorced woman may be rendered in the form of *Mataa*. The purpose of the present research is to investigate the rights of a divorced Muslim woman under *Shariah* law. This study evaluates the enactments of the Parliament and renowned case-decisions of the Higher Courts in the light of *Shariah* law. Besides, it reveals the present legal position and the questions raised with regard to 'post-divorce maintenance' of Muslim women under the *Shariah* has well as the practice in the Indian Sub-Continent. Qualitative research methodology is followed. Secondary data source is used to reach its culmination and obtain its desired aim.

Key Words: *Shariah*, Maintenance, Post-Divorce Maintenance, *Mataa*

1. Introduction

In Islamic law, rights and duties of a Muslim man and woman are different. Muslim males have to deal with the economic matters of the

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outside world and family chores inside the house are vested with Muslim females. Hence duty to provide maintenance is upon the shoulder of the male members of the family under *Shariah* law. A woman becomes entitled to maintenance from her husband once she starts cohabiting and submit herself at the disposal of her husband.[1] The Arabic term for such right of maintenance is *Nafaqa.*[2] *Nafaqa* comprises the provision of 'food, clothing, and lodging.'[3] There are differences of opinion as to the quantum of maintenance among the different schools in Islam.[4] A Muslim husband is responsible to render maintenance to his wife during the marriage. Muslim personal law imposes an obligatory duty on the husband to maintain his wife. The duty of maintenance continues even after divorce during the *iddat*[5] period of three months and not beyond. This principle of giving maintenance after the *iddat* period has led to the serious debates and criticisms in volumes of contemporary writings as the west feminist scholars take the partial view of Islam without understanding the spirit of the *Shariah* law as a whole. All the research conducted by those scholars adopted the view to reform Islamic law of post-divorce maintenance without searching the solution within the *Shariah* law. In most of the cases they have mixed up the concept of post-divorce maintenance of *iddat* period with the concept of *Mataa*.[6] This paper has tried to find out answers of some important issues such as - the current situations that exists in the Indian Sub-continent to protect Muslim women's right over post-divorce maintenance and the approaches of these countries regarding post-divorce maintenance under *Shariah* law. The answers of these significant questions will pave the way to protect

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1 Rahman, T., *A Code of Muslim Personal Law.*Vol. 1, Karachi, 1979, at p.258.

2 *Ibid*., at p.257.

3 Baillie, N.B.E., *A Digest of Moohammudan Law.* Vol. 1, London, 1865, at p.441.

4 For a detailed information on the quantum of maintenance for a woman during her marriage in the view of the four Sunni Schools in Islamic jurisprudence see, for example, Pearl, D., *A Textbook on the Muslim Personal Law*, 2nd edition, London, 1987, p.69 and Hodkinson, K., *Muslim Family Law*: A Source Book, London, 1984, p.147.

5 The period of three-monthly cycle for the women to ascertain pregnancy.

6 The literal meaning of *mataa* is enjoyment, pleasure, delight, satisfaction, contentment, and happiness, is a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment.

the rights of post-divorce maintenance of the divorced Muslim women by exploring the spirit of Islam through implementing *Shariah* law in the light of Prophetic (SM) teaching.

The research method which has been used in this paper is qualitative methodology. Primary and Secondary data have been used. Information has been gathered from different journal articles, books, Judgment of reported cases, statutory legislation and online sources. As a source of information along with other sources the Holy *Qur'an*, *Hadith* and *Tafsirs* have been mentioned in this paper. In order to attain the goal of this paper, a comparative discussion among the cases of Bangladesh, India and Pakistan has been made. The first phase of the paper tries to explore the terminology and principles of *Nafaqa, Mataa* and Post-divorce maintenance of Islamic *Shariah*. Right of a Muslim woman in respect of post-divorce maintenance has been discussed in second phase focusing on the situation of Bangladesh, Pakistan and India. The third phase has been designed to evaluate the position of these three countries regarding post-divorce maintenance in the light of *Shariah* law. Some recommendations have been provided in the last phase to resolve the critical situations.

2. Operational Definition

2.1 *Nafaqa*

Nafaqa is an Arabic term which means maintenance of a Muslim woman from her husband that she can claim as of right. *Nafaqa* comprises the provision of 'food, clothing, and lodging'.[7] There are considerable debates as to the quantum of maintenance after divorce since there are disparities of opinion among the different schools of thoughts in Islam.[8]

2.2 Post-divorce Maintenance

Post-divorce maintenance means the maintenance that a Muslim woman gets from her ex-husband after the termination of marriage contract. There is no debate that in the event of divorcee, the wife is

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7 Baillie, N.B.E., *A Digest of Moohammudan Law*. Vol. 1, London, 1865, at p.441.

8 *Supra note* 4.

entitled to maintenance for a certain limited period i.e. the *iddat* period which may be approximately three months. The main debate regarding post-divorce maintenance is whether a divorcee woman is entitled to post divorce maintenance after the conclusion of the *iddat* period. The common interpretation of the Islamic law suggests that a man's responsibility to maintain his divorced wife comes to an end after the conclusion of the *iddat* period.

2.3 *Mataa*

The Arabic term *Mataa* is the centre of the debate. The literal meaning of *Mataa* is enjoyment, pleasure, delight, satisfaction, contentment, and happiness. In practice it is used to refer to economic support, or post-divorce payment, rendered to divorcee by her former husband.[9] According to Hans Wehr, "*Mataa* is enjoyment, pleasure, delight, gratification, object of delight, necessities of life, chattel, possession of property, goods, wares, commodities, merchandise, furniture; implements, utensils, household effects, baggage, luggage, equipment, gear, useful article, article of everyday use, things, objects, stuff, odds and ends."[10] Thus *Mataa* is a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment.

3. Post-Divorce Maintenance in the Light of *Shariah* Law

In *Shariah* law, the Holy *Qur'an* and the *Hadith* are regarded as the basic and primary sources of law. The secondary sources of the *Shariah* law, *Ijma* and *Qiyas*, are used to solve the matters those are not possible to solve directly by the *Qur'an* and *Hadith*.[11] The *Shariah* Laws, which has been founded on the main sources and illustrated by different schools of law predominantly by *Hanafi, Maliki, Shafi* and *Hanbali* through jurisprudential interpretations, is termed as *Fiqh*. Under the *Shariah* law a Muslim wife has a right to get maintenance from her husband. The

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[9] Pervin. D, *Post-Divorce Maintenance for Muslim Women: Which path to follow in Bangladesh?* Society & Change ,Vol. VIII, No. 1, January-March 2014 ISSN :1997-1052 (Print), 227-202X

[10] Islam, Mohammad Azharul & Nahar, Azizun, *Rethinking the plights of Divorcee under Islamic Family Law*, Dhaka University Law Journal Vol.22, No 2, Dec 2011 at p.93.

[11] F. Rehman, *Post-divorce Maintenance for Muslim Women in Pakistan and India*, Bangladesh, Journal of Law, Dhanmondi R.A, Dhaka,1998.

basis of the principle that the male is the 'provider' of maintenance of the wife is mainly derived from the meaning and interpretation of *Surah Al-Nisa(4):* verse 34 which states: "Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other and because they support them from their means."[12]

The established principle of *Shariah* is that a Muslim wife has right to get maintenance during the continuance of marriage. There has been a huge controversy on the time span of maintenance after the divorce. It is mentioned in *Sura-al-Baqara* in Holy *Qur'an* in verses 225 and 240 that a Muslim wife is entitled to maintenance from her husband both during the continuance of marriage as well as after separation of marriage. However Muslim scholars have opined that the maintenance will not go beyond the *iddat* period.[13] The *Qur'anic* verse 65:6 in this regard directed that a man has to pay economic support to his divorced wife during *iddat*. It is mentioned in verse 241 of *Sura-al-Baqara* that the amount of maintenance to the divorced women should be reasonable. It is an obligation upon the righteous. This indicates that the Holy *Qur'an* gives a duty on the Muslim husband to make an arrangement for maintenance to the divorcee. There are divergences of opinion among the scholars of four prominent Islamic schools of law regarding the interpretations of the concerned *Qur'anic* verses in this context. The *Hanafis* interpret *Mataa* more strictly. The verse 236 and 237 of *Sura Baqara* of the Holy *Qur'an* provide guidance relating to the issue of divorce before consummation of the marriage. According to verses of the Holy *Qur'an* mentioned earlier, "There is no condemnation for you if you divorce women before intercourse or the determination of their dower; but give them (a suitable gift), the affluent according to his capacity and the poor according to his capacity, a gift of reasonable amount is due from those who wish to do the right thing. And if you divorce them before intercourse but after the determination of a dower for them, then the half of the dower (is due to them), unless they waive it or (the man's half) is waived and the waiver (of the man's half) is the nearest to righteousness".[14]In this way, the *Hanafi* school accepted the payment of *Mataa* as mandatory only

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[12] Verse 34 of *Surah Al-Nisa* of the Holy *Quran*

[13] A. Fyzee, *Outlines of Muhammadan Law*,Oxford University Press, Delhi, 1974, p.172

[14] 236 and 237 of *Sura Baqara*of the Holy *Quran*

when the woman has been divorced before intercourse or where *mahr* has not been fixed.[15] Furthermore, the *Hanbali* school took a uniform view with the *Hanafi* school and refused to recognize post-divorce maintenance beyond *iddat* period. On the other hand, some Sunni schools and the *Shias* consider *Mataa* as a payment which is surplus to her *mahr* that the husband is bound to pay to his wife in each case of divorce by *talaq*.[16] The stance taken by the *Shafi* and *Maliki* schools of thoughts is generous and flexible in comparison to the rigid stance adopted by the other two schools of thought. However, stricter positions were held by the followers of these schools of thought in the subsequent period and they adopted the view that post-divorce maintenance is confined only for the *iddat* period.[17]

4. Position of Post-Divorce Maintenance in Indian-Subcontinent

4.1 Post-divorce Maintenance in Bangladesh

In Bangladesh *Hanafi* school of Islamic Law is predominant. According to *Hedaya*, a divorcee in case of repudiation for any cause other than her own, has the right to get post-divorce maintenance and lodging only during her *iddat* period.[18] In *Hefzur Rahman v. Shamsun Nahar Begum*[19], the High Court Division of the Supreme Court of Bangladesh hold the view that former husbands are liable for maintenance of their divorced wives until their remarriage. In this case the HCD held that a person is under an obligation to maintain the divorcee on a reasonable scale beyond the period of *iddat* for an undefined period of time, that means, till the divorcee remarries another person. The decision was

[15] R. Abdullah, T. Monsoor, F. Johari & W. M. Radzi, *Financial support for women under Islamic family law in Bangladesh and Malaysia*, Asian Journal of Women's Studies, 21:4, 2015, 363-383.

[16] A. Shahid, 'Post-divorce Maintenance For Muslim Women In Pakistan and Bangladesh: A Comparative Perspective', *International Journal of Law, Policy and the Family*, Oxford University Press, 27(2),2013, 197–215.

[17] F. Rehman, 'Post-divorce Maintenance for Muslim Women in Pakistan and India', *Bangladesh Journal of Law,* Dhanmondi R.A, Dhaka-1205,1998.

[18] C. Hamilton, *Hedaya or Guide: Commentary to Musulman law,* Premier Book House, Lahore, 1982

[19] 47 DLR (1995) 74

reversed by the Appellate Division (AD) of the Supreme Court of Bangladesh on the following grounds:

- As the Arabic phrase *Mataa'um Bil-Ma'ruf* can not be interpreted or translated as an alternative of the English phrase "maintenance on a reasonable scale", the HCD misinterpreted *Mataa* adopting the meaning of *Mataa* as maintenance. Actually *Mataa* is a compensation which is given in the form of a presentation of essential goods necessary for livelihood of the divorcee which may include a cloth, money, chattel, or any kind of property according to prevailing practice.
- The HCD disregarded the well-established principle of interpretation of the *Qur'an* as it is not appropriate and acceptable to interpret a single verse in an isolated way and to determine the actual meaning of a single verse alone without taking into account the principles laid down by other related verses of the *Qur'an* in this regard.
- As there is no conclusive guideline in the Holy *Qur'an* regarding the payment of maintenance after the period of *iddat,* the other sources of *Shariah* law is required to be followed for a clear guidance in respect of providing maintenance to a divorcee. The judgment is contrary to the principles established by Muslim jurists and based on no rational reasoning.
- The Court relied on the explanations of *Hedaya*[20] and *Fatawa-i-Alamgiri*[21] and argued that the word *Mataa* which has been used in the *Qur'anic* verse II: 241 has never been used to indicate the term maintenance as a legal, formal and regular supply of essential stuffs for livelihood to the divorcee. It is a consolatory grant or gift to a divorcee to mitigate the trauma she suffers from divorce. As *Mataa* is a gift in nature, it can be forced judicially.[22]

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[20] *Al-Hedayah* is considered to be one of the most influential compendia of *Hanafi* Jurisprudence.

[21] *Fatawa-i-Alamgiri* is the greatest digest of Muslim Law complied in *Mughul* period.

[22] A. M. Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism*,Oxford University Press, Karachi, 2011.

Justice Mr. Mustafa Kamal[23] said that a destitute divorcee has right to claim maintenance as of right from her opulent relatives under Islamic *Shariah*. If the opulent relatives fail to render maintenance to the divorcee, it is the obligation of the state to maintain her. Another solution may be given to the destitute divorcee by funding her maintenance from the *Zakat* fund of the state if the ex-husband or the relatives fail to maintain her.[24] However, in *Mst. Razia Akhter vs. Abul Kalam Azad* [25] the court extended the period of maintenance till the conclusion of pregnancy period if the divorced woman is pregnant. This extension of the time span complies with the *Shariah* law and the statutory enactment.[26]

4.2 Post-Divorce Maintenance in Pakistan

Pakistan follows *Hanafi* school of law as a Sunni Muslim majority country. In Pakistan before the Ordinance of 1961, maintenance for divorcee was dealt with by criminal law as well as *Shariah* law. *Sh. Azmatullah vs. Mst. Imtiaz Behum* [27] was the first case where the Judiciary of Pakistan dealt with the issue of maintenance of divorcee where it was decided that the wife has right to maintenance till her *iddat* period. Similar decision was given in the *State vs. Muhammad Nabi Khan*.[28] Thus it is explicitly clear that the classical interpretation of *Shariah* law in respect of maintenance up to *iddat* period was upheld by the judiciary of Pakistan. In 1955, the issue of providing maintenance after *iddat* period to the divorcee came under scrutiny when the Commission on Marriage and Family Law [29] made some recommendations in respect of the provisions of maintenance for divorcee.[30] However, Islamic scholars as well as one of the members of the Commission strongly condemned and blatantly criticized the

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[23] Justice Mr. Mustafa Kamal was the 10th Chief Justice of Bangladesh.

[24] 51 DLR 1999 (AD), Per Mustafa Kamal, J., at para 146.

[25] Family Suit No. 98 of1990, Dhaka District Court.

[26] Section 7(5) Muslim Family Laws Ordinance of 1961 'If the wife is pregnant at the time of talaq, it is not effective unless the pregnancy ends.'

[27] PLD 1959 Lahore

[28] PLD 1961 WP Karachi 12

[29] Gazette of Pakistan, Extraordinary, 20 June 1956

[30] *Supra* 16.

recommendations.[31] Finally, the recommendations were refused to be incorporated in the Muslim Family Laws Ordinance 1961. In 1998 the issue of post-divorce maintenance was further scrutinized by the Pakistan Law and Justice Commission. Finally the Commission accepted *Mataa* as a consolatory gift. While accepting *Mataa* as a consolatory gift, the Commission also referred to some examples of different Muslim countries where *Mataa* is paid in excess of the payment of dower and maintenance during the *iddat*. In 2004, the issue of post-divorce maintenance was raised before the court that was adjudicated by the court by way of providing maintenance after the *iddat* period on the ground of breast-feeding to the suckling baby.[32] So, it is apparent that a divorcee in Pakistan has right to get maintenance during the *iddat* period only and not beyond that period.[33]

4.3 Post-Divorce Maintenance in India

In *Mohd Ahmed Khan vs. Shah Bano Begum,*[34] the High Court of Madhya Pradesh affirmed the decision of the lower court and increased the amount of maintenance but the husband, Mohd Ahmed Khan, appealed to the Supreme Court. He refused to pay the amount on the basis of the following grounds: (i) Muslim personal law imposes the obligation upon the husband to maintain a divorcee for a period which is limited to the *iddat* period only (ii) The amount of dower and maintenance had been paid by him during the *iddat* period. However, it had been refused by the Court to apply the rules of *Shariah* law in a case where the divorcee had no ability to maintain herself. The Court held that the husband's liability to maintain the divorced wife comes to an end with the conclusion of the *iddat* period. However, if the divorced wife has no ability to maintain herself beyond the *iddat* period she has the right to have protection under Section 125 of the Code of Criminal Procedure of India.[35] In addition with that the Court held that the statutory right of a divorcee under section 125 of the Code of

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[31] Islahi, A. H, Ahilli *Commission ki Report Par Tabsara*. Lahore, 1958

[32] *Muhammad Aslam v Muhammad Usman*,2004 CLC 473

[33] D.F. Mulla, *Principles of Mahomedan Law*, Tripathi Private Ltd, Bombay, 1977

[34] AIR 1985 SC

[35] *Supra note* 22.

Criminal Procedure to get maintenance from the former husband is not contrary to the rules of the Muslim personal laws which is applicable to her[36]. Actually the decision of the Indian Court was manifestly contrary against the *Shariah* law. The Judgment of *Shah Bano* case became a matter of dispute by creating a great chaos and Muslim masses protested against the judgment. To manage the situation, the Government enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986 and declared that Section 125 of the CrPC of India is not applicable to the Muslim divorcee. However, the statutory provisions under this law has been altered by another statutory provision granted to the women.[37] Section 3(1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 states that a divorcee will have right to get 'a reasonable and fair provision and maintenance 'which has to be offered and paid by her former husband within the *iddat* period. In *Ali vs. Sufaira*[38] it was decided that, a Muslim divorcee not only has the right to get maintenance for the *iddat* period but also has a right to get a reasonable and fair provision for the future under section 3(1) of the said Act. It indicates that entitlement of a divorced Muslim woman of her maintenance has to be paid during the *iddat* period in a manner which will be sufficient for mitigating her expenditure till her death or at least until she gets married with another man.

5. Assessment of the Position of Bangladesh, India and Pakistan under *Shariah* Law

Differences of opinions of Islamic schools of thoughts[39] on post-divorce maintenance have created divergent practice on the subject in the Muslim communities throughout the world. *Hanafi* scholars[40] have

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[36] AIR 1985 SC 945

[37] Latifi & Danial, Women's Rights…paper presented at the International Conference of Lawyers on Changing Scenario of Human Rights, New Delhi, 20 and 21 February, 1993.

[38] 1988 (2) K. L. T. 1994

[39] Hanafi, Shafi, Maliki& Hanbali Schools

[40] Imam Abu Hanifa, Imam Abu Yusuf(R), Imam Zufar(R), Imam Dawood Taa'ee(R), Imam Yusuf bin Khaalid(R), Imam Yahya bin Zakariyyah(R), Imam Muhammed(R) and Hadhrat Imam Abdullah ibn Mubarak(R).

recognized payment of *Mataa* as obligatory duty only in those situations when *mahr* is not determined at the time of marriage and when a woman is divorced before intercourse.[41] These *Hanafi* scholars argue that post-divorce economic support is compulsory only in this type of case as it is a substitute of the entitlement of divorcee of having half of the dower. The *Hanbali* school of thought also adopted the same stance and did not allow post-divorce maintenance beyond *iddat*. On the other hand, *Shafi* rendered a category of those who are entitled to get post-divorce maintenance.[42]

Both *Al-Hidayah and Fatawa-i-Alamgiri* are authoritative and dominant books founded on the *Hanafi* school, refer that maintenance to the divorcee should be fixed only on the basis of the husband's economic and social condition. These two books do not recognize the award of maintenance beyond the *iddat* period. Abu al Fidaa Ismail-ibn-Kathir[43] adopted the view that *Mataa* should be paid according to the husband's financial capacity in order to compensate the divorcee for what she deprived of due to divorce.[44]

The meaning and interpretation of the word *Mataa* is still a matter of debate encircling post-divorce maintenance. While it seems that there is a consensus amongst jurists and scholars that *Mataa* is a compensatory or consolatory relief which in practice can be translated as some form of financial support; the problem arises in legislating with regard to the ambit or tenure or form of this support.

Most of the jurists of different schools of thoughts had opined that the husband should give maintenance during continuance of marriage and during the *iddat* period. The logic behind this opinion is that in Islam

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41 *Qur'anic* verses 33:50, 2:237, 4:4 and 4:20.

42 The category comprises of a woman divorced without theguiltof the divorcee; the divorce occurred before determination of her Mahr and before the intercourse; divorce due to the husband's wrong attitude, cruelty, simpotence and desertion; the husband's failure to provide the required maintenance for her and if divorced due to „¯ılla¯h (that is chronic sickness) or ziha¯r (an old Arab custom, where the husband negate any marital relations with his wife, declaring her wife to be 'like the back of his mother').

43 Abu al Fidaa Ismail-ibn-Kathir was a prominent historian, scholar and exegete during the Mamluk period in Syria. Hisfield of expertise was Tafsir and Fiqh.

44 Tafsir Ibn Kathir –Retrieved from http://tafsir.com/default.asp

after separation of marriage both husband and wife are allowed to remarry and the woman comes back to her family. This is not equitable and legitimate to impose the burden on ex-husband to provide maintenance to the divorcee when he is no more her husband. Moreover, the deferred dower is considered as the protection for divorcee in Islamic law as it provide financial protection to the divorce. Furthermore, Islamic law states that if the guardian of the divorced woman is not able to maintain the divorcee, then her maintenance will be provided from the collective resources of the Muslim community (*Baitul Mal or waqf* property) as a whole.[45]

Mataa is known as a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment, but this argument did not satisfy the Court and the Court decided that divorcee should be provided for maintenance till remarriage or death. This decision by the apex Judiciary in India[46] exploded the Muslim community into a great controversy and debate. Majority of the Muslim community was of the opinion that the line of argument adopted by the Supreme Court was conflicting with the *Shariah.* It was opined that it is neither desirable nor reasonable to bend the personal laws beyond their limit to unsettle the well-established rules of Muslim personal law. This agitation in the Muslim circle compelled the authority to pass the Muslim Women (Protection of Rights on Divorce) Act, 1986.[47] There is differences of opinions among the different schools of thoughts, *Hanafi*, *Shafi* and *Maliki*, about whether giving *Mataa* is compulsory or not but it is never understood to give maintenance for rest of the life of a divorcee or till her remarriage. As all rights and responsibilities come to end with dissolution of marriage, it is unjust to give burden upon the ex-husband to provide maintenance till her remarriage or death. Thus, the Supreme Court of Bangladesh put a milestone in *Hefzur Rahman vs. Shamsun Nahar Begum,*[48] by keeping the spirit of *Shariah* law. In this

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45 Shabbir, Mohd. *Muslim Personal Law and Judiciary*, Allahabad, 1988, p. 288.

46 *Mohd Ahmed Khan vs. Shah Bano Begum*, AIR 1985 SC

47 For the current development under the Muslim Women (Protection of Rights on Divorce) Act of 1986 see Menski, W.F.: 'Maintenance for divorced Muslim wives', *Kerala Law Times*. Journal 1994 (1), pp. 45-52.

48 47 DLR (1995) 74

Judgment Mr. Justice Mustafa Kamal opined that if a destitute divorcee is not given right to get maintenance from her wealthy relatives then the state is bound to maintain her.[49]

6. Enforcement Mechanism of *Mataa* Provision in Bangladesh: Scope and Opportunity

The enforcement mechanism of *Mataa* in Bangladesh is based on the decision of Appellate division of Supreme Court of Bangladesh.[50] Giving maintenance till death or remarriage of a divorcee by interpreting the word *Mataa* is not the proper interpretation of *Shariah* Law as held by the apex Judiciary in India.[51] If the burden of maintenance till death or remarriage is given upon the ex-husband, it will be unjust as all rights and responsibilities come to an end when the marriage is dissolved. Real interpretation of *Shariah* law came from the decision of Appellate Division of Supreme Court of Bangladesh in *Hefzur Rahman vs. Shamsun Nahar Begum.*[52] The divorcee will get her 'post-divorce maintenance' during the *iddat* period. *Mataa* can be provided as a consolatory gift in those situations where it is permitted under Islamic *Shariah*.

7. Conclusion and Recommendations

The command of Islamic *Shariah* in respect of maintenance of the divorcee is that maintenance should be provided for the period of *iddat* and in certain cases even beyond the *iddat* period (e.g. during the time of breast feeding). A clear and certain set of laws on maintenance for the divorcee and widow is needed to cover all aspects of maintenance. Islamic teachings are universal and eternal and are not limited to time or space. The issues relating to maintenance of divorcee can be resolved through *Ijtehad*. Islamic *Shariah* provides protection to vulnerable class of the society like divorcee. Thus, there is a great necessity of fresh *Ijtehad* on the present and upcoming issues of maintenance of divorcee taking into account the existing socio-economic situations of the contemporary world. There should be some

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[49] 51 DLR 1999 (AD), Per Mustafa Kamal, J., at para 146.

[50] *Hefzur Rahman vs. Shamsun Nahar Begum*,47 DLR (1995) 74

[51] *Mohd Ahmed Khan vs. Shah Bano Begum*, AIR 1985 SC

[52] 47 DLR (1995) 74

regular studies and researches of the *Qur'an* and *Sunnah* that will clarify the Islamic concepts and rulings on personal laws. After analyzing the abovementioned matters the following issues are clear:

1. The concepts of post-divorce maintenance and *Mataa* are two different issues and those should not be mixed to serve the feminist purpose. *Mataa* is a gift to be given to divorcee at the time of departure to console her grief at the critical and delicate moment.
2. A consensus of opinion has been established among the scholars of various Islamic schools that a divorcee should not be allowed to get maintenance after the *iddat* period. According to Islamic law, a divorcee is free to remarry after the expiration of *iddat* period. This demonstrates the prevailing opinion of the *Shariah* law which states that a divorced Muslim wife should remarry if the divorcee needs maintenance. So that her new husband can provide her with food and protection.
3. Where there is consensus among Islamic scholars about the provision of maintenance to the divorcee during *iddat* period, there is a lack of unanimity of opinion about providing maintenance to the divorcee after the period of *iddat*. It is argued here that financial support may be and is available to divorced women in the form of *Mataa*.
4. Islamic law states that if the near relatives of the divorced wife cannot maintain the divorcee, her maintenance will be the responsibility of collective resources of the Muslim Community. Where there is a *Baitul Mal* or community fund, it can be a source of maintenance of the destitute divorcee.[53]
5. Muslim law should be interpreted keeping in mind the spirit of Islam without trying to give it a secular or feminist shape in the name of women's rights as it will not be an intelligent step to apply the western concept of women's rights in Muslim law without understanding the complete philosophy of Islam. So, we should follow the proper Islamic philosophy adopted by most of the schools of thoughts in case of *Mataa* and post-divorce maintenance. The divorcee will get her 'post-divorce maintenance' during the

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[53] *Supra note* 45, p. 288.

iddat period only. Post-divorce maintenance should not be allowed after *iddat* period. The monetary amount of 'post-divorce maintenance' should be fixed by the Court considering the reasonable expenditure of livelihood of the divorcee during the *iddat* period.

6. It is just not fair to put the burden of maintenance of the divorced wife on her ex-husband when there is no religious and social contract under Islamic law between them.
7. If any reform is possible within the boundary of *Shariah* law without frustrating its spirit that will be welcomed by the Muslim community.

Ijtehad by the prominent scholars of the Muslim community can be a method of solving the upcoming issues relating to maintenance of divorcee in future.

Assessing Legal and Institutional Framework for Natural Gas Extraction in Bangladesh

Mst. Momotaz Khatun*

Abstract

Bangladesh has been performing petroleum activities for long time. The country has discovered 27 gas fields with the help of national and international oil companies. Natural gas is the major source of energy in Bangladesh and it plays a vital role in the economic sector. There are several laws to govern the petroleum operations in Bangladesh. Bangladesh Oil, Gas and Mineral Corporation, which is commonly known as Petrobangla, is the prime institution to carry on the petroleum operation through its affiliated companies or international oil companies by contractual agreement like production sharing contract. Model production sharing contracts have been prepared to this purpose. This paper provides an overview of, and analyse the existing legal, institutional and policy frameworks for the upstream activities of natural gas in Bangladesh. The paper also makes some relevant comparison with some other petroleum producing countries and list a number of limitations of the current legislative and institutional framework to ensure sustainable natural gas extraction.

Keywords: Petroleum operation, Sustainable development, Legal and regulatory framework, Upstream activity, Petrobangla

1. Introduction

Natural gas has been playing very important role in the economy of Bangladesh since the early 1960's. Natural gas has been the principal fuel in the country for a quite long time due to its affordable price and

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widespread use. Natural gas accounts for about 75% of commercial primary energy and more than half of all primary energy supplies in the country. Although the energy mix of Bangladesh is diversifying slowly, it is indeed a constant challenge to ensure supply of natural gas resources to fuel the economic growth of the country against the sharply rising demand.[1] Recently Bangladesh has discovered more natural gas[2] as well as oil[3] in some gas fields. Natural gas is not only solidifying the backbone of the economy of Bangladesh, but also maintains the harmony with nature due to its inherent property[4]. These factors emphasize to know how the natural gas sector is managed through policies, laws and institutions to ensure the sustainability of the resource.

It is assumed that there is a direct effect of sound legal and institutional framework in oil and gas sector performance which is also acknowledged by many authors.[5] The Norwegian Model of petroleum sector management has been examined and separation of functions in the institutional framework proved effective for the petroleum sector.[6]Investment in the upstream petroleum operation is also affected

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1 Petrobangla *2015 Annual Report* (Dhaka 2015) 7 <https://petrobangla.org.bd/admin/attachment/webtable/79_upload_0.pdf> accessed 19 June 2017

2 Reuters, Bangladesh Finds First Oil, in Two Gas Fields (20 May 2012) <https://www.reuters.com/article/bangladesh-oil/bangladesh-finds-first-oil-in-two-gas-fields-idUSL4E8GK02M20120520> accessed 3 May 2019

3 AR Rasel, 'Bapex Discovers New Gas Field in Bhola' *The Daily Dhaka Tribune* (Dhaka 15 January 2018) <https://www.dhakatribune.com/bangladesh/power-energy/2018/01/15/bapex-discovers-gas-bhola-2> accessed 3 May 2019

4 The emission of natural gas is lower compare to other fossil fuel such as oil and coal. *Natural Gas: Issues and Trends* (Washington DC: Energy Information Administration, 1998) Available at https://www.eia.gov/naturalgas/archive/056098.pdf Accessed 7 July 2019.

5 Obadia Kyetuza Bishoge et al., "The Overview of the Legal and Institutional Framework for Oil and Natural Gas Sector in Tanzania: A review", *Journal of Applied and Advanced Research*, 3 no.1 (2018): 8-17. See also Alexander Huurdeman and Anastasiya Rozhkova (Eds) *Balancing Petroleum Policy Toward Value, Sustainability, and Security*. (World Bank Group, 2019). Available at https://openknowledge.worldbank.org/bitstream/handle/10986/31594/9781464813849.pdf Accessed 3 May 2019.

6 MC Thurber and others, 'Exporting the Norwegian Model: The Effect of Administrative Design on Oil Sector Performance,', *Energy Policy* 39,(2011): 5366-5378.

by the political-institutional framework.[7] Though relevant research document is still very low, it is reported that poor infrastructure, unclear policies, sketchy regulation, corruption, poor governance, lack of funds and political commitment have hindered the progress of the gas sector in Bangladesh.[8] This paper intends to provide the overview on the effectiveness and efficiency of the legal and institutional framework for the natural gas exploration in Bangladesh. The paper also analyses the effectiveness of the present legal, regulatory and policy frameworks in exploring the natural gas in a sustainable manner and makes some suggestions thereof.

The study is qualitative in nature and based on document analysis and some references of relevant countries are used to some appropriate extent. The materials from primary and secondary sources are used in this study. Relevant policy, laws and production sharing contracts are considered as the primary source of information and articles, books, annual reports of different government and non-government organisations, newspaper articles are the secondary sources of relevant information for this study.

2. **Petroleum Sector : An over view**

Exploration of petroleum[9] resources in Bangladesh was started in the later part of the 19th century during the British rule in the then undivided Indian subcontinent. In that period the exploration activities were not in an organised form.[10] The first drilling was taken place in Bangladesh region by Indian Prospecting Company in 1908 near the Sitakund, Chittagong and the first exploratory shallow well was drilled by the Burma Oil Company (BOC) in 1914. Both drillings gave no

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7 Peter Toft and Arash Duero, 'Reliable in the Long Run? Petroleum Policy and Long-term Oil Supplier Reliability,' *Energy Policy* 39, (2011): 6587.

8 M Tamim, 'Policies and Priorities in Bangladesh Gas Sector Planning', *Energy for Sustainable Development* 7, (2003): 57-65

9 Society of Petroleum Engineers defined petroleum as a naturally occurring mixture of hydrocarbons which can be obtained in gaseous, liquid or solid form. See also <https://www.spe.org/en/industry/terms-used-petroleum-reserves-resource-definitions/> accessed 5 January 2017

10 Bernhard G. Gunter, *Mineral Extraction in Bangladesh: Some Fundamental Reform SuggestionsBangladesh* (Development Research Working Paper Series, Bangladesh Development Research Center, Dhaka 2008) 2-3

positive indication of oil existence.[11] BOC also drilled two more borings between 1923 to 1933 in Patharia and the sign of oil was found in one well but there was not any commercial production.[12] During the period from 1950 to 1971, the National Oil and Gas Development Corporation (NOGDC) of Pakistan and some International Oil Companies (IOC) conducted extensive exploration activities. This period is called the golden time for the petroleum exploration in Bangladesh as 8 gas fields were discovered after drilling 22 wells including offshore and onshore. Among these gas fields, 5 gas fields were discovered by IOCs and 2 fields by the then Pakistan Petroleum Ltd. and 1 by NOGDC.[13] The first gas field was discovered in 1955 at Haripur and the second field was in 1959 at Chattak in Sylhet district.[14]

After the independence of Bangladesh, the exploration of petroleum was started with a new parameter both by the national and international oil companies. In the year 1975, Government purchased 5 gas fields from the international oil companies and established the sole national ownership of the national oil companies for the first time.[15] It was a great decision of the Government to secure the energy sector of Bangladesh. Bangladesh has discovered 27 gas fields and 27th field was discovered at Bhola by Bangladesh Petroleum Exploration & Production Company Limited (BAPEX).[16]According to the report of Petrobangla, total gas initially in place estimated was 39.8 TCF[17] of

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[11] MR Haque 'Effects of Petroleum Legislation on Hydrocarbon Exploration and Development in Bangladesh' (MEngg. Thesis, Bangladesh University of Engineering and Technology 2000) p.16.

[12] Centre for Policy Dialogue 'Bangladesh Gas Sector Development: Status, Policy Options and Challenges'(Report) No. 24, May 2000, 150 <http://www.sdnbd.org/sdi/issues/natural_gas/report/Bb%20Gas%20Sector%20Dev%20Status%20Policy%20Options%20&%20Challenges.PDF> accessed 9 April 2019

[13] Haque (n 3) 16

[14] Petrobangla *2018 Annual Report* (Dhaka 2004) 5 <https://petrobangla.org.bd/?params=en/annualreport>accessed 4 August 2019.

[15] Petrobangla *2017Annual Report* (Dhaka 2004) 17 <https://petrobangla.org.bd/?params=en/annualreport> accessed 8 January 2019

[16] AR Rasel, 'Bapex Discovers New Gas Field in Bhola' *The Daily Dhaka Tribune* (Dhaka 15 January 2018) <https://www.dhakatribune.com/bangladesh/power-energy/2018/01/15/bapex-discovers-gas-bhola-2> accessed 3 May 2019

[17] Trillion cubic feet

which estimated total recoverable gas reserve is 27.81 TCF. Up to December 2018, the gas reserve is 11.47 TCF. Out of 27 gas fields 21 gas fields are under production, production suspended in 4 fields and 2 fields are yet to produce, these are the Kutubdia and Bhola.[18] Despite the increase rate of production to meet the rising demand of the different sectors, the gap between the supply and demand is widening day by day. During December 2016, the daily production of gas was 2700 MMSCFD[19] . Now, Bangladesh produces 2.7 billion cft while the demand is 3.4 billion cft. The government has a legal and institutional framework consisting of plan, policy and laws to increase gas production sustainably as discussed hereunder.

2.1 Legal and Institutional Frameworks

Alegal framework or legal architecture for any natural resource extraction project is defined as a set of instruments that include the Constitution, legislation, regulations and contracts in which rights and responsibilities of governments, companies, and citizens are defined.[20] The relation among different instruments in a legal framework is shown in Figure 1.

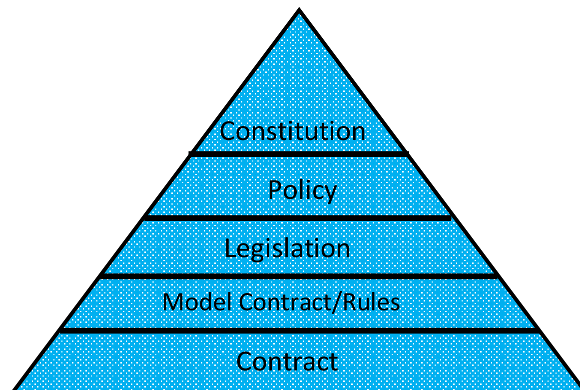

Figure 1. l Hierarchy in a Legal Framework

[18] Petrobangla (n 6) 18

[19] Million standard cubic feet

[20] Natural Resource Governance Institute, Legal Framework,Navigating the Web of Laws and Contracts Governing Extractive Industries (NRGI) < https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf> accessed 4 August 2019

The legal framework comprises Constitution of the country and the relevant policies, laws, regulations and agreements.[21] The Constitution is at the bottom of the hierarchy of a legal framework upon which the relevant policies are formulated. Policy comprises a course of action to guide the decisions, actions and legislative process of a government.[22] Actually, the policies lead to enactment of new legislation to achieve the goals determined by the policy.[23] Legislation is the binding set of rules to govern the vision set through the policy.[24] The rules, regulations and model contracts are made on the guidance of the policy and legislation. Finally, contracts are made on the basis of the model contract.[25] The legislation, which is adopted based on the policy, implemented through the legal institution established for the very purpose.

3. Legal Framework for Natural Gas Operation in Bangladesh

The legal framework comprises both the laws and policies to develop the petroleum resources and a number of relevant laws and policy enacted in time to time. Legal framework for the extraction of petroleum resource plays a vital role as it creates a competitive environment for the oil companies as well as facilitates the host country achieving national policy objectives.[26]Before the beginning of the exploration activities, the petroleum resources were governed by the Petroleum Act 1899, which was repealed by the Petroleum Act

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[21] Natural Resource Governance Institute (NRGI), Legal Framework,Navigating the Web of Laws and Contracts Governing Extractive Industries < https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf> accessed 4 August 2019

[22] Cited in Tina Hunter 'Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis' (PhD dissertation, University of Bergen, 2010) 136

[23] Difference Between Law and Policy<http://www.differencebetween.net/ miscellaneous/politics/difference-between-law-and-policy/> accessed 3 August 2019

[24] NRGI (n 25)

[25] *ibid*

[26] T Hunter, 'Sustainable Socio-economic Extraction of Australian Offshore Petroleum Resources through Legal Regulation: Is It Possible?' (2011) 29 *Journal of Energy & Natural Resources Law* 209- 227.

1934.[27] Though the first exploration of petroleum was started in 1908[28] the Petroleum Act 1934, in this regard was enacted in 1934. Thereafter a number of laws and rules are adopted and repealed with the changing circumstances. At present the extraction of natural gas in Bangladesh is governed through the following Constitutional and legislative framework.

3.1 Constitution of the People's Republic of Bangladesh

The Constitution of Bangladesh does not explicitly provide any provision regarding the operation and management of petroleum resources of the country. However, there are some articles which are directly and indirectly related with the petroleum activities. Article 143 of the Constitution vested the ownership of all minerals and any valuable things underlying the land and ocean within the territorial sea and continental shelf of Bangladesh on the republic.[29] Article 13 states that the people shall own and control the instruments and means of production and distribution and to this end, three types of ownership is recognized by the Constitution, state ownership is one of them. State ownership refers to the ownership on behalf of the people by creating efficient and dynamic nationalised public sector embracing the key sector of the economy.[30] To this effect, Bangladesh ensures ownership of the state on all mineral resources including petroleum. As an owner of petroleum resources, the responsibility to conduct the operations for and on behalf of the people lies on the state. The supremacy of the Constitution is guaranteed by article 7(ii) of the Constitution and the government is bound to conduct its activities according to and within the Constitution. Article 18 (a) of the Constitution of Bangladesh imposes responsibility on the government to endeavor to protect and improve the environment and to preserve and install safeguards for the natural resources, biodiversity, wetlands, forest and wild life for the present and future generation. Article 18(a) was not in the Constitution from the very beginning and inserted in 2011 to address

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[27] The Petroleum Rules 1937 s 2.

[28] Haque (n 3) 16.

[29] The Constitution of The People's Republic of Bangladesh, art 143.

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

the present demand of the sustainable development concept. The term 'preserve and safeguard of natural resources' and 'for the present and future generation' denote the sustainable development of the petroleum resources as well as the natural gas. The article impliedly expressed the state's responsibility to ensure the sustainable development of natural gas. Article 23 expresses the obligation of the state to take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.[31] There are some implied duties on the government to take all the necessary steps aimed at protecting the right of those vulnerable people who are subjected to the adverse impact of the petroleum operation and it imposes the liability of the government, before or during the petroleum operations to consult with the affected communities to protect their culture, language and lifestyle. Consultation with the concerned community regarding the petroleum project may serve a meaningful purpose to attain sustainable development of this resource such as Mexico adopted the method of community consultation as an obligation of the concerned ministry before conducting any petroleum operation.[32]

3.2 Policy Framework for Petroleum Activities in Bangladesh

Clear policy with specific objectives is one of the fundamental requirements for the development of the petroleum resources.[33] A comprehensive policy framework is essential to provide strategic direction for sustainable exploration and production of petroleum.[34] A successful and adaptive policy is required, to accelerate strength of the private companies to exploit petroleum, though in formulating the policy the national government may be influenced by the political,

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31 The Constitution of The People's Republic of Bangladesh art 23(a)

32 Social Sustainability in Oil and Gas Projects, file:///G:/3rd%20chapter/Social%20sustainability%20in%20oil%20and%20gas%20projects%20%E2%80%93%20EY%20Law.html accessed on September 25 2019

33 A Short Guide to Parliamentary Oversight of The Oil and Gas Sector for Parliament of Ghana, Section One Good Governance of the Oil and Gas Sector – a Primer for Ghanaian Members of Parliament Good Governance of the National Petroleum Sector Project, Chatham House 2006.

34 Ministry of Natural Resources, Republic of Rwanda 'National Upstream Petroleum Policy for Rwanda' (Report) 2013, 5

social and economic forces of the companies.[35] Without sound policy, the resource management become uncontrolled and ultimately benefit of the citizen could not be ensured.[36] As policy mechanism, Bangladesh has adopted The Petroleum Policy 1993 and the Gas Sector Master Plan 2017.

3.2.1 Petroleum Policy 1993

The only independent petroleum policy of Bangladesh was formulated in 1993 with 10 basic objectives.[37] The Government of Bangladesh formulated this policy to attract the national and foreign companies specially the private investors in this vital sector, to meet the rising demand of energy.[38] Some of the significant aspects of this policy were to ensure the sustainable development of the country through the systematic survey, exploration and exploitation of the petroleum resources.[39] To attract the foreign investment unique policy instrument was introduced for both local and foreign oil companies with a view to accelerating the exploration activities. As a direct consequence of this policy, four production sharing contracts were signed with the multinational companies for the exploration of the natural gas or petroleum in Bangladesh.[40] In order to increase the involvement of multinational oil companies, measurement of Environmental Impact Assessment (EIA) was also promoted in this policy. Through the policy the joint venture exploration activities were allowed for the national exploration companies with the foreign one.[41] The policy also specifies about the amendment of existing rules and legislation if necessary to achieve its goals, however no amendment of the Petroleum Act was made to cope with the changing circumstances.

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[35] T Hunter, 'It's time: Petroleum Policy Change for Sustainable Development in the Australian Offshore Upstream Petroleum Sector' <http://epublications.bond.edu.aulaw_pubs/313> accessed 15 February 2017

[36] *ibid*

[37] National Energy Policy 2004, Ministry of Power, Energy and Mineral Resources, Government of The People's Republic of Bangladesh

[38] The Petroleum Policy1993

[39] *ibid*

[40] M Tamim, 'Policies and Priorities in Bangladesh Gas Sector Planning,' *Energy for Sustainable Development* (2003) 2, 57-65

[41] n 32

A long time has been elapsed after issuing the Petroleum Policy in 1993; however, no independent petroleum policy is formulated thereafter though the energy policy of Bangladesh is revised in a regular interval and the petroleum is the part of energy but no separate policy like the Petroleum policy 1993 has been adopted. On the other hand, the Government of India issues petroleum policies on a regular basis. India adopted New Exploration Licensing Policy in 1997, the Integrated Energy Policy in 2008, and Hydrocarbon Exploration Licensing Policy in 2017 to accommodate the country's needs and developments and to attract international investors.[42]

3.2.2 National Energy Policy 2004

The National Energy Policy (NEP) 1995 was adopted in 1995 and revised in 2004. The petroleum policy of 1993 was merged with the NEP 1995 and was a part of this policy. The background of this policy stated "the Government of Bangladesh has given continuing attention to the overall development of energy sector. It involved survey, exploration, exploitation and distribution of indigenous natural gas..." that indicates the purpose of this policy was to ensure the development of energy sector including natural gas. The NEP outlined 10 objectives of which five are directly and/or indirectly related with the sustainable development of natural gas.[43] There is a strong provision regarding environment, which suggests that in all phases of the operation of any fuel's full life cycle including exploration, appraisal, extraction, conversion, transportation and consumption environmental issues have to be considered.[44] To this end, the EIA including social impact assessment have to be mandatory to initiate any new energy project[45] and utilization of cost effective environment friendly technology is encouraged.[46] It also recommended to consider environmental issues according to the provision of National Energy Policy and

[42] Ramboll, 'Gas Sector Master Plan Bangladesh 2017' (Report) 28 February 2018, 235

[43] Paragraph 1.2 (iii)-(vii) of National Energy Policy, Ministry of Power, Energy and Mineral Resources Government of The People's Republic of Bangladesh, 2004.

[44] Paragraph 6.9 (n 39).

[45] Paragraph 7.1.9 (n 39).

[46] Paragraph 7.1.9 (n 39).

environmental Act.[47] Formation of strong energy advisory council is recommended which constituted by the representatives of politician, policy makers, professionals and expert in this sector.[48] The national exploration company BAPEX should be modernised for assessing non renewable resources and intensive exploration in unexplored and virgin areas.[49] Enactment of new law and energy audit cell is also proposed by this policy.[50]

The energy policy includes a petroleum policy with the above guidelines for the development of energy sector of Bangladesh. The objectives of this petroleum policy is to ensure the systematic survey, exploration and exploitation of the petroleum resources for sustainable development of the country, adoption of uniform policy both for private and public enterprises, accelerate the exploration and development of indigenous petroleum resources, development of gas field through private sector and strengthen the administrative, technical and research capabilities of the government representatives who are responsible to make policy and its implementation.[51] The objectives also include the promotion of EIA of this sector. To attain these objectives it recommended the amendment of the existing laws and rules relating to petroleum sector, stipulate the time limit to decide exploration and disputed applications, amendment of confidentiality rules and revision of MPSC on a regular basis.[52] Mandate also imposed on companies to ensure maximum recovery by optimal development of oil and gas field.[53] For the protection of environment and ensuring the safety, the policy also suggests to formulate three new rules along with the implementation of existing laws and rules relating to environment. Among the suggested new rules one is regarding Oil and Gas Exploration Safety Rules.[54] Moreover, to accelerate the production the policy also proposed to develop the marginal or abandoned gas field.

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[47] Paragraph 6.20 (n 39).
[48] Paragraph 6.22 (n 39).
[49] Paragraph 7.1.1 (n 39).
[50] Paragraph 7.17 and 7.18 (n 39).
[51] Paragraph 7.2.1 (n 39).
[52] Paragraph 7.2.2(A) (n 39).
[53] Paragraph 7.2.2(C)(iv) (n 39).
[54] Paragraph 7.2.9 (n 39).

NEP 2004 suggested a number of reformations of the existing legal, institutional and policy frameworks to make a sustainable energy sector in Bangladesh however; implementation of these suggestions is not yet reflected. After the adoption of NEP 2004, Model PSC was revised in 2008, 2012 and 2019. Despite the recommendation of the energy policy no change is noticed in the confidentiality clause of the PSCs. Though the policy did not directly specify about the benefit of the future generation it proposed Energy Conservation Act which actually reflects the interest of the future generation. However, such Act is yet to enact. The concept of sustainable development of petroleum resources was not incorporated in such way before formulating the Energy Policy in 2004. Some of the suggestions are implemented as the MPSC is revised on a regular basis, provision of administering fee is also abolished from the PSC and some new law is enacted addressing the downstream activities of petroleum resources but no new law is enacted to enhance the exploration and production of natural gas in Bangladesh as it is the prime source of commercial energy supply.

3.2.3 Gas Sector Master Plan 2017 (GSMP 2017)

The gas sector master plan depicts an overall picture of the demand, supply, shortages and role of legal and regulatory framework of the natural gas sector in Bangladesh. GSMP 2017 also provides a forecast up to 2041. To meet the increasing demand of gas supply the master plan represents that to accelerate the exploration and production of gas, the capacity building of Petrobangla personnel's and its subsidies is inevitable which requires the prudent managerial and a large amount of financial support.[55] Updating the legal and regulatory framework of the upstream sector is emphasized with a view to increasing the exploration and production of indigenous natural gas.[56] GSMP 2017 also outlines an action plan highlighting two matters in upstream sector to ensure the overall development of the gas sector. These are the establishment of an independent upstream legal regulator and regulator to manage bidding rounds and granting PSCs.[57]

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55 Ramboll (n 38) 3.

56 Ramboll (n 38) 22.

57 Ramboll (n 36) 22-23

3.3 The Bangladesh Petroleum Act 1974

The upstream petroleum operation in Bangladesh is mainly governed by this Act. In the year 1973, a comprehensive policy was suggested to introduce a new regulatory framework with a view to accelerating the rapid exploration and production to protect the interest of the nation.[58] This Act was the direct output of that recommendation. In this Act, some guidelines were incorporated to foster the exploration and production activities of petroleum resources for the first time in the history of Bangladesh. In its very beginning, it is stated that the Bangladesh Petroleum Act is

> *…an expedient to provide for the exploration, development, exploitation, production, processing, refining and marketing of petroleum.*

One of the significant aspects of the Act is that it incorporated the doctrine of "permanent sovereignty over natural resources" which was affirmed by the United Nations General Assembly in 1962[59] and reaffirmed in a more comprehensive form in 1966.[60] Section 3(1) of this Act provides

> *The Government shall have, within the territory, continental shelf and economic zone of Bangladesh, exclusive right to explore, develop, exploit, produce, process, refine and market petroleum.*[61]

Bangladesh has recognised its sovereignty over natural resources by the Constitution and also through this Act. Not only Bangladesh but many countries of the world also incorporated this right in the Constitution such as Indonesia. In 1945, Indonesia recognised state's sovereign rights over natural resources found both in the land and

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[58] Haque (n 3) 1

[59] <http://Cil.Nus.Edu.Sg/Rp/Il/Pdf/1962%20General%20Assembly%20Resolution %20On%20Permanent%20Sovere Ignty%20Over%20Natural%20Resources-Pdf.Pdf> accessed 12 June 2019

[60] United Nations Yearbook, 1966. <http://Untreaty.Un.Org/Cod/ Unjuridicalyearbook/Pdfs/English/Byvolume/1966/Chpiii.Pdf> accessed 12 June 2019

[61] The Bangladesh Petroleum Act 1974 s 3(1)

under the water by article 33 of their Constitution.[62] The ownership of petroleum resources may vary from country to country. In some countries the ownership of petroleum is vested on the state, in some countries it is vested on the individuals *i.e.* the resource belongs to the owner of the land and in some countries it is vested on the people of the state with some restrictions not delegating the right of exploration and production to any private person.[63] However, section 3 of the Petroleum Act 1974 also provides the right of the Government to explore, produce, develop, transmit and distribute of the petroleum resources.

Bangladesh Petroleum Act was enacted in 1974 just after the Stockholm Declaration so some provisions were included to address the environmental issues *i.e* section 6 states that *it shall be the duty of any person engaged in any petroleum operation*

> *(a) to ensure that such petroleum operation is carried on in a proper and workmanlike manner and in accordance with good oil-field practice;*
>
> *(b) to carry on petroleum operation in any area in a manner that does not interfere with navigation, fishing, and conservation of resources of the sea and sea-bed;*
>
> *(c) to consider factors connected with the ecology and environment.* [64]

Provisions are also made as to the protection of the area on the petroleum operation such as

> *(a) control the flow, and prevent the waste or escape, in that area of petroleum or water;*
>
> *(b) prevent the escape in that area of any mixture of water or drilling fluid with petroleum or any other matter;*
>
> *(c) prevent damage to petroleum bearing strata in any area, whether adjacent to that area or not*
>
> *(d) prevent water or any other matter entering a petroleum pool through wells in that area, except when required by, and in accordance with, good oil-field practice.*[65]

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[62] AV Kaundu, 'Analysis of the Legal Framework for State Participation in the Petroleum Industry: A Case of Namibia' (LLM Thesis) 18.

[63] Kaundu (n 46) 5

[64] The Bangladesh Petroleum Act 1974 s 6(1)

No clear guideline is provided in which manner the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) will discharge those duties and ensures the compliance of the national and international oil companies with the above obligation outlined by this Act. Section 11 mentions the rule making power of the government but till now no rule is made under this Act specifying detailed upstream petroleum operation and wide discretionary power is delegated to Petrobangla.

Here the responsibility lies on the oil companies engaged in the operation to conduct the petroleum operation in an eco-friendly manner without prejudice to the environment and ecology. Though several rights of the country to extract the petroleum resources are guaranteed by section 3, no liability to protect the environment and ecology is imposed on the government. In fact, inclusion of above provisions, were the reflection of the Stockholm Declaration without any compliance mechanism. It overlooked some of the crucial points such as there is no provision of sustainable extraction to ensure the long-term development. Effective management of the petroleum resources depends on how the industry regulation, direct indigenous participation and utilization of petroleum revenues work in their relevant fields.[66]The Act mentioned to perform the work in a good oil field manner that varies from company to company. In this regard, the national law should outline the rights and responsibilities of the companies engaged in the petroleum operation. As the companies conduct their operation in a country are under an obligation to comply with the law of the land.

In this case the Mines and Mineral Rules 2012 can be considered which is formulated under the Mines and Mineral Resources (Control and Development) Act 1992. This Act is not applicable to petroleum resources as petroleum is governed by the petroleum Act 1974. However, it is mentionable that a detailedRule is framed to govern the extraction of other mineral resources which comprises a number of provisions to ensure the sustainable extraction. Such as the provision of

[65] s 6(2) (n 48)

[66] P Subai, 'Towards A Functional Petroleum Industry in Nigeria: A Critical Analysis of Nigeria's Petroleum Industry Reform'(PhD Dissertation, Newcastle University 2014)

compensation by the licence holder is included where the operator is responsible for any destruction. It ensures the payment of compensation for any damage that is held by the operator according to Bangladesh Environment Conservation Act 1995.[67] It also inserted a separate provision for the protection of environment which impose obligation on the operator to conduct the operation according to existing environmental laws of Bangladesh. Operator is required to plant trees and fill up the boreholes and if it impossible to fill up then to convert it in area of fisheries.[68] If any damage occurred to mineral resources due to negligence, lack of supervision or to carry out the operation in an unscientific manner the license holder or lease holder is responsible to pay compensation for the damage or loss.[69] Extraction of other mineral resources is governed in a well defined way where the obligations of the operator for conducting the mining operation, is explicitly described by formulating a rule which is absent in natural gas sector.

3.4 The Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985

The Bangladesh Oil Gas and Mineral Corporation *i.e.* Petrobangla[70] was established under this ordinance. Before the establishment of Petrobangla, the Bangladesh Mineral Exploration and Development Corporation established under the Bangladesh Mineral Exploration and Development Corporation Order, 1972 and Bangladesh Oil and Gas Corporation established under the Bangladesh Industrial Enterprises (Nationalisation) Order, 1972.[71] Before 1985 there were two organisations one is for mineral resources and the other is for oil and

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[67] Article 18 of The Mines and Minerals Rules 2012, Energy and Mineral Division, Ministry of Power, Energy and Mineral Resources, The People's Republic of Bangladesh.

[68] Article 42 and 56 of The Mines And Minerals Rules 2012, Energy and Mineral Division, Ministry of Power, Energy and Mineral Resources, The People's Republic of Bangladesh

[69] Article 26 of The Mines And Minerals Rules 2012, Energy and Mineral Division, Ministry of Power, Energy and Mineral Resources, The People's Republic of Bangladesh

[70] The Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985 s 2

[71] s 24 (c) (n 51)

gas that means petroleum resources. Both of the organisations were merged and Petrobangla was established in 1985 and is responsible for the development of mineral as well as petroleum resources. According to this Act, the board of directors are highly empowered as all the affairs and business of the corporation are vested on them.[72] The functions of the Petrobangla are clearly defined by this act as it state that

(1) The functions of the Corporation shall be-

(a) to undertake research in the field of oil, gas and minerals;

(b) to prepare and implement programmes for the exploration and development of oil, gas and mineral resources;

(c) to produce and sell oil, gas and mineral resources; …

(2) Without prejudice to the generality of the foregoing provisions, the Corporation shall, in particular, have power-

(b) to carry out geological, geophysical and other surveys for the exploration and development of oil, gas and mineral resources;

(c) to carry out drilling and other prospecting operations to prove and estimate the reserves of oil, gas and mineral resources and collect all data required for adopting the most suitable extraction and mining method;

All the responsibilities of explore, produce and develop petroleum resources lies on Petrobangla. The governance of the petroleum sector of Bangladesh is also conferred on the Petrobangla. On the other hand, some of the indicators of good governance in petroleum sector are not included in this ordinance. Provision of accountability in decision making and performance[73]as well as transparency[74] of the Petrobangla is not defined. However, in that time the concept of sustainable development was in a developing stage this ordinance did not possess any provision to ensure the benefit of the future generation.[75]

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[72] s 5 (n 51)

[73] National Petroleum Sector Project *A Short Guide to Parliamentary Oversight of the Oil and Gas Sector for Parliament Of Ghana* (Chatham House 2006) 3-8

[74] *ibid*

[75] *ibid*

3.5 The Speedy Supply of Power and Energy (Special Provision) Act 2010

Bangladesh is facing an acute power and energy crisis since 2006.[76] This law was enacted in 2010 to resolve the crisis within a short time and for quick disposal of contracts of power and energy sector for a period of two years.[77] Provisions of this Act are in controversy as well as compatibility with the concept of sustainable development is questionable. The Government formed a special committee named proposal processing committee comprised by the person experienced in technical and on other issues related with the proposal.[78] This committee is formed by top government officials of MoPEM[79] and officials of national power and energy entities.[80]This Act empowered the committee to conclude a contract by putting out short time newspaper notices, online advertisements even carrying on negotiations through email or letter.One of the non-transparent provision of this Act is the circulation of tender is also allowed even by private communication through email or letter with the concerned organisation[81] and empowered the special committee, to contract through private negotiation. Prior to submission of the proposal before the cabinet, the committee authorised to take any decision regarding the proposal and when the proposal submitted before the cabinet and Financial and Government Purchase Committee of the cabinet approved the proposal, the administrative division, shall respond appropriately to implement the proposal. The validity of any act done under this Act or act deemed to be taken, under this Act shall not be questioned before any court of law.[82] No civil or criminal suit can be filed against any

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76 Bangladesh Cabinet approves 4-year extension of special law for energy, power projects, S &P global plats,27 Aug 2014,https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/082714-bangladesh-cabinet-approves-4-year-extension-of-special-law-for-energy-power-projects accessed 10 August 2020.

77 Section 1(2) of the Power and Energy Speedy Transmission Enhancement (Special Provision) Act 2010 (translated by the researcher)

78 Section 5 (n 77).

79 Ministry of Power, Energy, and Mineral Resources, Peoples Republic of Bangladesh.

80 n 76.

81 Section 6(d) (n 77).

82 Section 9 (n 77).

officer for any act done in good faith under this Act or deemed to be done under this Act.[83] The acts and proceedings taken under this Act shall be continued in a manner as the Act is in operation even after the duration has been expired.

This Act is known as the indemnity Act to protect officials in the power and energy sector involved in signing contract without any tender.[84] Energy expert also expressed their deep concern that "the law would act as a shield to protect the corrupt officials and policymakers".[85]After expiration of two years, it was extended for another two years in September 2012, it was further extended for 4 years in August 2014 and finally it was extended for third time up to 2021. Experts of local energy industry expressed their concern on extension as it could encourage corruption and non transparency in energy and power sector. [86] Following the Act, Petrobangla engaged with Russian company Gazprom for drilling 10 gas production well in different fields cost BDT 1600 crores.[87] The Act may pave the way of corruption bypassing tendering process[88] and is considered as the violation of the Constitution as the unfettered power conferred by this Act is being used against public interest.[89] There is also urging to revoke the Act, as it may lead inefficiency of power sector.[90]

It is shown, that the policy, laws, regulation and institution of the petroleum sector is not sufficient to ensure the sustainable development of these resources. Enactment of special Act(s) is a matter

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83 Section 10 (n 77).

84 Speedy Supply of Power and Energy Act, 4 years extension, energy bangla, July 21,2014.https://energybangla.com/speedy-supply-power-energy-act-4-years-extension/ accessed 10 August 2020.

85 *ibid*

86 Bangladesh Cabinet approves 4-year extension of special law for energy, power projects, S &P global plats,27 Aug 2014,https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/082714-bangladesh-cabinet-approves-4-year-extension-of-special-law-for-energy-power-projects accessed 10 August 2020.

87 n 84 and n 86

88 n 86

89 Thrust on scrapping unConstitutional speedy energy supply law, The Business Standard, 10 July, 2020, pmsnews.net/bangladesh/energy/thrust-scrapping-unConstitutional-speedy-energy-supply-law-104563 accessed 10 August 2020.

90 *ibid*.

of great concern for proper management of this valuable sector and effectiveness of other laws and regulation becomes volatile.

3.6. Contractual Framework

Due to the lack of experts and technical support as well as financial capability, to some extent the petroleum producing countries have to seek the assistance of the IOCs throughout the world.[91] In this case, they entered into a contract with the petroleum producing companies whether it is national or international. There are mainly three types of agreements or contracts between the state and oil producing countries. These are the concession, production sharing contract and service contract. In addition to these three types of contracts another two types of agreement or contract also found which are derived from the main three categories that are the joint venture and hybrid system.[92] Bangladesh now follows the production sharing contract to carry on its exploration and production.

3.6.1 Production Sharing Contract (PSC)

Production Sharing Contract is essentially a process to involve the national or international private organisation in the upstream activities of the petroleum resources.[93] Indonesia is the pioneer of the production sharing contract in the world though it was introduced in 1966 in the agricultural sector to share the agricultural crops.[94] The emergence of Doctrine of permanent sovereignty over natural resources introduced the modification of the traditional concession system and the production sharing contract or agreement appear as a new way to make agreement with the oil producing companies.[95] In this contract,

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[91] Mailula (n 16) 74

[92] A Al Faruque, *Petroleum Contract:Stability and Risk Management in Developing Countries* (Bangladesh Institute of Law and International Affairs, Dhaka 2011) 8

[93] AWahid & N Rawshan, 'Exploration Activities in Bangladesh Gas' (2004) 1 *BRAC University Journal* 33-40

[94] Gustavson Associates, 'Monitoring and Supervision Procedures for Exploration and Development Activities' (Report) ,Hydrocarbon Unit, Energy and Mineral Resources Division, Government of the People's Republic of Bangladesh, 6 May 2011, 10

[95] Faruque (n 67)

three elements, e.g. the cost recovery, profit oil or gas and tax, are very essential. As in a PSC, the produced petroleum is divided as a part of cost recovery and profit. After that the profit petroleum will be shared between the host government and the operating company. All the risk and the cost are borne by the operating companies and the cost is only recoverable after the production. In this case, the payment is made to the resources owner (host government) after the successful production.[96]

At present PSC is the most familiar petroleum agreement among the developing countries but there is no any uniform model of it.[97] PSC is popular throughout the world especially in developing countries because petroleum operation is highly risky and there are average 9 out of 10 exploration is unsuccessful and the operating companies recover their cost only after a successful production with full control and management of the host country.[98]

3.6.2 Models Production Sharing Contract (MPSC) of Bangladesh

Bangladesh inherited the concession system from Pakistan after the independence in 1971.[99] After the independence, the government of Bangladesh and Petrobangla negotiate with the IOCs for the exploration and production of the natural gas. In that case, Petrobangla enjoyed wide discretionary authority to negotiate without any specific guidelines.[100] The first MPSC of Bangladesh was adopted in 1988 which framed contractual provisions and set guidelines for Petrobangla. Thereafter the MPSCs are revised in 1997, 2008, 2012 and lastly in 2019 separate MPSC have been formulated for onshore and offshore petroleum operation.

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96 Production Sharing Agreements: Theory and Practical Applications, Kazakhstan International Business Magazine (2003) <www.investkz.com> accessed 10 February 2017

97 B Taverne *An Introduction to the Regulation of the Petroleum Industry: Laws, Contracts and Conventions* (Kluwer Law International, 1994) 63

98 Kiluange Tiny, The JDZ Model PSC: A Legal Analysis, *JuriSTEP,* August 2005 .

99 Gustavson Associates (n 69)10

100 The World Bank (Performance Audit Report), People's Republic of Bangladesh Petroleum Exploration Promotion Project(CREDIT 1402-BD)30 June 1993.

In a production sharing contract of Bangladesh, there are three parties the Government, Petrobangla and the contractor. Paragraph 3 of the preamble of MPSC 2008 clearly states that all the power of the government will be exercised by Petrobangla and in all cases the interest of the People's Republic of Bangladesh will be the ultimate goal.[101] The MPSC provides a very significant definition of the petroleum operation. '"Petroleum Operations" means the Exploration, the Appraisal, the Development, the Production and Abandonment related operations along with other activities including environmental considerations and Environmental Management Plan related to those operations carried out under this Contract.[102] Though the environmental consideration is one of the important ingredients of the petroleum operation but there was no specific provision in the MPS Cregarding this issue before 2012. Moreover, there is a relation between the accident in petroleum operation and the lack of sustainable practice.[103] Despite a number of blowouts during petroleum history of Bangladesh, no special provision is added in the revised MPSC to prevent accidents.

4. Institutional Framework

It is necessary for any country to develop an institutional framework for successful petroleum exploitation in a sustainable manner. Petrobangla is the primary institution serving the petroleum and mining activities in the country.

4.1 Bangladesh Oil, Gas and Mineral Corporation (Petrobangla)

Bangladesh Mineral, Oil and Natural Gas Corporation (BMOGC), was established in 1972 by the presidential order number 27.[104] The operational activities of the corporation were separated in the same

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[101] Model Product Shearing Contract 2008 3

[102] MPSC 2008 art 1.65

[103] 'Piper Alpha Disaster: How 167 Oil Rig Workers Died' *The Guardian* (London 2013) <https://www.theguardian.com/business/2013/jul/04/piper-alpha-disaster-167-oil-rig> accessed 26 July 2017).

[104] Bangladesh Oil Gas and Mineral Corporation , BD Yellow Pages, Online Business Directory <http://bdyellowpages.net/description/BangladeshOilandGasMineralCorporati on accessed> 6 May 2018

year by the presidential order number 120 and vested to new organization named as Bangladesh Mineral Development Corporation (BMEDC).[105] Then it was reconstituted as Bangladesh Oil and Gas Corporation (BOGC) through the ordinance number 15 of 1974.[106] In 1985, the BMEDC and BOGC were merged into a single entity as Bangladesh Oil, Gas and Mineral Corporation (BOGMC).[107] The natural gas is under the heading of the energy and mineral resources division of MoPEMR which is vested on Bangladesh Oil, Gas and Mineral Corporation. The management and the development of natural gas are under this organization. Petrobangla conducts its activities with some affiliated companies of which three companies are responsible for exploration and production, one for transmission, six for distribution and one for CNG promotion.[108] The upstream activities of natural gas in Bangladesh are conducted through three national companies under Petrobangla, these are Bangladesh Petroleum Exploration and Production Company Limited (BAPEX), Bangladesh Gas Fields Company Limited (BGFCL) and Sylhet Gas Fields Limited (SGFL).[109] Among these three companies BAPEX is empowered for both the exploration and production and other two companies BGFCL and SGFL are responsible only for production.[110]

At present maximum gas fields are operated by Petrobangla's affiliated companies which are responsible for the development of natural gas and oil in Bangladesh. There is no separation of power as the commercial purpose also served by the same organisation that is Petrobangla which functions as a regulator. The fusion of regulatory and commercial function and their delegation to the same entity is one of the significant barriers to proper development of the petroleum

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105 Petrobangla<https://www.mpemr.gov.bd/public_service/details/4> accessed 6 May 2018

106 A Study on 'Accounting Systems of Petrobangla'< https://lawaspect.com/study-accounting-systems-petrobangla/> accessed 11 December 2018

107 *ibid*

108 Ministry of Power, Energy and Mineral Resources, The People's Republic of Bangladesh 'Data Collection Survey on Bangladesh Natural Gas Sector' (Report) 2012, 8

109 Petrobangla (n 7) 39

110 *ibid*

resources.[111] The NOCs are partners as well as competitors to the IOCs when the NOCS are working with the IOCs.[112] In case of Bangladesh, Petrobangla negotiates with the IOCs and the same time carry on their upstream and downstream activities through their affiliated companies sometimes in cooperation with the IOCs. Whereas in Norway, which is considered as a model country of petroleum exploitation in the world, ensures the separation of functions among the policy development, industry regulation and commercial operation. In this country, the administration of petroleum are imposed on three different bodies these are a National Oil Company that is engaged in commercial petroleum production, the responsibility of policy development lies on the Ministry of Petroleum and Energy and the Norwegian Petroleum Directorate is working as a regulatory body.[113] On the contrary, the same body that is Petrobangla which is working as a regulatory organization and at the same time performs the exploration and production activities through some affiliated companies. As the authority to control the petroleum operation is gathered to a single hand Petrobangla, there is a high susceptibility of collusion which is noticed in most of the developing countries.[114] Lack of accountability of Petrobangla, which is considered as one of the ingredient of sustainable development, leads some mismanagement in this organisation, such as collusion between the international oil company and the public official, corruption or bribery and lack of efficiency in different level.[115] The state owned organisation is also present in many other developing countries like Vietnam the Petrovietnam (Vietnam oil and gas corporation) played the same role as Petrobangla of Bangladesh. [116] This system of self-regulatory institution may be beneficial in the early stages of petroleum development of a state but in a long run it is the demand of time to establish an independent upstream regulating organisation. The neighbouring country India established the Directorate General of Hydrocarbon as a technical arm

[111] DG Victor and others, Thurber, *Oil and Governance: State-Owned Enterprises and the World Energy Supply,* (Cambridge University Press, Cambridge 2011) 31.
[112] Al-Kasim, *Managing Petroleum Resources,* 175
[113] Mailula (n 16) 105
[114] Gunter (n 2)
[115] *ibid*
[116] Ramboll (n 38) 226.

of the concerned ministry having oversight on all contract and national oil companies are completely separated from this controlling authority.[117]

5. Conclusion and Suggestion

Bangladesh is a country of great potentiality of natural gas, which is very significant for the sustainable development of the country. For the betterment of the country, the better management of this resource is dire need and it depends on the sound policy, legal and institutional framework. Therefore, a number of instruments have been adopted from time to time to foster the exploration and production of the petroleum resources as well as the natural gas in Bangladesh. However reviewing the existing policies, legal and institutional frameworks of Bangladesh it is revealed that the existing laws, policy and the institutional frameworks are not adequate to ensure the sustainable development of the petroleum resources. Policy is very significant instrument to accelerate the exploration and production activities. The policy identifies the goal of the Government and the methods and principles of achieving that goal lead to enactment of new legislation.[118]In the history of Bangladesh the only one independent policy in the petroleum sector is the Petroleum Policy 1993 thereafter it is updated as a part of the National Energy Policy in 2004.Initiatives should be taken to update the petroleum policy independently emphasizing its importance and consideringthe changing circumstances.

A number of loopholes such as lack of provision of accountability and transparency of the authorised institution are found in the Bangladesh Petroleum Act 1974. No stipulation of the sustainable petroleum operation is inserted in this Act as the very concept was in a developing stage during the enactment of the Act, however, even today no such incorporation held through the amendment. Even after

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[117] Ramboll (n 38) 235.

[118] The Policy and Law Making Process < https://www.etu.org.za/toolbox/docs/govern/policy.html> accessed 10 July 2019.

the adoption of The Petroleum Policy 1993, no amendment of this Act is taken place. With formulating new policy, the rule under this Act should be promulgated for explicit rights and duties of the Government, Petrobangla and the operating companies.

The power and responsibility of Petrobangla, regulatory institution of upstream operation of petroleum sector in Bangladesh, should be decentralised. Norwegian petroleum model, where the policy making authority is vested on the concerned ministry, Norwegian Petroleum Directorate work as regulator and the national oil company work as an independent entity, may be followed to overcome this issue.

The production sharing contract should be modified to conduct the operation in more environment friendly way to safeguard the environment within the ambit of policy and legislation.

Finally, the State has to develop such policy and regulatory framework that makes it possible to integrate the petroleum operation in a balanced and sustainable manner along with its economic development. The effective sustainable upstream operation of petroleum that is natural gas depends on harmonisation of policies, laws and institutional framework. After scrutinizing the legal, regulatory and institutional frameworks related to oil and natural gas it can be concluded that, there is a need of better and well organized legal and institutional framework for the country to receive sustainable benefit from these resources. Moreover, review of the existing laws and policies on a regular interval is essential to encourage investment in this sector.

A Critical Analysis of Parents' Maintenance Act, 2013 in Bangladesh

Mst. Rezwana Karim*

Abstract

The study aims to examine whether the regulatory provisions are sufficient to ensure the maintenance of elderly citizens, especially the parents in Bangladesh. Based on secondary sources of information, the study has revealed that the provisions of the law are not sufficient to guarantee the maintenance of parents and also to protect their property. The Parents' Maintenance Act (PMA), 2013 is very progressive and praiseworthy law, which addresses the emotional but very logical demand of elderly people. The Act has some limitations; for example, it is silent regarding the protection of the property of parents. Although there are provisions of punishment for failing parents' maintenance, minimal improvement is observed in the miserable condition of the parents. The study proposes the amendment by incorporating the provision of returning property from the descendants if they decline to or fail to take care of the elderly ascendants. The study has emphasized the creation of awareness amongst citizens through mass campaign and circulation of PMA. The study also suggests culturing religious and moral values among members of the young generation.

Keywords: Elderly people, Parents' maintenance, Protection of parents' property

1. Introduction

Childhood and old-age are two inevitable and natural stages of human life when a person becomes highly dependent on others. A good

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relationship between parents and their children is essential for ensuring the safety and nurture of dependents. Thus, the relationship between parents and children draws particular attention to social and legal issues all over the world. Parents play an active role in supporting the whole family, especially the children.[1] Looking after the elderly parents is considered a moral duty of their children. Living in joint families has been one of the oldest traditions of human civilization. However, nowadays, adult children want to live separately from their parents as they think that it helps them to enjoy their freedom.

Consequently, the number of the nuclear family is increasing very rapidly and the bondage among family members is decreasing gradually. Even many children consider their parents as a burden whenever they lose their strengths to work and earn money. In many cases, when the children become independent, they do not find any interest to look after their parents. Sometimes the aged parents encounter mental and physical torture by their children for getting parents' property transferred. A legal notice was issued on February 20, 2020, to the government by Md. Mahmudul Hasan (Mamun), an advocate of the Supreme Court of Bangladesh for taking necessary steps for the protection of the property of old aged persons. The notice states that children force their old parents to transfer property to them as a gift or otherwise, such as fraudulent sale. The notice has also said that parents become helpless after transferring their property in such a way, and old homes become their ultimate residence.[2]

Upon realizing the miserable conditions of elderly persons, the Government of Bangladesh has enacted the Parents' Maintenance Act (PMA), 2013. Section 2 of the Act[3] states that maintenance of parents means providing them food, clothing, residence, health care, and

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[1] S. M. Ayoob, 'Senior Citizens and their Roles in Family and Household,' *Journal of Politics and Law* 13, no. 2 (2020): 32–43, available at http://www.ccsenet.org/journal/index.php/jpl/article/view/0/42757, last accessed on July 20, 2020.

[2] Staff Correspondent of Banglanews24.com, 'Legal Notice Seeking Steps to Protect Property of the Elderly,' *Banglanews24.com*, February 19, 2020, available at https://www.banglanews24.com/law-court/news/bd/772464.details, last access on June 06, 2020.

[3] The Parents' Maintenance Act, 2013.

accompany. The Act has made it obligatory for children to ensure the maintenance of their parents. The Parliament, with the enactment of the Act, has given utmost importance to provide care and protection to parents by vesting the responsibility to their children. Although the PMA, 2013 is a progressive law with many positive sides, it has some loopholes.[4] The Act is silent regarding the protection of parents' property against misuse by their children, grandchildren and others. According to the provisions of this Act, parents can enforce children to maintain them, but they cannot restrain their children from transferring their property forcefully or through emotional blackmailing. In some cases, children become reluctant to maintain their parents after such transfers of property. Therefore, there is a doubt regarding the effectiveness of this Act to ensure parents' rights of maintenance. In this context, this study aims to explore the real scenario of implementation of parents' rights under the PMA, 2013.

This study is mainly based on the secondary data collected from diversified sources, such as books, journal articles, newspapers, and other online portals. Content analysis has been applied to extract relevant provisions concerning parents' maintenance and protection of their property. From the national context, the PMA, 2013 has been the key document, which has been evaluated critically. Relevant provisions available in the Constitution of Bangladesh along with four case references related to the PMA, 2013 have also been studied. In search of existing cases and necessary insight, consultation was made with three academics, two judges, four advocates, and two officials of subordinate courts. Alongside, relevant international instruments, and the guidelines of major religions have been reviewed to get necessary insights.

2. Concept of Rights of Senior Citizens

As the human rights field has become more specialized, the United Nations has recognized the particular needs of under privileged, such as senior citizens, children, migrant workers, disables, and women. Referring to the human rights laws, it suggests that old aged persons

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[4] Nazia Wahab, 'Maintenance to the Parents,' *The Daily Star*, February 28, 2017, available at https://www.thedailystar.net/law-our-rights/maintenance-the-parents-136830, last accessed on May 19, 2020.

should be dealt with special attention.[5] Many elderly persons all over the world encounter different challenges such as, discriminations and abuses, which restrict their human rights and contribution to society.[6] As a human being, it is their right to be looked after by their children when they are in need. Many States all over the world that have ratified international instruments have made different statutes regarding the rights of old aged persons and regarding their maintenance as well because it covers all the rights of them. Only a few States have emphasized, for example; India, Singapore, Bangladesh, China and thirty States of USA the rights to parents concerning maintenance by their children.[7]

Maltreatment of senior citizens is an issue, where people frequently, do not like to discuss with others. According to the World Health Organization (WHO), abuses of elderly persons is 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.'[8] Such abuse of elderly persons may occur in different ways, such as, physically, psychologically, and financially. It can also happen in the form of neglect and abandonment.[9] Older abuse is prevalent nowadays, and it is not just a problem for underdeveloped and developing countries. Although efforts have been made to eradicate older abuse in many developed countries, such as the United Kingdom and the United States, elderly citizens are still treated

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[5] Marthe Fredvang and Simon Biggs, 'The Rights of Older Persons: Protection and Gaps under Human Rights Law,' *Social Policy Working Paper No.16*, The Center for Public Policy, Australia (2012), available at https://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf, last accessed on May 18, 2020.

[6] *Ibid*.

[7] Ray Serrano, Richard Saltman, and Ming-JuiYeh, 'Laws on Filial Support in Four Asian Countries,' *Bulletin of the World Health Organization* 95, no. 11 (2017): 788–790, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5677618/, last accessed on June 13, 2020.

[8] 'Ageing and life-course,' *World Health Organization (WHO)*, available at https:// www. who.int/ageing/projects/elder_abuse/en/, last accessed on April 10, 2020.

[9] Jaclynn M. Miller, 'International Human Rights and the Elderly,' *Marquette Elder's Advisor* 11, no. 2 (2010): 343–365, available at https://scholarship.law. marquette.edu/ elders/vol11/iss2/6, last accessed on July 15, 2020.

poorly.[10] Therefore, older abuse is not only a matter of concern in the underdeveloped or developed world; it is a concern of all societies that require a global response.

Human rights cover political, economic, social, civil, and cultural rights belonging to all human being irrespective of their age, gender, and social status. The human rights related to senior citizens have been stated in different international declarations, conventions, and treaties such as the Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, and International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. These instruments have mentioned some indivisible and interdependent human rights related to elderly citizens. The rights are: (a) participation in decisions related to their well-being; (b) standard living facilities covering food, shelter, and clothing; (c) social security and assistant; (d) no discrimination in all aspects of life based on age or any other status; (e) treatment with dignity; (f) protection from any kind of physical and mental torture; and (f) full participation in political, economic, and socio-cultural activities.[11]

3. The Rights of Senior Citizens in International Instruments

Although many documents and treaties have incorporated the rights concerning the elderly, any comprehensive instrument is hardly found that thoroughly addresses all needs of elderly citizen.[12] Some instruments, ranging from international covenants to regional regulations, have incorporated rights related to all persons, and thus they apply to elderly persons.[13] Consequently, the specific rights of elderly citizens are often ignored. Thus, the prevailing international and regional legal framework is not enough to ensure the human rights

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[10] *Ibid.*

[11] Shashi Nath Mandal, 'Protection of Rights of Old Age Person in India: A Challenging Facet of Human Rights,' *Global Journal of Human Social Science* 11, no. 5 (2011): 22–32, available at https://socialscienceresearch.org/index.php/GJHSS/article/view/190, last accessed on April 01, 2020.

[12] Diego Rodriguez-Pinzon and Claudia Martin, 'The International Human Rights Status of Elderly Persons,' *American University International Law Review*18, no. 4 (2003): 915–1008, available at https://digitalcommons.wcl.american.edu/auilr/vol18/iss4/3/, last accessed on May 25, 2020.

[13] *Ibid*.

of elderly citizens.[14] The governments of different States are obliged to follow the instructions of international instruments after adaptation. Some provisions of UDHR, ICESCR, and ICCPR create an obligation upon the States to incorporate the provisions of these instruments in their domestic laws. Under these instruments, there are some provisions applicable to protect the rights of old aged persons. Though these provisions directly do not indicate the protection of old aged persons, based on these provision States can make provisions to protect the rights of the elderly.

UDHR protects the rights and freedoms of every citizen irrespective of sex, race, color, language, religion, political or other opinions, national or social origin, property, birth or other statuses.[15] The declaration further states that every member of society has the right to social security and some other rights crucial for the person's dignity.[16] This instrument has also made it mandatory for the State to insert the provision regarding the citizen's right to ensure such living facilities, which are considered sufficient for the health and well-being of a person and his family.[17] The UDHR is considered the founding human rights instrument, has provided the first reference of rights concerning older people. Article 25(1) of UDHR states that – "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Next to UDHR, another most relevant international instrument regarding elderly citizens' rights is the ICESCR, 1966. Articles 3, 6, 8, 9, 10, 11, and 12 of this Covenant provide the rights for old age persons. The Committee on Economic, Social and Cultural Rights (CESCR) is the regulatory body formed under ICESCR. The general comment 6 of the CESCR (1995) is the most comprehensive analysis of the rights

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[14] Thomas Hammarberg, 'Aged People are too often Ignored and Denied their Full Human Rights,' *Commissioner for Human Rights* (2008), available at https://www.coe.int/en/web/commissioner/-/aged-people-are-too-often ignored-and-denied-their-full-human-rights, last accessed on May 05, 2020.

[15] Article 2, Universal Declaration of Human Rights, 1948.

[16] *Ibid*, Article 22.

[17] *Ibid,* Article 25.

concerning senior citizens. The comment has expanded the scope of the ICESCR by providing various mechanisms required for protecting elderly citizens' rights all over the world. The Articles of ICCPR also provide some essential provisions concerning the rights of senior citizens.[18] More specifically, Article 26 of the ICCPR promulgates the rights of equal protection and social security to all.

Like UDHR, Articles 2, 7, 9, 11, and 12 of the ICESCR (1966) and Articles 2, 7, 10, and 17 of ICCPR (1966) has delivered some provisions that make an obligation to the State for incorporating the provision for elderly protection though it is not stated directly. Although UDHR, ICCPR, and ICESCR are considered prominent human rights instruments, none of these explicitly prohibits discrimination on the ground of age. The rights contained in the ICCPR and ICESCR apply to all people irrespective of their status. To some extent, the provisions of these two covenants are similar to the concept of Article 2 of the UDHR. Among the nine subsequent international human rights treaties, only one is related to the prohibition of discrimination on the ground of age and two are related to dealing with the elderly citizens. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 in its Article 11 provides for the equal rights of women to social security and, thus implicitly covers the older women. Whereas, Articles 25 and 28 of the Convention on the Rights of Persons with Disabilities (CRPD) of 2008 have incorporated the provisions of services for preventing and minimizing further disabilities of older people. The conventions have also emphasized access to retirement benefit programs. Articles 13(1) and 16(2) of the CRPD require age-sensitive measures for disabled persons and express the rights of access to justice and protection from abuse. Some other Articles of this instrument that may benefit elderly persons are 9, 19, 20, and 26 related to accessibility, independent living, personal movement, and habitation respectively.[19] The rights protected in the above mentioned instruments are also applicable to a migrant old-aged

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[18] *Supra note* 12.

[19] *Supra note* 5.

person or any old member of a migrant's family.[20] Beyond these international instruments, some regional instruments are also available for the protection of elderly persons. For example, the Charter of Fundament Rights of the European Union 2000, and the Inter-American human rights 1948 system have also incorporated some provisions concerning the rights of elderly persons covering the economic, social, and cultural rights. Along with these rights, the African Charter on Human and Peoples' Rights 1986 intend to protect civil and political rights of elderly persons.

4. Parents' Maintenance in Religious Scriptures

A significant number of total people all over the world, to some extent, are followers of four major religions, such as Islam, Hinduism, Christianity, and Buddhism. Therefore, the guidelines in the scriptures of these major religions are essential to evaluate the framework for maintenance of the parents and the elderly persons as well.

In Islam, parents are held in the position of esteem dignity, which is evident from various sources. The guidelines mentioned in Quran and Hadith instruct the followers to comply the rights of parents with kindness and equity. In the Quran, Allah has ordered people to worship him (Allah) and to be good to their parents; if you get one of them (parents) or both at their old age, never say to them 'fie' or utter any word that indicates your boredom of them, nor scold them, but speak to them with respect.[21] Parents have been given the rights of maintenance in different verses.[22]The verses imply that good behavior with and caring of parents, especially when they reach to their old ages are most praiseworthy to Allah. Performing proper duties to parents are the highest decree next to the faith and duties to Allah. Prophet Muhammad (SAW), in several hadith, has emphasized children's duty

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[20] Maggie Murphy, 'International Human Rights Law and Older People: Gaps, Fragments and Loopholes,' *OHCHR Open-ended Working Group on Ageing* (2012), available at http://health-rights.org/index.php/cop/item/international-human-rights-law-and-older-people-gaps-fragments-and-loopholes, last accessed on August 02, 2020.

[21] Al-Quran, 17:23.

[22] Al-Quran, 17:24; 2:215; 17:26.

concerning care and proper respect to their parents.[23]A hadith implies that serving parents and mind-blowing or satisfying them as the way to enter into paradise.[24]Beside the injunctions in the Quran and hadith, scholars have unanimously expressed their opinion that the children must provide maintenance to their insolvent parents.[25]They also agreed that the maintenance should come from the property owned by their children.[26]

According to Hindu Law, children are liable to maintain their aged and incapable parents whether or not they inherit any property from them. However, providing maintenance is only obligatory if his parents are unable to maintain themselves from their property.[27] In Bible, there are guidelines relating to the care of those in need, especially the parents and elderly citizens. In Timothy, particular emphasis has been given on the caring of widows and it is considered very pleasing to God.[28] Scriptures of Buddhist are very expressive in the caring of parents by their children and grandchildren. In 'Sutta-Nipata', "Through being well-to-do, not to support father and mother who are old and past their youth – this is a cause of one's downfall." The scripture also states that a wise man should support his parents as his duty.[29] In 'Itivuttaka', another scripture of Buddhists has highly praised those who respect their parents. Living with parents is also considered living with the Lord.[30]

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[23] Abu Abdullah Muhammad Ibn Ismail, *Sahih Al-Bukhari*, Vol 3 (Dhaka: Tawhid Publication, 2013), hadith 2620; Abu Abdullah Muhammad IbnYajid, *Sunan Ibn Majah*, Vol 2 (Dhaka: Islamic Foundation, 2006), hadith 2292.

[24] Abu Isa Muhammad Ibn Isa, *Jami' at-Tirmidhi*, Vol 6 (Dhaka: Islamic Foundation, 2015), Hadith 3545.

[25] Abd al-Karim Zaydan, 'Al-Mufashshal Fi Ahkam Al-Mar'ahWa Al-Bayt Al-Muslim Fi Al-Syari'ah Al-Islamiyah,' *Bayrut: Mu'assasahar-Risalah* (1997).

[26] *Ibid.*

[27] Mohammad Ataul Karim, *Hindu Law in Bangladesh: Intersecting Religion, Tradition and Law* (Dhaka: Oriental Law Publishing, 2020): 93–94.

[28] 1 Timothy, 5: 3–4, available at https://biblia.com/bible/esv/1-timothy/5/3-4, last accessed on June 16, 2020.

[29] Ron Epstein, 'Buddhism and Respect for Parents,' available at http://online.sfsu.edu/rone/Buddhism/ BuddhismParents/BuddhismParents, last accessed on March 20, 2020.

[30] *Ibid*.

5. Maintenance of Parents in Bangladesh

Although social security rights have been enshrined in the UDHR, most of the people in the world do not get benefit from any form of social security.[31] Mostly, older persons are vulnerable in every society. In Bangladesh, similar to many other countries, elderly persons – crossing the age of 60 years – are growing faster. There are many pieces of evidence that the family members are neglecting these elderly persons in many ways; even they are not treated with basic human courtesy. Moreover, the tradition of the joint family is becoming weaker day by day that causes many older people to live apart from their children. Although there are provisions concerning the social security rights of elderly persons, most of the older people do not enjoy such rights in their practical life.[32] According to Article 15(d) of the Constitution, social security right is one of the fundamental principles of State policy. Articles 26 – 47A consider social security rights as fundamental rights. To comply with the directions of the Constitution, and other international instruments concerning the maintenance of elderly persons by their children, the government of Bangladesh has enacted a law entitled '*Pita Matar Voron Poshon Ain*, 2013', which is popularly known as the Parents' Maintenance Act (PMA), 2013.

Before the enactment of the PMA there was no specific law in Bangladesh that could bring children into the court of law for not providing the maintenance of their parents. Parents could sue for maintenance only under section 5(d) of the Family Courts Ordinance, 1985. However, law suits by parents for getting maintenance under the Ordinance were hardly found because the provisions were not specific.[33] In the case of *Jamila Khatun v. Rostom Ali*,[34]it was held that

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[31] M. S. Carmona, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty (2010), available at https://www.ohchr.org/EN/NewsEvents/Pages/OlderPersons.aspx, last accessed on July 15, 2020.

[32] Md Raziur Rahman, 'Caring for Parents,' *The Independent*, May 18, 2017, available at http://www.theindependentbd.com/arcprint/details/94987/2017-05-18, last accessed on July 26, 2020.

[33] Arif Ahmed, 'Revisiting the Maintenance of Parents Act, 2013,' *The Daily Observer*, October 12, 2017, available at https://www.observerbd.com/details.php?id=99686Count, last accessed on July 26, 2020.

under Mohammedan Law, children in any circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves. These poor parents may also file a suit in the family court for maintenance from their opulent children under the Ordinance of 1985. The PMA intends to ensure social security of elderly citizens and has made it compulsory for the children to take good care of their parents. The Act directs children to take care of their parents and provide them with food and shelter. Although the PMA is a precise Act with only nine sections, it is very contemporary and progressive law in Bangladesh outlining legal provisions for parents' maintenance.

5.1 Parents' Rights under the Parents' Maintenance Act, 2013

Protection of elderly rights is one of the critical social issues nowadays. Many international and regional instruments have provisions regarding this issue and Bangladesh has ratified many of them. The Government of Bangladesh has enacted Parents' Maintenance Act for the protection of elderly rights by ensuring their maintenance through their children. Under this Act, if any child fails to provide proper maintenance of parents or forces them to live in an old home or any other place away from the child without sufficient reason, the parents can sue against that child before the court.[35]

According to section 9(1) of the Muslim Family Laws Ordinance, 1961, the term 'maintenance' indicates a legal remedy of payment to the wife, which means an amount for food, clothing, and residence. On the other hand, according to the PMA 'maintenance' includes food, clothing, health care, accommodation and company given by the child concerned. The positive aspect of the latter definition is that it includes psychological support or company of the children within the concept of maintenance.

Section 3 of the PMA has mentioned the responsible person(s) for the maintenance of parents. According to this section, every child of a family will ensure the maintenance of parents. If any parent has more than one child, the children will decide the issues relating to the

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[34] 48 DLR (AD) (1996) 110

[35] Section 5, the Parents' Maintenance Act, 2013.

maintenance of parents by discussion among them. According to the Act, every child will have to live with his parents and will not be allowed to pressurize them (parents) to live separately in an old home or any other place without their consent.

Moreover, children must take proper care of their parents regularly and provide the necessary medical facilities. If the parents live separately, their children are required to maintain communication with them within their capability. Section 4 of the PMA also states that in the absence of parents, every child has the responsibility to maintain their grandparents. This type of maintenance will also be considered as parents' maintenance under this Act. The court shall punish anyone failing to comply with the provisions mentioned above.

Regarding the monetary amount of maintenance, if the parents do not live with their children, every child will have to afford a logical amount as maintenance from their income.[36] Therefore, if any child violates this provision, he shall be punished with fine not exceeding taka 1,00,000 and in default of fine with imprisonment not exceeding three months. If anyone instigates any child for not giving maintenance to parents, he will also be liable and will be given the same punishment.[37]

Section 6 of the PMA states that offence of any kind under this Act shall be cognizable, bailable and compoundable, which shall be tried by a first-class judicial magistrate or a metropolitan magistrate. However, under this Act, a court is not allowed to accept any complaint of parents unless it is written by them.[38] This Act also provides a provision for an alternative solution of the offence outside the court. It is a praiseworthy side of this Act, where the court sends the complaint of parents as well as the accused children to the chairman or member or mayor or councilor of the concerned local government institution. However, in the case of any such solution, both the sides shall be given the chance of hearing. Section 8 of the Act states that any decision given in such meeting shall be deemed a judgment declared by the competent court.

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[36] Sec 3, the Parent' Maintenance Act, 2013.

[37] *Ibid*, Sec 5.

[38] *Ibid*, Sec 7.

5.2 Judicial Decisions (unreported) under the Parents' Maintenance Act, 2013

Although there are many violations of the Parents' Maintenance Act, there is a dearth of cases in this regard. The current study has found four relevant cases under court proceedings, which are summarized below:

In 2013, a complaint was filed in the 1st Class Judicial Magistrate Court, Chandpur by a father named Md. Liakot Ali against his son Md. Yeasin Rana for not providing him due maintenance.[39] A few days later, Md. Yeasin Rana sought forgiveness to the court and promised to provide proper maintenance, and the case was compromised. The court instructed Md. Yeasin Rana to pay taka 5,000 per month to his parents.[40]

In the case of *Aleya Begum v. Lance Nayek Abdul Kalam Azad* (2014), Mrs Aleya, who was a widow, filed the case against her eldest son and daughter-in-law. She alleged that her son did not give her any maintenance for the last 16 years; even he did not maintain any communication with her. Aleya Begum also complained that when she asked for regular maintenance, her son and daughter-in-law misbehaved with her. The court after hearing the witnesses was convinced, and her eldest son and daughter-in-law were held responsible for non-payment of maintenance. The complaint brought against the offenders under section 5(1) and 5(2) (a) of the PMA was proved beyond any reasonable doubt. On January 14, 2015, the court pronounced its judgment and punished the offenders. The court ordered the son of the complainant to pay a fine of taka 80,000 and the daughter in law to pay a fine of taka 70,000; instead of which they will have to undergo three months and two months simple imprisonment respectively. The court added that taka 20,000 (10,000 from son and 10,000 from daughter in law) of the fined amount shall be deposited in the government exchequer and the rest amount will be given to the parents.

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[39] *Liakot Ali v. Yeasin Rana* (2013), 1st Class Judicial Magistrate Court, Chandpur, Bangladesh.

[40] Rokeya Rahman, 'Maintenance of Parents: Everyone Needs to Know the Law,' *Daily Prothom Alo*, June 27, 2016, available at https://www.prothomalo.com/search, last accessed on July 30, 2020.

Another case was filed on January 1, 2017, before the Chief Judicial Magistrate Court, Rajshahi under section 5(1) and 5(2) of the PMA. In the case of *Abdul Mojid v. Md. Masud Rana and Md. Abu Bakkar* (2017),[41] Abdul Mojid filed the case against his two sons Md. Masud Rana and Md. Abu Bakkar. Mr. *Abdul Mojid* alleged that his two sons used to misbehave with their parents after extracting all the property by gift. The complainant stated that the children induced him and forced him to give the property. After getting all the property transferred to them, the children started to torture, and they did not give any maintenance or any kind of service relating to their parent's health. When Mr Mojid asked about the maintenance, the sons and their wives used slang language, and finally, they threw them away from the house on August 20, 2016. The court primarily tried to resolve the case through Alternative Dispute Resolution (ADR) but failed. The judgment was delivered after all the required procedures. The court fined taka 20,000 to one son and taka 30,000 to another son and in default of payment of fine, imprisonment for three months to each of the sons.

Most recently, a case has been filed at Charghat Upazila in Rajshahi district under the PMA. It is the first case under the Upazila. Srimoti Saraswati Pramanik files this case against her only son Sri Sukesh Kumar Pramanik and daughter in law Srimoti Beauty Pramanik. The petitioner has demanded that her husband died leaving 24 *bighas* of land, but her son and daughter in law do not give anything from that property. For this reason, Srimoti Saraswati Pramanik filed a case in the court of Joint District, Rajshahi for her share in her husband's property. Although the court gave verdict in favor of the complainant, the convicted did not give any maintenance. When she asked for her maintenance, her son and daughter in law tortured her brutally and threw her away from home. Then she again filed a case in the Charghat Thana under the Parents' Maintenance Act, 2013. As the case is pending, any verdict has not been found.[42]

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[41] Unreported Case no- CR 10/2017, the Chief Judicial Magistrate Court, Rajshahi.

[42] Abul Kalam Azad, 'Mother's Case against her Only Son for Not Paying Maintenance at Charghat,' *Rajshahi Tribune*, July 17, 2020, available at https://rajshahitribune.com, last accessed on August 01, 2020.

5.3 Deficiencies of the Parents' Maintenance Act, 2013

Though the PMA is treated as the landmark law to ensure the sacred duty by the children to maintain their parents, it has some pitfalls.

First, section 2 of this Act covers only the biological parents and children; thus, this Act is silent in case of the provision regarding foster parents, step-parents and step and adoptive children. Again, this Act defines children in the language of 'capable children,' so incapable children are not under the purview of this Act, and there is no provision in case of incapable children.[43]

Second, this Act is also silent regarding the financial incapacity of parents to institute a case. If the parents or the father or the mother are not financially capable of running a case, what will happen? Where will they get help from? There is no provision in this Act addressing such questions.

Third, sometimes the settlement of cases requires a long time when the conditions of parents become more miserable. At this stage of life, they badly need maintenance for their survival. However, the Act has no provision of interim maintenance if the case remains pending for a more extended period. Moreover, there is no scope of speedy trial of the offences under this Act.

Fourth, section 3(3) and (4) of this Act provides that the children are bound to live with their parents, and they cannot force the parents to live separately. Again section 3(6) and (7) says that if the children live separately, they have to give proper maintenance to their parents and they have to visit them regularly. It seems that these two provisions are contradictory, which requires clarification.

Fifth, section 3 of the Act stipulates that a child is bound to provide a reasonable monetary amount of maintenance to his/her parents when the parents do not live with the child. However, ambiguity remains in the law regarding the determination of a sufficient amount of maintenance.

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[43] Md. Abdur Rahim Mia, *Settlement of Family Dispute: Problems and Solution,* Unpublished Report, Rajshahi University Research Project, 2018, Rajshahi University, 2018, p. 31.

Sixth, in most of the cases, when the children seek forgiveness and promise to provide maintenance, the parents withdraw the case. However, this Act does not provide any provision to monitor whether the parents are given maintenance regularly.

Seventh, section 9 of this Act empowers the government to frame rules and thus to achieve the objective of this Act. Although a draft rule has been framed after six years of Act, there is uncertainty about its approval.

Eighth, it is evident[44] that sometimes negligence of parents' maintenance and inhuman behavior towards parents by their children starts after getting the parents' property transferred. However, this Act does not contain any provision regarding the protection of parents' property.

6. Conclusion

Old age is a very sensitive stage of human life that requires proper caring and good behavior from all. However, inadequate medication, misbehavior from the family members, unhygienic living condition, loneliness, and insufficient recreational facilities are prevalent in the life of the elderly people in Bangladesh. The country has ratified most of the international instruments related to the protection of the elderly. Again, it has enacted the statue to protect the rights of parents. There are also provisions of punishment in the law for improper caring of parents and misbehavior with them. Thus, the government of Bangladesh is under double obligation to ensure parents' rights regarding maintenance.

However, a very negligible improvement has been observed regarding parents' maintenance. Thus, the Act requires further improvement, side by side, other supplementary initiatives should be undertaken from the part of the major stakeholders, such as government, judiciary, human rights organization, and civil society. The Act could be amended by incorporating the provision of returning property from the descendants if they decline to or fail to take care of the elderly parents or ascendants.

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[44] Unreported Case, *Abdul Mojid v. Md. Masud Rana and Md. Abu Bakkar,* Case No- CR 10/2017, the Chief Judicial Magistrate Court, Rajshahi.

All the scriptures of major religions have given emphasis on the care of parents and well behavior with them. Thus, religious education of children can certainly help ensure the maintenance of elderly parents and the protection of their property. Side by side, initiatives should be taken to uplift the ethical and moral values of the new generations, especially the children. It will make the descendants and other family members morally obliged to extend their support towards the parents so that they can lead a respectful life with care during their old ages.

For the proper implementation of even a well-formulated law requires creation of awareness amongst citizens through mass campaign and circulation. However, it is observed that many elderly parents are not conscious of the existence of such a law, and consequently, the legal remedies of misbehavior with them and the decline of maintenance. On the other hand, some parents are well aware of the law but do not want to file cases against their children due to emotional attachment and fear of loss of social status. Moreover, in order to fulfill the aspiration of a welfare state, the government should extend the social safety net for all people including the elderly. Further, early enforcement of the draft rule of this Act might help the improvement of the current condition of parents' maintenance.

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The Prevention and Suppression of Human Trafficking Act, 2012: A Critical Analysis

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Abstract

Human trafficking is a serious problem for an economically under-developed and densely populated country like Bangladesh. A sizeable portion of economically vulnerable people can easily be allured by the traffickers. In order to curb this heinous offence, the Parliament of Bangladesh has enacted the Prevention and Suppression of Human Trafficking Act, 2012 (PSHT Act). This article critically analyses the relevant provisions of the Act and assesses to what extent the law may help to curb this serious crime, and also make some recommendations for further strengthening it.

Keywords: Human trafficking, Labour trafficking, PSHT Act 2012, Exploitation, Oppression

1. Introduction

The Prevention and Suppression of Human Trafficking Act, 2012 (hereinafter referred to as PSHT Act 2012) came into force from 20 February 2012.The Act has provisions to make rules and pursuant to that the Government has passed the Prevention and Suppression of Human Trafficking Rule, 2017. The PSHT Act 2012 is a welcome development in that it is the first law in Bangladesh, incorporating a specific law of trafficking. Previously trafficking was incorporated in various criminal laws such as *Nari O Shishu Nirjaton Domon Ain* 2000 and Penal Code 1860. These laws only addressed the trafficking of women and children for sexual purpose. But the PSHT Act 2012, for the first time considered trafficking of male labours as overseas migrant workers. The inclusion marked the path to ensure justice for

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the trafficking of males. This Act also introduced witness protection, compensation, repatriation and rehabilitation of victims for the first time.The PSHT Act, is arguably 'a paradigm shifts in the sense that it views the victims of trafficking not as violators of law but as victims and has provided compensatory and rehabilitating measures for them.'[1] Therefore, this law is an improvement as previously victims did not get legal protection regarding these aspects.[2]

According to the Preamble of the Act, the main objective of the enactment is the prevention of all forms of trafficking including organized transnational trafficking, to ensure justice and protection of the victims in consonance with constitutional rights, and international treaties which Bangladesh has ratified. This paper will discuss the substantive and procedural aspects of trafficking law, and will aim in pointing out some missing points of trafficking with a view to combat trafficking stringently. Obviously, trafficking of human beings may be influenced by extra-legal push factors from Bangladesh and pull factors from the destination countries,[3] but they will be beyond the scope of this paper. An important aspect of human trafficking in Bangladesh is the recruitment of people for working overseas for labour exploitation, but such a sectoral aspect is also beyond the scope of this paper.[4]

2. Analysis of the Substantive Provisions of PSHT Act

The Act repeals the trafficking provisions i.e., section 5 and 6 of *Nari O ShishuNirjatonDomon Ain* 2000, as this Act has been given overriding

[1] Md. Rizwanul Islam et al, 'Mapping of Knowledge on Projects on Justice Sector Facility Development and Human Rights in Bangladesh since 2000', (UNDP, July 2015), 194.

[2] Dr. Sayeeda Anju, "An Appraisal on Prostitution under Islamic Law and CEDAW in the Perspective of Bangladesh", *Dhaka University Law Journal*, Vol. 20, No. 1 & 2, Dec. 2009, 51

[3] Md. Rizwanul Islam, Dim the Destination Allure for Boat People, *The Straits Times* (Singapore) 12 June 2015, at A24.

[4] For such a study, see Ashraful Azad, 'Recruitment of Migrant Workers in Bangladesh: Elements of Human Trafficking for Labor Exploitation' (2018) 5(2) *Journal of Human Trafficking*, 218-230.

effect on all the other trafficking laws.[5] The provisions of the Penal Code 1860, Code of Criminal Procedure Act 1898, and the Evidence Act 1872 are followed regarding evidence, reporting, investigation, trial, and prosecution under this Act.[6] This Act has been given extraterritorial effect i.e. offences taking partly beyond the territorial limits of Bangladesh would also come under the purview of the Act and this is an integral part for combating trafficking offences.[7] On 12 September 2019, Bangladesh acceded to the Protocol to Prevent, Suppress and Punish Trafficking, In Persons, Especially Women and Children, 2000 (hereinafter referred to as the Protocol of 2000).[8] This accession should place Bangladesh in a better position to engage in seeking cooperation from other signatory States of the Protocol. As already pointed out, this Act not only deals with offence perpetrated against women and children but also considers men as trafficked victims which is also crucial in dealing with trafficking, as the number of male victims is not meagre. These various substantive provisions are analysed below:

2.1 Definition of Trafficking

This Act has provided a broad definition of trafficking under Section 3(1) of the Act. According to this section, human trafficking includes the following acts:

- selling or buying
- recruiting or receiving
- deporting or transferring
- sending or confining or harbouring

if any of these acts are done within of beyond the territory of Bangladesh against any person for the purpose of exploiting him/her sexually or oppressing him/her sexually or for labour exploitation or any other form of exploitation or oppression by means of threat; or force; or deception; or abuse of any vulnerability of the victim; or by

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5 Sec 47(1) of the Prevention and Suppression of Human Trafficking Act, 2012 (Act no 3 of 2012).

6 *Ibid*. Sec 4.

7 *Ibid*. Sec 3

8 United Nations Treaty Collection, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en> accessed 17 October 2019.

giving or receiving money or benefits to the person having control over the victim, the perpetrator will be convicted for the crime of human trafficking under this Act.[9]

Therefore, the Act defines human trafficking in a way which has three constituent elements: the acts, the means, and the purpose of the act and generally, to amount to trafficking, all of these three elements have to be present. However, when the victim is a child (under the age of 18 years), it would be immaterial whether or not any of the above three means have been used by perpetrator or not.[10] This definition is much more all-encompassing than the corresponding definition provided in the Suppression of Immoral Traffic Act, 1933 or *Nari O ShishuNirjatonDomon Ain* 2000. The punishments for the offence of trafficking as described under section 3 of the Act have been more stringent too. The maximum punishment for committing trafficking is life imprisonment and minimum 5 years rigorous imprisonment. The offender will also be fined for at least fifty thousand taka.[11] Considering the economic motive of the crime of human trafficking, the insertion of a mandatory minimum pecuniary penalty is very apt.

An important part of the definition is recruitment but the definition is missing in the section. Presumably, the definition of recruitment as used in Overseas Employment and Migrants Act, 2013 may explain the term:

> Recruitment means the hiring of workers for overseas employment by any overseas or Bangladeshi employer directly or through concerned authorities or a recruitment agent by means of a contract entered into orally or in writing, or enlistment of workers subsequent to publishing or circulating an advertisement for recruitment of workers, or exchanging letters or in any other way.

In recent times, trafficking through recruitment has extensively increased. Peoples desire to have a better life and employment in abroad facilitating traffickers to execute their crimes successfully.[12]

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9 *Supra*, 5 Sec 3

10 *Ibid*. Sec 3(2)

11 *Ibid*. Sec 6

12 Jahirul Islam and Md Zahir Ahmed, "Recent Human Trafficking Crisis and Policy Implementation in Bangladesh,", (The Journal for Social Advancement 3, 2018) 275-291

2.2 Penalty for Organized Offence of Trafficking

This Act provides for joint liability for organised trafficking. This is in keeping with the realities of the offence of trafficking which is in essence, an organised crime. The punishment for any person acting in furtherance of common intention for any material or financial benefit regarding organized trafficking shall be punished with death penalty or life imprisonment or minimum 7 years rigorous imprisonment and also shall be punished with a fine of five hundred thousand taka.[13] The penalty for instigating, conspiring, or attempting the offence of trafficking, and also allowing any person's property to be used for trafficking have also been penalised under this Act. Such offence will be punished with a minimum 3 years or a maximum of 7 years of rigorous imprisonment. In addition to it, a fine of a minimum of twenty thousand taka will be imposed.[14]

2.3 Trafficking for Forced Labour

A noticeable feature of the Act is that it has incorporated all forms of trafficking including forced or bonded labour which was missing in the earlier laws on this subject. The punishment for committing offence of forced or bonded or forced service by force, threat, or any means of pressure is punishable with minimum 5 years of rigorous imprisonment and 12 years of maximum rigorous imprisonment, and with a fine of minimum 50 thousand taka.[15] The insertion of this provision is also in keeping with the constitutional prohibition of forced labour as enshrined in Article 34 of the Constitution of the People's Republic of Bangladesh. More importantly, since many Bangladeshis are allured into trafficking forced labour[16] into Middle Eastern countries and other countries by various unscrupulous recruiters, inclusion of this provision was very much required. Large number of women and children are trafficked outside Bangladesh and recruited for providing illicit services in different countries.[17] However, these recruitments may not always be linked to sexual exploitation, and hence, they could be embraced by this provision in section 8.

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[13] *Supra*, 5 Sec 7
[14] *Ibid*. Sec 8
[15] *Ibid*. Sec 9
[16] *Supra*, 2 p 59
[17] *Ibid*.

2.4 Other Related Offences

Whoever commits kidnapping, stealing, or confining for the purpose of trafficking as described in Sec 3 of the Act shall be punished with minimum 5 years and maximum 10 years rigorous imprisonment and also be penalised with minimum fine of 20 thousand taka.[18] The offence also includes a penalty for stealing new-born baby from hospital, nursing home, or maternity or the custody of parents. Such punishment is minimum rigorous imprisonment of 5 years and maximum punishment is life imprisonment. The Act has made provision of penalty for allowing building or any part of the premises for the purpose of managing a brothel. The lessee, tenant, occupier, manager, keeper, owner, lesser, and even anyone who assists in keeping or managing such brothel is liable to be punished with rigorous imprisonment of minimum 3 years and maximum 5 years, and there is also a provision to be fined with minimum 20 thousand taka.[19] The Act also provides punishment for soliciting for the purposes of prostitution is liable to be punished with imprisonment of 3 years or with fine of minimum 20 thousand taka or with both.[20] Prostitution and trafficking are closely linked as many trafficked victims are often compelled to enter in sex trade.[21] Punishments provided in these above stated provisions can, if effectively applied, reduce forceful inclusion of victims in brothels and sex-trade. One of the main obstructions of trial of trafficking is the lack of protection of witnesses. This Act has enacted punishment for giving threat to the victims or witnesses soliciting for the purposes of prostitution under this Act. The penalty for such offence is minimum 3 years and maximum 7 years of imprisonment and fine of minimum 20 thousands taka.[22]

3. Analysis of Procedural Legal Framework under PSHT Act 2012

In many ways, the PSHT Act is a self-contained law. Besides the substantive provisions, the PSHT Act contains details of the procedural

18 *Supra*, 5 Sec 10
19 *Ibid*. Sec 12
20 *Ibid*. Sec 13
21 *Supra*, 2 p 50
22 *Supra*, 5 Sec 14

aspects for combating the offence of trafficking. This Act has, in particular, laid down the procedure of filing a complaint, and also the appointment and removal of judges. In addition to it, the Act has laid down the investigation procedure of the complaint by the police officer and the powers of the tribunal at length.

3.1 Anti-Human Trafficking Offence Tribunal and Its Powers

The Government is vested with the responsibility of establishing a tribunal in each district and such tribunal shall be presided by a judge not having below the rank of the Sessions Judge or Additional Sessions Judge.[23] The Government may assign the *Nari O ShishuNirjatonDomon*tribunal in each district as the Anti Human Trafficking Offence Tribunal until the establishment of the said human trafficking tribunal. The tribunal shall have territorial jurisdiction from where the victim has been rescued or where the victim has resided.[24] In case the offence was committed outside Bangladesh by a Bangladeshi citizen, or a company or a person who is habitually resident in Bangladesh, the tribunal under whose jurisdiction the accused resided or in case of a company, where registered office of the company was located; would possess the jurisdiction.[25] However, media reports indicate as of 2019, no dedicated Anti Human Trafficking Offence Tribunal was set up until April 2019.[26]

The tribunal shall have the power of the Court of Sessions, and may issue protective order or may ask for submitting any document. The tribunal shall have the power to accept any evidence including statements by an electronic device and can exempt the witness to depose before the tribunal.[27] The tribunal may, upon application or sue moto send the victim to a protective home or social welfare department

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[23] *Ibid*. Sec 21(1)

[24] *Ibid*. Sec 21(4)

[25] *Ibid*. Sec 21(5)

[26] Mehedi Al-Amin, 'Human Trafficking Cases: No Tribunal in Six Years, Conviction Rate Less Than Half Percent', Dhaka Tribune (online) 21 April 2019, <https://www.dhakatribune.com/bangladesh/nation/2019/04/21/human-trafficking-cases-no-tribunal-in-six-years-conviction-rate-less-than-half-percent> accessed 16 0ctober 2019.

[27] *Supra*, 5, Sec 22(2)

for ensuring the custody of the witness.[28] The tribunal can grant bail considering the gravity of the offences, the trauma and security of the witnesses, and previous record of criminality of the accused.[29] The whole trial shall be concluded within 180 working days. If the trial is not concluded within the time frame, then the tribunal has to send report to the High Court Division of Supreme Court.[30] However, since often the courts of Bangladesh takes this kind of legislative as directory rather than mandatory, it remains to be seen to what extent, the tribunals follow this provision of the law. And to avoid any confusion or giving the accused any benefit of doubt, the law has clearly spelt out that any failure to conclude the trial within the time-limit would not nullify the trial.

Another important feature of the tribunal is that the tribunal can also direct for trial in camera.[31] This can save victims from the negative public scrutiny which may be associated with the trial of human trafficking and protect the privacy and prevent her/his stigmatisation. In addition to these powers, the tribunal can confiscate property of the convict which have been acquired through commission of the offence and can deposit it in the anti-human trafficking fund. The tribunal can also seize properties situated abroad and the foreign embassy of Bangladesh in the relevant country is legally obligated to help in this process.[32]The accession of Bangladesh to the Protocol of 2000 should facilitate this process. And upon breach of any confiscation order, the convict is liable to be punished with five years of imprisonment and fine of taka 20 thousand.[33]

3.2 Lodging a Complaint and The Appointment of Prosecutors

The PSHT Act has enacted new provisions for the lodging of complaint. A complaint can either be lodged to a police station or maybe lodged directly in the tribunal established under this Act.[34] This

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[28] *Ibid*. Sec 22(3)
[29] *Ibid*. Sec 22(5)
[30] *Ibid*. Sec 24(2)
[31] *Ibid*. Sec 25
[32] *Ibid*. Sec 27 (4) and Sec 27(5)
[33] *Ibid*. Sec 27(4)
[34] *Ibid*. Sec 17(1)

is different from the typical provision for filing complaint relating to cognizable offences in Bangladesh where generally a compliant has to be filed with the police station. If a person lodges a complaint under the PSHT Act, the police officer shall not disclose the identity of the complainant unless such disclosure is necessary for legal process, and also the police officer shall provide security to the complainant. These provisions should offer some modicum of security to the victims against the traffickers who would more often than not be influential and organised. The cases shall be conducted by a special prosecutor who will be appointed in consultation with the judge of the tribunal. The government may appoint Assistant Judges for investigation, if deemed necessary. The government can remove the Prosecutor on the report of tribunal on ground of serious dereliction of duty.[35]

3.3 Investigation and Search and Seizure

Police officer not below the rank of sub-inspector is entitled to investigate upon reporting of a complaint or upon being referred by the tribunal. Such inquiry needs to be completed by 90 working days from the date of complaint.[36] In case the inquiry is not completed within the time frame, the officer shall before 3 days of the time completion, ask for time petition to the controlling officer in case the investigation was made out of reporting of a complaint. In case the investigation was made due to tribunal's referral, such time petition shall be submitted to the tribunal. The controlling officer or the tribunal upon being satisfied on the reasons showed may grant another 30 working days for the completion of investigation.[37]

The officer is also allowed to do pro-active inquiry for the commission of any offence even before the lodging of FIR. A monitoring cell shall be established to oversee the procedure of the investigation.[38] One of the important provisions of this Act is the provision of search and seizure has to be carried with conformity of human rights and dignity. In case of searching a woman, a woman officer shall accompany the search. Such search and seizure may be carried without warrant and

[35] *Ibid*. Sec 17(3)
[36] *Ibid*. Sec 19(3)
[37] *Ibid*. Sec 19(4)
[38] *Ibid*. Sec 19(6)

shall be guided by the rules prescribed by section 103 of the Code of Criminal Procedure 1898.[39]

3.4 Repatriation and Reintegration of Victims

One of the outstanding features of this Act is the incorporation of repatriation and rehabilitation of victims. There was no specific provision in the existing legislations for repatriation or reintegration of the victims of trafficking in Bangladesh before the enactment of PSHT Act 2012. In *Mr. Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt. of Bangladesh*,[40] the Supreme Court of Bangladesh clearly recognised repatriation as a fundamental right. In this case, the father of a victim of human trafficking who was languishing in India after being trafficked from her home in Tongi, applied to the Ministry of Foreign Affairs of Bangladesh for repatriating her into Bangladesh. The High Court Division relied on Article 27 and 31 of the Constitution and held that:

> This particular provision of the Constitution [Article 31] is in aid of the petitioner and the in action of the Respondents is a clear proof of denial of any assistant to the petitioner by the Government agency who (victim) is languishing in foreign soil in connection with a case…The principle of fairness in government acting requires that government functionaries must act according to law and must perform their duties on good faith, public accountability and acceptance demand that government action must correspond to good conscience and fair play. In the instant case, we are constrained to hold that the concept of fairness, fair play and legitimate expectation have been flouted by the Respondents and minimum fairness was not exhibited in dealing with the case which is unfortunate no doubt. The common expectation is that the Respondents would take up the matter in state level in order to bring back the victim, a citizen of this country who is languishing in foreign territory for no fault of her own for more than 5 years.[41]

The inclusion of repatriation provisions is in keeping with the international legal obligations of Bangladesh. The CEDAW Committee recommended the Government to ensure proper support for

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[39] *Ibid*. Sec 20(3)

[40] (1997) 17 BLD (HCD) 560

[41] *Ibid*. [5]-[6]

facilitating rehabilitation and reintegration of the victims of trafficking in the society.[42] The Committee on the Rights of the Children pointed out that there is no program in support of social and psychological recovery, which made it difficult for reintegration of the child into society.[43] The Committee of Optional Protocol II on the Rights of Children recommended ensuring an effective rehabilitation program through bilateral agreements with neighbouring countries.[44] The bilateral effort of both the states can play an effective and coordinating role for the prevention of child trafficking and care for child victims of trafficking who are involved in the commercial sex industry.[45]

Before PSHT Act 2012, the Penal Code 1860 and *Nari O ShishuNirjatonDomon Ain* 2000 did not include the victim and witness protection and rehabilitation. But the judicial authority played an important role in directing the Government to perform its responsibility for ensuring the rehabilitation and repatriation of the victims of trafficking. Following that, the Parliament has introduced these provisions in PSHT Act 2012 in compliance with international obligations of various treaties as mentioned before, and pursuant to judiciary's direction. The PSHT Act has incorporated a couple of provisions on rehabilitation, repatriation and return of victims of trafficking.

The Government has been prescribed to establish operating procedures for identification, rehabilitation, repatriation and return of victims of trafficking in collaboration with NGOs and relevant state agencies. Such process shall be conducted by providing for the welfare and needs for children and women.[46] The Act also provides for repatriation and return of victims of trafficking in a foreign country. The government has been given the duty to act in collaboration with accredited Bangladesh Embassy in any country for the purpose of

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[42] UNGA, 'Report of the Committee on the Elimination of Discrimination against Women' (2004) UN Doc A/59/38 (part I), 137 [242]

[43] UN Committee on the Rights of the Child, 'Concluding observations of the Committee on the Rights of the Child: Bangladesh' (2003) CRC/C/15/Add. 221, para 71.

[44] UN Committee on the Rights of the Child, 'Concluding observations: Bangladesh' (2007) CRC/C/OPSC/BGD/CO/1,para 41

[45] *Ibid*. para 42

[46] *Supra*, 5 Sec 32

return and repatriation of victims.[47] Even legal assistance has been guaranteed by the concerned Embassy in case the victim is prevented from returning to the country of origin.[48]

The Act has some specific provisions relating to providing information to victims and public generally. The victims are entitled to be informed about the steps which are being taken against the traffickers by the police or government or NGOs as the case maybe. The authority has been prescribed to maintain a database for providing necessary information to the journalists and relevant professionals without violating victims' right to privacy.[49] The Act also ensures that protective homes shall be established in case the victims are unable to return to their homes after the rescue.[50] The Act also guarantees victim's participation in making such decision to send them to protective homes. The protective homes are prescribed to offer victims scope of rehabilitation, reintegration, medical treatment, and legal-psychological counselling.[51] Rehabilitation cannot be availed without enabling the victim to deal with not just physical but also psychological impacts of the crime.[52] This Act has talked about medical and psychological counselling with is much needed and praiseworthy initiative.

3.5 Victims and Witness protection

The Act provides for the issuance of protective order for the protection of the victims and witnesses which is a landmark. The act comprehensively details on the protection, rehabilitation, repatriation, return, and social integration, medical-psychological counselling. The Act also provides accountability of the government, government officials and NGOs. It also calls for a public and private cooperation for combating trafficking.[53] These measures were lacking in our pre-

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[47] *Ibid*. Sec 33

[48] *Ibid*.

[49] *Ibid*. Sec 34

[50] *Ibid*. Sec 35

[51] *Ibid*. Sec 36

[52] Papers of International Conference on Combatting Human Trafficking with Special Reference to Women and Children organized by Campus Law Center, Faculty of Law, University of Delhi from 13February to 15 February 2015

[53] *Supra*, 5 Sec 36

existing laws. The Act has further taken some effective measures for protecting the victims by criminalising the publication of the name of the victims and witnesses or any family member without Tribunal's permission.[54] The threatening of the victims and witnesses was quite common before, but this Act criminalizes such threatening. The Act also ensures that all the reasonable costs of victims and witnesses for the trial can be borne by the government. The Act also provides for financial assistance for victims.[55] The Act further ensures the security of the victims and witnesses at the time of trial and while they travel to and from police station, and when they live in rehabilitation centre.[56]

The Act has some stringent measures for providing information to victims and public generally. The victims are entitled to be informed about the steps which are being taken against the traffickers by the police or government or NGOs as the case maybe. The respective Government authority has been prescribed to maintain a database for providing necessary information to the journalists and relevant professionals without violating victims' right to privacy.[57] This provision should facilitate research and necessary actions by interested private organisations which should be complementary to the public initiatives to tackle human trafficking.

3.6 Compensation

One of the most notable features of this Act is that it provides for compensation to victims. Before the enactment of PSHT Act 2012, the provision for compensation was left to the discretion of the courts. Especially the only provision for compensation was under Sec 545 of CrPC. It will be pertinent to mention that under section 545 of the CrPC, 1898, both trial and appellate or revision courts can award compensation to victims.[58] However, section 545 is subjected to two limitations: firstly, compensation to victims can be awarded only when a substantive sentence is imposed and not in cases of acquittal; secondly, quantum of compensation is limited to the fine levied and

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54 *Ibid*. Sec 37

55 *Ibid*. Sec 40

56 *Ibid*. Sec 37

57 *Ibid*. Sec 34

58 Sec 545, The Code of Criminal Procedure 1898, (Act no V of 1898).

not in addition to or exceeding it. The courts of Bangladesh, however, had rarely resorted to section 545 to award compensation to the victim as this provision leaves it entirely to the discretion of the courts to grant compensation to crime victims and defray costs of the proceedings. However, this remained largely unused due to insensitivity of judges towards victims. This lacuna has been addressed under the new law.

Under the PSHT Act, there are provisions for compensation which can be proved to be beneficial for the victims. The Tribunal under PSHT Act has been given wide power in awarding a reasonable amount of compensation, in addition to fine imposed by it. Compared to the process of recovery of dues under the Code of Civil Procedure, 1908, the recovery process under the PDR process is more expeditious. Thus, provision enshrined in Section 28(1) of the PSHT Act should mean that the victims may receive financial help from the offenders which may give her/him an option to engage in productive economic activities and facilitate smoother rehabilitation in the society.

The Act also lays down some criteria to fix the amount of such compensation. Such criteria depend on victim's medical cost both for physical and psychological treatment, the transportation, temporary shelter, the potential loss of income, the intensity of suffering, and the emotional loss.[59] Besides the provision for compensation, the Act allows the victim to file a suit in a civil court to enforce a contract, or for suffering any legal injury without prejudicing any ongoing criminal proceeding.[60] A victim can also be given financial assistance by the government from the fund established by this law.[61]

4. Limitations of The PSHT Act 2012

In order to promote and protect the rights of the victims of trafficking, the rights-based approach has been taken within the purview of PSHT Act 2012. Though the PSHT Act is quite revolutionary, it has some drawbacks which might defeat the purpose of the law.

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59 *Supra*, 5 Sec 28

60 *Ibid*. Sec 39

61 *Ibid*. Sec 40

4.1. Sweeping Provisions

The PSHT Act 2012 has certainly given a broad definition of trafficking, but it still lacks in defining some specific terms. This may allow unethical personals of law enforcement agencies to manipulate them and aid traffickers instead of victims.[62] For instance, the Act shows weakness in terms of defining trafficking of new born children. The Act narrowly defines places for such trafficking such as, hospital, health care centre and from the custody of parents.[63] These places should not be mentioned so narrowly, since the places to steal new born may be quite broad. Then again, the Act does not define custody. Secondly, the Act defines trafficking as a non-bailable offence,[64] but subject to the discretionary power of the judge of the Tribunal the accused might get bail.[65] In such case, the Act specifies some grounds for considering bail such as intensity of the crime, the security of the victims and witnesses and the prior criminal history of the accused.[66] The Act further declared that the tribunal may give a controlling order for producing the accused before the Tribunal on a specific day.[67] Arguably, such grounds for bail are quite discretionary and depend much on the judges. The law should provide a detailed framework as to when and why an accused should be given bail, since the Act generally defines trafficking as non bailable offense. The Act is thus flawed in providing details of grounds for granting bail.

4.2. Scant Provisions on Time Frame in Concluding Trial

The Act has some more procedural weaknesses regarding the time of conclusion of a trial. As already pointed out, the Act says that the trial should be ended conclusively by 180 days from the date of filing charge, and it also says that the time can be increased on sending a report to HCD within 10 days.[68] As a result, the Act does not endure accountability of the Tribunal on such failure to conclude a trial within

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[62] *Supra*, 12
[63] *Supra*, 5 Sec 10(1)
[64] *Ibid*. Sec 16
[65] *Ibid*. Sec 22(5)
[66] *Ibid*.
[67] *Ibid*. Sec 22(6)
[68] *Ibid*. Sec 24

180 days. The law could have been more specific in giving a tentative timeline for such extension, given the custom of the lengthy procedure of trial in our legal system. Thus, the law is not clear about the consequences of the delay in finishing the trial within specific timeline. Another major hindrance of ensuring speedy trial is the lacuna in providing specific timeline of resolving appeal against any decision of tribunal. The law merely says that any appeal can be preferred against any decision within 30 days,[69] but the law is not clear about providing details on completion of such appeal within a specific timeline.

4.3. Uncertainty about Proper infrastructure

The Act is quite revolutionary is a sense that it provides modern modes of admitting evidence by means of electronic or audio-visual device. But most of the trial courts in Bangladesh do not have proper internet facilities.[70] In a similar vein, the lack of expertise may also be an issue for some Judges and court officials in the trial courts in Bangladesh. This may prove to be a hindrance for ensuring such evidence in 'Digital Bangladesh' which should be addressed by the Government on a priority basis.

4.4 Low Rate of Conviction

While no in-depth study about the conviction rate of human trafficking is available, the patchy statistics available from various publicly available sources do not give a good reading. According to the information submitted by the Government as part of the Universal Periodic Review of Human Rights by United Nations Human Rights Council in 2018, during 2013–2017, 7,520 persons had been victims of trafficking, 3,487 cases were filed against 14,500 accused persons, and 5,700 persons were arrested for trafficking offences.[71] During the same period, a total of 145 cases of child trafficking were disposed of convicting 36 accused persons.[72] Considering the high rate of the crime, the number of completed cases seems to be quite low. And noticeably,

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69 *Ibid*. Sec 31

70 *Ibid*. Sec 30

71 UN Human Rights Council, Bangladesh National Report Submitted in Accordance with paragraph 5 of the Annex to Human Rights Council Resolution 16/21, UN Doc A/HRC/WG.6/30/BGD/1, para 120.

72 *Ibid*. para 94.

the statistics provided by the Government does not reveal the total number of convictions for trafficking adults, nor does it reveal the rate of convictions. According to data from the police headquarters, from 2013 to April 2019, 6,106 people were arrested in connection with human trafficking, but alarmingly only 25 of them have been convicted, making the conviction rate only 0.4%.[73] Given that the Government has set up a Case monitoring committee in the Public Security Division to expedite disposal of human trafficking cases and also Counter Trafficking Committee (CTC) in every district with representatives from the Government and non-government organisations; these bodies should conduct an in-depth study to assess the factors inhibiting the timely trial of trafficking human offences and the lowly conviction rate.

5. Findings and Suggestions

1. The Act has defined human trafficking as non-bailable offence and has allowed the discretionary power to the Tribunal subject to consideration of some factors. However the Act has narrowly stated the grounds of allowing bail. Detail listing could have helped the Tribunal to apply the given discretionary power more judicially.

2. The Tribunal shall have to conclude trial under this Act within 180 days and in failure, further extension will be allowed. However, no specific extent is set of any such extension. This undefined prolongation of trial period may create backlogs and unnecessary delay which may hinder the objective of this Act. Therefore, limits on extension period should be set to ensure speedy proceedings.

3. Moreover, the duration within which appeal against any order, judgment or sentence against the Tribunal will be resolved by the High Court Division is not stated in Section 31. A specific timeline could be set in this regard.

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[73] *Ibid*. (n 17).

4. Proper infrastructure to facilitate admission of electronic and audio-visual devices as evidences needs to be ensured, otherwise Section 30 will not be efficiently utilized.
5. Awareness of this Act and remedies that can be availed by victims shall be created with help of different media. Social media platform can be utilized to aware victims and also to encourage people to come forward with information on human trafficking.
6. Government should prioritize establishment of Anti-Human Trafficking Offence Tribunal. Having a specialized dedicated Tribunal will not only promulgate the Act, but also will accelerate fulfilment if its objectives.

6. Concluding Remarks

Since the incorporation of the 2012 law of trafficking only a small percentage of the accused people seem to have been convicted under this law which undermines the objective of this law. This may also mean that Bangladesh still continues to be a "tier 2"[74] country for trafficking i.e. on the Watch List which shows Bangladeshi men and women are still at a risk of trafficking.[75] The PSHT Act 2012 was definitely passed with a view to decrease the trafficking rate and to improve the conditions of trafficked victims. As pointed out throughout the paper, the law has provided for certain benevolent provisions for the protection of the victims of trafficking by the introduction of compensation, victim protection, repatriation, rehabilitation etc. are certainly noteworthy effort of government's aspiration to increase victim's socio-economic conditions. However, the low rate of conviction would connote that either a very high percentage of the accused were wrongly prosecuted (which seems rather unlikely) or either because of deficiencies in the investigating process or from the lack of participation of witnesses, the objectives of the law are not being achieved yet. Surely, this does not do justice to a well-crafted piece of legislation like this PSHT Act 2012.

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74 United States Department of State, Trafficking in Persons Report, (June 2019), 48.

75 *Ibid*.

বাংলাদেশে মুসলিম উত্তরাধিকার আইনে পুত্র ও কন্যা সন্তানের অধিকার: একটি পর্যালোচনা

মোহাম্মদ হেদায়েত উল্লাহ*

Abstract

As a complete code of life Islam ensures rights of all classes of people along with proper, detailed and balanced guideline to the forsaken property of a deceased. Muslim inheritance law allows a son to inherit double the share of property than the daughter of a deceased. Many critics tend to raise their voice regarding the issue of equal rights in Islam. The wisdom of Allah in bestowing son superiority in Islamic Sharia and inheritance law as against the daughters need to be comprehended. The scenario of, and strategems against, daughters inheriting property in Bangladesh society has been identified. The issue of rights of sons and daughters in the light of Muslim inheritance law has been discussed. The article explores that like a son, Allah has proclaimed daughters as '*Walad*' and given them rights in property. Allah has given more rights to sons in property considering various responsibilities and duties. This seems logical and apt if Islam is practised completely in a life of a Muslim. Review method has been utilised in this article.

মূলশব্দ: ইসলাম; উত্তরাধিকার; পুত্র-কন্যা সন্তানের উত্তরাধিকার; উত্তরাধিকার আইন

১. ভূমিকা

ইসলামী শরীয়ার মূল উৎস আলকুরআনে মৃত ব্যক্তির পরিত্যক্ত সম্পত্তিতে তার উত্তরাধিকারীদের বিবরণ দেওয়া হয়েছে এবং প্রত্যেকের প্রাপ্য অংশের ব্যাপারে সুস্পষ্ট বিধান রয়েছে। ইসলামের অন্যান্য মৌলিক বিধানের ব্যাখ্যাসহ বর্ণনা করার প্রয়োজন হলেও উত্তরাধিকার সম্পদ বণ্টন ব্যবস্থাপনায় ততটা বিস্তারিত বর্ণনার দরকার হয়নি।[১] ইসলামী উত্তরাধিকার আইন হচ্ছে সবচেয়ে বেশী যুক্তিসম্মত এবং পূর্ণাঙ্গ।[২] রাসূল সা. ইসলামী উত্তরাধিকার সম্পত্তি বণ্টনের আইন সংক্রান্ত বিষয়টি অতিগুরুত্বপূর্ণ হওয়ার কারণে সম্পদ বণ্টন সংক্রান্ত এ জ্ঞানকে চিহ্নিত করেছেন 'জ্ঞানের

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[১] যেমন সালাত, যাকাত, সাওম ও হাজ্জ ইত্যাদির ক্ষেত্রে হাদিসের মাধ্যমে বিস্তারিত ব্যাখ্যা তুলে ধরা হয়েছে, কিন্ত উত্তরাধিকার সংক্রান্ত সকল কিছুর ক্ষুদ্রাতিক্ষুদ্র বর্ণনা আলকুরআনে আল্লাহ তায়ালা বলে দিয়েছেন।

[২] মুহাম্মদ ইউসুফুদ্দীন, *ইসলামের অর্থনৈতিক মতাদর্শ*, অনুবাদ মুহাম্মদ আব্দুল মতিন জালালাবাদী, ৩য় সংস্করণ, (ঢাকা: ইসলামিক ফাউন্ডেশন বাংলাদেশ, ১৯৯৮), পৃ. ২০৭।

অর্ধেক' হিসেবে।[৩] আর তা হলো 'ইলমুল ফারায়িয'।[৪] আলকুরআনে বর্ণিত উত্তরাধিকার সম্পত্তি বণ্টন প্রক্রিয়ায় একই শ্রেণির একজন পুরুষ পায় দুইজন নারীর সমান সম্পদ। এ বিধানটি ইসলামে বর্ণিত ইনসাফ বা ন্যায়বিচারের ধারণাগত জ্ঞানকে প্রশ্নবোধক করে তুলেছে; এখানে কন্যা সন্তানদের পক্ষপাতিত্বের মাধ্যমে ঠকানো হয়েছে–একশ্রেণির মানুষের মনে এ বিষয়ে প্রশ্ন দেখা দেওয়ার প্রেক্ষাপটে কন্যাদের উত্তরাধিকার সংক্রান্ত আইনে প্রকৃতপক্ষে বঞ্চিত করা হয়েছে কি-না, বা পুত্র সন্তানদের তুলনায় তাদের সম্পত্তি কম দেওয়া হলো কেন; এটাই তাদের জিজ্ঞাসা।[৫] অন্য দিকে কেউ কেউ মনে করেন, পুত্রদের সম্পদ বেশি দেওয়ার কারণ তাদের জন্য পারিবারিক ও সামাজিক বিভিন্ন দায়িত্ব বেশি নির্ধারণ করা হয়েছে। যাবতীয় খরচের ভারও তাদের উপর; তাই তারা কন্যা সন্তানের চেয়ে দ্বিগুণ সম্পদ পাবে এটাই সঠিক ও অধিক যুক্তিযুক্ত।[৬] কারো কারো এমন ধারণা পোষণ করার প্রেক্ষাপটে– এ বিষয়ে আইনের বিশ্লেষণ, আইন প্রয়োগ ও চর্চায় সমাজের বাস্তবচিত্র গবেষণার মাধ্যমে তুলে আনা দরকার। পাশাপাশি বাংলাদেশের বর্তমান সমাজ ব্যবস্থায় কন্যা সন্তানের পরিত্যক্ত সম্পত্তি পাওয়ার বাস্তব চিত্র বা এর অনুশীলন কেমন, এ বিষয়ে অনুসন্ধানও জরুরি। বিভিন্ন সমীক্ষায় দেখা গেছে অধিকাংশ ক্ষেত্রে কন্যা সন্তানরা তাদের পিতা-মাতার সম্পত্তি থেকে নানাভাবে বঞ্চিত হয়।[৭] কন্যা সন্তানরা তাদের ভাইদের কাছে সম্পত্তি দাবি করলে ভাইয়ের সঙ্গে সম্পর্কের চরম অবনতি হয়।[৮] এ গবেষণার ফলে আশা করা যায় ইসলামে উত্তরাধিকার সম্পত্তি বণ্টনের মূলভিত্তি, দৃষ্টিভঙ্গি, কন্যা সন্তানের তুলনায় পুত্রসন্তানকে কেনইবা বেশী দেওয়া হলো তা জানা যাবে। আবার কন্যা সন্তানের সম্পদে অধিকার ও বণ্টনের পদ্ধতি এবং বাংলাদেশের প্রেক্ষাপটে তাদের সম্পদ প্রাপ্তির বাস্তব চিত্র নিয়ে সবিস্তার তুলে ধরা হয়েছে।

২. গবেষণা পদ্ধতি ও উদ্দেশ্য

'বাংলাদেশের মুসলিম উত্তরাধিকার আইনে পুত্র ও কন্যা সন্তানের অধিকার: একটি পর্যালোচনা' শীর্ষক প্রবন্ধটিতে প্রধানত পর্যালোচনা পদ্ধতি অনুসরণ করা হয়েছে। এ পদ্ধতি হলো লিখিত বা মূদ্রিত বিভিন্ন উপকরণ থেকে তথ্য সংগ্রহ করে পাঠ বিশ্লেষণ পদ্ধতির মাধ্যমে সিদ্ধান্তে উপনীত

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[৩] মহানবী স. আবূ হুরায়রাহ রা. কে উদ্দেশ্য করে বলেন: 'হে আবূ হুরায়রাহ। 'ফারাইয' শিক্ষা করো এবং তা শিক্ষা দাও। কেননা তা জ্ঞানের অর্ধেক। নিশ্চয়ই তা ভুলে যাওয়া হবে এবং আমার উম্মাত থেকে সর্বপ্রথম এটিই উঠিয়ে নেওয়া হবে। মুহাম্মদ ইবনে আব্দুল্লাহ, *আল হাকেম*, পৃ. ৫৫।

[৪] ইসলামের দৃষ্টিতে উত্তরাধিকার বণ্টন সংক্রান্ত জ্ঞানকে জ্ঞানের একটি আলাদা শাখা হিসেবে সাব্যস্ত করা হয়েছে। হাদীসে এর নাম দেয়া হয়েছে 'ইলমুল ফারায়িয' বা উত্তরাধিকার বণ্টন সংক্রান্ত জ্ঞান। হাদিসের গ্রন্থগুলোতে এ নামে আলাদা অধ্যায় রচিত হয়েছে এবং এ সংক্রান্ত জ্ঞানার্জন করার ব্যাপারে বিশেষ গুরুত্বারোপ করা হয়েছে।

[৫] ইসলামি উত্তরাধিকার আইনে নারীর প্রতি রয়েছে চরম বৈষম্য, http://giasuddinonline.blogspot.com/2016/01/blog-post_19.html. Accessed on date, 15/07/2019.
নারীর অর্থনৈতিক অধিকার, https://www.muslimmedia.info/2017/05/09/womens-finacial-rights-in-islam. Accessed on date, 10/07/2019.

[৬] ইমামুদ্দিন ইসমাঈল, *ইবনে কাছীর*, খন্ড-১, (বয়রুত: দারুল কুতুব আল ইলমিয়াহ, ১৯৯০), পৃ. ৩৩। মুহাম্মদ ইবনে ইয়াজিদ, *ইবনে মাজাহ* (বয়রুত: দার আল ফিকর, ২০০৩), পৃ. ৫৩১।

[৭] মুহাম্মদ গোলাম রাব্বানী, *ইসলামী আইনে উত্তরাধিকার স্বত্বলাভ: পরিপ্রেক্ষিত বাংলাদেশ*, (পিএইচডি অভিসন্দর্ভ-২০০৯), আলকুরআন এন্ড ইসলামিক স্টাডিজ বিভাগ, ইসলামী বিশ্ববিদ্যালয়, কুষ্টিয়া, পৃ. ৪১২।

[৮] মুসলিম নারীর অধিকার ও মর্যাদা, নারী ও শিশু কল্যাণ কেন্দ্র, ওয়েস্ট বেঙ্গল মাইনরিটী কমিশন, পশ্চিমবঙ্গ (কলকাতা: এসএম প্রিন্টার্স), পৃ. ৩০।

হওয়া বা সংশ্লিষ্ট বিষয় সম্পর্কে সবিস্তর জানা। উৎসগত শ্রেণি বিন্যাস অনুযায়ী প্রবন্ধটিতে যে সকল তথ্য উপাত্ত তা মুলতঃ দুই ধরনের। এর একটি হচ্ছে প্রাথমিক তথ্য-উপাত্ত; যা সরাসরি কোরআন ও হাদীস। দ্বিতীয়টি হচ্ছে সহায়ক উপকরণ; প্রবন্ধ সংশ্লিষ্ট ইলমে ফিকহ বা ইসলামী আইনের বইসমূহ, বিভিন্ন প্রবন্ধ-নিবন্ধ, পুস্তক আকারে প্রকাশিত উত্তরাধিকার আইন সংক্রান্ত বই। ইসলামী উত্তরাধিকার আইন ও বর্তমান বাংলাদেশে প্রচলিত মুসলিম উত্তরাধিকার আইন বিশ্লেষণপূর্বক আরবি শব্দগত ব্যাখ্যা-বিশ্লেষণের বহুমাত্রিক প্রবাহের কারণে কোনো ব্যক্তির পুত্র ও কন্যা সন্তান রেখে মারা গেলে এ ভাই-বোনের পিতা-মাতার সম্পত্তি থেকে সম্পদ কীভাবে পাবে এবং এর পর্যালোচনা গভীর অনুসন্ধানের মাধ্যমে তার স্বরূপ জানা ও জানানোর চেষ্টা করা হয়েছে। একটি দেশের নাগরিক হিসেবে বিশেষ করে পিতা-মাতার মৃত্যুর পর পরিত্যক্ত সম্পত্তিতে পুত্র ও কন্যাসন্তানের প্রাপ্য অংশ সম্পর্কে জানা খুব দরকার। আলোচিত প্রবন্ধটিতে উত্তরাধিকারের পরিচয়, ইসলামে বর্ণিত পুত্র ও কন্যা সন্তানের পরিত্যক্ত সম্পত্তির অংশ সংক্রান্ত বিধানের বিশ্লেষণ ও উত্তরাধিকার আইনের কন্যাসন্তানের অংশ কম পাওয়ার কারণ নির্ণয়ের বিবরণ বর্ণিত হয়েছে।

৩. উত্তরাধিকার আইন এর বিশ্লেষণ

৩.১.১ উত্তরাধিকার এর শাব্দিক অর্থ

উত্তরাধিকার শব্দটি বাংলা। এর আরবি প্রতিশব্দ হলো *ওয়ারিস*। এ শব্দটি মুসলিম উত্তরাধিকার আইনের মূলগ্রন্থ এবং ইসলামের প্রধান মৌলিক ধর্মগ্রন্থ আলকুরআনে ব্যবহৃত হয়েছে। ওয়ারিছ একবচন, বহুবচনে 'ওয়ারাছাহ'। যার বাংলা অর্থ-উত্তরাধিকারী, উত্তরসূরী, ওয়ারিছ বা ওয়ারিস, বংশধর ইত্যাদি।[৯] আরবি বর্ণ 'ওয়া-রা-সা' শব্দমূল থেকে এসেছে 'মীরাস'। যার অর্থ উত্তরাধিকারসূত্রে প্রাপ্ত সম্পদ অথবা সম্পদের মালিকানা তথা স্বত্বাধিকার। আলকুরআনে স্বত্বাধিকার শব্দটির ব্যবহার লক্ষ্য করা যায়।[১০] আবার 'ওয়ারিসা' অর্থ উত্তরাধিকারী হওয়া এবং 'আওরাসা' অর্থ উত্তরাধিকারী বানানো। দুভাবেই এটি আলকুরআনে এসেছে।[১১] মহান আল্লাহর গুণবাচক নামসমূহের মধ্যে একটি হলো 'আলওয়ারিস'।[১২] কেউ কেউ বলেছেন, শব্দটি 'ইরসু'

[৯] মুহাম্মদ ফজলুর রহমান, *আরবি বাংলা ব্যবহারিক অভিধান*, (ঢাকা: রিয়াদ প্রকাশনী, ১৯৯৮), পৃ. ৮০।

[১০] মহান আল্লাহ তায়ালা বলেন, 'যারা আল্লাহ তায়ালা তাদেরকে নিজ অনুগ্রহ থেকে যা দিয়েছেন, সে ব্যাপারে কৃপণতা করে তারা যেন মনে না করে যে, এটা তাদের জন্যে ভালো। বরং এতে রয়েছে তাদের জন্যে অনিষ্ট। যা নিয়ে তারা কৃপণতা করে, কিয়ামতের দিন তাই হবে তাদের গলার বেড়ি। মহাকাশ এবং এই পৃথিবীর স্বত্বাধিকার একমাত্র আল্লাহর। আর আল্লাহ তোমাদের আমল সম্পর্কে বিশেষভাবে খবর রাখেন।' আলকুরআন ৩:১৮০।

[১১] আল্লাহ তায়ালা বলেন, 'সুলাইমান হয়েছিল দাউদের ওয়ারিস (উত্তরাধিকারী)', আলকুরআন ২৭:১৬। অন্য আয়াতে এসেছে: আর তারা বলবে: 'সমস্ত প্রশংসা আল্লাহর, তিনি আমাদেরকে দেয়া ওয়াদা সত্যে পরিণত করেছেন এবং আমাদেরকে ওয়ারিস (স্বত্বাধিকারী) বানিয়েছেন এই পৃথিবীর। (আর এখন) জান্নাতের যেখানে ইচ্ছা আমরা আবাস বানাবো। সৎকর্মশীল পুরস্কার কতো যে উত্তম!', আলকুরআন ৩৯:৭৪।

[১২] সকল সৃষ্টি ধ্বংস হয়ে যাবার পর যেহেতু কেবল তিনিই অবশিষ্ট থাকবেন, তাই এটি তাঁর গুণবাচক নাম। মুহাম্মদ ইবনে মুকরাম ইবনে মানজুর, *লিসান আল আরব* (কায়রো: দারুল হাদীস, ২০০৩), পৃ. ৭৮। মহান আল্লাহ তায়ালা বলেন: 'নিশ্চয়ই পৃথিবীর এবং পৃথিবীর উপর যারা আছে তাদের চূড়ান্ত মালিকানা আমরই এবং তারা আমারই নিকট প্রত্যানীত হবে।' আলকুরআন ১৯:৪০। মহান আল্লাহ তায়ালা আরো বলেন, '(আরো স্মরণ করো) যাকারিয়ার কথা, সে তার প্রভুকে ডেকে বলেছিল, 'প্রভু! তুমি আমাকে (সন্তানহীন করে) রেখো না। তুমিই

(আলিফ-রা-স) শব্দমূল থেকে এসেছে। যার অর্থ হলো– 'আল্‌আসলু' বা মূল। পুরাতন জিনিস বা পরবর্তীকালের লোকেরা পূর্ববর্তী লোকদের থেকে উত্তরাধিকার সূত্রে লাভ করে। এর দ্বারা প্রতিটি জিনিসের অবশিষ্টাংশ বুঝানো হয়ে থাকে।[১৩] 'ইরসু' বা উত্তরাধিকার বলতে কোনো একটি জিনিস একদল লোকের নিকট থেকে অন্য একদল লোকের কাছে হস্তান্তর করা বুঝানো হয়ে থাকে। এর দ্বারা উত্তরাধিকারসূত্রে প্রাপ্ত বস্তুকেও বুঝানো হয়ে থাকে।[১৪] উত্তরাধিকারের ইংরেজি প্রতিশব্দ হলো Inheritance, Succession।[১৫] এর অর্থ মৃত ব্যক্তির পরিত্যক্ত সম্পদ।[১৬] আর আইনের ভাষায় যে আইন দ্বারা মৃত ব্যক্তির সম্পত্তিতে কারো অধিকার নিশ্চিত হয় তাই উত্তরাধিকার আইন। এ আইনকে 'ইলমুল ফারায়েজ' ও বলা হয়। ফারায়েজ আরবি শব্দ; শব্দটি বহুবচন। এর একবচন হলো ফরজ যার বাংলা অর্থ অবশ্যপালনীয়, কর্তব্য, অনুমান, নির্দিষ্টি অংশ। এখানে নির্দিষ্ট অংশ অর্থে ব্যবহার করা হয়েছে।[১৭] যেহেতু একমাত্র উত্তরাধিকার আইনের নীতিমালা আল্লাহ তায়ালার পক্ষ থেকে নির্ধারিত; সে কারণেই এ জ্ঞানকে ইলমুল ফারায়েজ বলা হয়েছে। মূল কথা হলো, হিসাব নিকাশের কিছু মূলনীতি সম্পর্কে জ্ঞানলাভ করা; 'যার সাহায্যে মৃত ব্যক্তির পরিত্যক্ত সম্পদে হকদারদের প্রত্যেকের প্রাপ্যাংশ সম্পর্কে জানা যায়,'[১৮] তা হলো 'ইলমুল মিরাছ' বা উত্তরাধিকার বিজ্ঞান।

৩.১.২ পারিভাষিক অর্থ

উত্তরাধিকার বিজ্ঞান হলো ইসলামী আইন শাস্ত্র ও হিসাব শাস্ত্রের এ জাতীয় কিছু নিয়ম কানুন এবং সূত্রাবলী জানার নাম, যা দ্বারা মৃত ব্যক্তির পরিত্যক্ত সম্পদ তার উত্তরাধিকারীদের চিহ্নিত করে তাদের মধ্যে বণ্টনের নিয়ম পদ্ধতি জানা যায়।[১৯] জুরজানী বলেন, 'উত্তরাধিকার বিজ্ঞান হলো এমন বিদ্যা, যা দ্বারা পরিত্যক্ত সম্পদ তার প্রকৃত উত্তরাধিকারীদের মাঝে বণ্টনের নিয়ম পদ্ধতি জানা যায়'।[২০] শাফেয়ী ও হাম্বলীদের কাজী আফজালুদ্দীন আল-খাওয়ানজী প্রদত্ত সংজ্ঞা হলো, 'উত্তরাধিকার বণ্টনযোগ্য এমন একটি হক, যা কোনো জিনিসের মালিকানা স্বত্বাধিকারীর মৃত্যুর পর আত্মীয়তা বা অন্য কোনো কারণে প্রাপকগণ পেয়ে থাকেন।'[২১] মূলকথা হলো ব্যক্তির মৃত্যুর পর

তো সর্বোত্তম ওয়ারিস।' আলকুরআন ২১:৮৯। যেমন তিনি বলেছেন,'আল্লাহই নভোমন্ডল ও ভূমন্ডলের উত্তরাধিকারী'। আলকুরআন ৫৭:১০।

[১৩] আল-কামূস আল মুহীত, খ. ১,পৃ. ১৬৭।

[১৪] আল-আযবুল ফায়েদ, খ. ১, পৃ. ১৬; হাশিয়াতুল বাকারী, পৃ. ১০।

[১৫] আল-মাওরিদ, আরবী- ইংরেজী, ১ম সংস্করণ (বয়রুত: দারুল ইলম লিল মাল্লাইন, ১৯৮৮), পৃ. ৭৩,৭১১; *The New Encyclopedia Britannica,* 15th Edition (USA: 1986), v-6, p- 317.

[১৬] *আল মুনজিদ ফীল লুগাতি ওয়াল আলাম,* ১৮তম সংস্করণ (বয়রুত: দারুল মাশরিক, ১৯৯৬), পৃ. ৮৯৫, জিবরান মাসউদ, আররায়েদ, ৭ম সংস্করণ (বৈরুত: দারুল ইলম লিল মাল্লাইন, ১৯৯৩), পৃ. ৮৬০।

[১৭] ফজলুর রহমান, *আধুনিক আরবী- বাংলা অভিধান*, ১ম সংস্করণ (ঢাকা: রিয়াদ প্রকাশনী, ২০০৭), পৃ. ৬০৯।

[১৮] আশ-শারহুল কাবীর, খ. ৪, পৃ. ৪৫৬; নিহায়াতুল মুহতাজ, খ. ৬, পৃ.২; আল আযবুল ফায়েদ, খ. ১, পৃ. ৬২; আদদুররুল-মুখতার ও হাশিয়া ইবনে আবেদীন, খ. ৫, পৃ. ৪৯৯।

[১৯] ইমাম সিরাজুদ্দিন, মুহাম্মদ ইবন আব্দুর রশিদ, *কাশফুর রাজি ফী হল্লে সিরাজী*, অনুবাদক: মাওলানা মুহাম্মদ সিদ্দিকুল্লাহ (ঢাকা: ইসলামিয়া কুতুবখানা, তাবি), পৃ. ৮।

[২০] তদেব, পৃ. ৪৫।

[২১] আল আযবুল ফায়েদ, খ. ১, পৃ. ১৬; হাশিয়াতুল বাকারী, পৃ. ১০।

যাঁরা তার সম্পত্তির ভাগ পান তাদেরকেই 'ওয়ারিস' বা উত্তরাধিকারী বলা হয়। কোনো ব্যক্তি মারা গেলে তার রেখে যাওয়া পরিত্যক্ত সম্পত্তিতে তার সন্তানদের হক বা অধিকার তৈরি হয়। মৃত ব্যক্তি পুরুষ হোক অথবা নারী অথবা হিজড়া, সকল ক্ষেত্রেই নারী কিংবা পুরুষ দুই শ্রেণির উত্তরাধিকারী থাকতে পারে।

৩.২ আইন

আইন শব্দটি ফারসি। আব্বাসীয় যুগে সাধারণত কানুন, প্রথা, দেশাচার ও নিয়ম অর্থে আইন শব্দটি ব্যবহার হতো।[২২] কেউ কেউ শব্দটিকে আরবি বলেছেন। আরবি বর্ণ 'আইন, ইয়া ও নুনের' সমন্বয়ে 'আইন' শব্দটি গঠিত। যার বাংলা অর্থ চোখ,[২৩] ঝর্ণা,[২৪] আবার উপস্থিত বিষয়কে আরবীয়গণ আইন বলে থাকে।[২৫] আরবি আইন শব্দটির অর্থসমূহের সাথে পারিভাষিক আইন শব্দটির যথেষ্ট সাদৃশ্য রয়েছে। কেননা মানুষের চোখ যেমন করে সত্য সন্ধান করে; আইনও ঠিক তেমনিভাবে সত্য প্রতিষ্ঠায় তৎপর থাকে। প্রবাহিত ঝর্ণা যেমন নিম্নস্থানের দিকে প্রবাহিত বা ধাবিত হয় ঠিক তেমনি ভাবে আইনও রাষ্ট্রের উচ্চপরিষদ থেকে পাস হয়ে নিম্নস্তর পর্যন্ত এর প্রয়োগধারা প্রবাহিত হয়। আসলে এটি হলো 'এমন বিধিমালার সমষ্টি, যা কোনো আনুষ্ঠানিকভাবে বিধিবদ্ধকৃত আইন বা প্রথা থেকে উদ্ভূত হয়েছে এবং বিশেষ রাষ্ট্র বা সম্প্রদায়ের সদস্য বা প্রজাদের উপর একে বাধ্যতামূলক হিসেবে স্বীকার করে নিয়েছে।'[২৬] বিচার প্রশাসন কার্যে যে সকল নীতিমালা রাষ্ট্রকর্তৃক স্বীকৃত ও প্রয়োগকৃত হয়ে থাকে তাই আইন। হোকারের মতে, 'যে কোন ধরনের বিধি বা প্রথা, যা দ্বারা কর্ম বা আচরণ তৈরি হয়, আইন শব্দটি সে সকল অর্থে ব্যবহার হয়'।[২৭] জন অস্টিন এর মতে, 'সার্বভৌম কর্তৃপক্ষের আদেশই আইন'।[২৮] এটি 'একধরনের অধিকার ও বাধ্যবাধকতা যা রাষ্ট্র বলবৎ করে'।[২৯] আসলে মানুষের সামগ্রিক জীবনধারা যে বিধিবিধান ও নিয়ম পদ্ধতির মাধ্যমে পরিচালিত হয় তাই আইন। আর রাষ্ট্রীয় বিধানে আইন বলে ঐ বিধিবিধান ও নিয়ম পদ্ধতিকে বুঝায় যা সার্বভৌম রাষ্ট্রশক্তি কর্তৃক স্বীকৃত এবং অনুমোদিত, যা সকলে পালন করতে বাধ্য এবং পালন না করলে শাস্তি পেতে হয়। তবে ইসলাম ধর্মের আলোকে বিশ্বাসীরা মনে করে আইন হলো

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[২২] আবুল ফারাজ মুহাম্মদ ইবন ইসহাক ইবনুন নাদীম, *আল ফিহরিস্ত* (বয়রুতঃ মাকতাবাতু খাইরাত, ২০০১), পৃ. ১১৮।

[২৩] আলকুরআন, ১৯:২৬।

[২৪] আলকুরআন, ৮৮:১২।

[২৫] সম্পাদনা পরিষদ,*আল মু'জামুল ওয়াসিত* (দেওবন্দ: কুতুবখানা হুসাইনিয়া), পৃ ৬৪১।

[২৬] Dorling Kindersley Limited and Oxford University Press (ed), Illustrated Oxford Dictionary (New York: Oxford University Press, Reprinted in India, 2007), p-457.

[২৭] V D Mahajan, *Jurisprudence and legal Theory*, Fifth edition (Lucknow: Eastern Book Company, 1993), p. 28.

[২৮] 'Law is the command of the sovereign', Hafiz Habibur Rahman, *Political science and Government,* Seventh Edition (Dhaka: Ideal Publication, 1970), p-94; V.D.Mahjan, p-29-৩০; R.C.Agarwal, Political Theory, 1st edition (New Delhi: S. chand & Company Ltd, 1976), Reprint, 2005, p.202.

[২৯] 'Law is the system of rights and obligation which the state enforces'. Hafiz Habibur Rahman, P. 94; N. Jaypalan, *Political Theory* (Delhi: Atlantic Publishers and Distributor, 1999), p. 60.

স্রষ্টা ও সৃষ্টির মাঝে যোগসূত্রের সেতুবন্ধন। আর স্রষ্টা কর্তৃক অনস্তিত্ব থেকে অস্তিত্ব সৃষ্ট কোন বস্তু বা বিষয়ের নিয়ন্ত্রণের নিয়মকেই আইন বলে।[৩০] আলকুরআনে এসেছে 'স্বর্গ ও মর্ত লোকের সার্বভৌমত্ব একমাত্র তাঁরই।'[৩১] উত্তরাধিকার আইন হলো একটি ইসলামী আইন। আর সে হিসেবে আব্দুর রহিমের মতে, 'আইন হলো একজন মুসলমানের সর্বব্যাপারে ধর্ম কিংবা নৈতিকতাবোধ যাহা স্বয়ং আল্লাহ তায়ালার নিকট হতে প্রাপ্ত অনুপ্রেরণা প্রসূত'।[৩২] আল্লাহ তায়ালার সার্বভৌমত্বের বুনিয়াদে আলকুরআন ও সুন্নাহর আলোকে গবেষণাপ্রসূত যে সকল সার্বজনীন নিয়ম পদ্ধতি, ধ্যান ধারণা ও বিধান জনজীবনকে সুষ্ঠুভাবে পরিচালিত ও নিয়ন্ত্রিত করার জন্য রাষ্ট্র ক্ষমতার মাধ্যমে বলবৎ করা হয় তাকেই ইসলামী আইন বলে। মূলত এটি ঐশ্বরিক আইন। এটি আলকুরআন ও সুন্নাহ ভিত্তিক। আলকুরআন ও সুন্নাহ ছাড়াও ইজমা ও কিয়াস আইনের উৎস; এ আইন মানুষকে খারাপ কাজ থেকে বিরত রাখে এবং ভালো পথে পরিচালিত করে। পরিশেষে বলা যায়, ইসলামী আইন হলো আলকুরআন, আলহাদীস, (ইজমা ও কিয়াসের স্বমন্বয়ে) ইজতিহাদ বা গবেষণার মাধ্যমে একজন মুসলিম তার সামগ্রিক কার্য পরিচালনা করে। এটি কেনো নির্দিষ্টি ভূখণ্ডের সার্বভৌম রাষ্ট্রীয় ক্ষমতা কর্তৃক জারিকৃত বা বিশেষ সংসদ কর্তৃক গৃহীত আইন নয়। এ আইনের মূল বুনিয়াদ হলো ঈমান বা বিশ্বাস। আর এ বিশ্বাস আল্লাহ তায়ালার অস্তিত্বের প্রতি বিশ্বাসের পাশাপাশি মানবিক সামগ্রিক কর্মকাণ্ডের উপর তার ক্ষমতার স্বীকৃতিকে বুঝায়। তিনি মানবজাতির ব্যবহারিক জীবন নিয়ন্ত্রণের জন্য যে সকল বিধিনিষেধ তাঁর মনোনীত প্রেরিত মহানবীর উপর অবতীর্ণ করেছেন তাই ইসলামী আইন। এর উৎপত্তি ঘটে ইসলাম ধর্মের বিকাশের সাথে সাথেই।

৪. ইসলামপূর্ব আরবে পুত্র-কন্যার উত্তরাধিকার সম্পত্তি লাভের চিত্র

ইসলামপূর্ব আরব সমাজে জাহেলী রীতিনীতি প্রচলিত ছিলো। সে রীতি মোতাবেক নারী ও শিশু তাদের পিতা-মাতা ও অন্যান্য আত্মীয় স্বজনের উত্তরাধিকারী বলে পরিগণিত হতো না। নারীদের তারা পুরুষের অধীনস্থ সেবাদাসী বলে বিবেচনা করতো।[৩৩] নারী ও শিশু সকল কাজের উপযোগী নয় বলে তাদেরকে উত্তরাধিকারী হওয়ার অনুপযুক্ত বলে বিবেচনা করা হতো। উত্তরাধিকারী হওয়ার যোগ্যতা ছিলো ঘোড়ায় চড়তে পারা, ভার বহন করতে পারা, যুদ্ধ ও নিজ গোত্রের নিরাপত্তার দায়িত্ব পালন করতে পারা। তারাই উত্তরাধিকারী হতো যারা যুদ্ধ করতো ও গনীমতের মাল আহরণ করতে পারতো।[৩৪] প্রাপ্তবয়স্ক পুরুষ সন্তান, ভাই, ভাতিজা, চাচা প্রভৃতি পুরুষ আত্মীয়গণ উত্তরাধিকারী বিবেচিত হতেন।[৩৫] আল্লাহ তায়ালা আলকুরআনে উত্তরাধিকার সম্পত্তি অন্যায়ভাবে ভোগ করার চিত্র তুলে ধরেছেন এবং এর মাধ্যমে আরব সমাজের তৎকালীন কন্যা সন্তানকে বঞ্চিত করার চিত্র ও ফুটে উঠেছে। তিনি

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৩০ সিরাজুল ইসলাম তালুকদার, *আলকুরানিক আইন* (ঢাকা: আলীগড় লাইব্রেরী- ১৯৯৩), পৃ. ১।

৩১ আলকুরআন, ৭:৫।

৩২ আব্দুর রহিম, *ইসলামী আইনতত্ত্ব* (মাদ্রাজ: ১৯৯১), পৃ. ৫০; আব্দল মান্নান তালিব সম্পাদিত, *ইসলামী আইন ও বিচার*, প্রবন্ধকার, এমবি তাজ মোহাম্মদ, *ইসলামী আইন ও বিশ্বায়ন*, ৩য় সংখ্যা (ঢাকা: ইসলামিক ল' রিসার্চ সেন্টার এন্ড লিগ্যাল এইড বাংলাদেশ, ২০০৩), পৃ. ২৮।

৩৩ সৈয়দ জিল্লুর রহমান, *ইলমুল ফারায়েজ বা ইসলামে উত্তরাধিকার আইন*, পৃ. ১৩।

৩৪ সম্পাদনা পরিষদ, *ইসলামের পারিবারিক আইন*, দ্বিতীয় খন্ড (ঢাকা: বাংলাদেশ ইসলামিক ল' রিসার্চ এন্ড লিগ্যাল এইড সেন্টার-২০১৬), পৃ. ৪৯৫।

৩৫ সৈয়দ জিল্লুর রহমান, *ইলমুল ফারায়েজ বা ইসলামে উত্তরাধিকার আইন*, পৃ. ১৩।

বলেছেন, 'তোমরা উত্তরাধিকারের সকল সম্পদ ভক্ষন করে ফেলো।'[৩৬] অতপর তিনি বিস্তারিতভাবে আলকুরআনের বিভিন্ন আয়াতের মাধ্যমে মৃতের সম্পত্তি বণ্টনের পূর্ণাঙ্গ ব্যবস্থা তুলে ধরেছেন।[৩৭] 'সিহাহ সিত্তা'সহ অন্যান্য হাদিস গ্রন্থসমূহে এর বিভিন্ন দিক অলোচিত হয়েছে। মোদ্দাকথা হলো পিতা-মাতার পরিত্যক্ত সম্পত্তিতে শিশু ও কন্যাদের কোনো অধিকার ইসলামপূর্ব সমাজে ছিলোনা। উহুদ যুদ্ধের পর সর্বপ্রথম মীরাস বণ্টন সংক্রান্ত বিধান দানের মাধ্যমে ইসলামই সর্বপ্রথম শিশু ও নারীদের সম্পত্তিতে অধিকার প্রদানের ব্যবস্থা করেন। আল্লাহ তায়ালা আলকুরআনে দ্ব্যর্থহীনভাবে মৃতের পরিত্যক্ত সম্পত্তিতে সকলের প্রাপ্য অংশের ঘোষণা দিয়েছেন। তিনি বলেন, 'পিতা-মাতা ও আত্মীয়-স্বজনের পরিত্যক্ত সম্পত্তিতে পুরুষের প্রাপ্য অংশ রয়েছে। অনুরূপভাবে পিতা-মাতা ও আত্মীয়-স্বজনের পরিত্যক্ত সম্পত্তি কম হোক অথবা বেশি তাতে নারীদেরও প্রাপ্য অংশ রয়েছে। (উভয়ের জন্য) অংশ নির্ধারণ করে দেয়া হয়েছে।'[৩৮] মানব সভ্যতার ইতিহাসে এ প্রথম উত্তরাধিকারী হিসেবে নারীরা সম্পত্তিতে অধিকার পেলো। পুরুষের ন্যায় নারীর মালিকানা প্রতিষ্ঠিত হলো। পিতা-মাতা এবং নিকটাত্মীয়রা যা রেখে যাবে, তাতে নারী ও পুরুষ উভয়েরই সুনির্দিষ্ট অংশ রয়েছে, যা মহান আল্লাহ তায়ালা কর্তৃক নির্ধারিত– এ ঘোষণার মাধ্যমে ইসলামপূর্ব যুগে নারী বা কন্যা সন্তানের উত্তরাধিকার সম্পদ হতে বঞ্চিত হওয়ার রীতির অবসান হলো। আল্লাহ তায়ালা 'দুর্বল তথা শিশু এবং নারীদেরকে অত্যাচার ও নিগ্রহের কবল থেকে রক্ষা, তাদের প্রতি ইনসাফ ও অনুগ্রহের নির্দেশ দিয়ে এবং তাদের উত্তরাধিকার প্রাপ্তি নিশ্চিত করেছেন।'[৩৯] এ নির্দেশনার মাধ্যমে নীতিগতভাবে সকলের; বিশেষ করে নারী ও কন্যাদের তাদের পিতা-মাতার উত্তরাধিকার সম্পত্তিতে অধিকার প্রতিষ্ঠা লাভ করেছে।

৫. ইসলামে পুত্র-কন্যার উত্তরাধিকার সম্পত্তি লাভের ধারাক্রম

ইসলাম ধর্ম পরিপূর্ণরূপে বিকাশলাভের প্রেক্ষাপটে আরব সমাজের এক নারী রাসূল সা. এর কাছে এসে সর্বপ্রথম এ অভিযোগ করেন যে, তার স্বামীর সকল সম্পদ তার ভাই নিয়ে নিয়েছেন অথচ তার দুইটি কন্যা সন্তান আছে। তখন পর্যন্ত উত্তরাধিকার সম্পত্তি বণ্টনের ক্ষেত্রে আল্লাহ তায়ালার পক্ষ থেকে নির্দেশনা আসেনি। হাদীসে এসেছে–

> 'হযরত জাবির রা. থেকে বর্ণিত। তিনি বলেন, একদিন রসুল সা. এর কাছে সা'দ বিন রাবী'য় রা. এর স্ত্রী তার দু'জন মেয়েকে নিয়ে এসে আরজ করলেন, হে আল্লাহর রসুল সা., সা'দ বিন রাবী'য় আপনার সাথে উহুদ যুদ্ধে গিয়েছিলেন। সে যুদ্ধে তিনি শহীদ হন। এই

[৩৬] আলকুরআন ৮৯:১৯।

[৩৭] আলকুরআন ৪:১১-১২।

[৩৮] আলকুরআন ৪:৭।

[৩৯] এ আয়াত প্রসঙ্গে মুহাম্মাদ আলী আস্সাবূনী লেখেন, 'আল্লাহ তায়ালা এ আয়াতের মাধ্যমে দুই শ্রেণির দুর্বল তথা শিশু এবং নারীদেরকে অত্যাচার ও নিগ্রহের কবল থেকে রক্ষা করেছেন, তাদের প্রতি ইনসাফ ও অনুগ্রহের নির্দেশ দিয়েছেন এবং তাদের উত্তরাধিকার প্রাপ্তি নিশ্চিত করেছেন। তিনি সুস্পষ্টভাবে ঘোষণা করে দিয়েছেন যে, ছোট-বড় বা নারী-পুরুষে কোনো পার্থক্য নয়; বরং উত্তরাধিকার বণ্টনে তাদের প্রত্যেকেরই প্রাপ্য অংশ রয়েছে। তা পরিমাণে কম বা বেশি যাই হোক; বণ্টনকারী তাতে সন্তুষ্ট থাকুক বা না থাকুক।' মুহাম্মাদ আলী আস্সাবূনী, *আল মাওয়ারিস ফিশশারিয়্যাহ আল ইসলামিয়্যাহ ফি দাবিল কিতাব ওয়াসসুন্নাহ* (কায়রোঃ দার আল সাবুনী, ৫ম সংস্করণ, ১৪০৭ হিজরী), পৃ. ৫৩।

> তার দু'মেয়ে। তার সম্পদ তাদের চাচা নিয়ে গেছে; তাদের জন্য কিছুই বাকি রাখেনি। সম্পদ না থাকার কারণে তাদের বিয়েও দেয়া যাবে না। রসুল সা. বললেন, আল্লাহ এ ব্যাপারে সিদ্ধান্ত দিবেন। এর পরেই উত্তরাধিকার সংক্রান্ত আয়াতগুলো অবতীর্ণ হয়। তখন রসুল সা. তাদের চাচার কাছে খবর পাঠিয়ে বললেন, সা'দের দু'মেয়েকে দু'তৃতীয়াংশ দিয়ে দাও এবং তাদের মাতাকে এক অষ্টমাংশ প্রদান কর। আর যা কিছু অবশিষ্ট থাকবে, তা তুমি পাবে।[৪০]

এ ঘটনা পরবর্তী নির্দেশনায় উত্তরাধিকার সম্পত্তি বণ্টন ব্যবস্থাপনা সংক্রান্ত সর্বপ্রথম অবতীর্ণ বর্ণনায় মহান আল্লাহ তায়ালা বিস্তারিতভাবে বলেন,

> 'তোমাদের সন্তানদের ব্যাপারে আল্লাহর নির্দেশনা হল এই যে, একজন পুত্র, দুইজন কন্যার সমান হিস্‌সা পাবে। কিন্তু কেবল কন্যা দুইয়ের অধিক থাকলে তাদের জন্য পরিত্যক্ত সম্পত্তির দুই তৃতীয়াংশ, আর মাত্র এক কন্যা থাকলে তাদের জন্য অর্ধাংশ। তার সন্তান থাকলে তার পিতা-মাতা প্রত্যেকের জন্য পরিত্যক্ত সম্পত্তির এক ষষ্ঠাংশ; সে নি:সন্তান হলে এবং পিতামাতাই উত্তরাধিকারী হলে তার মাতার জন্য এক তৃতীয়াংশ; তার ভাইবোন থাকলে মাতার জন্য এক ষষ্ঠাংশ; এ সবই সে যা ওয়াসিয়ত করে তা দেয়ার এবং ঋণ পরিশোধের পর। তোমাদের পিতা ও সন্তানদের মধ্যে উপকারে কে তোমাদের নিকটতর তা তোমরা অবগত নও। নিশ্চয় এটা আল্লাহর বিধান; আল্লাহ সর্বজ্ঞ, প্রজ্ঞাময়। তোমাদের স্ত্রীদের পরিত্যক্ত সম্পত্তির অর্ধাংশ তোমাদের জন্য, যদি তাদের কোন সন্তান না থাকে এবং তাদের সন্তান থাকলে তোমাদের জন্য তাদের পরিত্যক্ত সম্পত্তির এক চতুর্থাংশ, আর তোমাদের সন্তান থাকলে তাদের জন্য তোমাদের পরিত্যক্ত সম্পত্তির এক অষ্টমাংশ; তোমরা যা ওয়াসিয়ত করবে তা দেয়ার পর এবং ঋণ পরিশোধের পর। যদি পিতামাতা ও সন্তানহীন কোন পুরুষ অথবা নারীর উত্তরাধিকারী থাকে তার এক বৈপিত্রিয় ভাই বা বোন, তবে প্রত্যেকের জন্য এক ষষ্ঠাংশ। তারা এর অধিক হলে সকলে সম অংশীদার হবে এক তৃতীয়াংশ; এটা যা ওয়াসিয়ত করবে তা দেওয়ার এবং ঋণ পরিশোধের পর, যদি কারো জন্য ক্ষতিকর না হয়। এটা আল্লাহর নির্দেশ, আল্লাহ সর্বজ্ঞ, সহনশীল।'[৪১]

এ আয়াতে দুই নারীর সমান একজন পুরুষের সম্পত্তি লাভের ঘোষণা এসেছে। আবার এ আয়াতেই বর্ণিত হয়েছে 'যদি কারো শুধুমাত্র এক কন্যা থাকে তাহলে সে মৃত ব্যক্তির সমূদয় সম্পদের অর্ধেক পাবে, আর দুই কন্যা থাকলে দুই তৃতীয়াংশ সম্পদ পাবে।' বাকী সম্পদ তার অন্যান্য নিকটাত্মীয়গণ পাবে। কিন্তু বিদায় হজ্বের পূর্বে সূরা নিসার ১৭৬ নম্বর আয়াত অবতীর্ণের মাধ্যমে কেবলমাত্র মৃত ব্যক্তি নিঃসন্তান হলে তার ভাই-বোন সম্পত্তি পাবে মর্মে ঘোষনা দেওয়া হয়েছে। কন্যা সন্তান যেহেতু পুত্র সন্তানের মতোই একই মায়েরই ঔরসজাত সন্তান; সে বিবেচনায় কন্যা থাকাবস্থায় মৃতের ভাই-বোন কোনভাবেই মীরাসী সম্পত্তি পায় না। পুত্র সন্তানের মতো কন্যা সন্তানও বাকী সম্পদের হকদার হয়। সন্তান থাকা অবস্থায় কোনোভাবেই মৃতের ভাই বা বোনরা পরিত্যক্ত সম্পদের অংশিদার হবেনা। এ 'কালালা' বা নি:সন্তান সংক্রান্ত আয়াতে 'ওয়ালাদ' শব্দের

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[৪০] তিরমিযি- ২০৯২ কিতাবুল ফারাইজ; ইবনু মাজাহ- ২৭২০ কিতাবুল ফারাইজ; আল মুসতাদরাক-৭৯৫৪, কিতাবুল ফারাইজ; আবু দাউদ- ২৮৯৩, বাবু মা জাআ ফী মীরাছিছ ছুলব।

[৪১] আলকুরআন ৪:১১-১২।

উল্লেখ আছে। যার বাংলা অর্থ সন্তান; পুত্র সন্তান নয়। আর এ সর্বশেষ মহান আল্লাহর কুরআনিক নির্দেশনার মাধ্যমেই উত্তরাধিকার সম্পত্তি বণ্টনের বিস্তারিত বিবরণ ও নির্দেশনার পরিসমাপ্তি ঘটে।

৬. ইসলামী উত্তরাধিকার আইনে সন্তানের সম্পদ লাভের মৌলিক ভিত্তি

ইসলামী বিধান মতে উত্তরাধিকারী আত্মীয়গণের মধ্যে কিছু আত্মীয়ের উত্তরাধিকার শর্তহীন ও প্রশ্নাতীত। যেমন, পুত্র-কন্যা, পিতা-মাতা ও স্বামী-স্ত্রী। এ তিন ধরনের মোট ছয় জন ব্যক্তির মধ্যে কোনো একজন মারা গেলে বাকি আত্মীয়গণ সর্বাবস্থায় উত্তরাধিকারী গণ্য হন। এদেরকে বলা হয় 'আসহাবে ফুরুজ' নির্দিষ্ট অংশভোগী। আলকুরআনে সন্তান 'ওয়ালাদ' শব্দ বলে পুত্র-কন্যাদের পিতা-মাতার সম্পত্তি প্রাপ্তিতে অন্তর্ভুক্তই শুধু করেননি, বরং অধিকার ও সম্পদ গ্রহণের বিষয়টি একইভাবে সুনিশ্চিত করেছেন।[৪২] কেউ ইচ্ছা করে পুত্র বা কন্যা হিসেবে জন্মগ্রহণ করেন না; আল্লাহ তায়ালা নিজের ইচ্ছানুযায়ী মানুষকে সন্তান দিয়ে থাকেন।[৪৩] আল্লাহ তায়ালার সৃজিত বান্দাহ হিসেবে পুত্র-কন্যা তাঁর কাছে উভয়ই সমান। তাঁর নির্দেশনা অনুযায়ী সন্তানদের পরস্পরের মধ্যে সম্পদের বণ্টন পদ্ধতি হবে-'একজন পুরুষ দুইজন নারীর সমান হিস্যা পাবে'- এ অনুসারে। 'সিয়াকে কালাম' বা বক্তব্যের ধরন দেখে বুঝা যায় যে, 'একজন পুরুষ দুইজন নারীর সমান হিস্যা হিসেবে' সন্তানেরা সমস্ত সম্পদ পাবে। আর এ সূত্র মতে একজন মাত্র পুত্র থাকলে সে সম্পূর্ণ সম্পদের মালিক হবে, আবার শুধুমাত্র কন্যা থাকলে সেও সম্পূর্ণ সম্পদের মালিকানা লাভ করবে। কেননা, উত্তরাধিকারী না থাকার কারণে সম্পদ বণ্টনের প্রয়োজন নেই। আবার কারো কেবল এক বা একাধিক কন্যা সন্তান থাকলে পিতা-মাতার পরিত্যক্ত সম্পত্তি প্রথমত সম্পূর্ণ সম্পত্তির অর্ধেক বা দুই তৃতীয়াংশ কন্যা সন্তান বা সন্তানেরা পাওয়ার পর বাকী অবশিষ্ট সম্পদ *'রদ'* বা ফেরত হয়ে আবার কন্যারা পাবে। ইসলামের প্রথম যুগের বিশেষ করে উহুদ যুদ্ধে শহীদ হওয়া সা'দ বিন রাবীয় রা. এর ভাই তার সকল পরিত্যক্ত সম্পত্তি দখল করলে তার স্ত্রী রাসূল সা. এর কাছে অভিযোগ করার পর তার উত্তরে সূরা নিসার ১১-১২ নং আয়াত অবতীর্ণ হয়। এখানে কন্যা একজন হলে সম্পত্তির অর্ধেক আর দুই বা ততোধিক হলে দুই তৃতীয়াংশ মীরাসী সম্পত্তি পাবে মর্মে ঘোষণা এসেছে। অবশিষ্ট সম্পত্তি মৃতের ভাই-বোন পাবে। উত্তরাধিকার সম্পত্তি বণ্টন ব্যবস্থাপনার এটি প্রথম আল্লাহ প্রদত্ত বিধান। বাংলাদেশে এ বিধানের উপর ভিত্তি করে মৃতের ভাই বা বোনেরা যদিও সম্পদ পেয়ে থাকে। বাস্তবিক পক্ষে এ বিধান সঠিক নয়; কারণ রাসূল সা. এর বিদায় হজ্বের পূর্বে উত্তরাধিকারের সর্বশেষ অবতীর্ণ 'কালালা' সংক্রান্ত আয়াতে মৃতের মীরাসী সম্পত্তির হকদার হবে তার ভাই-বোন যদি তিনি নিঃসন্তান হন মর্মে শর্তারোপ করা হয়েছে। সূরা নিসার ১৭৬ নং *কালালা*

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[৪২] 'তোমাদের সন্তানদের ব্যাপারে আল্লাহর নির্দেশনা হল এই যে, একজন পুত্র, দুইজন কন্যার সমান হিস্সা পাবে।' আলকুরআন ৪:১১-১২। 'ওয়ালাদ' শব্দের অর্থ সদ্যভূমিষ্ট শিশু। সে জন্য 'ওয়ালাদ' শব্দের মাধ্যমে শিশুপুত্র, শিশুকন্যা বা লিঙ্গহীন অথবা হিজড়া সকল শিশুকে বুঝাবে। শাহ আব্দুল হান্নান, *কন্যা সন্তানের উত্তরাধিকার: একটি পর্যালোচনা*, বাংলাদেশ জার্নাল অব ইসলামিক থট, ভ-১১, নম্বর-১৬, জুলাই-ডিসেম্বর-২০১৫, পৃ. ১৩১।

[৪৩] আল্লাহ তায়ালা বলেন, "আকাশ মণ্ডলী ও পৃথিবীর আধিপত্য আল্লাহ তায়ালারই। তিনি যা ইচ্ছা তাই সৃষ্টি করেন। তিনি যাকে ইচ্ছা কন্যা সন্তান দান করেন এবং যাকে ইচ্ছা পুত্র সন্তান দান করেন। অথবা দান করেন পুত্র ও কন্যা উভয়ই এবং যাকে ইচ্ছা তাকে করে দেন বন্ধ্যা; তিনি সর্বজ্ঞ, সর্বশক্তিমান।" আলকুরআন ৪২:৪৯।

সংক্রান্ত আয়াতই প্রমাণ করে মৃতের সন্তান থাকাবস্থায় ভাই-বোন সম্পত্তি পাবে না।[৪৪] আর পুত্রের ন্যায় কন্যাও সন্তান হিসেবে বিবেচিত। অন্যদিকে সূরা নিসার ৩৩ নং আয়াতে আল্লাহ তায়ালা ‘পিতা মাতা ও আত্মীয়-স্বজনেরা যা রেখে যাবেন তাতে প্রত্যেককে মাওলা বানিয়েছি’ মর্মে ঘোষণা দিয়ে পুত্রদের সাথে কন্যাদেরকেও অন্তর্ভূক্ত করেছেন।[৪৫] আবার অনেক সাহাবীর মতামত ও আব্দুল্লাহ বিন আব্বাস রা. এর হাদীসটিও এখানে প্রাসঙ্গিক; তিনি বলেছেন, সম্পদ মূলে সন্তানের জন্য। আল্লাহ তায়ালা সেখান থেকে পিতা-মাতা ও স্বামী-স্ত্রীকে ছিনিয়ে নিয়ে হিস্যা দিয়েছেন।[৪৬] তার এ বক্তব্য ‘সম্পদে সন্তানের হক বেশী’ এ দাবীকে সত্যায়িত করে।

৭. পুত্র ও কন্যার অংশ

ইসলামের উত্তরাধিকার বণ্টনের ভাগী হবে তার ওয়ারিসগণ। আবূ হুরায়রাহ (রা.) থেকে বর্ণিত রাসূলুল্লাহ স. এর প্রসিদ্ধ বাণী,

> ‘আমি মুমিনদের প্রতি তাদের নিজেদের চেয়েও বেশি দায়িত্ববান। অতএব, তাদের কেউ যদি এমন ঋণ রেখে মারা যায়, যা শোধ করার সামর্থ্য তার ছিল না, তাহলে তা শোধ করার দায়িত্ব আমার (তথা মুসলিম রাষ্ট্রপ্রধানের)। পক্ষান্তরে যে ব্যক্তি সম্পদ রেখে মারা যায়, সে সম্পদের ভাগী হবে তার ওয়ারিসগণ।’[৪৭]

আল্লাহ তায়ালা বলেন, ‘তোমাদের সন্তানদের ব্যাপারে আল্লাহর নির্দেশনা হল এই যে, একজন পুত্র, দুইজন কন্যার সমান হিস্সা পাবে।’[৪৮] এ আয়াতের মাধ্যমেই মূলত পিতা-মাতার পরিত্যক্ত সম্পত্তির হকদার হয় পুত্র-কন্যারা। আর সম্পদ পায় দুইজন কন্যার সমান একজন পুত্র।

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৪৪ ‘লোকে তোমর নিকট ব্যবস্থা জানতে চায়। বল, পিতা-মাতাহীন নিঃসন্তান ব্যক্তি সম্বন্ধে তোমাদেরকে আল্লাহ ব্যবস্থা জানাচ্ছেন, কোন পুরুষ মারা গেলে সে যদি সন্তানহীন হয় এবং তার এক বোন থাকে তবে তার জন্য পরিত্যক্ত সম্পত্তির অর্ধাংশ এবং সে যদি সন্তানহীনা হয় তবে তার ভাই তার উত্তরাধিকারী হবে।’ আলকুরআন: ৪:১৭৬।

৪৫ “আর পিতা-মাতা ও আত্মীয় স্বজনেরা যা কিছু ছেড়ে যাবেন তাতে পুরুষ ও নারীর প্রত্যেককে আমরা মাওলা বানিয়েছি।” আলকুরআন ৪:৩৩। এ আয়াতে বর্ণিত মাওলা শব্দের অর্থ অবশিষ্টাংশভোগী উত্তরাধিকারী, যাকে অনেকেই ‘আসাবা’ নাম দিয়ে থাকেন। সুতরাং নির্দিষ্টভোগী অংশিদাররা অংশ নেওয়ার পর পুত্র সন্তানের মতো কন্যা সন্তানও আসাবা হিসেবে (অবশিষ্টভোগী হিসাবে) বাকী সম্পত্তি পাবে।

৪৬ হযরত আব্দুল্লাহ বিন আব্বাস, আব্দুল্লাহ বিন যুবায়ের রা. সহ কিছু সংখ্যক সাহাবী ও অন্য একদল ফুকাহার মতে সন্তান পুত্র হউক বা কন্যা; কোনো ধরণের সন্তানের উপস্থিতিতে ভাই-বোন কোনো উত্তরাধিকারী বলে বিবেচিত হবেন না। যেমন হযরত আতা রা. থেকে বর্ণিত, তিনি বলেন, “ইবনে আব্বাস বলতেন মালের হকদার হলেন সন্তানগণ। সেখান থেকে আল্লাহ তায়ালা স্বামী- স্ত্রীদের জন্য কিছু সম্পদ ছিনিয়ে দিয়েছেন।” শাহ আব্দুল হান্নান, *কন্যাসন্তানের অধিকার: একটি সার্বিক পর্যালোচনা*, বাংলাদেশ জার্নাল অব ইসলামিক থট, ভ-১৭,নং-১৮, পৃ. ১৫৪। আব্দুর রাজ্জাক, *কিতাবুল ফারায়েজ*, (বয়রুত: দারুল কিতাব-১৯৭৮), পৃ. ৩৮। আল মুছান্নাফ, ভ. ৮, পৃ. ৪৫৮।

৪৭ মুহাম্মদ ইবনে ঈসমাঈল আল বুখারী, *আলজামি আসসাহীহ* (বয়রুত: দার ইবনে কাছির, ১৯৮৭), হাদীস নং-৬৩৫০, পৃ. ৪৪২।

৪৮ আলকুরআন ৪:১১।

৮. সম্পদ বণ্টনের ক্ষেত্রে ইসলামের মৌলিক দৃষ্টিভঙ্গি

মীরাসের কুরআনিক নির্দেশনা গভীরভাবে দেখলে সহজেই বুঝা যায় যে সম্পদ বণ্টনের ক্ষেত্রে ইসলাম যে মৌলিক নীতিমালাকে সামনে রেখেছে,তা হলো ব্যক্তির আর্থিক দায়ভার ও তার চাহিদার বিবেচনা। সে বিবেচনায় একজন নারীর যাবতীয় ব্যয় নির্বাহের দায়িত্ব দেয়া হয়েছে তার পরিবারের পুরুষ সদস্যদের উপর।[৪৯] সে কখনো নিজের বাবা, কখনো ভাই, কখনো স্বামী আবার কখনো সন্তানের কর্তৃত্বাধীন থাকে। তার যাবতীয় প্রয়োজন মেটাবার পাশাপাশি নৈতিক দায়িত্ব থাকে তাদের উপর। ঐসব পুরুষ তাদের নিজেদের প্রয়োজন নিজেরা মেটানোর পাশাপাশি তাদের অধীনস্থ নারীদের মৌলিক প্রয়োজন মেটাবারও ব্যবস্থা গ্রহণ করতে বাধ্য। অথচ ইসলামে বর্ণিত নির্দেশনায় কোনো নারীরই তার নিজের মৌলিক প্রয়োজন মেটাবার কথা তাকে ভাবতে হয় না। যেমন নিম্নে কিছু ধারণা উপস্থাপিত হলো–

৯.১ নারীর অর্থনৈতিক ব্যয় নির্বাহের স্বরূপ

ব্যয় নির্বাহের দিক বিবেচনা করলে একজন নারীর অর্থনৈতিক জীবনকে দুই ভাগে ভাগ করা যায়। যথা–

৯.১.১ বিবাহপূর্ব সময়ে নারীর ব্যয়নির্বাহ

জন্মের পর থেকে নিয়ে বিবাহ পর্যন্ত একজন নারীর যাবতীয় ব্যয় নির্বাহের দায়িত্ব তার বাবা কিংবা ভাইদের উপর। তাকে তার নিজের আর্থিক চাহিদা মেটানো নিয়ে এভাবে গলদঘর্ম হতে হয় না, যেভাবে হতে হয় তারই পরিবারের একজন পুরুষ সদস্যের। পুরুষটিকে তার নিজের সকল প্রয়োজন মেটাবার পাশাপাশি নিজের বিবাহ এবং সংসার গঠনের লক্ষ্যে আর্থিক প্রস্তুতি নিতে হয়। যেমন–

> আবূ সাঈদ আল-খুদরী রা. থেকে বর্ণিত, তিনি বলেন: রাসূলুল্লাহ স. বলেছেন, যে ব্যক্তি তিনটি কন্যার ভরণপোষণ করলো, তাদেরকে শিষ্টাচার শেখালো, (সৎ পাত্রে) বিবাহ দানের ব্যবস্থা করলো এবং তাদের প্রতি সদাচরণ করলো, তার জন্যে জান্নাত অবধারিত।[৫০]

কোনো কোনো বর্ণনায় তিন জন বোন/দুই জন বোন এবং কোনো কোনো বর্ণনায় তিন কন্যা/ দুই কন্যা/এক কন্যার কথাও বর্ণিত হয়েছে। এ থেকে পরিষ্কার বুঝা যায় যে, বিষয়টি বাবা-ভাইসহ সকল অভিভাবককেই অন্তর্ভুক্ত করে এবং বিবাহের ব্যবস্থা না করা পর্যন্ত এ দায়িত্ব অব্যাহত থাকে। তাছাড়া হাদীসে উল্লেখিত অব্যয়টি ব্যাপকার্থবোধক, যা দ্বারা এমন সরল অভিভাবককেই বুঝায়, যারা বোন কিংবা কন্যাদের ভরণ পোষণ, শিক্ষা-দীক্ষা ও বিবাহ প্রদানে নিষ্ঠার স্বাক্ষর রাখে। এমনকি ইসলামী শারীয়ার বিধান অনুযায়ী একজন পুত্র প্রাপ্তবয়স্ক হয়ে গেলে তার ব্যক্তিগত খরচাদি দিতে তার পিতা বাধ্য নন।[৫১] অথচ কন্যাটিকে বিবাহ দিয়ে স্বামীর দায়িত্বে না দেয়া পর্যন্ত পিতা তার যাবতীয় খরচ মেটাতে বাধ্য। পিতার অবর্তমানে তা করবে তার দাদা, চাচা, ভাই কিংবা অন্য

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[৪৯] আলকুরআন ২:২৩৬; আবু দাউদ, হাদীস নং ৫১৪৭; মুসলিম, হাদীস নং ১০০২; মুসনাদ, হাদীস নং ৪২৩৭।

[৫০] সুলাইমান ইবনে আল আসআস আবু দাউদ, আল সুনান, (বায়রুতঃ দারুল ফিকর, ১৯৮৭), হাদীস নং- ৫১৪৭।

[৫১] আলকুরআন ৬:১৫২; ১৭:৩৪; ১৮:৮২।

কোনো পুরুষ অভিভাবক।[৫২] কিন্তু এমনও পরিবার আছে মৃত ব্যক্তি যেখানে তার স্ত্রী ও বড় কন্যার সাথে নাবালক সন্তান রেখে মারা যান এবং স্ত্রী ও বড় কন্যাটিকে সংসার পরিচালনার দায়িত্ব নিতে হয়। ইসলামী শরীয়া অনুযায়ী মৃত ব্যক্তির পিতা বা চাচা তাদের উপর অর্পিত দায়িত্ব পালন না করার কারণে অথবা কেউই না থাকার কারণে এমন পরিস্থিতি তৈরী হয়। তখন স্ত্রী বা বড় কন্যাকেই যাবতীয় অর্থনৈতিক দায় দায়িত্ব পালন করতে হয়। এ অস্বাভাবিক সংঘটিত পরিস্থিতি কারো দায়িত্ব অবহেলা বা শরয়ী বিধান অমান্যের ফলে হওয়ার ফলে মীরাসী সম্পত্তি বণ্টন বিবেচনায় কন্যাকে সংসারে বিশেষ অবদানের জন্য মীরাসী সম্পত্তির বেশী অংশ দেওয়ার কোন সুযোগ নেই। তবে পিতা-মাতা জীবদ্দশায় পুত্র-কন্যাদের মাঝে সম্পত্তি সমান ভাগ করে দিতে পারেন। এ ছাড়া জীবদ্দশায় কাউকে বেশী বা কম দিতে পারেন না।

৯.১.২ বিবাহ পরবর্তী সময়ে নারীর ব্যয়নির্বাহ

বিবাহের পর স্ত্রী যাবতীয় ব্যয় নির্বাহের দায়িত্ব তার স্বামীর। উপরন্তু বিবাহোত্তর তার নিজের কাছে একটা রিজার্ভ ফান্ড থাকার ব্যবস্থা ইসলাম করেছে। সে তার স্বামীর কাছ থেকে একটা উল্লেখযোগ্য পরিমাণ মোহরানা[৫৩] পেয়ে থাকে, যা তার জন্য নিঃসন্দেহে একটা আপদকালীন তহবিল। বাংলাদেশের প্রেক্ষাপটে যৌতুকের কারণে এবং সামাজিক বিভিন্ন প্রথা ও নিয়মের কারণে বিয়ের সময়ে এ মহর নির্ধারনের পরিমাণ বিভিন্ন হয়ে থাকে এবং তা সময়মতো স্ত্রীকে প্রধানের হার খুবই কম। অথচ স্ত্রীকে মহর প্রদান করা প্রত্যেক মুসলিমের জন্য ফরজ। মহান আল্লাহ বলেন, 'আর তোমরা স্ত্রীদের মহর খোলামনে আনন্দচিত্তে দিয়ে দাও। তবে তারা নিজেরাই যদি সন্তুষ্টচিত্তে (মহরের) কিছু অংশ মাফ করে দেয়, তবে তোমরাও সানন্দে তা গ্রহণ করতে পারো।'[৫৪]

অতএব, একজন কন্যা ছোট কিংবা বড় একটা ফান্ড নিয়ে এসে তার সাংসারিক জীবন শুরু করলো; অথচ দৈবাৎ কোনো দুর্ঘটনা না ঘটলে হয়ত তার সে ফান্ডে কোনো দিনই হাতও দেওয়া লাগে না। পক্ষান্তরে যে লোকটির সাথে তার বিবাহ হলো সে হয়ত দীর্ঘদিন ধরে আয় রোজগার করে বিবাহের জন্য একটা ফান্ড জমা করেছিল। এবার সে ফান্ড থেকে সে তার স্ত্রীর মোহরানাসহ বিবাহের আনুষঙ্গিক অন্যান্য খরচ মেটাতে বাধ্য। উপরন্তু, বিবাহের পর থেকে তার স্ত্রীর যাবতীয় খরচ মেটাবার দায়িত্বও তারই উপর। স্ত্রীদের ব্যয় নির্বাহের দায়িত্বের কথা জানিয়ে মহান আল্লাহ বলেন-

> তোমরা তাদের ভরণ পোষণ দেবে। সচ্ছল ব্যক্তি দেবে তার (আর্থিক) সচ্ছলতা অনুযায়ী, আর দরিদ্র ব্যক্তি দেবে তার সামর্থ্য অনুযায়ী প্রচলিত নিয়ম ও যুক্তি সংগত পরিমাণে। এটি কল্যাণপরায়ণদের উপর আরোপিত একটি কর্তব্য।[৫৫]

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[৫২] তদেব।

[৫৩] আরবী 'মহর' শব্দটিকে বাংলায় আমাদের সমাজে মোহরানা বলা হয়। বিবাহ করার জন্য স্বামীর পক্ষ থেকে স্ত্রীকে এই মহর প্রদান করা ফরয। মহর বিবাহের প্রাক্কালেই নির্ধারণ করে নিয়ে তা প্রদান করতে হয়। তবে স্ত্রীর সম্মতিক্রমে তা পরেও পরিশোধ করা যায়।

[৫৪] আলকুরআন ৪:৪।

[৫৫] আলকুরআন ২:২৩৬। আয়াতটিতে যদিও তালাকপ্রাপ্তাদের ভরণ-পোষণের ব্যাপারে বলা হয়েছে, তা বিবাহ বন্ধনে থাকা স্ত্রীদের বেলায় বরং আরো বেশি প্রযোজ্য।

আবূ মাসঊদ আল বাদরী রা. থেকে বর্ণিত, তিনি নবী স. থেকে বর্ণনা করেন যে, তিনি বলেন- 'মুসলিম যখন আল্লাহর নিকট সাওয়াব প্রাপ্তির আশায় পরিবারের জন্য ব্যয় করে, তখন তা তার জন্য *সাদাকাহ* বলে গণ্য হয়।'[৫৬] এ ব্যাপারে 'আমর ইবন উমাইয়্যা রা. এর বর্ণনাটি আরো ব্যাপকার্থক। তিনি রাসূলুল্লাহ স. কে বলতে শুনেছেন যে, তুমি তোমার পরিবারের প্রতি যত ধরনের দায়িত্ব পালন করো, তা সবই *সাদাকাহ*।[৫৭] শুধু তাই নয়, সামর্থ্য থাকা সত্ত্বেও কোনো স্বামী পরিবারের ভরণ-পোষণে গড়িমসি করলে রাসূলুল্লাহ স. ন্যায়সংগতভাবে স্বামীর অনুমতি ছাড়াই তার সম্পদ থেকে ব্যয় করার ব্যাপারেও অনুমতি প্রদান করেছেন। অথচ স্বামীর অর্থ সঙ্কট থাকলেও স্ত্রীকে কখনো স্বামীর ভরণ-পোষণের দায়িত্ব ইসলাম দেয়নি। তবে প্রয়োজনে ও পরিস্থিতির কারণে শরয়ী বিধান পালনের মাধ্যমে সঙ্কট মোকাবিলায় স্ত্রী অর্থ উপার্জনে ইসলামে কোন নিষেধ নেই।

৯.২ অভিভাবক ও ব্যবস্থাপনার দায়িত্ব

পিতার অবর্তমানে সাধারণভাবে ছেলেই হলো সংসারের কর্তা। কিন্তু ব্যতিক্রম ছাড়া অধিকাংশ পরিবারেই ছেলে হয় সংসারের পরবর্তী কর্ণধার। পরিবারের সকল অর্থনৈতিক কার্যক্রম তাকেই পরিচালনা করতে হয়। এসব বিবেচনা করেই মহান আল্লাহ পুত্রদেরকে কন্যাদের চেয়ে ভাগ বেশি দিয়েছেন। পুরুষদের এ বিশাল দায়িত্ব এবং এর কারণে তাদের যে মর্যাদা দেয়া হয়েছে সে কথা মহান আল্লাহ পবিত্র কুরআনে সুস্পষ্টভাবে ঘোষণাও করেছেন। আল্লাহ তায়ালা বলেন,

> 'পুরুষরা নারীদের অভিভাবক ও ব্যবস্থাপক। কারণ, আল্লাহ তাদের একের উপর অপরকে শ্রেষ্ঠত্ব দিয়েই সৃষ্টি করেছেন। তাছাড়া পুরুষরা তাদের (নারীদের) জন্যে নিজেদের ধন-সম্পদ ব্যয় করে। (কাজেই) সতী সাধ্বী স্ত্রীরা (স্বামীর) অনুগত হয়ে থাকে। তারা স্বামীর অনুপস্থিতিতে হিফাযাত করে আল্লাহ তাদেরকে যা হিফাযাত করার নির্দেশ দিয়েছেন।[৫৮]

সুতরাং নারীদের উপর পুরুষদের অভিভাবকত্বের অন্যতম কারণ হচ্ছে, তাদের সামাজিক নিরাপত্তা ও অর্থনৈতিক চাহিদা পূরণে পুরুষের ভূমিকা। এই ভূমিকা পালনের জন্য আর্থিক সচ্ছলতা অন্যতম প্রধান নিয়ামক বিধায় মহান আল্লাহ সম্পদ বণ্টনে পুরুষদেরকে নারীদের তুলনায় মীরাসী সম্পত্তিতে অধিক অংশ দিয়েছেন। মূলত এ কারণেই একজন ভাইকে ইসলাম তার বোনের তুলনায় মীরাসী সম্পত্তির ভাগ বেশি দিয়েছে।

এ প্রসঙ্গে শাইখ মুহাম্মদ 'আলী আস্ সাবূনী রহ. একটি সুন্দর উদাহরণ টেনেছেন। তিনি বলেছেন-

> কোন ব্যক্তি যদি তার মৃত্যুকালে তিন হাজার রিয়াল[৫৯] এবং একটি ছেলে ও একটি মেয়ে রেখে যায়। ইসলামের উত্তরাধিকার বিধান মতে, ছেলেটি এখান থেকে দুই হাজার রিয়াল এবং মেয়েটি এক হাজার রিয়াল পাবে। এমতাবস্থায় ছেলেটি যদি বিবাহ করতে গিয়ে তার

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[৫৬] মুসলিম ইবনে হাজ্জাজ আল নিসাপূরী, আল মুসনাদ আল সাহীহ, (বায়রুতঃ দার ইয়াহহিয়া আল তুরাদ আল আরাবি, ১৬১৫ হিজরী), হাদীস নং-১০০২।

[৫৭] আবু হাতিম মুহাম্মদ ইবনে হিব্বান, আল মুসনাদ আস সহীহ্, (বায়রুতঃ মুআস্সাসাতু আল রিসালাহ, ১৯৯৩), হাদীস নং-৪২৩৭।

[৫৮] আলকুরআন ৪:৩৪।

[৫৯] সৌদি আরবে প্রচলিত মুদ্রাকে রিয়াল বলে।

নববধুকে দুই হাজার রিয়াল মোহরানা দিয়ে দেয়, তাহলে সে রিক্তহস্ত হয়ে যায়। অপরদিকে মেয়েটির বিবাহ হলে সে তার স্বামীর কাছ থেকে দুই হাজার রিয়াল মোহরানা পেল। বাবার থেকে প্রাপ্ত এক হাজারের সাথে এখন আরো দুই হাজার মিলে সে মোট তিন হাজার রিয়ালের মালিক হলো। অথচ তার ভাই পিতার সম্পদ থেকে তার দ্বিগুণ পেয়েও এখন রিক্তহস্ত। এরই মাঝে তাকে সংসারের যাবতীয় ব্যয়ভার বহন করতে হবে। পক্ষান্তরে বোনের তিন হাজার রিয়াল সংরক্ষিত থেকে যাবে। কারণ কোনো প্রকার আর্থিক দায়ভারই তার উপর নেই।[৬০]

৯.৩ সময়ের বিবেচনায় উত্তরাধিকারের অবস্থান

এ প্রসঙ্গে ড. মুহাম্মদ 'আম্মারাহ মীরাস সংক্রান্ত ড. সালাহ উদ্দীন সুলতানের বইয়ের ভূমিকা লিখেছেন, মীরাস বণ্টনের বেলায় যে তারতম্য তা নারী কিংবা পুরুষ বিবেচনায় নয়; বরং তার ভিত্তি হলো তিনটি;

এক. মৃত ব্যক্তির ওয়ারিসের নৈকট্যের (সম্পর্কের) স্তর। অর্থাৎ মৃত ব্যক্তির সাথে ওয়ারিসের সম্পর্ক যত কাছের হবে মীরাসী অংশে তার প্রাপ্যও তত বেশি হবে।

দুই. সময়ের বিবেচনায় উত্তরাধিকারীদের অবস্থান। অর্থাৎ যেসব উত্তরাধিকারীর জীবনকাল সামনে চলমান তথা যাদের আয়ুষ্কাল সাধারণভাবে বেশি হওয়ার কথা, তাদের মীরাস বেশি। পক্ষান্তরে যাদের জীবনকাল পিছনে চলমান তথা যাদের আয়ুষ্কাল ফুরিয়ে যাবার পথে, তাদের মীরাস কম। এক্ষেত্রে পুরুষ কিংবা নারীর কোনো বিষয় নেই। যেমন, মৃতব্যক্তির মেয়ে তার (মৃতব্যক্তির) মায়ের চেয়ে ভাগ বেশি পায়; অথচ তারা দুইজনেই নারী। এমনকি সে (মেয়ে) মৃতব্যক্তির পিতার চেয়েও ভাগ বেশি পায়। একইভাবে ছেলে পিতার চেয়ে ভাগ বেশি পায়; অথচ তারা দুইজনেই পুরুষ।

তিন. ইসলামী শারীয়াহ যে সকল অর্থনৈতিক দায়ভার কোনো ওয়ারিসের উপর আরোপ করে সে বিবেচনায়ও মীরাস বণ্টনে তারতম্য হয়।[৬১]

এগুলোই হলো মীরাস বণ্টনে নারী এবং পুরুষের মধ্যে তারতম্যের আসল ভিত্তি। মহান আল্লাহ একটি ছেলেকে দুইটি মেয়ের সমান ভাগ দিতে বলেছেন। কারণ ছেলেটি এখানে মেয়েটির সমস্তরের হওয়া সত্ত্বেও তার উপর অন্য একটি মেয়ে তথা তার স্ত্রীর দায়িত্ব বর্তিয়েছে। অথচ মেয়েটির ব্যয়ভার বহনের দায়িত্ব পড়েছে তার সাথে সংশ্লিষ্ট আরেকটি পুরুষ তথা তার স্বামীর উপর। এ দৃষ্টিকোণ থেকে ইসলাম ছেলেটির প্রতিও জুলুম করেনি; বরং মেয়েটিকে আরো মর্যাদাবান করেছে এভাবে যে, আপদকালে তার জন্য একটি অর্থনৈতিক অবলম্বনের ব্যবস্থা করেছে। তবে এই ছেলে ও মেয়ের মাঝে ২ঃ১ এর ভিত্তিতে সম্পদ বণ্টনের বিষয়টি শুধুমাত্র মীরাসী সম্পত্তি বণ্টনের ক্ষেত্রে প্রযোজ্য। জীবদ্দশায় কোন ব্যক্তি কোন কিছু সন্তানদের মাঝে বণ্টন করে দিতে চাইলে সমান

[৬০] মুহাম্মদ আলী আল সাবুনী, *আল মাওয়ারিস ফিশশারিয়্যাহ আল ইসলামিয়্যাহ ফি দাবিল কিতাব ওয়াসসুন্নাহ*, (কায়রোঃ দার আল সাবুনী, ৫ম সংস্করণ, ১৪০৭ হিজরী), পৃ. ২০।

[৬১] সালাউদ্দিন সুলতান, *মীরাস আর মারআত ওয়া কাদিয়া আল মুসাওয়াত*, (কায়রোঃ দার নাহদা আলমিসর, ১৯৯৯), পৃ. ৩-৫।

দুইভাগ করে দিতে হবে। কোনক্রমেই এর ব্যতিক্রম করা যাবে না। ব্যক্তির মৃত্যু পর মীরাসী সম্পত্তি বণ্টন ব্যবস্থাপনায় ২ঃ১ এর বিধান মহান আল্লাহর নির্দেশনা। এই নির্দেশনা বর্ণনার শেষে সূরা নিসার ১১ নং আয়াতের শেষে আল্লাহ তায়ালা ঘোষনা দিয়েছেন এই বলে যে 'উপকারে কে তোমাদের নিকটতর তা তোমরা অবগত নও, নিশ্চয়ই এটি আল্লাহর বিধান'।[৬২] আর উক্ত সূরার ১৩ এবং ১৪ নং আয়াতে এই বিধানকে সীমা হিসেবে ঘোষনা দিয়ে তা পালনের আবশ্যকতা এবং পালনের মাধ্যমে জান্নাত লাভ এবং এই বিধান না মেনে সীমালংঘন করলে স্থায়ী জাহান্নামের কথা বলা হয়েছে।[৬৩]

১০. পুরুষদেরকে সম্পদের ভাগ বেশি দেয়ার কারণ বিশ্লেষণ

একথা অস্বীকার করার কোনো উপায় নেই যে, ইসলামের উত্তরাধিকার বিধানে পুরুষ উত্তরাধিকারীদেরকে কোথাও কোথাও নারী উত্তরাধিকারীদের তুলনায় অংশ বেশি দেয়া হয়েছে। তবে সে ক্ষেত্রে মহামহিম স্রষ্টার বিজ্ঞানময় ও ইনসাফপূর্ণ বিধানের ব্যাপারে বিশ্বাসের কমতি থাকলে সংশয়ের সৃষ্টি হওয়া অস্বাভাবিক নয়। তাই কোথায় কোথায় এবং কেন একজন পুরুষ উত্তরাধিকারীকে মীরাসী সম্পত্তি বেশি দেয়া হলো তা জানা প্রয়োজন। উত্তরাধিকার বণ্টনে ইসলাম যে দৃষ্টিভঙ্গিটি সামনে রেখেছে তা হলো- মৃত ব্যক্তির সাথে সম্পর্কের দিক থেকে কে আগে এবং কে পিছে? কার প্রতি মৃত ব্যক্তির দায়ভার কী পরিমাণ ছিল? এবং মৃত্যুর পর ঐ মৃতব্যক্তির রেখে যাওয়া ওয়ারিসদের ব্যাপারে কার দায়বদ্ধতা কতটুকু? অথবা সে বেঁচে থাকলে তার প্রতি কার দায়িত্ব কর্তব্য বেশি ছিল? ইত্যাকার বিষয়গুলো বিবেচনায় রাখা হয়েছে। এ প্রসঙ্গে শাইখ সাবূনী[৬৪] প্রশ্নের অবতারণা করে বলেন, একজন নারী পুরুষের তুলনায় (শারীরিকভাবে) দুর্বল বিধায় সে অর্থের অধিক মুখাপেক্ষী, তবুও ইসলাম কেন তাকে পুরুষের অর্ধেক ভাগ দিলো? এমন প্রশ্নের সৃষ্টি হওয়া অস্বাভাবিক নয়। এরপর তিনি এর জবাব দিয়ে বলেন- ইসলামী শারী'আয় মীরাস বণ্টনে নিঃসন্দেহে বহুবিধ হিমকাত রয়েছে। তন্মধ্যে নিম্নোক্ত পাঁচটি হিকমাত তথা কারণ অত্যন্ত সুস্পষ্টরূপে প্রতিভাত হয়। আর তা হলো-

এক. একজন নারীর ব্যক্তিগত প্রয়োজন ও চাহিদা সীমাবদ্ধ না হলেও অর্থনৈতিক ব্যয় নির্বাহের বাধ্যবাধকতায় তিনি পুরুষের তুলনায় অধিকতর সুবিধাজনক অবস্থানে থাকেন। কেননা, তার ব্যয়নির্বাহের দায়িত্ব তার স্বামীর, ছেলের, অথবা পিতার, কিংবা ভাইয়ের, অন্যথায় অপর কোনো নিকটাত্মীয় পুরুষের। মহান আল্লাহ বলেনঃ '(বাচ্চার পিতার অবর্তমানে স্তন্যদানকারীণী মায়ের প্রতি) ওয়ারিসদের দায়িত্ব কর্তব্য তার (পিতার) অনুরূপ।'[৬৫] এ প্রসঙ্গে সাহীহ এবং সুনানের প্রায় সকল গ্রন্থেই হাদীস এসেছে। ইমাম তিরমিযীসহ কেউ কেউ এ নিয়ে আলাদা অধ্যায়ও রচনা করেছেন। ইবনুল মুনকাদির রা. থেকে বর্ণিত যে, নবী স. বলেছেনঃ

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[৬২] আলকুরআন ৪:১১।

[৬৩] আলকুরআন ৪:১৩-১৪।

[৬৪] মুহাম্মদ আলী আল সাবুনী, *আল মাওয়ারিস ফিশশারিয়্যাহ আল ইসলামিয়্যাহ ফি দাবিল কিতাব ওয়াসসুন্নাহ,* (কায়রোঃ দার আল সাবুনী, ৫ম সংস্করণ, ১৪০৭ হিজরী), পৃ. ১৮-১৯।

[৬৫] আলকুরআন ২:২৩৩।

> কারো যদি তিনটি মেয়ে অথবা তিনটি বোন থাকে এবং সে তাদের ব্যয়ভার বহন করে, তাদেরকে আশ্রয় দেয়, তাদের সাথে সুসম্পর্ক রক্ষা করে চলে, তাহলে সে জান্নাতে প্রবেশ করবে। তারা বললেন যদি দুইজন হয়? তিনি বললেন: যদি দুইজন হয়, তবুও। তারা (বর্ণনাকারীগণ) বলেন, আমাদের মনে হয় তারা একজনের কথাও বলেছেন।[৬৬]

দুই. পুরুষের ন্যায় অপর কারো ব্যয়নির্বাহের দায়িত্বও নারীর উপরে নেই। অথচ নিজের পরিবারসহ নিকটাত্মীয়দের ব্যয় নির্বাহ করা একজন পুরুষের উপর ওয়াজিব।

মহান আল্লাহ বলেছেন:

> সামর্থ্যবানরা নিজেদের সামর্থ্য অনুযায়ী ব্যয়ভার নির্বাহ করবে। আর যার জীবিকা সীমিত, সে ব্যয় করবে আল্লাহ যা দিয়েছেন তা থেকেই। আল্লাহ যা দান করেছেন তার চেয়ে বেশি বোঝা তিনি কোনো ব্যক্তির উপর চাপান না। আল্লাহ কাঠিন্যের পর সহজতা দান করেন।[৬৭]

তিন. একজন পুরুষের আর্থিক দায়ভার অনেক। তাই তার অর্থনৈতিক চাহিদাও একজন নারীর তুলনায় অনেক বেশি। পুরুষের দায়ভার বিষয়ক মহান আল্লাহর বাণী পূর্বে আলোচনা করা হয়েছে।[৬৮]

চার. একজন পুরুষকে তার স্ত্রীর মোহরানা আদায় করতে হয়। তাছাড়া স্ত্রী এবং সন্তানদের বাসস্থান ও ভরণ-পোষণের ব্যবস্থাও তাকেই করতে হয়। এমনকি স্বামীর অবর্তমানেও সে আশ্রয়হীন/বিপদগ্রস্ত নয়। পুরুষের উপর মোহরানা আদায়ের বাধ্যবাধকতা বিষয়ে আল্লাহর নির্দেশ সম্বলিত আয়াত ইতঃপূর্বে উল্লেখ করা হয়েছে।[৬৯] অন্য আয়াতে আল্লাহ বলেন:

> সন্তানের পিতার দায়িত্ব হলো সন্তানের মায়ের খাওয়া পরার ব্যয়ভার বহন করা ন্যায়সংগতভাবে। কারো উপর তার সাধ্যের বাইরে বোঝা চাপানো ঠিক নয়। কোনো মাকে তার সন্তানের কারণে কষ্ট দেয়া যাবে না এবং কোনো পিতাকেও তার সন্তানের কারণে কষ্ট দেয়া যাবে না। (সন্তানের পিতার অবর্তমানে স্তন্যদানকারিণী মায়ের প্রতি) ওয়ারিসদের দায়িত্ব কর্তব্য তার (পিতার) অনুরূপ।[৭০]

পাঁচ. পরিবারের সকলের শিক্ষা ও চিকিৎসার ব্যয়ভারও একজন পুরুষকেই বহন করতে হয়। এ প্রসঙ্গে কুরআন ও সুন্নাহর বর্ণিত উপর্যুক্ত দলীলাদি ছাড়াও আরো বিভিন্ন দলীয় বিদ্যমান। যেমন জাবির রা. বলেন, মহানবী স. বলেছেন:

> 'যে ব্যক্তি তিনটি কন্যা সন্তানের ভরণ-পোষণ করলো, তাদের সকল প্রয়োজন মেটালো, তাদের প্রতি দয়া প্রদর্শন এবং সদাচরণ করলো, সে জান্নাতে যাবে। (বর্ণনাকারী বলেন) অথবা তিনি বলেছেন, যে আমার সাথে জান্নাতে যাবে।'[৭১]

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[৬৬] আব্দুর রাজ্জাক ইবনে হুমাম আল সানানী, আল মুসান্নাফ, (বায়রুত: আল মাকতাবাহ আল ইসলামিয়্যাহ, ১৪০৩ হিজরী), হাদীস নং-১৬৯৭।

[৬৭] আলকুরআন ৬৫:৭।

[৬৮] আলকুরআন ২:২৩৬।

[৬৯] আলকুরআন ৪:৪।

[৭০] আলকুরআন ২:২৩৩।

[৭১] আব্দুল্লাহ ইবনে মুহাম্মদ ইবনে আবি শাইবা, আল মুসান্নাফ, (রিয়াদ: মাকতাবাহ আল রুশদ, ১৪০৯ হিজরী), পৃ. ৭১-৭২।

অতএব, এটিই ইনসাফের দাবি যে, পুরুষটির আর্থিক দায়ভার যেহেতু বেশি, তাই তাকে সম্পদের ভাগও দেয়া হবে বেশি। তবে একথাও অনস্বীকার্য যে, মহান আল্লাহ একজন পুরুষকে নারীর দ্বিগুণ উত্তরাধিকার দেয়ার পাশাপাশি একজন নারীকেও পরম দয়া ও অনুগ্রহে আচ্ছাদিত করেছেন। সে উত্তরাধিকার প্রাপ্তিতে ঠিকই শামিল হয়; কিন্তু সম্পদ আহরণের জন্য কষ্ট স্বীকার করতে সে বাধ্য নয়। সম্পদ ব্যয়ের কোনো খাতই তার উপর বর্তায় না; অথচ সে তার ভাগ নিয়ে তা সঞ্চয় করতে পারে।

প্রসঙ্গত আরেকটি বিষয়ও স্পষ্ট করে নেয়া প্রয়োজন যে, সকল ক্ষেত্রেই ইসলাম একজন পুরুষকে নারীর তুলনায় সম্পদের ভাগ বেশি দেয়নি। ইসলামের উত্তরাধিকার বিধানে সাধারণ নিয়মে নারী ও পুরুষের মীরাস বণ্টনের ক্ষেত্রে নিম্নোক্ত তিনটি ধারা রয়েছে।[৭২]

১. কখনো কখনো একই স্তর এবং অভিন্ন অবস্থান হওয়া সত্ত্বেও পুরুষ সদস্যটি অংশীদার হয় না; অথচ নারী সদস্যটি অংশীদার হয়ে থাকে। যেমন-

ক. মৃতব্যক্তির নানা-নানী জীবিত থাকলে নানা উত্তরাধিকারী হবে না; কিন্তু নানী তার উত্তরাধিকারিণী হবে।

খ. মৃতব্যক্তির দৌহিত্র (মেয়ের ঘরের ছেলে) অংশ পাবে না; কিন্তু তার পৌত্রী (ছেলের ঘরের মেয়ে) অংশ পাবে। ইসলামের উত্তরাধিকার বণ্টন নীতিমালায় মহিলা অংশীদারদের অগ্রাধিকার প্রাপ্তির এটি আরেকটি বাস্তব উদাহরণ।

২. কখনো কখনো নারী এবং পুরুষ সমান অংশীদারও হয়। যেমন–মৃতব্যক্তির পিতা-মাতা এবং সন্তানাদি না থাকলে তার ভাই-বোন উভয়েই সমান অংশ পায়। আল-কুরআনে এসেছে:

> যদি এমন কোনো পুরুষ বা নারী মারা যায়, যার সন্তান নেই এবং বাবা-মাও বেঁচে নেই, তবে (বৈপিত্রেয়) একজন ভাই এবং একজন বোন আছে, সে ক্ষেত্রে তারা প্রত্যেকেই ছয়ের এক অংশ পাবে। কিন্তু একাধিক হলে তারা প্রত্যেকেই এক তৃতীয়াংশে সমান অংশীদার হবে। এসব বণ্টন হবে (মৃতব্যক্তির) ওসীয়াত ও ঋণ পরিশোধ করার পর।[৭৩]

বিশিষ্ট মুফাসসির আবূ 'আবদিল্লাহ আল-কুরতুবী (মৃ. ৬৭১ হি.) রহ. বলেন: 'আলিমগণ এ ব্যাপারে ঐকমত্যে পৌঁছেছেন যে, এই আয়াতে ভাই-বোন বলতে বৈপিত্রেয় ভাই-বোনকে বুঝানো হয়েছে।[৭৪]

৩. আবার কখনো কখনো নারী পুরুষের অর্ধেক অংশ পায়। যেমন-

মৃতব্যক্তির কন্যা এবং বোন তাদের সাথে ভাই থাকলে ভাইয়ের অর্ধেক পাবে। কেননা মহান আল্লাহ এ ব্যাপারে স্পষ্ট ঘোষণা দিয়েছেন যে, তোমাদের সন্তানদের উত্তরাধিকার সম্পর্কে আল্লাহ তোমাদেরকে ওসিয়াত (নির্দেশ) করছেন; এক ছেলে সন্তান পাবে দুই মেয়ে সন্তানের সমান।[৭৫]

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[৭২] মুহাম্মদ আব্দুর রাহমান, ইসলামে উত্তরাধিকার আইন, (ঢাকা: বাংলাদেশ ইসলামিক সেন্টার, ২০০৯), পৃ. ৭১-৭২।

[৭৩] আলকুরআন ৪:১২।

[৭৪] মুহাম্মদ ইবনে আলী আস সাওকানী, ফাতহুল ক্বাদীর, (বায়রুত: আল মাক্বতাবাহ আল আসরিয়্যাহ, ১৯৯৬), ১ম খন্ড, পৃ. ৫৪৭।

ইসলামের উত্তরাধিকার আইনের এ বণ্টন নীতিতে ভাই তার বোনের চেয়ে দ্বিগুণ সম্পদ পেয়েছে। এক্ষেত্রে মূলত আর্থিক দায়ভার ও দায়িত্ব কর্তব্যের কথা বিবেচনা করেই একজন পুরুষকে মহান আল্লাহ উত্তরাধিকার বণ্টনে একজন নারীর তুলনায় বেশি দিয়েছেন। এটি অত্যন্ত যৌক্তিক এবং ন্যায়বিচার ও ইনসাফের দাবী। এখানে আরো একটি বিষয় স্মর্তব্য যে, ভাই/ছেলেকে ইসলাম যাবিল ফুরূয বানায়নি; অথচ বোন/মেয়েকে যাবিল ফুরূয বানিয়েছে। ভাই/ছেলেকে বানিয়েছে 'আসাবাহ বা অবশিষ্টভোগী। অর্থাৎ যাবিল ফুরূযদেরকে দেওয়ার পর যা থাকবে তা তারা পাবে। তাছাড়া ভাই-বোন বা ছেলে-মেয়ে একসাথে থাকলে যেহেতু বোন এবং মেয়েটিও তার ভাইয়ের সাথে 'আসাবাহ হয়ে যায়, এতেই প্রমাণিত হয় যে, ভাই/ছেলেটিকে অতিরিক্ত আর্থিক দায়ভার দেয়ার কারণেই এখানে তার ভাগ বেশি দেয়া হয়েছে।

১১. পুরুষদের সম্পদ বেশী দেওয়ার ক্ষেত্র বিশ্লেষণ

ইসলামের উত্তরাধিকার আইনে একজন পুরুষ প্রধানত তিনটি জায়গায় নারীর তুলনায় সম্পদের অংশ বেশি পেয়ে থাকে। আর তা হলো:

এক. তার বাবা-মার রেখে যাওয়া সম্পদে সে তার বোনের তুলনায় ভাগ বেশি পায়।

দুই. সে তার ভাই/বোনের রেখে যাওয়া সম্পদে বোনের তুলনায় ভাগ বেশি পায়। এটি নিছক এ কারণেই যে, তার নিজের এবং তার অধীনস্থ অনেকের দেখাশুনার দায়িত্ব তার উপর ন্যস্ত থাকে। ক্ষেত্র বিশেষে যে বোনের চেয়ে তাকে বেশি ভাগ দেয়া হলো তার ভরণ-পোষণের দায়িত্বেও এই ভাইটির উপরেই ন্যস্ত।

তিন. স্বামীর মৃত্যুর পর স্ত্রী তার সম্পদে যে ভাগ পায়, স্ত্রীর মৃত্যুর পর স্বামী তার সম্পদে সে তুলনায় বেশি ভাগ পায়। এক্ষেত্রেও স্ত্রীর রেখে যাওয়া সম্পদে স্বামীর ভাগ বেশি হওয়ার যুক্তি হলো- স্ত্রীর জীবদ্দশায় তার প্রতি এই স্বামীই সবচেয়ে বেশি আর্থিক ব্যয়বরাদ্দ করেছিল এবং মৃত্যুর পরও তার রেখে যাওয়া ওয়ারিসদের দেখাশুনার দায়িত্ব তাকেই বেশি পালন করতে হবে। পক্ষান্তরে স্বামীর রেখে যাওয়া সম্পদে স্ত্রীকে অনেক বেশি ভাগ দিলেও তা তার জীবদ্দশায় ঐ মৃত স্বামীর ঊর্ধতন কিংবা অধঃস্তন ওয়ারিসদের বেলায় তত বেশি কাজে লাগার সম্ভাবনা একেবারেই ক্ষীণ। পক্ষান্তরে তার মৃত্যুর পর ঐ সম্পদের অধিকাংশ নির্ধারিত অংশের প্রাপক হবে তার পিতৃকূলের আত্মীয়গণ এবং তার পরবর্তী স্বামী। সম্পদ বণ্টন সংক্রান্ত বিধান নাযিলের এক পর্যায়ে মহান আল্লাহ আমাদেরকে সতর্ক করে দিয়ে বলেছেন:

> তোমরা তো জানো না, তোমাদের বাবা-মা ও সন্তানের মধ্যে তোমাদের জন্য লাভের দিক থেকে কে বেশি নিকটবর্তী? (উত্তরাধিকার বণ্টন এবং বণ্টনের এই হার) মহান আল্লাহ কর্তৃক নির্ধারিত। নিশ্চয়ই আল্লাহ সর্বজ্ঞানী এবং পরিপূর্ণ প্রজ্ঞার অধিকারী।[৭৬]

আয়াতটির শুরুতে মা-বাবা ও সন্তান-সন্ততির মীরাস বর্ণনার পর পরবর্তী আয়াতে অন্যান্য ওয়ারিসের বর্ণনার আগেই মাঝখানে একথা বলে মহান আল্লাহ আমাদেরকে সতর্ক করে দিলেন যে, তাঁর বণ্টন নিয়ে কোনোরূপ সংশয় কিংবা প্রশ্নারোপ করার অবকাশ নেই। তিনি মহাজ্ঞানী ও প্রজ্ঞাময়। পরবর্তী আয়াতে আরো কতক ওয়ারিসের সম্পদ বণ্টনের পর তিনি আশ্বস্ত করলেন যে:

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[৭৫] আলকুরআন ৪:১১।

[৭৬] আলকুরআন ৪:১১।

> এগুলো (মীরাসের ব্যাপারে) আল্লাহর নির্ধারিত সীমানা। আর যে কেউ (এক্ষেত্রে) আল্লাহ ও তাঁর রাসূলের আনুগত্য করবে, তিনি তাকে এমন জান্নাতসমূহে প্রবেশ করাবেন, যেগুলোর তলদেশ দিয়ে নদ-নদী প্রবাহিত রয়েছে। সেখানে তারা চিরকাল থাকবে। আর এটাই মহাসাফল্য।[৭৭]

পরক্ষণে তিনি আবার কঠোর শাস্তির ব্যাপারে পূর্বাভাস দিয়ে পরিষ্কার জানিয়ে দিলেন যে, এ বিধান তাঁর রচিত। সুতরাং এর বিরোধিতা করার পরিণতি অত্যন্ত ভয়াবহ। মহান আল্লাহ তায়ালা বলেন, 'আর যে কেউ আল্লাহ এবং তাঁর রাসূলের নির্দেশ অমান্য করবে এবং তাঁর (আল্লাহর নির্ধারিত) সীমানা লংঘন করবে, তিনি তাকে জাহান্নামের আগুনে প্রবেশ করাবেন। সেখানেই সে চিরকাল থাকবে। আর তার জন্যে রয়েছে অপমানকর আযাব।'[৭৮] অতএব, ইসলাম একটি পরিপূর্ণ জীবন ব্যবস্থা; এখানে খণ্ডিত কোন বিশেষ বিধানের দিকে দৃষ্টি না দিয়ে সামগ্রিক দৃশ্যায়নের প্রতি দৃষ্টিপাত করা জরুরী। তাহলে কোন ধরনের বিভ্রান্তি থাকবে না। তার কারন উত্তরাধিকার সংক্রান্ত বিধিবিধান মহান আল্লাহ কর্তৃক নির্ধারিত। এ বিধান নিসংকোচে মেনে নিতে হবে। সার্বিক বিচার একথা অত্যন্ত দ্ব্যর্থহীনভাবে বলা যায় যে, সম্পদ বণ্টনের ক্ষেত্রে ইসলামের উত্তরাধিকার আইনে মহিলাদেরকে কোনোরূপ বঞ্চিত করা হয়নি। নিজের ভরণ-পোষণ এবং বিবাহের মোহরানা ছাড়াও একজন নারী ঐ সকল খাত থেকেই উত্তরাধিকার পান, যে সকল খাত থেকে একজন পুরুষ উত্তরাধিকার পেয়ে থাকেন। ভাই না থাকলে তিনি নিজের নির্ধারিত অংশ নিশ্চিতরূপে পেয়ে থাকেন। যখন ভাই (পিতা/স্বামীর অবর্তমানে তার অভিভাবক) থাকেন, তখন তিনি সেই ভাইয়ের সাথে 'আসাবাহ হিসেবে অবশিষ্ট সম্পদের ন্যায্য ভাগী হন।

১২. বাংলাদেশে কন্যাসন্তানদের উত্তরাধিকার সম্পত্তি পাওয়ার চিত্র

বর্তমানে বাংলাদেশে বিদ্যমান মুসলিম উত্তরাধিকার আইন অনুযায়ী শুধুমাত্র কন্যা সন্তানের উপস্থিতিতে মৃত ব্যক্তির ভাই-বোনদেরকে উত্তরাধিকারী গণ্য করে সম্পদের হিস্যা প্রদান করা হয়। এটা অন্যায় এবং একটি বিতর্কিত বিষয়।[৭৯] বিদ্যমান মুসলিম উত্তরাধিকার আইনে কন্যা একজন হলে পরিত্যক্ত সম্পত্তির দুইভাগের এক, আর কন্যা দুই বা দুইয়ের অধিক হলে তিন ভাগের দুই ভাগ সম্পদ পাবে। বাকি সম্পত্তির অংশ পাবে মৃতের ভাই বা তার সন্তানেরা। মৃতের ভাইয়ের সাথে সম্পর্ক ভালো না থাকলেও বিধি মোতাবেক সে পরিত্যক্ত সম্পত্তি হতে সম্পদ লাভ করে 'আসাবা' হিসেবে। অথচ বিষয়টি ইসলামী উত্তরাধিকার আইনের সম্পূর্ণ পরিপন্থী।[৮০] আবার পিতা-মাতার সম্পত্তি থেকে অধিকাংশ কন্যা সন্তানেরা ভাই বা ভাইয়ের সন্তানদের সাথে সম্পর্ক বিনষ্ট হওয়ার

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[৭৭] আলকুরআন ৪:১৩।

[৭৮] আলকুরআন ৪:১৪।

[৭৯] সৈয়দ জিল্লুর রহমান, *ইলমুল ফারায়েজ বা ইসলামে উত্তরাধিকার আইন* (সিলেট: দারুল আনওয়ার প্রকাশনী- ২০০৮), পৃ. ১৬৩-৬৪।

[৮০] শাহ আব্দুল হান্নান, *অবশিষ্টাংশভোগী উত্তরাধিকার: মাওলা ও মাওয়ালী বনাম আসাবা*, বাংলাদেশ জার্ণাল অব ইসলামিক থট, ভলি ১১, নাম্বার ১৬, জুলাই-ডিসেম্বর-২০১৫, পৃ. ১১৩।

আশঙ্কায় তাদের প্রদত্ত অধিকার যথাযথ ভোগ থেকে বিরত থাকে।[৮১] 'দুইজন কন্যার অংশের সমান একজন পুত্রের অংশ' হিসেবে যে অংশ কন্যা সন্তান পাওয়ার কথা তাও কন্যা সন্তান পায়না। ড. আবুল বারকাত Accessing Inheritance Law and Their Impact on Rural Women in Bangladesh শীর্ষক এক গবেষণা প্রতিবেদনে বলেন,

> উত্তরাধিকার আইন অনুযায়ী সম্পত্তিতে নিজের অধিকার সম্পর্কে বাংলাদেশের অধিকাংশ গ্রামীণ নারীই কিছু জানেন না। যারা জানেন তাদের সংখ্যা দুই থেকে চার শতাংশের বেশি নয়। মুসলিম গ্রামীণ নারীর মধ্যে মাত্র ৪৩ দশমিক ২ শতাংশ নারী উত্তরাধিকার সম্পত্তির ভাগ পান। তবে তারা বেশিরভাগ সময়ই তাদের প্রাপ্য জমির চেয়ে কম পান।[৮২]

বিষয়টি ইসলামী আইনের সরাসরি লংঘন এবং মানবিকতার দৃষ্টিতে ঘোরতর অন্যায়। ক্ষেত্র বিশেষে শাস্তিযোগ্য অপরাধ। উত্তরাধিকার সম্পত্তি থেকে বঞ্চিতকারীরা পরকালে জান্নাত থেকে অনেক দূরে অবস্থান করবে।[৮৩] আধুনিক এ যুগের চিন্তাশীল বিশ্বাসী মানুষকে এ নৈরাজ্যকর অবস্থা ভীষণভাবে ভাবিয়ে তুলেছে। পিতার সম্পত্তিতে নারীর এই নির্দিষ্ট অংশ পাওয়ার অধিকার ইসলামী আইনে স্বীকৃত। কিন্তু বাস্তবতা হলো আমাদের দেশের বেশির ভাগ অঞ্চলেই নারীরা তাদের এই অধিকার থেকে বঞ্চিত।[৮৪] আলকুরআন ও ইসলামী উত্তরাধিকার আইন অনুসারে কন্যাসন্তানকে সম্পত্তির অংশ দেওয়ার নির্দেশনা থাকলেও শহরে বা গ্রামে বাস্তবে তারা এর সুফল পায় না।[৮৫] দেশের প্রায় সবখানেই কন্যাসন্তানদের উত্তরাধিকার সম্পত্তি থেকে বঞ্চিত করার একটি ট্র্যাডিশন তৈরি হয়ে গেছে। কোনো কোনো সমাজে উত্তরাধিকার সম্পত্তি বণ্টনের সময় নিয়মানুসারে নারীকে তার অংশ দেওয়া হয়; কিন্তু নারী তার সম্পত্তি গ্রহণ না করে ভাইদের জন্য তার অংশটুকু ছেড়ে দেন এই ভয়ে যে, পিতার সম্পত্তির অংশ গ্রহণ করলে ভাইদের কাছে ভবিষ্যতে বোনদের আর কোনো দাবি-দাওয়া থাকবে না।[৮৬] কোনো অঞ্চলে আবার কন্যাসন্তানদের বঞ্চিত করা হয় ভিন্ন প্রতারণার মাধ্যমে। এ ক্ষেত্রে উত্তরাধিকার সম্পত্তি হস্তান্তর না করে নামেমাত্র কিছু টাকা নামে মাত্র মূল্য হিসেবে দিয়ে বিদায় করে দেওয়া হয় নারীদের।[৮৭] যা সম্পূর্ণরূপে অন্যায় এবং ইসলামী নীতি ও আদর্শবিরোধী কাজ।

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[৮১] *Women's Inheritance Rights to Land and Property in South Asia: A Study of Afghanistan, Bangladesh, India, Nepal, Pakistan, and Srilanka,* A report by The Rural Development Institute (RDI), for the World Justice Project, December-2009.

[৮২] https://samakal.com/todays-print-edition/tp, Accessed on date, 12/07/2019.

[৮৩] রাসূল সা. বলেছেন, "যে লোক তার কোনো উত্তরাধিকারীর অধিকারকে ছিন্ন করার জন্য দূরে কোথাও পালিয়ে যাবে, আল্লাহ তায়ালা তার জান্নাতের অধিকারকে ছিন্ন করবেন।" ইবনু মাজাহ, হাদীস নং- ২৬৯৪।

[৮৪] Kazi Arshadul Hoque and Others, *Inheritance rights of women in Islamic law: An assessment,*International Journal of Islamic Thoughts, v.2, n. 2, (Dhaka: Bangladesh Institute of Islamic Thought-2013), p. 54.

[৮৫] N. Keddie, `Introduction'in N. Keddie and B.Baron (eds), *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender,* Yale University Press, p. 6.

[৮৬] L.P. Freedman, *Women and law in Asia and the Near East, `Draft Paper,* Development Law and Policy Program, Columbia UniversitySchool of Public Heath, p.24-25.

[৮৭] প্রাপ্য সম্পত্তি থেকেও বঞ্চিত নারীরা, http://www.dailyislambd.com, Accessed on date, 12/07/2019.

১৩. গবেষণার ফলাফল ও তা বাস্তবায়নের জন্য কতিপয় সুপারিশ

কোন মানুষ জীবদ্দশায় চাইলে পুত্র-কন্যা সন্তানের মাঝে সম্পত্তি সমান ভাগ করে দিতে পারেন। এটাই সঙ্গত ও ন্যায়নুগ; কারন বাজার থেকে কলা কিনে আনলে কন্যাকে অর্ধেক আর পুত্রকে একটা দেওয়া হয় না; বরং সমান সমানই ভাগই করা হয়। তবে ব্যক্তির মৃত্যুর পরে সম্পত্তি বণ্টন করতে গেলে পুরো কুরআনিক নির্দেশনা অনুযায়ী বণ্টন করতে হয়। এ ক্ষেত্রে কোন ধরনের ব্যত্যয় ইসলামী শরীয়া অনুমোদন করে না। অন্য দিকে পিতা-মাতার মীরাসী সম্পত্তি হলো বান্দার হক। সুতরাং এ সম্পত্তি বণ্টনে অন্যায়-অবিচার করা হলে সংশ্লিষ্ট বান্দার সাথে এর সমাধান করতে হয়। কেবল মহান আল্লাহর কাছে ক্ষমা চাইলেই তা সমাধান হয়ে যায় না। পুরুষের তুলনায় নারীর অর্থনৈতিক দায়ভার একেবারেই নগণ্য হওয়া সত্ত্বেও উত্তরাধিকার বণ্টনের ক্ষেত্রে ইসলাম তাকে অনেক বেশি অংশ দিয়েছে, যাতে তা তাকে আর্থিক ক্ষমতায়নের মধ্যে সে সমাজে নিজের অবস্থান সুসংহত করতে ভূমিকা রাখতে পারে। অধিকাংশ পুরুষের ন্যায় নারী উত্তরাধিকারীদেরকেও 'আসাবা' বা অবশিষ্টভোগী বানানো হয়েছে, যারা 'যাবিল ফুরূযদের' অংশ বণ্টনের পর অবশিষ্ট অংশ পান। ইসলামের উত্তরাধিকার বিধান মহান আল্লাহ প্রণীত এক অলংঘনীয় বিধান-মু'মিনদেরকে একথার উপর দৃঢ় বিশ্বাস স্থাপন করতে হয়। ইসলামের অন্যান্য বিধানের ন্যায় এ বিধান সম্পর্কেও জ্ঞানার্জন করা ফরয। এ বিধানকে যথাযথ বাস্তবায়নের জন্য যার যার অবস্থান থেকে যথাযথ ভূমিকা পালন করতে হবে। শুধু চারটি অবস্থা এমন আছে, যেখানে নারীরা পুরুষদের অর্ধেক ভাগ পায়। অথচ আটটি অবস্থা এমন আছে, যেখানে নারীরা পুরুষদের সমান পায়। আবার দশ বা ততোধিক অবস্থায় নারীরা পুরুষদের চেয়ে বেশি পায়। শুধু তাই নয়, এমনও কতক অবস্থা আছে যেখানে কেবল নারীরা ওয়ারিস বা সম্পত্তির হিস্যার হকদার হয়; অথচ তাদের সমকক্ষ পুরুষেরা ওয়ারিস হয় না। বাংলাদেশের প্রেক্ষাপটে নারীরা মীরাসী সম্পত্তি থেকে অধিকাংশ ক্ষেত্রে বঞ্চিত হয়। নিম্নে এতদসংক্রান্ত কয়েকটি সুপারিশ ও প্রস্তাবনা পেশ করছি:

এক. ইসলামী জীবন বিধান সংক্রান্ত মৌলিক বিশ্বাস ও মুসলমানদের পারস্পরিক ব্যবহারিক জীবনের সাথে বিষয়টি সংশ্লিষ্ট বিধায় এ বিষয়ে বাংলা ভাষায় সহজ ভাবে পর্যাপ্ত গ্রন্থ রচনা করা প্রয়োজন;

দুই. মুসলিম শিক্ষার্থীদের মাঝে এ সংক্রান্ত মৌলিক জ্ঞান সৃষ্টির লক্ষ্যে উত্তরাধিকার সংক্রান্ত আইনকে সংক্ষিপ্তভাবে স্কুল, কলেজ ও মাদরাসার পাঠ্যভুক্ত করা অপরিহার্য;

তিন. ইসলামের উত্তরাধিকার বিধানের গুরুত্ব ও প্রয়োজনীয়তা তুলে ধরতে সরকারী ও বেসরকারী পর্যায়ে বিভিন্ন সেমিনার ও সেম্পোজিয়ামের আয়োজন করা দরকার;

চার. অশিক্ষিত ও অর্ধশিক্ষিত ধর্মপ্রাণ মুসলিমদেরকে এ ব্যাপারে উদ্বুদ্ধ করতে ও এ সংক্রান্ত প্রয়োজনীয় জ্ঞান দানের লক্ষ্যে ওয়াজ মাহফিল ও ধর্মীয় অনুষ্ঠানাদিতে আলোচনা হওয়া প্রয়োজন;

পাঁচ. এ বিষয়ে সঠিক জ্ঞান দান ও অবহেলা দূর করতে সাপ্তাহিক জুমুআর খুতবায় মাঝে মাঝে এ সংক্রান্ত দিকনির্দেশনামূলক বক্তব্য থাকা অতীব জরুরী;

ছয়. উত্তরাধিকার বণ্টনের ব্যাপারে সচেতন লোক তৈরি করার লক্ষ্যে রাষ্ট্রীয় উদ্যোগে বিভিন্ন শিক্ষা প্রতিষ্ঠানে এ বিষয়ে সার্টিফিকেট কোর্স ও ডিপ্লোমা কোর্স প্রদানের ও কর্মশালার আয়োজন করা যেতে পারে;

সাত. উত্তরাধিকার সম্পত্তি যথাযথ বণ্টনের ব্যাপারে সচেতনতা তৈরি ও ভুল বুঝাবুঝি নিরসনের লক্ষ্যে মাতা-পিতা কর্তৃক নিজেদের জীবদ্দশায় সন্তানদেরকে ডেকে প্রয়োজনীয় দিক-নির্দেশনা দেওয়া, মেয়ে সন্তানদেরকে আল্লাহ প্রদত্ত নিজেদের এ অধিকার ছেড়ে না দেয়ার ব্যাপারে উদ্বুদ্ধ করার পাশাপাশি সন্তানদেরকে পরস্পরের সুখে ও দুঃখে অংশীদার হওয়ার ব্যাপারে তাগিদ দেয়া প্রয়োজন;

আট. উত্তরাধিকার বণ্টনের ক্ষেত্রে নানাবিধ অনিয়মের ব্যাপারে রাষ্ট্রের পক্ষ থেকে স্থানীয় প্রশাসনকে তদারকি করা এবং তা নিরসনের প্রয়োজনীয় উদ্যোগ গ্রহনের জন্য আইনী কাঠামো গঠন করা যেত পারে।

১৪. উপসংহার

উত্তরাধিকার বিজ্ঞান বা Succession Science ইসলামী জীবন বিধানের এক অবিচ্ছেদ্য অংশ। এ বিধানের প্রণেতা হলেন মহাজ্ঞানী ও মহামহিম আল্লাহ তায়ালা, যিনি বান্দাহর প্রকৃত চাহিদা ও দায়িত্ব কর্তব্য সম্পর্কে সম্যক অবগত। জীবদ্দশায় বান্দা কার দ্বারা বেশি উপকৃত হয়েছে এবং মৃত্যুর পর কে তার কাজে আসবে বা তার রেখে যাওয়া ওয়ারিসদের বেশি উপকারে আসবে, তা কেবল তিনিই জানেন। সুতরাং তাঁর বণ্টনই হবে সর্বোত্তম বণ্টন, এতে কোনো সন্দেহ নেই। মহান আল্লাহ নারী-পুরুষ নির্বিশেষে সকলেরই স্রষ্টা। তিনিই তাদের সকলের সকল প্রয়োজন পূরণের জন্য যথাযথ আইন ও বিধান রচনা করেছেন। তাই এ আইন বাস্তবায়ন করা সকলের নৈতিক দায়িত্ব এবং তাতে কোনোরূপ বিপত্তি তৈরি না করাও অপরিহার্য। উত্তরাধিকার বণ্টনে অনিয়ম করার মাধ্যমে কেবল ব্যক্তিবিশেষকেই বঞ্চিত করা হয় না; বরং এর মাধ্যমে তার সাথে সংশ্লিষ্ট আরো অনেক নারী ও পুরুষকেও বঞ্চিত করা হয়। ইসলামী শরীয়াতের বিধানাবলী অবলোকনের পর শিরক- কুফর এবং অন্যায়ভাবে মানুষকে হত্যার অপরাধের পর মীরাসী সম্পত্তি অন্যায়ভাবে ভক্ষনের অপরাধ সবচেয়ে বেশী ও ভয়ঙ্কর। সূরা নিসার ১৩ এবং ১৪ নং আয়াতে উত্তরাধিকার আইন পালনে পুরুষ্কার ও তা লংঘনে চরম শাস্তির ঘোষনা এসেছে। বাংলাদেশে ইসলামী উত্তরাধিকার আইনের আলোকে মীরাসী সম্পত্তি সঠিকভাবে খুব কমই বণ্টিত হয়। অধিকাংশ ক্ষেত্রে পুরুষের খেয়াল-খুশি ও নিজস্ব চিন্তা-চেতনার আলোকে গ্রাম্য সালিশ সংস্কৃতি ও মামলার মাধ্যমে মানুষ মীরাসী সম্পত্তির অধিকার লাভ করে।