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CONTENTS

Ensuring Access to Legal Aid at the Early Stage in Criminal Proceedings in India: An Appraisal of the NALSA Model Scheme for Legal Aid Counsel in All the Courts of Magistrates, 1998

Dr. Farzana Akter*

Abstract: *The legal aid system of India has made significant progress in the strategic level by adopting various Regulations, standards and other related mechanisms in consonance with the requirements of the Legal Services Authorities Act, 1987. India also became a member state of the ICCPR in 1979, and thus undertakes the responsibility of adhering to the principles of the Convention. The article demonstrates that the prevalent problems of arbitrary arrest and lengthy pretrial detention essentially hamper the right to fair trial of those living in poverty. However, the existing mechanisms acknowledge the duty of the Indian government to safeguard access to legal aid at the early stage in criminal proceedings involving the delivery service starting from police stations, then in the court proceedings and finally in the prison to sentenced or un-sentenced prisoners. In the same line, the paper also examines the current implementation status of the NALSA Model Scheme for Legal Aid Counsel in all the Courts of Magistrates 1998 (hereinafter the 1998 Model Scheme) in order to find out whether the scheme is effective in providing meaningful and substantial service to legal aid beneficiaries. This article identifies various factors that adversely impact on the functioning of the scheme. The author, therefore, recommends that the government should adopt specific measures that could help the scheme to be effective and well functional.*

Keywords: *Access to justice, Early access, Legal aid, the Model Scheme, and India*

1. Introduction

Access to justice is indispensable for the enforcement of human rights[1] and, therefore, recognized as an integral component of government programmes.[2] As noted by Cappelletti and Garth, access to justice seeks to incriminate restraints that confront people living in poverty in accessing the legal system. They specifically mention about three practical approaches in the effort to combat barriers to access justice.[3] The first practical solution or the 'first wave' involved the mechanism of legal aid that began in Western states in the wake of the Second World War.[4] This wave targeted to furnish legal services to financially disadvantaged persons to capacitate them to approach the judicial system in line with the affluent in society.[5] Thus, access to justice implicates the formation of a legal aid system, as its unavailability makes judicial remedies available only to those who are financially capable to pay lawyers' fees and other accompanying costs of the justice system.[6] In short, legal aid functions as the bridge between people who are excluded and prevailing law of the country.[7] It

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[1] S Muralidhar, 'Access to Justice by Disadvantaged Groups' (United Nations Office of the High Commissioner for Human Rights 2005) 3-4 <https://www.ielrc.org/content/a0501.pdf> accessed 10 August 2025

[2] Mauro Cappelletti and Bryant Garth 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff. L. Rev. 181, 184,196-209.

[3] Ibid 196-97

[4] ibid

[5] Christine Parker, *Just Lawyers*: *Regulation and Access to Justice* (OUP 1999) 32-3.

[6] Garry Balsi, 'How Much Access? How Much Justice?' (2004) 73 Fordham L. Rev. 865

[7] paras. 27 and 35, Gabriela Knaul, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (A/HRC/23/43, dated 15 March 2013) <https://docs.un.org/en/A/HRC/23/43> accessed 10 August 2025

also has a considerable role in ensuring access to justice and eventually to produce far reaching positive outcome on individuals and the larger society both.[8]

It is noted that legal aid safeguards a person's right from the infringement of his liberty in criminal proceedings.[9] Therefore, it is important to analyze when legal aid is allowed in such proceedings since this is crucial in maintaining the legitimacy and credibility of the administration of criminal justice. The early period comprising of the initial time spent in custody of police or detention poses great importance for those arrested or detained persons because their capacity to adequately safeguard their rights, duration of their detention, or the time of producing them before a Court depend on the initiatory stages of the proceedings.[10] The suspected and accused persons are also likely to face torture or maltreatment during this period.[11] As a result, the human right to a fair trial of accused or detained or suspected persons is considerably influenced by the proceedings of early stages of the administration of the criminal justice.

The right to access to legal aid at the early stage has been amply recognized in numerous international human rights standards. The International Covenant on Civil and Political Rights (ICCPR) by dint of Article 14 entitles a person who is under a criminal charge to have sufficient time and resources to draw up his defense and also be able to make communication with the counsel as per his choice. [12] Thus, this Article guarantees an accused person the right to have legal assistance and to make communication with the lawyer not only for preparing his case but also for all stages of the proceedings. The monitoring authority of the ICCPR, namely the Human Rights Committee, has upheld this right on certain instances by stating that when the State Authority does not provide the right to have a consultation with the lawyer during the first period of detention and investigation, this causes the infringement of the rights endorsed in the aforesaid article of the ICCPR.[13]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[14] (hereinafter the UNPG) that rely on international norms and best practices have specific provisions with regard to access to legal aid at the initial stages of the proceedings. It, therefore, allows legal aid to those who are arrested, prosecuted and detained in the criminal proceedings.[15] According to Principle 7 of the UNPG, the concerned person is entitled to obtain legal aid instantly and throughout the whole criminal proceedings. This signifies that States are obligated to render legal aid to those who are arrested, who are in detention centres or courts promptly after the Authority finds them eligible for such kind of service.[16] It should be noted that the UNPG was approved by the General Assembly in 2012 and it has an exclusive focus on the right to legal aid.[17] Since the General Assembly adopted them, it is a reflection of the consensus of global community that legal

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[8] Zaza Namoradze, 'UN General Assembly Enacts Global Standards on Access to Legal Aid' (Open Society Foundations 2012) <https://www.justiceinitiative.org/voices/un-general-assembly-enacts-global-standards-access-legal-aid> accessed 10 August 2025

[9] Richard Young and David Wall, 'Access to Criminal Justice, Legal Aid, and the Defence of Liberty' in Richard Young and David Wall (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* 7(Blackstone 1996) 7; Richard Abel, 'The Paradoxes of Legal Aid', in Jeremy Cooper and Rajeev Dhavan (eds.), *Public Interest Law* (Basil Blackwell 1986) 380

[10] UNODC and UNDP, *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (2014) 1 https://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf > accessed 10 August 2025

[11] Moritz Birk et al, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk: A Global Campaign for Pretrial Justice Report* (University of Bristol, Ludwig Boltzmann Institute and Open Society Justice Initiatives 2011) 11 <http://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-06222011.pdf > accessed10 August 2025

[12] International Covenant on Civil and Political Rights, 1966 (Adopted on 16th December, 1966, entry into force on 23 March, 1976) Art. 14 (3) (b).

[13] Para. 8.5 *(Gridin v. Russian Federation* (U.N. Doc. CCPR/C/69/D/770/1997); para. 6.7 (*Toshev v. Tajikistan* (U.N. Doc. CCPR/C/101/D/1499/2006)

[14] The General Assembly approved the resolution on 20 December 2012 (A/RES/67/187, dated 28 March 2013)

[15] ibid para. 8, Introduction.

[16] ibid paras. 20, 23, Principal 3; para. 41, Guideline 1; para. 4, Guideline 4, UNPG.

[17] Auke Willems, 'The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: A Step toward Global Assurance of Legal Aid?' (2014) 17(2) New Crim. L. Rev. 184-5.

aid is an imperative for enjoying and promoting human rights.[18] Thus, the UNPG presents guidelines for States in establishing legal aid systems within their national frameworks. In 2014, a handbook was published by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Development Programme (UNDP) collectively with a view to providing States realistic guidelines and models for ensuring availability of legal aid at the early stages in criminal proceedings.[19] The handbook draws examples from the established practices of different States and explains the functions of related bodies involving police, legal aid providers and judges for the delivery of such service. More recently, the UN Model Law on Legal Aid in the Criminal Justice System[20] (hereinafter UN Model Law) provides that the right relating to legal aid begins from the time when a person becomes the subject of an investigation and, as such, this right is available at the period when the person is taken to be questioned by the police or some other investigative authority and also even before the beginning of the questioning by authorities. It is pertinent to mention that the UN Model Law is drawn from the UNPG and is intended to assist lawmakers in outlining legal aid legislation. Thus, it carries significant weight since it has its basis on the UNPG and is an appropriate guide for countries in preparing their legal aid laws. The UN Model Law guarantees the right to have legal assistance clearly to a person either arrested, detained, suspected or accused of an offence under its Articles 4, 6 and 12.

Article 39-A of the Indian Constitution (one of the Directive Principles of State policy) explicitly mentions about the government's obligation to institute a countrywide legal aid system for the disadvantaged of the community. [21] The Article says that the State is prescribed to operate the legal system for the purpose of upholding justice founded on the principle of equal opportunity of its citizens. The State also undertakes a duty to deliver legal aid without cost so that no person is excluded from getting justice due to financial or other impotence. Articles 14[22] and 22(1)[23] also convey the essence of legal aid system by incorporating provisions of equality before the law and safeguard against arrest and detention in specific cases. Moreover, provisions of the *Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS),* (earlier called the Code of Criminal Procedure /CrPC, 1973) are clear about the right of an accused to have legal aid during the court proceedings. For instance, section 341 of the *BNSS* (previous section 304 of the CrPC) articulates that where the accused is not able to represent himself by a lawyer before the court of Sessions at the trial stage, and the court is convinced that the accused lacks adequate capability to appoint a lawyer, the court shall appoint a lawyer to prepare his case and the relevant expenses will be borne by the State.

In 1979, India became a member State of the ICCPR[24] and thus undertakes the responsibility to comply with the principles of the Convention. The government formulated the Legal Services Authorities Act (hereinafter LeSAA)[25] in 1987 with a view to establishing a domestic system of legal aid. The Indian government also assumes the obligation to maintain standards as established by the aforesaid UN documents in discharging its national obligations. In this context, the article analyzes the factors that necessitate the establishment and effective implementation of mechanisms to guarantee access to legal aid at the early stages in criminal proceedings in India. In doing that, it also examines the NALSA Model Scheme for Legal Aid Counsel in all

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[18] The General Assembly holds a pivotal position in the United Nations as it deliberates, frames policies and represents all the Members of the United Nations <https://www.un.org/en/ga/about/background.shtml> accessed 10 August 2025

[19] UNODC and UNDP (n 10)

[20] The UN Model Law 2017 was prepared by the UNODC

[21] Incorporated by the Constitution (forty-second amendment) Act, 1976 <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-second-amendment-act-1976> accessed 10 August 2025

[22] In the words of Article 14, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

[23] As Article 22(1) says, 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.'

[24] <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind> accessed 10 August 2025

[25] The Legal Services Authorities Act (Act 39 of 1987)

the courts of Magistrates, 1998 (the 1998 Model Scheme) in order to find out whether the scheme is effective in providing meaningful and substantial service to legal aid beneficiaries.

2. Current Laws for Providing Legal Aid in Criminal Justice System in India with a Particular Focus on the 1998 Model Scheme

In India, different clauses of the Constitution, procedural law and decisions of the Supreme Court endorse the system to provide access to legal aid at the initial stages in criminal proceedings. Particularly the Constitution through Article 22(1) accords protection against arrest and detention. It states that an arrested person is entitled to get information as regards the causes of his arrest, and the person will enjoy the right to have a consultation with and defence by a lawyer according to his choice. In *Nandini Satpathy v Dani (P.L.) And Anr*, the Supreme Court explained Article 22 by saying that,

> *'The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation.'*[26]

As regards the right of an arrested person, section 38 of the BNSS (previous section 41D of the CrPC) allows him to contact an advocate according to his preference during questioning, but this does not necessarily imply the whole period of interrogation.[27] Moreover, section 35 (previous section 41A of the CrPC) provides the police officer with the authority to compel a suspected person to show up before him. It should be clarified here that this notice is issued when the person is suspected but his arrest does not seem essential. Therefore, the police officer issues a notice to 'a person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice'.[28] If the person against whom the notice is issued abides by the conditions of the notice, he will not be arrested unless the police officer considers that he ought to be arrested for the offence. The Supreme Court's observation with regard to previous section 41A of the CrPC can be mentioned here; the Court in *Arnesh Kumar Vs State of Bihar* says,

> *'Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1), Cr.PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary.'*[29]

All these imply that the right to have assistance from a lawyer commences at police stations under the principles of the constitution and statutory laws. The provisions of the LeSAA are more relevant and specific in this connection. Section 2 of the Act defines legal service as providing legal consultation and representation both, and this service is granted in civil and criminal proceedings. The section allows certain groups of persons an inevitable right to legal aid by following a merit test. The groups consist of a member belonging to a Scheduled Caste or Tribe, a victim of a mass disaster or ethnic violence or natural disaster like flood, drought,

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[26] *Nandini Satpathy v Dani (P.L.) And Anr,* 1978 AIR 1025

[27] Section 38 says, 'When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation,' the Bhartiya Nagarik Suraksha Sanhita, *2023 (BNSS)*

[28] Ibid, s. 35(3),

[29] *Arnesh Kumar Vs State of Bihar,* AIR 2014 SUPREME COURT 2756, para. 4

and a person who is taken in custody. Those who do not belong to these specified groups are required to pass a means or financial eligibility test to receive legal aid as per the provisions of the said section. Legal aid applicants need to satisfy the eligibility test by their annual income limit. The LeSAA calls for a holistic organization by developing committees of legal aid at different administrative tiers namely State, District and Taluk. However, the National Legal Services Authority (NALSA) is the highest authority established in agreement with section 3 of the Act. Legal Aid Committees at respective levels render legal service and assistance to the recipients and conduct other incidental functions as mandated by the NALSA. The Committees are also prescribed to function in co-ordination with each other.

Regardless of the existence of Constitutional principles, the practice of arbitrary arrest is widespread in India. The police arrest and detain unnecessarily considerable numbers of persons often with a view to linking criminal conspiracy or connecting criminal events to cases awaiting trial.[30] The police also do not use their powers of arrest in compliance with legal provisions. The Law Commission of India in its 177th report mentioned that despite the protections stipulated in the CrPC and the Constitution, the police exercise the authority of arrest unjustifiably and illegally in numerous cases across the country.[31] They use this power frequently to obtain money and other valued property or upon the persuasion of the opponent party of the arrested person. The police even exercise this power to harass a party to a dispute of civil nature based on false allegations made by his opponent.[32]

Another problem in the administration of criminal proceedings in India is lengthy pretrial detention. The primary cause for prolonged detention in many instances is the failure of the accused to furnish a bail bond.[33] As Bhandari says, courts often determine bail bonds' amounts without considering the financial realities of the accused. Therefore, it is not easy to calculate the exact total of persons undergoing detention at the pretrial stage since they are incapable to present a bail bond.[34] In this connection, the observations made by the All-India Committee for Jail Reforms (the "Mulla" Committee, 1980-83) are relevant. The Committee notes that majority of prison inmates belong to the economically disadvantaged sections of society and their incapability to manage the bail bond results in an increase of the prison population.[35] This has been also supported by a study carried on by the Commonwealth Human Rights Initiative in 2018. The report shows that a large number of accused persons come from poor economic backgrounds and they spend a long period in jails due to their failure to produce the bail bond.[36] As a result, the poor fall victim to arbitrary arrest and expanded pretrial detention in India which violate their human right to a fair trial.[37]

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[30] R.K. Saxena, 'Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India' (Open Society Justice Initiative 2008) 59-60 <http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf> accessed 10 August 2025.

[31] Para. 1.8, 'Consultation paper on Law relating to Arrest' (Law Commission of India 2001) < <http://www.commonlii.org/in/other/lawreform/INLC/2001/2.html> accessed 10 August 2025

[32] ibid

[33] Vrinda Bhandari, 'Pretrial Detention in India: An Examination of the Causes and Possible Solutions' (2016) 11 Asian Criminology 83, 99

[34] ibid

[35] Report of All India Committee on Jail Reforms (Mulla Committee 1980-83), vol. 1, Ch. 12, 171. <https://www.mha.gov.in/MHA1/Prison Reforms/report.html > accessed 10 August 2025

[36] Raja Bagga, 'Hope Behind Bars? Status Report on Legal Aid for Persons in Custody' (Commonwealth Human Rights Initiative 2018) xiv <https://www.humanrightsinitiative.org/download/CHRI%20Legal%20Aid%20Report%20Hope%20Behind%20Bars%20Volume%201.pdf> accessed 10 August 2025

[37] According to Shaw, pretrial detainees disproportionately belong to the poor as they are incapable to obtain a lawyer's services, and lack resources to arrange a financial bail. Mark Shaw, 'Foreword, Reducing the Excessive Use of Pretrial Detention' (Open Society Justice Initiative, 2008) 2 <http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf> accessed 10 August 2025

The exorbitant and lengthy pretrial detention makes most Indian prisons overcrowded.[38] The National Crime Records Bureau in the 2022 Prison Statistics exposes that overcrowding is common in a large majority of jails in India. In particular, the occupancy rate in all jails at national level is 131.4 percent.[39] The most desolating fact is that out of the whole prison population only about 23.3 percent of prisoners are convicts, while 75.8 percent are awaiting trial at the end of 2022.[40] The said statistics also indicates that the number of under trial prisoners (pretrial detainees are also called under trial prisoners in India) is on the rise and has increased by 1.7 percent from 4, 27,165 (2021) to 4, 34,302 (2022) (estimated on 31 December of each year).[41]

The above expositions indicate an apparent need to guarantee the availability of legal aid at the early stages in criminal proceedings in India for the arrested or detainees immediately after they are taken to police stations and while their statements are being obtained by the authorities. As section 12 of the LeSAA states, any person placed in custody is eligible to get legal assistance. This means that the right to counsel can be sought at all custodial interrogations including the stage when the accused is delivered to the custody of police for interrogation as well as at other crucial stages after formal proceedings have started. The Court in *D.K. Basu v. State of West Bengal,*[42] recognizes that the violation of human rights occurs during investigative proceedings when the police torment or use other unfair means to obtain confessions. The Court also notes irregularity of arrest procedures, and resolves that the arrested persons are not allowed to consult lawyers during the investigation stage.[43] A study of 2011 also states that legal aid is available only at the stage of trial proceedings and not when the detainee is introduced to the remand court.[44] However, international human rights principles obligate States to guarantee legal aid not merely at the trial proceedings; they impose an obligation of ensuring access to legal aid at the initial stages particularly to the arrested, suspected or detained persons when they are taken to the police stations and while their statements are being obtained by the authorities. As noted earlier, the LeSAA has guaranteed legal aid in criminal proceedings in all custodial settings according to the provisions of section 12. Therefore, it is important to investigate how this right is safeguarded by the current Indian legal aid institutions.

Research of the Commonwealth Human Rights Initiative outlines that there exists no separate and comprehensive scheme that exclusively deals with the arrangements of legal aid facility in India for persons placed in custody. [45] However, three schemes or regulations can be named that accumulate different elements of the framework concerning access to legal aid at the initiative stages for persons in custody, such as, contacting lawyers in police stations or lawyers' presence in police stations or assignment of lawyers in the course of producing the arrested person before the Court.[46] The schemes are the NALSA Model Scheme for Legal Aid Counsel in all the courts of Magistrates 1998 (hereinafter the 1998 Model Scheme) that prescribes appointing remand lawyers at Magistrate Courts; the NALSA (Free and Competent Legal Services)

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[38] Saxena, (n 30), 58

[39] Prison Statistics India (National Crime Records Bureau, Ministry of Human Affairs, 2022) ix <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf> accessed 2 August 2025

[40] ibid xi, xii.

[41] ibid xii

[42] *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610

[43] Mandeep Tiwana, 'Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines' (Commonwealth Human Rights Initiative 2005) 18 <http://www.humanrightsinitiative.org/publications/hrc/humanrights_policing.pdf> accessed 10 August 2025

[44] Suresh Bada Math, Pratima Murthy, Rajani Parthasarathy, C Naveen Kumar and S Madhusudhan (eds.), 'Prisons in India: An overview of reforms and current situation' in *Mental Health and Substance Use Problems in Prisons: Local Lessons for National Action* (National Institute of Mental Health Neuro Sciences, (Deemed University) Bangalore, Karnataka State Legal Services Authority, Bangalore and Department of Prisons, Government of Karnataka 2011) 31-53 <https://nimhans.co.in/wp-content/uploads/2021/09/Mental-Health-and-Substance-Use-Problems-in-Prisons_Local-Lessons-for-National-Action.pdf> accessed 10 August 2025

[45] Bagga, (n 36), xii.

[46] ibid

Regulations, 2010 (hereinafter the 2010 Regulations) that govern appointment and monitoring the functions of legal aid lawyers and, the NALSA (Legal Services Clinics) Regulations, 2011 that call on authorities to institute legal aid clinics in different settings including prisons. In addition to these schemes, the government adopted a standard namely 'Early Access to Justice at Pre-Arrest, Arrest and Remand Stage' in order to administer legal aid at the early stages of criminal proceedings in 2019. The framework recognizes that legal aid needs to be administered when a person is arrested and becomes subject to interrogation. Thus, it is clear that the existing mechanisms acknowledge the duty of the Indian government to secure the right to access legal aid at the early stages in criminal proceedings involving the delivery of service starting from police stations, then in the court proceedings and finally in the prison to sentenced or unsentenced prisoners. However, this article limits its scope by examining the current implementation status of the 1998 Model Scheme in order to find out whether the scheme is effective in providing meaningful and substantial service to legal aid seekers.

In agreement with the 2010 Regulations, respective legal aid authorities appoint a panel of lawyers to run the office and deliver legal assistance to justice seekers.[47] The Authorities also appoint retainer lawyers from the panel lawyers to provide legal assistance as a full time service and maintain the office simultaneously.[48] The Legal Services Authorities require lawyers to possess at least three years of experience to get empanelled as legal aid lawyers.[49] They consider different factors during the empanelment of lawyers, such as, competence, sincerity, suitability and experience.[50] Remand lawyers are also appointed from the panel lawyers in Magistrates' Courts under the 1998 NALSA Model Scheme to ensure representation of those who are produced before the court but have no ability to engage own counsels. Thus, remand lawyers begin to function when the person reaches the court for the first time. The Model scheme requires that lawyers remain present regularly at the court during remand hours. This programmer also prescribes lawyers to make a visit at police stations adjacent to their assigned courts for the purpose of preventing unnecessary police remand and filing application for bail.

However, the 2018 research of the Commonwealth Human Rights Initiative reveals that remand lawyers are not appointed in all States who have responded to the study. More particularly, 164 out of the 244 District Legal Services Authorities have assigned remand lawyers in accordance with the provisions of the scheme. In addition, remand lawyers remain unavailable or are found absent in the court during remand hours which frustrates the purpose of the 1998 Model Scheme.[51] The 2018 study further indicates that the scheme does not function to make legal aid available at police stations in 65 percent of the responded districts (147 districts).[52] Since legal aid is crucial in police stations, the absence of the service at this stage demonstrates a dearth of coordination between authorities of legal aid and police stations. Nevertheless, 41 districts gave positive response that the scheme also functioned at police stations and, as such, legal aid lawyers represented a total of 1,044 persons at police custody. It should be noted that the statistics of 1,044 people represented only eight districts of the country.[53] Therefore, the statistics is disproportionate and does not demonstrate the accurate status and quality of the mechanism. It is also found that a person in custody does not get access to a legal aid lawyer until he is placed before a magistrate in the court.[54] Furthermore, legal aid lawyers do not visit police

[47] R. 8, the NALSA (Free and Competent Legal Services) Regulations, 2010
[48] ibid
[49] ibid
[50] ibid
[51] Bagga, (n 36), 1.
[52] ibid 5-6
[53] ibid
[54] ibid

stations as a regular and established practice so as to ensure legal aid service at the early stages of the proceedings.[55] However, there is no official report available indicating that a disciplinary action has been taken against lawyers for professional misconduct or insincerity. Thus, lawyers lack commitment to maintain professional diligence and sincerity and eventually provide service that is insufficient and futile. The absence of a strong monitoring mechanism further exacerbates such professional negligence and indifference. Therefore, it can be said that the 1998 Model scheme does not function effectively due to various reasons and fails to deliver meaningful service to the beneficiaries. It adversely impacts on the right to have access to legal aid at the early stages of the proceedings. More precisely, the scheme is unable to act as a safeguard to prevent arbitrary arrest and eventually fails to reduce prison overcrowding in India.

Conclusion

The Indian legal aid system has made significant progress in the strategic level by adopting various Regulations, standards and other related mechanisms in line with the provisions of the LeSAA to ensure legal assistance for the disadvantaged of the society. These are irrefutable developments in the legal aid sector and are essential to run a functional system established on the promise of equality before the law as enshrined in the constitution. However, the above expositions make it clear that various factors adversely impact on the administration of the legal aid system and particularly of the 1998 Model scheme. These include lawyers' insincerity, lack of standard procedure to be observed by lawyers, lack of co-ordination between police stations and legal aid institutions, and the absence of a strong monitoring system on the part of the government. Thus, the scheme suffers from operational defects and is not able to provide efficacious assistance to the beneficiaries. The article also demonstrates that a person in custody gets access to a legal aid lawyer for the first time when he is made to appear before the court. In other words, he is not granted such right in police stations. The government, therefore, should be strongly committed to implement the legal aid system effectively in order to guarantee access to legal aid at the early stage in criminal proceedings in India. Legal assistance should be granted from the stage when the accused is brought in the custody of police for the purpose of interrogation and also at other crucial stages after the formal proceedings have started. The government should make adequate publicity about the schemes so as make potential beneficiaries aware of the service and its eligibility criteria. Moreover, lawyers should be trained and sensitized in a way so as to persuade them to deliver the service not merely as a routine work, rather as a component of professional responsibility and accountability. A strong monitoring or oversight mechanism should be established to evaluate lawyers' performance and service delivery. Co-ordination between different related authorities namely police stations and legal aid institutions should be guaranteed to ensure smooth and organized functioning of the system. In particular, the international human rights norms and practices as enshrined in the UNODC and the UNDP's handbook and the UN Model Law can be used by the government as practical guidelines to establish a functional mechanism to ensure such service in India. Thus, the system would guarantee access to legal aid at the initial stages in criminal proceedings and effectively protect the interests of arrested or detained persons. This would also function to prevent arbitrary arrest, reduce prison overcrowding and eventually promote justness and credibility of the criminal justice system.

[55] ibid 6

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About the Author: Dr. Farzana Akter is an Associate Professor of Law in the University of Dhaka. Her research interest has a particular focus on the legal aid systems of Bangladesh and India.

Autocratic Legalism in Bangladesh: Constitutional Design and the Erosion of Democratic Safeguards

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Abstract: *The article examines the institutionalisation of executive dominance that took place in the recent constitutional history of Bangladesh through the manipulative use of constitutional design and ordinary law, a phenomenon that can be understood through the theoretical lens of 'autocratic legalism'. Based on the insightful framework developed by American sociologist Kim Lane Scheppele, it demonstrates how certain 'ingenious' amendments to the Constitution and ordinary law were used to dismantle the electoral regime, shrink the autonomy of the judiciary and other balancing institutions, and infringe fundamental rights systematically, all while maintaining the semblance of formal democracy. The article studies two landmark constitutional amendments, the 15th which, among other controversial changes, abolished the non-partisan caretaker government, and the 16th which sought to put judicial removal under parliamentary control, as case studies of this authoritarian legalist strategy. As these types of legal interventions cannot originate and operate in a vacuum, they have been analysed through the enabling environment of clientelist politics, limited civil society and lack of constitutional literacy prevalent in Bangladesh. The article concludes with calling for reforms to recover serious constitutional checks and strengthen democratic accountability within the constitutional order in Bangladesh.*

Keywords: *Autocratic legalism, Democratic erosion, Authoritarian governance, Parliamentary democracy, and Judicial independence.*

1. Introduction

Since independence in 1971, the democratic continuity of Bangladesh has time and again broken and shaken by the advent of autocratic regimes.[1] Unlike the autocratic regimes of 70s and 80s that captured state power through force without democratic legitimacy,[2] the last two decades has witnessed a 'creeping' form of autocracy that thrives in the democratic processes. Although political culture has been studied as the main factor behind this steady decline,[3] this article argues that the persistence of recent autocratic rule is deeply rooted in the structural flaws of the constitutional framework. And these flaws have been strategically exploited to entrench executive supremacy and weaken rule of law, making the constitutional and legal structure an instrument of authoritarian power.

Autocratic legalism, a term popularised by the American sociologist Kim Lane Scheppele, describes a global trend in which democratically elected leaders use the law, legal process and institutions to subvert democratic

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[1] See Ali Riaz, 'Bangladesh's Quiet Slide to Autocracy: Roles of Institutional Changes and Media' in *Pathways of Autocratization: The Tumultuous Journey of Bangladeshi Politics* (Routledge 2023); Md Masum Sikdar and Md Mehedi Hasan Shohag, 'Democracy and Authoritarianism: Understanding Three Decades of Bangladesh Politics' (2016) 6(24) Research on Humanities and Social Sciences 7.

[2] These autocratic regimes sought to garner democratic legitimacy and validation through court in later period but their assumption to power was clearly extra-legal. See generally, Md Ershadul Bari, *Martial Law in Bangladesh 1975-1979: A Legal Analysis* (PhD thesis, SOAS University of London, 1985).

[3] See Syed Serajul Islam, 'Good Governance and Political Culture: A Case Study of Bangladesh' (2016) 24(2) Intellectual Discourse 245; Md Sultan Mahmud and Mst Quamrun Naher, 'Electoral Transition and Democratic Governance in Bangladesh: An Analytical Study of Conflicting Issue and Political Culture' (2015) 11(1) Development Compilation 11.

principles from within.[4] It is a "constitutional malice" where autocrats with an electoral mandate introduce legal reforms aimed at removing checks and balances, limiting political competition and entrenching themselves in power, while maintaining the appearances of legality.[5] In recent Bangladesh, this mechanism has played itself not in the form of a military *coup d'état*, but through a gradual 'legalistic' encroachment on executive power, weakening of parliamentary oversight, exerting control over the judiciary and systematic curtailing of fundamental rights through repressive laws.

The present study contextualises the constitutional and legal experience of Bangladesh in the wider theoretical background of autocratic legalism, examining the common playbooks and tactics employed by aspiring autocrats. It then goes on to a structural analysis of the Constitution of Bangladesh, analysing the relevant constitutional provisions and institutional structures through which executive overreach is facilitated and checks and balances are weakened. It then conducts by two case studies on the 15th and 16th Constitutional Amendments, which demonstrate how the constitution has specifically been manipulated to serve autocratic purposes. The discussion extends further to the social and political context that has maintained these autocratic practices, such as a strong presence of political clientelism, a weak civil society, and inadequate awareness of constitutionalism among the citizens. Finally, building on the reform momentum since the 2024 transition, the article calls for constitutional and institutional reform to reclaim the promise of the original aspiration of democracy.

2. Understanding Autocratic Legalism

2.1 Conceptual Foundations: The Scheppele Thesis

The contemporary erosion of democracy is often, though not always, executed quietly, without the sound of a gunshot or brute power but through soft legal process. This process, according to Kim Lane Scheppele, is a series of strategies used in consolidating autocracy "legally clever autocrats... use constitutionalism and democracy to destroy both".[6] It is procedurally different from the classic 20th century version of authoritarianism, one reliant on brute force and extra-legal coups. Rather, contemporary autocrats work 'within' the legal framework, using "electoral mandates plus constitutional and legal change... in the service of an illiberal agenda".[7] This approach allows them to benefit from the apparent compliance of both democracy and legality and, indeed, to make their actions more difficult for their opponents to detect and oppose.

The characteristic features of autocratic legalism are identifiable and follow a common script. At the forefront is the emphasis on the principle of governing *by* law, not under the rule of law. It is necessary pay attention to the means autocrats use to realise their illiberal agenda because they are often mistaken for fulfilment of constitutionalism and legality.[8] The process attacks the basic tenets of a constitutional and legal order with the tools and processes the order itself enables. The central tactic in the playbook of an aspiring autocrat is capturing institutions. They methodically subvert independent public institutions, the judiciary in particular, by appointing 'party-friendly' judges and officials who are prepared to legitimize the government's actions and reject legal challenges.[9] Legalistic autocrats stay in power "by tinkering with the election rules" and other

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[4] For a comprehensive overview of the concept of 'autocratic legalism' see Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545. For specific case study see Regitze H Rohlfing and Marlene Wind, 'Death by a Thousand Cuts: Measuring Autocratic Legalism in the European Union's Rule of Law Conundrum' (2022) 30 Democratization 1.

[5] Scheppele, (n 4) 547.

[6] ibid.

[7] ibid 545.

[8] Viktor Kazai, 'Autocratic (Il)legalism' *Verfassungsblog* <https://tinyurl.com/yw8n87zn/> accessed 29 August 2025.

[9] Akudo McGee, 'Autocratic Legalism: The "Silent" Authoritarianism' *The Loop* (13 October 2022) <https://theloop.ecpr.eu/autocratic-legalism-the-silent-authoritarianism/> accessed 29 August 2025.

modes of impairing electoral integrity.[10] This process is both covert and incremental, a "creeping" process of erosion of democracy, with small, intentional steps that are hard to recognize in its early stages.[11] By the time the autocratic nature of the regime is made clear to domestic and global audiences, it is usually solidly entrenched and hard to reverse.[12]

As stated earlier, autocratic legalism is the tactical use of constitutional and statutory regime to introduce and perpetuate illiberal rule by adhering to the formalistic aspects of the democratic process, including elections. For studying authoritarian tendencies, autocratic legalism should be treated conceptually distinct from traditional forms of authoritarianism which usually employs extra-legal means to capture state power, such as military takeovers or emergency proclamation. Case studies such as Hungary under Viktor Orbán and Turkey under Recep Tayyip Erdoğan, where the constitutional amendments, the political appointment of judges, and amendments to the electoral law dismantled the checks to executive government, yet these actions were still performed through electoral democracy.[13] The phenomenon in Turkey is described as a form of "strategic legalism" or "rule-by-law", which entails employing legal reforms and states of emergency to restructure institutions and suppress dissent.[14] On the other hand, traditional cases of authoritarian rule, such as the military junta of Myanmar or President Sisi of Egypt, do not exercise power behind a legalistic facade but mostly through coercion, the suspension of the constitution, and the demonstration of brute force.[15]

2.2 Why Focus on Bangladesh?

Bangladesh presents a particularly interesting and relevant case for the study of autocratic legalism. The history of the country from its independence in 1971 has witnessed a recurring and frequently violent struggle between the democratic aspiration of the country's founders and its powerful authoritarian inclinations.[16] It is not just a matter of political culture but part of the fabric of the Constitution. One such recent avenue for investigating the precise legal dynamics of democratic decline and autocratic legalism is the latest autocratic rule that was ousted in 2024 by an uprising.[17]

The Constitution of Bangladesh, with its distinct Westminster-style parliamentary elements and structurally-embedded defects, is an excellent case study of how a democratic constitution can be subverted in a systematic manner to accommodate anti-democratic ends. There are three main conclusions of this analysis that will be elaborated in this article: the constitutional design of executive supremacy, the strategic 'misuse' of constitutional amendments to entrench power, and the legal subversion of fundamental rights through ordinary legislation. Understanding this process as it operates in Bangladesh is not just an academic exercise, it is critical in order to inform and remind the contemporary reform efforts not just to Bangladesh but also to other fragile democracies confronted with similar challenges.

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[10] Ali Riaz, (n 1).

[11] Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20(8) German Law Journal 1140.

[12] Barbara Geddes, Joseph Wright, and Erica Frantz, 'Autocratic Breakdown and Regime Transitions: A New Data Set' (2014) 12(2) Perspectives on Politics 313.

[13] Kim Lane Scheppele, 'How Viktor Orbán Wins' (2022) 33 Journal of Democracy 45; Zafer Yılmaz, 'Erdoğan's Presidential Regime and Strategic Legalism' (2020) 26(2) Turkish Studies 235.

[14] Ibid (Yılmaz).

[15] Morten B Pedersen, 'The 2021 Military Coup: Causes and Consequences' in Mary Callahan and Min Zin (eds), *Myanmar in Crisis* (Cambridge University Press 2023) 73; Hesham Sallam, 'The Autocrat-in-Training: The Sisi Regime at 10' (2024) 35(1) Journal of Democracy 87.

[16] Ali Riaz, (n 1).

[17] For an overview of the transition in 2024, see Nusrat Sabina Chowdhury, 'The Return of Politics in Bangladesh' (2025) 36(1) Journal of Democracy 65.

3. The Constitutional Design of Executive Dominance in Bangladesh

The transition towards autocratic legalism in Bangladesh has been facilitated by the flaws in constitutional design that allow power to be aggregated, accountability to be weakened, and avenues for legalistic abuse to be constructed. The architecture of the system is deliberately designed to consistently favour the executive branch, creating inadequate legislative and judicial mechanisms to act as strong constraints.

3.1 A Westminster System without Accountability

Although the Constitution has adopted Westminster system parliamentary government responsible to the Parliament, it establishes a system of prime ministerial supremacy quite oppositely. As all the executive authorities are “exercised by or on the authority of the Prime Minister” [18] with the presidential advice being merely nominal, all state power is monopolised by one person. This concentration of executive power is further expanded by the structural subordination of the legislature by Article 70 of the Constitution. The provision provides that an MP's seat would be vacated if he resigns from his nominating political party, or casts a vote in Parliament against the party. This provision makes the Parliament impotent to perform its primary role of oversight and essentially serves as a “rubber stamp” to the legislative agenda of the executive.[19]

The Westminster system contains the principle of ministerial responsibility which grants a power for to legislature to overthrow a government through a vote of no confidence or block any legislative proposal from the executive.[20] Yet article 70 effectively cripples this system as a no-confidence motion is not possible because the PM is typically the leader of the majority party. This deterrent mechanism protects the Prime Minister against any challenge from parliament. There ensued a 'Catch 22' situation under the Constitution wherein a basic mechanism of responsible government is neutered by another constitutional provision. As a result, there is a structural flaw that forms the basis of autocratic legalism: an executive branch that is nearly impossible for the legislative, to which it is meant to answer, to abolish.

3.2 The Constitutional Amendment Process

The process of constitutional amendment in Bangladesh has frequently been co-opted as a tool for partisan political advantage rather than a deliberative exercise for the public good. The constitutional procedure for amending the Constitution, that needs a two-thirds majority in parliament, is something that has frequently been utilized without meaningful public participation or general political consensus.[21] Ruling parties with supermajority have been able to ram through major changes in the Constitution in ways that advance their party’s immediate political short-term interests, even at the expense of democratic norms.[22] When the Constitution can be conveniently amended to suit the political agenda of the ruling party, it factually no longer remains the supreme law of the land but just simply another instrument of power.

3.3 Judicial Independence Undermined

A primary mechanism for undermining judicial independence has been the politicization of judicial appointments. As per Article 95 of the Constitution, the President appoints the judges of the Supreme Court, where the President appoints the Chief Justice independently and all other appointments are made "after

[18] The Constitution of the People’s Republic of Bangladesh 1972, art 55.

[19] Ali Riaz, 'The Legislature as a Tool, Executives’ Power Grab, and Civilian Authoritarianism: The Bangladesh Case' in Irina Khmelko, Rick Stapenhurst and Michael L Mezey (eds), *Legislative Decline in the 21st Century* (Routledge 2020) 13.

[20] John Wanna, Patrick Weller and R A W Rhodes, ‘Ministerial Responsibility’ in R A W Rhodes, John Wanna and Patrick Weller (eds), *Comparing Westminster: British Government and the Australian Model* (Oxford University Press 2009) 167.

[21] Ridwanul Hoque, ‘Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh’ (2021) 21(2) Australian Journal of Asian Law 7, and Adeeba Aziz Khan, 'The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-Political Caretaker Government' (2015) 9 International Review of Law 1.

[22] ibid (Khan).

consultation with the Chief Justice", but on the advice of the Prime Minister because that is the overarching principle enshrined in Article 48(3). This process has been criticized for being opaque and for placing political loyalty over that of merit, resulting in the institutional capture of the judiciary.[23]

The result of this politicization has been to erode the traditional position of the judiciary as the ultimate guarantor of citizen rights. The Supreme Court is constitutionally designated to act as the ultimate interpreter of the Constitution and is also vested with the authority of judicial review to nullify any law or executive action found to be inconsistent with the Constitution.[24] Despite a history of judicial activism (in which under landmark judgments it ruled in the public interest and politically controversial issues,[25] there is judicial under-activism illustrating lack of judicial will to interfere against ruling executive by way of invalidating legislation. The executive's power over the judiciary was dramatically exemplified in 2017, when the serving Chief Justice was reportedly compelled to go into exile and resign after the Supreme Court ruled against a constitutional amendment backed by the government.[26] This is a prime example of how autocratic legalism is compounded by the exercise of traditional brute 'extra-legal' power.

3.4 The Legal Architecture Restricting Fundamental Rights

Although Part III of the Constitution enumerates a list of fundamental rights, most of these rights are qualified by clauses that permit "reasonable restrictions" to be imposed by law in the interest of national security, public order, decency, or morality.[27] Such limitation clauses are not rare in democratic constitutions, but the danger with them is that of interpretation and application. In a system with a hyper-dominant executive, a subservient legislature and judiciary, these vaguely worded clauses become a legal gateway for the enactment of repressive laws that systematically undermine the very rights of the Constitution.

The 2018 Digital Security Act (DSA) epitomizes these dynamics. Passed under the 'pretext' of protecting digital security, the DSA was replete with broadly phrased and vague offences. It gave law enforcement broad authority to detain people without a warrant for online speech which was systematically weaponised to muzzle dissent, with thousands of cases filed against journalists, academics, activists and opposition party members, perpetuating an "atmosphere of intimidation, self-censorship and a sense of insecurity".[28] The DSA was later replaced by the Cyber Security Act (CSA) in 2023 following widespread domestic and international criticism.[29] But critics found CSA was identical to the DSA maintaining the substantive sections that have impact on freedom of expression and only modifying some punishments.[30] And this is a form of sophisticated autocratic legalism: the appearance of responding to criticism by "reform" of the law, while leaving its repressive essence intact.

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[23] Kazuki Minato, *Politics and Independence of the Judiciary in* Bangladesh (Institute of Developing Economies, March 2019).

[24] For an overview of how the judges interpret 7, 26, 44 and 102 of the Constitution in order to wield the power of judicial review see Chowdhury Ishrak Ahmed Siddiky, 'Judicial Review and the Separation of Powers' in Ridwanul Hoque and Rokeya Chowdhury (eds), *A History of the Constitution of Bangladesh* (Routledge 2023) 15.

[25] See generally Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011).

[26] Ashfaqul Chowdhury, 'How Autocrats Can Suppress Democratic Institutions and Blind Themselves To Reality: A Case Study from Bangladesh' (International Growth Centre, 3 December 2024) <https://www.theigc.org/blogs/how-autocrats-can-suppress-democratic-institutions-and-blind-themselves-reality-case-study> accessed 29 August 2025.

[27] Azhar Uddin Bhuiyan, 'Restrictions on the Constitutional Fundamental Rights in Bangladesh: Wednesbury Unreasonableness and Proportionality' in M Rafiqul Islam and Muhammad Ekramul Haque (eds), *The Constitutional Law of Bangladesh: Progression and Transformation at Its 50th Anniversary* (Springer 2023) 197 provided a useful classification of the fundamental rights based on the restriction imposed on them.

[28] Transparency International Bangladesh, *Position Paper on Digital Security Act 2018 and Draft Cyber Security Act (2023)* <https://tinyurl.com/mryk72xw> accessed 29 August 2025.

[29] Amnesty International, 'Repackaging Repression: The Cyber Security Act and the Continuing Lawfare Against Dissent in Bangladesh' (ReliefWeb, 8 August 2024) <https://tinyurl.com/wrax2btt> accessed 29 August 2025.

[30] ibid 5, 12, 23, 24.

Thus, the constitutional framework of Bangladesh reveals a series of interlocking flaws that combinedly produce a monumental effect on the governance. The ability to pass repressive laws like the DSA stems from the broad "reasonable restrictions" clauses in the fundamental rights chapter. Article 70 guarantees the passage of such a law, which otherwise passes through the power of the executive authority on the legislative. The final check against such a law, the courts, is in turn weakened by a political appointment process over which the executive has control. Because the checks are interdependent, a single failure breaks the whole system.

4. Case Studies of Constitutional Manipulation for Autocratic Ends

The theoretical and architectural vulnerabilities in the Constitution of Bangladesh have already been exploited through certain amendments to Constitution to perpetrate power and undermine democratic safeguards. The 15th and 16th Amendments are among the clearest examples of autocratic legalism in practice: a sustained attack on the two primary cornerstones of a well-functioning democracy, namely free and fair elections, and an independent judiciary.

4.1 Engineering Electoral Monopoly

Passed in 2011, the 15th Amendment is arguably the most consequential act of constitutional engineering in the recent constitutional history of Bangladesh. The CTG established through the 13th Amendment (1996) was an unprecedented institutional experiment to manage the chronic political and electoral distrust in the country.[31] It formed a non-political, neutral caretaker administration to preside over parliamentary elections, ensuring the level playing field. The arrangement was widely seen as having contributed to some of the fairest and most competitive elections that the country ever held, in 1996, 2001, and 2008.[32] The Awami League, once it had come to power in 2009, elimination of the nonpartisan Caretaker Government (CTG) system using its parliamentary supermajority and further defended the scrapping of the CTG on the basis of a Supreme Court decision which had invalidated the system.[33]

The justification behind this amendment, however, was a masterclass in 'selective legalism'. Although the Supreme Court's full verdict did suggest that the CTG system did not comply with the principles of democratic continuity, its short order had explicitly stated that the next two parliamentary elections could be conducted under the CTG framework for the sake of political stability and public interest.[34] The government decided to submit to the finding of unconstitutionality by the court and completely ignored its practical recommendation to the effect that a transitional period could be granted. The cherry-picking of a judgment enabled the government to wrap a purely political action, abolishing a crucial electoral safeguard, in the language of constitutionality and judicial deference.

The consequences of this amendment on democratic governance were immediate and longstanding. It dissolved the cross-party consensus on electoral competition which were established in 1990s.[35] The leading opposition party, the Bangladesh Nationalist Party (BNP), considered the abolition to be an effort to rig upcoming elections, and it boycotted the 2014 general election, which turned into a largely non-competitive contest and a parliament devoid of a meaningful opposition.[36] The subsequent elections conducted under a

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[31] ibid.

[32] Md Mahbub Alam Prodip and Golam Rabbani, 'Abolition of Non-Party Caretaker Government System in Bangladesh: Controversy and Reality' (2014) 2 Global Journal of Arts, Humanities and Social Sciences, 24.

[33] *Abdul Mannan Khan v Government of Bangladesh* [2012] 64 DLR (AD) 169.

[34] Ali Riaz, 'Legislature as a Tool of the Hybrid Regime: Bangladesh Experience' (2019) 52(2) PS: Political Science & Politics 275.

[35] For the background of establishing non-party caretaker government see Habib Zafarullah and M. Yeahia Akhter, 'Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Assessment' (2000) 15 Asian Journal of Comparative Politics 248.

[36] Khna, (n 21).

partisan government in 2018 were also plagued by widespread accusations of fraud and manipulation.[37] Both popular demand and the 2024 High Court ruling [38] confirm that the Caretaker Government is and efficient path to genuine elections.

4.2 Impact of 16th Amendment on Judicial and Electoral Independence

After securing the electoral process via the 15th Amendment, the government paid attention the Supreme Court, the final check on its power. The 16th Amendment abolished the then existing system for the discipline and removal of the judges of the Supreme Court.[39] This amendment substituted the Supreme Judicial Council (SJC), made up of the Chief Justice and the next two senior judges to investigate allegations of misconduct or incapacity against the judges, with a provision enabling Parliament to impeach Supreme Court judges by way of resolutions passed by a two-thirds majority.[40] Since the Constitution subjects both judges and constitutional commissioners an identical manner of removal,[41] the new removal procedure extended to the constitutional commissions, including the Election Commission. The government justified it as a 'democratic' reform, pointing out that it was merely reinstating a clause from the 1972 Constitution.[42]

In 2017, the Appellate Division of the Supreme Court delivered a 'historic and defiant' judgment by invalidating the 16th amendment unanimously.[43] It ruled that an independent judiciary was a "basic structure" of the Constitution, that is, a feature that cannot be amended by the Parliament. The judges demonstrated the inherent flaw in the government's argument by connecting the proposed power of impeachment with the reality of parliamentary politics under Article 70. The Court reasoned that since MPs are constitutionally bound to vote along party lines, giving Parliament the power of impeachment would not make judges accountable to the people's representatives, but would instead make them subservient to the "mercy of the party high command".[44] Judicial conduct could no longer be independently voted on and judges would be open to political pressure and coercion.

The executive response to that 'judicial activism' came promptly and with manifest vengeance. The government launched propaganda campaign against the judiciary, and Surendra Kumar Sinha, the Chief Justice during the verdict, was reported to have been put under immense pressure, forced to take leave, compelled to resign while being abroad,[45] an unprecedented phenomenon in the history of Bangladesh. At first glance, this may seem to contradict the argument of autocratic legalism and instead point to state capture through brute force. However, a closer look shows that brute force was used only after 'legal' mechanisms had failed.

Viewed together, the 15th and 16th Amendments were not separate or unrelated constitutional amendments. They were two-pronged strategic intervention on the core pillars of liberal democracy. The 15th Amendment was concerned with the integrity of the voting process itself, and aimed to secure political power. The 16th amendment in essence targeted the independence of judiciary and aimed to weaken the main institution able to hold that power to account. This pincer mechanism: First, capturing the mechanism of power, then disabling

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[37] M Zahidul Islam Miaji and Md Nazmul Islam, 'Clientelism, Brokers Dominance, and Rigged Election: A Process of Authoritarian Democracy in Bangladesh' (2023) 60(2) Journal of Asian and African Studies 185.

[38] *Dr Badiul Alam Majumdar v Government of Bangladesh* Writ Petition No 9935 of 2024 (High Court Division, 17 December 2024)''; *Md Mofazzal Hossain v Government of Bangladesh* Writ Petition No 12431 of 2024 (High Court Division, 17 December 2024).

[39] Ridwanul Hoque, 'The Politics of Unconstitutional Amendments in Bangladesh' in Abeyratne R and Bui Ngoc Son (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021) ch 11.

[40] ibid.

[41] See the removal procedures as outlined in articles 118(5) for Election Commissioners, 129(2) for Comptroller and Auditor General and 139(2) for Chairman and members of the Public Service Commission.

[42] See Dr. Badiul Alam Majumdar, (n 38).

[43] ibid.

[44] ibid 124.

[45] See Kazuki Minato, (n 23).

the mechanism of accountability, is characteristic of a 'well-crafted' and 'well-thought' project of autocratic legalism, intended to dismantle the democratic architecture from within.

5. The Enabling Environment: Political Culture and Societal Dynamics

Constitutional manipulation is rooted in a culture of patronage that prioritizes political favours over the rule of law, a weakened civil society, and low public constitutional awareness. These factors make up the enabling environment in which autocratic practices have been allowed to prosper and become entrenched.

5.1 Patronage as a System of Governance

The Bangladeshi political system is deeply saturated with clientelism, the rule by patron-client relationships, rather than by formal and impersonal rules. These are systems in which material rewards, services, or protection are offered in exchange for political allegiance and support.[46] These patronage networks permeate all levels from the top to the bottom, from the political elite at cities to the marginalized in village.[47] At such a context politics is often reduced to a struggle between conflicting factions for a share of state resources that can be passed on to loyal supporters to preserve and expand their support base.[48] Such a culture of "partyarchic clientelism", where the political party is the ultimate patron, is deeply detrimental to both democracy and good governance.[49] In the electoral setting, clientelism modifies democratic competition from organized competition of ideas and programs to a venue where voters are treated as commodities: bought, rented, or sold.[50] Because it creates a vertical kind of accountability to the patron, this is fertile ground for autocratic leaders to base themselves as the supreme patrons of the entire system.

The form of top-down autocratic legalism is symbiotically related to a bottom-up system of clientelism. The autocratic leadership's legal and constitutional revisions, undermining anti-corruption institutions or ensuring impunity for the loyal, offers this formal legal cover that shields and nurtures the informal patronage networks. In exchange, such clientelist networks deliver the social and political mechanics to mobilize support, secure electoral victories (flawed as they may be) and demand loyalty at the local level, in turn sustaining the hold of the autocratic leader on power. One system cannot be fully understood, or effectively reformed, without addressing the other.

5.2 Civil Society Under Control

Bangladesh has historically been home to a vibrant and influential civil society through the activities of non-governmental organizations (NGOs) and other civil society organizations (CSOs).[51] Yet, this fundamental tenet of democratic accountability has come under systematic attack, both legally and financially. Repressive legislation, such as the Digital Security Act (DSA) and its successor, the Cyber Security Act (CSA) was used to force people into self-censorship, to target activists and journalists.[52] Meanwhile, the Foreign Donations (Voluntary Activities) Regulation Act 2016 granted the government broad administrative powers relating to the funds and activities of NGOs, including the power of the authorities to postpone or refuse funds for projects

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[46] See M Zahidul Islam Miaji and Md Nazmul Islam, (n 37).
[47] ibid.
[48] ibid.
[49] Md Yasin Khan Chowdhury, 'Clientelism, Corruption and Kleptocratic Politics in Bangladesh: A Political Economy Analysis' (2018) *IIUM Repository* <https://irep.iium.edu.my/67459/> accessed 29 August 2025.
[50] See M Zahidul Islam Miaji and Md Nazmul Islam, (n 37).
[51] See Habib Zafarullah and Md Habibur Rahman, 'Human Rights, Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh' (2002) 24(4) Human Rights Quarterly 1011, Sarah C. White, 'NGOs, Civil Society, and the State in Bangladesh: The Politics of Representing the Poor' (1999) 30(2) Development and Change 307.
[52] Amnesty International, (n 29).

that criticize government policies.[53] This financial deterrent may have been particularly impactful over the rights-based groups, and compelled to transition into less controversial service delivery in order to survive.[54] Apart from this, an intense political polarization has divided and weakened civil society from within. Some organisations and professional groups were either co-opted or politicized in favour of the ruling party in exchange for patronage or to avoid persecution.[55] Between 2013 and 2024, some CSOs continued to raise concerns about democratic backsliding, while many others were either co-opted or complicit in the government's "development over democracy" narrative.[56] The systematic weakening of an independent, critical civil society removes one of the most significant sources of social resistance to autocratic centralization and makes it possible to implement illiberal practices without public scrutiny and resistance.

5.3 Lack of Constitutional Literacy

A significant and often overlooked factor that enables autocratic legalism in Bangladesh is the low constitutional literacy of the people. There is widespread public confusion over basic principles and provisions of the Constitution.[57] This lack of awareness has severe implications for democratic resilience. An undereducated populace that does not understand its constitutional rights and how democratic institutions are supposed to work is less likely to perceive the slow and subtle form of autocratic legalism.[58] Complex legal statutes can be manipulated, court decisions can be selectively enforced, and technical amendments can be made, all without igniting much public outrage. This low level of constitutional literacy undermines that crucial defence line, making the entire democratic system more vulnerable to being collapsed from within.

Conclusion

The preceding analysis points to, for the most part, an orchestrated use of the constitutional and legal machinery as a means of consolidating executive power in the hand of an autocrat figure. What is truly worth noting here that this is not an abrogation of legality as was employed by traditional autocrats, it is rather the tactical reuse of the constitutionality and legality in gaining executive supremacy. Amendments to the Constitution, manipulation of electoral laws, the subordination of higher judiciary, weakening the role of parliament, enactment of repressive legislation: all were performed under the 'pretext' of democratic mandate, but ultimately destabilized the spirit of democracy itself. This is an instance of Kim Lane Scheppele's "autocratic legalism," and a vivid application of it in a South Asian context.

The example of Bangladesh demonstrates that authoritarianism may thrive even 'within' the bounds of law, not only 'beyond' it. The latest authoritarian government did not need to engage in the 'unpleasant' practice of *coups d'etat* or years of direct emergency rule but could, with the help of constitutional amendments and the endorsement of the judicial system, simply make its arbitrariness a permanent feature of normal politics. This served two purposes: on the one hand it preserved a guise of domestic legitimacy and on the other received international support in the form of façade elections, legislative action and judicial review. The result, however,

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[53] Jasmin Lorch, 'Elite capture, civil society and democratic backsliding in Bangladesh, Thailand and the Philippines' (2021) 28 Democratization 81.

[54] Human Rights Watch, 'Bangladesh: New Law Will Choke Civil Society' (19 October 2016) <https://www.hrw.org/news/2016/10/19/bangladesh-new-law-will-choke-civil-society> accessed 29 August 2025.

[55] Farhat Tasnim, 'Politicized Civil Society in Bangladesh: Case Study Analyses' (2017) 9 Cosmopolitan Civil Societies 98.

[56] ibid.

[57] Md. Manir Alam, 'Assessing the Awareness of the Constitution of Bangladesh: An Empirical Study on the Secondary and Tertiary Level Students in Mymensingh District' (2023) 9(4) Journal of Legal Studies & Research 90.

[58] Charles Manga Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' (2018) <https://repository.up.ac.za/bitstreams/1759ce9d-a13e-41d0-ab75-c152ed3fdd99/download> accessed 29 August 2025.

is a “Frankenstate”: an assemblage of democratic forms that, in practice, entrenches one-party hegemony and precludes real competition.[59]

This has consequences that are not limited to the existing political context. First, the reconfiguration of institutions eroded the very concept of the rule of law, transforming it from a limit on power into a means of domination. Second, it fostered lack of confidence in institutions, contributing to a cycle of alienation and disengagement that hindered the prospects for participatory politics. Third, in targeting the institutional mechanisms that were supposed to enable peaceful political change, the regime had constrained the space for democratic redress. Institutions were blocked; with no independent courts, no competitive elections and no functioning legislature, channels of institutional regeneration are closed.

Bangladesh thus provides a cautionary case study for comparative constitutional experience. It shows how authoritarian states no longer wield force of arms or sub-legal power, but they use legal and constitutional means to turn back democracy from within. For scholars, it illustrates the shortcomings of thinking about a world divided into binary categories of democracy and dictatorship, and for understanding the nuanced, legalistic ways in which authoritarians consolidate power. For policymakers and civil society, it presents a compelling question about how one opposes such mechanisms when the very instruments accountability is captured.

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[59] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) Governance 559.

Corporate Tax Regime and Recent Reforms in Bangladesh: A Critical Legal Study

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Dr. Sarder Kaisar Ahmed**

Abstract: *Corporate taxes are a key source of direct revenue for the national economy of Bangladesh. However, the current corporate tax regime in Bangladesh is frequently criticized for being opaque, complicated, and expensive, which can hinder investment. The study analyzes the legislative frameworks and institutional practices that underpin Bangladesh's corporate tax policies, evaluating their effects on both domestic and foreign investment. The study highlights major flaws in the formulation and implementation of tax policies, particularly in the areas of corporate tax governance, corporate tax compliance, tax assessment and collection, tax evasion, and tax avoidance. Additionally, it looks at recent reforms including tax rate increases and digitization initiatives, highlighting the need for an environment that is more conducive to investment. The study suggests to lower regulatory barriers, enhance compliance, and establish a competitive tax climate that promotes investment and entrepreneurship while guaranteeing a fair, transparent, and sustainable corporate tax regime in Bangladesh.*

Keywords: *Corporate Tax, Legislations, Drawbacks, Investment, and Bangladesh.*

1. Introduction

The term "corporate tax" describes a direct tax imposed on the earnings or revenue of firms or enterprises. This type of taxation targets the profits made by corporations instead of taxing individual income. Corporations are subject to this tax at a rate determined by law. Particularly for developing nations like Bangladesh, it is essential for the national coffers.[1] It is crucial in determining investment choices, encouraging company expansion, and moulding a nation's economic environment.[2] Raising funds for public goods and social services, mitigating externalities are the usual justifications for taxation.[3] The corporate sector contributes significantly to the income tax collection of the Government of Bangladesh (GoB).[4] Businesses rely on it as a strategic component, and governments around the world rely on it as a vital revenue source.[5] It is mandatory for all companies to pay a 30% yearly tax on their revenues that come from trading, investing, or bringing in money from Bangladesh.[6] This is related to the process by which a country's income tax legislations are used to collect taxes from companies on their profits. Businesses are structured and run in ways that try to minimize tax

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[1]Fathyah Hashim and Md. Nazrul Islam, "Corporate Governance and Tax Avoidance in the Listed Companies of Bangladesh: A Conceptual Review," (2020) Vol 5 (30) International Journal of Accotning, Finance and Business, https://doi. org/10.24191/jibe.v5i2.14230.

[2] Martin Jacob and Robert Vossebürger, "The Role of Personal Income Taxes in Corporate Investment Decisions," (2022) 77 Journal of Corporate Finance, 102275, https://doi.org/10.1016/j.jcorpfin.2022.102275.

[3] Halvar Troyel Nerbo, "A Theoretical and empirical evaluation of the corporate tax base elasticity in OECD countries from a Norwegian viewpoint," (Master's thesis at the Department of Economics, University of Oslo, 2015) 1.

[4] Mohammad Munayem Chowdhury, 'Corporate Taxation in Bangladesh' (Phd Dissertation, Institute of Bangladesh Studies, Rajshahi University, 2019) .

[5] James R Hines Jr, 'Corporate Taxation' (Term Paper, Michigan University, 2001).

[6] Greg Ekpung Edame and Willie Wilfred Okoi, 'The Impact of Taxation on Investment and Economic Development in Nigeria' (2014) Academic Journal of Interdisciplinary Studies.
<https://www.richtmann.org/journal/index.php/ajis/article/view/3091> accessed 16 July 2025.

liabilities because of the taxation of corporate profits.[7] From a more conventional economic stance, taxing corporations is necessary to fund public services and guarantee equitable distribution. On the other hand, Critical Legal Studies (CLS) doubts the laws' objectivity and views them as tools to support corporate dominance. Its regulatory structure impacts the state of the economy, the ease of doing business, and the trust of investors. Despite recent economic progress, Bangladesh's corporate tax system remains criticized for being complex, burdensome, and out of sync with business needs. In the fiscal year 2023-24, the overall revenue collection amounted to Tk 382,562 crore.[8] The breakdown of tax collection by category indicates that 13 percent originated from individuals, 20 percent from corporations, 40 percent from VAT, and 26 percent from various other sources.[9] This indicates lower levels of collection from corporate taxes.[10]A corporation's profits that originate in, are produced by, or are received from a trade, business, or investment within Bangladesh are normally subject to an annual corporate tax rate of 27.5%.[11] Corporate taxes have an impact on the quantity and location of foreign direct investment (FDI) because they have an effect on the post-tax returns on investment.[12] The requirement that corporations pay taxes does not necessarily mean that the owners of those corporations bear the financial weight of the tax; instead, the burden may be passed on to employees in the form of lower wages or to consumers in the form of higher prices.

The existence of a corporate tax may, in certain reasonable cases, lead to higher profits for capital owners, including those who own firms.[13] Developing nations frequently establish a low corporate tax rate, as determined by governments, to create more appealing circumstances for international investment.[14] The primary rationale for a reduced corporate tax rate is to foster comprehensive growth and development throughout several industries and the economy at large.[15]A slight misconception or error in the application of income tax regulations may lead to an augmented tax liability for corporate organizations.[16] In recent years, Bangladesh has achieved significant economic progress; nonetheless, its corporate tax system remains criticized for its complexity, burdensomeness, and misalignment with commercial reality. The corporate tax system in Bangladesh has progressed alongside the country's economic and legal development. In recent years, the country has undergone substantial economic expansion, mostly fueled by a thriving industrial sectors- the ready-made garment industry, coupled with increasing foreign direct investment (FDI) and a vibrant small- and medium-sized enterprise (SME).[17]

This growth trajectory highlights the necessity for a regulatory structure that is both supportive of business and financially viable. The prevailing corporate tax culture in Bangladesh, characterized by opaque corporate tax

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[7] James R, (n 5).

[8] "Revenue Collection witnesses healthy 15.40% growth in FY24", *BSS News*, (Dhaka, 2025).

[9] Dr. Khondaker Golam Moazzem et al, ""Https://Cpd.Org.Bd/Resources/2025/04/Presentation-on-Corporate-Income-Tax-Reform-for-Graduating-Bangladesh.Pdf" , accessed June 3, 2025

[10] AF Nesaruddin, " Accelerating Revenue Collection by NBR" *The Daily Star*, (Dhaka, 24 November, 2024)

[11]"Bangladesh Corporate Tax Rate," *Trading Economics*, (Dhaka, 2025). https://tradingeconomics.com/bangladesh/corporate-tax-rate, accessed at 28.06.2025.

[12] Greg Ekpung Edame and Willie Wilfred Okoi, (n 6).

[13] Arnold C. Harberger, 'The Incidence of the Corporation Income Tax' (1962) 70 Journal of Political Economy 215.

[14] Babatayo Kolawole Olayemi and Adegbie Festus Folajimi, "Tax Incentives and the Growth in Sales Revenue of Small and Medium Enterprises (SMEs) in Ondo and Ekiti States, Nigeria" (2021) 7 International Journal on Data Science and Technology 1 <https://doi.org/10.11648/j.ijdst.20210701.11>.

[15] Alim Al Ayub Ahmed, 'Relationship between Foreign Direct Investment and Company Taxation: Case of Bangladesh' (2016) 3 American Journal of Trade and Policy 11.

[16] RN. Lakhotia and Subhash Lakhotia, *Corporate Tax Planning*, (7th ed. New Delhi: Vision Books Pvt. Ltd., 1997), 9.

[17] Joynal Abdin, 'Investment Climate in Bangladesh: Performance and Possibilities' (2024) 04 International Journal of Economics & Management Sciences <https://www.omicsonline.com/open-access/investment-climate-in-bangladesh-performance-and-possibilities-2162-6359-1000290.php?aid=63727> accessed 10 September 2025.

regime,[18] elevated tax rates yet a low tax-to-GDP ratio,[19] lax enforcement,[20] non-compliance of tax regulations,[21] procedural uncertainties,[22] flawed assessment and collection methods,[23] insufficient independence in the corporate tax auditing mechanism,[24] significant tax avoidance and evasion,[25] corrupt and irresponsible administration,[26] has been identified as an impediment to competitiveness and the progress of the corporate sector.[27] The study also examines the nexus between a transparent corporate tax culture and investment. The research identifies that the existing corporate tax regime is not conducive to the sustainable investment climate. The study aims to address all of the aforementioned concerns associated with the Bangladesh corporate tax regime from the CLS perspective and to demonstrate the necessity of a transparent, sustainable, and up-to-date corporate tax regime to draw more investors' attention.

1.1 Research Objectives

The periphery of this research denotes the following objectives-

a. to identify the legal and institutional drawback of the corporate tax system of Bangladesh;
b. to analyze the impact of existing corporate tax laws on both local and international investments;
c. to provide the path and ways for resolving the legal and institutional constraints regarding corporate taxation and to improve and harmonize business incentives with the government's financial requirements.

1.2 Methodology

The research primarily examines national legislation pertaining to the corporate tax regime in Bangladesh, incorporating numerous journal articles, books, reports, newspapers, websites, and blogs from both global and national perspectives. Relevant data have been obtained from secondary sources. Utilizing these data collection approaches is advantageous for developing the theoretical premise of the study and generating precise arguments. This article exclusively utilizes secondary data.

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[18] Sams Uddin Ahmed, "Tax Evasion in Bangladesh: Causes, Consequences and Remedies" (2018) Volume 46 (2), the Cost and Management.

[19] Azharul Islam and others, "Public Policies and Tax Evasion: Evidence from SAARC Countries" (2020) 6 Heliyon e05449 <https://doi.org/10.1016/j.heliyon.2020.e05449>.

[20] Sams Uddin Ahmed, "Taxation Challenges for Bangladesh" Volume 47 (04), the Cost and Management.

[21] Rashedul Hasan, Niaz Mohammad and Mohammad Faridul Alam, "Tax Compliance in Bangladesh – A Structural Equation Modelling Approach" (2017) Volume 4 American Journal of Trade and Policy 87 <https://doi.org/10.18034/ajtp.v4i3.422>.

[22] Md. Shafiqul Islam and others, "Challenges of Tax Assessment and Collection Procedures in Bangladesh" (2021) Volume 49 (06), the Cost and Management 1.

[23] Md Shamim Hossain and others, "Tax Avoidance and Tax Evasion: Current Insights and Future Research Directions from an Emerging Economy" (2024) Volume 9 Asian Journal of Accounting Research 275 https://doi.org/10.1108/ajar-09-2023-0305, see also Nigar Nargis and others, "Tobacco Industry Pricing Undermines Tobacco Tax Policy: A Tale from Bangladesh" (2020) 132 Preventive Medicine 105991 https://doi.org/10.1016/j.ypmed.2020.105991 see also, Ibid (Md Shafiqul Islam) N 21.

[24] Md Islam and Fathyah Hashim, "Audit Committee Attributes and Corporate Tax Avoidance: The Moderating Role of Audit Committee Independence" (2023) International Journal of Advanced Research in Economics and Finance <https://doi.org/10.55057/ijaref.2023.5.1.11>.

[25] Shakhawat Hossain Sarker, " Effects of Income Tax Reform on Assesse and Government Revenue in abngladesh" Volume VIII (2), Emperor International Journal of finace and management Research, see also Khaoula Ftouhi and Wafa Ghardallou, "International Tax Planning Techniques: A Review of the Literature" (2020) 21 Journal of Applied Accounting Research 329 <https://doi.org/10.1108/jaar-05-2019-0080>.

[26] Md. Mahathy Hasan Jewel and others, "An Appraisal of Dimensions Responsible for Tax Evasion in Bangladesh" (2020) Volume 6 (1) the Comilla University Journal of Business Studies 3, see also M Adnan Kabir, Nazia Choudhury and Liliping, "Corruption in a Tax Game" (2020) 22 Journal of Applied Business and Economics <https://doi.org/10.33423/jabe.v22i2.2805>.

[27] OECD, *Addressing the Tax Challenges of the Digital Economy* (OECD 2014) <https://www.oecd.org/en/publications/addressing-the-tax-challenges-of-the-digital economy_9789264218789-en.html> accessed 10 September 2025.

Secondary data is obtained from established sources, including journals, textbooks, reports, and national legislation. The majority of the gathered data is expected to substantiate the study's aims. The study has certain limitations and deficiencies stemming from the utilization of secondary data.

2. Corporate Taxation in Bangladesh: A Legal Overview

Corporate taxation is a widely discussed topic globally; however, in Bangladesh, it doesn't receive as much attention, even though it contributes significantly to funding public services, infrastructure projects, and organizations that uphold the rule of law and political representation.[28] Similar to other developing countries, Bangladesh is facing significant challenges in administering corporate taxation and implementing tax policy. Income tax systems in developing countries are unnecessarily complex, inelastic, inefficient, inequitable, and unfair. Often, they are complex enough to be beyond the authorities' capacity to administer.[29]

2.1. Governing Laws and Regulations of Corporate Taxation in Bangladesh

Corporate taxation has presented a complicated challenge for businesses, while transparency has come under intense examination by regulators and policymakers engaged in tax matters.[30] In Bangladesh, it is governed primarily by laws enacted by the Parliament and regulations administered by the National Board of Revenue (NBR) under the Ministry of Finance. The NBR, which falls under the Ministry of Finance, is the central authority responsible for tax policy, collection, and enforcement. It works according to the following laws-

a. Income Tax Act, 2023
b. Value Added Tax and Supplementary Duty Act, 2012
c. Custom Act, 1969
d. The Gift Act, 1990
e. The Travel Tax Act, 2023
f. Finance Acts (Passed annually by our parliament).

The Income Tax Act of 2023 serves as the primary legislation outlining the taxation of corporations. It specifies what constitutes taxable income, the tax rates applicable, and the deductions that are permitted. The Finance Acts, which are enacted annually, incorporate updates to tax rates and introduce new regulations. This Act enables the government to modify taxes in response to the country's requirements. The NBR is the leading government agency overseeing tax issues. It provides guidelines, collects taxes, and ensures that businesses comply with tax regulations. In our country, the NBR serves as the top executive body tasked with the comprehensive authority and duties of gathering over 95 percent of the nation's tax income.[31] Its main role is to gather a range of tax revenues, such as Value Added Tax (VAT), Customs Duty, Excise Duty, and Income Tax. It is structured into three divisions focused on distinct taxes: the Customs Division, the VAT Division, and the Income Tax Division. Furthermore, it includes the IT Division and the Research & Statistics Division to aid its functions.[32] In summary, corporate taxation in Bangladesh is governed by laws that are revised annually. Companies are required to adhere to these regulations, submit tax returns, and remit taxes to the relevant government authorities.

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[28] Md. Monayem Chowdhury, (n 4).
[29] Satsang Vihar Marg, 'National Institute of Public Finance & Policy' Annual Report.
[30] Khondokar Golam Moazzem et al, (n 9).
[31] Md. Faridul Alam, "Determinates of Tax Compliance Behavior in Bangladesh: the Case of Individual Tax Payer" (2020), (Thesis, Institute of Business Administration, University of Dhaka.
[32] " Bangladesh Company Tax Return Guide for 2023-24" *Legal Sheba*, (Dhaka, 2025), accessed on 12.08.2025

2.2. Tax Rate and Corporate Structure

The corporate tax rate varies between countries and exhibits structural differences. Some countries employ multiple tax rates, whereas others, such as Bangladesh, utilize a single tax rate.[33] The Government of Bangladesh has progressively lowered the general Corporate Income Tax (CIT) rate, which is presently 30% for unlisted companies and 25% for listed companies, with exceptions for specific sectors.[34] The following is the corporate tax rate of our country in the taxation year of 2024-2025-

(Table -1) Corporate Tax Rates (2024–2025)

Name of the Company	Tax Rate
Publicly listed companies that have listed more than 10% of their paid-up capital through IPO.	20%–22.5% **Note:** Tax rate is increased by 2.5% for publicly traded companies having listed 10% or less of their paid-up capital through IPO Tax rate is increased by 2.5% if cashless operation conditions[35] are not met.
i. Non-listed companies, and ii. Trust, fund, association of persons, and other taxable entities	25% **Note:** The Tax rate is increased by 2.5% if cashless operation conditions are not met, except for trusts, funds, associations of persons, and other taxable entities.
One-person companies	20% The tax rate is increased by 2.5% if the cashless operation conditions are not met.
Banks and financial institutions	37.5%–42.5%
Cigarette, zarda, bidi, gul, or any other tobacco product manufacturing companies, firms, and individuals, irrespective of listing status.	45% An additional 2.5% surcharge is applicable on the above business income.
Export-based companies	Often get lower tax rates.

3. Recent Reforms and Policy Developments toward an Investment-Friendly Regulatory Environment

In developing nations like Bangladesh, the government needs to take an active role in fostering economic growth and development due to the constraints on private initiative and capital.[36] Bangladesh has recently reformed its corporate tax system to promote investment and transparency. The interim administration has pushed the reforms to improve governance and efficiency. Drawing from recent studies, it is evident that a mix of achievements and persistent obstacles has characterized tax reform efforts in Bangladesh.[37] Despite notable progress, including the establishment of entities such as the Large Taxpayers Unit (LTU) and Central Intelligence Cell (CIC), as well as the digitization of tax procedures, considerable deficiencies persist in

[33] Fatema Tuj Johora, 'CORPORATE TAX STRUCTURE: A COMPARISON AMONG BANGLADESH, INDIA, AND PAKISTAN' (2024) 14 Journal of SUB 40.
[34] ibid.
[35] Conditions for cashless operations-Business should conduct the transactions through the banking channel: i. All income and receipts, and ii. All expenses and investments over Taka 0.5 million for a single transaction and a total of Taka 3.6 million in a year.
[36] Edame and Okoi, (n 4)..
[37] Khadiza Begum, 'Tax Reforms in Bangladesh: An Overview' (2024) 35 International Journal of Science and Business 1.

enforcement,[38] auditing,[39] and compliance.[40] A tiered tax rate structure now applies: publicly traded companies with over 10% public shares pay a reduced 22.5%, which can decrease to 20% if they meet certain criteria[41]. Non-publicly traded firms face a 27.5% rate, lowered to 25% with compliance. One-Person Companies (OPCs) pay 22.5%, reducible to 20%. Merchant banks' tax rate dropped from 37.5% to 27.5%, while sectors like tobacco, telecom, and banking still face higher taxes.[42] These reforms aim to improve tax compliance and reduce the informal sector by requiring digital banking for lower rates. For example, companies must process transactions over a stipulated amount through banks to qualify for lower rates. As digitalization plays a crucial role, the NBR has introduced convenient online options for tax filing and payments, along with electronic fiscal devices, and these efforts are boosted by IMF initiatives. Institutionally, the "Revenue Policy and Revenue Management Ordinance 2025" replaced the NBR with the Revenue Policy Division (RPD) and the Revenue Management Division (RMD) to increase transparency and efficiency, despite some resistance. While the RMD will be in charge of income tax, VAT, and customs compliance, enforcement, and audits, the newly formed RPD will be in charge of creating tax legislation, determining rates, and maintaining international tax treaties.[43] Separating tax policy from tax administration is a step in the right direction. International best practice suggests that this is important to avoid conflict of interest between making the rules (policy) and enforcing them (administration).[44] Sector-specific incentives include full tax exemptions for the ICT and ITES sectors until 2027, lower turnover taxes for startups, and tax holidays for companies in Export and Economic Zones. These steps aim to formalize the economy, boost compliance, and align Bangladesh's tax system with global standards, encouraging growth and investment. Very recently, the interim government has made the Finance Ordinance 2025, which is considered a significant advancement in the modernization of fiscal policies and the reform of the financial sector in Bangladesh. Breaking from the previous trend of providing applicable tax rates for an income year after it has concluded, this Ordinance allows the NBR to take a novel step of providing tax rates prospectively for upcoming income years. New investors in Hi-Tech Parks are offered more favorable tax exemption rates. Previous investors and developers of Hi-Tech Parks and Economic Zones who have commenced operations or contracted with the respective zone /park authority will continue to enjoy their tax exemptions as per the previously applicable Statutory Regulatory Order (SRO). This anticipated change aligns Bangladesh tax legislation with global norms and will facilitate taxpayers in planning. Although it demonstrates the government's dedication to boosting revenue collection, enhancing tax administration, and stabilizing the banking sector, the overall effectiveness will depend on clear enforcement, the preparedness of institutions, and awareness of the economic and social conditions present.

3.1. Analysis of the 'Income Tax Act 2023' from the Perspective of Ensuring an Investment Friendly Environment in Bangladesh

The Income Tax Act 2023 represents a significant advancement over the outdated Income Tax Ordinance 1984, aiming to foster a more investment-friendly atmosphere in Bangladesh. By streamlining tax regulations, providing clearer definitions, and minimizing uncertainties, the new Act delivers enhanced legal clarity for

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[38] Md Shamim Hossain and others, (n 23).
[39] ibid.
[40] Mohammad Munayem Chowdhury and Syed Zabid Hossain, 'An Overview of Tax Reforms in Bangladesh: Corporate Perspective' (2019) 19 (4), Global Journal of Management and Business Research 15.
[41] Income Tax Paripatra 2024-25, NBR, Bangladesh, https://nbr.gov.bd/taxtypes/income-tax/income-tax-paripatra/eng, Accessed on : 4 July, 2025.
[42] Fatema Tuj Johora, (n 33).
[43] "Tax Authority Split in Major Overhaul," *The Daily Star*, (Dhaka, 2025), https://www.thedailystar.net/news/bangladesh/news/tax-authority-split-major-overhaul-3893991 accessed on 26.07.2025.
[44] Suvojit Chattopadhya, "Fixing the Tax System in Bangladesh- A Long Road Ahead" *ASI,* (Dhaka, 2025), https://adamsmithinternational.com/articles/fixing-the-tax-system-in-bangladesh-a-long-road-ahead/. accessed on 26.07.2025

investors. Its focus on digital integration—including e-filing,[45] automated assessments,[46] and data-driven compliance—promotes transparency and efficiency, lessening bureaucratic obstacles that have previously discouraged both domestic and foreign investors. With its progressive tax rates, incentives for investments, and provisions for tax compliance, the Act aims to foster economic growth, equitable distribution of the tax burden, and efficient revenue collection.[47] It includes a General Anti-Avoidance Rule (GAAR) to stop aggressive tax avoidance schemes that weren't specifically covered in the 1984 Ordinance. This boosts the tax system's integrity and gives investors a fair and stable regulatory environment. Notably, the Act conforms to international standards, boosting confidence among global stakeholders. It also expands the tax base equitably, avoiding excessive burdens on compliant taxpayers, and offers incentives and protections that could promote sustainable business development. In summary, the Income Tax Act 2023 establishes Bangladesh as a more appealing and reliable destination for investment.

4. Key Challenges Persist in the Legal and Institutional Framework of Corporate Tax Regime in Bangladesh

In Bangladesh, the framework for corporate taxation is mainly regulated by the Income Tax Act, 2023, and is overseen by the NBR. Though an effective revenue system is essential for robust, continuous, and inclusive economic growth,[48] Bangladesh tax regulations are often complicated and ambiguous, resulting in inconsistent interpretations and discretionary enforcement. The following are the key challenges that still persist in the legal and institutional framework of corporate taxation in Bangladesh.

4.1 Existing Legal Gaps

Although taxes are fundamental to a nation's development, gaps and conflicts often arise from the interplay of domestic tax laws.[49] The complexities and drawbacks of tax law contribute to tax evasion and avoidance in Bangladesh. Tax law is intricate, resulting in noncompliance and incentivizing unscrupulous corporations to escape taxation.[50] The complexities of the legislation render it challenging for corporate taxpayers to comprehend.[51] Given the annual modifications to the Finance Act, income tax law must maintain alignment with the Finance Act and the statutory rules and orders of the NBR. The swift transformations and integration processes render the law more complex for company taxpayers.[52] Obsolete or ambiguous tax laws and regulations lead to confusion and inefficiencies in Bangladesh. Such a significant issue is the disparity between profit-based tax regulations and turnover-based minimum tax requirements. Although income tax law levies taxes on company profits, the minimum tax rule requires payment based on gross turnover irrespective of profitability, leading to contradictory obligations for businesses. Moreover, the intersection of regulations concerning income tax, VAT, and customs duties frequently leads to uncertainty about tax obligations and the potential for double taxation.[53]

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[45] The Income Tax Act, 2023, (Enacted in June, 2023, Bangladesh), Section 169.
[46] Nur Ahammed Suprim FCA, "Income Tax Assessment Manually in Digital Bangladesh" (2024), The Institute of Chartered Accountant, Bangladesh, https://www.icab.org.bd/publication/news/ 4/1345/Income -Tax- Assessment-Manually -in- Digital-Bangladesh. assessed on 15 September 2025
[47] "Income Tax Act 2023 & Taxation: A Summary of Income Taxation of Bangladesh" (Jural Acquity, 2025), https://juralacuity.com/income-taxation-in-bangladesh, accessed on 15 September 2025
[48] Michael Carnahan, 'Taxation Challenges in Developing Countries' (2015) 2 Asia & the Pacific Policy Studies 169.
[49] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013) <https://www.oecd.org/en/publications/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.html> accessed 12 July 2025.
[50] Sams Uddin Ahmed, (n 18).
[51] Ibid
[52] Ibid
[53] Omar Khan Joy, "Double Taxation Avoidance Mechanism in Bangladesh" *Daily Star* (Dhaka, 17 November, 2020)

Universal self-assessment method has been incorporated in the tax assessment rules for corporate tax payers in the 2024-25 fiscal year.[54] This form of assessment has been criticism for a prevalent inclination to obscure actual income while exaggerating expenses.[55] In Bangladesh, tax rates are subject to frequent changes, and the exemptions provided through annual Finance Acts create uncertainty for businesses. It is noted that a permanent, sustainable tax rate could be seen as meeting the criteria for reducing the tax load.[56] Specifically, small business owners and individuals face challenges with sudden increases or changes in tax rates, which lead to unexpected financial burdens. Because of its excessive dependence on indirect taxes, such as VAT and customs charges, the current tax system is inefficient and regressive.

Judicial interpretations and enforcement procedures may conflict each other. For instance, tax officials may impose severe fines or demands without giving sufficient opportunity for hearings, prompting courts to step in and raise concerns about the legitimacy of such measures. The tax burden provisions in Bangladesh are inequitable.[57] For example, in many cases, major corporations often benefit from tax exemptions and holidays, while small and medium enterprises face a higher effective tax burden. Existing tax exemption policies result in revenue leaks since they are not time-bound or supported by evidence.[58] In Bangladesh, tax evasion and avoidance are prevalent,[59] although tax compliance is very low. These problems stem in part from inadequate auditing capabilities and lax enforcement.[60] Worldwide, responsible governments implement a progressive income tax system, in which those with higher incomes pay a larger proportion of their tax earnings than those with lower incomes.[61]

4.2 Institutional Drawbacks

Being a developing country, Bangladesh's tax administration faces formidable challenges in mobilizing internal resources in terms of tax revenue.[62] The weaknesses in the tax system and tax administration have contributed to the very low level of tax collection in Bangladesh, undermining the government's capacity to provide necessary public services.[63] The government is losing a significant portion of its revenue due to a lack of tax transparency. In fiscal year 2022–2023, tax avoidance and evasion[64] cost Bangladesh an estimated Tk 226,236 crore in lost tax income.[65] In Bangladesh, tax avoidance and evasion can take several forms, such as less administrative responsibility[66] and institutional flaws.[67] Displaying lower income, unethical assistance from tax professionals, displaying greater investment allowances, the desire of an individual to conceal income, and a high number of cash-based or informal transactions are all contributing factors to tax evasion[68]

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54 Doulot Akter Mala, " NBR Considering Self-Assessment only for Corporate Filers" *Financial Express* (Dhaka, 12 May, 2024)
55 Md. Nur Mohabbat and Others, "Tax Avoidance and Evasion Practices in Bangladesh: A Case study on Dhaka City" (2028) Volume 9 (20), Research Journal on Finance and Accounting.
56 Dilruba Begum and David Flath, 'Sustainability Analysis of Bangladesh Government Debt: Are Bnagladesh Taxes High Enough?" (2020).
57 Mamun Rashid, "We Must Create an Equitable Tax System" *The Daily Star* (Dhaka, 20 March, 2025)
58 Selim Raihan, "Overcoming Tax Reform Challenge in Bangladesh", *Daily Star* (Dhaka, 3 October 2024)
59 Mohammad Nurunnabi, "Tax Evasion and the Role of the State Actor (s) in Bangladesh," (2019) Volume 42 (10), International Journal of Public Administration, https://doi.org/10.1080/01900692.2018.1520245
60 Ibid
61 Muhammad Shaheen Chowdhury, "Implementation of Taxation Laws in Bangladesh: In Search of an Innovative and Effective Mechanism for Increasing the Number of Tax Payers", (An unpublished report, University of Chittagong, Bangladesh, 2011)
62 Sams Uddin Ahmed, (n 20).
63 Ahsan H. Mansur and Others, " *An Evaluation of Tax System in Bangladesh*" (Policy Brief, International Growth Centre, 2011)
64 Md. Nur Mohabbat, (n 55).
65 "Bangladesh Lost Over Tk 226,000cr for Tax Evasion: CPD" *The Daily Star*, (Dhaka, April, 2025), https://www.thedailystar.net/business/news/bangladesh-lost-over-tk-226000cr-tax-evasion-cpd-387639 [Accessed on: September 1, 2025]
66 Ahsan H. Mansur and Others, (n 63).
67 Khondaker Golam Moazzem, (n 9).
68 Sams Uddin Ahmed, (n 18).

and avoidance.[69] Tax evasion is frequently caused by low detection probability, low penalties, unscrupulous tax consultants and officials, an ineffective tax auditing system, and very low penalty procedures.[70] Tax amenities,[71] black economy,[72] complex tax assessment process[73] could significantly contribute to corporate tax evasion.[74] Corporate tax avoidance can be decreased by increasing CSR spending, although political connections lessen CSR's role in tax evasion.[75] Indecent behaviour of tax officials and an inconvenient payment mechanism cause corporate tax avoidance.[76] In a nation like Bangladesh, where more than 80% of government income is collected through taxes, the social and economic effects of tax avoidance and evasion are substantial.[77] The following is the recent summary regarding tax avoidance and evasion in Bangladesh **(Table-2).**

Fiscal Year	Estimated Tax Evasion / Loss	Corporate Tax Evasion Share
2019–20	Tk 190,000 crore (est.)	45–50% (est.)[78]
2020–21	Tk 200,000 crore (est.)	50% (est.)[79]
2021–22	Tk 210,000 crore (est.)	50% (est.)
2022–23	Tk 226,236 crore	Tk 113,118 crore[80]

Conversely, tax evasion and avoidance are prevalent issues globally. This poses a significant challenge for a developing nation such as Bangladesh.[81] In terms of institutional deficiencies, the NBR[82] faces capacity challenges, including insufficient automation, a shortage of skilled staff, and inefficiencies in tax auditing and dispute resolution. It is widely recognized that ineffective tax administration can significantly impede the mobilization of tax resources in developing nations.[83] For those reasons-NBR has fallen short of its revenue collection target for the last 12th consecutive years, with experts opining that the existing framework for tax collection is inadequate.[84] The corporate tax collection performance of Bangladesh, with the comparison with its neighboring countries, is given below **(Chart 1)**.

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69 Md Nur Mohabbad, (n 55).

70 Md. Nazrul Islam and Fathyah Hashim"Tax Avoidance and Firm Value Relationship in the Listed Companies of Bangladesh: A Conceptual Overview," (2020) 5 (2), Journal of International Business, Economics and Entrepreneurship, 23-37, https://doi.org/10.24191/jibe.v5i2.14230.

71 Mohammad Ashraful Islam, "Dynamics of Tax Evasion: An Explorative Study in a Tax Circle of Bangladesh" (Master Thesis, Noth South University, 2020)

72 Kazi Abdul Mannan and others, "Social Network and Tax Evasion: Theoretical Model Empirical Evidence" (2021), Vol 49 (2), The Cost and Management.

73 Shakhawat Hossain Sarker, (n 25).

74 Md Shamim Hossain and others, (n 38).

75 Md Harun Ur Rashid and others, "Does CSR Affect Tax Avoidance? Moderating Role of Political Connections in Bangladesh Banking Sector" (2023) 20 Social Responsibility Journal 719 <https://doi.org/10.1108/srj-09-2022-0364>.

76 Shakhawat Hossain Sarker, (n 25).

77 Christopher Finnigan, "Tackling tax evasion in Bangladesh" (South Asia@LSE, 1 July,2019), https://blogs.lse.ac.uk /southasia/ 2019/07/01/tackling-tax-evasion-in-banglade, accessed on 20.07.2025

78 CPD, (n 65).

79 Ibid

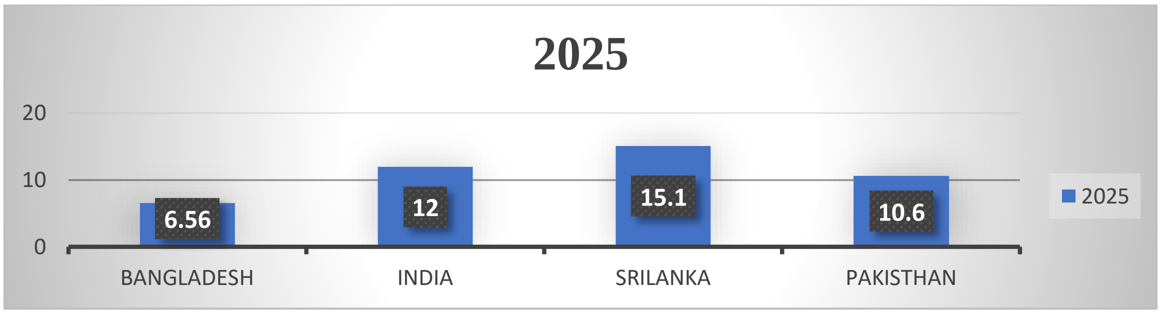
80 "Income Tax Intelligence and Investigation Unit" (Wikipedia, 2025) https://en.wikipedia.org/ wiki/Income_Tax _Intelligence _and_Investigation_Unit. accessed on 23.08.2025

81 Md. Masud Rana and Md. Masukujjaman, "Factors Affecting Evasion of Income Tax in Bangladesh: A Study on Individual Assesses in Bangladesh" (2017), Volume- XII, (2), Journal of Business and Technology (Dhaka), 1-13.

82 Md. Mahathy Hasan Jewel and others, (n 26).

83 Sadik Ahmed, "Institutional Dimensions of Tax Reforms in Bangladesh" (2020), Policy Research Institute of Bangladesh.

84 Md. Asaduz Zaman, "NBR Misses Revenue Target for 12th Year" *The Daily Star*, (Dhaka, 2024) https://www. thedailystar.net/business/news/nbr-misses-revenue-target-12th-year-3664321. accessed on 23.08.2025



(Chart 1) Source: BBS; Financial Express; India Times.

In Bangladesh, the process of filing taxes lacks user-friendliness, simplicity, and automation.[85] Within the current legal framework, the mechanisms for resolving disputes are inadequate. Because, at present, more than 20 thousand cases related to tax are pending with different courts, involving about 20 thousand crore taka (US$260 million).[86] The tax appeal process is sluggish and inefficient, often leading to drawn-out litigation and a lack of impartiality in tribunals. Media reports highlight that both the NBR and taxpayers often avoid ADR. Authorities see ADR as requiring compromise, while taxpayers may prefer litigation to avoid appearing to concede. This reluctance slows ADR adoption.[87] Consequently, stakeholders have limited options for efficiently settling disagreements outside the traditional legal system. Concerning weak enforcement and compliance, it is reported that tax evasion and underreporting are widespread due to ineffective enforcement mechanisms. Additionally, the challenges posed by the digital economy and multinational tax avoidance are not being adequately addressed, highlighting the necessity for adopting the BEPS (Base Erosion and Profit Shifting) framework. It is the practice of paying a lower amount of tax than what one is legally required to pay according to the tax laws established by the government.[88] Corruption within the tax administration[89] further complicates the enforcement of tax laws. The existing framework offers businesses low and consistent tax rates, grants significant leeway and potential for corruption to the tax authorities, and serves as a crucial means for political leaders to generate revenue and allocate benefits and economic advantages.[90] Incidents of tax corruption in Bangladesh are referred from different newspapers. These are: i. Deputy tax commissioner caught red-handed while taking a 10L bribe.[91] According to the news, the Anti-Corruption Commission (ACC) detained a senior income tax official as he was accepting Tk 10 lakh – an installment of Tk 60 lakh – in bribes at the Rajshahi Income Tax Office. On 1st May 2023, The Daily Star marked a news title- tax officer jailed in a corruption case.[92] A court in Chattogram has imposed a prison sentence of four and a half years on a tax officer from the Chattogram City Corporation (CCC) after a case was brought forward by the Anti-Corruption Commission (ACC). Divisional Special Judge Munshi Abdul Mozid announced the ruling and imposed a fine of Tk 70,000. If the officer fails to pay this amount, he will serve an additional nine months in jail. A significant issue with tax administration in Bangladesh is the complicated nature of the tax collection system and the

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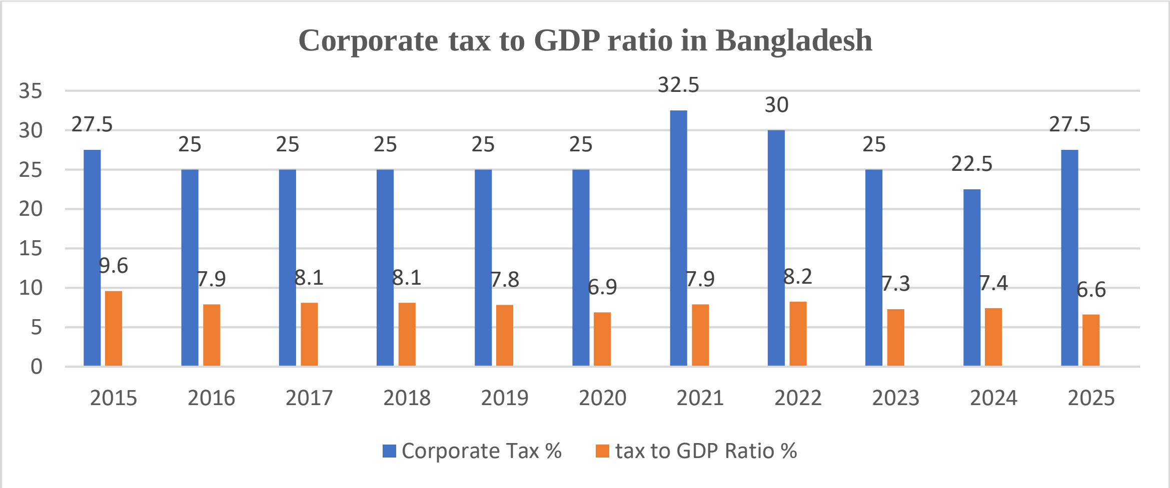
85 Sadik Ahmed, (n 83).
86 Ahsan H Mansur and others, (n 63).
87 "NBR to focus on out-of-court settlement of tax disputes to boost revenue," *Dhaka Tribune*, (Dhaka, 15 October 2024) https://www.dhakatribune.com/business/362001/nbr-to-focus-on-out-of-court-settlement-of-tax? accessed on 23.08.2025
88 Matthew Bishop, *Pocket Economist* (London: The Economist Books 2000).
89 M Adnan Kabir, Nazia Choudhury and Liliping, (n 26).
90 Mirza Hassan and Wilson Prichard, 'The Political Economy of Domestic Tax Reform in Bangladesh: Political Settlements, Informal Institutions and the Negotiation of Reform' (2016) 52 The Journal of Development Studies 1704.
91 Abdullah al Dulal, "Deputy Tax Commissioner Caught Red Handed while taking 10L Bribe" Dhaka Tribune, (Dhaka, 4 April, 2023) https://www.dhakatribune.com/bangladesh /nation/308303/deputy-tax- commissioner-caught-red-handed. accessed on 05.05.2025.
92 "CCC Tax Officer Jailed in Corruption Case" *Prothom Alo English*, (Dhaka, 1 May, 2023), https://en.prothomalo. com/ bangladesh/crime-and-law/2rjf67j2cp?utm. accessed on 05.05.2025

mistreatment of taxpayers. Developing and implementing an effective policy framework presents major challenges to improving tax administration efficiency in Bangladesh.

4.3 Hindrances for Investment from Local and Foreign Entrepreneurs

The GoB is implementing generous tax holidays and exemptions to stimulate investment for the country's rapid industrial development. Notably, the government is sometimes swayed by powerful political lobbyists. Common challenges include a high ratio of indirect to direct taxes, an excessive dependency on import taxes compared to income taxes, a limited tax base, and a low tax-to-GDP ratio.[93] Bangladesh has a higher corporate tax rate than the norm for the world and South Asia, but its tax-to-GDP ratio is lower than that of other South Asian nations except Afghanistan.[94] The corporate tax to GDP ratio of Bangladesh over the last 10 years is shown below **(Chart-2)**.



(Chart 2) Source: Trading Economics; CPD 2023; the Business Standard.

In our country, the system tends to benefit large conglomerates and firms with political connections disproportionately through tax holidays, exemptions, and tailored regimes. In contrast, small and medium-sized enterprises (SMEs) and foreign investors frequently experience a higher effective tax burden. Additionally, weak enforcement of regulations,[95] compliance problems,[96] insufficient audit and collection efforts, and ineffective revenue management highlight capacity gaps and resistance from influential vested interests. As firms increasingly exploit these incentives, the government has responded by introducing a minimum tax under the Income Tax Act 2023 to boost revenue.[97] Consequently, one problem seems to be addressed by creating another, further complicating the tax system. Currently, Bangladesh's corporate tax system is often perceived as complex, inconsistent, and occasionally overly burdensome, although foreign investment is crucial for accelerating economic development in many developing countries.[98] This is because a high corporate tax rate, as shown in Bangladesh, harms FDI and GDP, and it deters new incentives by skewing

[93] Mohammad Munayem Chowdhury and Syed Zabid Hossain, "An Overview of Tax Reforms in Bangladesh: Corporate Perspective" (2019), 19 (4), Global Journal of Management and Business Research: Accounting and Auditing.
[94] Meraj Mavis, "Bangladesh Lost 84,200C to shadow economy in just a year" *Dhaka Tribune*, (Dhaka, 2023).
[95] Grant Richardson, "The Relationship between Culture and Tax Evasion across Countries: Additional Evidence and Extensions" (2008) Volume 17 Journal of International Accounting, Auditing, and Taxation.
[96] Mohammad Ziaul Hoque, " Improving Personal Income Tax Compliance in Bangladesh" (Master Theses, BRACK University, 2000)
[97] "Medium and Long Term Revenue Strategy FY 2025-26 to 2034-35", (NBR, Bangladesh, 2025). https://nbr.gov.bd/ uploads/ publications/ MLTRS_E_Book_Version.pdf, Accessed on: 8 September, 2025.
[98] Edame and Okoi, (n 36).

FDI decisions and reducing labor effort.[99] The discretionary powers granted to tax authorities, combined with uneven enforcement, often result in arbitrary assessments and legal disputes that deter FDI. Generally, foreign investors typically seek predictable and transparent tax systems, but when tax authorities have broad discretionary power and enforcement is inconsistent, it opens the door to unfair or unexpected tax assessments, corruption, and costly legal battles.

5. Recommendations

In line with Bangladesh's development objectives, it is essential to prevent both tax avoidance and tax evasion by promoting tax transparency, which will ultimately help to reduce the fiscal deficit and support the country's sustainable growth.[100] The government should implement effective checks and balances, including independent oversight, regular audits, and transparent reporting systems, to ensure that tax enforcement is carried out fairly, free from corruption or abuse of power.[101] The process of developing tax policies should involve consultations with businesses, trade groups, legal experts, and civil society to ensure that reforms are both practical and inclusive. Based on this study's findings, the following suggestions aim to guide legal and policy reforms for a more efficient, investment-friendly corporate tax system in Bangladesh.

5.1 Recommendation for Removing the Existing Legal Gaps

Bangladesh's income tax regulations are often perceived as unclear, complex, and riddled with numerous exemptions and allowances.[102] Legal reforms should focus on the consistent application of tax laws and minimize sudden, ad hoc regulatory changes. This approach will build investor confidence and support long-term planning. So, the Government of our country should revise corporate tax legislations to remove ambiguities and reduce complexity. Using clear, concise, and accessible language will help taxpayers understand their obligations better and ensure compliance, while also minimizing discretionary interpretations by tax authorities. Numerous taxpayers and VAT professionals claim that locating a legitimate legal provision for a specific issue is similar to navigating a maze filled with numerous rules, orders, and notifications—some of which are still in effect, some have been revoked, and some have been replaced by others.[103] Policymaking should involve meaningful consultations with the private sector, legal experts, tax professionals, and civil society to make reforms practical, inclusive, and responsive to stakeholder needs. The expectations of stakeholders regarding corporate behavior that exceeds legal requirements are especially noteworthy given the current perception that companies can choose their tax contributions within existing tax regulations.[104]

5.2 Recommendation for Removing Institutional Drawbacks

An effective revenue system is essential for robust, continuous, and inclusive economic growth.[105] Well-defined and current regulations will lessen uncertainty for taxpayers and enhance the overall management of tax administration.[106] Adopting digital technologies can minimize human discretion, reduce corruption, and

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[99] Ibid.
[100] Khondaker Golam Moazzem, Shah Ahsan Habib, and Chowdhury Fariha, (n 9).
[101] Ibid
[102] Muhammod Shaheen Chowdhury, 'Income Tax Compliance and Policy Issues in Developing and Emerging Economies: The Case of Bangladesh' (2014) Volume 20 New Zeland Journal of Tax Law and Policy 277-303-.
[103] A. M. Saleheen, "The Use of Discretion in Taxation: The case of VAT in Bangladesh. E-Journal of Tax Research," (2013) Volume 11, eJournal of Tax Research, 97-113.
[104] Hasseldine, John & Morris, Gregory, "Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection," (2013) Vol. 37(1), Accounting Forum, pages 1-14.
[105] Carnahan, (n 48).
[106] Selim Raihan, "Overcoming Tax Reform challenges in Bangladesh" *The Daily Star,* (Dhaka, 3 October, 2024) https://www .thedailystar.net/opinion/views/news/overcoming-tax-reform-challenges-bangladesh 3718151. accessed on 27.07.2025.

make compliance easier and more transparent for businesses. Investing in digital infrastructure and automating processes like tax filing, assessment, and auditing can greatly enhance efficiency, transparency, and accountability in tax administration. For improving the strengthening of tax administration, the NBR can take many initiatives. The initiatives encompass integrating technology and data analytics, launching additional programs to boost return submissions, broadening the tax base, ensuring compliance with at-source deductions, enhancing the collection of overdue taxes and advance income taxes, and promptly resolving disputes and audits.[107] So, the tax authority should increase digital tax audit activities to unearth revenue leakage and tax evasion. A fair and efficient tax dispute resolution system, including specialized tax tribunals and ADR mechanisms, is essential to address grievances and reduce litigation delays. Enhancing the capacity of tax administration is crucial for attaining sustainable goals, allowing for greater tax revenue mobilization while ensuring that economic growth remains unaffected. Ongoing professional development and training for tax officials, legal practitioners, and corporate taxpayers are vital for effective tax reform implementation and comprehension. Tax officials also need to be adequately trained for overall improved efficiency in delivering services and playing their roles efficaciously.[108] A comprehensive taxation system is essential for carrying out governmental duties, driving economic progress, fostering sustainable development, and enhancing national well-being.

5.3 Recommendation for Ensuring Investment from Local or Foreign Entrepreneurs

An increase in tax rates may deter investors from investing in corporations. The increasing tax rate in our country reveals that its corporate tax structure is less effective compared to those of India and Vietnam, as the corporate tax rate in Bangladesh is currently higher than that of its neighbors.[109] Worldwide, responsible governments implement a progressive income tax system, in which those with higher incomes pay a larger proportion of their tax earnings than those with lower incomes.[110] The increase in tax rates results in reduced wages and elevated costs for all individuals. Increased income tax reflects the economic fragility of Bangladesh.[111] Setting rational, competitive, and fair tax rates is crucial for attracting investors. Gradually lowering corporate rates to match regional and global standards, while expanding the tax base to maintain revenue, should be considered. So, Bangladesh should gradually decrease its corporate tax rates to stay competitive regionally. A moderate, stable tax rate combined with a broader tax base can boost compliance and attract investment without sacrificing revenue goals. Investors value stability in tax laws; therefore, Bangladesh should limit frequent legislative changes and base reforms on long-term strategies. As a low corporate tax rate is typically a feature of the economic framework in developing nations, often implemented by governments to create more appealing conditions for foreign investors to commit to investments in their country,[112] our government should promote a more attractive investment climate and must undertake comprehensive legal and administrative reforms. Bangladesh ought to align its corporate tax policies with global standards, such as the OECD/G20 Base Erosion and Profit Shifting (BEPS) framework, to foster transparency, prevent tax avoidance, and promote cross-border cooperation. The system of taxation, the efficiency of tax authorities, and the integration of digital technology are linked to issues of tax transparency and the ability to generate revenue within an economy.[113] In order to reduce the fiscal deficit and promote

[107] NBR to Form Four New Units to Prevent Tax Evasion" *The Business Standard*, (Dhaka, 9 October, 2023), https://www.dhakatribune.com/business/327811/nbr-to-form-4-new-units-to-prevent-tax-evasion. accessed on 13.04.2025.
[108] Khondaker Golam Moazzem, Shah Ahsan Habib, and Chowdhury Fariha, (n 9).
[109] Fatema Tuj Johora, (n 33).
[110] Muhammad Shaheen Chowdhury, (n 61).
[111] Fatema Tuj Johora, (n 33).
[112] Babatayo Kolawole Olayemi and Adegbie Festus Folajimi, (n 14).
[113] Khondaker Golam Moazzem, Shah Ahsan Habib, and Chowdhury Fariha, (n 9).

sustainable growth in Bangladesh, it is imperative to promote tax transparency and curtail both tax avoidance and tax evasion in accordance with the country's development objectives.[114] Bangladesh, India, and Vietnam—three emerging Asian economies—have diverse corporate tax policies with various incentives, rates, and procedures. India's multi-tiered system has a standard 22% rate for domestic companies, with a 15% rate for certain manufacturing firms under specific conditions, and offers incentives in SEZs, infrastructure projects, and R&D. Withholding taxes range from 10% to 20%. Progress includes digital filing, faceless assessments, and GST, with strict transfer pricing standards. Vietnam has a simple 20% corporate rate, with preferential rates of 10% or 17% for targeted sectors, offering incentives like tax holidays, especially in economic zones for foreign investors. Tax filings are quarterly or annual, with withholding taxes at 5% on dividends and interest and 10% on royalties. Transfer pricing rules are enforced, and despite bureaucratic hurdles, Vietnam supports foreign investment due to its low flat tax and incentives. India appeals to the tech, R&D, and manufacturing sectors with its evolving, concession-friendly system.

So, it can be concluded that while Bangladesh possesses a structured corporate tax framework, vital reforms in legal clarity, institutional capabilities, transparency, and digital enforcement are crucial for improving efficiency, equity, and investor trust in the corporate taxation system. By adopting the above recommendations, Bangladesh can also develop a corporate tax environment that ensures fiscal sustainability while supporting private sector growth and sustainable economic development.

Concluding Remarks

This article offers a critical analysis of the corporate tax regulations in Bangladesh, highlighting their influence on establishing a business-friendly atmosphere. The analysis indicates that while the existing system fulfills fundamental fiscal requirements, it is legally intricate, administratively ineffective, and inconsistent, which inhibits corporate compliance and investment. To stimulate economic expansion and facilitate business operations, the corporate tax structure in Bangladesh needs reform through legal streamlining, enhanced transparency, and institutional improvements. By aligning tax regulations with international norms, minimizing regulatory barriers, and reinforcing enforcement mechanisms, Bangladesh can cultivate a more reliable and equitable corporate tax system. Ultimately, reforms should balance the government's revenue objectives with initiatives to encourage growth in the private sector. Though our government has made strides in simplifying procedures and promoting online filing, challenges remain in transparency and timely dispute resolution. A clear, modernized tax system will boost voluntary compliance and make Bangladesh more appealing to both local and foreign investors.

[114] ibid.

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Maternity Care of Women Prisoners in Bangladesh: Laws and Practices from the Perspective of International Standards

Md. Ahsan Kabir*
Mehedi Hasan Anik**

***Abstract**: This study evaluates the scenario of maternity care of women prisoners in Bangladesh within the national legal frameworks and international human rights standards. The prison system of Bangladesh is not well equipped to handle the special needs of pregnant women though the numbers of women prisoners have increased notably. The aim of this study is to find out how the prison administration in Bangladesh addresses the maternal rights of women prisoner. Bangladesh has some safeguards within a few regulations like the Prisons Act, 1894, Jail Code and Special Privileges for Convicted Women Act, 2006, but loopholes exist. These shortcomings have been assessed by analyzing international frameworks like the ICCPR, CEDAW, CRC, the Mandela Rules and the Bangkok Rules through doctrinal and comparative methods. To meet the international standards regarding maternity care of women prisoners in domestic practices the study suggests policy reforms based on secondary sources and international jurisprudence.*

***Keywords:** Women Prisoners, Maternity Care, Bangladesh Prison Law, Human Rights Standards, and Reproductive Justice*

1. Introduction

Women Prisoners are already one of the most marginalized groups within the criminal justice system and they become the most vulnerable when pregnant. According to World Prison Brief, more than 740,000 are held in prisons worldwide in 2023 which denotes that women prisoners are increasing day by day. Adding to that, many of them are mothers or expected.[1] Now, in Bangladesh, where we already see a poorly managed prison system, it's nowhere capable of handling the care and facilities needed for pregnant women in our prison.[2] Although Articles 32 and 35 of the Bangladeshi Constitution protect the right to life and personal liberty,[3] in practice these protections remain largely aspirational for women in prison. International human rights instruments emphasize gender sensitive custodial care; the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) affirm the right to adequate healthcare for all detainees[4] while Maternity related protections and non-custodial alternatives for female offenders are particularly mandated by the Bangkok Rules, also known as the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.[5] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has also been ratified by Bangladesh[6] and the Convention on the Rights of the Child (CRC)[7] both of which impose obligations to protect the reproductive rights of women and the welfare

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[1] Institute for Crime & Justice Policy Research (ICPR), World Prison Brief: Bangladesh (ICPR, Birkbeck, University of London 2023) https://www.prisonstudies.org/country/bangladesh accessed 21 July 2025.
[2] BLAST, *Behind Bars: The Situation of Women in Prisons in Bangladesh* (Dhaka, Bangladesh Legal Aid and Services Trust 2022) 17–22 https://www.blast.org.bd/publications/behind-bars-2022 accessed 21 July 2025.
[3] The Constitution of the People's Republic of Bangladesh, arts 32, 35.
[4] The Nelson Mandela Rules, Rules 24–28.
[5] The Bangkok Rules, Rules 5–9, 48–49.
[6] UN Convention on the Elimination of all Discrimination Against Women, 1979, arts 11(1)(f), 12.
[7] UN Convention on the Rights of the Child, 1989, arts 3, 6, 24.

of children even in custodial settings. Despite these commitments, the Bangladeshi prison system is outdated legal frameworks such as the Prisons Act 1894 and the Jail Code which contain no substantive provisions on maternity, childbirth or child rearing in prisons.[8] Due to a lack of implementing regulations and low institutional awareness, the Special Privileges for Convicted Women Act 2006, which was passed in order to solve some of these difficulties, is still not being used to its full potential.[9] Rights group's reports such as those from the Bangladesh Legal Aid and Services Trust (BLAST) and Ain o Salish Kendra (ASK), document recurring violations of maternal rights in custody ranging from denial of medical attention to unhygienic birthing conditions and inadequate nutrition.[10] Academically, there is a scarcity of focused scholarship on maternity care in Bangladeshi prisons, with most studies addressing general prison conditions rather than gender specific issues.[11] Existing practice from Norway, the United Kingdom and India provides a combined model by which these challenges can be mitigated by merging gender sensitive policies, institutional reform and dedicated maternity care cells.[12] This study, therefore, addresses a dual gap; firstly, between Bangladesh's constitutional and international obligations and its custodial practices, and secondly, in the academic literature, where maternity care in prisons remains under-researched.

2. Literature Review

Imprisoned pregnant women are a standalone vulnerable group which has been a focus of the academic arena for the last few years notably. Compared to normal women, female inmates show increased mental illness, drag use, delayed prenatal care and adverse perinatal outcome.[13] Studies point out the compounded psychosocial stress these women face including fear of infant separation and institutional neglect[14] adding that organized care, like special mother-and-baby programs helps keep moms and newborns healthy. However, it can be hard to find these programs, and some are much better than others.[15] Even with institutional supports, many prisons globally still exhibit critical issues such as late or absent hospital referrals, insufficient midwifery staffing, poor postpartum follow-up and in some regions, shackling during labor, a practice widely condemned but still reported.[16] International standards that establish the benchmark for custodial care coexist with these empirical findings. A right to gender sensitization and community-equivalent healthcare in prisoners is outlined in the Mandela Rules and Bangkok Rules.[17] However, experts frequently point out a widespread implementation gap which is a discrepancy between idealized standards and practical realities, particularly in

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[8] The Prisons Act 1894 (Bangladesh); The Jail Code (revised edn).

[9] The Special Privileges for Convicted Women Act 2006 (Bangladesh).

[10] Ain o Salish Kendra (ASK), Annual Human Rights Report 2020 (ASK 2021) 43–45; BLAST (n 2).

[11] Mahbubur Rahman, *Education, Training and Human Rights of Prisoners in Bangladesh* (Academia Insights 2019) 12–14; Salma Sultana Khan, 'The Role of the Jail Code in Protecting Prisoners' Rights: A Gendered Perspective' (2021) 14 Dhaka University Law Journal 103, 110.

[12] *R.D. Upadhyay v State of AP* AIR 2007 SC 1946 (India); *HM Prison and Probation Service (UK), Prison Service Instruction 49/2014: Mother and Baby Units* (2014); Norwegian Correctional Service, *Women in Prison: Conditions and Sentencing* (2020) 11–13.

[13] Bard E, Knight M and Plugge E, 'Perinatal Health Care Services for Imprisoned Pregnant Women …' (2016) 16 BMC Pregnancy & Childbirth 285. https://doi.org/10.1186/s12884-016-1051-0

[14] Diksha Sapkota *et al.*, 'Navigating Pregnancy and Early Motherhood in Prison' (2022) 10 Health & Justice 32. https://doi.org/10.1186/s40352-022-00180-1 accessed 21 July 2025.

[15] Abbott L *et al.*, 'Improving Maternity Provision for Incarcerated Women in the UK' (2024) 388 BMJ e080445; Wilson SH *et al.*, 'Enhanced Perinatal Programs for People in Prisons' (2022) J Correct Health Care. https://doi.org/10.1136/bmj-2024-080445 accessed 21 July 2025.

[16] Molly Skerker *et al.*, 'Improving Antenatal Care in Prisons' (2015) 93 Bull World Health Organ 739; Hawkins SS, 'Reproductive Health Care for Incarcerated Women' (2024) Bulletin of the World Health Organization 739 https://doi.org/10.2471/BLT.14.144063 accessed 21 July 2025.

[17] UNGA Res 70/175 (17 December 2015) Mandela Rules; UNGA Res 65/229 (21 December 2010).

low- and middle-income environments.[18] According to recent criticisms, these normative frameworks run the risk of staying ornamental rather than useful in the absence of systemic change and sufficient funding.[19] In contrast, India has established rights for women who are incarcerated by using legal processes like Public Interest Litigation.[20] Norway provides progressive, non-custodial models centered on the child's benefit and reintegration, whereas the UK oversees mother-and-baby units and specialized programmatic treatments.[21] These examples illustrate that humane, rights-based rehabilitation is practicable when supported by legal and policy commitment. In contrast, research on maternity care in Bangladeshi prisons remains few and far between. Academic analyses like those by Wahab (2020) and Khan (2021) critique outdated laws such as the Prisons Act 1894 and the Jail Code for minimal maternal care provisions.[22] NGO investigations by BLAST (2022), ASK (2020) and recent government and advocacy reports (e.g., GAO 2024) offer sobering evidence of systemic failure like overcrowding, poor nutrition, unsanitary birthing conditions, and the absence of formal maternity protocols.[23] The discrepancy between Bangladesh's legal responsibilities and actual circumstances highlights an urgent need for research and policy. This study examines major concepts, international data, and Bangladeshi legislation.

3. Methodology

This study employs a qualitative form of legal research that combines doctrinal and comparative techniques. The Constitution, the Prisons Act of 1894, the Jail Code, the Code of Criminal Procedure of 1898, and the Special Privileges for Convicted Women Act of 2006 are the main sources of law in Bangladesh that are the subject of the doctrinal study. When interpreting these laws, CEDAW, and the CRC, international human rights instruments such as the Nelson Mandela Rules and the Bangkok Rules are taken into account to assess the degree of conformity between domestic rules and international norms on maternity care for women in custody. The legal and institutional frameworks of Norway, the United Kingdom, and India are compared in order to supplement the doctrinal approach. These diverse jurisdictions were selected to identify adaptable reform models for Bangladesh. Judicial decisions particularly in India and the UK provide insight into how courts have addressed issues of women's rights and prison reform while Norway offers lessons from a rehabilitative and child centered correctional model. This research uses secondary sources, like NGO reports and academic studies to show what prisons in Bangladesh are really like. These accounts help ground the legal analysis by comparing the written law to what happens in real life. This combination of doctrinal, comparative and empirical insights enables a critical evaluation of legal voids, highlights practical barriers in implementation and supports the development of context specific, rights-based reform recommendations.

Furthermore, though the study is confined to a doctrinal and comparative legal analysis based on secondary sources, it has some limitations. While it adheres to global norms like the Bangkok Rules, the Nelson Mandela Rules, CEDAW, ICCPR, and CRC, the comparative perspective is limited to India, the United Kingdom, and Norway. Due to resource and access constraints, the research does not include primary empirical fieldwork or official judicial inspection reports.

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[18] Rosemary Barberet and Crystal Jackson, 'UN Rules for the Treatment of Women Prisoners' (2017) 17 Criminology & Criminal Justice 275. https://doi.org/10.5565/rev/papers.2336 accessed 21 July 2025.

[19] Kathryn Cahalin, 'Complexities of Midwifery Care Delivered to Perinatal Women in Prison' (2024) Midwifery, https://doi.org/10.1016/j.midw.2024.103782 accessed 21 July 2025.

[20] *R D Upadhyay v State of Andhra Pradesh*, (n 12).

[21] HM Prison and Probation Service (UK), Prison Service Instruction 49/2014: Mother and Baby Units; Norwegian Correctional Service, Women in Prison: Conditions and Sentencing (2020).

[22] Nazia Wahab, 'Women Prisoners' Rights in Bangladesh …' (2020) *The Law Brigade*; Khan SS, 'The Role of the Jail Code in Protecting Prisoners' Rights' (2021) 14 Dhaka University Law Journal 103. e) https://thelawbrigade.com/wp-content/uploads/2020/06/Syed-Nazia-Wahab-IJLDAI.pdf accessed 21 July 2025.

[23] GAO, Advocacy and Research on Reproductive Wellness of Incarcerated People (2024) US GAO-25-106404.

4. Domestic Legal Framework in Bangladesh

In Bangladesh, the domestic legal system that protects the rights of women who are incarcerated is mostly based on laws from the colonial era and prison manuals that are still in use, combined with a few reform-focused acts. While these instruments contain general provisions for the treatment of prisoners, they do not explicitly address the healthcare and maternity needs of female inmates. This section explores the relevant constitutional guarantees, statutory laws, prison regulations as well as judicial interpretations in Bangladesh concerning maternity care for women prisoners.

4.1 Constitutional Protections

The Constitution of Bangladesh embodies fundamental rights that apply equally to all citizens, including those deprived of liberty. Equal protection under the law and equality before the law are guaranteed by Article 27.[24] Article 28 prohibits sex-based discrimination, while Article 28(4) expressly allows positive action for women and children.[25] Furthermore, Article 32 of the Bangladesh Constitution signifies that no person shall be deprived of life and personal liberty.[26] Together, these constitutional provisions provide the framework for guaranteeing maternity care to inmates as part of their rights to life, health, and nondiscrimination. Although all people, including prisoners are entitled to certain constitutional rights, the Supreme Court of Bangladesh has decided that confinement does not deny anyone these rights.[27] However, the practical applicability of these protections for pregnant inmates is limited by the lack of any explicit reference of maternal rights in detention. There is a gap in court enforcement because these constitutional provisions have seldom been applied in favor of inmates' health rights.[28]

4.2 The Prisons Act, 1894

The major enactment governing prisons in Bangladesh is the Prisons Act of 1894, a colonial relic that remains largely unchanged. While the Act provides general rules for the custody, discipline, and maintenance of prisoners, it fails to include any gender-specific provisions.[29] The Act's broad implementation upholds antiquated, punishing standards that disadvantage women in particular.[30] Section 4 mandates classification of prisoners, and section 7 outlines separation of female inmates from male prisoners, but there is no mention of pregnant prisoners or children born in custody.[31] The Act empowers medical officers to examine and treat prisoners,[32] but makes no reference to antenatal or postnatal care, maternity diets or birth-related provisions. This omission is especially concerning given the Act's antiquated provisions and the increasing number of women entering the prison system.[33]

4.3 Jail Code and Prison Rules

The Jail Code is Bangladesh's practical guide for basic medical care, food, and jail management, however it does not adequately address maternal health. The "hospital diet" is only available to expectant mothers if the

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[24] Constitution of Bangladesh, art 27.
[25] Ibid, art 28(1)– (4).
[26] Ibid, art 32.
[27] *BLAST and others v Bangladesh* [2003] 55 DLR (HCD) 363.
[28] Mahbubur Rahman, *Education, Training and Human Rights of Prisoners in Bangladesh* (Academia Insights 2019) 12–14.
[29] The Prisons Act (n 8).
[30] Syeda Nazia Wahab, 'Women Prisoner's Rights in Bangladesh and Bangladeshi Rules and Regulations: A Critical Analysis of International Standards' (2020) 5 The Law Brigade.
[31] Ibid, ss 4, 7.
[32] Ibid, s 13.
[33] ASK 2021, (n 10) 43–45.

prison medical officer deems them unwell.[34] Enforcement varies greatly, but some laws permit children to remain with their prison moms until they are six years old.[35] In many cases, infants are held in overcrowded conditions without adequate nutrition, clothing, or recreational facilities.[36] Thus, the Jail Code fails to institutionalize the Bangkok Rules or CEDAW standards within domestic prison policy.

4.4 The Code of Criminal Procedure (CrPC), 1898

Section 382 of the CrPC, 1898 states that the execution of a death sentence on a pregnant woman must be postponed until after childbirth.[37] However, this is the only provision in the criminal justice system that explicitly acknowledges pregnancy. The CrPC bail norms lack explicit humanitarian grounds, contributing to prolonged pre-trial detention of vulnerable women.[38] It does not provide for bail,[39] parole or alternative sentencing based on maternity or care responsibilities, unlike India's Code which includes such mechanisms.[40] The absence of provisions regarding pre-trial release of pregnant women or those with infants results in prolonged detention of vulnerable female prisoners, often for non-violent or minor offences.

4.5 The Special Privileges for Convicted Women Act, 2006

The Special Privileges for Convicted Women Act, 2006, was introduced to provide certain rehabilitative and gender-sensitive measures for incarcerated women. It permits conditional bail in certain situations as well as vocational training.[41] On maternity care, prenatal treatments, and child welfare facilities, however, this statute is likewise silent. Reports show how the Act's exceptional privileges are essentially meaningless due to the lack of implementing regulations.[42] Furthermore, under-trial inmates, who make up the majority of female inmates, are not granted the same benefits under this law as convicted inmates.[43]

4.6 Judicial Interpretations

The Bangladeshi courts have occasionally intervened to protect inmates, ruling in cases like *BLAST v. Bangladesh* that all prisoners have a fundamental right to dignity, legal representation and medical care.[44] However, the ruling did not elaborate on pregnancy-specific rights. There prevails a judicial vacuum in the interpretation of maternity rights in prisons, in contrast to jurisdictions like India, where courts have issued binding guidelines for the treatment of pregnant inmates.[45] There are no special safeguards in Bangladesh's legislative and regulatory framework to safeguard the welfare of children born in detention or to protect pregnant inmates. Maternal health is not addressed by jail laws, despite the constitution providing theoretical protection. As a result, maternity care for female prisoners is inconsistent and relies heavily on the charity of prison officials.

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[34] Jail Code (revised edn, Bangladesh Jail Directorate), Rule 761.
[35] Ibid, Rules 838, 1231.
[36] Bangladesh Legal Aid and Services Trust (BLAST), Behind Bars: The Situation of Women in Prisons in Bangladesh (Dhaka, BLAST 2022) 22–23.
[37] The Code of Criminal Procedure 1898 (Act V of 1898), s 382.
[38] Sayedul Husan, 'Provisions Relating to Bail Under the Code of Criminal Procedure in Bangladesh: A Critical Study' (2023) 8 South Asian Law Review Journal 126, 130.
[39] Ibid
[40] The Code of Criminal Procedure 1973 (India), s 436A.
[41] Special Privileges for Convicted Women Act 2006 (Bangladesh), s 3.
[42] Penal Reform International and Bangladesh Legal Aid and Services Trust (BLAST), Development and Use of the Probation System in Bangladesh (PRI 2014) 22–23.
[43] ASK 2021, (n 10), see also United Nations Development Program (UNDP), Prison Reforms in Bangladesh (UNDP 2019) 14.
[44] *BLAST and others v Bangladesh*, (n 27).
[45] *R D Upadhyay v State of Andhra Pradesh*, (n 12).

5. International Standards and Bangladesh's Obligations

Bangladesh has ratified a number of international treaties that provide minimum requirements for the humane treatment of prisoners, including clauses pertaining to maternity care for women. These legal instruments ranging from core human rights conventions to specialized UN rules, impose both moral and legal obligations upon the state to ensure gender-sensitive treatment of incarcerated women. This section reviews key international instruments relevant to maternity care for female prisoners and assesses their binding or persuasive effect on Bangladeshi law.

5.1 ICCPR, 1966: Humane Treatment and Dignity

The International Covenant on Civil and Political Rights (ICCPR), which establishes guidelines for the humane treatment of all people who are deprived their freedom, was ratified by Bangladesh in 2000.[46] Article 10 (1) states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[47] States have a positive obligation under Article 10 to ensure basic health care and humane conditions for all inmates, including pregnant women.[48] Moreover, Article 10 (2) requires separation between accused and convicted persons, while Article 10 (3) emphasizes rehabilitation as the goal of imprisonment. These provisions although general are crucial for interpreting maternity-related rights in custodial settings.[49] The UN Human Rights Committee has interpreted Article 10 as requiring states to ensure adequate healthcare, accommodation and special protections for vulnerable groups including pregnant women.[50]

5.2 CEDAW, 1979: Gender-Specific Rights in Detention

Bangladesh ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1984. Article 12[51] requires states, including in custodial settings, to provide adequate services related to pregnancy, childbirth, and the postpartum period.[52] Article 14, though originally intended for rural women, has been interpreted broadly to include women in vulnerable conditions, such as in detention.[53] The duty of state parties to guarantee non-discrimination and access to maternal health care in detention settings has been underlined by the CEDAW Committee on numerous occasions.[54] In its General Recommendation No. 24, the Committee stressed that women prisoners must be provided gender-appropriate healthcare, including during pregnancy and childbirth.[55] Bangladesh's periodic reports to the CEDAW Committee have largely overlooked prison conditions, and the recommendations directed toward prison reform have largely remained unimplemented.[56]

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[46] International Covenant on Civil and Political Rights, 1966 <https://treaties.un.org> accessed 20 July 2025.
[47] Ibid, art 10 (1).
[48] Australian Human Rights Commission, Human Rights Standards for Australian Prisons (2012) 15 accessed 21 July 2025.
[49] ICCPR, art 10 (2)–(3).
[50] United Nations Human Rights Committee, General Comment No 21: Humane Treatment of Persons Deprived of Liberty, UN Doc HRI/GEN/1/Rev.1 (10 April 1992).
[51] CEDAW, art 12.
[52] CEDAW Committee, General Recommendation No 24: Women and Health (1999) UN Doc A/54/38/Rev.1, para 12.
[53] Ibid, art 14.
[54] Ibid, paras 42–43.
[55] CEDAW Committee, (n 52).
[56] CEDAW Committee, Concluding Observations on the Eighth Periodic Report of Bangladesh (2016) CEDAW/C/BGD/CO/8.

5.3 CRC, 1989: A Perspective on Maternal Custodial Care

Bangladesh has adopted the CRC in 1990, extends protection not only to children in free society but also to those born or living in custody. Article 3(1)[57] declares that in all decisions involving children, the child's best interests must always come first.[58] While Article 7 ensures the right to be registered, have a name, and get nationality, Article 24 upholds every child's right to the best possible quality of health.[59] Separation from parents is prohibited by Article 9 unless it is required for the child's best interests.[60] The Committee on the Rights of the Child has repeatedly raised concerns over the plight of children living in prison environments, calling for non-custodial alternatives for pregnant women and child-caring mothers.[61] These recommendations are directly applicable to Bangladesh, where children remain in jail with limited care and legal identity.

5.4 Nelson Mandela Rules (SMRs), 2015

The UN Standard Minimum Rules for the Treatment of Prisoners, also referred to as the Nelson Mandela Rules, provide widely accepted guidelines for prison conditions. Although they are not legally binding, they have strong moral and persuasive power. According to Rule 24, all inmates must get free medical care that is comparable to that which is provided in the community.[62] Rule 28[63] addresses special attention to women's healthcare, noting that pregnant prisoners must receive prenatal and postnatal care and that arrangements must be made for childbirth in appropriate hospitals.[64] Bangladesh has not formally incorporated the Mandela Rules into domestic law and current prison conditions reflect significant deviations from these standards, especially concerning maternal care and hospital referrals.[65]

5.5 Bangkok Rules, 2010: Women-Specific Custodial Standards

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) provide an over and above, gender-specific framework. The Bangkok Rules, which were adopted in 2010, include topics that the Mandela Rules mostly ignore. Rule 48[66] requires prison authorities to ensure proper pre- and postnatal care, including nutritional needs, safe childbirth and access to qualified medical professionals.[67] Rule 49 mandates that women prisoners should not be discouraged from breastfeeding and that child-rearing practices should be facilitated in custody.[68] These rules also require alternatives to incarceration, particularly for expectant moms and mothers of young children. There is no official endorsement of these concepts in Bangladesh's prison system. Instead of following set protocols, maternity care is still provided on an as-needed basis, depending on prison conditions and administrative discretion.[69] Humane treatment and nondiscriminatory healthcare are mandated by the ICCPR and CEDAW. According to the CRC, children have a right to developmental care and dignity, even if they are born behind

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57 CRC, art 3 (1).
58 Howard League for Penal Reform, Mothers and Babies in Prison: Upholding Children's Rights (2020) 6–8.
59 Ibid, arts 7, 24.
60 CRC Committee, General Comment No 7: Implementing Child Rights in Early Childhood (2005) CRC/C/GC/7/Rev.1.
61 Ibid
62 The Nelson Mandela Rules, Rule 24.
63 Ibid, Rule 28.
64 The Nelson Mandela Rules: Implementation Guide 2018, (n 4), 45–47.
65 United Nations Development Program (UNDP), Prison Conditions in Bangladesh: A Gendered Perspective (2019) 57–59; Bangladesh Legal Aid and Services Trust (BLAST), Behind Bars: The Situation of Women in Prisons in Bangladesh (Dhaka, BLAST 2022) 30.
66 The Bangkok Rules, Rule 48.
67 Penal Reform International, A Guide to the United Nations Rules for the Treatment of Women Prisoners (The Bangkok Rules) (2013) 28–32.
68 Ibid, Rule 49.
69 BLAST 2022, (n 2), 31–32.

bars. The Mandela and Bangkok Rules offer these obligations a concrete form even though they are not legally enforceable. Bangladeshi procedures, however, do not meet international standards.

6. Empirical Realities: Maternity Care in Bangladeshi Prisons

Despite the relatively low percentage of female inmates in Bangladesh's overall prison population, their specific needs, especially concerning maternity care remain largely overlooked in custodial policies and infrastructure. According to data from the Institute for Crime & Justice Policy Research (ICPR), female prisoners comprised approximately 4.69% of the total prison population in 2023.[70] This figure, while seemingly marginal in absolute terms, represents a vulnerable group whose health, reproductive rights and childcare needs demand targeted attention. The following table illustrates the gradual increase in the number of female prisoners over the past four years, reflecting a persistent trend that exacerbates the pressure on an already inadequate prison healthcare system:

Year	Total Prison Population	Female Prisoners	Female (%)
2020	71,000	3,000	4.23%
2021	72,000	3,150	4.38%
2022	73,000	3,300	4.52%
2023	74,000	3,470	4.69%

Source: World Prison Brief data, Institute for Crime & Justice Policy Research[71]

Given the steadily rising number of incarcerated women, as indicated in the Table, the absence of specialized maternity units and structured hospital referral systems is indicative of a systemic neglect that violates both domestic legal obligations and international custodial standards. Though constitutional and international guarantees, the lived realities of pregnant women and mothers in Bangladeshi prisons remain deeply distressing. In practice, the prison system is ill-equipped to handle the unique physical, emotional and developmental needs of pregnant inmates and children born in custody. Empirical findings by human rights organizations, media investigations and national prison audits reveal a persistent gap between law and implementation.

6.1 Infrastructure and Healthcare Deficits

Most prisons in Bangladesh lack even the minimum infrastructure for maternal healthcare. According to the Bangladesh Legal Aid and Services Trust (BLAST), only a handful of central jails have designated female wards, and even fewer have separate maternity facilities.[72] In many district jails, women are held in overcrowded, unsanitary cells where access to clean water, nutritious food and basic prenatal care is scarce.[73] These observations are consistent with recent multi country evidence: qualitative and review studies since 2020 repeatedly document delayed referrals, thin on site midwifery capacity and fragmented post-partum follow up as primary drivers of preventable morbidity for pregnant prisoners.[74] They also note that

[70] ICPR, 2023.
[71] Ibid
[72] BLAST 2022, (n 36), 18.
[73] Ibid, 20–22.
[74] Diksha Sapkota and others, 'Navigating pregnancy and early motherhood in prison: a thematic analysis of mothers' experiences' (2022) 10 Health & Justice 32.

improvements occur where prisons embed dedicated perinatal clinics and clear hospital transfer pathways, aligning care with community standards. Medical staff in prisons are usually overburdened and underqualified. A 2018 report by Ain o Salish Kendra (ASK) found that some jails had no full-time female doctors and pregnant prisoners were examined by male medical officers without female attendants, violating privacy and dignity.[75] Antenatal check-ups are infrequent and emergency referrals to hospitals are delayed or denied often due to bureaucratic procedures and lack of transport.[76] The Jail Code, which technically allows for hospital diets and some medical attention, is applied inconsistently, and depends heavily on the discretion of jail superintendents which conflicts with the "equivalence of care" principle in Rule 24 of the Mandela Rules and the gender specific obligations in the Bangkok Rules.[77] Pregnant prisoners are rarely given additional bedding, sanitary products, or postnatal support unless NGOs intervene.[78]

6.2 Births Behind Bars

NGO monitoring in Bangladesh has recorded instances of in cell delivery or late hospital transfer, conditions that fall short of minimum standards for safe childbirth. The international record is clear that labor should occur in appropriate medical settings and that restraints during labor constitute inhuman and degrading treatment.[79] These circumstances breach Bangkok Rule 48 and Mandela Rule 28, which require safe, hygienic, hospital-based delivery and prohibit practices that compromise dignity. [80] Even when women are referred to hospitals, reports suggest that they are handcuffed to beds during labor, a practice condemned as inhuman and degrading by the UN Special Rapporteur on Torture.[81] These practices not only violate international norms but also fundamental rights under Article 35(5) of the Constitution of Bangladesh.[82]

6.3 Children Born in Custody

Consistent with international child-rights guidance, children residing in prison with their mothers should have their best interests assessed individually and enjoy access to health care, identity registration and early-childhood stimulation; without structured provision, developmental harms are foreseeable. Comparative advocacy syntheses underline that Mother-and-Baby provisions mitigate risk only when resourced and rights based.[83] These children are not officially registered as citizens unless external organizations intervene raising serious questions about their identity and legal rights.[84] Although mothers are allowed to keep their children with them until a specific age under the Jail Code, the implementation is erratic and there is no structured plan for transitioning such children into family care or state custody.[85] This case violates the Convention on the Rights of the Child (CRC), which states that the child's best interests must always come first in all custody decisions.[86] Consistent with international child rights guidance, children residing in prison with their mothers

[75] Ain O Salish Kendra (ASK), Annual Human Rights Report 2018 (ASK 2019) 43.
[76] Ibid, 44.
[77] Jail Code, Rule 761.
[78] BLAST 2022, (n 36), 24.
[79] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (1 February 2013) UN Doc A/HRC/22/53.
[80] The Nelson Mandela Rules, (n 4), Rule 28; see also the Bangkok Rules, (n 5), Rule 48.
[81] United Nations Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2013) A/HRC/22/53.
[82] The Constitution of Bangladesh, (n 3), art 35(5).
[83] UNDP, Prison Conditions in Bangladesh: A Gendered Perspective (2019) 12.
[84] Ibid, (2019) 13.
[85] Jail Code, Rule 838.
[86] ASK 2021, (n 10), 45.

should have their best interests assessed individually and enjoy access to health care, identity registration and early childhood stimulation as without structured provision, developmental harms are foreseeable.[87]

6.4 Pre-trial Detention and Legal Access

In Bangladesh, a sizable portion of women behind bars are under-trial detainees, which means they have not been found guilty of any crime. In 2021, around 70% of female inmates were awaiting trial, according to ASK.[88] This tendency is consistent with larger regional studies that demonstrate that inadequate legal assistance and procedural delays disproportionately affect women in custody. Spending more time in these under resourced environments increases their maternal health risks.[89] Pregnant women and mothers of infants are rarely granted bail even for minor, non-violent offences. Legal aid is nominally available but women are frequently unaware of their rights, and legal aid lawyers are overworked. Bail applications based on health grounds or pregnancy are rarely prioritized unless pursued by activist lawyers or human rights NGOs.[90]

6.5 NGO Intervention and Civil Society Efforts

Civil society groups like BLAST, ASK and Naripokkho defend prisoners' rights through legal aid, strategic lawsuits and essential hygiene support.[91] Although judicial standards on women's prison conditions were successfully lobbied for in 2018 by BLAST and Naripokkho, enforcement has been uneven.[92] Nevertheless, these initiatives have minimal impact on jails in rural areas since they are fragmented and focused on urban areas. Furthermore, many NGOs are unable to obtain prison data or carry out independent monitoring because of bureaucratic opposition.

Frequent violations of human rights, inadequate infrastructure, legal stagnation, and administrative indifference describe the current status of maternity care in Bangladeshi jails. Despite approved treaties and constitutional commitments, official policy still largely ignores pregnant mothers and children in custody. These mistakes are deeply moral as well as institutional and legal. The next section discusses how other nations have addressed comparable issues and what Bangladesh can take away from them. According to international assessments, quantifiable improvements in prenatal attendance and hospital delivery occur when jail authorities formalize NGO participation through MOUs that include data exchange, referral procedures, and post-release continuity of care.[93] Instead of using a national jail health dataset, these empirical findings mostly rely on NGO reports, media coverage, and administrative papers; as a result, certain statistics may underestimate or exaggerate prevalence. Given the contextual disparities in resources and governance, cross-jurisdictional comparisons (India, UK, Norway) are utilized illustratively rather than as direct benchmarks.

7. Comparative Analysis: India, the United Kingdom and Norway

Bangladesh may enhance its jail system by studying how other nations manage theirs, particularly with regard to pregnant convicts. In order to identify effective methods that Bangladesh could adopt, this section examines the laws in Norway, the UK, and India.

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[87] Howard League for Penal Reform, *Mothers and Babies in Prison: Upholding Children's Rights* (Howard League 2020).
[88] ASK 2021, (n 10), 45.
[89] Syed Mohammad Arafat and others, 'Addressing mental health in the criminal justice system: a synthesis of mental health, forensic risks, and pathways to reform in Bangladesh' (2025) 24 Annals of General Psychiatry 19. https://doi.org/10.1186/s12991-025-00485-1 accessed 21 July 2025.
[90] BLAST 2022, (n 36), 29.
[91] Naripokkho and Bangladesh Legal Aid and Services Trust (BLAST), Joint Legal Aid Initiative Report (2019).
[92] *BLAST and others v Bangladesh, (*n 27).
[93] Laura Abbott and others, 'Improving maternity provision for incarcerated women in the UK' (2025) 389 *BMJ* 080445.

7.1 India: Judicial Activism and Prison Reform Guidelines

India, which shares colonial legal roots with Bangladesh, has taken several significant steps in protecting the rights of incarcerated women, particularly through its judiciary. In *R.D. Upadhyay v. State of A.P.*, the Supreme Court released extensive rules regarding how pregnant inmates and children in detention should be treated.[94] Key highlights of the guidelines include proper antenatal and postnatal care in government hospitals, mandatory separate ward facilities for women with children, nutrition and clothing provision for infants and limiting the child's stay with the mother to six years unless no alternatives exist. Moreover, Indian prison manuals in several states now reflect these standards.[95] In 2016, the Ministry of Home Affairs issued a Model Prison Manual recommending non-custodial alternatives for pregnant and lactating women and requiring every prison to have a creche with trained staff.[96]

The Indian judiciary also uses Public Interest Litigation (PIL) to address systemic issues, allowing NGOs to file on behalf of prisoners. For instance, in *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96, a journalist successfully petitioned the Supreme Court to improve conditions for women prisoners, leading to directives on medical care, legal aid, and safeguards against custodial abuse.[97] This has expanded the scope of constitutional protections under Articles 14, 21 and 39 of the Indian Constitution.[98] Bangladesh can adopt a similar judicial and policy approach by issuing binding guidelines under Article 102 of its Constitution, especially through *suo motu* action or strategic litigation.

7.2 United Kingdom: Institutionalized Mother-and-Baby Units

The United Kingdom offers a more institutionalized model through its Mother and Baby Units (MBUs), regulated under the Prison Service Instructions (PSI).[99] These units allow qualified moms to keep their babies with them for up to 18 months depending on an assessment by a team of professionals. The PSI mandates specialized maternity care and midwifery services, a family-oriented environment within prison and child welfare assessments prior to admission. Pregnant women are not handcuffed during labor or medical appointments, in line with European Court of Human Rights standards on humane treatment.[100] MBUs operate on the principle that incarceration should not deprive children of their rights. The UK also promotes early release or community sentencing for pregnant or primary-caretaker women when appropriate.[101] While Bangladesh lacks the infrastructure and staffing for MBUs, a scaled-down version, such as temporary residential facilities attached to prisons or supervised halfway homes could be piloted in major central jails.

7.3 Norway: Non-Custodial and Child-Centered Approach

Norway represents one of the most progressive systems globally regarding non-custodial sentencing and the provision of family-friendly, child-centered arrangements for incarcerated mothers. It follows a "normalization principle" denoting that prisons must mirror the outside world as closely as possible. Pregnant women and mothers with children are generally not imprisoned, except in cases of serious violent crimes.[102] Key practices include use of non-custodial sanctions such as electronic monitoring, probation, and community service for pregnant offenders, separate family wards in prisons with full childcare facilities, and individual sentence

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94 *R D Upadhyay v State of Andhra Pradesh*, (n 12).
95 Commonwealth Human Rights Initiative (CHRI), *Women in Indian Prisons* (2018) 19–22.
96 Ministry of Home Affairs (India), *Model Prison Manual 2016*, Ch 32.
97 *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96 (India).
98 *Francis Coralie Mullin v Union of India* (1981) AIR SC 746.
99 HM Prison and Probation Service (UK), (n, 21).
100 *Keenan v United Kingdom* (2001) 33 EHRR 38.
101 UK Ministry of Justice, *Female Offender Strategy* (2018) 6–7.
102 Norwegian Correctional Service, *Women in Prison: Conditions and Sentencing* (2020) 11–13.

planning with focus on reintegration and child development.[103] Norway's model aligns closely with Bangkok Rule 2, which recommends that alternatives to imprisonment be considered for women with child-care responsibilities.[104] Although Bangladesh may not immediately adopt such a liberal penal model, introducing conditional bail, parole, and halfway facilities for pregnant women would be a step forward.

7.4 Lessons for Bangladesh

From the three jurisdictions, the practices that are especially relevant for Bangladesh are judicial guidelines on maternity care (India), separate units or supervised spaces for mothers and babies (UK), non-custodial alternatives for pregnant and nursing mothers (Norway) and integration of child rights into prison policy, in line with the CRC. Budgetary allotments, legal changes, and policy commitment would all be necessary to carry out these reforms. The judicial and penal systems in Bangladesh should start by concentrating on maternal health, establishing trial programs, and allowing outside organizations to assist with their oversight. Other nations demonstrate that, with strong judicial support, it is entirely possible to make jails safer for women. Bangladesh can choose to include elements that are appropriate for its socio-legal environment rather than adopting these systems in their totality. In an effort to bridge the gap between law and reality, the following section provides policy and legal recommendations specific to Bangladeshi circumstances.

8. Towards a Rights-Based Reform Framework for Bangladesh

Bangladesh must implement a number of specific legal, institutional, and administrative reforms to guarantee the protection of the rights of pregnant inmates and infants born in detention. The Jail Code and the Prisons Act of 1894 are out of date and do not address the concerns of detained women with regard to child care. These legal instruments must be amended to include mandatory prenatal and postnatal healthcare administered by qualified female professionals. Further, access to safe, hygienic, and dignified birthing arrangements, ideally in hospitals outside prison, as well as provision of sanitary products, nutritional food, and postnatal support for both mother and child.

Such amendments would ensure alignment with the Mandela Rules (Rules 24 and 28) and the Bangkok Rules (Rules 48 and 49).[105] Furthermore, the Special Privileges for Convicted Women Act 2006 should be operationalized through rules or notifications that specifically address the maternal rights of women in custody.[106] Similarly, In the absence of comprehensive legislation, the Supreme Court of Bangladesh can exercise its jurisdiction under Article 102 of the Constitution to issue binding guidelines, as done in India in *R.D. Upadhyay v State of A.P*.[107] These guidelines should include procedures for early identification of pregnancy during prison admission, regular medical check-ups and maternal diet planning, clear standards for the treatment of infants in custody, including education and nutrition and time-bound directions for considering bail or parole for pregnant or nursing mothers. Until legislative reform is put into place, such judicial intervention may serve as a temporary solution.

Additionally, Bangladesh should institutionalize non-custodial alternatives like conditional bail, probation, electronic monitoring, and community-based sentencing for non-violent and low-risk offenses, given the high percentage of female inmates awaiting trial, especially those who are pregnant or have young children. The Bangkok Rule 2 specifies the importance of non-custodial measures for women prisoners.[108] The Code of Criminal Procedure (CrPC), 1898, may be amended to make pregnancy or child-rearing a statutory ground for

[103] Ibid, 14.
[104] The Bangkok Rules, Rule 2.
[105] Ibid
[106] The Special Privileges for Convicted Women Act 2006 (Bangladesh).
[107] *R.D. Upadhyay v State of Andra Pradesh, (*n 12).
[108] Ibid, Rule 2.

bail, especially in non-bailable cases.[109] The creation of a Maternity Review Board, composed of a magistrate, medical officer, and social worker, could further ensure that women are not needlessly incarcerated during or after pregnancy.[110] At present, most Bangladeshi prisons lack designated maternal care wards or even basic medical infrastructure for childbirth. The government should immediately establish maternity units in central jails with round-the-clock medical supervision, then provide childcare units (crèches) inside prison premises for children below six years, with provisions for play, nutrition, and basic education, and ensure the registration of births and access to identity documents for all children born in custody.[111] Through these initiatives, the Convention on the Rights of the Child (CRC) would be put into practice, particularly articles 3 and 7.[112] Afterward, all prison staff should receive mandatory training regarding the Bangkok Rules and gender-sensitive custodial standards, human rights-based approaches to dealing with vulnerable prisoners, and emergency response procedures for maternal complications. Subsequently, the National Human Rights Commission (NHRC) should be empowered to conduct independent inspections of female prisons and report on compliance with maternity care standards. In addition, civil society organizations with expertise in health and legal aid should be formally recognized as partners in supporting maternal care in prisons.[113]

These reforms are both legally necessary and entirely possible. Bangladesh can finally treat incarcerated women with true dignity if the judiciary, legislature, and prison administration cooperate. Pregnant prisoners and their unborn children would be shielded from systemic damage if even a few of these measures were implemented.

Conclusion

The plight of pregnant prisoners and children born or raised in Bangladeshi prisons remains a largely invisible and inadequately addressed issue within the country's criminal justice framework. While the Constitution of Bangladesh guarantees dignity, life, and equal protection to all, these promises ring hollow for women behind bars who face systemic neglect during pregnancy and motherhood. The domestic legal instruments including the Prisons Act 1894, Jail Code, and the Special Privileges for Convicted Women Act, 2006 lack the specificity and enforceability required to safeguard maternal rights in custodial settings. The failure to put policy into practice exposes a deep disregard for vulnerable inmates. These systemic shortcomings break Bangladesh's constitutional laws and violate human rights standards including the Mandela and Bangkok Rules. This research has shown that, when rights-based policies, judicial interventions, and institutional innovations are implemented with intent, significant progress can be made even within resource-constrained or formerly colonial legal systems through a comparative analysis of Norway, the United Kingdom, and India. Bangladesh must implement a multi-tiered reform agenda in order to close the gap between the law and reality. This agenda should include modifying the country's penal legislation and Jail Code, issuing judicial recommendations, allowing pregnant women to have non-custodial options, and institutionalizing maternity healthcare and childcare inside jails. Despite their ambitious nature, these reforms are neither new nor unheard of; rather, they are based on the fundamental idea that humanity cannot be eradicated by incarceration. In the end, a society's core moral and constitutional character is reflected in the way it treats its imprisoned women, particularly those who are carrying or caring for life. Bangladesh has the chance to reassert its commitment to justice, decency, and the rule of law while also bringing its prison maternity care system into compliance with international

[109] CRPC, Bangladesh, s 496–497.
[110] UNODC, Handbook on Women and Imprisonment (2nd edn, 2014) 92.
[111] BLAST 2022, (n 2), 26–27.
[112] CRC, articles: 3, 7.
[113] Naripokkho and Bangladesh Legal Aid and Services Trust (BLAST), Joint Legal Aid Initiative Report (2019).

norms. We will look forward the day as our prison system would be like this as Mehmet Murat Ildan has rightly observed-

"The strongest prison is the one where you are afraid to leave even though the door is open! There is no more heavy imprisonment than being afraid to be free!"

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Enforcement of Citizens' Ocean Rights in Bangladesh: Limitations and Possible Ways Out

Md. Gajiur Rahman*

Abstract: *Ensuring citizens' ocean rights are crucial in the context of Bangladesh. This concept has not been explicitly defined by any single legal instrument; instead citizens' ocean rights are collections of various types of ocean rights mentioned in existing national laws, constitutional principles and international legal instruments. While Bangladesh has largely concentrated on the robust legal framework for delimitation of maritime boundaries and sovereign control over maritime zones, the practical realization of citizens' rights has been a challenging issue due to the lack of proper enforcement legislation. This article highlights the constitutional and statutory rights of citizens over the resources of the sea. It also includes the assessment of the deprivation of rights of coastal communities as well as rights of land based communities. One of the purposes is to address the legal instruments that provides obligation for states regarding the management of their respective sea zones. This article aims investigate prevailing challenges, limitations and drawbacks associated with enforcing citizen rights in Bangladesh. The focal point of the research is to find out the possible ways for judicial bodies to ensure citizens' rights to the ocean effectively.*

Keywords: *Citizen, Ocean, Rights, Limitations, Enforcement, and Bangladesh.*

1. Introduction

Bangladesh has a maritime area that includes 118,813 square kilometers and long coast line of 710 km. Bangladesh, India and Myanmar have maritime boundaries in the Bay of Bengal. Bangladesh can claim the status of the longest sea beach in the world which covers 580 square kilometers. Bangladesh has 720 km long coastline in the Bay of Bengal and 2.30 million hectares of coastal land.[1] This vast maritime area is a national asset which provides food security of millions of coastal citizens. In Bangladesh, the numbers of coastal people is over one-fourth of the total population and depend on the sea for their livelihood. United Nation Convention on the Law of The Sea (UNCLOS) entitles every state with strategic, political, social, and economic interest within their maritime boundaries. States can conduct various types of marine activities and explore both living and non living resources for the national economic development. These rights are exercised by a variety of maritime activities – including hydrocarbon and mineral resource extraction, marine scientific research, shipping and fishing. The ocean provides sea resources and the opportunity to meet the growing demands of population worldwide.[2] Although there is no explicit reference of citizen's ocean rights in the constitution, statutory laws and policies of Bangladesh but the logical interpretation of constitutional and statutory rights also includes citizen's oceanic rights. The demand for the recognition of these rights and its effective enforcement has been remarkably increased after the judgment of case in between Bangladesh and Myanmar in 2014 and award in between Bangladesh and India in 2012. Ocean rights addresses neutral and equitable sharing of ocean-oriented benefits, protecting marine environment, and establishing accountability through administrative and judicial bodies to support sustainable and inclusive ocean

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[1] Mohammad Rayhan Uddin, "Establishment of an Exclusive and Effective Maritime Tribunal in Bangladesh under the "Territorial Waters and Maritime Zones (Amendment) Act, 2021 (Act No. XXIX Of 2021)": what is the necessity?" The Maritime Commons: Digital Repository of World Maritime University, (2023) .

[2] Rear Admiral M Khaled Iqbal, 'Ocean Policy for Bangladesh – A Comprehensive Roadmap' (2019) Vol.3 BMJ.

governance.[3] Bangladesh must increasingly confront issues requiring the setting of priorities among competing uses and of balancing the distribution of ocean benefits between current and future generations.[4] Bangladesh constitution has protected the right to life, right to livelihood and healthy environment which are also intersected with oceanic rights of citizens. The Constitution of Bangladesh imposes the obligation for the management of marine environment and resources in the Republic. The government has duty to safeguard the marine rights and resources as public trust properties. The rights to sea resources of people, particularly vulnerable coastal communities, face serious challenges to livelihood due to environmental degradation, lack of safety and security and management drawbacks. The judicial remedies for the violations of rights of a citizen arising from sea disputes within maritime zones are often hampered by procedural barriers of maritime tribunal[5] rendering them largely ineffective for ordinary citizens. Moreover, for enforcement of these rights, the existing other judicial bodies comprising Environmental Courts and Admiralty Court face certain challenges and limitations. The purpose of the study is to highlight citizen's ocean rights along with its challenges towards effective enforcement.

2. Understanding the Concept of Citizen's Ocean Rights

Ocean rights of citizens in Bangladesh are not mentioned in a particular legal instrument. In Bangladesh, citizen ocean rights are special kinds of human rights indirectly protected by the Constitution and judicial decision. Citizen can claim the protection of marine bio-diversity, equitable and fair sharing of sea related benefits, social security and safety, establishing accountability and robust ocean governance system.[6] The protection and enforcement of these rights are enshrined in a legal framework that operates at both international and domestic levels. Coastal state rights and obligation over the different sea zones under the mandate of the United Nation Convention of the Law of the Sea and specific ocean rights are different in context but very much interrelated. Although the primary objective of maritime laws is to protect delicate ecosystems and valuable resources, they can inadvertently limit human livelihoods and fundamental freedoms and rights.[7] In one hand, Bangladesh, during exercising its sovereign rights over maritime zones, can make laws following relevant provisions of UNCLOS. Coastal state can make laws regarding safety of navigation, maritime traffic and innocent passage in its territorial sea.[8] For the exploitation, exploration, management of natural resources in the Exclusive Economic Zone (EEZ), coastal state can make national laws.[9]With regard to licensing of fishing vessel and fisherman, catching procedure of fish and applicable naval vehicle, coastal state can establish laws.[10] Bangladesh can make laws for the preservation and prevention of marine environment in the EEZ.[11] The newly Territorial Waters and Maritime Zones Act 2021 has introduced certain offences for the prevention of marine pollution.[12] In another hand, citizens have the constitutional and statutory rights over the state owned sea zones of Bangladesh. These include right to life,

[3] Fabiayea Hasan, 'Ocean Justice in Focus: Bangladesh and The Global Ocean Treaty'(*Greenpeace South Asia*, 17 June 2025) https://www.greenpeace.org/southasia/story/1994/ocean-justice-in-focus-bangladesh-and-the-global-oceans-treaty

[4] Ibid (n 2)

[5] Md. Muhtasim Faiyaz, 'Fragmentary Approach Towards Maritime Tribunal' *The Daily Star*, (Dhaka, 5 August 2025) https://www.thedailystar.net/law-our-rights/news/fragmentary-approach-toward-maritime-tribunals-3956411

[6] Fabiayea Hassan, 'Ocean Justice in Focus: Bangladesh and Global Ocean Treaty' (2025) <https:// www. greenpeace. org/southasia/story/1994/ocean-justice-in-focus-bangladesh-and-the-global-oceans-treaty/>accessed 17 August 2025

[7] Pradeep Singh and Mara Ort, "Law and Policy Dimensions of Ocean Governance," in *YOUMARES 9*, (7th edition, Springer eBooks, 2019) https://doi.org/10.1007/978-3-030-20389-4_3 accessed 25 August 2025

[8] The United Nation Convention on the Law of The Sea, Article 19

[9] Ibid, Article 56

[10] ibid, Article 62

[11] Ibid, Article 56

[12] Md. Muhtasim Faiyaz, 'Fragmentary Approach Towards Maritime Tribunal' *The Daily Star*, (Dhaka, 5 August 2025) <https://www.thedailystar.net/law-our-rights/news/fragmentary-approach-toward-maritime-tribunals-3956411> 17 August 2025

right to secured livelihood, right to a healthy marine environment and easy access to justice which are also intersected with oceanic rights of citizens. Marine ecosystem faces some threats like climate change, pollution, overfishing and deep-sea mining. The weak enforcement mechanism of marine policy impacts on small-scale fishers, Indigenous peoples and coastal communities.[13]

Moreover, ocean itself has inherent rights having intrinsic value as a living being. The legal frame work includes the recognition of those rights and allow for legal action to be taken on behalf of the Ocean. [14] The demand for the recognition of these rights and its effective enforcement has been remarkably increased after the judgment of case in between Bangladesh and Myanmar in 2014 and award in between Bangladesh and India in 2012.

3. Legal Frameworks Addressing Ocean Rights

3.1 Constitutional Framework

The preamble of Bangladesh constitution indicates the aim of the state to secure fundamental human rights as well as political, economic, social equality and justice for all citizens.[15] Here, fundamental human rights imply all human rights that can be interpreted to include ocean rights of citizens also. Since preamble is not only operative part of the constitution but also judicially enforceable, the rights mentioned in this part are enforceable by the court.[16]In fundamental principles of state policy, it has been mentioned that state has the responsibility to attain a constant increase of productive forces and a steady improvement, with a view to securing the basic necessities that are right to food, shelter, right to work and right to social security.[17] Although this part of the constitution is merely principles not laws and not judicially enforceable[18], there exists constitutional jurisprudence and judicial interpretation towards the enforceability of the principles in any other alternative ways. Hegde J. comments that"... a mandate of the Constitution, though not enforceable by courts is nonetheless binding on all the organs of the State. If the State ignores those mandates, it ignores the Constitution."'[19] Justice Mustafa Kamal observed that since the fundamental principles of state policy are not laws to be enforceable by the judiciary, so if any law is passed by the parliament violating any of these principles, judiciary is not the only light at the end of the tunnel to enforce it, and if it really happens so, there are many other ways of enforcement except judicial enforcement, like public opinion, political party and election.'[20] Bangladesh has the duty to improve and protect environment, safeguard natural resources for present and future generation which also includes marine environment and marine resources.[21] Fundamental

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[13] Ms. Astrid puentes Riano, 'Ocean isues are human rights issues' (UN press release, 14 March, 2025)https://www.ohchr.org/en/press-releases/2025/03/ocean-issues-are-human-rights-issues-saysunexpert#:~:text=%E2%80%9CWe%20must%20mainstream%20the%20human,%2C%E2%80%9D%20the%20Special%20Rapporteur%20said. accessed on 30 August 2025.

[14] Michelle Bender, 'Ocean Rights in action:Insight from equador's constitutional court on the practical application of rights of Nature in Ocean Governance' (21 January 2025)<https://www.oceanvisionlegal.com/post/safeguarding-the-ocean-through-law_ocean-litigation_oceanrights#:~:text=Acknowledging%20the%20Ocean%20as%20a,inherent%20rights%20and%20intrinsic%20value. > 28 August 2025.

[15] The Constitution of Peoples Republic of Bangladesh1, 972, Preamble, third paragraph.

[16] Muhammad Ekramul Haque,'The Preamble of the constitution of the peoples' Republic of Bangladesh: An Analysis from Legal perspective' (2004), Dhaka University Law Journal, 127.

[17] The Constitution of Peoples Republic of Bangladesh, Article 15.

[18] Ibid, Article 8(2).

[19] Justice Kawdorr Sadananda Hegde, '*Directive Principles of State Policy in the Constitution of India'* (1st edition, National Publishing House, 1972) p.49.

[20] *Kudrat-E-Elahi V. Bangladesh*, 44 DLR (AD) 319, at paragraph 86.

[21]The Constitution of Peoples Republic of Bangladesh, Article 18A.

right to life[22] of the constitution also addresses the ocean rights. The scope of right to life is far reaching and wide to bring the right to pollution free and decent environment.[23] In Bangladesh constitution, no specific provision is mentioned for the protection of environment.[24]Appellate division of the supreme court of Bangladesh held that right to life encompasses within its ambit the protection and preservation of environment and ecological balance free from pollution of water, air, sanitation, without which life can be hardly enjoyed. Any act or omission contrary thereto will be the violation to the said right to life.[25] High Court Division of the Supreme Court of Bangladesh held that life occurring in Article 32 does not mean merely elementary life or sub human life but includes in this expression the life of the greatest creation of the Lord who has at least a decent and healthy way of life in hygienic condition. Hygienic environment is an integral part of right to life.[26] Right to life includes right to food and right to decent environment.[27] State may not, by affirmative action, be compellable, to provide adequate means of livelihood to the citizens but any persons who is deprived of right to livelihood except according to the just and fair procedure, can challenge the deprivation as offending the right to life.[28] Due to ocean based industrialization, unsustainable development plan, deep sea mining, increasing sea activities gradual environmental degradation are undermining the livelihoods, food security, housing, infrastructure and physical security of coastal communities. Marine pollution affecting the ecosystem reduces the quality of life of citizens. Many people have been physically displaced due to lacking of food safety and security. So, it is arguable that the fundamental oceanic rights are implicit into the ambit of right to life of the constitution. Every citizen can move to the High Court Division of the Supreme Court of Bangladesh for the enforcement of fundamental rights amounting to ocean rights also following the writ jurisdiction[29] of the constitution.

3.2 Domestic Legislations

3.2.1 The Territorial Waters and Maritime Zones (Amendment) Act, 2021

Under the constitutional jurisdiction mentioned in article 143, Bangladesh legislate The Territorial Waters and Maritime Zones (Amendment) Act, 2021 which updates 1974 statute. In this Act, an attempt has been taken to reflect the relevant provisions of UNCLOS and judicial decision of the border conflict with Myanmar and India. The Act addresses the internal water, territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf (CS) of Bangladesh. It affirms the sovereignty and sovereign rights and jurisdiction to explore and exploit marine natural resources, control and prevent marine pollution and conservation of marine environment of these areas.[30] It also prohibits piracy, theft, robbery and maritime terrorism, pollution at sea which are punishable offences. The law for the first time includes the evidential value of video, photo and electronic records for proving offences and incidents at sea.[31]The Act allows Bangladesh to bring legal action against any person, vessel within or beyond national jurisdiction of maritime zones.[32] The government of Bangladesh is empowered to prevent and control marine pollution and take proper steps to grow blue economy of the country.[33]The law assigns legal duty to the government to

[22] Ibid, Article 32,
[23] *Ramkrisna vs State of Kerala and others,* 1992 (2) KLT 725).
[24] Justice Naimuddin Ahmed, 'Public Interest Environment litigation in Bangladesh' (2023), Volume III JATTI Journal, p.18.
[25] *Dr.Mohiuddin Farooque vs Bangladesh,* 1BLC (AD), (1996), 189.
[26] *BELA vs Bangladesh and others,* 7MLR (HCD), (2002), 157.
[27] *M/S Shantisar Builders vs Narayan KhimalalTotame* AIR 1990 SC 630.
[28] *Olga Telis vs Bombay Municipal Corporation* 1985 suppl. 2 SCR 51.
[29] The Constitution of Peoples Republic of Bangladesh, Article 102(2).
[30] Shweata Mishra and Jahirul Bashar,' Reviewing the New Territorial Water and Maritime Zones Act' *The Daily Star*,(Dhaka, 29 january, 2022).
[31] The Territorial Waters and Maritime Zones (Amendment) Act, 2021, Section 29.
[32] Ibid, Section 2B.
[33] (Mishra and Jahirul Bashar, (n 30).

take action for the sustainable use of natural resources and human development associated with knowledge, skills, and experiences. Government should provide strategic directions to the stakeholders and follows customary international law to maintain productive, safe, healthy, resilient and secure ocean.[34] This Act empowers government to establish one or more Maritime Tribunals,[35] though yet to be established. Under this enactment, no victims or aggrieved person can complain to the Maritime Tribunal except written complaint made by person authorized by government.[36] Furthermore, strict and complex bail procedure has been enumerated in the Act.[37] It is worth mentioning that the Act does not directly mention and recognize the citizen ocean rights but proper implementation of the Act is implicitly related to protect, defend and enforce these rights. It is arguable that ensuring citizen easy access to Maritime Tribunal, robust and effective ocean governance is the legal duty of the government which ultimately amounts to legal rights of the citizens.

3.2.2 Marine Fisheries Act, 2020

Replacing the Marine Fisheries Ordinance of 1983, this Act is crucial for regulating and managing fishing activities. It sets stricter penalties for Illegal, Unreported, and Unregulated (IUU) fishing, particularly by foreign vessels, and is a key tool for protecting the rights of local artisanal fishers. The Act prohibits the IUU fishing. It also includes the procedure for monitoring and surveillance system to protect the sea resources upon which the livelihood of citizen depends on. The right of citizen of appeal through formal process against non-approval of license or revocation of license is recognized under the Act which amounts to a proof of transparency and fairness. The government is empowered to declare particular marine area as restricted and impose ban on fishing certain species and prohibits harmful fishing methods which preserve the rights of future generation in the long term. By determining who can catch and what do they can catch, this Act prevents depletion of marine resources and ensure the fair share of marine resources. So, it is relevant to mention that the Act emphasize on conservation of fishing resource approach which ultimately secure the citizen rights of present and future generations.

3.2.3 Bangladesh Environment Conservation Act (BECA), 1995 and Amended Act 2010

This Act provides the principal legal framework for the environment governance in Bangladesh. It does not explicitly mention about citizen ocean rights but establish a structure which impliedly grants the citizen rights to clean and healthy oceanic environment also. The Act is designed to conserve the environment, improve environmental standard, mitigate and control environmental pollution.[38] The term environment encompasses the interrelationship among and between air, water and soil and human beings, living beings, and microorganisms and plants.[39] It is crucial definition that allows legal action against the harm caused to the human health, marine biodiversity and ecosystem. In addition to that the term "pollution" and "environmental pollutant" implies alteration and contamination of biological, chemical and physical properties which also a legal basis to challenge injurious discharge from any source to sea zones.[40] Government is empowered to control the environment pollution and health hazard arising from ship breaking activities.[41]With regard to safeguarding critical ecosystem, government can declare any region facing environmentally critical condition as critical area and prohibit or restrict certain activities within that area.[42]

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[34] The Territorial Waters and Maritime Zones (Amendment) Act, Section 7E (1).
[35] Ibid, Section 27(1).
[35] Ibid, Section 30.
[36] Ibid, Section 31.
[38] Bangladesh Environment Conservation Act (BECA), 1995, Preamble.
[39] Ibid, Sec 2.
[40] Ibid.
[41]BECA, Section 6 D.
[42] Ibid, Section 5.

Any person who is affected or likely to be affected by the environmental degradation can apply to the Director General of the Department of environment for the remedy. The DG may take any measures including public hearing to settle the claims.[43] The typical language of the Act does not render the public hearing as legally binding. It deprives citizens of the rights to consultation which is necessary for effective governance. The laws and policies which address environmental issues do not provide increased opportunity for public participation. Moreover, regarding administrative remedy, any person aggrieved by the order or notice under this Act, can file appeal to the authority appointed by the government within thirty days of the decisions.[44] The appeal is disposed of within next three months. The decision of the appellate authority is final and can't be called in question before any court. It is worthy to mention that the interdepartmental review of its own notice or decision raises question of biasness and finality of the decision curtails the opportunity of judicial review of the court. This is the very reason, aggrieved party bypass the administrative remedy and prefers to file public interest litigation before the High Court Division of the Supreme Court of Bangladesh. Under the Act, DG is empowered to take such action which he deems fit for the conservation of environment. In doing so, authority issues directions for mitigating of pollution and regulating hazardous substances. For the enforcement of such direction, the DG may seek for assistance from government law enforcing agencies. The logical interpretation of the wording the term 'May' instead of the binding term 'Shall' renders that the DG is not legally binding to take action when any environmental violation happens. So, due to the shortcoming of administrative enforcement system, Supreme Court of Bangladesh are playing key role as principal guardian to the protection of any kind of environmental rights. It is evident that the dependence on judicial activism has been very significant for protecting citizen rights in the marine zones considering administrative inconsistencies of existing laws.

4. Judicial Bodies for Redressing Violations of Ocean Rights

4.1 Maritime Tribunal (proposed) under Territorial Waters and Maritime Zones (Amendment) Act, 2021

Until or unless Maritime Tribunal is established by the government, the District Judge (DJ) or Additional District Judge (ADJ) performs the task of the tribunal in addition to their regular duties.[45] The government is empowered to establish one or more maritime Tribunal for the country.[46] The maritime tribunal is yet to be established. The Maritime Tribunal has been given the jurisdiction to try criminal marine offences in different zones of the sea. The offences include armed robbery, terrorism, piracy throwing hazardous wastes in the water, committing marine pollution and so on.[47]As citizen rights extend to clean and healthy environment, safety and secured maritime zones as well as robust and effective ocean governance, it is a high necessity to establish maritime tribunals for ensuring environmental justice.

[43] Ibid, Section 8.
[44] Ibid, Section 14.
[45] The Territorial Waters and Maritime Zones (Amendment) Act, Section 27(3).
[46] Ibid, Section 27(1).
[47] n 2.

4.2. Environment Court Act 2010

This is a special court established under the Bangladesh Environment Court Act 2010. It addresses the environmental protection by speedy legal action.[48] Although, the act does not explicitly talk about the marine environment but there is no bar to get remedies against the marine environment offences. The court has both the civil and criminal jurisdiction to hear the environment offences. Three environment courts namely Special Magistrate Court for petty offences, Divisional Court for grave violation of environmental laws and Environmental Appellate Court to hear appeal and review petition.[49] Environment justice is not easy in Bangladesh court system for ordinary people. An aggrieved person can't file complaint to the environment court directly. The party has to depend upon the report of the department of Environment.[50] These legal barriers to take cognizance of complain without the written report of the DOE is a barrier to get environment ocean justice also.

4.3 Admiralty Court Act 2000

Admiralty Court Act 2000 gives the High Court Division of the Supreme Court of Bangladesh status of Admiralty Court.[51] High Court Division can hear the maritime claims as original suits. This Act grants High Court Division jurisdiction to try disputes related to proprietary right, personal injury, wages, right to labor and financial security, righty safety as well as commercial disputes which are core of ocean rights of citizens. Under this Act most priority is given to the private litigation rather than environment protection. It is relevant to highlight that it is very much necessary to establish specialized Admiralty Court with appointment of judges skilled at admiralty issues. The absence of such court increases the backlog of cases and hampers the timely and fair justice to admiralty affairs.

5. Key Challenges towards Citizen's Ocean Rights

5.1 Establishment of Special Maritime Tribunal

The proposed Maritime Tribunal should be established and merged with the existing Marine Court established under the Inland Shipping Ordinance 1976 for the smooth functioning of maritime issues. There is a difference with the qualification of judges between these two courts. The judge of Marine Court is a special magistrate having the status of first class while the District Judge or Additional district judge sits as presiding officers at the existing Maritime Tribunal. The Marine court imposes only nominal fine whereas the Maritime Tribunal can impose fine up to 110 crore BDT. There is no reference with regard to the specialization of maritime knowledge of judges for the appointment at the Maritime Tribunal. In the context of Bangladesh, district or additional district judge court is over burdened with the cases, so additional duties upon them will increase backlog of cases that will hamper the proper justice.

5.2 Citizens' Ocean Rights Concerning a Sustainable Environment

The General Assembly of the United Nation formally recognized the human right to a healthy, clean and sustainable environment. The obligation and responsibility regarding right to a healthy environment apply to everyone and everywhere including the Ocean. Yet, there is a little bit attention to the recognition of these

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[48] Imtiaz Ahmed Sajal, "Bangladesh Environment Court Act 2010: A Critical Analysis" (Bangladesh Law Digest (BDLD),October 25, 2020) <https://bdlawdigest.org/environment-court-act-2010.html>accessed on 15 September 2025.

[49] Kaniz Tania-E-Binte Basar, 'Environmental management and justice system in Bangladesh: Issues and legal framework' (2024), ,Vol.10 No. 1, Journal of Asian and African Social Sciences and Humanities, <https://doi.org/10.55327/jaash.v10i1.322>accessed on 01 September 2025.

[50] ibid.

[51] Admiralty Court Act 2000, Section 3(1).

rights in spite of evidence of mounting threat.[52] Bangladesh has the duty to improve and protect environment, safeguard natural resources for present and future generation which also includes marine environment and marine resources.[53]A framework for the national action has been formulated to conserve and sustainable use of marine resources for sustainable development in SDGs 14 by United Nation. UN Convention on the Law of the Sea (UNCLOS) imposes general obligation upon the states to protect and preserve the marine environment.[54] Bangladesh is a party to the biodiversity beyond national jurisdiction agreement that addresses sustainable use of sea resources in the High Sea for benefits of all citizens.[55]So, International obligation creates foundation for citizen to demand sustainable marine environment. The right to sustainable marine environment encompasses with the preservation of the benefits for present and future generation on equity basis. It is a big challenge to ensuring literacy regarding citizens' ocean rights and ocean connection to daily life for public engagement to create pressure for protection of environment at sea. Vulnerable coastal communities face challenges to participate at national and global decision making policy and raise voice against marine resource depletion. To enact effective national laws complying with international obligations and robust enforcement framework is essential to prevent and control pollution and illegal activities at sea that abridge citizens' right.

5.3 Prevention of Illegal Fishing

Illegal fishing gangs and pirate shows continuous intimidation or violence to the fisherman and others who conduct marine activities which is the safety concern in true sense. These types of offences are the violation of the right to health, right to life and safe work place. There is a lacking of administrative monitoring and authentic data of IUU fishing scenario that hampers taking remedial measures in this regard. IUU fishing reduces the fish stock and supply which amounts to food insecurity and economic instability for fishing communities.[56] It has been now a great concern to prevent illegal and unlicensed fishing by national and foreign vessel which use destructive fishing tactics and catch fish indiscriminately as well as damage marine ecosystem. [57]

5.4 Enforcement Gap

The existing legislation and policy does not cover maritime issues that affect the right of the people, especially the rights of the coastal communities. Most of the coastal communities largely depend on the sea for their livelihood, so any prohibition on catching fish whether temporarily or permanent basis without alternative arrangement of earning leads them to unsecured life. The rights of coastal fisherman who depend on the maritime resources should be given statutory basis sufficiently.[58] Sometimes, it is necessary to take preventive action against marine piracy and illegal activities or action for the protection of marine environment which make the coastal people bound to shift to the ecologically sensitive coastal zones. It is a

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[52] Nathan J Bennett, 'The human right to a clean, healthy and sustaiable ocean' (2024), npj Ocean Sustainability, vol.3,.issue.no.1.page.8 <https://www.researchgate.net/publication/379655299_The_human_right_to_a_clean_healthy_and_sustainable_ocean> accessed on15 October, 2025.

[53] The Constitution of Bangladesh, Article 18A.

[54] UNCLOS, Article 192.

[55] Andy Schmid, 'Agreement on Marine diversity of Areas beyond National Jurisdiction' (UN world Ocean day (2023) <https://www.un.org/bbnjagreement/en > accessed on 28 September 2025.

[56] MMH Mozumder and others, "Governance of Illegal, Unreported, and Unregulated (IUU) Fishing in Bangladesh: Status, Challenges, and Potentials" (2023) 10 Frontiers in Marine Science.

[57] Abul Kalam Azad and Charlotte Pamment, "Bangladesh Overfishing: Almost All Species Pushed to Brink" *BBC Bangali*, (Dhaka, April 16, 2020) < https://www.bbc.com/news/world-asia-52227735> accessed on 30 september, 2025.

[58] Mehedi Hasan Marof, "Fishing Ban in Bangladesh Is a Bilateral Issue", *The Daily Star* (Dhaka May 29, 2023) <https://www.thedailystar.net/ > accessed on 01 September 2025.

remarkable challenge to ensure balance between administrative action and protection of rights of coastal communities.[59]

5.5 Enforcement of ITLOS Judgment

The certainties of maritime boundaries of Bangladesh have been established through ITLOS judgment in cases with Myanmar and India. The Arbitration Tribunal delivered its decision on July 7, 2014, awarding Bangladesh a significant portion of the contested area in the Bay of Bengal.[60] Bangladesh had successfully resolved a similar dispute with Myanmar through the International Tribunal for the Law of the Sea (ITLOS) in 2012.[61] Nevertheless, there exist tensions with regard to the full enjoyment of the fruits of judgment. The recent incidents disclose the serious concern for exploring and exploiting marine resources. Arakan army of Myanmar abducted 18 Bangladesh fishermen along with 3 fishing trawlers near the St Martin's Island.[62] Moreover, these people get harassed, killed and tortured by the neighbor states due to the lacking of respect to the judgment.[63] Presently, Bangladesh needs to talk with or conclude bi-lateral agreement with Myanmar and India on the basis of judgment and UNCLOS provision to address these issues. In true sense, it is difficult but not impossible.

5.6 Mitigation of Effect of Climate Change

Climate change directly affects the coastal communities and other citizens of low lying country like Bangladesh. The common results of climate change are droughts, cyclone, storm, salinity, food, coastal erosion that immensely affects the right to life of citizens.[64] There is the possibility of 13 to 40 million physical displacements of coastal people for the effect of rise sea level reported by International Organization for migration.[65] This amounts to the violation of the right to housing. Impacts of climate change tremors affect coastal livelihoods differently and govern vulnerability and adaptive capacity. Some of the disasters are fast in coastal areas in terms of its sudden affects to coastal life and livelihoods like tropical cyclone and storm surges, where others are slow in events like salinity or inundation increase, but these have long-term impacts on social and economic functions.[66] But very limited technologies are available that are tolerant to flood and drought.[67]Adaptation to climate change in coastal areas of Bangladesh is complex because of an amalgamation of different climate variability, geographical dynamics, and the involvement of different stakeholders.[68] Considering the economical limitation of Bangladesh, mitigation the sufferings of

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[59] Sadab Bin Ashraf, 'Protection of Coastal and Marine Environment in Bangladesh: A Critical Analysis under Domestic and International Law' (2022) Vol.8, JLSR, <https://journal.thelawbrigade.com/jlsr/article/view/1416> accessed on 15 October 2025.

[60] Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, *Bangladesh v India, Final Award,* ICGJ 479 (PCA 2014), 7th July 2014, Permanent Court of Arbitration (PCA)

[61] *International Tribunal for the Law of The Sea,* Case No 16, (52014XC0830-01, ICGJ 448, ITLOS 2012).

[62] Staff Correspondent, 'Arakan Army Abducts 18 Bangladeshi fisherman near St. Martin's Island' *The Daily Star,* (Dhaka.1.September.2025)<https://www.thedailystar.net/news/bangladesh/news/arakan-army-abducts-18-bangladeshi-fishermen-near-st-martins-island-3976046 > accessed on 15 October 2025

[63] Sarah Watson 'The Bangladesh/Myanmar Maritime Dispute: Lessons for Peaceful Resolution' (Asia Maritime Transparency Initiative, 19 October 2015) < https://amti.csis.org/the-bangladeshmyanmar-maritime-dispute-lessons-for-peaceful-resolution/> accessed on 20 October 2025

[64] Omar Farukh ,"Maritime Safety in Bangladesh, Legal Framework" (Academia, 15 January, 2021)< https://www. academia. edu/44904320/Maritime_safety_in_Bangladesh_Legal_Framework> accessed on 10 October 2025

[65] Tasneem Siddiqui "Policy Architecture to Address Disaster and Climate Change Induced Displacement in Bangladesh" (Researcing Internal Displacement, March 9, 2023)(< https://researchinginternaldisplacement.org/short_pieces/policy-architecture-to-address-disaster-and-climate-change-induced-displacement-in-bangladesh/> accessed on 10 September 2025

[66] Md. Safiqur Rahman and Dr. A K M Obaydullah, 'Climate Change and Mitigation Strategy in Coastal Areas of Bangladesh'(2020) , *Vol-6 Issue-2 2020 IJARIIE*

[67] Ibid

[68] Md. Arif Chowdhury, ' Climate Change Adaptation in Bangladesh: Current Practices, Challenges and Way Forward'(2022), Vol.6 JCCH, <https://doi.org/10.1016/j.joclim.2021.100108> accessed on 12 October, 2025

climate change victims is a big challenge. Bangladesh is yet to take effective steps to mitigate the sufferings of climate change. Bangladesh government has approved Bangladesh delta plan 2100 to create climate-resilient and a safe delta by the end of century. Bangladesh is most likely to suffer adverse impacts from climate change that brings a significant delta hazard. Analysis of the key characteristics of the BDP 2100 shows that the Delta Plan addresses several major aspects of ocean governance including water resources management, sediment management, climate change, disaster management and environmental pollution. Due to the lack of any MSP Act and proper guidance of ocean policy, unplanned development in the coastal areas is a commonplace.[69] Moreover, Bangladesh has created two separate funds: the Bangladesh Climate Change Trust Fund (BCCTF), and the Bangladesh Climate Change Resilience Fund (BCCRF). These funds face several challenges for proper implementation. The lack of transparency in project selection, fund disbursement and determination of rationality in selecting implementing agencies are some remarkable challenges in the way of achieving purpose. The BCCTF is primarily oriented with immediate threat like floods, cyclone, salinity which affects agriculture and infrastructures of coastal region. Less priority is given on direct funding for marine ecosystem protection and ocean's rights. The right to ocean ecosystem should be introduced into national law and policy that the BCCTF's guidelines has failed to address. Weak enforcement of existing marine laws is a limitation to the implementation of BCCTF. Fragmented ocean governance policy with multiple ministries brings no satisfactory result in true sense. The BCCTF does not address centralized authority that is essential to take ocean's right based actions in all marine sectors. The existing statutory recognition of rights of citizen and policies do not reflect the true picture of violations of ocean rights.

5.7 Access to Justice

Discrimination with regard to access to ocean justice and procedural complexities to get the remedies from judicial bodies is very crucial. Everyone is entitled to get the fundamental rights enforced in the eye of law. But, it has been very difficult for the poor masses to go before the High Court Division of the Supreme Court of Bangladesh to enforce the constitutional rights amounting to ocean rights also.[70] High Court Division turns into the guardian of some affluent person though a few non-governmental organizations act as guardian for people for enforcement of their rights. It is very unfortunate that even the affected group, coastal and non-coastal communities are unaware about their rights that may include ocean rights also. The Special Maritime Tribunal is yet to be established though special Maritime Zones (Amendment) Act 2021 is enacted. Under this enactment, no victims or aggrieved person can complain to the Maritime Tribunal except written complaint made by person authorized by government. Under the Environment Court Act, An aggrieved person can't file complaint to the environment court directly. The party has to depend upon the report of the department of environment. So, robust and effective ocean justice system is very much relevant for ensuring constitutional and statutory rights relating to maritime affairs.

6. Recommendations

While lots of time is spent conducting discussion upon violations of citizen's rights to property and life, there is a missing voice of rights over the ocean resources and environment. The emerging development of jurisprudence regarding right of nature says about the universal declaration of oceans' inherent rights also. Bangladesh is lagging behind in addressing rights of the state, citizen and the ocean itself. There is no

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[69] Rear Admiral M Khaled Ikbal, 'Bangladesh Delta Plan 2100: Charting a Course For Sustainable Ocean Governance And Maritime Development' (2024) BMJ < https://bsmrmu.edu.bd/public/files/econtents/619097f07d644MS%20-%204%20A.pdf> accessed on 25 October, 2025

[70] Rebecca Starting, Sunil Rao and Sallie Yea , "Human Rights at Sea: The Limits of Inter-State Cooperation in Addressing Forced Labour on Fishing Vessels" (2024) 159 Marine Policy 105934

specific reference with regard to citizen ocean rights in the Bangladesh constitution. Supreme Court interprets fundamental rights to life or other rights logically to include the rights to marine resources and environment. But considering the significance and increasing dependency on blue economy in modern times, citizen ocean rights should be specific and placed in the constitution. It is a dire necessity to prepare legal framework addressing statutory citizen rights under maritime laws and ensure remedies effectively. For this purpose, special maritime tribunal needs to be established immediately. Limitation of filing complaint and complex trial procedure should be eradicated. Updated rules and guidelines should be adopted under The Territorial Waters and Maritime Zones (Amendment) Act, 2021 that follows the Evidence Act, 1872 and The Code of Criminal Procedure, 1898. Alternative Dispute Resolution (ADR) mechanism can be introduced into the maritime laws for the speedy disposal of maritime disputes and proper justice. The Ocean policy should include community needs and aspirations. The Marine Fisheries Act 2020 should be adequately amended. Specific fishing rights, updated licensing procedure, international fishing principles and community involvement provisions should be included into the Act. The project selection criteria should be effectively introduced into Bangladesh Climate Change Trust Act, 2010 in such a way that ensure neutrality and accountability. Follow up provisions after completion of project should be inserted to achieve the purpose. Bangladesh Climate Change strategy and Action Plan along with the Bangladesh Climate change Fund are heavily oriented with immediate threats like flood, cyclone and salinity. So, significant and direct funding need to allocate for marine ecosystem and enforcing ocean's rights also. Periodical surveillances and monitoring should be conducted and modern technology used to address the illegal, unreported fishing and prevent fishing gangs and piracy. To ensure the right to clean and healthy marine environment, robust and effective ocean governance policy should be adopted. Ocean governance policy should provide rehabilitation opportunity to the victims of climate change causing sea level rise. The coastal communities lack food security, lose housing and face coastal erosion immensely. Try to conclude bilateral treaty with Myanmar and India on the basis of ITLOS judgment in 2012 and Award in 2014 for creating cooperative environment and avoid illegal arrest of fishermen by Arakan Army of Myanmar and Indian coast guard. Government should take measures to aware the citizens about their right to marine resources and available remedies. Easy access to ocean justice system must be ensured at any cost.

Conclusion

The existing maritime and environmental laws are not sufficient to recognize and enforce citizen ocean rights. The conceptual ambiguity of the terms relating to maritime rights and overlapping jurisdiction of Maritime Courts leads to the uncertainty of enforcement of those rights. The prevailing procedural complexities and institutional incapacity implies that citizens' ocean rights remains in theory only. Declarations of citizen ocean rights specifically under the constitution of Bangladesh have been a new demand considering the development of blue economy in modern times. The projects that address the violations of rights of coastal communities need to be conducted with strong monitoring and outcome based system. The role of High Court Division in public interest litigation in enforcing rights of citizen can't be an alternative forum to decide all marine rights issues of citizens in true sense. Special Maritime Tribunal can be a better choice to avoid complex trial procedure in existing courts for the purpose of ensuring ocean rights speedily and effectively. In addition to that court annexed alternative dispute resolution (ADR) or arbitration procedure can provide the victims suitable remedies. The administrative bodies should take proper actions to prevent piracy and illegal fishing activities periodically. Moreover, the concept of maritime rights should be clarified in statutory and maritime laws specifically. A robust and effective legal framework needs to be adopted confirming administrative accountability and easy access to ocean justice.

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Beyond the Citizen: An Inquiry Regarding the Applicability of Fundamental Rights of the Bangladesh Constitution to the Rohingya Refugees Residing in Bangladesh

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Abstract: *This article undertakes a jurisprudential examination of the relevance of fundamental rights, as articulated in Part III of the Constitution of the People's Republic of Bangladesh, to these marginalized Rohingya people who have fled Myanmar in large numbers. Although Bangladesh is not a member of the 1951 Refugee Convention, this research contends that a deliberate and humane interpretation of its constitution demands the provision of fundamental, non-derogable rights to the Rohingya. Four pillars support the argument: a careful textual analysis of the constitution's intentional differentiation between rights granted to "citizens" and rights granted to "any person"; a review of the Bangladesh Supreme Court's progressive jurisprudence, especially its historic recognition of non-refoulement as customary international law; a comparative legal analysis of the Indian Supreme Court's broad interpretation of the right to life for non-citizens; and an evaluation of Bangladesh's legally binding obligations under other international human rights treaties and customs. The article argues that the Constitution itself offers a domestic solution to a worldwide crisis of belonging by providing a crucial legal shield against the absolute rightlessness. In order to turn these constitutional promises into a concrete, rights-based framework for the Rohingya in Bangladesh, it ends with specific recommendations for the judiciary and the government.*

Keywords: *Constitution, Rohingya, Non-refoulement, Fundamental Rights, and Bangladesh.*

1. Introduction: The Stateless Person and the Constitution

The contemporary framework of human rights, founded on Universalist principles, faces its most significant contradiction in the existence of the stateless person. For these persons, devoid of the political affiliation that citizenship provides, fundamental rights may devolve into mere abstractions, unenforceable and unattainable. The political philosopher Hannah Arendt described this dilemma as the forfeiture of the "right to have rights"—the essential right to belong to a political community that can ensure all other rights.[1] The stateless individual, existing outside the traditional social contract, acts as a litmus test for the true universality of human rights and the ultimate extent of constitutionalism. Their circumstances require a basic inquiry: do rights fundamentally lie inside the individual, or are they contingent upon the conferment of citizenship by a sovereign state? This phenomenon lies at the heart of modern legal and political theory, forcing countries to find a balance between national sovereignty and human rights. The Rohingya crisis is not only a humanitarian or geopolitical issue[2] for Bangladesh; it represents a significant constitutional turning point. It compels a national reflection on the underlying principles of the Constitution of Bangladesh, 1972 (COB), which was influenced by the collective

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[1] Hanna Arendt, *The Origins of Totalitarianism* (3rd edn, Harcourt Brace Jovanovich 1973) 267.

[2] Shahadat Swadhin, 'China and India in the Rohingya Crisis: Exploring a Sustainable Solutions in the Geopolitical Considerations and Legal Framework' (2024) 12 Malaysian Journal of International Relations 35 <https://mjir.um. edu.my/index. php/mjir/article/view/45903>. Accessed on 23 August 2025.

experience of displacement. Most of the earliest reactions to the arrival of Rohingya individuals were based on humanitarian and security concerns. The issue has been going on for a long time, and it has produced a lot of legal concerns, such being wrongfully detained and not being able to receive justice. As a result, the issue had to be handled by the courts in the country. This difference makes courts and legal scholars look to the Constitution for answers, especially when it comes to the different meanings of "person" and "citizen." As a result, the presence of the Rohingya serves as a catalyst, necessitating an interpretation of the Constitution's Universalist principles that may have previously been inactive or unexamined on such a large scale. This article argues that even though Bangladesh has not ratified the 1951 Refugee Convention, a purposeful and humane interpretation of the Constitution of the People's Republic of Bangladesh—supported by the clear language of Part III (Fundamental Rights), the evolving precedent of its Supreme Court, relevant comparative law from India, and established principles of customary international law—requires the extension of core, non-derogable fundamental rights to the Rohingya population. Some people say that the difference between "citizen" and "person" in the Constitution was made on purpose to protect the basic human dignity of everyone who lives in its authority. The Constitution serves as a crucial legal protection against the complete lack of rights faced by the stateless Rohingya, providing a domestic solution to an international issue of belonging.

2. The Constitution of Bangladesh on Fundamental Rights: A Deliberate Dichotomy of Rights in Part III

A comprehensive textual analysis of Part III of the Constitution of Bangladesh reveals a precisely structured hierarchy of rights. The framers, through their linguistic selections, delineated a clear and consistent distinction between rights reliant upon political membership ("citizens") and those that are universal, intrinsic to persons by virtue of their humanity ("any person"). The dichotomy is intentional; it embodies a significant jurisprudential decision to establish the new republic on the tenets of universal human dignity while conferring particular political and economic benefits to its formal members.[3] The nation's recent past had a big impact on this constitutional framework. Formulated in 1972, directly after the Liberation War, the Constitution was crafted by individuals possessing a firsthand and profound comprehension of displacement and statelessness. The 1971 War resulted in millions of Bangladeshi refugees seeking asylum in neighboring India, an experience that significantly influenced the founders' understanding of the precariousness of non-citizens. The Preamble promises to protect "fundamental human rights and freedom, equality, and justice" for its entire people. This shows that the battle has a Universalist goal.[4] The Constitution's third part, called "Fundamental Rights," is the basis for the republic's commitment to justice and the rule of law. The Constitution's supremacy is affirmed in Article 7, which designates it as the "supreme law of the Republic," and further reinforced in Article 26, which states that any statute inconsistent with the provisions of Part III shall be rendered void to the extent of the inconsistency. This clause sets limits on the power of the legislative and executive branches by establishing basic rights. This means that the state can't do anything that contradicts these basic rights. Articles 27 to 44 delineate these rights, revealing a critical distinction between citizen-centric and person-centric rights through their unique wording.

[3] Akhil Reed Amar, *America's Constitution: A Biography* (Random House Incorporated 2005).
See also: Akhil Reed Amar, 'The Bill of Rights and the Fourteenth Amendment' (1992) 101 Yale Law Journal 1193 <https://openyls.law.yale.edu/server/api/core/bitstreams/4e6d5404-ea97-4a0a-a611-b526cdc057c3/content>. Accessed on August 23, 2025.

[4] The Constitution of the People's Republic of Bangladesh 1972, < http://bdlaws.minlaw.gov.bd/act-367.html> Accessed on August 23, 2025.

2.1 Rights Reserved for "Citizens" Vs Rights Extended to "Any Person" or "No Person"

Several fundamental rights are clearly and exclusively conferred upon the "citizens" of Bangladesh. These rights are inherently connected to the social contract, regulating an individual's engagement in the political, civic, and economic spheres of the nation.[5] An analysis of these papers uncovers a consistent theme: they relate to the interaction between the state and its formal polity constituents. The rights guaranteed solely to citizens include: Equality before law (Article 27), Non-Discrimination on grounds of religion, race, caste, sex or place of birth (Article 28), Equality of opportunity in public employment (Article 29), Freedom of movement (Article 36), Freedom of assembly (Article 37), Freedom of association (Article 38), Freedom of thought and conscience, and of speech (Article 39), Freedom of profession or occupation (Article 40), Rights to property (Article 42) and Protection of home and correspondence (Article 43). Constitutional democracies usually reserve things for citizens. This is based on the idea that some parts of national life should only be available to people who formally pledge their loyalty to the state.

The Constitution, on the other hand, sets out a set of basic rights that apply to "any person" or restrict certain actions against "any person." This is very different from the rights that are specific to citizens. These rights do not depend on a person's nationality; they depend on their intrinsic worth as a person. They are the foundation of the Constitution's promise to protect human rights and protect people from the arbitrary use of state authority against them. These universal rights include: Protection of right to life and personal liberty (Article 32),[6] Safeguards as to arrest and detention (Article 33),[7] Prohibition of forced labour (Article 34), Protection in respect of trial and punishment (Article 35),[8] Freedom from compulsory religious instruction (Article 41(2)), Enforcement of fundamental rights (Article 44) which guarantees the right to move the High Court Division for the enforcement of the rights in Part III. Article 102(1) describes the process for this. It says that "any person aggrieved" can file an application, which means that non-citizens whose basic rights have been violated can go to court. The deliberate employment of the phrase "person" in connection with life, liberty, and due process signifies a constitutional commitment to a fundamental norm of human rights that transcends citizenship.[9] It shows that anybody who enters Bangladesh is covered by a constitutional shield that protects them from the worst kinds of state oppression, no matter what their legal status is.[10]

2.2 Nexus between Articles 31 and 32

The primary argument for granting constitutional protection to the Rohingya is the strong correlation between Articles 31 and 32. Article 31 is unique in its wording and very important because it clearly separates the rights of citizens from those of non-citizens in the same clause:

> *"To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time*

[5] Jean-Jacques Rousseau, *The Social Contract* (2004 edn, Penguin Classics) 54.
[6] "No person shall be deprived of life or personal liberty save in accordance with law", The Constitution of the People's Republic of Bangladesh 1972, art 32.
[7] "No person who is arrested shall be detained in custody without being informed...of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner...", The Constitution of the People's Republic of Bangladesh 1972, art 32.
[8] "No person shall be convicted of any offence except for violation of a law in force at the time...nor be subjected to a penalty greater than...that which might have been inflicted...", This article also guarantees against double jeopardy and ensures a speedy and public trial for "every person accused of a criminal offence". The Constitution of the People's Republic of Bangladesh 1972, art 35.
[9] Jobair Alam, The Constitutional Law of Bangladesh Progression and Transformation at Its 50th Anniversary: 16. Refugee Protection Under the Constitution of Bangladesh: The Rohingya Refugees in Context (first, Springer Nature 2023) <https://www.springerprofessional.de/en/the-constitutional-law-of-bangladesh/25847180> accessed 24 August 2025.
[10] Jobair Alam and Ali Mashraf, 'Fifty Years of Human Rights Enforcement in Legal and Political Systems in Bangladesh: Past Controversies and Future Challenges' (2023) 24 Human Rights Review 121. https://doi.org/10.1007/s12142-023-00679-3 <https://link.springer.com/content/pdf/10.1007/s12142-023-00679-3.pdf> accessed 24 August 2025.

> *being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law".*[11]

This article serves as a conduit, affirming the notion of legality as a universal right for all those physically present in Bangladesh. It ensures that no individual is exempt from the law. The phrase "every other person for the time being within Bangladesh" obviously refers to non-citizens, including refugees, asylum seekers, and stateless people like the Rohingya.[12] The guarantee of due process and legality, in conjunction with the unequivocal right to life and personal liberty for "any person" in Article 32, forms an indissoluble and formidable protection. Article 31 says that any limits on the freedom or acts of a Rohingya that affect their life must be allowed by law while Article 32 says that the right to life is a fundamental right.[13] They collaboratively provide a constitutional safeguard, guaranteeing that those lacking a state are not devoid of rights.

3. The Legal Status of the Rohingya: Foreigners, FDMNs, or Constitutional Persons?

The Rohingya, an ethnic minority deliberately repressed and deprived of citizenship in their homeland Myanmar by the 1982 nationality law, exhibit Arendt's contradiction with poignant clarity. They represent the largest stateless community globally. The brutal killings they suffered, especially the "clearance operations" of 2017, caused a large migration, with more than a million Rohingya fleeing to Bangladesh for safety.[14] They live in a state of great legal and existential uncertainty in Bangladesh. The Government of Bangladesh has officially classified them as "Forcibly Displaced Myanmar Nationals" (FDMNs) while offering asylum on humanitarian grounds.[15] This is a political and administrative phrase that was purposefully chosen to avoid the legal meaning of "refugee" and to clarify the government's position that their stay is temporary and that repatriation is the only long-term option.[16] This lack of status places the Rohingya in a legal void, subject to executive discretion instead of a defined rights-based framework. They are limited in their ability to move around, get an education, and find work because they are only allowed to live in large, crowded camps. They also don't have much access to the formal judicial system, which makes them more vulnerable to exploitation and abuse. The necessity of elucidating their legal status is not merely an abstract scholarly endeavor but an issue of direct human significance. The unclear and ad hoc legal framework that governs the Rohingya's status in Bangladesh makes it hard for them to enjoy their human rights. The state has chosen not to give them a clear legal status on purpose. Instead, it has put them in an administrative category that gives the executive more power and lessens the government's duties. The method of "legal othering" puts the Rohingya in a dangerous gray area where their real treatment often goes against their constitutional rights as "persons." This policy of legal ambiguity creates a situation that is paradoxical. The executive branch operates in a seemingly constitutional manner by enforcing a legitimate statute, the Foreigners Act, on a non-citizen demographic.

The ramifications of this application, encompassing prolonged detention and hindrance of access to justice, may be regarded as unconstitutional, as they infringe against the rights to life and liberty established in Articles 31 and 32. This situation is not a legal void, but rather a constitutional uncertainty that allows for challenges to the constitutionality of executive actions. The state's dependence on the Foreigners Act generates a direct

[11] The Constitution of the People's Republic of Bangladesh, 1972. accessed August 23, 2025, https://rimap.unhcr.org/node/383

[12] Ashraful Azad, 'Foreigners Act and the Freedom of Movement of the Rohingyas in Bangladesh', 2017, GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY, <https://griffithlawjournal.org/index.php/gjlhd/article/view/986/899> accessed 26 August 2025.

[13] Muhammad Ekramul Haque and Md Abu Bakar Siddique, 'Protection of Refugees in the Non-Signatory States to the 1951 Refugee Convention: Bangladesh Case Study' (2024) 33 <https://brill.com/display/book/9789004718128/BP000012.xml> accessed 26 August 2025.

[14] 'Foreigners Act and the Freedom of Movement of the Rohingyas in Bangladesh', (n 12).

[15] Masud Parvez Chowdhury, 'Forcibly Displaced Myanmar Nationals (FDMN) in Bangladesh: The Need for Repatriation to Myanmar' [2023] 2(1) the Journal of Bangladesh and Global Affairs 1, 1.

[16] Brian Gorlick, 'Political-Legal Considerations of the Rohingya Refugee Situation' in *The Rohingya Crisis: Humanitarian and Legal Perspectives* (1st edn, Routledge 2022) <https://doi.org/10.4324/9781003304883-3> accessed 2 August 2025.

confrontation with the Constitution's paramount guarantees, positioning the court as the essential and rational adjudicator to reconcile this discord between legislative authority and basic rights. The formal appellation for the Rohingya in Bangladesh is "Forcibly Displaced Myanmar Nationals" (FDMN). This phrase is a political and administrative construct that doesn't have a legal definition in either Bangladeshi or international law. Its use is tactical. At first, it purposely leaves out the word "refugee," which shows that Bangladesh wants to avoid the specific duties that come with being part of the international refugee regime, especially as it is not a signatory to the 1951 Convention. Second, the label emphasizes the "Myanmar National" classification, which supports Bangladesh's main policy position that the Rohingya are citizens of Myanmar and that the only long-term answer is to send them back there. The FDMN classification identifies them as a temporarily displaced group, intended to counter any notion of long-term integration and to keep international focus on their repatriation to Myanmar.[17] This results in a prolonged condition of legal uncertainty, as the Rohingya are deprived of a formal status that would establish their rights within a reliable and enforceable legal framework. In the absence of a designated refugee statute, the Rohingya, as non-citizens, are governed by the Foreigners Act of 1946. This law from the colonial era defines a "foreigner" as "someone who is not a citizen of Bangladesh" and gives the government a lot of power that it can use as it sees fit. The Act gives the government the power to issue orders that prohibit, restrict, or limit the entry, exit, movement, and presence of any foreign national. These rights are broad and include the right to detain, limit, and force a foreigner to live in a given place. This broad executive power goes against the idea of constitutional supremacy, which is set out in Article 7 of the Constitution. This article says that the Constitution is the "supreme law of the Republic" and that any statute that goes against it is null and void. The fundamental rights in Part III are an essential component of this paramount legislation. The powers conferred by the Foreigners Act cannot be unlimited; they must be interpreted and limited by the constitutional protections afforded to "any person." Executive measures, including the imprisonment of a Rohingya individual for being outside a designated camp, must adhere to the procedural protections outlined in Article 33 and the right to liberty as stipulated in Article 32. The Act sets forth the rules for state control, but the Constitution sets the final standard for how it should be done legally.

3.1 The Real Implications of Legal Ambiguity

The absence of a definitive, rights-based legal status has profound implications for the Rohingya population, rendering their daily lives a battle for survival and dignity.[18] This legal vacuum is not a neutral condition but an active cause of vulnerability and human rights infringements, including a) Restricted movement and confinement b) Lack of access to formal justice and c) Vulnerability to arbitrary actions. The government imposes stringent movement restrictions, mostly limiting the Rohingya to the camps in Cox's Bazar. Checkpoints and the risk of detention under the Foreigners Act establish a de facto condition of confinement, significantly restricting their capacity to pursue opportunities or access services beyond the authorized zones. Rohingya refugees possess minimal access to the institutional police and judicial systems in Bangladesh. They cannot file police complaints right away; they have to go via administrative officials like the Camp-in-Charge (CiC).[19] This makes it much harder for justice to be served, especially for victims of the rising violence, extortion, and other crimes committed by armed groups and criminal groups in the camps.[20] The existing legal system for the Rohingyas in the camps is predominantly informal and ad hoc, perpetuating detrimental power dynamics and inadequately safeguarding individuals. The lack of an acknowledged legal status renders the

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[17] 'Political-Legal Considerations of the Rohingya Refugee Situation', (n 16).

[18] Md Syful Islam and Md. Emon Mia, 'Navigating Legal and Humanitarian Challenges Regarding the Rohingya Refugee Crisis in Bangladesh' [2024] 17(3) International Journal of Social Inquiry 467 <https://doi.org/10.37093/ijsi.1487343> accessed 2 August 2025.

[19] 'Navigating Legal and Humanitarian Challenges Regarding the Rohingya Refugee Crisis in Bangladesh', (n 18).

[20] ibid

Rohingya vulnerable to arbitrary detention, intimidation, and extortion by security forces, notably the Armed Police Battalion (APBn) responsible for camp security.[21] Their uncertain legal status gives them very little choices for dealing with these kinds of breaches. The government made a deliberate choice to create this situation of "legal othering." The state wants to treat the Rohingya as a humanitarian issue rather than as legal beings with constitutional rights by maintaining those in a transitional state where they are physically present but not legally recognized. The legal problem is to penetrate this administrative barrier and recognize their status as "persons" under the Constitution, thus extricating them from this legal void into the safeguarding scope of the rule of law.

4. The Gravitational Pull of International Law: Obligations beyond Ratification

The constitutional text of Bangladesh establishes a strong basis for the rights of the Rohingya, while Bangladesh's obligations are additionally supported by binding international law principles. Although Bangladesh has chosen to remain outside the formal international refugee regime, it is still subject to essential global norms regarding the treatment of displaced and vulnerable populations. The international legal principles, especially the doctrine of non-refoulement, function alongside the Constitution's "personhood" rights, establishing a dual-source obligation for protection.[22] The government's significant dependence on its non-signatory status to the 1951 Convention serves as a misleading argument, diverting attention from a more intricate legal reality. The state's public and diplomatic stance centers primarily on the issue of non-ratification. This narrative strategically omits two significant sources of international legal obligation[23]: binding customary international law, in which non-refoulement has attained the status of jus cogens, and other key human rights treaties ratified by Bangladesh, including the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). The CAT explicitly includes a non-refoulement clause in Article 3, which Bangladesh is legally obligated to uphold. This establishes a pincer movement within the legal framework. The legal rationale for safeguarding the Rohingya is not reliant on a singular, unratified treaty; rather, it is built upon a comprehensive legal framework that the state cannot readily disregard. The government's official position is frequently supported by arguments prevalent among South Asian nations, including the assertion that the 1951 Convention is a "Eurocentric"[24] document inadequately addressing the region's unique challenges related to mass displacement.[25] Bangladesh's refusal to accede to these treaties allows it to maintain significant policy flexibility in addressing the Rohingya crisis, thereby circumventing the legal obligations and oversight mechanisms associated with ratification.

4.1 Harmonizing Domestic Law with International Human Rights Obligations

The concept of non-refoulement is the most important part of international refugee protection. This concept forbids states from sending a refugee or asylum seeker back to the borders of a country where their life or freedom would be in danger because of their race, religion, nationality, membership in a certain social group, or political beliefs.[26] This ban is absolute and is widely accepted as customary international law. This view is

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[21] ibid

[22] Kamrul Hasan Arif, "The Rohingya Refugees in Bangladesh: Non-Refoulement and Legal Obligation under National and International Law" (2020) 27 International Journal on Minority and Group Rights 855 <https://doi.org/10.1163/15718115-02702014>. Accessed on 20 July 2025.

[23] Srobana Bhattacharya and Bidisha Biswas, "International Norms of Asylum and Burden-Sharing: A Case Study of Bangladesh and the Rohingya Refugee Population" (2020) 34 Journal of Refugee Studies 3734 <https://doi.org/10.1093/jrs/feaa122> accessed 20 July 2025.

[24] Laura Madokoro, 'Eurocentrism and the International Refugee Regime' (2022), Journal of Modern European History <https://doi.org/10.1177/16118944221077423 > accessed 20 July 2025.

[25] Jay Ramasubramanyam, 'Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?' (2020) *Brill | Nijhoff eBooks* <https://doi.org/10.1163/9789004437784_005> accessed 20 July 2025.

[26] Raghad Almuhaisen, "Non-Refoulement of Refugees in International Law" (2022) 3 Al-Zaytoonah University of Jordan Journal

backed by credible authorities like the UNHCR and several scholarly documents.[27] This means that all countries must follow the principle of non-refoulement, even if they haven't signed the 1951 Convention. It is a peremptory norm of international law[28] (jus cogens) that cannot be changed. For Bangladesh, this is a very important point: as long as the Rohingya refugees face a real threat of persecution, torture, or other significant human rights violations, the country cannot force them to return to Myanmar. This international legal duty persists regardless of the government's inclination for repatriation. In addition to refugee law, Bangladesh's legal obligations are influenced by its ratification of key international human rights treaties. Bangladesh is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The treaties include non-derogable provisions applicable to all individuals within a state's territory and under its jurisdiction, without discrimination. The ICCPR ensures the right to life as stated in Article 6 and forbids torture as well as cruel, inhuman, or degrading treatment as outlined in Article 7. These rights are applicable universally to both citizens and non-citizens.[29] The UN Human Rights Committee's General Comment No. 31 elucidates that the obligation under Article 2 of the Covenant to respect and ensure rights for all individuals within its territory and subject to its jurisdiction includes a duty not to expel a person from their territory when there are significant grounds for believing there is a genuine risk of irreparable harm, as outlined in Articles 6 and 7.[30]

The CAT clearly establishes the principle of non-refoulement in Article 3, which asserts that "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Bangladesh, as a signatory, is directly obligated by this provision. The Committee against Torture's General Comment No. 4 clarifies that this prohibition is absolute and extends to all non-citizens, irrespective of their status.[31] Article 25 of the Bangladesh Constitution provides a domestic anchor for these international obligations, stating that "The State shall base its international relations on the principles of...respect for international law and the principles enunciated in the United Nations Charter".[32] Bangladeshi courts have ruled that international treaties are not directly enforceable unless they are included in domestic law.[33] However, they have also shown a tendency to interpret constitutional provisions, like fundamental rights, in a way that is consistent with the country's international obligations.[34] This makes the government's main defense, which is that it hasn't ratified the Refugee Convention, mostly useless.

for Legal Studies 175 <https://doi.org/10.15849/zujjls.221130.09> accessed 20 July 2025.

[27] Pavitra Khaitan & Jvalita Krishan, 'The Obligation of Non-Refoulement and Its *Erga Omnes Partes* Character' (29 September 2023) Harvard International Law Journal https://journals.law.harvard.edu/ilj/2022/12/the-obligation-of-non-refoulement-and-its-erga-omnes-partes-character/ Accessed 26 August 2025.

[28] Muhammad Alvi Syahrin, "The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law" (2021) 6 Journal of Indonesian Legal Studies 53 <https://doi.org/10.15294/jils.v6i1.43350> accessed 21 July 2025.

[29] William Binchy, "Human Rights, Constitutions and Non-Citizens" (2015), Y Derecho 275 <https://doi.org/10.15581/011.71.275-306> accessed 21 July 2025.

[30] United States, 'Observations on Human Rights Committee General Comment No 31' (27 December 2007) https://2001-2009.state.gov/s/l/2007/112674.htm accessed 23 July 2025.

[31] United Nations, 'The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Guide to Reporting to the Committee against Torture' (2018) <https://redress.org/wp-content/uploads/2018/10/REDRESS-Guide-to-UNCAT-2018. pdf> accessed 24 July 2025.

[32] "The Constitution of the People's Republic of Bangladesh | Rights Mapping and Analysis Platform" <https://rimap. unhcr. org/node/383> accessed 01 August 2025.

[33] Mazharul Islam and others, "The Application of International Laws in Bangladesh: A Critical Evaluation" (2022) 8 Unnes Law Journal 207 <https://doi.org/10.15294/ulj.v8i1.56458> accessed 01 August 2025.

[34] Md Nazmul Hasan, 'Correlation between UN Human Rights Treaty Monitoring Bodies and Domestic Courts; An Analytical Overview in Respect of Bangladesh' (2022) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.4265375> accessed 10 August 2025.

5. Constitutional Guardianship of the Supreme Court of Bangladesh: Analysis of RMMRU v. Government of Bangladesh (2017)

In the absence of legislation and under an executive policy of legal uncertainty, the Supreme Court of Bangladesh has become the most important guardian[35] of fundamental rights for the marginalized.[36] The judiciary has started to create a de facto legal framework for protecting refugees by broadly interpreting constitutional principles and being open to collaborating with international law. The Court's important decisions, especially in Public Interest Litigation (PIL), show that it can be a strong counter-majoritarian force that makes sure the Constitution's promise reaches even the most disadvantaged non-citizens.[37] The 2017 ruling in RMMRU v. Government of Bangladesh[38] exemplifies a nuanced yet significant manifestation of judicial constitutionalism. The Supreme Court, confronted with a legislative and executive void, might have adjudicated on the specific basis of wrongful detention following the end of a sentence, which constitutes a blatant infringement of Article 31.[39] Instead, it chose to engage deeply with the principle of *non-refoulement*, recognizing that the core issue was not just the illegality of the detention, but the *reason* for it: the state's inability to repatriate the individual to a place of grave danger.[40] By declaring non-refoulement a customary international law norm, the Court legalized it. It then linked this international principle to Article 32's constitutional right to life, concluding that forcibly returning someone to persecution may violate their right to life. This innovative judicial move informs and enriches a domestic constitutional right using international law. This "harmonious interpretation" enhances the domestic constitution, legitimizes the court's action, and creates a stable, homegrown refugee protection base that the government cannot dismiss as foreign interference. The RMMRU judgment stands as a watershed moment in the country's refugee jurisprudence. The case concerned Md. Rafique, a Rohingya man who remained in detention for years after completing his prison sentence for illegal entry under the Foreigners Act, 1946.[41] The petition, brought as a PIL, challenged his continued imprisonment as unlawful.[42] The Court's ruling was significant in multiple ways. The Court issued a definitive statement regarding the status of international refugee law in the domestic legal framework of Bangladesh. The judgment determined that the principle of non-refoulement, as defined in Article 33 of the 1951 Refugee Convention, has evolved beyond its treaty origins to establish itself as a binding principle of customary international law.[43] The Court stated:

> *"Though Bangladesh has not formally ratified the Convention... [t]his Convention by now has become a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention..."*[44]

This judicial pronouncement was highly effective. It successfully circumvented the executive's enduring

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[35] Mohammad Saiful Islam, "An Appraisal of Efficiency and Effectiveness of the Supreme Court of Bangladesh" (2019) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.3414977> accessed 10 August 2025.
[36] Md Rizwanul Islam, "Dissecting Quasi-Legislative Judicial Directives of the Supreme Court of Bangladesh" (2024) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.4696028> accessed 12 August 2025.
[37] Vibhor Sharma and Sk Bose, "Indian Judiciary and Its Role in Interpreting Humanitarian Law" (2025) 7 International Journal for Multidisciplinary Research <https://doi.org/10.36948/ijfmr.2025.v07i03.48879> accessed on 12 August 2025.
[38] Case Number: Writ Petition No. 10504 of 2016 | PUBLIC INTEREST LITIGATION (PIL), 2025, <https://bdpil.org/2016/08/21/338/> Accessed on 17 August 2025.
[39] Writ Petition No. 10504 of 2016, n (38)
[40] M Sanjeeb Hossain, "Bangladesh's Judicial Encounter with the 1951 Refugee Convention - Forced Migration Review" (Forced Migration Review, August 27, 2024) <https://www.fmreview.org/issue67/hossain>.
[41] Forced Migration Review (n 40).
[42] ibid
[43] ibid
[44] University of Minnesota Human Rights Library, 'Refugees and Asylum Seekers in India' (Human Rights Library) <https://hrlibrary.umn.edu/research/india-refugees.html>
Accessed 23 August 2025.

assertion that non-ratification exempted it from essential refugee protection responsibilities. The Court recognized non-refoulement as a customary norm, thereby integrating it into the legal framework that Bangladesh is obligated to uphold, establishing a judicially enforceable duty for the state absent from any domestic legislation. The Court established a direct connection between this principle and the safeguarding of life and liberty. It recognized that returning Rafique to Myanmar would likely expose him to "persecution or torture," potentially endangering his life. This linked the abstract principle of international law to the specific, enforceable rights provided by the Bangladesh Constitution, notably the right to life as outlined in Article 32. The Court ultimately offered a pragmatic and compassionate solution. The court determined that Rafique's post-sentence detention lacked lawful authority and mandated his immediate release, directing that he be placed under the care and custody of the UNHCR. This showed that the Court was willing to do more than just establish rights; it was also willing to make sure that those rights were followed by issuing effective orders. The RMMRU ruling is a major example of judicial law-making. The Court stepped in when the legislature and government didn't do anything to set up a basic framework for refugee protection in Bangladesh. The RMMRU case shows that non-citizens can use this important constitutional remedy when a right that applies to "any person," like the right to liberty under Article 32, is violated. Bangladesh has a long history of Public Interest Litigation (PIL), which makes it easier to protect the rights of Rohingya people. The RMMRU case constituted a successful Public Interest Litigation, initiated by a research unit representing a detained Rohingya individual. This illustrates a definitive and feasible institutional route for human rights organizations, lawyers' associations, and other civil society entities to serve as representatives for the Rohingya community.

6. Insights from the Indian Supreme Court

The Constitution of Bangladesh, which was enacted in 1972, is based on the constitutional traditions of the subcontinent, especially the Constitution of India. It is clear that the two constitutions share a common ancestry in the way that the chapters on fundamental rights are set up and written (Part III). The Indian Constitution makes it clear that "citizens" have different rights than "any person."[45] For example, Article 19 gives citizens the right to free speech, assembly, and movement, while Article 14 guarantees equality before the law and Article 21 protects life and personal freedom. The similar textual design provides a perceptive foundation for the interpretive trajectory of the Indian Supreme Court, affording significant direction for its Bangladeshi counterparts. Both judiciaries confront a fundamental inquiry: what constitutes the scope of "personhood" within their respective constitutional frameworks? The centerpiece of Indian human rights jurisprudence is the Supreme Court's expansive and dynamic interpretation of Article 21, which states: "No person shall be deprived of his life or personal liberty except according to procedure established by law".[46] This provision is the direct analogue to Article 32 of the Bangladesh Constitution. Over several decades, the Indian Supreme Court has transformed Article 21 from a mere negative guarantee against arbitrary executive action into a positive fount of rights necessary for a life with human dignity.[47] This expanded right has been held to encompass the right to shelter, the right to a clean environment, the right to health, and the right to livelihood.[48] The most essential thing for this analysis is that the Court has always and strongly said that Article 21's right to life is universal. It applies to everyone in India, whether they are a citizen, a non-citizen, a refugee, or an asylum seeker.[22] In Louis de Raedt v. Union of India, the Court clarified this distinction, stating that a

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[45] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9-29. <https://www.semanticscholar.org/paper/Persons-and-Citizens-in-Constitutional-Thought-Bosniak/f73674ff20a743fd81c44182371b6f3b7323735f> accessed 23 August 2025.

[46] Dr. Gyanendra Kumar Sahu, 'An Overview of Article 21 of the Indian Constitution' (2017) International Journal of Law <https://www.lawjournals.org/assets/archives/2017/vol3issue3/3-3-31-379.pdf> accessed on August 23, 2025.

[47] EVOLUTION OF DUE PROCESS IN INDIA, 2014, Bharati Law Review, <http://docs. manupatra. in/newsline /articles/ Upload/ C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf> accessed August 24, 2025.

[48] Ibid

foreigner's fundamental right does not include the right to reside and settle in India (a right under Article 19 reserved for citizens); it is specifically "confined to Article 21 for life and liberty." This made it evident that the political rights of membership are not the same as the general human right to life and freedom. To strengthen the jurisprudential argument for the extension of fundamental rights to the Rohingya, it is beneficial to examine the jurisprudence of the Supreme Court of India. The Indian constitutional framework and its judicial interpretation present a compelling comparative model, considering the shared legal heritage and similar challenges encountered by both nations in managing substantial non-citizen populations without a distinct domestic refugee law. Indian jurisprudence serves not only as persuasive authority[49] but also presents the Bangladesh Supreme Court with a distinct legal doctrine—the "positive duty of the state"—which can effectively address the security vacuum and pervasive violence in the Rohingya camps. The prevailing legal discourse in Bangladesh has concentrated on "negative" rights, specifically the right against unlawful detention as articulated in Article 32 and the right to avoid return to harm under the principle of non-refoulement. A significant issue confronting the Rohingya is the absence of protection against violence inflicted by non-state actors, including criminal gangs and armed groups, within the camps.[50] The judgment of the Indian Supreme Court in *NHRC v. State of Arunachal Pradesh*[51] addresses this issue directly. The Court stated that the government is obligated to safeguard the endangered group from such attacks by private entities.[52] This fundamental argument redefines the "right to life" from a passive safeguard against governmental action to an active duty that compels the state to implement proactive measures for security. This comparison study constitutes a vital theological instrument. In Bangladesh, a Public Interest Litigation (PIL) can be filed, citing the NHRC case as a significant precedents. This would mean that the government is violating the Rohingya's positive right to life by not being able to ensure their protection in the camps, which means that the state needs to take steps to improve policing, the judicial system, and overall safety.

The NHRC started this lawsuit (NHRC) as a Public Interest Litigation. It is about the Chakma refugees who fled East Pakistan (now Bangladesh) in the 1960s and were moved to Arunachal Pradesh. The individuals encountered threats of forced eviction and persecution from a local students' union, accompanied by the implicit complicity or inaction of the state government. The intervention of the Supreme Court was pivotal. A writ of mandamus was issued, directing the state to guarantee the protection of the life and liberty of all Chakma individuals residing within its territory. The Court's reasoning offers a clear framework for the protection of the Rohingya in Bangladesh. The judgment notably declared:

> *"Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons... to threaten the Chakmas to leave the State..."*[53]

This ruling established several fundamental principles: a) Article 21 guarantees the right to life for everyone, whether they are a citizen or not, b) The state has a duty to protect this right, not just from its own actions but

[49] Malcolm Katrak and Shardool Kulkarni, 'Refouling Rohingyas: The Supreme Court of India's Uneasy Engagement with International Law' (2021) 7 Journal of Liberty and International Affairs 116-127. < https://doi.org/10.47305/JLIA21720116K> accessed 24 August 2025.
[50] Shahadat Swadhin, (n 2).
[51] *National Human Rights Commission vs State Of Arunachal Pradesh & Anr* (9 January, 1996, Indian Kanon) <https:// indiankanoon.org/doc/767216/> Accessed on 26 August 2025.
[52] 'CHINA AND INDIA IN THE ROHINGYA CRISIS', (n 2).
[53] Indian Kanon, (n 51).

also from threats posed by private individuals,[54] c) The state's inability to safeguard a vulnerable, non-citizen population represents a breach of its constitutional duties and d) The Court is capable of and will intervene via Public Interest Litigation to uphold this obligation of protection. The similarities between the Chakmas in Arunachal Pradesh and the Rohingya in Bangladesh are notable. Both groups are non-citizens experiencing animosity and residing under an unstable legal status in a state that has not ratified the 1951 Convention. The NHRC rulling provides a compelling legal basis for the Bangladesh Supreme Court, demonstrating how the universal right to life can serve as a potent tool to advocate for state protection of a vulnerable refugee population. The analogous judicial reasoning in both countries suggests the emergence of a cohesive "common law of South Asian constitutionalism," where supreme courts, grounded in a common legal tradition, address the gaps left by political bodies to protect the essential human dignity of non-citizens through a broad interpretation of the right to life.

7. Weaving the Threads: Argument for the Relevance of "Personhood" Rights

The prior analysis has constructed a multi-layered legal argument supporting the extension of fundamental rights to the Rohingya population in Bangladesh. This argument is based on various sources, including constitutional texts, domestic judicial precedent, binding international law, and compelling comparative jurisprudence. The synthesis of these elements presents a strong argument that aligns the rightful exercise of state sovereignty with the essential requirement of safeguarding human dignity. The issue of whether and to what extent fundamental rights should be granted to Rohingyas in Bangladesh constitutes a significant legal and policy challenge. We are not defending all the fundamental rights enshrined in the Constitution for Rohingyas; instead, we are solely pushing for the rights accorded to 'any person', such as the right to life and freedom from torture. The Constitution of Bangladesh differentiates between rights granted to citizens and those accessible to any person.[55] Certain core guarantees—such as equality before law (Article 27), protection of law (Article 31), and the right to life and liberty (Article 32)—apply to all persons, regardless of nationality.[56] However, we are well aware that fully extending these rights to the Rohingyas would pose significant threats to security, economy, and sovereignty of Bangladesh.[57] This section of the paper examines these potential threats and evaluates legal, policy, and international strategies to mitigate them. The conferral of constitutional rights may be exploited by militant factions or criminal organizations that occasionally function within Rohingya camps, such as those involved in smuggling, drug trafficking, and armed activities.[58] Moreover, excessive judicial protection of "any person" rights may restrain law enforcement agencies in maintaining public order. The enforcement of rights to education, health, and livelihood as extensions of the right to life at the same level as that of Bangladeshi citizens may exacerbate the already scarce national resources.[59] This may incite frustration within local host communities, resulting in social conflicts.[60] There are also social and political consequences. Unrestricted constitutional rights may promote permanent settlement

[54] 'CHINA AND INDIA IN THE ROHINGYA CRISIS', (n 2).
[55] The Constitution of the People's Republic of Bangladesh 1972, arts 27, 31, 32.
[56] *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) 14 BLT (HCD) Special.
[57] Human Rights Watch, 'Bangladesh: Events of 2023' (HRW, 2024) <https://www.hrw.org/world-report/2024/country-chapters/bangladesh> accessed 20 September 2025.
[58] International Crisis Group, 'Building a Better Future for Rohingya Refugees in Bangladesh' (Asia Report No 338, 5 December 2023). < https://www. crisisgroup. org/asia -pacific/ myanmar -bangladesh/ b155-building-better-future-rohingya-refugees-bangladesh> accessed 20 September 2025.
[59] Imtiaz Ahmed, *The Plight of the Stateless Rohingyas: Responses of the State, Society and the International Community* (1st edn, University Press Limited 2010)
[60] M Ala Uddin and others, 'Social Cohesion between the Rohingya and Host Communities in Cox's Bazar' (Advocacy for Social Change (ASC), BRAC 2021) < https://www.brac.net/program/wp-content/uploads/2024/01/Social-Cohesion-between-the-Rohingya-and-Host-Communities-in-Coxs-Bazar.pdf > accessed 20 September 2025.

in Bangladesh instead of voluntary repatriation to Myanmar.[61] This could result in long-term demographic imbalance and political pressures for the demand of voting rights and citizenship.[62] If the Rohingyas are granted enforceable access to courts for all "any person" rights, it could establish a precedent for other undocumented migrants or stateless groups to claim similar treatment, thereby complicating immigration control.

Bangladesh cannot deny basic rights to Rohingyas without violating international human rights standards, even though there are risks. So, it's important to find an appropriate harmony between humanitarian duties and national objectives. So, what can be done to deal with or minimize these risks? Bangladesh does not have a law that specifically deals with refugees. Rather than depending on ad-hoc measures or expansive constitutional interpretations, a Refugee and Stateless Persons Act could delineate the rights afforded to Rohingyas and the limits thereof. This kind of framework would make things clearer, prevent judicial overreach, and let the government limit things like freedom of movement or employment when they need to for national security and social cohesion.[63] This prevents blanket application of "any person" rights in sensitive areas. The misuse of rights by militant or criminal groups can be prevented through improved intelligence, policing, and camp management.[64] These measures must, however, remain proportionate and subject to a degree of judicial scrutiny to prevent abuse. Bangladesh must persist in asserting that the Rohingya problem constitutes an international obligation, rather than solely a national one. Collaborative burden-sharing among UNHCR, IOM, donor nations, and regional partners is essential to prevent humanitarian responsibilities from overburdening Bangladesh. Bangladesh should keep putting pressure on Myanmar through diverse international channels to make sure that people can return home safely and of their own free will. This would help avoid the risks of permanent settlement. Extending "the fundamental rights available to any person" to Rohingyas is both a legal and moral imperative; nevertheless, if granted without restrictions, it poses hazards to Bangladesh regarding security, resources, and sovereignty.

The rationale for national security, while politically persuasive, is deficient in legal strength when used to support the infringement of essential, non-derogable rights. The Bangladeshi government has instituted certain restrictive measures, such as the erection of fenced camps, the enforcement of internet outages, and the imposition of movement restrictions, justifying these actions as vital for national security.[65] International law (ICCPR, CAT) and constitutional law (Article 32) assert that rights such as freedom from torture and the right to life are fundamentally non-derogable, even during public emergencies. The jurisprudence from Bangladesh in the RMMRU case and India in the NHRC case stipulates that state actions affecting life and liberty are susceptible to court review, requiring that such actions be legitimate, fair, and rational. A blanket claim of "national security" cannot legally justify actions such as arbitrary detention or the establishment of conditions that jeopardize life and dignity.

The legal basis for protecting the Rohingya rests on four mutually reinforcing pillars:

a. **The Constitutional Text:** The Constitution of Bangladesh clearly uses the phrase "any person" or something similar in Articles 31, 32, 33, 35, and 44 to protect the most basic rights, such as the right to life and liberty, the right to protection of the law, and the right to due process in trial and punishment.

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[61] Tasneem Siddiqui, 'Cross Border Forced and Voluntary Migration and Non-Traditional Security Discourse' 2019, <https://www.rmmru.org/newsite/wp-content/uploads/2020/07/WP-48.pdf> accessed 20 September 2025.

[62] Reza Habib, 'the "stateless" Rohingya in Bangladesh: Crisis Management and Policy Responses' (2021) 19 (1) Asian Politics & Policy. < DOI:10.1111/aspp.12611>

[63] Md. Riday Howlader and others, 'The Rohingya Crisis in Bangladesh: Challenges and Prospects' (2025) 3 Discover Global Society 103 <https://doi.org/10.1007/s44282-025-00213-5> accessed 20 September 2025.

[64] 'Building a Better Future for Rohingya Refugees in Bangladesh', (n 58).

[65] Taufiq-e-Faruque, 'Bangladesh's Policy on Rohingya Refugees: Securitization or What?' (2025) NUST Journal of International Peace & Stability. <https://njips.nust.edu.pk/index.php/njips/article/download/54/58/145> Accessed on 27 August 2025.

This linguistic evidence demonstrates a deliberate choice by the founders to create a category of universal rights that exists independently of citizenship.

b. **Domestic Jurisprudence:** In *RMMRU v. Government of Bangladesh*, the Supreme Court of Bangladesh affirmed its position as the ultimate guardian of these rights. The Court has demonstrated both the desire and the legal framework to safeguard vulnerable non-citizens from significant harm by establishing the concept of non-refoulement as a binding norm of customary international law and linking it to the constitutional right to life. The Court's endorsement of Public Interest Litigation serves as an additional mechanism for the enforcement of fundamental rights.

c. **Customary International Law:** Although Bangladesh is not a signatory to the 1951 Refugee Convention, it is bound by the customary international law principle of non-refoulement. Moreover, its acceptance of treaties such as the Convention Against Torture reinforces this commitment, establishing an external legal mandate that complements its internal constitutional responsibilities.

d. **Comparative Jurisprudence:** The Indian Supreme Court's experience, especially in *NHRC v. State of Arunachal Pradesh*, offers a compelling persuasive precedent. The Indian court confirmed that the constitutional right to life is a universal human right, imposing a concrete obligation on the state to safeguard non-citizens under its jurisdiction.

These four pillars make up a legal argument that can't be broken. The claim to fundamental rights for the Rohingya is not an appeal to charity but an assertion of legal entitlement grounded in the supreme law of Bangladesh itself.

8. Conclusion and Recommendations

This study finds a strong and multifaceted legal foundation for the enforcement of core fundamental rights for Rohingya refugees in Bangladesh. The Constitution of Bangladesh establishes a clear distinction between rights afforded to "citizens" and universal protections for "any person,"[66] serving as the fundamental basis for this argument.[67] The rights to legal protection (Article 31), life and personal liberty (Article 32), safeguards against arbitrary arrest and detention (Article 33), and protection concerning trial and punishment (Article 35) are explicitly guaranteed to all individuals within the territory of Bangladesh. The constitutional mandate is strongly supported by the progressive jurisprudence of the Bangladesh Supreme Court, which in *RMMRU v. Government of Bangladesh* acknowledged the binding nature of the customary international law principle of non-refoulement.[68] Additional support is derived from the compelling precedent set by the Indian Supreme Court's broad interpretation of the right to life for all individuals, as well as from Bangladesh's obligations under international human rights treaties such as the Convention Against Torture. The designation of Rohingya as "FDMNs" and the broad powers granted by the Foreigners Act of 1946 must be understood in the context of, and constrained by, these fundamental constitutional safeguards.

8.1 Recommendations for the Judiciary

The Supreme Court of Bangladesh has positioned itself as a crucial guardian of human rights amid a complex political environment. To strengthen this foundation, it suggests that the judiciary: a) proceed with judicial activism and purposive constitutional interpretation, explicitly confirming that "any person" in Part III encompasses refugees, asylum seekers, and stateless individuals, b) Broaden the application of principles from the RMMRU judgment, utilizing the binding nature of non-refoulement to assess and, if necessary, invalidate executive actions that could result in refoulement, c) Utilize the persuasive jurisprudence of the Indian Supreme Court, specifically referencing the NHRC, d) State of Arunachal Pradesh case, to substantiate the

[66] 'Human Rights, Constitutions and Non-Citizens', (n 29).
[67] 'Persons and Citizens in Constitutional Thought', (n 45).
[68] 'Forced Migration Review', (n 40).

state's affirmative obligation to safeguard the life and liberty of Rohingya refugees against threats posed by both state and non-state entities and e) Maintain openness to Public Interest Litigation initiated by civil society organizations representing the Rohingya community, ensuring access to the courts for the most vulnerable populations.

8.2 Recommendations for the Government of Bangladesh

To ensure compliance with its constitutional and international legal obligations, the Government of Bangladesh should: a) officially acknowledge and incorporate the Supreme Court's ruling in RMMRU into its policies, particularly by affirming the binding nature of the principle of non-refoulement, b) initiate the process of legislative amendment. This should mean either amending the Foreigners Act of 1946 to make a separate category for refugees and asylum seekers with special protections, or, even better, passing a separate national refugee law that sets out a rights-based framework that is in line with constitutional principles and international standards and c) Give clear orders to all law enforcement and administrative bodies, such as the Armed Police Battalion (APBn) and Camp-in-Charge (CiC) officials, making it clear that Rohingya refugees have the same basic rights as "any person" under the Constitution and that all actions must follow the law.

Returning to the Arendtian framework,[69] the stateless Rohingya's situation is the ultimate test of a legal system's devotion to human rights. They have lost their most important "right to have rights" because they are not treated as citizens of Myanmar. They come to Bangladesh not as nationals of another country, but just as human being. In this situation, the "personhood" clauses of the Bangladesh Constitution are quite important. They are an important part of the constitution that protects the Rohingya by giving them a "place in the world" where they can be acknowledged as legal subjects and ask for help. Articles 31 and 32, in particular, provide a domestic basis for the "right to have rights," making sure that a person is not considered a legal non-entity even if they are not a citizen. To construe these provisions as excluding the Rohingya would be to endorse a condition of complete rightlessness, a stance fundamentally at variance with the constitutional commitment to uphold "the rule of law, fundamental human rights, and freedom, equality, and justice."

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[69] '*The Origins of Totalitarianism'*, (n 1).

Economic Efficiency of Plea Bargaining in Bangladesh's Criminal Justice System: A Legal-Economic Analysis

Umma Habiba Mou*

Abstract: *The criminal justice system in Bangladesh is marked by persistent procedural delays, overloaded courts, and rising public expense on criminal litigation. Plea bargaining, while not now included into Bangladeshi statute law, presents a potentially transformational solution for rectifying systemic inefficiencies. This paper provides an economic analysis of plea bargaining and critically assesses its potential efficacy within the context of Bangladesh's criminal justice system. Theoretical insights indicate that plea bargaining improves cost-effectiveness and expedites case resolution, therefore reducing institutional overcrowding. Nonetheless, it concurrently highlights significant issues pertaining to power imbalances, compelled admissions, and possible injustices, especially among socio-economically marginalized accuseds. From a law-and-economics perspective, the system partly internalizes court expenses; yet, it fails to guarantee the optimum distribution of justice owing to inadequate legal protections, insufficient transparency, and weak supervision measures. The report finishes by presenting a series of policy proposals designed to create a well-regulated environment for plea bargaining in Bangladesh. This encompasses legislative incorporation, obligatory legal representation, judicial monitoring, and victim engagement, therefore enabling a more equitable integration of economic efficiency with ethical and constitutional values in the administration of criminal justice.*

Keywords*: Plea bargaining, Economic Analysis of law, Criminal justice, Legal reform and Bangladesh.*

Introduction

A fundamental concept of contemporary criminal law is the right of an accused individual to avoid self-incrimination. This idea is codified in both national constitutional provisions and international human rights treaties. Thus, the responsibility rests entirely with the prosecution to uncover evidence, get witness testimony, counter defense arguments, and prove guilt beyond a reasonable doubt. This endeavor, albeit challenging in any jurisdiction, is especially daunting in Bangladesh, where persistent resource limitations, structural inefficiencies, and institutional corruption significantly obstruct the administration of justice. The criminal justice system in Bangladesh is beset with procedural delays at almost every phase, including investigation, inquiry, prosecution, and trial. The structural constraints are exacerbated by a shortage of skilled personnel, political meddling, bureaucratic slowness, and widespread corruption in law enforcement and prosecuting authorities. Consequently, the judicial system has difficulties in providing prompt and effective resolutions, particularly in criminal cases where delays can equate to a denial of justice. According to Halim, the criminal justice system in Bangladesh is "encumbered by numerous deficiencies" that systemically obstruct access to equitable and prompt adjudication.[1]

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[1] M Abdul Halim, *The Legal System of Bangladesh: Text and Materials* (5th edn, CCB Foundation 2010) 221.

The numerical strain on the courts highlights the need for structural change. According to the *Annual Judicial Statistics Report 2025* published by the Supreme Court of Bangladesh, the nation's judiciary continues to experience an escalating case backlog. As of 31 December 2024, a total of 4,516,603 cases remained pending across the Appellate Division, the High Court Division, and the subordinate courts, marking a significant increase from 1,789,914 pending cases in 2008.[2] This figure reflects an average annual rise of approximately 160,393 pending cases over the sixteen-year period. In 2024 alone, 1,473,073 new cases were filed, while 1,201,240 were disposed of, thereby contributing to the overall accumulation of unresolved matters.[3] The workload distribution remains markedly uneven: each judge of the High Court Division is currently burdened with an average of 6,552 cases, judges of the Appellate Division with 4,446 cases each, and judges of the lower judiciary with 1,977 cases per judge.[4] These figures highlight the sustained strain on judicial resources and underscore the urgent need for systemic reform to enhance adjudicatory efficiency within Bangladesh's judicial system. Public spending on criminal litigation has been on the rise due to excessive delays, backlog congestion, and the glaring imbalance between workload and court capability. Given these systemic flaws, plea bargaining where the accused willingly accepts a lower charge or reduced punishment in return for a guilty plea stands out as a good and affordable alternative dispute resolution (ADR) option. While not yet codified in Bangladeshi law, plea bargaining has helped speed up criminal trials, lighten the strain on judges, and save money for the state in other countries. Section 345 of the *Code of Criminal Procedure, 1898* (CrPC) confines compromise strictly to compoundable offences, offering no procedural avenue through which an accused person may voluntarily admit guilt before trial.[5] This legislative limitation exposes a significant procedural gap within Bangladesh's criminal justice framework and presents an opportunity for statutory reform aimed at incorporating structured plea-bargaining or admission-of-guilt mechanisms consistent with due-process guarantees.[6] This results in acquittals without confessions and fails to promote accountability or deterrence. Moreover, plea bargaining creates a strategic incentive for accuseds, especially those facing overwhelming evidence, to accept responsibility in exchange for a lighter sentence thereby reducing trial risks and fostering the possibility of rehabilitation.[7] As Nadia has observed, "the principal benefit of plea bargaining is receiving a lighter sentence for a less severe charge that might result from taking the case to trial and losing."[8] This pragmatic approach not only eases judicial burdens but also enables the criminal justice system to redirect its limited resources toward more serious and complex prosecutions.

The present study adopts an economic lens to evaluate the efficacy of plea bargaining within the context of Bangladesh. It employs economic principles to justify the introduction of plea bargaining as an efficient and cost-effective tool for resolving criminal cases. By analyzing costs, incentives, and institutional design, this paper aims to demonstrate that plea bargaining if implemented with adequate legal safeguards and oversight can serve both as a deterrent mechanism and a means of improving systemic efficiency. The article concludes by offering policy recommendations for incorporating plea bargaining into Bangladesh's criminal justice process in a manner that balances economic utility with constitutional fairness.

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[2] Supreme Court of Bangladesh, Annual Judicial Statistics Report 2025 (Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs, 2025).

[3] ibid.

[4] Ibid.

[5] Code of Criminal Procedure 1898 (Act V of 1898), s 345

[6] Law Commission of Bangladesh, *Report on Reform of the Code of Criminal Procedure* (Law Commission Secretariat 2020) https://lawcommissionbangladesh.org accessed 1 November 2025.

[7] John H. Blume, *the Dynamics of Plea Bargaining: Understanding the Decision Process in Criminal Courts* (University of Chicago Press 1996).

[8] Nadia Shabnam, 'Plea Bargaining: A Comparative Legal Study and Its Prospects in Bangladesh' (2020) 34(2) Bangladesh Journal of Law and Society 56.

1. Plea Bargaining and Criminal Justice System of Bangladesh

1.1 Concept of Plea Bargaining

The quickest way to explain what plea bargaining means is "pleading guilty and getting a shorter sentence."[9] A plea bargain is an agreement between the accused and the prosecution that lets the accused secure a less sentence by admitting guilt. The prosecutor, the accused, and the judge are the three primary people involved in a plea deal. According to the Bevier Law Dictionary, it means "to make an agreement in which the accuseds plead guilty to a lesser charge and the prosecutors drop more serious charges in return."[10] The law commission of Canada said in 1975 that plea bargaining is when the accused agrees to plead guilty in exchange for a promise of some advantage.[11] Black's Law Dictionary says that plea bargaining is when the accused and the prosecution in a criminal matter come to an agreement on how to settle the case that both sides are happy with, as long as the court agrees.[12] There are three forms of plea bargaining: Charge bargaining, bargaining for a Sentence and bargaining with facts.[13]

1.1.1 Charge Bargaining

Charge bargaining constitutes a specific form of plea negotiation whereby the prosecution and defense engage in discussions to determine the precise charges that an accused will ultimately face at trial. This procedural mechanism functions as a strategic instrument within the larger context of prosecutorial discretion and judicial efficiency. When just one charge is filed against the accused, the prosecution may consent to replace that charge with a lesser one, contingent upon the accused's agreement to plead guilty. An often referenced example is the reclassification of a charge from murder to culpable homicide not amounting to murder, so substantially modifying the legal and sentence ramifications for the accused.[14]

The scope of charge bargaining is multifaceted and may manifest in several legally significant forms, including:

a. **Reduction of Charges**: A higher-grade offence may be replaced with a charge carrying a lower degree of culpability or punishment.[15]
b. **Withdrawal or Stay of Ancillary Charges**: The prosecution may agree to discontinue or suspend additional pending charges, thereby narrowing the scope of prosecution.[16]
c. **Non-Prosecution Commitments**: In certain cases, the prosecutor may formally agree not to pursue particular charges at all, contingent upon a guilty plea.[17]
d. **Third-Party Charge Dismissals**: As part of a broader agreement, charges against co-accused individuals or third parties may be withdrawn or stayed.[18]
e. **Charge Consolidation**: Multiple charges may be amalgamated into a single, all-encompassing charge that captures the essence of the criminal conduct in question.[19]

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[9] Nadia Shabnam, 'Plea Bargaining: An Analysis of its Prospects in the Criminal Justice Administration of Bangladesh' (2012) 1(2) UITS Journal 136, 137.
[10] 'Plea bargain' in *TheLawDictionary.org* (2026) https://thelawdictionary.org/plea-bargaining/ accessed 9 May 2026.
[11] Law Reform Commission of Canada, *Criminal Procedure: Control of the Process* (Working Paper No 15, Information Canada 1975) 45.
[12] Bryan A Garner (ed), Black's Law Dictionary (11th edn, Thomson Reuters 2019) 1399 (definition of 'plea bargain').
[13] Nadia Shabnam (n 9) 137–38.
[14] Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial' (2004) 117 Harvard Law Review 2464, 2471.
[15] Julian V Roberts and Loretta J Stalans, 'Plea Bargaining: The Decision to Plead Guilty' in Julian V Roberts and Loretta J Stalans (eds), *Public Opinion, Crime, and Criminal Justice* (Westview Press 2000) 163.
[16] Richard L Lippke, *The Ethics of Plea Bargaining* (Oxford University Press, 4th edition, 2010) 45.
[17] Liz Campbell, Andrew Ashworth and Mike Redmayne, The Criminal Process (5th edn, Oxford University Press 2019)
[18] Albert W Alschuler, 'The Prosecutor's Role in Plea Bargaining' (1968) 36 U Chi L Rev 50, 55.
[19] Stephen J Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 Yale LJ 1979, 1988.

From a doctrinal and policy perspective, charge bargaining underscores the tension between judicial efficiency and procedural fairness. While it expedites the resolution of criminal cases and reduces the burden on judicial resources, it also necessitates rigorous safeguards to prevent coercion, ensure voluntariness, and uphold the integrity of the justice process. The legal validity and ethical acceptability of such bargains depend upon transparent prosecutorial conduct, informed consent of the accused, and, in many jurisdictions, judicial oversight.[20]

1.1.2 Sentence Bargaining

In sentence negotiating, the accused agrees to plead guilty in exchange for a lesser sentence. It keeps the trial from going on for a lengthy time and gives the accused a chance to get a lower punishment. Sentence bargaining might include the following:

- A prosecutor's suggestion for a specified range of sentences.
- A suggestion from both the prosecution and the defense lawyer for a range of sentences
- A promise from the prosecution not to fight the defense council's sentencing recommendation.
- An agreement by a prosecutor not to ask for further optional punishments, such forfeiture and restriction orders.
- A promise from the prosecution not to ask for a harsher sentence.
- A deal between the prosecution and the accused not to fight the imposition of an intermittent sentence instead of a continuous sentence.[21]

1.1.3 Fact Bargaining

Fact bargaining is when the prosecutor agrees not to tell the court about any aggravating facts because it would mean a required minimum sentence or a harsher sentence according to sentencing guidelines. In short, plea bargaining is when the accused and the prosecution talk before the trial and the accused agrees to plead guilty in return for specific promises from the prosecutor. A court must approve a plea agreement before it can be enforced.[22]

1.2 The Legal Backdrop of Plea Bargaining in Bangladesh

Plea bargaining is not currently part of Bangladeshi law, could be a game-changing way to fix problems with the system. While Bangladesh has not legally adopted plea bargaining, the concept intersects with existing provisions. Section 241 of CrPc (1898) allows conviction upon a voluntary plea of guilt. As well as, sections 24-26 of the Evidence Act 1887 govern admissibility of confession, ensuring they are free from coercion. These provisions do not offer a structured process for negotiated pleas, but they form the basis for any future statutory recognition of plea bargaining.[23]

Furthermore, Compounding of certain offenses is permitted by provision 345 of the Code of the Criminal Procedure (CrPC), 1898, as stated in subsections (1) and (2) of the same provision. While section 345(2) covers compounding of an offense "with the permission of the court," section 345(1) is more lenient and states "without the permission of the court" when it comes to compounding an offense.[24] Therefore, crimes may be added at any point in the process:

[20] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 Brit J Criminology 578.

[21] Public Prosecution Service of Canada, '3.7 Resolution Discussions' in *Public Prosecution Service of Canada Deskbook* (4 March 2024) section 3.3.

[22] Nadia Shabnam (n 9) 144.

[23] ibid

[24] Code of Criminal Procedure 1898, s 345 (7).

- The court has the authority to release the accused if a settlement is made prior to the official charge being formed.
- The accused is considered acquitted (i.e. found not guilty) if a settlement is struck after the trial has begun.
- In both circumstances, nevertheless, the Court's approval is necessary. Criminal cases may be concluded by this procedure called "compounding" so that the court's time can be better used. The idea that the victim should get compensation instead of the offender paying a fee or going to prison is similar to restorative justice.[25]

A list of crimes punished under the Penal Code of 1860 is found in section 345 of the Criminal Procedure Code. Under two separate categories, CrPC suggests two distinct kinds of compounding. The first one implies that crimes such as intentionally hurting someone's religious sentiments, inflicting harm upon provocation, unlawfully keeping someone in captivity, and forcing someone to work may be made worse with the injured person's aim. Actually, the majorities of the offenses on the first list are rather minor and carry fines and/or jail terms of little more than a year. More serious crimes, such as rioting with a lethal weapon, willfully inflicting severe pain, jeopardizing the personal safety of others, and assaulting or criminally forcefully coercing a woman with the goal to insult her modesty, make up the second category of compoundable offenses.[26] The penalties for these offenses range from a fine to a prison sentence of two to seven years. Additionally, the offended party may compound these offences with the court's approval.[27] Thus, the provision that requires court approval serves as a "safety clause" to prevent the prospect of forced compounding that may occur in the event that compounding was to occur "without" the court's approval.[28]

1.3 The Interface of Plea Bargaining and Criminal Justice in Bangladesh: Opportunities and Challenges

Many jurists have argued that plea bargaining is not the best way to guarantee justice, placing it in a very distasteful position within the criminal justice system.[29] Some have drawn the conclusion that, in contrast to the adversarial character of Bangladeshi law, plea bargaining lacks important elements of adversarial doctrine, such as the presence of objective and effective decision-makers and rules governing the evidential and arbitration processes.[30] It is also contended that, as offenders would have more opportunities to compound their offences under a plea bargaining system, the number of crimes committed would rise. Coercion by the prosecution or corrupt practices using affluent victims is also possible during plea negotiations. However, if the accused's request for a plea deal is turned down, they may encounter significant difficulties. There is also a lack of a formal structure for teaching people how to use plea bargaining in our nation. Decriminalization of crimes may result from promoting ADR in the criminal justice system, which would entail that crimes would no longer be prosecuted, despite the system's inherent flaws. Village shalish will also provide a means of resolving criminal offences, although it is now mired in local politics and arbitrary rulings. People will still have to show up to court if they want any kind of guarantee of justice in

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[25] Jamila A Chowdhury and Nushera Tazrin Darin, 'Juridical Possibilities of ADR through "Plea Bargaining" of Compoundable Offences: Potentials and Perils under the Current Socio-Legal Context of Bangladesh' *University of Asia Pacific Journal of Law and Policy* 7.
[26] Code of Criminal Procedure 1898, s 145
[27] Penal Code 1860, ss 148, 324, 325, 336, 354.
[28] ibid
June 21, 2019, https://www.thedailystar.net/news/introduction-of-adr-in-criminal-cases
[29] Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial' (2004) 117 Harvard Law Review 2464, 2468
[30] Md Alamin, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview' (2015) 3(11) Journal of Research in Humanities and Social Science 68, 69, 77; Fred C Zacharias, 'Justice in Plea Bargaining' (1998) 39 Wm & Mary L Rev 1121, 1139.

this situation. This might lead to a decriminalization of crime and chaos in society if no judicial agency is involved in compounding offences. It is common for the prosecution to focus on overcharging the accused and ignoring the victim's interests when a case is first initiated. According to experts, it is disrespectful to the victim's interests to engage in plea negotiations.[31] The accused may feel tremendous pressure to plead guilty in such a situation, even when he is innocent. The introduction of plea bargaining in criminal cases has the potential to severely harm some of the most fundamental rights of the victim and the accused. Instead of serving as a means of justice, plea bargaining might end up being used by the prosecution. Sometimes, one of the co-accused may enter a guilty plea in order to shift the responsibility onto another, setting others up for a trap.[32] The defense argued that a guilty plea in plea bargaining might strip an innocent person of his voting rights, public office, ability to get a loan, and other civil liberties. It is possible for an accused person to still be sentenced to a certain amount of time in jail, even after pleading guilty and receiving a reduced sentence. The accused may suffer needlessly if the police submit a corrupt investigative report that affects the elements of the plea bargain. Plea bargaining has the potential to water down the moral message to prevent. Due punishment may be evaded by many criminals, who may acquire impunity. Regardless of these issues, there are arguments that recognize the need of plea bargaining in achieving the best possible outcome in the criminal justice system.[33] By making it easier for the accused to do so, it will help the court and the prosecution reaches a decision. Both parties will be satisfied with the outcome, and the state will be able to save money. Mediation, as an alternative dispute resolution (ADR) process in civil lawsuits, occurs under the supervision of the court.[34] Village courts and municipal dispute resolution boards already handle the settlement of some criminal offences; parties may be encouraged to use these quasi-formal courts to resolve their disputes instead of resorting to compounding.[35] The "contractarian" view argues that plea bargaining is a good system because it reduces the burden on the court system, keeps all parties involved in the dispute involved, and prevents them from having to wait for a lengthy trial.[36]

Apart from some accused can be viewed as more likely to win by not pleading guilty and forcing that through a full trial, especially if the conviction rate is low. To that extent, plea bargaining may appear to be irrational since it forces the accused to forego any chance of acquittal. But this argument is incomplete since the rationale for plea bargaining extends beyond simply conviction rate. This depends on the accused's entire risk calculus of delay, detention, expense, uncertainty, stigma; and possibility of a higher sentence at trial.

In Bangladesh, the process of a criminal trial itself can punish. The majorities of prisoners are pre-trial detainees or remand prisoners; Pre-trial detainees/remand prisoners accounted for 73.1% of the total prison population in Bangladesh on 29 November, 2025 (World Prison Brief). Therefore, where the trial process is long, costly and unpredictable, agreeing to live with a negotiated reduced penalty may simply be rational calculus, even if you face an only slightly below probability of conviction.[37]

Additionally, low conviction rates may not shelter the accused evenly. Wealthier accused may rise up to be able to contest the case, get bail and continue litigation. The poor accused persons who generally belong to

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[31] Michael M O'Hear, 'Plea Bargaining and Victims: From Consultation to Guidelines' (2007) 91 Marquette L Rev 323, 323–24; Jenia Iontcheva Turner, 'Plea Bargaining and International Criminal Justice' (2017) 48 U Pac L Rev 219, 235.

[32] Mohammad Aktarul Alam Chowdhury, 'An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System of Bangladesh: Promotion of Access to Justice' (2018) 6(11) International Journal of Advanced Research 712, 718.

[33] Nadia Shabnam (n 9) 136, 139.

[34] Md Manjur Hossain Patoari and others, 'Legal and Administrative Challenges of Alternative Dispute Resolution (ADR) as a Peaceful Means of Resolving the Land Dispute in the Rural Areas of Bangladesh' (2020) 11 Beijing Law Review 415, 415–16.

[35] Village Courts Act 2006 (Bangladesh); Local Government (Union Parishad) Act 2009, s 58.

[36] Md Alamin, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview' (2015) 3(11) *Journal of Research in Humanities and Social Science* 68.

[37] Oren Bar-Gill and Omri Ben-Shahar, 'The Prisoners' (Plea Bargain) Dilemma*'* (2009) 1 Journal of Legal Analysis *737;* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press 1944).

social, economic weaker sections of people suffer from continued detention, no legal representation and their families are put under some sort of economic pressure. Even an inherently weak case might have practical ramifications for them. That said, in this regard plea bargaining may be rational as a strategy for staying out of jail but perhaps not quite rational as an honest calculation of guilt. But it also comes with what the danger of plea bargaining. If the system comes in without protections, some innocent accused persons may plead guilty just in order to get out of detention, or at the very least delay. So plea bargaining must not be defended as a means of overcoming a backlog. It should tie in with judicial control, legal assistance, freedom of choice, evidence-gathering disclosure at the time of trial (intentionally and deliberately) offence engagement and suspension for serious offences as well. The plea is voluntarily and intelligently entered and is not the result of coercion or fear of punishment by the court.[38]

The low conviction rate in the criminal justice system thus would not preclude plea bargaining from being a rational choice for an accused, because rational choice is constrained by real-world pressure and context, rather than simply the chances of securing a proposal on charges following conviction. Yet its rationality can be misapprehended: it may seem individually rational for the accused, while remaining institutionally perilous unless life-or-death procedural safeguards prevail. Lastly, in order to ensure fair justice, certain requirements of plea bargaining must be upheld.

2. Analyzing Plea Bargaining Through the Lens of Economic Rationality

Plea bargaining is a process in which the accused agrees to plead guilty in exchange for a shorter sentence or fewer charges.[39] From an economic point of view, this section looks at plea bargaining in Bangladesh and how it affects the distribution of resources, the courts' efficiency, and the social costs of the criminal justice system. Plea bargaining can be seen as a way to keep costs down, use resources wisely, and get results that are good for everyone in the criminal justice system. This is based on economic theories like rational behavior theory, game theory, and Pareto optimality**.**

Reinganum (1988)[40]

Reinganum (1988) adds the idea of uneven information to the study of plea bargaining in economics. This is a basic idea in microeconomics.[41] In plea bargaining, the accused and the prosecutor each have private information that the other person can't see. The accused knows for sure if they are guilty or innocent, but the prosecutor knows secret information about how strong the evidence is and how likely it is that they will win the case in court. Neither side wants to honestly share their private information because of strategic reasons. Instead, each side only shares information that will give them the best chance of getting what they want in the negotiation process.

Reinganum's model shows that when one side has more information than the other, it can change the balance of power in a negotiation, which can lead to surprising results. She finds that the stronger the prosecutor's case, the more likely it is that the case will go to trial. This is because rational accused’s especially those who are innocent or unsure of how strong the prosecution's case is, are more likely to turn down bad plea deals. They think that the plea offer doesn't accurately show the risk-adjusted outcome they could get at trial. So, stronger prosecutorial positions may actually make plea agreements less common, which is the opposite of

[38] B*oykin v Alabama* 395 US 238, 242–44 (1969); *Brady v United States* 397 US 742, 748–51 (1970); UN Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* UN Doc E/RES/2002/12 (24 July 2002) annex, paras 7, 13

[39] Nadia Shabnam (n 9).

[40] Jennifer F Reinganum, 'Plea Bargaining and Prosecutorial Discretion' (1988) 78(4) Am Econ Rev 713.

[41] Joseph E Stiglitz, 'The Contributions of the Economics of Information to Twentieth Century Economics' (2000) 115(4) QJE 1441, 1441–42.

what they are meant to do. This shows how complicated the strategic dynamics are in criminal cases with information asymmetry.

Richard Posner (2003)[42]

Posner (1973) gives a basic economic defense of plea bargaining by arguing against common criticisms from both legal and moral points of view. He starts by talking about two main criticisms: first, that plea bargaining violates an accused's right to a trial under the Constitution; and second, that it lets prosecutors give out sentences that are too lenient too often. Posner says that neither of the two objections takes into account the economic reasons for voluntary settlement. He says that a plea agreement is always a win-win situation, so if either the accused or the prosecutor thinks that going to trial is a better option, they can just go ahead and do it.[43] In this view, plea bargaining isn't coercive; it's the best way for both sides to get what they want when there is uncertainty and a lack of resources. Posner also talks about the long-term effects of getting rid of plea bargaining. He says that getting rid of this mechanism would make cases take much longer to process, which would make pre-trial detention times even longer for people who are accused.[44]

Besides there are some other concepts in Economics that can be used to justify Plea Bargaining a few of which are Rational Behavior, scarcity of resources, utility maximization, prisoners' dilemma, Pareto optimality etc.

2.1 Rational Behavior

The very foundation of economics is based upon the assumption that every individual is guided by and exhibits a rational behavior.[45] It means the purpose of every individual in a society is to maximize his benefits and minimize the costs in every transaction that he/she undertakes. In case of criminal cases both the accused as well as the prosecutor seeks to maximize benefit from their respective stand point.

From a rational choice perspective, plea bargaining may be understood as a strategic decision-making process in which both the accused and the prosecutor seek to maximise their respective interests within a context of legal uncertainty, institutional constraint, and limited judicial resources. The accused has to weigh the expected sentence from trial, which is based on the likelihood of conviction and the length of the sentence, against the certainty of a lower penalty through a negotiated plea. This calculation also takes into account a number of non-monetary costs, such as time spent in jail before the trial, legal fees, mental stress, and the possibility of damage to one's reputation. For example, if an accused has a 70% chance of getting a 10-year sentence at trial, their expected sentence is 7 years. If they are offered a 4-year plea deal, a rational person would take the deal to minimize their expected loss.[46] From the prosecutor's point of view, the incentives are also in line with maximizing efficiency.

A significant number of accused's in Bangladesh are impoverished, undereducated, and deprived of access to competent legal representation.[47] This distorts the cost–benefit analysis: the accused may "rationally" plead guilty while being innocent, viewing it as the least detrimental option under institutional coercion. It provides a valuable lens to understand how plea bargaining operates under conditions of limited resources, systemic

[42] Richard A Posner, 'The Economic Approach to Law' (1975) 53 Tex L Rev 757.

[43] ibid

[44] Richard A Posner, *Economic Analysis of Law* (6th edn, Aspen 2003) 578.

[45] Gary S Becker, *The Economic Approach to Human Behavior* (University of Chicago Press 1976) 5; Richard A Posner, *Economic Analysis of Law* (4th edn, Little, Brown and Company 1992) 3–4

[46] ibid

[47] Rabiul Islam, 'Access to Justice through Legal Aid: A Study in Bangladesh' (2017) 1(1) American International Journal of Social Science Research 22, 31.

delay, and socio-economic pressure. It reveals that actors behave rationally within their constraints but those constraints themselves often reflect deeper issues of access to justice, inequality, and procedural fairness.[48]

2.2 Game Theory

Game theory studies how rational individuals (players) make decisions when outcomes depend on the actions of others.[49] It applies to plea bargaining. From a game theory perspective, plea bargaining may be viewed as a non-zero-sum strategic interaction, where both the accused and the prosecutor can potentially secure a more favourable outcome than they might obtain through a full trial. In this sense, the accused may benefit from reduced charges or a lighter sentence, while the prosecution may secure a conviction without the uncertainty, delay, and cost of trial. This situation is similar to a prisoner's dilemma, where both sides work together to get a better result by avoiding the high costs, delays, and uncertainties of trial. In this case, the accused accepts a plea and the prosecutor offers a fair deal. On the other hand, if one side stops cooperating, like when the accused turns down the plea or the prosecutor insists on going to trial, the outcome is usually worse for both sides, with higher costs and a greater chance of losing. Under these conditions, strategic rationality makes it easier for a stable bargaining equilibrium to form, which has lower costs, faster resolution, and more predictability for both parties. Here, accused wants to minimize punishment and uncertainty, prosecutor wants to secure a conviction efficiently (maximizing justice or career stats) as well as judge (if involved) may want to manage docket load and ensure justice is served reasonably.[50]

2.3 Prisoner's Dilemma

Plea bargaining closely mirrors the strategic structure of the prisoner's dilemma, a canonical model in game theory that illustrates how rational individuals might fail to cooperate even when cooperation would lead to a collectively better outcome. In the context of criminal adjudication, accused's face a similar dilemma: while mutual cooperation such as jointly refusing to plead guilty and demanding a trial might result in minimal sentences or even acquittal due to insufficient evidence, the dominant strategy for each accused, acting independently and without trust, is often to accept a plea in exchange for a reduced sentence.[51] This self-interested behavior leads to suboptimal outcomes, particularly when both parties confess (or accept pleas), resulting in moderate sentences for both, rather than risking harsher penalties through trial or benefiting from potential acquittal. This dynamic reveals that the prisoner's dilemma is, in essence, a plea bargaining dilemma. If both accused s "defect" by pleading guilty independently, the resulting sentences may be longer than if they had cooperated or challenged the prosecution collectively. From a systemic perspective, longer sentences are also associated with increased prosecutorial and correctional costs, creating an economic inefficiency. The longer the sentence imposed, the higher the direct and indirect expenditures borne by the state including court time, pre-trial detention, incarceration costs, and post-conviction supervision.[52] In Bangladesh prisoners dilemma will operate strongly because of case backlog and trial delays. Here, Accuseds often spend years in pre-trial detention. Pleading guilty appears the "rational" choice to regain liberty sooner.[53] Besides, prosecutors and judges prefer quick resolution to resolve performance pressure. In

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48 Deborah M Weiss, 'Plea Bargaining, Acquittal, and Conviction under Imperfect Information' (1986) 4 J L Econ & Org 406, 409; Robert E Scott and William J Stuntz, 'Plea Bargaining as Contract' (1992) 101 Yale LJ 1909, 1935.
49 ibid
50 ibid
51 Bar-Gill and Ben-Shahar (n 37) 751–60; Robert J Norris and Allison D Redlich, 'Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner\'s Dilemma' (2014) 77 Albany L Rev 1005, 1018–19; Brady v United States 397 US 742, 751 (1970).
52 William J Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 Harvard Law Review 2548
53 Law Commission of Bangladesh, *Report on Reform of Criminal Justice System* (Dhaka, 2022).

Bangladesh, where delays and inequality dominate, the dilemma is particularly acute. True reform lies in balancing efficiency with fairness, ensuring that the rational choice to plead does not become a forced one.

2.4 Pareto Optimality and Pareto Efficiency

An allocation of resources is Pareto superior to an alternative allocation if and only if no individual is worse off and at least one individual is better off. Ronald Coase used this notion to elucidate that, in the absence of transaction costs, a Pareto optimum state may be attained that does not disadvantage anybody while benefiting both parties involved.[54] Also, plea bargaining can be seen as a way of Pareto improvements within the judicial process. The concept of Pareto efficiency posits that an allocation is efficient if no individual's situation can be improved without worsening another's.[55] In the context of Bangladesh's judiciary, where over 4.5 million cases remained pending as of December 2024,[56] resources such as judicial time and administrative capacity are severely constrained. Any procedural reform, such as introducing plea bargaining or alternative dispute resolution (ADR), can be viewed through a Pareto lens: a shift that reduces backlog and improves access to justice without compromising fairness constitutes a Pareto improvement.[57]

Similarly, Pareto optimality provides a normative benchmark for assessing whether procedural innovations yield mutually beneficial outcomes among litigants, prosecutors, and the judiciary. For example, adopting structured plea negotiations could reduce costs for accuseds and the state while preserving conviction integrity a move towards an optimal equilibrium.[58]

2.5 Transaction Cost of Coase's Theory

From a transaction-cost economics perspective, Bangladesh's procedural delays represent high "judicial transaction costs," encompassing time, legal fees, and opportunity losses.[59] Reforms that streamline pre-trial negotiations or digitize case management systems directly reduce these costs, increasing overall welfare. Empirical studies on Bangladesh's lower judiciary reveal that, on average, criminal trials take more than five years to conclude, with administrative inefficiencies accounting for over 30% of total delay time.[60] Reducing such friction enhances allocative efficiency and strengthens the rule of law.

When looked at via economic theories like rational choice, game theory, Pareto efficiency, and opportunity cost, plea bargaining is a smart way to make the criminal justice system in Bangladesh work better. It makes sure that the state, the court, and the accused all have the same goals: to keep costs low and utility high. But plea bargaining has to be controlled, targeted, and open to the public in order to avoid results that are good for the economy but bad for society. It can only find the right balance between saving money and being fair in its procedures.

3. Institutionalizing Plea Bargaining: A Model for Effective Criminal Dispute Resolution

The overwhelming number of cases that have not been addressed poses a danger to Bangladesh's criminal justice system. Because of this, the administration of criminal justice needs a method for successful and meaningful alternative dispute settlement, and plea bargaining is a practical way to achieve this goal. For instance, India introduced plea bargaining through Chapter XXIA of its *Code of Criminal Procedure 1973*

[54] R H Coase, 'The Problem of Social Cost' (1960) 3 J L & Econ 1
[55] Vilfredo Pareto, *Manual of Political Economy* (A M Kelley 1971).
[56] Supreme Court of Bangladesh, *Annual Judicial Statistics Report 2025* (Law and Justice Division 2025).
[57] Richard A Posner, *Economic Analysis of Law* (10th edn, Wolters Kluwer 2022).
[58] Steven Shavell, 'The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System' (1997) 26 Journal of Legal Studies 575.
[59] Coase, (n, 54)
[60] Law Commission of Bangladesh, *Delay in Disposal of Cases and Reform of Judicial Process* (Law Commission Secretariat 2021) https://lawcommissionbangladesh.org accessed 1 November 2025.

(as amended by the Criminal Law (Amendment) Act 2005), allowing certain categories of offenders to negotiate reduced sentences upon admission of guilt.[61] Similarly, the United Kingdom employs early guilty-plea discounts under the *Sentencing Council's Reduction in Sentence for a Guilty Plea* guideline,[62] while the United States relies extensively on prosecutorial plea negotiations under Rule 11 of the *Federal Rules of Criminal Procedure*.[63] Incorporating a comparable mechanism into Bangladesh's CrPC could alleviate judicial backlog, enhance efficiency, and ensure proportionate sentencing, provided that adequate safeguards such as judicial oversight and voluntariness checks are embedded to protect the rights of the accused.[64] Reforming Section 345 to include a structured admission-of-guilt provision would thus modernize the criminal process while maintaining fidelity to constitutional and procedural fairness. Plea bargaining will be an effective and meaningful ADR process in administration of criminal justice.

The integration of plea bargaining within the criminal justice system offers a promising avenue to address the endemic issues of case backlog, prolonged trials, and prison overcrowding. As an alternative dispute resolution (ADR) mechanism, plea bargaining must, however, be implemented within a carefully delineated legal and ethical framework to ensure its legitimacy, fairness, and effectiveness. This sub-section proposes a normative model of plea bargaining, designed to align procedural efficiency with the foundational principles of justice.

3.1 Tiered Scope of Applicability

The proposed model adopts a tiered approach to the applicability of plea bargaining, ensuring that the mechanism functions as both an instrument of efficiency and a tool of restorative justice. This framework allows flexibility while preserving the moral gravity of criminal law. To safeguard against misuse and ensure proportionate justice, the applicability of plea bargaining must be applied to different tires like petty and mid-level offences, moderate offences and serious offences where negotiation may serve rehabilitative and restorative goals without compromising public safety or moral culpability.[65] A tiered system allowing judicial discretion to admit slightly more serious cases under strict safeguards could improve efficiency while preserving justice.[66]

3.2 Rationalized Exclusion of Certain Offences

The application of plea bargaining must be categorically excluded for offences involving grave moral and societal consequences, particularly violence against women and children, including but not limited to rape, sexual harassment, and domestic abuse and crimes against state. Crimes arising from socio-economic vulnerabilities, such as human trafficking, bonded labour, acid attacks, and caste or ethnicity-based crimes should be excluded but should allow limited scope for socio-economic offences (like minor labour law breaches) if restitution and victim rehabilitation are central to the bargain. Furthermore habitual offenders, defined as individuals with prior convictions for similar offences or patterns of repeat offending should be excluded.

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[61] Code of Criminal Procedure 1973 (India), ch XXIA (ss 265A–265L).

[62] Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (Sentencing Council 2017).

[63] Federal Rules of Criminal Procedure, r 11 (US).

[64] Md Rahmat Ullah, 'Criminal Justice Reform in Bangladesh: Challenges and Prospects' (2022) Dhaka University Law Journal.

[65] Marie Manikis, 'The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions' (2022) 59 (3) Osgoode Hall LJ 587; Carrie Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Ann Rev L & Soc Sci 161; Adriaan Lanni, 'Taking Restorative Justice Seriously' (2021) 69 Buff L Rev 635.

[66] Law Commission of India, *Report No 239: Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities* (March 2012).

3.3 Voluntariness and Legal Representation

A core pillar of this model is the voluntary nature of participation.[67] Both the accused and the prosecution must enter into the plea agreement freely, knowingly, and without coercion. Legal representation must be mandatory for the accused, ensuring informed consent and safeguarding the rights enshrined under constitutional and international human rights frameworks. Courts must examine each plea to affirm the presence of genuine voluntariness and absence of duress or inducement. The process should be negotiation-centric, rather than judge-centric. Establishing state-funded public defender units with specialized training in plea negotiations would ensure informed consent and balance bargaining power.[68]

The accuseds need to be well-informed of the consequences of entering a plea deal. Therefore, it is the court's responsibility to warn the accused that he would be deprived of some fundamental rights, such as the right to a fair trial and due process of law, if he proceeds with this procedure. It is possible to add a specific clause to the Criminal Procedure Code (CrPC) that addresses this matter.[69] Because it might increase corruption among police officers, the police should stay out of plea bargaining. If the accused does not have legal representation, the court and prosecutors might take this step to expedite the judicial process. Judgment must be delivered publicly to prevent misunderstanding after the prosecution and the accused have negotiated.

3.4 Victim Participation and Public Interest Consideration

The model requires victims to be involved, especially when the victims can be identified. Victims should be able to give impact statements and agree to any negotiated resolution. The prosecutor and the judge in charge must also make sure that the plea agreement is in the best interest of the public as a whole. This is to make sure that expediency does not take precedence over societal values or deterrence goals.[70] Restorative elements should be introduced.

3.5 Judicial Oversight and Guideline-based Sentence Reductions

Robust judicial oversight is imperative to ensure transparency and fairness in the plea bargaining process. Judges must confirm the voluntariness and factual basis of the plea; verify that all procedural safeguards have been observed; as well as ensure that the outcome does not undermine the ends of justice. Additionally, all plea agreements should be documented in writing, reviewed in open court, and preserved in the judicial record for accountability. Introducing guideline-based sentence reductions, similar to the UK Sentencing Council model, would enhance consistency, transparency, and proportionality.[71]

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[67] UN Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* UN Doc E/RES/2002/12 (24 July 2002) annex, paras 7, 13; *Boykin v Alabama* 395 US 238, 242–44 (1969); *Brady v United States* 397 US 742, 748 (1970

[68] R Ramachandran, 'Fairness, Efficiency and the Indian Criminal Justice System' (2018) 60(2) Indian Journal of Criminology 201.

[69] Boykin v Alabama 395 US 238 (1969); Mirjan R Damaška, 'Models of Criminal Procedure' (1973) 51(3) U Cincinnati L Rev 611, 623., 623.

[70] Edna Erez, 'Victim Participation in Legal Proceedings and the Restorative Justice Model: The Case for Victim Impact Statements' (1999) 8(3) Violence and Victims 325

[71] Sentencing Council (UK), *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017).

3.6 Transparency and Review

The proposed model insists to establish a statutory Plea Bargaining Review Board to monitor patterns, prevent abuse, and publish annual data for accountability.[72] By mandating continuous data-driven review, it converts plea bargaining from a mere procedural shortcut into a responsible, evidence-based reform mechanism aligned with the ideals of fairness, rehabilitation, and rule of law.[73]

This model of plea bargaining grounded in voluntariness, fairness, and judicial scrutiny, seeks to institutionalize an effective and meaningful ADR mechanism within administration of criminal justice. Plea bargaining can function as a transformative tool promoting swift resolution without compromising justice. The principles of victim dignity, public interest, and legal integrity must remain paramount in its design and practice. A tiered, discretion-based model with strong victim and judicial safeguards would better harmonize efficiency with justice, aligning with both restorative and retributive goals of criminal law.

Conclusion

This study looked at plea bargaining from an economic theoretical point of view to see how well it works in Bangladesh's criminal justice system. Using ideas from rational choice theory, game theory, transaction cost economics, and Pareto efficiency, it becomes clear that plea bargaining is a way to cut costs, speed up the resolution of cases, and make the best use of limited judicial resources. The process shows how to make smart decisions when you don't know what's going to happen and you don't have a lot of resources. It leads to solutions that are good for both the prosecution and the defense and lower the costs of going to trial for the state.

Plea bargaining is a practical way to deal with the ongoing problems in Bangladesh, such as long court waits, overcrowded jails, and limited resources. It also has a lot of institutional benefits. Even though the process has clear economic benefits, it must be done with safeguards to prevent coercion, protect accused’s rights, and ensure transparency. Without these kinds of protections, the system puts procedural fairness and public trust at risk, especially in situations where there are big differences in knowledge and power. The effectiveness of plea bargaining in Bangladesh depends on how well it balances the need to save money with the need to uphold basic principles of justice. A carefully planned, open, and context-aware approach to plea bargaining could make the national criminal justice system more efficient and transparent.

[72] Sanjay K. Verma, 'Revisiting Plea Bargaining in India: The Search for Balance between Efficiency and Fairness' (2021) 63(4) J Indian L Inst 321, 336.

[73] Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 364.

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Confession in the Criminal Justice System of Bangladesh: Navigating Admissibility and Legal Reforms

Rokeya Afroz *

Abstract: *A lawfully recorded, true and voluntary confessional statement can be used to convict an accused. This study focuses on the varying interpretations and lacunas of laws on the documentation of confessional statements leading to ambiguities while addressing their admissibility. Contradictions in existing laws and practices, partial implementation of rules and repudiation of the Constitutional safety measures through permitting prolonged detention or remand by Magistrates are accelerating the continuous police torture for obtaining confessions. Validation of unauthorized detention owing to post-confessional discovery facilitates the violation of accused's rights and affects the fair trial. The article examines the ambiguities in the rules for retraction of confessions. Legal principles or grounds of punishing a non-confessing accused based on the statement made by a co-accused has been analyzed in this writing. The object of this paper is to investigate the laws and principles on the admissibility of confessional statements and discover pathways to obliterate torture applied on the accused in police custody.*

Keywords: *Confession, True and Voluntary, Police Torture, Remand, and Constitutional Rights.*

1. Introduction

In the criminal legal framework of Bangladesh, confessional statements serve as an important form of proof against the accused, relying on which numerous death penalties have even been awarded.[1] Confession refers to a voluntary admission of particular facts which establishes a wrongdoing, made by an individual accused charged with the crime.[2] A statement containing self-exculpatory matter does not amount to a confession if such exclusion demonstrates any fact which if proved would oppose the existence of an offence allegedly confessed. A confession must either admit directly the offence or acknowledge the substantial facts and key requirements which constitute the crime.[3] Only the "plenary admission of guilt" stated obviously and without equivocation amounts to a confession.[4] When a confession combines the admission of guilt with renunciations, the Court will generally accept the admission and require them to be supported by additional independent evidence.[5] The alternative legal interpretation clutches that such a mixed confession must be appraised entirely, leading to its comprehensive acceptance or dismissal.[6]

Acting as the strongest evidentiary armament of the prosecutor, a confession may make other angles of the trial redundant.[7] The matter of concern is that there are frequent incidents of torture by law enforcing agencies

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1 *Hazrat Ali & Abdur Rahman v. State*, 42 DLR (HCD) (1990)177; *State v. Nazma Sarker Beauty* (2011) 40 CLC (HCD) 7240; Shishir Manir, 'Proposal to Improve the Current State of Recording Confessional Statement', *Daily Star* (Dhaka, 06 November 2021) <https://www.thedailystar.net/law-our-rights/law-reform/news/proposal-improve-the-current-state-recording-confessional-statement-222328> accessed 20.09. 2025.

2 *State v. Tariqul Islam Rinku* (2011) 40 CLC (HCD) 8766.

3 *Pakala Narayana Swami v. The King Emperor,* AIR 1939 PC 47, referred in *State v. Jahedul Islam Moulavi,* 29 BLD (AD) (2009) 47; *State v. Lalu Miah,* 39 DLR (AD) (1987) 117; *Jabed Ali v. State,* 51 DLR (HCD) (1999) 397.

4 *State v MM RaftquI Hyder*, 45 DLR (AD) 13.

5 *State v. Hemayet Khan,* 3 BLC 56.

6 *Lalu Miah case* (n 3); *Kabir v. State,* 45 DLR (HCD) (1993) 755; *Hasan Rony v. State,* 56 DLR (2004) 580; Mohammad Ridwan Goni et. al., 'Extraction of Confessional Statements in the Criminal Justice of Bangladesh: Law and Reality' (2013) Vol. 3 No. 1, African Journal of Law and Criminology 20, 25.

7 Saul M. Kassin, 'The Psychology of Confession Evidence' (1997) Vol. 52, No. 3, American Psychologist 221, 221.

while obtaining confessional statements.[8] False confessions made out of ruthless torture towards the accused persons by the police in Bangladesh is not uncommon.[9] An innocent person may also erroneously approve that he is culpable for a crime by reason of his lunacy or mistake of facts.[10] Courts are conscious about the ingrained torture in the nation's criminal justice system and often warns the police. [11] Yet, due to lack of enough judicial activism, the viciousness towards the arrestee or detainee has not been completely eliminated. The Court of Magistrates sometimes downplays the accusation of torture on the accused.[12] Notwithstanding, there is a positive example like the case of *Bangladesh Legal Aid and Services Trust v. Bangladesh*[13] where the High Court Division exhibited its utmost concern on the enduring cruelty committed by the police force.[14]

The basic research questions in this article are when and how a confessional statement may be admissible as evidence against the maker of it and how torture in police custody may be removed while eliciting such a confession? The present study focuses on legal uncertainties in the admissibility of confessions. How torture for procuring confessions in police custody or remand leads to infringements of Constitutional and legal safeguards has been analyzed with caution. The article analyzes the hazy rules for retracting confessions resulting in doubts. Rules of using a confession as evidence against the non-confessing accused has been also evaluated in this paper. Certain suggestions have been offered lastly so that the illegality and unconstitutionality in case of confessions may be removed from our legal system and ensure justice to the people. While investigating concerned laws and principles present study follows qualitative research methodology.

2. Legal Frameworks for Documentation and Admissibility of Confessions

In order to determine and prove a confession, one requires a thorough and holistic evaluation of the statement.[15] An accused may be convicted on the basis of a well-defined, true and voluntary confession made by him without corroboration of all facts narrated within it.[16] Truth and voluntariness are two yardsticks for ascertaining admissibility of confessional statements. The Court should enquire into the surrounding situation of making the confession and compare it with other evidence or materials on record while addressing the truth and voluntariness.[17] A confession is considered voluntary when the accused person, for disclosing the truth, gives his statement willingly and without any fear or expectation of reward. [18] Involuntary confession will be rejected without further assessment of its truthfulness.[19] When a confession is blended with both the fact and falsehood, the judiciary must isolate the truth from the fallacy.[20] The question of the admissibility of a

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[8] Ibid.

[9] 'Return of 'Murdered' Girl: 3 Accused Want to Withdraw 'False' Confessions', *Dhaka Tribune* (Dhaka, 31 Aug 2020) <https://www.dhakatribune.com/bangladesh/nation/221447/return-of-murdered-girl-3-accused-want-to > accessed 22.09.2025.

[10] Hock Lai Ho, 'Confessions in the Criminal Process' (2021) Vol. 84, Issue 1, Modern Law Review 30, 33, DOI: 10.1111/1468-2230.12571 < https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12571> accessed 22.09.2025.

[11] Ridwanul Hoque, 'Criminal Law and the Constitution: The Relationship Revisited' (2007) Issue: Special, Bangladesh Journal of Law 45, 59.

[12] Ibid.

[13] 55 DLR (2003) 363.

[14] Hoque (n 11).

[15] *Abdul Hannan v. State*, 61 DLR (HCD) (2009) 713; *Khalilur Rahman v. State*, 62 DLR (HCD) (2010) 309.

[16] *Hazrat Ali case* (n 1); *Nazma Sarker case* (n 1); *Abdul Hannan case* ibid; *Khalilur Rahman case* ibid; *State v. Harish*, 54 DLR (2002) 473.

[17] *State v Ali Kibria*, 43 DLR 512; *Hazrat Ali case* ibid; *Nazma Sarker case* ibid; *Abdul Hannan case* ibid; *Khalilur Rahman case* ibid; *Harish case* ibid.

[18] *State v. Anjuara Khatun*, 57 DLR (2005) 277; *Kazi Mahbubuddin Ahmed v. State*, 57 DLR (2005) 513; *The Evidence Act, 1872*, s. 24.

[19] *Lalu Miah case* (n 3).

[20] Ibid.

confession may be settled through the examination of legal procedures followed and circumstances under which it was made.

2.1 Manner of Recording Confession by the Magistrate

Section 24 of the *Evidence Act, 1872* excludes confessions made as a result of coercion from any person in authority. Section 164 of the *Code of Criminal Procedure, 1898* (hereinafter CrPC) lays down the provision as to recording of confessions. Section 164 (3) is an obligatory provision nonobservance of which shall render a confession illegal and untrustworthy. The Magistrate should follow sections 164 (3) and 364 of the CrPC stringently for ensuring the voluntariness and veracity of a confession.[21] The Magistrate shall warn the accused that he is not bound to make any confession and if he does so, it may be applied as evidence against him.[22] As an involuntary confession made without any warning or following a deception is admissible under section 29 of the Evidence Act, it is inconsistent with section 164, CrPC, legal norms and other judicial principles. Shahabuddin Ahmed J. rejected the confession because of failure to fulfil the provisions of law while recording, complain of torture in police custody and subsequent retraction of it. [23] Physical injury hindering mobility of the accused coupled with unexplained police detention before appearing in the court indicates an involuntary and false confession.[24] The Magistrate shall notify the accused that he is not a police officer and, with real and substantial endeavor, examine the circumstances of detention by questioning in an atmosphere free from fear of police.[25] Where the Magistrate was successful in removing fear of police torture while making a confession, his previous treatment in the police custody did not affect its voluntariness.[26]

2.2 Is Specific Question-Answer Mandatory?

Besides CrPC, the *Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009* contains provisions for recording the statement of an accused. A Magistrate must not start the proceeding of recoding a confession until he is satisfied by questioning the accused and noticing his demeanor that the accused is willing to give statement voluntarily.[27] Cognizance by the Magistrate should be taken of grievance of abuse by the police and sign of indecorous duress should be investigated simultaneously.[28] The questioning of an accused with a view to determining the voluntariness of a confession should not be taken by the Magistrate as "a mere formality". He should act utilizing his judicial mind and true endeavor to reach a conclusion based on sufficient particulars.[29] It is not necessary to put questions to the accused in the same way as followed during the cross examination.[30] The Magistrate should record the accused's articulation thoroughly and using his original phraseology to the extent as practicable and refrain from asking any leading questions.[31] The nature of the question will be as such so that the accused may narrate everything he desires and the Magistrate may also be capable to understand the meaning of the statement.[32] The Magistrate should put questions related to the duration of the accused's detention in police custody; whether he faced any pressure, threat or inducement

[21] *Abul Hossain v. State*, 46 DLR (HCD) (1994) 77; *Khorshed v. State*, 18 BLC (HCD) (2013) 241; *State v. Babul Miah*, 16 MLR (AD) (2011) 35.
[22] The Code of Criminal Procedure, 1898, s. 164(3); *Mst. Saida Begum v. State*, PLD 1958 (Lahore) 559, cited in *State v. Rafiqul Sheikh*, 72 DLR (2020) 334.
[23] *Lalu Miah case* (n 3).
[24] *Akhtar Hossain Babul v. State*, 44 DLR (HCD) (1992) 83; *Habibur Rahman v. State,* BCR 1986(HCD) 278.
[25] *Akhtar Hossain case* ibid; *Habibur Rahman case* ibid; *State v. Abul Hashem*, 50 DLR (HCD) (1998) 17.
[26] *State v. Tota Mia*, 51 DLR (HCD) (1999) 244.
[27] The Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009 (hereinafter CrRO), Rule 79 (7) (a).
[28] Ibid Rule 79 (7) (b).
[29] Ibid Rule 79 (7) (c).
[30] Ibid Rule 79 (8).
[31] Ibid.
[32] Ibid.

for making a confession; or offered to be an approver; and what are the reasons behind making of his confession.[33]

Generally, a printed form consisting of certain questions is utilized for the administration of recording confessional statements on which the destiny of an accused may depend.[34] The form must be organized enough and questions should be arranged suitably with necessary information so that the concerned Court may without any difficulty discover the truth and voluntariness of a confession.[35] When a printed from is absent because of its unavailability or by error, mere 'statement' on a blank paper without an interrogatory format, may be admissible in evidence, subject to compliance with all formalities under section 164, CrPC and proved to be voluntary and true.[36] Notwithstanding, absence of a well-organized printed form consisting of particular questions for determining the free will to make a true confession by an accused may render the process perilous, though not inadmissible.

2.3 Prolonged Police Custody before Making a Confession

An integrated review of Article 33(2) of the Constitution and sections 61 and 167, CrPC provides that a person cannot be under police detention beyond the period of 24 hours without Magistrate's grant or remand.[37] Police detention exceeding 24 hours without any order of remand is unlawful, prolonged[38] as well as unconstitutional. *The Code of Criminal Procedure (Second Amendment) Ordinance, 2025* has added Section 46A which lays down that the relatives of an arrested person must be notified about the time and place of arrest and detention within 12 hours.[39] He will have opportunity to consult with a lawyer within the period of 12 hours.[40] The right to health and safety of the person detained has also been safeguarded under the law.[41]

Unexplained prolonged police custody may be enough to show a confession as involuntary and untrue when it is retracted later or associated with allegation of physical torture.[42] Under certain circumstances, instead of prolonged detention of the accused, confession can be considered voluntary, e.g., lawful recording of the confession; absence of abuse by the police; providing rational time for reflection of mind; availability of other evidence proving the confessional statement as true; discovery of things; and willingly made confession together with the circumstantial evidence demonstrating the guilt of the accused person.[43] Approving detention of the accused beyond the period of 24 hours before its recording subject to some conditions manifests the partial observance of laws and denial of the particular Constitutional rule by the judiciary.

2.4 Time for Reflection and Validity of a Confessional Statement

It is the duty of the Magistrate to give enough time for reflection to dispel fear from the accused's mind before recording a confession.[44] Rule 79(4), CrRO states that Magistrates shall not record the confession of a suspect instantly as the police takes him to the Court premises and shall provide "sufficient time for reflection". During this period, the accused shall not have any interaction with any police otherwise the confession will become

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[33] *Saida Begum case* (n 22); *Habibur Rahman case* (n 24); *Abul Hossain case* (n 21).
[34] *Saida Begum case* ibid; *Khorshed case* (n 21).
[35] *Rafiqul Sheikh case* (n 22); *Habibur Rahman case* ibid; *Babul Miah case* (n 21).
[36] *Abdul Hakim v. The State*, 43 DLR (1991) 291; *Syed Ahmed v. Abdul Khaleque,* 51 DLR (HCD) (1999) 43; *State v. Kalu Bepari,* 43 DLR (1991) 249; *Abul Kalam Mollah v. State*, 4 BLC 470.
[37] The Constitution of the People's Republic of Bangladesh, 1872*; Shaharul Islam Green v. State,* 1 BLC 524.
[38] *Belal v. State,* 54 DLR (2002) 80; *State v Sarowaruddin,* 7 BLC 503.
[39] CrPC, s. 46A.
[40] Ibid.
[41] Ibid, s. 46D.
[42] *Abu Taleb v. State,* 41 DLR (HCD) (1989) 239; *Akhtar Hossain case* (n 24)*; Hasmat Ali v. State*, 53 DLR (2001) 169; *Farid Karim v. State*, 45 DLR (HCD) (1993) 171; *Safar Ali v. State,* 36 DLR 185; *Shaharul Islam case* (n 37).
[43] *Hazrat Ali case* (n 1)
[44] *Lalu Miah case* (n 3); *Akhtar Hossain case* (n 24).

untrustworthy. There is no specific provision for the 'duration' of reflection in this rule of CrRO. Nonetheless, Rule 23 (3) of the Form No. (M) 84 states that the Magistrate must give an accused person a minimum of 'three hours' for reflection before recording his confession, unless due to any exceptional circumstances, postponement in recording becomes impossible.[45] Providing three hours for reflection to an accused lacks juridical force.[46] Courts also opined that a confession becomes untrustworthy if the accused is held under the control of police during the reflection period.[47] After police remand, if any accused gets time for reflection less than the three hours and makes a confession without any assurance by a Magistrate that he would not be sent to police custody again, it will be inadmissible as evidence.[48] If at least three hours for reflection of mind is not ensured after confinement by police, it will increase the chance of psychological pressure on the accused leading to false and involuntary confession.

2.5 Examination of the Magistrate who Recorded Confession

Magistrates may be examined for curing irregularities or defects in recording confessions or when their genuineness is in question. Nonobservance of section 164 (3), CrPC leads to incurable defects which cannot be rectified by examination of the Magistrate subsequently.[49] The confession recorded on a plain paper without a memorandum under section 164 (3) and the lack of signature of the confessor are incurable mistakes.[50] The omissions of filling up paragraphs in the prescribed form showing want of free-will of making the confession cannot be cured.[51] Only the formal defect in recording the confession is curable under section 533, CrPC.[52] Conversely, the absence of memorandum or omission of endorsement required under section 164, CrPC not being treated as a fatal defect, the Court recognized it as curable under section 533. [53] In case of curing defects and irregularities in the record of confessions, there are varying interpretations leading to ambiguities.

When a Magistrate records a confession following provisions of CrPC, the trial Court shall admit it into evidence under section 80 of the Evidence Act, i.e., presume it as genuine.[54] In this case, it is not essential to produce or examine the recording Magistrate as a witness before the Court.[55] If there is any allegation as to the truth or voluntariness of a confession, examination of the Magistrate will be conducted.[56] The Magistrate will be cross-examined for scrutinizing the doubtful confession or accusation of police torture.[57] Confessional statements can be used to contradict or corroborate the Magistrate.[58] Examination of the Magistrate may play a crucial role rendering the legal procedure of documentation of confessions more reliable and upholding the principles of justice.

3. Sending Back the Confessor to Police Custody or Granting of Remand

Sending back the accused to police custody subsequent to making of the confession throws question on voluntariness of it.[59] When an accused does not make any confession before the Magistrate, application for

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[45] Bangladesh Form No. 3859, Form of Recording Confession or other Statements under s. 164 of the CrPC.
[46] *Haripada Devenath v. State,* 19 DLR 573.
[47] *State v. Mizanul Islam Dablu,* 1988 BLD 317*; Akhtar Hossain case* (n 24).
[48] *Harish case* (n 16); *Hafizuddin v. State*, 42 DLR (1990) (HCD).
[49] *Zaheda Bewa v. State,* 37 DLR (HCD) (1985) 66; *Abdul Hakim case* (n 36).
[50] Ibid.
[51] *Md. Azad Shaikh v. State*, 41 DLR (1989) 62.
[52] *Nurul Hoque v. the State* 20 DLR 780.
[53] *Khalilur Rahman v. State*, 59 DLR (2007) 227; *Syed Ahmed case* (n 36); *Abdul Hakim case* (n 36).
[54] *State v Arman Ali*, 7 LG (HCD) (2010) 47; *Abul Khayer v. State,* 46 DLR 212*; Emran Ali v. State,* 37 DLR (HCD) (1985) 1.
[55] *Abul Khayer case* ibid.
[56] *Babul alias Abdul Majid Khan v. State*, 42 DLR (AD) (1990) 186; *Sadequr Rahman v. State,* 61 DLR (HCD) (2009) 498.
[57] *Abdul Majid case* ibid; *Sadequr Rahman case* ibid; *State v. Tajul Islam,* 48 DLR (HCD) (1996) 305.
[58] *Ismail Sarker v. State* 33 DLR 320; *Abul Kashem v. State*, 42 DLR 378.
[59] *State v. Ali Hossain,* 1998 BLD 655.

'further remand' by the police shall not be approved.[60] Whenever it is realized by the Magistrate that the person charged with the crime has made or being on the verge of making a statement involuntarily, he shall immediately record an order for terminating the proceeding under section 164, CrPC.[61] If an accused expresses his disinclination to make a self-incriminatory statement, there is no substitute but sending him to judicial custody or release on bail.[62] The assurance for not returning back is practiced as a caution for eliminating the worry of torture and essential when the accused was detained in the police custody beyond the legislative period. Lack of this guarantee or shifting him to police custody after the recording may make a confession untrue, involuntary and inadmissible.[63] Audio – video recording of a confession should be incorporated, because the Evidence Act recognizes digital or electronic record as documentary evidence within the meaning of section 3. This electronic record will provide more clarity and act as a sustainable method for rendering the confessional statements admissible. In India, the Magistrate is authorized to record a confession of an accused person using electronic means in the attendance of his advocate.[64]

3.1 Confession during Remand: the Constitutional and Legal Safeguards

The Magistrate is authorized to allow the detention of an accused person in police custody for a period of total fifteen days in the whole. Considering necessity, the Magistrate may issue further detention in judicial custody.[65] BLAST claims decrease in the 15 days period of remand and suggest to embrace rules for questioning the accused in a transparent room subject to ensuring a lawyer's presence.[66] An arrested person shall have the right to meet an advocate prior to or after the interrogation and not during the continuation of questioning by the police.[67] The object of presence of an advocate during police remand is that he will explain the accused's Constitutional rights to remain silent or refrain from self-incrimination, commonly known as Miranda rights.[68] Article 33(1) of the Constitution also ensures the right of an arrested person to seek legal support form a lawyer and it may be construed as a right for the impoverished accused to access to legal aid from the government.[69]

Unlawful arrests and detention as well as torture in police custody are leading causes behind the infringement of human rights of the accused.[70] "Remand is seen as to persuade the accused to confess to Magistrate."[71] Once remand is granted, the police just dives into extracting confessions and other information through coercion which sometimes leads to death of the accused.[72] Torture and death of a person in police custody are the direct violation of right to life and liberty within the preview of the Articles 31, 32 and 35 of the Constitution. Illegal police custody violates Article 33 of the Constitution which provides safety measures for arrestee and detainee.[73] The limited object of questioning an accused negates the need of police remand.[74] The recording

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[60] CrRO, Rule 74(5).

[61] *Rafiqul Sheikh case* (n 22).

[62] Abdullah Al Faruque, Hussain Mohmmad Fazlul Bari, 'Arbitrary Arrest and Detention in Bangladesh' (2019) Vol. 19, No. 2, Australian Journal of Asian Law 315, 316.

[63] *Ali Hossain case* (n 59); *Ali Kibria case* (n17); Abdullah Al Faruque, *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh* (NHRC, Bangladesh 2013) 34.

[64] The Code of Criminal Procedure, 1973 (India), s.164.

[65] CrPC, s. 167 (2).

[66] < https://blast.org.bd/2025/08/14/7995/> accessed 29.09.2025.

[67] CrPC, s. 46B.

[68] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[69] Hoque (n 11) 53.

[70] Ibid 55.

[71] Shahdeen Malik, 'Arrest and Remand: Towards a Rights Paradigm' 255, 270, <https://www.biliabd.org/wp-content /uploads/ 2021/08/Dr.-Shahdeen-Malik.pdf > accessed 29.09. 2025.

[72] *BLAST case* (n 13).

[73] Hoque (n 11).

[74] *BLAST case* (n 13).

of confession shall be held in the Court of Magistrates or in any other Court room if required.[75] As Article 35(4) lays down that an accused person shall not be bound to be a witness against himself, information extracted on remand by torture lacks evidentiary value.[76] When a confession is acquired violating the above stated Constitutional safeguards, the confession becomes involuntary.[77] Forceful extraction of confessions by the police force during remand is infringing a range of rights affecting the Constitutional Supremacy.[78] Magistrates have also some sort of liability in increasing torture and death of accused in police remand leading to injustice as they grant order of remand very often using their "unguided discretion".[79] The senior judge can check out the order of remand cautiously and confirm the responsibility of the Court who ordered remand.[80] In American legal regime, electronic recording of the interrogation by the police has been recommended as a mandatory rule for stopping torture. Such recording may render a confession obtained in police custody impartial, inclusive, and justiciable and it can be reviewed by the concerned authority later if needed.[81]

Bangladesh ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984*. Following this convention, the *Torture and Custodial Death (Prevention) Act of 2013* has been passed that criminalizes torture by police for extracting confession and other information and custodial death of any person. This Act has been criticized for containing inadequate provisions of punishments to the offender and its minimal application in the reality.[82]

3.2 Post-Confessional Discovery: Does it Affect Rights of an Accused?

If anything is discovered as a result of a confession or information derived from an accused during his detention in police custody, it may be proved against him as evidence.[83] Section 27 departs from sections 25 and 26 of the Evidence Act as it legalizes confessions in police custody even in the absence of any Magistrate.[84] This section is grounded on the "doctrine of confirmation by subsequent facts" where the discovery of things operates as a guarantee of the truthfulness of a confession.[85] The discovery of drug (heroin), dead bodies and incriminating articles following confessions to the police have been accepted as evidence by the Court under section 27.[86] Where two accused persons give joint information in police custody leading to retrieval but it is ambiguous that who made the crucial statement, it is inadmissible against any of them.[87]

Recovery of things associated with the crime validated the illegal detention of confessors. Since things related to crime were discovered within the 24 hours of the accused's arrest, the HCD did not find any detrimental effect of the illegal detention in violation of sections 61 and 167, CrPC. It should be noted that the accused persons alleged torture by the police in their statements under section 342, CrPC.[88] The provision of police remand under section 167, CrPC has been criticized for allowing police to extract confessions or information through torture. The torture sometimes leads to death of the accused. Section 163, CrPC bars police threats or

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75 CrRO, Rule 79. (1).
76 *BLAST case* (n 13).
77 Al Faruque, Bari (n 62).
78 Constitution (n 37), Art. 7.
79 Hoque (n 11) 60.
80 Al Faruque, Bari (n 62) 318.
81 Richard A. Leo, 'False Confessions: Causes, Consequences, and Implications', (2009) Vol. 37, No. 3, The Journal of the American Academy of Psychiatry and the Law 332, 342.
82 Shishir Manir, 'Torture and Custodial Death (Prevention) Act, 2013' (2020) < https://static.shishirmanir.com › store › document> accessed 30.09. 2025.
83 Evidence Act (n 18), s.27.
84 Muhammad Monir, *Law of Evidence,* Vol.1 (14th ed. ULP 2006) 536.
85 *Bashir Ali v. State*, 45 DLR 63.
86 *State v. Raja Abdul Majid*, 1 BLC 144; *Hazrat Ali case* (n 1); *Arman Ali case* (n 54).
87 *Bashir Ali case* (n 85).
88 *State v. Ali Ahmed,* 16 DLR 558.

inducements during interrogations. Therefore, the practice of remanding accused individuals for forced interrogation contradicts Constitutional rights and legal protections.[89] Section 27 of the Evidence Act permits law enforcement officials to obtain evidence through torture.[90] The physical evidence procured by dint of torture is the "fruit of the poisoned tree" and the legal rule challenges the Constitutional rights to be free from self-incrimination and torture and thereby restricts the path of ensuring the right to fair trial.[91] Till now, it is tough to achieve equilibrium between the necessity of legal enforcement and unfairness towards people caused by the law enforcing agency.[92] It is a matter of concern that illegal detention and torture is justified only for the discovery of incriminating articles.

In our criminal justice system, failure by the Magistrate to follow legal mandates while recording confessions, issuing of order for remand instead of sending him to jail custody and brutal torture for extracting confessions by the police have been practiced continuously. These malpractices are illegal, unconstitutional and contrary to the international legal standards. Instead of extreme reliance on confessional statements, the prosecution should seek for other relevant evidence.

4. Legal Consequences of Retracted Confessions

The vast majority of detainee who retracted their confessions alleged that they were subjected to torture by the police.[93] A suspect may retract his self-incriminating statement to avoid punishment as well.[94] A confession is required to be retracted as soon as possible or within a reasonable time from the date of recording.[95] A confession either Judicial or Extrajudicial, if proved to be inculpatory, voluntary, true and lawful as well as retracted at an earliest occasion, such retraction is of no importance; conviction can be awarded solely on this confession without seeking further corroboration.[96] Corroboration is sought as a matter of judiciousness [97] or to resolve the doubt on reliability of the retraction.[98]

A belated retracted confession without corroborative evidence may constitute the foundation for sentencing a confessor.[99] In the absence of a petition from jail or in Court or oral allegation for withdrawing the confession, retraction at the last moment was not considered.[100] In another case, the Court held that it is not an absolute rule to retract a confession by filing an application.[101] Retraction of a confession during the examination under section 342 of the CrPC, was rejected by the Court treating it 'belated' on the proof of observing all legal rules by the Magistrate and nonexistence of sign of physical injury.[102] There are also precedents of admitting retraction of confession at the time of examination in accordance with section 342, CrPC.[103]

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[89] *BLAST case* (n 13).
[90] Al Faruque (n 63) 20-21; *BLAST case* (n 13).
[91] Hoque (n 11) 61-62.
[92] *Saifuzzaman v. State*, 56 DLR (2004) 324.
[93] Saira Rahman, 'The Accused and His Confession' Issue No: 46, Law and Our Rights, *Daily Star* (Dhaka, 2007) < https://archive.thedailystar.net/law/2007/12/01/index.htm > accessed 30.09.2025.
[94] Md. Al-Amin and Md. Tajul Islam Suhag, 'A Critical Analysis on Admissibility of Confessional Statements: Limitations and Realities' (2016) Vol. 10, No. 2, ASA University Review 43, 46.
[95] *State v. Minhun alias Gul Hassan,* 16 DLR (SC) 598; *Hazrat Ali case* (n 1); *Tota Mia case* (n 26); *Hasmat Ali case* (n 42).
[96] *Minhun case* ibid; *Hazrat Ali case* ibid; *Tota Mia* case ibid; *Hasmat Ali case* ibid; *Khorshed case* (n 21); *State v Tahazzel Hossain Nura*, 35 BLD (2015) 457; *Abul Kashem case* (n 58); *Jahedul Islam case* (n 3); *Jaigun Bibi v. State,* 12 DLR(SC) 156; *State v. Fozu Kazi,* 29 DLR (SC) 271;
[97] *Fazu Kazi case* ibid.
[98] *Ali Kibria* case (n 17).
[99] *Tajul Islam case* (57).
[100] *State v. Kamal Ahmed,* 49 DLR (HCD) (1997) 381.
[101] *Hasmat Ali case* (n 42).
[102] *State v. Mokammel Hyeath Khan,* 58 DLR (2006) 373; *Mizanur Rahman v. state,* 1996 BLD (AD) 293; *Kamal Ahmed case* (n 100).
[103] *Hasmat Ali case* (n 42); *Md. Tajul Islam Khokan v. State* 6 BLT (1998) 79.

The contrasting explanations and vagueness found in the above discussion create misperceptions about legal rules on admissibility of retracted confessions. Explaining ‘retraction within earliest occasion’ or specifying time frame for retraction, ensuring necessity of filing application, defining ‘delayed retraction’ along with its consequences or the admissibility of retraction of confessions during examination under 342, CrPC are needed to be settled.

5. Confession by a Co-accused

The confession made by an accused may be proved against a co-accused.[104] The statement of a co-accused does not come under the definition of ‘evidence’ as given in section 3 of the Evidence Act. As such confession is not made on oath or in presence of other persons affected and its veracity is not tested by cross-examination, it is an evidence of fragile nature while using against the co-accused.[105] Confession of a co-accused is not a substantive evidence against the other to find him guilty of the offence.[106] The confession of an accused can be used against the non-confessing co-accused to find him guilty of the offence in the presence of substantive evidence against him. The confession will be acceptable as a supplementary evidence or to lend assurance to other available evidence or provide an additional weight while using it against the non-confessing co-accused. Conviction of an accused cannot be awarded considering an uncorroborated confessional statement of a co-accused.[107]

A confessional statement of a co-accused affords a great clue in a case for tracing other members of the gang who are unknown criminals and known only among their associates.[108] The exculpatory confession cannot be applied against the non-confessing accused.[109] In the context of a non-confessing co-accused, the evidentiary value of a retracted confession is nil and without robust independent evidence it is completely useless.[110] Corroboration of a confession by medical evidence may be considered sufficient along with other evidence in support.[111] The confession of one accused does not amount to evidence for corroborating the confession of his co-accused as both are tainted, especially when they are retracted later.[112] The rules established by the Court for not applying a confession of an accused against a non-confessing co-accused without corroboration protects him form false accusation of a crime.

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[104] Evidence Act, s.30.

[105] *Amir Hossain Howlader v. State,* 37 DLR (AD) (1985) 139; *Mokammel Hyeath case* (n 102); *Emran Ali case* (n 54); *Nazrul Islam v. State,* 45 DLR (HCD) (1993) 142; *State v. Abdul Kader alias Mobile Kader,* 67 DLR (AD) (2015) 6; *Mojibar v. State,*51 DLR (HCD) (1999) 507.

[106] *Abdul Kader case* ibid; *Abdul Hakim Henju v State,* 8 BLC 362; *Rezaul Karim v. State,* 55 DLR (2003) 382; *Mofazzal Hossain v. State*, 58 DLR (2006) 524.

[107] *Abdus Salam Mollah v. State,* 20 BLT (AD) (2012) 14 *Mokammel Hyeath case* (n 102); *State v. Abul Khair,* 44 DLR 284; *Babor Ali Molla v. State,* 44 DLR (AD) 10; *Md. Azad case* (n 51)*; State v. Lt. Col. Syed Faruk Rahman*, 53 DLR (2001) 287; *Sohel Monir v. State*, 49 DLR (1997) 407; *Ustar Ali v. State*, 3 BLC (AD) 53; *State v. Delwar Hossain,* 64 DLR (HCD) (2012) 356; *Mubarak Hussein v. State* 1983 BLD (AD) 329; *Abdur Rahman Syed v. State*, 44 DLR 556; *Khalilur Rahman case* (n 15); *State v. Mir Hossain,* 56 DLR (2004) 124; *Zahid Hossain v. State*, 55 DLR (2003) 160; *Lalu Miah case* (n 3).

[108] *Aslam Billal v. State,* 18 BLC (HCD) (2013) 130.

[109] *State v. Al Hasib Bin Jamal*, 59 DLR (2007) 653; *Ibrahim Mollah v. State*, BLD (1987) AD 248.

[110] *Amir Hossain Howlader case* (n 105); *Sohel Monir case* (n 107); *Joygun Bibi case* (n 96); *Abdul Kader case* (n 105).

[111] *Lutfun Nahar Begum v. State,* 27 DLR (AD) 29; *Babor Ali case* (n 107); *Ustar Ali case* (n 107)*; Kabir v. State*, 45 DLR (HCD) (1993) 755; *Abdus Salam case* (n 107); *Abul Khair case* (n 107); *Md. Azad case* (n 51).

[112] *State v. Mukhtar Ali,* 10 DLR 155.

6. Recommendations for Reformation of the Law and Practice

In the criminal prosecution of Bangladesh, obtaining confessional statements without infringing the Constitutional and legal rights of the accused person mostly depends on the Magistrate. The higher judiciary has inquired into the legal requirements for obtaining or recording self-incriminating statements of the accused by the police and the Magistrate respectively and expounded a profuse number of rules and principles for the admissibility of confessions. Though there are several Constitutional safeguards, laws and principles for eliminating compelled confessions, brutal torture and death of the accused caused by the police and some sort of inattention on the part of the Magistrate while issuing order of remand and recording of confessional statements are found.

With a view to abolishing torture in police custody for obtaining confessions, certain recommendations have been proposed. A printed form for questioning the accused by the Magistrate should be mandatorily used to achieve better outcomes for the successful implementation of procedures under section 164, CrPC. The Magistrate should not accept a confession made after unexplained police detention of the accused beyond the statutory period of 24 hours for eliminating the culture of partial implementation of the law and refutation of the Constitutional rule; the 'explanation' must be accurately specified in the law as exceptions for allowing this kind of delay. Inconsistency between section 29 of the Evidence Act and the section 164, CrPC accompanied by other legal norms as to the admissibility of confessions should be removed. Explicit provision for at least three hours for reflection of mind before recording a confession should be assimilated into the law for ensuring voluntary making of confessions. Curable and incurable defects and irregularities done by the Magistrate in the record of confessions should be stipulated to remove ambiguities. Audio-visual recording must be introduced while documenting confessions by the Magistrate and questioning by the police in a transparent room.

The accused should get opportunity to meet his relatives and a lawyer not within 12 hours, rather immediately after the arrest as practicable in this era of modern technology. The accused must be entitled to exercise his Miranda rights. Rules for presence of the lawyer at the time of recording confessions by the Magistrate and interrogation during remand must be formulated. If an accused does not make any confession, the Magistrate should give order for his jail custody or release him on bail. Senior judicial officer should scrutinize the order of remand by the Magistrate to substantiate its legality and oversee his/her accountability.

Section 27 of the Evidence Act should be amended as it keeps the door open for prolonged detention and police torture, deprives the suspect from exercising his lawful and Constitutional rights and obstructs just trial. Digital, forensic, direct and circumstantial evidence should be valued over confessional statements. The term 'confession' should be defined following a rights-based approach which may stop illegal or unconstitutional practices. The time limit, grounds and procedures for retraction of confessions should also be specified to remove uncertainties of legal rules practiced by the judiciary.

The police involved in torture and death of an accused must be brought under criminal proceedings. Training and awareness programs and sessions for knowledge of law and ethics to stop cruel treatment towards the detainee should be arranged periodically for the police. For safeguarding rights of the citizens and ensuring justice in the criminal legal regime of Bangladesh, judicial activism should be encouraged and ameliorated.

Conclusion

The unlawful extraction of confessions in the police custody is a common scenario in the criminal justice system of Bangladesh. Confessions made during or after illegal detention have been admitted by the Court, subject to the conditions of ascertainment of their truth and voluntariness, absence of police torture on the accused as well as discovery of material particulars. The malpractice of illegal detention provides opportunity to the police to infringe legal and Constitutional safeguards of accused persons. The torture in police custody or during remand for eliciting the confession and irregularities made while its recording may be eliminated under the stewardship of the Magistrate. The civilized State proceeds to the better legal practice and it is the time to follow laws entirely, not partially. Laws should be obeyed by the police, Magistrates and Courts in a synchronized way so that an accused person may be sentenced only on the basis of a true and voluntary confession after being facilitated by exercising all of his rights. However, the rejection of evidence of an untrue and involuntary confession by the higher judiciary manifests its cordiality to remove injustice. Audio-video recording of confessions will amplify its evidentiary value. Justice towards a non-confessing accused may be ensured through the utilization of the legal principle that he will not be punished basing on a confession of a co-accused without corroborated by other independent evidence. Eventually, it is culminated that if laws and judicial decisions on the admissibility of confessional statements along with recommendations provided in this paper are comprehensively followed, a fair and balanced criminal legal system is not beyond our reach.

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"Climate Change Mitigation" as an Emerging Customary International Law Obligation

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***Abstract**: Climate Change has emerged as the biggest threat to modern human civilization, which has profound implications for global peace and prosperity. Mitigating the adverse effects of it has taken the heart of climate change discourse. Every state throughout the globe has acknowledged its daunting effects and taken various measures to mitigate and fight against this 'super wicked problem.' They negotiate with each other, make multilateral and regional treaties, and implement domestic legislation to carry out mitigation obligations. Recently, the domestic judiciary of different countries around the world has been playing an essential role in overseeing the mitigation activities of states and private bodies. Through a review of legislation and judicial practice of various States and analyzing the customary principle of 'no-harm' obligation, this paper suggests that climate change mitigation is an emerging Customary International Law (CIL) obligation with some prospects and challenges. In support of the position of this paper that mitigation obligation is an emerging CIL, this paper finds out opinio juris and state practice relating to mitigation obligation and then analyze mitigation obligation as a customary principle of no-harm obligation. Finally, this paper evaluates the potential prospects and challenges that may arise if a mitigation obligation evolves into a Customary International Law (CIL).*

***Keywords:** Climate change mitigation, Customary international law, Greenhouse gas emission, and No-harm principle.*

Introduction

In 2021, the Pacific island-state Vanuatu expressed its intention to make a coalition that will cause the UN General Assembly to seek advisory jurisdiction which will assess the rights of the climate vulnerable countries under international law and claimed that the protection under the current climate regime is insufficient.[1] In 2011, Palau and the Marshall Islands led a push for similar action.[2] If the UN General Assembly really seeks a similar Advisory Opinion (AO) from the world court, the issue can be naturally raised that the court will look for treaties and customary international law to determine whether the largest emitter States are responsible to the climate vulnerable states or not. Since the current climate treaties, i.e., the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, the Paris Agreement, etc. do not give jurisdiction to the International Court of Justice (ICJ) to deal with this issue, a question naturally arises whether mitigation obligation is a Customary International Law (CIL) or not. On the other hand, after US's withdrawal from the Paris Agreement, an anxiety arose among scholars that if one of the largest emitter countries escapes from the current climate regime, then the whole fight against adverse effects of climate change will be vitiated. If mitigation obligation becomes a CIL, then it will prevent such free ride. Against this background, the paper

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[1] Radina Gigova, 'Vanuatu Will Seek International Court of Justice Opinion on Climate Protection' *CNN* (26 September 2021) <https://www.cnn.com/2021/09/26/asia/vanuatu-climate-change-protection-rights-intl/index.html> accessed 31 December 2022.

[2] Katelyn Weisbrod, 'Is It Time for the World Court to Weigh in on Climate Change?' (*Inside Climate News*, 4 October 2021) <https://insideclimatenews.org/news/04102021/internationa-court-of-justice-vanuatu-ecocide/> accessed 31 December 2022.

attempts to answer two questions, whether climate mitigation is an emerging CIL or not; and if it is, what will be the prospects and challenges.

In dealing with these questions this paper is divided into six sections. Firstly, it explores what climate change mitigation means and the criteria for identifying a Customary International Law (CIL). Then, this paper applies these criteria in the second section to determine whether the mitigation obligation qualifies as a CIL. The third section discusses how mitigation obligation fits within the customary principle of no-harm obligation. It then counters the argument in the fourth section that existing climate laws around the world could prevent mitigation obligation from becoming a CIL. Finally, it discusses the potential benefits and hurdles of recognizing mitigation obligation as a CIL in the fifth and sixth sections, respectively.

1. Understanding Climate Change Mitigation

The fundamentals of mitigation involve how to reduce the greenhouse gas (GHG) emission. We can define the mitigation of climate change as the process of reducing how severe, harmful, unpleasant or painful the climate change is. Any actions or attempts undertaken for the reduction of the magnitude of global warming[3] or its related effects[4] can be termed as climate change mitigation.[5] Climate change mitigation is an action which is undertaken to reduce GHG emissions by reducing the sources or by enhancing the sink.[6]

1.1 Criteria for Identifying the Rules of Customary International Law (CIL) to Assess the Emergence of Climate Change as a Customary International Law Obligation

Customary International Law (CIL) stands as one of the primary sources of international law and thus one of the foundational pillars of international legal norms, outlined in Article 38 of the ICJ Statute, alongside treaties. CIL is one of the two primary sources of international law as referred in the catalogue of 'sources of international law' under Article 38 of the ICJ Statute. Though 'treaty' precedes 'international custom' in the list of Article 38, there is no hierarchy between the two.[7] Article 38 (1) (b) mentions that the Court (ICJ) in deciding disputes submitted to it in accordance with international law shall apply 'international custom, as evidence of a general practice accepted as law'. Two conditions are to be fulfilled to be an international custom, e.g., there must be a general practice of climate change mitigation, and such general practice must be accepted as law or *opinio juris*. The ICJ Statute does not mention any methodology to determine the *general practice* and the *opinio juris*. In absence of this, the section shall follow the 2018 Draft Conclusions on Identification of Customary International Law as adopted by the International Law Commission (ILC).

The 'ILC Draft Conclusions on Identification of Customary International Law' (hereinafter Draft Conclusions) may be helpful as a practical guide or methodology for the identification of the rules of CIL and their contents.[8]

[3] Global warming is the long-term increase of global average temperature. It can be interchanged with climate change. Though both global warming and its impacts on the earth are included in climate change.

[4] It includes Environmental and social effects caused by global temperature rise.

[5] B Fisher and others, 'Issues Related to Mitigation in the Long-Term Context' in B Metz (ed), *Climate Change 2007: Mitigation of Climate Change, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007) <https://ueaeprints.uea.ac.uk/id/eprint/25259/> accessed 31 December 2022.

[6] Richard B Rood, 'Mitigation and Adaptation | Solutions – Climate Change: Vital Signs of the Planet' (*Professor Ricky Rood's Climate Change Website*, 15 November 2007) <https://climate.nasa.gov/solutions/adaptation-mitigation/> accessed 20 January 2023.

[7] Tullio Treves, 'Oxford Public International Law: Customary International Law', *Customary International Law* (Oxford Public International Law 2006) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393> accessed 20 January 2023.

[8] 'Draft Conclusions on Identification of Customary International Law, with Commentaries (A/73/10)' (International Law Commission) <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf> accessed 20 January 2023. Conclusion 1 of the Draft Conclusions clarifies that it is concerned with the identification of rules of CIL.

To identify a rule of CIL, the first and foremost duty is to apply the 'two-element approach'[9] or to apply the test to determine whether there is general practice, and if so exists, whether this practice is accepted as law (*opinio juris*).[10] Conclusion 3 emphasizes the need to evaluate the two elements independently.

The term "practice" primarily refers to what states do, sometimes also encompassing actions by international organizations (IOs), which play a role in shaping or confirming customary international law rules.[11] While states largely shape customary international law, actions by international organizations representing member states can also influence it if they align with the organization's mandate.[12] The more member states there are, the more influential the rule becomes.[13] The actions of states, encompassing their governmental bodies across executive, legislative, judicial, and other functions, constitute state practice.[14] Conclusion 6 outlines the various ways states demonstrate their practice, which can range from physical or verbal actions to, in certain situations, a lack of action.

Paragraph 2 of conclusion 6 provides a non-exhaustive list of examples that fall under the category of 'state practice', such as "diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts." In addition to identifying the sources of practice, the practice itself must be "sufficiently widespread and representative, as well as consistent".[15] Consistency does not mean absolute uniformity; minor inconsistencies would not necessarily prevent a rule from being considered general practice.[16] Conclusion 8, Paragraph 2 highlights that there's no set duration needed for a rule to form; even a brief period may be adequate for the emergence of a new customary international law.[17]

To meet the criteria of the second constituent element of customary international law, *opinio juris*, the practice must be accompanied by "a conviction that it is permitted, required or prohibited by customary international law".[18] Like conclusion 6, conclusion 10 provides a non-exhaustive list of opinion juris which are:

> "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference."[19]

1.2 Growing *State Practice* and *Opinio Juris* in Support of Climate Change Mitigation

It is evident from the above forms that there are some common sources of general practice and *opinio juris* i.e., decisions of national courts, treaty provisions, legislation etc. It is neither possible nor desirable to conduct detailed empirical study in each source of CIL. So, in the next section, this paper applies the methodology discussed in this section to identify CIL. The main common sources of the two elements, i.e., domestic legislations, judicial decisions, and treaty provisions, are discussed in the next section to determine the general practice accepted as law.

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[9] This is an inductive or empirical approach to determine general practice and the *opinion juris*, in contrast to the deductive approach, which does not follow the empirical approach.

[10] 'Draft Conclusions on Identification of Customary International Law, with Commentaries (A/73/10)' (n 8)., conclusion 2.

[11] ibid., conclusion 4.

[12] ibid., conclusion 4 (commentaires, para 5).

[13] ibid, conclusion 4 (commentaires, para 7).

[14] ibid, conclusion 5.

[15] ibid, conclusion 8.

[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment (1986) ICJ Rep 14, 98 [186].

[17] *North Sea Continental Shelf (Germany v Denmark)* [1969] ICJ Report 3 (International Court of Justice) 43.

[18] 'Draft Conclusions on Identification of Customary International Law, with Commentaries (A/73/10)' (n 8), conclusion 9; *North Sea Continental Shelf (Germany v Denmark)* (n 17) 44.

[19] 'Draft Conclusions on Identification of Customary International Law, with Commentaries (A/73/10)' (n 8).

It is true that to constitute climate change as a CIL, cooperation of all the states is essential. If all the States become free riders and escapists, the multilateral efforts to combat climate change will be vitiated. If mainly responsible States or principal originators i.e. EU, the USA, China; fail to reduce greenhouse gas (GHG) emission, then the whole system will have little effect.[20] Keeping this in mind, the next section will find out whether there is sufficient general practice and *opinio juris* to mitigate climate change to be an emerging CIL and will analyze legislations, judicial decisions of the largest emitter countries and some developing countries as well.

1.2.1 Judicial Decisions

As of May 2021, about 1841 climate litigation are pending before or concluded by the domestic, regional, or international court.[21] About 78% of the litigations find its motivation in climate mitigation.[22] Many of the cases have been filed against the state or private entity with a view to imposing liability on them to reduce global GHG emissions. Several court cases seeking climate change mitigation are currently pending, but some, despite having strong arguments, are dismissed due to procedural issues regarding admissibility. In this section, some of the notable judgments are discussed

The Netherlands

In the *Urgenda case,*[23] the Supreme Court affirmed the District Court's ruling, which determined that the Netherlands government failed in its duty to mitigate climate change. It ordered the government to reduce greenhouse gas emissions by at least 25% by the end of 2020 compared to 1990 levels.[24]

In the *Royal Dutch Shell case,* the District Court of The Hague mandated corporate actors to decrease their extraterritorial greenhouse gas emissions and contribute to mitigating climate change.[25] This case was significant for shaping climate change law by requiring non-governmental entities like RSD to take action, emphasizing their duty to care for and protect human rights from the harmful effects of climate change, based on principles of due diligence.[26] The court mandated that Royal Dutch Shell must decrease its carbon emissions by a net 45% by the conclusion of 2030 compared to 2019 levels, implemented through the Shell group's corporate policies.[27]

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[20] Md. Jahid-Al-Mamun, ‘The Paris Agreement on Climate Change: Efficiency of Mitigation Obligation’ (2022) 33 Dhaka University Law Journal 99.

[21] ‘Of these, 1,387 were filed before courts in the United States, while the remaining 454 were filed before courts in 39 other countries and 13 international or regional courts and tribunals (including the courts of the European Union).’ See for details, Joana Setzer and Catherine Higham, ‘Global Trends in Climate Change Litigation: 2021 Snapshot Policy Report’ (2021) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> accessed 20 January 2023.

[22] Michal Nachmany and others, ‘Global Trends in Climate Change Legislation and Litigation’ (2017) <http://archive.ipu.org/pdf/publications/global.pdf> accessed 20 January 2022.

[23] *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* (Court of Appeal of the Hague (CA)).

[24] ibid.

[25] *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC* (Hague District Court C/09/571932/HA ZA 19-379).; See also, Jacques Hartmann and Annalisa Savaresi, ‘Corporate Actors, Environmental Harms and the Draft UN Treaty on Business and Human Rights: History in the Making?’ (2021) 83 QIL 27.

[26] *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC* (n 25)., para 4; Annalisa Savaresi and Margaretha Wewerinke-Singh, ‘Friends of the Earth (Netherlands) v Royal Dutch Shell: Human Rights and the Obligations of Corporations in the Hague District Court Decision’ (*GNHRE*, 31 May 2023) <https://gnhre.org/2021/05/31/friends-of-the-earth-netherlands-v-royal-dutch-shell-human-rights-and-the-obligations-of-corporations-in-the-hague-district-court-decision/> accessed 20 January 2023.

[27] *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC* (n 22), para 4.4.55.

Pakistan

In *Asghar Leghari vs Federation of Pakistan*, the Supreme Court of Pakistan found that the government had failed to implement the "National Climate Policy and Framework 2012" which deals with climate change mitigation and established a Commission to oversee the proper implementation of the policy.[28]

USA

The Supreme Judicial Court of Massachusetts found the State in violation of its statutory obligation to limit the GHG emission by 80% by 2050 than 1990 levels.[29] In the case of *Juliana vs United States*, the 9th Circuit Court mandated that the federal government must implement "a comprehensive scheme to reduce fuel emissions and address climate change".[30]

EU

In the case of *Armando Carvalho and Others v The EU Parliament and Council,*[31] the petitioner challenged the EU's climate target of reducing greenhouse gas emissions by 40% by 2030 compared to 1990 levels as it is inadequate to avert its detrimental impact on the human rights of the petitioners.[32] Though the court dismissed the case for lack of *locus standi*, it keeps us optimistic that if the petitioners could have proved their standing before the court it might have given a positive decision like *Urgenda*.

UN Human Rights Council

In *Torres Strait Islanders v Australia,*[33] a group of people from the Torres Islanders filed a complaint against Australia for its inaction to climate change and sought climate mitigation measures from Australia as a remedy. This case is still pending before UN Human Rights Council. However, if a favorable decision is reached, it will profoundly influence mitigation jurisprudence.

1.2.2 National Legislations

The world is now witnessing an increase in development of domestic legislation to combat adverse effect of climate change. A report showed that there were more than 1200 laws and policies in 164 Countries until 2017 dealing with climate change.[34] These legislations generally deal with climate mitigation which covers 95% of global GHG emissions.[35] A search in the website of Grantham Research Institute on climate change and the Environment shows that there are more or less 2077 laws and policies worldwide dealing with climate change mitigation.[36]

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[28] *Ashgar Leghari v Federation of Pakistan* (Lahore High Court Green Bench, Pakistan)*;* See 'Ashgar Leghari v. Federation of Pakistan (Lahore High Court Green Bench 2015) - Pakistan - Climate Change Laws of the World' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/geographies/pakistan/litigation_cases/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015> accessed 20 January 2023.

[29] *Kain v Department of Environment Protection* (Boston Bar Journal (Supreme Judicial Court of Massachusetts)).

[30] 'Juliana v. United States' (*Harvard Law Review*, 3 October 2021) <https://harvardlawreview.org/2021/03/juliana-v-united-states/> accessed 20 January 2023.

[31] *Case T-330/18 Armando Carvalho and Others v The EU Parliament and Council*.

[32] ibid.

[33] ''Climate Threatened Torres Strait Islanders Bring Human Rights Claim against Australia' (*ClientEarth*, 5 December 2019) <https://www.clientearth.org/latest/press-office/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/> accessed 20 January 2023.

[34] Michal Nachmany and others (n 22).

[35] Florentina Simlinger and Benoit Mayer, 'Legal Responses to Climate Change Induced Loss and Damage', *Climate Risk Management, Policy and Governance* (Springer 2018) <https://link.springer.com/chapter/10.1007/978-3-319-72026-5_7> accessed 20 January 2023.

[36] 'Climate Change Laws of the World' (*Grantham Research Institute on Climate Change and the Environment*, 12 December 2021) <https://climate-laws.org/legislation_and_policies?q=mitigation> accessed 20 January 2023.

A close study conducted on the domestic legislations and policies of the largest emitter countries in the world, i.e., China,[37] the United States,[38] India,[39] Russia,[40] Japan,[41] Iran,[42] Germany,[43] Indonesia,[44] South Korea,[45] Saudi Arabia,[46] Canada,[47] South Africa,[48] Brazil,[49] Mexico,[50] and Australia[51] shows that each of the country has more than 10 laws and policies at least relating to climate change mitigation.

2. Mitigation Obligation under the Paris Agreement as an Emerging CIL

The Paris Agreement (PA) is widely hailed as a groundbreaking achievement and a significant milestone in global diplomacy for its historic adoption of a landmark climate treaty as the scholars termed it as a "landmark",[52] a "big big deal",[53] and "world greatest diplomatic success"[54] in the adoption of a "historic"[55] climate treaty. Nearly all countries around the world have signed and ratified this treaty, making it a pact that represents humanity as a whole.[56] Despite previously announcing its intention to leave the agreement, the USA decided to recommit by officially accepting it again in January 2021.[57]

Participation in the treaty by many states, as Hilary Charlesworth points out, serves as evidence of their state practice,[58] and such a high level of participation is driven by societal, economic, or political needs which may

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[37] China is the largest emitters countries in the world. It has adopted more than 14 laws which deal with climate change mitigation. See, ibid.; Starre Vartan, 'Carbon Emissions by Country: Top 15' (*Treehugger*) <https://www.treehugger.com/greenhouse-gas-emissions-by-country-5120253> accessed 20 January 2023.

[38] The USA is the second largest emitters country in the world. It has more than 16 laws and policies dealing with climate change mitigation. Vartan (n 37).

[39] India is the third largest emitter country in the world. It has more than 19 legislation dealing with climate change.ibid.

[40] Russia, the third largest emitter country, has more than 12 laws and policies dealing with climate change mitigation. ibid.

[41] Japan is the fourth largest emitter country in the world. It has more than 19 laws and policies dealing with climate change. ibid.

[42] Iran is the fifth largest emitter country in the world. It has more than 10 laws and policies dealing with climate change. ibid.

[43] Germany is the seventh largest emitter country in the world. It has more than 27 laws and policies dealing with climate change. ibid.

[44] Indonesia is the eighth largest emitter country in the world. It has more than 31 laws and policies dealing with climate change. ibid.

[45] South Korea is the ninth largest emitter country in the world. It has more than 21 laws and policies dealing with climate change. ibid.

[46] Saudi Arabia is the tenth largest emitter country in the world. It has more than 6 laws and policies dealing with climate change. ibid.

[47] Canada is the 11th largest emitter country in the world. It has more than 26th laws and policies dealing with climate change. ibid.

[48] South Africa is the 12th largest emitter country in the world. It has more than 12 laws and policies dealing with climate change. ibid.

[49] Brazil is the 13th largest emitter country in the world. It has more than 37 laws and policies dealing with climate change. ibid.

[50] Mexico is the 14th largest emitter country in the world. It has more than 18 laws and policies dealing with climate change. ibid.

[51] Australia is the 15th largest emitter country in the world. It has more than 17 laws and policies dealing with climate change. ibid.

[52] Coral Davenport, 'Nations Approve Landmark Climate Accord in Paris - The New York Times' *NY Times* (13 December 2015) <https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html> accessed 20 January 2023.

[53] Thomas L Friedman, 'Paris Climate Accord Is a Big, Big Deal - The New York Times' <https://www.nytimes.com/2015/12/16/opinion/paris-climate-accord-is-a-big-big-deal.html> accessed 20 January 2023.

[54] Fiona Harvey, 'Paris Climate Change Agreement: The World's Greatest Diplomatic Success' (*Guardian*, 14 December 2015) <https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations> accessed 20 January 2023.

[55] Joby Warrick and Chris Mooney, '196 Countries Approve Historic Climate Agreement' (*The Washington Post*, 12 December 2015) <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/12/proposed-historic-climate-pact-nears-final-vote/> accessed 20 January 2023.

[56] 195 States signed the treaty and among them 193 has already ratified it.

[57] 'Depository Notification (Paris Agreement, United States of America: Acceptance' (2021) <https://treaties.un.org/doc/Publication/CN/2021/CN.10.2021-Eng.pdf> accessed 20 January 2023.

[58] Hilary Charlesworth, 'Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 193 <https://www.cambridge.org/core/books/abs/cambridge-companion-to-international-law/lawmaking-and-sources/A45B03D7390196ED39348E469801AAA3> accessed 20 January 2023.

be labelled as "*opinio necessitates*".[59] In *Cassese's International Law,* the term "*opinio necessitates"* is used interchangeably with "*opinio juris"*.[60] The widespread acceptance of the Paris Agreement signifies "state practice", while its goal to safeguard the shared value of the international community by mitigating greenhouse gas emissions (mitigation obligation) equates to *"opinio necessitates"*.[61]

The existence of such "state practice" and "*opinio necessitates"* suggests that a new rule of CIL in respect of mitigation obligation under the Paris Agreement is evolving. However, because the Paris Agreement doesn't impose mandatory mitigation obligations on states, it may pose a significant challenge in this process of becoming a CIL rule. Nevertheless, according to the International Court of Justice's decisions in the *Chagos AO* and *Military and Paramilitary Activities in and against Nicaragua Case*, a United Nations General Assembly resolution, even if non-binding, adopted unanimously, can serve as compelling evidence of the *opinio juris* regarding the presumed rule of CIL.[62] Building upon the ICJ's insight, it may be contended that the widespread acceptance of the Paris Agreement suggests its emergence as a CIL.

3. Mitigation Obligation under the Customary Principle of "No-Harm Obligation"

Climate change has become the most troublesome and most challenging transboundary environmental damage in the 21st Century.[63] It is an undeniable fact that climate change is a global concern and challenge making it a common problem for humankind. This commonality of the problem requires shared responsibility of all the States to reduce emissions of GHGs. The most important rule to deal with climate change as a 'trans boundary damage' or 'common concern of the humankind' is 'no harm principle', simply the rule of prohibition of transboundary damages.[64] This 'no harm principle' originated from *Trail Smelter* decision where the arbitral tribunal declared that:

> *"under the principles of international law [...] no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence"*.[65]

Different courts and tribunals, including those involved in cases like the *Corfu Channel Case, Gabcikovo-Nagymaros Project Case, Pulp Mills Case,* etc., have widely recognized this principle as customary international law.[66] This principle affirms that while states have the sovereign authority to use their territory as they choose, they are also obligated to prevent activities within their borders from causing harm to other states' territories.[67]

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[59] Paola Gaeta, Jorge E Viñuales and Salvatore Zappala, *Cassese's International Law* (3rd edn, Oxford University Press 2020) 184.

[60] Gaeta, Viñuales and Zappala (n 59). The book mentions that 'custom is made up of two elements: general practice or *usus or diuturnitas*, and the conviction that such practice reflects or amounts to, law (*opinion juris)* or is required by social, economic, or political exigencies (*opinion neccessitatis)'.*

[61] Giovanni Sciaccaluga, 'The Erga Omnes Obligation to Mitigate and Manage Climate Change', *International Law and the Protection of "Climate Refugees"* (Palgrave Macmillan, Cham 2020) 102 <https://link.springer.com/chapter/10.1007/978-3-030-52402-9_7> accessed 20 January 2023.

[62] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Report 95 (International Court of Justice).; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (merit)* [1986] ICJ Report 14 (International Court of Justice).

[63] Xue Hanqin, *Liability for Damage to the Global Commons* (1st edn, Cambridge University Press 2003) 223.

[64] Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1, 7.

[65] *Trail Smelter Arbitration (United States v Canada)* (1938) III UNRIAA 1995.

[66] See, for example, *Corfu Channel (United Kingdom v Albania), Merits Judgment* [1949] ICJ Report 4; *Case concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia), Judgment* (1997) ICJ Report 7(International Court of Justice); *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment* (2010) ICJ Report 14 (International Court of Justice).

[67] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Report 241 (International Court of Justice).; *Trail Smelter Arbitration (United States v. Canada)* (n 65) 1905.; *Islands of Palmas Case (Netherlands v USA)* (PCIJ).; *North*

This principle entails duties to avoid cross-border harm, preempt foreseeable harm, and/or reduce risks to the extent possible.[68] The obligation outlined in the "no harm rule" to prevent foreseeable harm or minimize risks can be understood as the duty to address climate change to reduce or prevent the damages it causes. This rule places a shared responsibility on all states to protect vulnerable states from the harm inflicted by climate change.[69]

In light of the above principle, a state's engagement in the GHG emissions within its territory which has potential threat to cause damages to the territory of other states would incur an obligation under the no-harm rule to avoid such damages. However, determining the precise extent of the obligation to prevent climate change poses challenges. ICJ clarified it by imposing *due diligence* obligation to prevent such transboundary damages.[70] The term *due diligence* refers to such actions which can be expected from a 'good government' who will exert best efforts to significantly minimize the transboundary harm, herein the climate change.[71]

4. *Lex Specialies* and Applicability of CIL

A possible objection may arise against the applicability of CIL obligation to transboundary matters. GHG emissions in presence of *lex specialies* (special law), i.e., the UNFCCC, the Kyoto Protocol, the Paris Agreement, the COP decisions etc. dealing with mitigation obligation.[72] The notion *lex specialies* denotes that more special law shall be prevail over more general law. However, the ILC has clarified that "for the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".[73] In this context, there's no chance to point out any conflicts between the aims of the current climate agreements like the UNFCCC, Kyoto Protocol, or the Paris Agreement, and the CIL.[74] Many countries, including those most vulnerable to climate change, have expressed that implementing the current climate agreements won't stop the enforcement of established CIL.[75]

5. Potential Outcome if the Duty to Mitigate Becomes a Rule of Customary International Law (CIL)

The issue of climate change creates concern for the mankind as a whole. The emission of greenhouse gases (GHGs) in one part of the globe has a horrific impact on every part of the world. Since it is the common concern of mankind, a common and coordinated global action is a *sine qua non* to fight against the super wicked climate change, no nation should be allowed to have the benefit to free ride on the action of others.

However, when Canada withdrew from the Kyoto Protocol[76] and the US from the Paris Agreement, it raised concerns about the success of these agreements in achieving mitigation goals if other major emitting countries

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Sea Continental Shelf (Germany v Denmark) (n 17). *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment* (n 66) 101.

[68] See, Tullio Scouvazzi, 'State Responsibility for Environmental Harm' (2001) 12 Yearbook of International Environmental Law 49.

[69] Vanessa Tsang, 'Establishing State Responsibility in Mitigating Climate Change Establishing State Responsibility in Mitigating Climate Change under Customary International Law under Customary International Law' (2021) Columbia Law School Scholarship Archive 10. <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1001&context=llm_essays_theses> accessed November 29, 2021.

[70] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment* (n 66) 101.

[71] 'Yearbook of the International Law Commission 2001' (ILC 2001) 154-155<UN Doc A/CN.4/SER.A/2001/Add.1>.

72 See for example, Alexander Zahar, 'Methodological Issues in Climate Law' (2015) 5 Climate Law 25.

[73] 'Yearbook of the International Law Commission 2001' (n 67) 140.

[74] Benoit Mayer, 'the Applicability of the Principle of Prevention to Climate Change: A Response to Zahar' 5 Climate Law 1.

[75] See for example, Simlinger and Mayer (n 35).

[76] See, 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en> accessed 21 January 2023.

follow suit.[77] This tendency to avoid responsibility could greatly disrupt efforts for "widest possible cooperation"[78] in mitigation and long-term global climate governance, potentially undermining the achievement of the "long-term temperature goal".[79] If mitigation obligations become a recognized part of CIL, it could prevent this dire scenario. This worst situation may be avoided if the mitigation obligation emerged as a Customary International Law obligation. If mitigation obligations become a part of CIL, every country will be bound by them, unlike treaties that only affect their members. This means that even countries withdrawing from treaties must still address climate change.[80] Thus CIL acts like a "safety net," ensuring that states are still obligated to follow certain norms even if they don't join or withdraw from treaties. This means that CIL imposes a commitment without allowing states to opt out.[81]

The Paris Agreement is widely recognized as a success because it has been unanimously accepted, with 195 countries signing it, and 193 of those countries going on to officially approve it.[82] However, the Agreement does not enforce penalties for failing to meet mitigation obligations, which poses a significant challenge.[83] However, no punishment is specified for a state's failure to comply. Article 15 solely discusses the creation of a mechanism designed to support implementation, but this mechanism is described as "transparent, non-adversarial and non-punitive".[84] The wording of the Agreement contributes to the weakness of its specific obligations since terms like "may", "should", or "encouraged" lack the force of imposing positive obligations.[85] While the participating nations are obligated to draft, share, and revise their Nationally Determined Contributions (NDCs), there is no stringent requirement to adhere precisely to the details outlined in these contributions.[86] If a state fails to meet its mitigation obligations outlined in the NDCs, other states cannot utilize the Agreement's provisions to hold them liable, as it does not constitute an internationally wrongful act. However, the evolving customary international law norm regarding climate change mitigation obligations would offer a more effective means to invoke state accountability.

During its 64th plenary session on March 29, 2023, the United Nations General Assembly (UNGA) endorsed a resolution introduced by a coalition of more than 100 nations, outlining two questions to be submitted to the

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[77] See, 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en#4> accessed 21 January 2023. "On 3 September 2016, the Government of the United States of America deposited its instrument of acceptance of the Agreement. See C.N.612.2016.TREATIES-XXVII.7.d of 3 September 2016. On 4 November 2019, the Government of the United States of America notified the Secretary-General of its decision to withdraw from the Agreement which took effect on 4 November 2020 in accordance with article 28 (1) and (2) of the Agreement. See C.N.575.2019.TREATIES-XXVII.7.d of 4 November 2019. On 20 January 2021, the Government of the United States of America deposited its instrument of acceptance of the Agreement. See C.N.10.2021.TREATIES-XXVII.7.d of 20 January 2021."

[78] UN Framework Convention on Climate Change 1992 1771 (UNTS) 107, Preamble [2]; Paris Agreement 2015 55 (ILM) 740, Preamble.

[79] See for example, Kola O. Odeku, Alice Maveneka and Raligilia Happy Konanani, 'The Consequences of Country's Withdrawal from Climate Change Agreements: Implications for Carbon Emissions Reduction' (2017) 41 Journal of Human Ecology 1.

[80] Tsang (n 65) 10.

[81] Curtis A Bradley and Mitu Gulati, 'Customary International Law and Private Rights of Action' (2020) 21:30 Proceedings of the ASIL Annual Meeting 8.

[82] 'Paris Agreement - Status of Ratification | UNFCCC' (*United Nations Climate Change*) <https://unfccc.int/process/the-paris-agreement/status-of-ratification> accessed 21 January 2023.

[83] 'Paris Agreement: Near-Term Actions Do Not Match Long Term Purpose - but Stage Is Set to Ramp up Climate Action' (*Climate Action Tracker*, 12 December 2015) <https://climateactiontracker.org/publications/paris-agreement-near-term-actions-do-not-match-long-term-purpose-stage-set-ramp-climate-action/> accessed 21 January 2023.

[84] Paris Agreement, art 15.

[85] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 Oxford Journal of Environmental Law 337-338.

[86] Ralph Bodle and others, 'The Paris Agreement: Analysis, Assessment and Outlook', *Ecologic Institute 2016* (Background paper for the workshop 'Beyond COP21) <http://ecologic.eu/sites/files/event/2016/ecologic_institute_2016_paris_agreement_assessment.pdf> accessed 21 January 2023.

International Court of Justice (ICJ) for its advisory opinion.[87]The Assembly posed two questions among which one may be relevant for including mitigation obligation as a rule of CIL, which is:

> *"What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas (GHG) emissions for States and for present and future generations?"*[88]

In determining "the obligations of States under international law to ensure the protection of the climate system", the Court may consider whether mitigation obligation emerges a rule of CIL or not. If the Court recognizes mitigation obligation as a rule of customary international law (CIL), it would significantly impact global climate governance. Firstly, it would establish a binding legal obligation on all states to mitigate climate change, irrespective of their participation in specific treaties like the Paris Agreement. This could lead to more comprehensive and coordinated efforts worldwide to reduce greenhouse gas emissions. However, the effectiveness of such a ruling would depend on several factors. One critical aspect is the enforcement mechanism. Unlike treaty obligations, which often come with monitoring and compliance mechanisms, customary obligations rely more on the willingness of states to adhere to them. Therefore, while the ruling may establish a legal duty, its practical impact could be limited if states fail to implement adequate measures for compliance. Additionally, the Court's recognition of mitigation obligation as a CIL rule could prompt discussions on liability and compensation for climate-related damages. States failing to meet their obligations might face legal claims from affected parties, potentially leading to contentious legal battles and disputes over responsibility. Overall, while recognizing mitigation obligation as a rule of customary international law could provide a stronger legal basis for climate action, its effectiveness would hinge on robust enforcement mechanisms, global cooperation, and addressing the concerns of all stakeholders, including states, businesses, and communities.

6. Challenges of Mitigation Obligation as a Rule of CIL

One of the key drawbacks of customary international law (CIL) as a primary legal source is its vagueness, making it challenging to pinpoint its precise content.[89] Climate change is undoubtedly a transboundary harm, but it differs from other harms for some reasons. The impact of climate change is complex: (a) it doesn't stem from one single action, but from various activities; (b) it involves the actions of numerous states, not just one; (c) it results from ongoing activities spanning decades, rather than isolated incidents.[90] For instance, in the case of *Sheila Watt-Cloutier et al v United States,*[91] the Inter American Commission of Human Rights rejected the petition because the petitioners couldn't specify which actions by the US directly violated human rights due to its failure to adapt mitigation policies.[92]

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[87] 'UNGA Resolution (A/RES/77/276) on Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change' <https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf?token=fQmo9gkvKq3NWsZOfo&fe=true> accessed 5 August 2024.

[88] ibid.

[89] Voigt (n 60) 9.

[90] Simlinger and Mayer (n 31) 188.

[91] See, 'Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States' (*Climate Change Litigation*) <http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/> accessed 21 January 2023.

[92] Ivano Alogna and Eleanor Clifford, 'Climate Change Litigation: Comparative and International Perspectives' British Institute of International and Comparative Law 14.

Despite states consistently voicing their dedication to mitigation efforts, their actions often fall short of meeting targets and achieving mitigation goals.[93] According to Mayer, this inconsistency between states' actions and their stated mitigation objectives poses a challenge in establishing a Customary International Law obligation, which necessitates consistent practices aligned with set targets.[94]

Determining and enforcing the specific mitigation responsibilities of each state under Customary International Law is highly challenging. Scientifically assessing the emissions reduction required from individual states and assigning accountability for such actions is complex, especially given the absence of scientific tools to establish an overall mitigation target. In this regard, Mayer rightly observes,

> *"the absence of comprehensive agreements on the timing of mitigation action and on the sharing of efforts among States makes it impossible to determine precisely what achieving these targets would require from an individual State at a given time".*[95]

The way climate change happens, coming from lots of different things and involving many countries over many years, makes it hard to set clear rules of CIL. Even though States are trying hard to mitigate climate change, the state practices are not being consistent which makes it difficult to reach the goals for reducing the bad effects of climate change. This also makes it tough to make sure every state tries to mitigate climate change with a sense of obligation (opinion juris) like they are bound to do so.

Conclusion

This paper has documented firstly the growing state practice and *opinio juris* in respect of mitigation obligation and applicability of CIL principle of 'no-harm' obligation in respect of transboundary GHG emissions. It is now evident that the jurisprudence of mitigation obligation is being developed rapidly throughout the globe. No State is declining or objecting persistently to the development. Owing to some ambiguity and imprecision in mitigation obligation, relationship with the activities of States with possible transboundary harm, quantifiability of obligation etc., it cannot be emphasized at present that climate change mitigation is a CIL`. A policy report shows that more than 2200 legislations and policies are adopted by States and more than 1800 cases are pending before domestic courts throughout the world.[96] It states the relevance of extending the 'no-harm' rule that one state cannot carry out within its territory that has the threat to cause damages to another territory and the uniform acceptance of some climate treaties like the Paris Agreement. Climate change is one of the burning agendas in global diplomacy. The State's behaviours make us optimistic that climate change mitigation is an emerging CIL obligation. It may help, on the one hand, the climate-vulnerable countries to get remedies from the largest emitter countries; and will create a strong psychological impact among States that they cannot evade the mitigation obligation arbitrary. Eventually, this principle may save the international community from the threat of the adverse impact of climate change.

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[93] 'Countries' (*Climate Action Tracker*) <https://climateactiontracker.org/countries/> accessed 21 January 2023. This website mentioned the mitigation actions of different countries. It is evident from the report that there is no country which action to mitigate climate change is sufficient.

[94] Benoit Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change' (2021) 33 Journal of Environmental Law 585.

[95] ibid.

[96] Setzer and Higham (n 21).

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The Principles of Tort Laws and its Possible Enforceability in the Present Context of Bangladesh: A Critical Study with Case Reference

Md. Gajiur Rahman*

Abstract: *The law of torts is related with the rights, duties & liabilities of every man in the society. It is an instrument for making the people aware about their reasonable behavior & reciprocal interest in everyday life. This branch of law teaches the human being how to enjoy the rights through respecting other's rights & performing own duties properly. There are different kinds of rights namely social, moral, religious, legal rights & duties which are considered under the law of torts. All kinds of rights are not possible to be enforced because of the differences of moral & religious rights among various religions. The law of tort emphasizes to provide damages in case of violation of legal rights as well as social rights to some extent behind which state recognition is present indirectly. The enforceability of the law of tort depends upon the social values & judicial recognition. Bangladesh as a developing country has not recognized the law of tort formally but there is scope to apply the principles of tort law in different situations under some existing legislations. The purpose of the article is to clarify the principles of tort laws and determine criteria for tracing out duties, liabilities & enforceable rights. Moreover, emphasis is given on highlight opportunity for applying & enforcing tort principles and laws in present legal system of Bangladesh.*

Keywords: *Tort, Principles, Laws, Enforceability, and Bangladesh*

1. Introduction

Tort is a civil wrongs which are committed not only against an individual but also legal entities. It is not the wrings against the state. Tort law protects the legal rights and interest that are recognized and protected by statutory law. The nature of interest may be trivial or large one. Touching a person in anger with hand without permission, throwing water upon another, injuring the reputation of a person with malice, entering into the land of other without permission are examples of tort. The word 'tort' has got its place from the Latin word "*tortum*". The term implies twisted or tortious conduct. In Roman law, *delict* was popular in the form of tort.[1] The law of tort is based on a doctrine "*alterum non leadere*" which means not to harm others by words & conduct. Everyman has the right to way but it is his duty not to walk through the middle of highway in where if any accident is occurred driver of vehicle can't be held liable for the injury. Again, driver has the duty not to drive recklessly. So,the law of tort is concerned with the internal instinct of human thinking that must be necessary, reasonable, adequate, safe, sufficient, fit, proper, practicable, appropriate, beneficial, competent, convenient, non-detrimental, expedient, equitable, fair etc. However, primarily there is found a doctrine in England which is "*Ubi remedium ibi jus"* meaning where there is remedy, there is a right. Because, remedy is confined to a list called writs. After the amendments in the law in England, the present situation is that the court award remedies against the violation of legal following the maxim *Ubi jus ibi remedium* that means every right is accompanied by remedies.[2] Moreover, the tort laws are primarily developed through judicial decision. In England, court generally took a stand towards recognizing of an action in new situations or even remedying new types of torts with keeping pace of demand of time.[3] So, the law of tort is being developed with the new problems arising in different circumstances. In modern times, it

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[1] Noshirvan H Jhabvala, *The Law of Torts*, (25th edition, C. Jamnadas& Co., 2016) pp.2

[2] Ramesh kumar Bangia, *Law of Torts*, (15th edition, Allhabah law agency, 2012) pp 1

[3] Ibid

is a crying need to insert principles of tort law into the some native penal laws also for proper justice. The reason is that only punishment to the accused can't satisfy the grievances of the victim who suffer from financial loss caused in the offences.

2. Principles of the Law of Tort

The basic principle of the law of tort is to provide pecuniary compensation to the victims which are undetermined. Awarding compensation varies according to the nature of every wrong committed by the wrong doer. The law of tort provides remedy to the plaintiff for not performing legal duty properly. Torts are resulted from an *act or commission* or *omission of activities attributed to* the defendant legally and the plaintiff has to prove damage for holding fault of the defendant.

2.1 Act or Omission

Act is the commission of certain things which is prohibited by law to be performed. This act amounts to civil wrongs. Physical performance of an act need not be there to commit tort. Even words intended to injury others reputation is enough for such wrong. Omission is arisen refraining from doing a lawful act which a person is legally bound to do. Vicarious liability may be created from this act or omission if there remains the relationship like servant & master.

The legal liability arising from the commission and omission can be described in different stages. These stages are: firstly act or omission which turns into causation, secondly, there happens fault and finally if there causes damage, the legal liability is established. An illustration a motor accident can be depicted to clarify the concept.

Example: Mr. X drives his car recklessly and hits Y, a pedestrian, resulting severe injury. Here, act or commission is driving the car by X. there happens damage due to such act. The damage was as a result of unauthorized driving, i.e. X's fault. At the end, law imposes legal liability that is liability for negligence upon X.

2.2 Legal Damage

The plaintiff has to prove legal damage for the successful action for tort. It has to be proved that there has been violation of legal rights or breach of legal duty vested in the plaintiff. In case of legal damage, it is immaterial whether there has been any loss or not. Two maxims can be explained with case reference to clarify the legal damage more effectively. These are the followings:

2.2.1 Injuria Sine Damnum

Here *injuria* means legal damage where sine implies except & *damnum* includes actual damage. Thus, the maxim means legal damage without actual damage or in another sense *actionable per se* meaning remedy without the proof of actual damage. The facts of a case are that the plaintiff was a qualified voter went to cast vote in a parliamentary election. He was refused by the returning officer to cast vote but the candidate to whom he wanted to provide vote was duly elected. Later on, that voter filed a suit against the returning officer claiming damages. Returning officer based on an argument that there happened no actual damage court held that returning officer is liable for legal damage that is violating voting right though there happens no actual damage.[4] The law of torts provides remedy to the legal damage rather than actual damage only.

[4] *Ashby Vs White*, 2 Lord Raym, (1703) 938.

2.2.2 Damnum Sine Injuria

It includes actual damage without legal damage. The facts in a case are that the defendant ran a rival school and made competition with the plaintiff. Defendant reduced tuition fees from 40 pence to 12 pence per scholar per quarter. As a result, students from plaintiffs school got admitted to the defendants school for availing the opportunity of less tuition fees. Consequently, plaintiff's school suffered financial loss and filed an action claiming damages. Court held that the plaintiff is entitled to no remedy for the actual loss as there happened no legal damage. Fair competition in trade and commerce is justified by law. Hankford J. said:

> *"Damnum may be abseque injuria, as if I have a mill & another mill is set up by my neighbor as a matter of competition. I have no remedy but if that neighbor makes any nuisance or acts in malice otherwise I shall have such action as the law gives."*[5]

2.2.3 Direct Consequences

For the action of tort, there must be proved the connection of cause & consequences of every act. The maxim *In Jure non remota causased proxima spectator* is referable in this regard. It means remote consequences of any cause are not recognized in the law of torts. In addition to that the damage must be natural cause of the defendant's act. The defendant threw a lighted squib at A. To protect himself, A threw it away & it fell on B. B did the same, with the result that it exploded & blinded the plaintiff. Court held that the plaintiff was entitled to remedy.[6] Here, in every case the result of the throwing would be the same, so, the defendant who threw it firstly was held liable. Again, when the consequences of an act can't be foreseen, the damage is too remote. A man is held liable for the direct or immediate result of an act. There must have a connection between cause and consequences. For an example, "A "hits B upon his head & "B" gets simple injury in consequence. "B" shows negligence in taking proper treatment for such hurt. After few days, the simple injury turns into cancer & B dies. Here "A" is liable only for the simple hurt not for the death of "B" as the consequence of simple hurt upon head is not death. There are two views of the remoteness of damages. These are:

(I) if a reasonable man is not able to foresee them, consequences will be too remote.[7]

(II) Once the defendant is liable for tort he is liable for all its direct consequences,

The second view was adopted by the court of Appeal in another case[8] the facts of the case are as follows: A hired ship under a charter loaded a quantity of benzene among other cargo. During the voyage, the tins containing benzene leaked, & thus there was a lot of petrol vapor in the hold. At a port of call, the servants of the charterer negligently let a plank drop into the hold while they were shifting the cargo. A rush of flame at once followed, & the ship was totally destroyed. The question was whether the test of reasonable man being able to foresee or the direct consequences test was to be applied. The court of appeal adopted the direct consequences test & held the defendants liable for the loss of the ship. But the principle adopted in the *Re polemis* case was not followed in the *Wagon Mound case*.[9] Two remarkable principles are recognized in the case. These are:

(I) the only test applicable was foreseeability of the damage complained of, which in this case the damage was caused by fire.

(II) The defendants could not be held liable for unforeseeable damage.

So, not only direct consequences but also foreseeability of the damage by a reasonable person is considered.

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[5] *Gloucester Grammar School*, Y.B. Hill 11 Hen(1410)4 of 47, p.21

[6] *Scott vs. Sheperd*, 96 Eng.2 W.B.I.(1773) 892

[7] *Rigby Vs. Hewitt*, 5Ex. (1850)240

[8] *Re Polemis & furness Withy & Co. Ltd.* 3 k.B. (1921) 577

[9] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*, 2 W.L.R.A.C. (1961)388

2.2.4 Legal Relation

There must be proved legal relationship between plaintiff & defendant for the action of tort. For an example, a doctor has the duty to provide proper treatment to the patient & the patient has the right to get medical treatment from the doctor. In the same way, there is a legal relationship between a client & advocate, between a public officer & a citizen, between customer & manufacturer. So, rights & duties entirely depend upon the existing legal relation. In a case, a customer purchased a Ginger beer from a retailer for his friend who was appellant. The bottle of ginger beer was made of opaque glass having metallic cap. So, it is not possible to see the contents into the bottle. Even, there was no instruction of consuming that beer upon the label. The appellant consumed directly that beer mixed with decomposed body of snail. Later on, she suffered in health seriously and filed suit against the manufacturer praying for damages. The defendant pleaded defence with a statement that it did not owe any duty of care to the plaintiff. The House of Lords held that Manufacturer Company had the duty of care that the container did not have any noxious materials or providing proper instructions. So, that company was held liable for violating duty of care. Lord Atkin said whether a person has legal duty or not depend upon particular relations that can't be exhaustively determined and depends upon particular facts and circumstances. He also propounded that "one should take rational care to avoid injurious acts or omissions that can be foreseen to injure your neighbor." So, it is clear that whether there are legal rights, duties & liabilities of a person in the society, entirely depends upon the remaining legal relation between plaintiff & defendant. A police officer is not liable for the maltreatment of a patient but he can be liable for the violation of public peace & security.

2.2.5 Legal Remedy

A wrong without legal remedy is not a wrong or offence at all in the eye of law. One of the principles of law of torts is to provide pecuniary compensations to the civil injuries. All civil injuries are not torts. The injuries which are not exclusively civil wrongs & for which unliquidated damages is provided are categorized as torts. No doubts, the law of torts also recognizes other remedies, like injunction, specific performance of contract, specific restitution of property etc.

3. Possible Areas of Enforcement of Law of Torts in Bangladesh

3.1 Medical Negligence

Under the Constitutional provisions of Bangladesh every citizen has the enjoyment of health rights. The provision of basic necessity with regard to medical care is inserted as fundamental principle of state policy.[10] It is very unfortunate that the negligence in medical sector has been a common scenario in Bangladesh. Laws relating to negligence by the doctors and others concerned are scattered. The remedies awarded to victims of medical negligence are not satisfactory as there lacking proper compensation package and punishment system into existing statutory laws. So, it is the demand of the time to legislate exhaustive special laws to ensure medical justice. Does sentencing only to the wrong doer reduce the grievances of victims? Does fixed compensation package in laws ensure justice? The answer is not positive. The principles of tort laws can be a better choice to be applied in cases to ensure justice in true sense. In Bangladesh, criminal litigation against medical negligence is filed following Penal Code 1860. Liability arises from the negligence of doctors or others concerned causing death of patient for which punishment may extend 10 years or with fine or with both.[11] Again, if any one causes death any patient by any rash or negligent act which does not amount to

[10] The Constitution of the People's Republic of Bangladesh, Art. 15.
[11] The Penal Code, 1860, section 304 (Act No. XLV of 1860).

culpable homicide, he shall be punished with five years' imprisonment along with fine.[12] In an incident, Asma who was a victim suffered severe injury due to improper treatment. Her mother filed a suit on the basis of medical negligence against doctors under Section 307 which implies Attempt to murder and under section 326 of penal code which includes voluntarily causing grievous hurt by dangerous weapons.[13] Moreover, in case a doctor, negligently or rashly, apply any poisonous substances to patient which endanger to human life , punishment may extents to six months, or with fine, which may extend to one thousand taka, or with both.[14]A doctor can be held liable for voluntary causing hurt for such punishment which may extend to one year, or with fine, which may extend to one thousand Taka, or with both.[15] Doctors can also be liable for causing voluntary grievous hurt for such punishment which may extend to seven years and shall also be liable to fine.[16]

Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be liable to pay compensation under civil law at the same time. Moreover, many cases have been filed under different section of Penal Code. For example, in 3rd September 2006, a case has been filed in Mohammad pure police station under section 406/420/170/326/109 of the Penal Code 1860.[17] There will be a Medical and Dental Council (BMDC) which is a statutory body having legal entity. It can sue and be sued in its own name.[18] The BMDC aims at a maintaining a resister of all medical practitioners in Bangladesh as well as encouraging and upholding standards of practice of medical practitioners and examining complaints made against practitioners and taking disciplinary and punitive actions. Bangladesh Medical and Dental Council narrate its functions, procedures and disciplinary jurisdiction in their Medical Ethics.[19] If any doctors or other medical Practitioners are convicted with indecent behavior, theft, forgery, fraud, or assault, they will liable be liable for disciplinary action by the council.[20] The council is silent about the remedies of victims of medical malpractice. It is worthy to mention that insertion of the principles of tort laws into the BMDC Act 2010 can be a better choice to control malpractice.

3.2 Road Accidents

Road accidents are the common scenario in Bangladesh. The numbers of accidents are increasing in an alarming rate every year. The data collected from a time span of 2015 to 2022 shows a various types of reported data. Nirapad Sarak Chai claims on reports that in the past eight years, there happens 32,195 road accidents in where 43,220 passengers lost their lives, and 54,381 got injured. As per Save the Road which makes a report including 30,509 road accidents causing death deaths of 40,523 people, wherein 182,308 individual got injured. According to the report of Bangladesh Jatri Kalyan Samity', during the last 7 years, 44,171 road accidents have snatched away lives of 61,656 individuals and injured 112,753 people. The Road Safety Foundation makes also a reports that during previous 4 years, 21,628 road accidents have taken lives of 24,639 people and injured 34,565.[21]The above mentioned report is an issue of major concern. It is a matter of regret that many people die due to the accident but the family of the victims doesn't get legitimate

[12] Ibid, section 304A.
[13] Akhter Jahan, *Medical Negligence; Law and Practice in Bangladesh,* (Ain O Salishi Kandro, 2008) 43.
[14] The Penal Code, Section 284 (Act No. XLV of 1860.
[15] Ibid, section 323.
[16] Ibid, section 325.
[17] n 13.
[18] The Bangladesh Medical and Dental Council Act 2010, Section 3.
[19] Ibid, section 5.
[20] Code of Medical Ethics: Guidelines of Bangladesh Medical and Dental Council (BMDC), Birdem Medical Journal, Vol. 4, No 1, January 2014.
[21] Mahfuz Sadi; Clouded 'Figures:Understanding Road Accidents in Bangladesh', *Dhaka Tribune* (Dhaka 11 July 2023<)https://www.dhakatribune.com/bangladesh/320155/clouded-figures-understanding-road-accidents-in Bangladesh>accessed on August 1, 2023.

compensation from the accused. Most of the accidents happened because of the negligence of the driver. The driver or the owner is exempted from giving compensation the individual victim. So, by applying the law of torts the victim can be compensated by the defendant.

3.3 Consumer's Right

Considering the constitutional mandate of ensuring citizen's right with regard to food, medical care,[22] prevention of consumption of poisonous drinks or other drugs not conducive to health,[23] the passing of consumer's Right Protection Act had been a government responsibility. The consumer rights promoting organizations and civil society have been raising their voice claiming a comprehensive consumer rights protection law for long. Finally, The Consumer Rights' Protection Act, 2009 was passed on 6th April 2009. The preamble of the Act aims at protecting the consumer rights and preventing anti-consumer right practices. Under the Act, there will be a National Consumers' Right Protection Council which shall perform function of monitoring director General (DG) of directorate, make policy, creating public awareness to protect consumer rights from the apex level.[24] For the prevention of anti-consumer right practice and disposal of complaints, The DG can take necessary action as he think expedient.[25] Moreover, that District Magistrate has been given same functions and powers and he can exercise such power and function without prior approval of DG.[26] In addition to the administrative actions, the Act includes civil and criminal remedies also. First class magistrate or metropolitan magistrate is empowered to try offences under this Act .Magistrate can impose unlimited fine.[27] A consumer can file civil suit to the joint district judge for damages which are assessable in consideration of money and the amount of damages will not be exceed five times of the amount assessed for the damage.[28] But a question can be raised that how much this Act protects consumer rights? No one can file a criminal case in first class magistrate court or a Metropolitan Magistrate against the offender directly under this Act. The victim of anti-consumer malpractice may make a complaint to the Director General or any officer empowered by him or a District Magistrate or any Executive Magistrate empowered by the District Magistrate.[29]Again, a consumer has to file complaint within 30 (thirty) days of arising the cause of action of any anti-consumer right practice to the Director General or any officer of the Directorate empowered.[30] In fact, in many cases, the effects of adulterated product can't be identified or traced out within 30 days' time span. Moreover, consumers are prevented to file case before the court directly which is a violation to right to access to justice smoothly. The civil court can award compensation up to a certain limit which causes injustice considering long term sufferings to the victims. So, the Act losses the status of comprehensiveness to some extent. The insertion of the principles of tort laws can add a new dimension to protect the rights of the consumers at all sphere.

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[22] Constitution of Bangladesh, article 15.
[23] Ibid, article 18.
[24] The Consumers' Right Protection Act, 2009, section 8.
[25] Ibid, section 21.
[26] Ibid, section 69.
[27] Ibid, section 57.
[28] Supra note 23, section 66.
[29] Ibid, section 71.
[30] Ibid, section 60.

3.4 Unlawful Arrest

Every person has the right to have his body protected from unlawful interference. So, unlawful arrest is a remedied issue in legal proceeding. If in any case, government in a country arrest a person illegally in the guise of legality for maintaining peace & security, victim needs to be compensated. If any person is arrested, he must be communicated with the ground of arrest and must have an opportunity to consult with legal practitioner for the purpose of getting defence.[31] Every arrestee in custody must be produced before the nearest magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate and such person shall not be detained in custody beyond the same period without the authority of magistrate.[32] The detention of an individual without procedural compliance of arrest is unlawful. But this constitutional guideline can be effective to prevent malice and unlawful arrest therefore by the implementation of the law of torts providing rational compensation to the victim by the defendant.

3.5 Wrong Done by Bureaucrats and Autonomous Bodies

Public and private service providers owe duty of care towards the citizens of the country. This duty of care depends upon the relationship between service provider and customer. A debtor has the duty towards creditors, manufacturer has the duty towards customer, and an advocate has the duty towards client. Similarly, government officials have the duty of care for the enjoyment of rights of people in a state. Every person in the service of the republic has a duty to strive at all times to serve the people. As a citizen, one has the constitutional duty also to maintain discipline, to perform public duties and to protect public property.[33] The law of torts emphasis on the reciprocal rights and duties of every person in all situations. Presently, people are getting sufferer by the wrongful acts of the bureaucracy, agencies, instrumentalities, and other bodies like, financial institutions, banks and other utility service providers etc. For example, the wrongdoings of bankers may cause actual or legal damage and may cause both actual and legal damage at the same time to a person. In every case, howsoever the damage is so trivial, the sufferer should be entitled to get compensation for unliquidated damages. In many cases, exemplary damages will be suitable against the willful. Arbitrary, unconstitutional and oppressive wrongdoings of bureaucrats and autonomous bodies to ensure public and private service. Immunity from the liability can't be given in the name of good faith clause where a wrongdoing causes damage to a person. If any person is affected or likely to be affected by any act done in good faith under this Act or any rules, for that reason no suit, prosecution or other legal proceedings shall lie against the Government, the Council, any member of the Council, the Directorate or any officer or employee of the Directorate.[34] The concept of tortuous offence is still unfamiliar owing to the lack of awareness in the society and modification of legal system. The compromise between doctors and patient or their relatives is a common scenario for suppressing medical negligence. In fact, we are suffering for lack of service from local bodies, utility providers, neighbors having administrative and political power connection, local ruffians etc. All these sufferings have been as part of our daily life without compensation. Judicial pronouncement applying tort principles is hardly found. In the above consideration, we must enact law of tort to improve the service of government, professionals, service providing agencies both in public and private sectors etc.

[31] Constitution of Bangladesh, clause 1 of article 33.
[32] Ibid, clause 2 of the article (33).
[33] Constitution of Bangladesh, article 21.
[34] The Consumers' Right Protection Act, 2009 section 7.

3.6 Educational Sectors

Bangladesh as a developing country is lagging behind for the lacking of proper educational policy & system creating a bit competitive scenario with others country in the present world. The government of Bangladesh has a constitutional mandate to ensure proper education to all citizens through effective educational policy. Trained and motivated citizens through adequate education system are very much necessary for establishing a society free from all types of exploitation. The application of tort laws for assessing the damage of students and holding educational institutions liable for not providing required teachings seems to be very abroad concept in the context of Bangladesh. The liability arising from professional negligence in education is not an absurd concept at all as tort laws provide remedies against professional negligence.

Most educational malpractice complaints are associated with losses arising out of human activities. Tort law aims at the adjustment of these losses providing equitable compensation to the affected persons. It is socially harmful conduct not to educate students according to specifically designed curriculum and preparing skillful resource persons. It is unreasonable and unjustified for which law of tort provides remedy. The cause of action arising from educational malpractices has not been generally recognized as remediable by the court.[35] The fear of judicial involvement in the daily implementation of educational policies is perhaps the primary public policy consideration relied upon by the courts in rejecting educational malpractice claims.[36] The judicial intervention into the educational malpractice should not be denied on the ground that it is against public policy. The true victims of educational malpractice clearly suffer measurable injuries affecting both real economic and social values.[37] In a broader sense, society at large suffers as a result of educational malpractice.[38] The highest public policy should be ensuring right to education in the county. So, the application of tort laws can be effective to achieve the right to education.

3.7 Environmental Sectors

The demand for environmental justice has been a global concern including Bangladesh. The environmental rights of the citizens are enforced by existing statutory laws, rules, regulations and policies. There is an environment court for the settlement of environment disputes under the Environment court Act 2010. Many writ petitions regarding environmental rights are heard and disposed by the supreme court of Bangladesh. There is no statutory law accompanied with the principles of tort laws. However, the law of tort is a traditional accepted tool for the remedy of environmental harm in different parts of the world other than Bangladesh. In fact, the lack of identifying certain harms to environmental interests as well as remedial measures of the common law tort system has been a reason for making environmental statute and regulations over the last 7 decades.[39] In spite of that theories of tort laws have been successfully applied to remedy various types of harm to the environment in many countries. The remedy is available where the damage is caused to a well-defined area or class of person or a specific person. Moreover, the harm must be direct one to an individual or legal entity to maintain a tort suit.[40] For example, courts have historically viewed with great skepticism claims brought by environmentalist groups or taxpayers solely alleging harm to the

[35] *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981).
[36] Educational Malpractice: Can The Judiciary Remedy The Growing Problem Of Functional Illiteracy? (1979), 13 Suffolk U.L. Rev. 27, 37.
[37] *In Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 818, 131, Cal. Rptr. 854, 856 (1976).
[38] President Reagan stated: "If America is to offer greater economic opportunity to her citizens, if she's to defend our freedom, democracy and keep the peace, then our children will need wisdom, courage, and strength - virtues beyond their reach without education."
[39] Elizabeth Fisher et al, Maturity and Methodology: Starting a Debate About Environmental Law Scholarship, (2009) 21 J. ENVTL. L. 213, 219.
[40] Albert C. Lin, the Unifying Role of Harm in Environmental Law, 2006 WIS. L.REV. 897, 915 .

environment, often pointing to failure to satisfy standing or direct injury requirements.[41]The law of torts that is significantly used to remedy alleged environmental harm are based on law of negligence and nuisance.[42]
At present, both public and private nuisance involves an "unreasonable interference" with another's land and personal discomfort. Public nuisance is unreasonable interference causing injury against public right. The nature of interference includes polluting the air, water, soil and sound etc. which causes public discomfort. A public nuisance action may be initiated by public authorities, or by private citizens who have suffered a special damage originated from public nuisance. On the other hand, Private nuisance is unreasonable interference with private right causing damage to land, proper and creating personal discomfort also. The violation of possessory rights such as obstructing neighbors' right to air and light, creating irrational noise, emitting noxious gas, conducting activities that spread germs etc. are the implication of the violation of environmental interest.[43] One of the remedies is available which is generally known as tort damages. Moreover, negligence requires the breach of a duty of care and a duty may be created where a party creates an unreasonable risk of harm to another. The law of negligence can potentially reach those environmental harms that do not implicate a possessory interest in the use and enjoyment of land. A negligence claim may be brought by any party directly injured by another's failure to exercise reasonable care under the circumstances.[44] Examples of negligence actions with an environmental effect might include physical injuries sustained from exposure to hazardous substances released into the environment, the failure to adequately reduce or warn of such serious risks of injury, or perhaps the failure to promptly remediate an acknowledged harm to the environment, for example in the aftermath of an oil spill or a release of toxic chemicals following a train derailment.[45]

4. The Feasibility of Enforcing Tort Laws in Bangladesh under Existing laws

The principles of law of torts have not been recognized formally into the statutory laws of Bangladesh. But, there is an opportunity to apply tort principle for ensuring justice. These are the followings:

4.1 Environment Laws

The existing environmental laws of Bangladesh include several provisions for awarding compensations to the victims. The liquidated damages according to the law can't bring justice against actual damage in true sense. In some cases, there need to insert the provision of applying mind to the facts and circumstances following tort law principles and providing unliquidated damages.

4.1.1 The Bangladesh Environment Court (Amendment) Act 2010

Bangladesh voted the actions plans which were included at Agenda 21 that appeared as an outcome of the united nation conference on Environment and Development (UNCED) 1992. In pursuance of this Agenda, the first Environment Court Act was passed in 2000. However, to meet the challenge of time and to ensure the proper application of environmental laws of Bangladesh effectively, the Environment Court Act, 2000 has been repealed in 2010 and the new Environment Court Act, 2010 has been passed with the object of establishing environmental courts for speedy trial of environmental offences and matters incidental thereto. One of the characteristics of this court is to provide compensation to the victim considering relevant facts & circumstances. It is worthy to mention that if the principles of torts law are applied for providing

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[41] *Lujan v. Defenders of Wildlife*, 504 U.S. 555.
[42] Palma Joy Strand, The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation, (1983) 35 STAN. L. REV. 575, 581.
[43] *Boomer v. Atl.* Cement Co., 257 N.E.2d 870 (N.Y. 1970) .
[44] Dan Byron. Dobbs, *The Law of Torts* (1st edition, west Group, 12 Feb, 2000) p 14.
[45] *In re the Exxon Valdez*, 239 F.3d 985, 987 (9th Cir. 2001).

compensation to the aggrieved person, it will open a new dimension of justice. Under this Act, special magistrate can impose penalty or can order or decree of compensation in appropriate case.[46] For the purpose of getting damages under this Act, one has to file suit directly to the Environment court directly.[47] The Environment court can provide compensation to the victims for the offences mentioned in the environment laws.[48] The environment court is considered as civil court during conducting trial of suits relating to compensations & shall enjoy all power of civil courts.[49]

4.1.2 The Bangladesh Environment Conservation (Amendment) Act 2010

Any aggrieved person, group of person, general people or director general on their behalf can file suit to the environment court for the purpose of getting damages.[50] Under this Act court can impose fine which may extend up to ten lack whatever the nature of environmental damage or tort.[51]

4.1.3 Fatal Accident Act 1885

In many cases, it is found that the whole family depends upon the earning of a person. That family faces irreparable loses due to the incapability or death of only earning member of the family resulting from an accident. If a wrongdoer is given punishment or imposed fine for the wrongful act, default or negligence, it cannot bring any benefit to the dependent victim family in the true sense. Even a determinate compensation package is not enough in ensuring justice. In Bangladesh, family of a person can file suit for compensation for the loss arising from death of that person. The legal provision includes that any administrator, executor and representative of the deceased person can file compensation suit for the benefit of wife, husband, child or parents. The court can give such damages which are proportionate to the loss suffered by the victims respectively. [52] Here, Court has the opportunity to assess the present loss as well as future maintenance issue upon facts and circumstances before giving compensation to the victims.

4.1.4 The Consumer's Right Protection Act 2009

The Consumer Protection Act 2009 has been enacted to protect consumer rights against anti-consumer rights practices. A consumer can file both civil and criminal action against the manufacturer or service provider for their anti-consumer rights practices. The Civil Court can, after considering plaint, defence, evidence and other circumstance, give compensation not exceeding five times of the amount assessed for the damage.[53] The criminal court can impose punishment upon the service provider for negligent, careless and irresponsible acts which cause damage to money, health and life of service receiver. This punishment may extend to three years or with fine not exceeding two lack or both.[54] The financial penalty ranges from fifty thousand taka to two lacks as per the gravity of the offence under the Act. However, this Act lacks the remedies against the long term effects of adulterated or noxious food into the human body. So, the principles of tort laws can be inserted into the Consumer related laws for assessing actual damage and ensuring justice.

4.1.5 The Code of Civil Procedure 1908

Attorney General or two or more persons after obtaining consent of Attorney General can file suit for injunction or other relief appropriate to the circumstance on the ground of public nuisance. The provision of

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[46] The Environment Court Act 2010, sec. 6 (2).
[47] Ibid, section 7 (2).
[48] Ibid, section, 7 (3).
[49] Ibid, sec14 (6).
[50] The Environment Conservation Act 1995, section. 17.
[51] Ibid, section, 15 (1).
[52] The Fatal Accident Act 1885, section 1.
[53] Consumer Act, section 66.
[54] Ibid, section 53.

public nuisance does not limit the right of suit that may exist independently.[55] Any special damage of a person arising from public nuisance is remedied by filing individual suit also. In that case, court can determine the amount of compensation considering particular facts and circumstances as well as other relief as it thinks fit. So, court can apply tort laws following the provision of nuisance and inherent power of the court in where court can give such order as may be necessary.[56]

4.1.6 Penal Code 1860

Penal Code is criminal laws which define offences and includes penalties for the commission of crimes. According to this code, "Injury" means any kind of harm to reputation, body, mind or property.[57] If any person causes injury or damage or creates annoyance to the enjoyment of public rights, he will be liable for public nuisance and can be exempted on the ground that there are some conveniences or advantages.[58] The punishment of public nuisance is fine which may extend two hundred taka is not justified in the present context.[59] Negligent or rash driving of vehicles may cause hurt or injury or endanger human life in many times. The imprisonment which may extend to three years and the fine which may extend five thousand Taka with subject to minimum one thousand Taka imposed on the offender may not bring proper justice for the victim in the true sense.[60] Moreover, if anyone, by his rash or negligent driving causes the death which does not amount to culpable homicide shall be punished with imprisonment that may extend to five years or fine or with both.[61]In above mentioned penal provisions, the principles of tort laws can be applied to assess the actual damage or grievance as a matter of giving proper remedy.

4.1.7 Labor Act 2006

A Labor Court is considered as civil court having same power vested under the Code of Civil procedure 1908. The court can adjudicate and determine any matter or dispute other than offences.[62] If a worker gets injured arising from an accident during working, he can apply before the labor court for compensation against the employer.[63] If a worker dies in course of employment, he is entitled to get two lac taka as compensation.[64] In case of permanent total disablement, a worker is entitled to two lac fifty thousand as compensation.[65] For temporary disablement, compensation is awarded for the period of disablement or one year which one is shorter. Such compensation for the first 2 (two) months is at the rate of full monthly wages and for the next 2 (two) months at the rate of two thirds of the monthly wages and for the subsequent months at the rate of half of monthly wages. But in no cases, such period shall exceed 2 (two) years.[66] So, the Labor court possessing the civil court status can have the opportunity to apply tort laws if the principles of tort laws are inserted into Labor Act.

[55] The Code of Civil Procedure 1908, section 91.
[56] Ibid, section 151.
[57] Penal Code 1860, section 44.
[58] Ibid, section 268.
[59] Ibid, section 290.
[60] Ibid, section 279.
[61] Ibid, section 304A.
[62] Bangladesh Labor Act 2006, section 216 (XLII of 2006).
[63] Ibid, section 150 (XLII of 2006).
[64] Ibid, Section 151 (Second column of fifth schedule).
[65] Ibid, (Third column of fifth schedule).
[66] Ibid, (Fourth column of fifth schedule).

Conclusion

The application of tort laws depends upon the social perspective of a country. It is very difficult but not impossible for the developing country like Bangladesh to implement the law of torts, as the provisions of tort laws includes every social & legal wrong committed in the society. It is immaterial to consider the gravity of an injury done by the wrongdoer. Although, lots of offences are tried summarily by the small causes courts, village court & through arbitration proceedings but a considerable amount of wrongs remains remedied due to the peculiar nature of that wrongs. However, the law of torts provides remedies in the way of pecuniary compensation which can be applied both to civil & criminal matters in certain areas for the proper administration of justice. This branch of laws creates social awareness with regard to rights, duties, and liabilities of every man as well as provides logical & sufficient remedy considering every facts & circumstances of every case. If the provisions of these laws are abided by the people, it will bring unity & solidarity in the society. The more a state recognizes & enforces the legal rights of an individual from cradle to grave properly, the more is the presumption of establishment of justice there. There are many countries like India which has not codified the law of torts but recognized it considerably. Following the instances of India, the judges and the lawyers can play their contribution for the initial growth of the law of Torts in Bangladesh. So, it is perceived that by sorting out the relevant sectors & provisions of law in where the principles of tort laws can be applied, we can add a new dimension to the tort litigation in Bangladesh.

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Gaps and Challenges in Vital Environmental Laws in Bangladesh: Towards Effective Reform

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Abstract: *Bangladesh has so many domestic legal and policy tools related to environmental issues in operation that directly or indirectly address different facets of managing the environment, natural resources, and ecosystems. The country stands as a nation that faces the highest possible vulnerability to environmental degradation and climate change impacts globally. Bangladesh has environmental laws to deal with these core issues, yet most of these laws fall short of their goals because of multiple defects. This study will highlight the key provisions of vital environmental laws of Bangladesh, identify the defects in those environmental laws, and recommend reforms to ensure environmental sustainability, justice, and proper implementation of these laws. The study will emphasize the critical need for change to improve efficacy of these laws, stressing the significance of unambiguous legal requirements, efficient institutional frameworks, and inclusive public participation. By fixing these serious defects, Bangladesh may its legal system to tackle environmental issues more effectively and advance sustainable growth.*

Keywords: *Environmental Law, Challenges, Reformation, and Bangladesh.*

1. Introduction

Bangladesh is a very vulnerable country with significant environmental issues that encompass pollution, deforestation and climate change. Although so many laws have been adopted to conserve the environment, such as Bangladesh Environment Conservation Act, 1995, Environment Court Act, 2010 and Bangladesh Biodiversity Act, 2017 and so on, they are very much defective. These deficiencies obstruct the operations of environmental laws. This study aims to analyze and identify these deficiencies and recommend reforms for sustainable environmental protection and justice for current and future generations. The study aims to address the shortcomings of vital environmental laws of Bangladesh by identifying the flaws, problems, and issues that hinder the successful application of these laws. The shortcomings are flowing, though there exist over 200 domestic legal and policy tools, about 180 of which are related to environmental regulations.[1] The study will focus on five vital environmental laws in Bangladesh to address these issues and promote sustainable development goals.

The main objectives of the study are-

a. to highlight the key features of vital environmental laws of Bangladesh,
b. pointing out the shortcomings and limitations in those laws, and
c. suggesting reforms to guarantee implementation, environmental justice and sustainability.

This study follows a qualitative research methodology to critically analyze defects in 5 vital environmental laws of Bangladesh and recommend reforms. It relies on both primary and secondary data. Primary data includes acts, rules, and case laws related to environmental governance in Bangladesh. The key laws

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[1] Bahreen Khan, 'Efficacy & Implementation Gaps in the "Core Environmental Laws" of Bangladesh: An Overview' (2022) 33(1) Dhaka University Law Journal 73

examined here are the Bangladesh Environment Conservation Act 1995, the Environment Court Act 2010, the Bangladesh Biodiversity Act 2017, etc. Secondary data includes journals, books, newspaper articles, and online resources. The resources provide theoretical insight along with comparative perspectives, etc., regarding the effectiveness and limitations of environmental laws in Bangladesh.

The study follows a legal analytical framework that includes systematic interpretation, comparison, institutional mechanisms and so on. The analysis adopts following steps-

- ✓ Doctrinal: It examines the text, objective, and scope of the selected 5 acts to identify the provisions.
- ✓ Comparison: In some cases, it compares Bangladesh's laws with international environmental standards and practices.
- ✓ Identification of Gaps: It shows the inconsistencies, flaws, and enforcement challenges through a critical analysis of these laws.
- ✓ Evolution of Implementation: It reviews the reports, institutional actions to trace how far they are enforced.
- ✓ Recommendation of Reforms: Based on the findings, it suggests some effective reforms to ensure environmental justice and sustainability.

Five important environmental acts of Bangladesh ware covered in this study. The chosen environmental acts are deemed as vital fundamentals of Bangladesh's environmental governance. The Bangladesh Environment Conservation Act, 1995 (BECA 1995) forms the mainstay of environmental laws in Bangladesh. It gives the legal framework of the pollution control, environmental clearance and ecosystem conservation. The Act introduces the Department of Environment (DoE) and confines it with the authority to control the industrial operations, which makes it the most important tool of environmental regulation. The Environment Court Act, 2010 plays the main role in environmental justice. It establishes specialized courts that deal with environmental offences and disputes effectively. It enhances the enforcement of other environmental laws as it offers a legal avenue to hold the culprits accountable and also ensures that the citizens have the right to a healthy environment. Since conventional brick kilns are still very much in use, The Brick Manufacturing and Brick Kilns Establishment Act, 2013 is a must to battle severe air pollution and to reduce the health threats coming from toxic emissions. It regulates the construction of kilns, promotes eco-friendly technology, and addresses one of the major sources of air pollution in urban areas of Bangladesh. The Bangladesh Biodiversity Act, 2017 becomes indispensable in the safeguarding of biological variety and ecologically sustainable consumption of nature's sources. By protecting species and habitats that are not only crucial for the country's ecological balance but also for the livelihood of the rural population, Bangladesh can meet its responsibilities under the Convention on Biological Diversity (CBD). The Marine Fisheries Act, 2020 is vital in the sustainable management of the marine area as the ocean is largely its foundation and the country is a coast state. It controls fishing methods and also prevents overuse of the resource and protects the marine ecology; thus, security of food, biodiversity and the coastal communities' economic sustainability are not compromised.

These acts address a wide and varied spectrum of environmental issues, encompassing both the general principles of conservation and legal implementation of the same as well as those directly related to environmental issues like air pollution, biodiversity loss and management of marine resources. Therefore these acts are selected for analysis.

2. Literature Review and Novelty of the Study

Bangladesh's environmental laws have evolved to address environmental issues, but their effectiveness is hampered by flaws, which are highlighted in the literature for their impact on environmental governance.

Examining the establishment and operation of the environment court, a study titled "*Establishment and Operation of the Environment Court in Bangladesh: An Analysis"* shows the jurisdiction, procedures and powers of the environment court, appeal against the decisions of the environment court, etc. The study discovers the drawbacks towards the environment court's efficient operation and provides recommendations.[2] Though it is a well-established procedural approach, it fails to attribute judicial failures to overarching institutional problems. It does not build upon the relationship by examining the relationship between the procedural faults in the Environment Court Act 2010 and the broader legal shortcomings.

The study *"Efficacy & Implementation Gaps in the "Core Environmental Laws" of Bangladesh: An Overview" ex*amines ten well-known laws in Bangladesh's environmental legal framework. Despite multilateral environmental agreements, the study finds significant gaps in implementation, coordination, and policy integration. The findings suggest repealing laws, recognizing additional environmental laws, and improving institutional capacity to address pollution and unregulated development for sustainability and environmental justice.[3] This study analyzed 7 Rules and 3 Acts. Here the main provisions and implementation gaps are presented together and in a concise form and the recommendations are not presented separately act by act. The study forms a context on how the state of environmental laws is disjointed, but fails to discuss recent or industry-specific legislation such as the Marine Fisheries Act 2020.

A study by Imtiaz Ahmed titled "*Bangladesh Biological Diversity Act 2017: An Appraisal"* mentions that governing mechanisms and benefit sharing have been accompanied by the new biodiversity law of Bangladesh that adds onto the existing conservation laws. This report evaluates that framework and comes up with policy proposal to avail somewhat differently the new law to international biodiversity standards. The study shows the salient features, objectives of the Bangladesh Biodiversity Act 2017, equitable distribution of advantages resulting from genetic or biological resources, Biodiversity Management and Surveillance Committees, Groups, Societies etc., and other remarkable developments in the Act. It determines the legal and practical challenges to implement the Biodiversity Act.[4] The strength of this analysis lies in its alignment of domestic law with international biodiversity standards. Nonetheless, it focuses mainly on one specific statute, without situating it in relation to other environmental laws. The study does not identify overlapping challenges and coordination deficits.

Md. Zahid and Sanjida in the book of "*International Environmental Law with Bangladesh Perspective"* analyses international environmental law with environmental law in Bangladesh in their review of international environmental law in Bangladesh. They divide into different chapters and show different environmental laws of Bangladesh and also discover the problems of those laws in some cases.[5] This book looks into the interaction of international and domestic regulations, providing clues to the changing of Bangladesh's legal tools for international conformance. Though it is mainly descriptive, it also forms the basis for suggesting particular changes of the national environmental laws.

In the study titled *"Health effects of brick kiln operations: A study on the largest brick kiln cluster in Bangladesh"*, the health effects of operational brick kilns were examined by the researchers on one of the

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[2] Mohammad Irfan Aziz, 'Establishment and Operation of the Environment Court in Bangladesh: An Analysis' (2016) 01 International Multidisciplinary Journal of Environment 115.

[3] Bahreen Khan (n 1)

[4] Imtiaz Ahmed Sajal, 'Bangladesh Biological Diversity Act 2017: An Appraisal' (2018) 9 IUCNAEL EJournal 132. <https://www.researchgate.net/profile/ImtiazSajal/publication/328487714_Bangladesh_Biological_Diversity_Act_2017_An_Appraisal> accessed 1 January 2025.

[5] Md. Jahid Hossain Dolon and Sanjida Sarwar, *International Environmental Law with Bangladesh Perspective* (04 edn, UNIVERSITY PUBLICATIONS).

largest clusters of brick kilns in Bangladesh Gazipur district. It established that the large cluster of operations of the brick kiln is a major health hazard because of the pollutants such as carbon monoxide, sulfur dioxide, nitrogen oxides, and fine particulate matter. These contaminants cause breathing illnesses, skin ailments, eye irritation, and headaches. Those who worked less experienced higher rates of lung and skin illnesses and those who lived longer had higher chronic respiratory illness. The authors recommended environmentally friendly kilns that follow workplace safety measures and health education initiatives as protective measures that could reduce the harm of brick kiln pollution.[6] This empirical study convincingly illustrates the negative impact on the environment and public health due to the lack of enforcement of the Act, 2013. But it does not evaluate the legal shortcomings of the Act. The current research expands this debate by pinpointing the legislative and procedural shortcomings that lead to such health risks and suggesting, through legal reform, effective solutions.

While existing literature offers valuable insights, it remains fragmented, typically analyzing specific laws in isolation rather than providing a broad overview. A clear research gap exists regarding the in-depth analysis, determination of some major flaws, and providing recommendations to ensure environmental justice, sustainability, and to ensure the proper implementation of environmental laws in Bangladesh. This study examines the main provisions of five vital environmental acts in Bangladesh, show their key provisions, identify their shortcomings in depth, and recommend appropriate reforms to ensure justice, sustainability, and implementation of environmental laws. Furthermore, existing literature largely fails to compare domestic frameworks with international standards or global best practices. There is a clear lack of a systematic analysis of the impact of the latest legislative developments in particular sectors in a comprehensive way and much previous work has concentrated largely on the empirical or operational problem symptoms of regulatory failure, rather than the underlying statutory failures that cause them. This study directly addresses these gaps by using a multi-statute, comprehensive analytical framework to consider the core environmental laws together. This study compares structural inadequacies in the country with both contemporary international standards and best practices around the world, moving from the surface-level critique of symptoms to analyzing the underlying causes of the structural deficiencies through legislation. Finally, the present paper fills the existing gap by providing a legal analysis on an act-by-act basis alongside a specific statutory reform agenda that is grounded in institutional effectiveness and environmental justice.

3. Environmental Laws in Bangladesh

3.1 An Overview of Environmental Laws in Bangladesh

The existence of a good legal background and the provisions of the constitution indicate that Bangladesh is determined to conserve the environment. Article 18A of the Constitution reiterates the obligation of the state in the conservation of wildlife, wetland, forests, biodiversity and natural resources in the interest of the current and future generations. This basic commitment restates the importance of sustainable development as a national priority. Bangladesh enacted some sector-specific laws in order to counter various environmental problems. The Environment Conservation Act of 1995 and the Environment Conservation Rules of 1997, made under this Act, stand as the primary legislative tools of Bangladesh to prevent pollution and protect the environment. Associated environmental regulations set forth the rules and standards that are to be followed to control industry emissions, reduce pollution, and ensure compliance with environmental standards. An important piece of forestry legislation is the Forest Act of 1927 which marks the beginning of legal lexis in the conservation and forestry management. Similarly, Protection and Conservation of Fish Act of 1950, and

[6] Tanmoy Roy Tusher, Zisan Ashraf, and Shilpi Akter, 'Health Effects of Brick Kiln Operations: A Study on Largest Brick Kiln Cluster in Bangladesh' (2018) 8 South East Asia Journal of Public Health 32.

the Marine Fisheries Act of 2020, marks as regulations that promote best practices fishing and aquatic environment preservation for the fisheries sector.[7]

Having passed the Wildlife Conservation and Protection Act (2012) devoted to preserving the habitat and the Animal Welfare Act (2019) that forbids mistreating animals, the domestic and wild animals are now under the protection of the legislature. Flood safety is an essential component of the health of the population and it is under the Food Safety Act (2013) that assures people of the healthy and safe food. Some examples of laws to protect marine and inland water resources are the Territorial Water and Maritime Zones Act (1974) and the Bangladesh Water Act (2013). They give the government powers to make additional regulations, set up management structures and safeguard ecosystems, which are religious in nature. The Climate Change Trust Act, 2010 also created an adaptation and mitigation fund since the war against climate change must be addressed urgently. The Bangladesh Biodiversity Act, 2017 seeks to safeguard biodiversity and guarantee fair utilization of the same, which is also explicitly identified by the national strategy of the country. The amendment of the Environment Court Act, 2010 has brought about a formal structure of environmental governance and law enforcement to bring accountability and justice to environmental governance.[8]

3.2 Key Provisions of the Vital Environmental Laws in Bangladesh

3.2.1 The Bangladesh Environment Conservation Act, 1995

BECA has the mandate of monitoring environmental pollution, establishing environmental standards, and conserving natural resources. It establishes the Department of Environment (DoE) and grants it full operational power. The Director General executes BECA's goals without disclosure of qualifications. The Director General coordinates DoE activities with other agencies, advises on environmental accidents, regulates hazardous substance use, conducts environmental research, collects and disseminates environmental information, advises the government on pollution, assesses drinking water quality, warns industries to stop harmful activities, directs utility cuts, closes noncompliant establishments, designates ecologically critical areas, and creates restoration plans. Factors considered include plastic usage, vehicle pollution, hill cutting, hazardous waste management, ship breaking, and wetland filling.[9]

The BECA Act allows aggrieved individuals to appeal to the appellate authority within thirty days of notice, order, or direction. The court can impose penalties and fines on the offending party, with a maximum of 10 lac taka fine and 10 years in prison. A documented report from a Department Inspector or designated individual is required before a court can recognize an offense or accept a complaint for damages. The court may accept the complaint or claim immediately or order an investigation if a written request for registration or compensation was disregarded for sixty days and a trial is required. No action can be brought against the Government, Director-General, or departmental employees for acts causing or may cause loss or harm, as long as they were carried out in good faith.[10]

3.2.2 The Environment Court Act, 2010

In order to enforce the "environmental law" as defined and acknowledged in Section 2(c), this Act establishes three distinct types of environment courts. These consist of the BECA, the EC Act, any rules enacted under either of these laws, and any further laws and rules enacted by the government by gazette notification to accomplish the objectives of the Act. The Special Magistrate Court only hears cases involving

[7] Tahseen Lubaba, 'An Overview of Environmental Laws of Bangladesh' *The Daily Star* <https://www.thedailystar.net/law-our-rights/news/overview-environmental-laws-bangladesh-1753360> accessed 12 November 2024.

[8] Ibid

[9] The Bangladesh Environment Conservation Act 1995, ss 3, 4, 4A, 5, 6, 6A, 7.

[10] Ibid, ss 14, 15, 17, 18.

violations of environmental laws, which carry a maximum punishment of Taka 5,000.00 in fines, five years in prison, or both. The Special Magistrate Court also uses an executive magistrate to run a mobile court in compliance with the Criminal Procedure Code (CrPC) 1898. The EC (environment court) deals with environmental violations and claims for compensation for environmental harm by following the Code of Civil Procedure (CPC) and the CrPC. The EC has the right to view the crime scene before making an order.[11] They typically have 180 days to resolve cases, though this can be extended by an additional 90 to 180 days. If an offender violates court orders, they may be punished with a maximum sentence of five years in prison or a fine of Taka 500,000. Violations of Sections 4(2), 4(3), and 5(4) of BECA may be resolved through compromise. If the offender violates these sections for the first time, they must deposit a minimum of Taka 50,000, submit a compliance report, or promise the DoE that they will not commit the same offense in the future.[12] Revisions and appeals filed with the Environment Appellate Court within 30 days of the Special Magistrate Court or Environment Court rendering a decision are under its jurisdiction.[13] Since the EC Act prohibits direct access to these courts and mandates that cases be filed using the written reports of inspectors, it blatantly violates BECA.[14]

3.2.3 The Brick Manufacturing and Brick Kilns Establishment (Control) Act, 2013

The BMBKEA, 2013 controls the brick kilns by licensing them under a three-year term by the District Commissioner to conserve farmlands, reduce air pollution, and protect the environment.[15] Outside of licensed kilns, no brick production activities are allowed because they must obey mandated environmental and safety requirements.[16] The law permits soil extraction from ponds, rivers, and fallow lands, with approval from authorities. The federal government supports hollow brick and block manufacturing.[17] Part of the Act controls fuel usage by prohibiting firewood usage and setting coal quality requirements for reducing toxic substances such as sulfur and mercury and ash release.[18] Brick kilns must comply with the 1997 Environment Protection Rules' waste standard requirements, with restricted zones like residential, agricultural, and environmentally sensitive areas requiring license cancellation within two years for non-compliance.[19] Enforcement mechanisms include the formation of an Inquiry Committee in each district to oversee licensing, conduct inspections, and ensure compliance with the law.[20] Violations can be detected by inspectors entering and inspecting kilns without prior notice and seizing materials and reporting on the case.[21] Failure to adhere to licensing, emission, or illegal entry of the prohibited zone may lead to harsh punishment, which may involve imprisonment, huge fines or both.[22] Offenses under this Act are non-compoundable but bailable, and prosecutions may be initiated through environmental or mobile courts.[23]

3.2.4 The Bangladesh Biodiversity Act, 2017

The Bangladesh Biodiversity Act, 2017 provides a legal framework whereby biodiversity is conserved and equitable economic gains are made from biological resources. It engages the local involvement in

[11] The Environment Court Act 2010, ss 4, 7, 14, 17.
[12] Ibid, ss 8, 10, 14, 15, 18.
[13] Ibid, ss 19, 20.
[14] Ibid, ss 6(3), 7(4), 12.
[15] Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013, ss 4, 9.
[16] Ibid, s 4 A.
[17] Ibid, s 5(3A).
[18] Ibid, ss 6, 7.
[19] Ibid, s 8(4).
[20] Ibid, s 12.
[21] Ibid, s 13.
[22] Ibid, ss 14, 15,16,17,18.
[23] Ibid, ss 19, 21.

conservation programs and creates a National Committee on Biodiversity as the overall governing body, with a national biodiversity directory and a designation of biodiversity hotspots, as part of Bangladesh's international obligations and constitutional responsibilities.[24] The Law forbids unauthorized access to biodiversity resources when it requires non-residents to obtain official approval.[25] According to the Act local-level participation occurs through required biodiversity management committees operating at four different levels from the city corporation to the union/union parishad.[26] The committees are responsible for creating biodiversity registers, implementing the National Biodiversity Strategy, promoting public awareness, conducting conservation monitoring, and developing initiatives. District Committees serve as coordinators, while Union and Upazila Committees prioritize local environmental protection.

The act prohibits activities that cause harm to endangered species or ecosystems because the Act implements biodiversity safeguards.[27] The government can declare biodiversity-rich heritage sites for protection, requiring local community needs and stakeholder interest assessment. Section 32 includes compensatory programs for losses, ensuring no area becomes solely ecological management. Public participation and environmental impact assessment are prioritized in development projects threatening biodiversity.[28] The legislation established the Biodiversity Conservation Fund to fund heritage site preservation, community rewards, and biodiversity-oriented projects.[29] The National Committee funds local grassroots projects through community-based conservation associations. Section 30 requires fair monetary compensation of business activities involving biological resources to recognize local communities and the people keeping the knowledge. There are penalties to enforce against misuse of resources, misappropriated intellectual property and violations of endangered species.[30] Biodiversity conservation is balanced with socio-economic development in the Bangladesh Biodiversity Act, 2017, which creates a well-developed environmental governance and management regime.

3.2.5 The Marine Fisheries Act, 2020

The Marine Fisheries Act 2020 (replaces the 1983 Marine Fisheries Ordinance) establishes a sound system of sustainable management of marine resources in the territorial waters and in the exclusive economic zone of Bangladesh. The Act grants the government authority to manage fishing operations, establish vessel types, and enhance fish stock conservation.[31] Proper permits are essential for all types of fishing vessels, both domestic and overseas, to enable marine ventures and economic regulation, with violations resulting in severe penalties.[32] IUU fishing incidents can be fought through the Director-General's authority to conduct resource surveys and set catch limits while conducting monitoring and surveillance operations.[33] Bangladesh requires licenses for foreign fishing vessels to enter its waters however specific humanitarian or lawful excuses including vessel rescue operations and innocent passage under international law allow admission without permits.[34] International ships that fish illegally or transship or cause environmental destruction face criminal sanctions which include jail terms and monetary fines in addition to vessel seizure and equipment confiscation.[35]

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[24] Bangladesh Biodiversity Act 2017, s 32.
[25] Ibid, s 4.
[26] Ibid, ss 13, 16, 19, 25.
[27] Ibid, s 33.
[28] Ibid, s 31.
[29] Ibid, s 36.
[30] Ibid, ss 39, 40, 41.
[31] The Marine Fisheries Act 2020, ss 4, 7.
[32] Ibid, ss 8, 14, 21.
[33] Ibid, s 5.
[34] Ibid, ss 23, 24.
[35] Ibid, ss 25, 33.

The Act sets forward-looking blue economy developments by providing legal bases for mariculture zone development to culture marine living resources.[36] The Act gives the authority to officials to create marine protection areas adjacent to fish sanctuaries to support vital breeding areas of endangered or threatened aquatic species.[37] Section 30 of the Act denies fishing, dredging, and construction in the breeding areas of the marine fishes, prohibiting harmful explosives and toxic substances in the environment to protect the ecosystem and avoid the destruction of the environment.[38] The Act sets forth strong enforcement measures and authorizes the empowered officers to inspect vessels, confiscate illicit catches, and apprehend criminals without a warrant.[39] The vessels of offenses could be seized, and their contents auctioned, the proceeds placed in the treasury.[40] The law also provides administrative punishment in case of non-compliance and punishments that are more severe in case of repeat offenses.[41] Under the Act, mobile courts are permitted to deal with particular offenses to speed up justice delivery.[42] The Act also strikes a balance between the use of resources and the conservation of the environment to protect marine ecosystems and ensure economic development, which is the agenda of the nation and the global standards of the management of marine resources.

4. Gaps and Limitations in the Laws

The main environmental laws in Bangladesh have major loopholes and constraints which result to poor enforcement and environmental degradation.

4.1 As regards the Bangladesh Environment Conservation Act, 1995

4.1.1 Unrestrained Power of the Environment Department

BECA gives the Director General unfettered power to interfere in every environmental issue. An aggrieved person has to go to the DG before filing a suit. We know that power corrupts, and absolute power corrupts absolutely. This unfettered power of DG opportune him to abuse his power as well as impedes the regular power of the environment court.[43] Such excessive concentration violates the principle (10) of checks and balances in environmental governance, as recognized by the Rio Declaration.[44] In India and the Philippines, executive authorities remain subject to judicial oversight, thereby maintaining institutional balance and preventing the misuse of discretion.[45]

4.1.2. Insufficient Punishment

BECA permits courts to impose minor penalties and fines on offenders for environmental offenses resulting in significant environmental losses, which cannot be adequately compensated with specific funds. The harshest penalty is 10 years in prison and a fine of up to 10 lac taka.[46] In contrast, in India, the highest punishment for the same cases is –

- for a natural person- 10 crore rupees

[36] Ibid, s 6.
[37] Ibid, s 29.
[38] Ibid, s 27.
[39] Ibid, ss 32, 33, 34.
[40] Ibid, ss 37, 38, 39.
[41] Ibid, ss 53, 54.
[42] Ibid, s 59.
[43] Md. Jahid Hossain Dolon and Sanjida Sarwar (n 5).
[44] Rio Declaration on Environment and Development 1992, principle 10.
[45] National Green Tribunal Act 2010, ss 14, 15, 18, 19;
The Rules for Procedure of Environmental Cases (Philippines) 2010, rr 2, 6, 8.
[46] BECA, s 15

- for a legal person- 25 crore rupees[47]

Tengratilla gas explosion, Hazaribagh tannery, and seismic survey caused significant environmental damages, resulting in gas loss and damage of 13630.50 crore taka and 3175 crore taka, respectively. The penalty that the environment court can administer is insufficient.[48]

4.1.3. Suit Filing by Department of Environment (DoE)

An individual cannot directly sue for any kind of pollution. Instead, he must notify and coordinate with the Department of Environment, which will make the final determination regarding whether or not to file a lawsuit. In the end, this authority tends to make corruption and bribery in DoE worse.[49]

4.1.4. Lack of Explicit Recognition of Environmental Rights

The Bangladesh Environment Conservation Act (BECA) does not explicitly establish the "right to environment" as a fundamental right, and while it includes international environmental principles like harm prevention, polluter pays, and EIA, it lacks sufficient implementation of sustainable development concepts.
This omission contradicts the global standard established by the UN, which is formally known as “Right to a Clean, Healthy, and Sustainable Environment” as a human right.[50]

4.1.5. Emphasis on Curative Rather than Preventive Measures

BECA delivers remedies as its main focus instead of taking measures that protect the environment in advance. Although BECA contains limited acknowledgment of forest and biodiversity conservation by declaring Ecologically Critical Areas as well as conducting ecosystem damage assessments, its preventive measures are inadequate.

4.1.6. Making Harmful Activities Legal

BECA allows dangerous shipbreaking activities, causing environmental deterioration, and weak enforcement systems. It permits hill-cutting and wetland filling through "national interest" provisions, allowing special interest groups to bypass accountability standards and transparency requirements. This ambiguous definition of "national interest" contributes to ecosystem destruction.

4.1.7. Neglecting to Manage Severe Environmental Degradation

The growing environmental challenges are largely due to insufficient legal enforcement methods, including the uncontrolled use of polythene bags, harmful pollutant emissions from vehicles and enterprises, unlawful encroachment on open spaces and wetlands, excessive hill cutting in development projects, and ecosystem devastation due to untreated industrial waste discharge.
Additionally, the Department of Environment (DoE) in Bangladesh faces challenges in executing environmental development projects due to shortages of technical specialists and manpower. The Environment Conservation Act's good-faith clause has led to corruption and dishonesty within the department. The DoE heavily relies on foreign aid agencies, highlighting the lack of local funds and the government's refusal to address Bangladesh's environmental issues. The buffer zone's main points are ignored, and conflicting elements exist between the departments of the environment and forests.[51]

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[47] NGT Act, s 26.
[48] Md. Jahid Hossain Dolon and Sanjida Sarwar (n 5).
[49] BECA, s 17.
[50] The United Nations General Assembly Resolution 76/300, 2022.
[51] Md. Jahid Hossain Dolon and Sanjida Sarwar (n 5).

4.2 As regards the Environment Court Act, 2010

4.2. 1. Complexity in Filing Suit

There are no direct lawsuits allowed in the Environment Court. He needs to take it up with the director general. If the DG receives a written report and the inspector or other designated person fails to act within sixty days, the DG may immediately launch a case with the environment court.[52] It is a very risky procedure for a person who feels wronged. This complexity contradicts Principle 10 of the Rio Declaration, which guarantees public participation and access[53] to judicial remedies in environmental matters.[54] Countries like India allow any aggrieved person or organization to directly file an application before the tribunal without any previous approval of the executive

4.2. 2. Insufficient Scope

Only a few prevalent areas of environmental pollution are the focus of environmental law and its enforcement. It briefly discusses machinery, the production process, and materials and substances, but many other important topics are overlooked and are not covered in detail with precise terminology and explanations. This indicates that environmental legislation has limited the reach of environment courts by failing to adequately define the environment and offenses related to it.[55] Best practices from countries like the Philippines show that environmental courts are empowered to address a wide range of environmental and ecological issues, including land degradation, biodiversity loss, and marine pollution.[56]

4.2.3. Additional Duties of the Judges

In the environmental courts, the Joint District Judges are persona designata as judges, according to Section 4 of the ECA 2010. It is important because the government's "window dressing" approach to environmental protection is demonstrated by their part-time positions as judges in environmental tribunals. The backlog of civil court cases prevents a Joint District Judge from sitting as a judge in both environmental and civil courts.[57]

4.2.4. Executives' Dominance

Both the ECA 2010 and the BECA 1995 stipulate that a court cannot consider a case based on claims made by a party who has suffered harm without first obtaining permission from an executive, such as the DoE inspector.[58] This clearly gives the executive legislative dominance over the court, which inevitably prevents people from accessing justice. It clearly violates the separation of powers principle, a cornerstone of constitutional governance and international best practices.

4.3 As regards the Brick Manufacturing and Brick Kilns Establishment (Control) Act, 2013

4.3.1 Improper Penalty

The Act of 2013 only defines maximum institutional penalties up to five years imprisonment as well as fines starting from 100,000 Taka and ending at 2,000,000 Taka with a legal option for prison or money

[52] BECA, s 17.
[53] NGT Act, s 18.
[54] Rio Declaration.
[55] Md. Jahid Hossain Dolon and Sanjida Sarwar (n 5).
[56] The Rules for Procedure (n 45).
[57] Mohammad Irfan Aziz (n 2).
[58] BECA, s 17.
ECA , ss 6,7.

punishment. The government enforces these violations through mobile courts together with the Executive Committee, who follow the CrPC and Information Technology Act 2006 guidelines due to their non-cognizable and bailable nature. The 2019 amendment of this law aimed at improving its function, but the situation remains unchanged. If we look into India and China, environmental laws allow for significantly higher fines and harsher prison sentences for industrial polluters, ensuring more effective deterrence in proportion to the environmental damage.[59]

4.3 2. Air Pollution and Influential Groups

The illegal operation of brick kilns in Bangladesh, along with dozens of functioning facilities, remains an ongoing air pollution problem despite High Court closure orders of such operations. Traditional BKs operate illegally under local influential owners because they disregard applicable legislation. The influential groups that break the law employ different tactics including coercion and bribery along with manipulation, to control inspectors who monitor the Brick Manufacturing and Brick Kiln Establishment Act (BMBKEA). The procedural limitations within the law make it difficult to choose suitable areas for brick kilns because of their space requirements.[60]

4.3.3. Ambiguous Procedure

The law does not clearly outline a procedure for obtaining approvals from designated authorities, nor does it define what constitutes an "appropriate authority" or specify coal quality standards. The BMBKEA needs to create comprehensive rules and implementation incentives to stop pollution from traditional brick kilns while offering benefits to owners following international standards and people who help detect and record violations.

4.4 As regards the Bangladesh Biodiversity Act, 2017

4.4.1. No Full-fledged Institutional Mechanism

The proposal suggests establishing a National Committee with all bureaucrats as the top decision-making body, without a complete institutional process or legal entity. A Technical Committee assists the National Committee but is not involved in decision-making. This structure was once part of policy frameworks but is now often offered under national environmental laws, weakening the regime. Coordination of roles among local government committees and authorities is crucial for creating biodiversity registers and TK documentation.[61] This system is inconsistent with the international standard for effective institutional arrangements for biodiversity management, as emphasized in UNCBD, which requires competent national authorities with clear decision-making powers.[62] The best examples in India can be found where the Biodiversity Committees (BMCs) and the National Biodiversity Board (NBA) work to ensure effective implementation of the mandate at the local, district and national levels.[63]

In most cases, the Access and Benefit Sharing (ABS) system is not based on Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT). The way the ABS mechanism is explained is really worrisome. According to the CBD and the Nagoya Protocol, PIC and MAT must constitute the foundation of any

[59] Air (Prevention and Control of Pollution) Act, 1981(India);
Environmental Protection Law, 2014(China).
[60] Bahreen Khan (n 1).
[61] Imtiaz Ahmed Sajal (n 4).
[62] The UN Convention on Biological Diversity 1992, art 8.
[63] Biological Diversity Act, 2002 (India).

domestic ABS system. The Biodiversity Act recommended using all or any of the six approaches listed for assessing fair and equitable distribution. Only the first of the six approaches provides for PIC and MAT, blatantly failing to meet CBD or Nagoya requirements. It is argued that additional regulations are required to clarify PIC and MAT requirements, especially with regard to local and indigenous communities.[64] It violates international standards under the Nagoya Protocol on Access and Benefit-Sharing, which mandates PIC and MAT for the utilization of genetic resources.[65] Countries such as India and South Africa have incorporated ABS regulations that require the disclosure of PICs and MATs with indigenous and local communities for equitable benefit-sharing.[66]

4.4.2 Lacks in Application for Intellectual Property Rights (IPR)

The law in Bangladesh does not require the National Committee to oppose IPRS issuance, but prohibits applications for IPRs on biological resources or traditional knowledge acquired from Bangladesh without prior consent. The invention process must include mandatory reporting of the genetic material origin and technology source. The Biodiversity Act only mentions conservation of "cultivars" and "landraces," requiring a unified legal framework for farmers' rights.[67] This is inconsistent with international standards, such as the World Intellectual Property Organization (WIPO) Model Law on Intellectual Property Rights, which emphasizes the integration of farmers' rights and prior consent in IPR applications applying for and the integration of prior rights.[68]

4.4.3 No Budgetary Allocation

The Biodiversity Fund, a unique funding source, has not received any funding for its implementation expenses. To cover these costs, the Act requires budgetary provision. However, funding can be raised from existing funds like the Climate Change Trust Fund due to biodiversity's cross-cutting concern.[69] Countries like India allocate specific budgetary support through the National Biodiversity Fund and State-level Biodiversity Funds, which ensure financial sustainability for implementation.[70]

The law requires appeals against the National Committee's judgments to be made to the committee itself, preventing independent judicial review of its legality. Bangladesh's Environment Courts, though equipped, lack the authority to handle biodiversity and wildlife crimes.[71]

4.5 As regards the Marine Fisheries Act, 2020

4.5.1 Absence of Precautionary Principle

The law does not directly address the precautionary principle, yet it has been considered an essential part of fishery management. It is enshrined in other international instruments, including the FAO Code and UN Fish Stocks Agreement, both of which Bangladesh has ratified. It is also suggested that the principle should be implemented in accordance with customary international law.[72]

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[64] Ibid.
[65] Nagoya Protocol, 2010.
[66] Biological Diversity Act, 2004 (India).
National Biodiversity Act, 2004 (South Africa).
[67] Ibid.
[68] The World Intellectual Property Organization, 2017.
[69] Ibid.
[70] The Biological Diversity Act, 2004 (India)
[71] Ibid.
[72] Sunanda Majumdar and others, 'The Marine Fisheries Act 2020: An Appraisal' (2023) 7(1) Bangabandhu Sheikh Mujibur Rahman Maritime University Journal 71.

In a recent case concerning river pollution and encroachment, the HCD of the Supreme Court of Bangladesh decided that the precautionary principle is incorporated into Bangladeshi law.[73] But in the end, the Appellate Division overturned this ruling, claiming that the Court lacked the power to enshrine the precautionary principle in law.[74] Nevertheless, the Appellate Division determined that if the principle was acknowledged by any law, it should be followed.[75] This illustrates how important the statutory provisions controlling the principle's implementation are.

This is a clear violation of the international legal standards for precautionary principle management, as set out in the Code of Conduct for Responsible Fisheries 1995.[76] Countries such as New Zealand and Norway have incorporated into their fisheries legislation and security measures, which are fully scientific preventive measures for fisheries management.[77]

4.5.2 Absence of Eso-system-based Fisheries Management

The 2020 Act does not address ecosystem-based fisheries (EBFM) management. Plans for managing one species that ignore how such fishing affects other species or marine ecosystems will surely fail since fish populations are interdependent and intimately related to their environments.[78] The 2020 Act and other relevant statutes in Bangladesh do not include requirements for coastal governments to consider interspecies connections and ecosystems when managing fisheries resources, indicating a lack of commitment to EBFM implementation. So, the fisheries managers will still manage fisheries on the basis of the target population without considering interspecies relationships or the impact of fisheries on the larger marine ecosystems.[79]

This violates the FAO Code of Conduct for Fisheries Management, which is consistent with the Sustainable Development Goal 14 (SDG 14) of the United Nations. Countries such as Australia and Canada have adopted EBFM through their domestic laws (Fisheries Management Act 1991, Australia; Fisheries Act 1996, Canada), which integrates ecosystem impacts, species interactions, and fisheries management into their fisheries management.

3.5.3 No Determination of Total Allowable Catch (TAC)

Coastal states must calculate the Total Amount of Conservation (TAC) of living resources within their EEZ, considering scientific knowledge, stock regulation, and fishing effects on harvested species. The 2020 Act allows for authorized catches and fish species maintenance at the MSY level, but does not define necessary elements. The law also addresses assessing acceptable catches to prevent IUU fishing, rather than a standalone fisheries management action.[80]

This does not reach the level of the global criterion as specified in the UN Fish Stocks Agreement, which mandates that the coastal states must calculate the total allowable catch (TAC) based on scientific evidence and apply precautionary limits.[81]

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[73] *Human Rights and Peace for Bangladesh* v *Bangladesh*, Writ Petition No. 13989 of 2016, (Bangladesh Supreme Court, High Court Division, 30 January 2019 and 3 February 2019).
[74] *Nishat Jute Mills Limited* v. *Human Rights and Peace for Bangladesh and Others*, Civil Petition for Leave to Appeal No. 3039 of 2019, (Bangladesh Supreme Court, Appellate Division, 17 February 2020).
[75] Ibid
[76] The Code of Conduct for Responsible Fisheries 1995 (FAO, 1995).
[77] Fisheries Act, 1996 (New Zealand);
Norwegian Marine Resources Act, 2008.
[78] Sunanda Majumdar and others (n 72).
[79] Ibid.
[80] Ibid.
[81] UN Fish Stocks Agreement 1995, art 6.

4.5.4. Silent on Transboundary Fish Stocks Management

The LOSC requires states to ensure that scientific data, statistics on catch and fishing efforts, and any other information on the conservation of fish stocks become available to other states. It also focuses on the necessity of bilateral, multilateral, or regional collaboration to protect and manage transboundary fish species. Nevertheless, the act does not deal with the transboundary management of fish stock.[82] The Act 2020 gave significant authority and powers to the Director of the Marine Fisheries Division without establishing a system of checks and balances, which may result in a lack of performance or abuse of power.[83] This gap conflicts with international law under the UN Fish Stocks Agreement 1995 and the FAO Voluntary Guidelines for Transboundary Fish Stocks (FAO, 2015)

5. Recommendations

Identifying the flaws in these environmental laws is only the first step toward fixing Bangladesh's environmental crisis. To ensure proper enforcement and stop ongoing pollution, the underlying legal text must be updated and reformed. This section provides clear, actionable recommendations for each specific act to achieve those goals.

5.1 As to the Bangladesh Environment Conservation Act, 1995

Reform should be made in the BECA, due to many defects therein. First, there is an absolute need to ensure the specific and limited power of the Director General by creating checks and balances and giving the public the power to approach the Environment Court without seeking preliminary permission. This would curtail the scope for abuse of power and prevent justice from being delayed in the environment.

Environmental offenses in India should be punished with a maximum fine of 5 crore taka for natural persons and 15 crore taka for legal persons. Citizens should be empowered to file suits without relying on the Department of Environment (DoE) for reforms. Strengthening the DoE's capacity through technical personnel, increased manpower, and local funding will enhance project execution and enforcement. Strict regulations on ecologically critical areas (ECAs) should be made with clear roles within the DoE and Forest department to avoid interdepartmental conflict. The Act should explicitly state that every person has the fundamental right to maintain a healthy environment, including principles of sustainable development, wise resource use, and the 3R system. Premature reaction methods should transition into preventive strategies, and new systematic enforcement systems should be developed to stop illegal activities. Environmental laws require independent political and corporate interference-free enforcement through open public participation and transparent accountability.

5.2 As to the Environment Court Act, 2010

The ECA 2010 needs reforms to improve its effectiveness and streamline case-filing procedures. This would allow individuals to visit Environmental Courts directly without requiring assistance from the Department of Environment's Director General or Inspectors. Additionally, the Act should have a wider scope when defining the environment and listing environmental offences, ensuring fewer procedural delays and improved access to justice.

The Environmental Courts should have full-time judges trained in environmental law to improve efficiency and effectiveness. Additionally, the Executive's dominance over the court should be removed to ensure judicial independence and fairness, thereby enhancing the judiciary's role in these courts.

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[82] Ibid.

[83] Ibid.

5.3 As to the Brick Manufacturing and Brick Kilns Establishment (Control) Act, 2013

Revision of the BMBKEA 2013 requires setting up a stronger operational framework that strengthens environmental results and compliance enforcement measures. A new version of the BMBKEA 2013 must define exact punishments, including minimum charges, to make violations truly discouraging. In addition, a transparent and standardized approval process must be integrated, with explicit definitions of key terms such as "appropriate authority" and precise coal quality standards. The act should protect inspectors against manipulation by the local power groups, provide incentive schemes for compliance, and make communities report violations. An institutional framework and sufficient budgetary allocation are required to avail efficient enforcement capacities to help in dealing with environmental issues, to make sure that there is adherence and promote environmental watchdogs.

5.4 As to the Bangladesh Biodiversity Act, 2017

There should be a full-fledged institutional framework established to replace the National Committee structure as an independent legal body, thus defining its roles and responsibilities clearly. The local committees and authorities must also coordinate to streamline biodiversity registers and traditional knowledge (TK) documentation. Furthermore, the act must accord powers to the Technical Committee for making decisions on matters that would enhance its functional use.

The Access and Benefit Sharing (ABS) system in Bangladesh needs to be reviewed to align with the U.N. Convention on Biological Diversity and the Nagoya Protocol. The IPR regulations must guarantee disclosure by patent application of the source and origin of genetic material and traditional knowledge. The legislation on plant variety protection ought to have a provision on farmers' rights. An independent Biodiversity Fund must be implemented, and this can be reinforced with budgetary allocations and financing from available funds. A mechanism of independent judicial review should be created so that decisions made can be transparent and Environment Courts should be given jurisdiction over crimes related to biodiversity. Bangladesh needs these reforms to conserve biodiversity sustainably.

5.5 As to the Marine Fisheries Act, 2020

The precautionary principle, which is a universally acknowledged international principle, should be embedded in the Act to make sure that precautionary measures are undertaken against marine ecosystems in cases where total scientific certainty cannot be attained. This would reinforce proactive decision-making and sustainable fisheries management in line with the international requirements such as the FAO Code of Conduct on Responsible Fisheries and the UN Fish Stocks Agreement.

The Act should incorporate an ecosystem-based fisheries management methodology (EBFM) to mitigate threats on fish stocks such as development and pollution in an effort to achieve long-term sustainability and minimize ecosystem effects. It must also set scientific standards of Total Allowable Catch (TAC) levels, considering Maximum Sustainable Yield (MSY), inter-species interactions and ecosystem effects in general beyond the narrow general approach of IUU fishing. It will allow minimizing the effects in the ecosystem and enhance the sustainability of fisheries.

The exclusive economic zone of Bangladesh needs transboundary fish stocks to be managed effectively and efficiently since most of the species found in the area are transboundary. Resource conservation requires cooperation with the neighboring countries in bilateral or regional agreements. The Director of the Marine Fisheries Division should be delegated substantial powers, balanced with strong accountability mechanisms and checks to prevent misuse. Addressing resource and manpower shortages is crucial for efficient enforcement and implementation of the Act's objectives.

Conclusion

The study reveals significant flaws in Bangladesh's core environmental statutes that hinder effective environmental governance and sustainability. The BECA 1995 grants excessive power to the Director General of the Department of Environment, leading to abuse of authority and delays in justice. Crimes against the environment are not met with deterrent punishment, even if they involve substantial environmental destruction. The ECA 2010 has complexities and a narrow mandate, making the justice system ineffective. There is no specific enforcement mechanism, incentive-based mechanisms for awareness or reporting of violations, and the establishment of brick kilns remains illegal without consequences. The Bangladesh Biodiversity Act, 2017 lacks a fully functioning institution framework and weak decision-making power, with significant flaws such as the absence of an International Standard for Access and Benefit Sharing (ABS), Intellectual Property Rights (IPR), and an operating budget. The Marine Fisheries Act 2020 does not include the essential principles such as the precautionary principle, ecosystem-based fisheries management, and transboundary fish stock management; this makes it unable to offer effective management of marine resources. To address these issues, urgent reform of existing laws is needed, including limiting the powers of the Director General, offering simpler, efficient laws, proportionate punishment of environmental offenders, allotting full-time environmental judges to serve in various courts, and reforming existing systems and institutions. These reforms should guarantee the enhancement of inter-organizational coordination and the effectiveness of laws, correspondence with the international standards, and the conservation of waste of biodiversity and fisheries. Special budgetary allocation on biodiversity and environmental projects, the precautionary principle, and ecosystem-based management will further promote the sustainability of the country's natural resources.

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The Constitutional Framework of Bangladesh: A Critical Analysis from a Socio-economic Perspective

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Abstract: *A historic struggle for attaining social and economic freedom paved the way for the constitution of Bangladesh. It symbolizes the rights of those people who had been fighting for their emancipation for a long period, from the British colonial period to the dictatorial regime of West Pakistan. In addition to civil and political rights, the constitution recognizes certain social and economic rights for the people of Bangladesh. This paper visualizes the economic ideas and principles in the Constitution. In doing so, it takes the help of normative analysis to picture how the economic state of the people is reflected and how it can be developed with the demand of the society in this postmodern world. The paper accentuates that since the constitution is a piece of historical document of Bangladesh, it has to be dealt with in such a way where rights of the people are to be elevated in every moment of constitutional development. The paper urges the constitution of Bangladesh to be a 'social engineer' to move towards a just society.*

Keywords: *Constitution, Socio-economic and Bangladesh*

1. Introduction:

A constitution is the reflection of people's aspirations and hopes. It is a combination of rules and principles under which a country is governed. Constitution embodies a country's character and nature. A country is a gathering of people who share common habits and customs with a patriotic sense of touch and confidence. Bangladesh gained independence with such feelings, and the constitution came into force on 16 December 1972, following the same feelings. However, it was officially adopted by the Constituent Assembly on 4 November 1972. Before Independence, we had been oppressed socially, economically and politically, but we are now an independent and sovereign country. From colonial rule to 1971, Bangladesh had been suffering from various forms of discrimination, one of which was economic discrimination and exploitation.[1] People of our country were deprived for a long time. The long-cherished independence of Bangladesh is the result of various historic and heroic struggles. The idea of freedom came into effect in 1947 with the cessation of two-hundred-year-long British rule, but could not bring up a vigilant nation. The movements in 1952, 1962, 1969 and 1971 symbolize the charismatic resilience of the people of East Pakistan against all forms of discrimination imposed by the West Pakistani dictators. To overcome economic oppression along with other necessities, we shaped our constitution as a nation's expression after independence in 1971.

The constitution of Bangladesh pledges to eradicate disparities, discrimination and inequality and places the people in the highest position.[2] As provided in the preamble of the constitution, the fundamental goal of the state is to create a socialist society through the democratic process (Socialist society refers to a society which is free from economic exploitation, sharing the sacrifices and equal distributing of wealth to establish a national economy) free from exploitation- all citizens will have access to the rule of law, fundamental human rights,

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[1] Muhammad Ekramul Haque, 'The Bangladesh Constitutional Framework and Human Rights' (2011) 22 (1) Dhaka University Law Journal, p 57

[2] The Constitution of the People's Republic of Bangladesh, Art 7 (1)

freedom, and political, economic, and social justice. The framers of the Constitution of Bangladesh put the justifiable civil and political rights of citizens with some restrictions into Part III and non-justifiable economic, social and cultural rights into Part II of the Constitution. Through this constitution, the people of Bangladesh feel new economic rights and expectations. The people of Bangladesh are now living in a sovereign state and its economic system is free from dominance from the hegemon power as our constitution mandate is for the people. However, with the passage of time, after the fifty years of independence, our constitution needs to be more people-orientated. While other countries like India, and South Africa are concentrating on the enforcement of basic needs (food, environment, water) of the people, constitution of Bangladesh still considers them as program rights which are not judicially enforceable. As the constitution is for the people and all powers belong to the people as echoed by the constitution itself, saving some amendments, most of them are politically motivated where the desire of the people has not been imbedded as far expectation they had fought for. A constitution should not swing like a pendulum. Instead, it must incorporate past and future efforts in any constitutional movement.

2. Socialism in the Constitution: A Promising Endeavor

In British India, the region of Bengal was the most significant area for revolution. Bengal leaders played a very crucial role in establishing socialism in India. Following Bangladesh's independence in 1971, the Bangladesh government implemented a few socialist programs. Its goal was to boost economic activity to improve the war-torn nation's economic situation. On March 26, 1972, all banks, insurance companies, public enterprises, and several large and medium-sized businesses were nationalized to create a socialist nation inspired by the Soviet economic model.

All the people of Bangladesh should have an equal share of the total production. People of Bangladesh struggled for a society free from exploitation. As a result of their aspiration for an exploitation-free state, the constitution of Bangladesh was highly motivated by socialist norms and ideas. As stated in the Bangladesh Constitution's preamble, its goals are to create a society in which all Bangladeshi people have access to the rule of law, fundamental human rights, freedom, equality, and political, economic, and social justice.[3]

Bangladesh Constitution has four fundamental ideas. Socialism is one of the concepts. Our constitution mandates a socialist economy in which there is no exploitation.[4] Though the constitution recognizes socialism as one of the basic principles, socialism in Bangladesh is different from that of other socialist countries. The means of production are socially owned by all people in fully socialist nations. However, in addition to governmental and cooperative ownership, constitution also recognizes private ownership.[5] It promises to guarantee the workers' and peasants' emancipation.[6] Moreover, the constitution recognizes our country as a people’s republic where fundamental human rights shall be ensured for all citizens of Bangladesh. Henceforth, it can easily be said that the Bangladeshi constitution recognizes democratic socialism.

3. Socio-Economic Rights and Enforceability: An Enterprise to Rethink

Socio-economic rights are such rights which are fundamental to every human being. These rights are enumerated in the Constitution of Bangladesh. Apart from Bangladesh, India and South Africa have also inserted these rights in their constitution. After Bangladesh's independence, the framers of the constitution enumerated provisions relating to economic, social and cultural rights. These rights are set out in Part II of the Constitution of Bangladesh under the heading ‘Fundamental Principles of State Policy’. These are, for

[3] Ibid, preamble.
[4] Ibid, art 10.
[5] Ibid, art 13.
[6] Ibid, art 14.

instance, right to basic necessities, right to free education,[7] right to safe health and nutrition,[8] right to protection environment and biodiversity,[9] and so on. These policies also include some social welfare rights, such as the right to social security.[10] These policies are considered as fundamental to the governance of the state. But these shall not be judicially enforceable.[11] The reason behind its non-enforceability is that it would not be possible for a war-ridden state to ensure such rights to its citizens. Economic stability and adequate resources are needed in order to make these rights enforceable. It was not possible for the drafters of the Constitution to place those socio-economic rights to the list of fundamental rights. As a result, these rights are recognized as non-justifiable second-generation rights.

Under the constitution of India, the economic, social and cultural rights are enumerated in Part IV under the heading of "Directive Principles of State Policy." These are not judicially enforceable, but certain principles are provided for the functioning of the constitution. It includes right to work, right to education, and so on. The Indian judiciary played a crucial role in fusing socio-economic rights with justifiable civil and political rights. It has been observed in many cases that the lack of adequate resources is not a justified ground for refusing basic services to the citizens of India. Supreme Court of India in a famous case *Olga Tellis v. Bombay Municipal Corporation*[12] elaborated on the right to life[13] and held that the right to livelihood is essential to ensuring the right to life. Right to livelihood also includes the right to shelter.

The Constitution of South Africa (1996) can be regarded as the most progressive constitution as it specifically recognizes socio-economic rights as justifiable rights. [14] It did not make any demarcation between civil-political rights and socio-economic rights. It accumulates these rights under the heading of the Bill of Rights (BOR) and makes them constitutionally enforceable.[15] The judiciary of South Africa also played a vital role in enforcing socio-economic rights as mandated by its constitution. In a reported case, Minister of Health and Others vs. Treatment Action Campaign and others[16] the High Court of South Africa held that everyone has right to equal access to public health services.

The Supreme Court of Bangladesh also interpreted the fundamental principles of state policy in a few landmark cases. In *Professor Nurul Islam vs. the State,*[17]Court opined that the right to life includes the right to protection of health. In another case, *Dr Mohiuddin Farooque vs State*[18] the Court held that right to life means and includes right to safe health and hygiene.

Enforceability of socio-economic rights is not an unrealistic matter to achieve. Our country is developing gradually. It turns into a developing country from a least developing country. It is high time for the government to consider socio-economic rights seriously and do everything possible to enforce these rights. It may not be realized overnight, but an earnest endeavor must be taken to reach this objective progressively.

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[7] Ibid, art 17
[8] Ibid, art 18
[9] Ibid, art 18a
[10] Ibid, art 15 (d)
[11] Ibid, art 8 (2)
[12] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.
[13] The Constitution of India, art 21.
[14] Winkler, "Judicial Enforcement of the Human Right to Water- Case Law from South Africa, Argentina and India" (2008), *Law, Social Justice & Global Development Journal (LGD)*, Issue 1 p. 4.
[15] The Constitution of South-Africa, art 38.
[16] *Minister of Health and Others vs. Treatment Action Campaign and others* (2002) (10) BCLR 1033 (CC).
[17] *Professor Nurul Islam vs State* (2000), 52 DLR (HCD) 413.
[18] *Dr Mohiuddin Farooque vs State*, 55 DLR (HCD) 69.

4. Economic Improvement and Constitution: A Passage to Justice

Every motif in the constitution of Bangladesh inserted by the drafters is ideal and sustainable. After going through the literature of the constitution, it can easily be perceived that constitution accommodates principle of economic improvement along with other sacred concerns and beliefs. To begin with, it is better to clarify economic improvement and how it is made up in the Bangladesh Constitution to ensure the needs of its people. Vilfredo Pareto was an Italian economist who first gave the idea of economic improvement. For him, an improvement happens when a change in distribution harms no one and favours at least one person, given the original distribution of goods. Pareto defines the improvement that makes at least one individual better off without making any other individual worse off which means position of other should not be worse because of others improvement.[19]

States can make special provisions for women or children or for the advancement of any backward section of citizens under article 28 of the Constitution. Article 29 (3) (a) also enables the state to make special provisions for backward sections of citizens to secure adequate representation in the country. These refer to differential treatment of unequal individuals and recognizes that government has a positive responsibility to eliminate inequality and provide opportunities for the disadvantaged through making special reservations. Nevertheless, article 29 (3) (a) leaves a discretion for the state to provide any other privileges than mere reservation. Scheme may be taken to provide free medical care, financial assistance, educational and hostel facilities, free transport, scholarships, and so on. Such treatment will also support the backward in securing success through merit-based competition.

Following these mandates, the government of Bangladesh gives a constitutional guarantee in article 65 by reserving 50 seats for women as a member of parliament (MP), without interfering with 300 seats where men and women can participate in the national election to be elected as MP. Moreover, to protect and uphold the rights of women and children in society, various pieces of legislation have been introduced by the government without making other worse off. There are, for example, the Nari o Shishu Nirjatan Daman Ain, 2000, The Hindu Marriage Registration Act 2012, the Child Marriage Restraint Act 2017, the Dowry Prohibition Act 1980, the Cruelty to Women (Deterrent Punishment) Act 1983, and the Family Court Act 2023. Besides, in article 15(d) of the Constitution outlines that it is the foremost responsibility of the state to pursue planned economic growth to continually enhance the productive forces and elevate the material and cultural standard of living of the populace. This is intended to secure the citizens' entitlement to social security, encompassing public assistance for individuals facing undeserved need due to unemployment, illness, or disability. Additionally, provision is made for assistance to widows, orphans, the elderly, and others in similar circumstances.[20] In pursuance of this commitment, the government of Bangladesh introduced a National Social Insurance Scheme covering widow allowance, sickness, disablement allowance, old age pensions, maternity pay and protection, workplace accidents and unemployment benefits for workers. Currently, there are 114 social protection programs in Bangladesh, primarily focused on food allocation and cash transfers.[21] These programs should be dealt with carefully and integrated under a coherent institutional framework to ensure inclusive coverage of vulnerable populations to reduce socioeconomic risks, food scarcity and related sufferings. Every endeavor is made to uphold and protect the socio-economic rights of women and children as ensured in the Constitution.

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[19] Pareto V, *Manual of Political Economy: a Critical and Variorum Edition* (Aldo Montesano and others eds, Oxford University Press 2014).
[20] Constitution of Bangladesh, art 15 (d).
[21] ILO Report, Bangladesh: Social Protection<https://www.social-protection.org/gimi/gini/gess/ShowCountryProfile.action?iso=BD > Accessed 12 May 2025.

5. Formal Equality and Substantive Equality: A Dichotomy and Reconciliation

Equality is an abstract concept. It means every person will be treated equally. One shall have the same opportunity that the other has. There shall not be any discrimination. Everybody will be treated in the same way, regardless of race, sex, color, religion, etc. The equality principle is embedded in article 27 of the Constitution. For example, out of four apples, if one gets two, the other will get two also. However, it is called formal equality, which H L A Hart said as "treat like cases alike," but it does not always ensure the promise of justice.[22] For instance, according to a provision in a workplace, employees will be promoted upon merit. In situations where they are the most qualified and experienced, anyone can be promoted, regardless of gender. This seems to be a non-discriminatory prima facie. In this situation, a pregnant woman is less likely to succeed because she took time off for maternity leave to make flexible arrangements to care for her unborn child. Unless she decides to have children, these circumstances prevent a woman from gaining the same level of expertise or experience as a man working in the same role at the same time. Treating people as same is only fair if they are beginning from the same starting point. But what will happen to the disadvantaged people who are not on the same footing? H L A Hart said that the principle "treat like cases alike" (treated people equally) should be a sacrifice to the general security or welfare of the society which he called as 'Treat different cases differently'.[23] The metaphoric word for it is substantive equality or true equality. Substantive equality allows classification along with gender, race, or other lines to achieve greater equality. By assisting in putting people in the same position and providing them with the same possibilities as others, substantive equality aims to eliminate disparities arising from an individual's particular circumstances. Article 27 is silent about this psyche, but equality does not mean absolute equality. The idea of equality implicitly incorporates the rule of differentiation. Bringing the unequal into equality is a major challenge in Bangladesh's class-ridden society, where economic exploitation is historical, and social and educational facilities are inadequate and unfairly allocated. The backward communities facing socio-economic exploitation demand fair participation in public service reservation. Articles 28 and 29 pledge such positive discrimination to protect and uphold the rights of backward sections. Since Article 27 simply speaks of equality without further explanation, it needs to be harmoniously interpreted with Articles 28 and 29 of the Constitution to bring the people into the realm of justice. Nonetheless, there should be a reasonable classification. The word "backward section" should be defined clearly. The state cannot cause injustice in the name of classification. Moreover, the government of a state is to act like 'a social engineer.' Privileges and protections under the head of 'backward section' should be reviewed over the years by the government to fulfill the continual demands of society.

6. Access to Justice and Constitutional Arrangement: A Resilience from Ashes

The Constitution of Bangladesh is the highest law in the country. Importantly, the Constitution guarantees fundamental rights to equality before the law. As provided in Article 27 of the Constitution, all are equal before the law and will get equal protection of the law. Equality before the law implies that all citizens must be ensured a right of equal access to a court or tribunal for the determination of their disputes without discrimination. Equal access means that such ability should not be restricted to certain social classes or groups. The judicial system is constitutionally divided into two categories. These are the Supreme Court and the subordinate courts. The Supreme Court stands at the top of the hierarchy of courts comprising the Appellate Division and the High Court Division (HCD). According to Articles 44 and 102 of our constitution, the people of Bangladesh have the right to enforce their fundamental rights, as provided in Part III of the constitution, through a writ petition to the HCD. But HCD is situated in Dhaka; consequently, not all citizens of our country can come to this court because of their poverty. Article 100 of our constitution accepts the scope of holding sessions of the HCD at

[22] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 166
[23] Ibid

"other place or places". An attempt for decentralization of HCD was carried through the 8th amendment but the dream of general people ended in smoke after a while. As a result, it provides ample amenities for the monopoly of some reputed law chambers serving the corporate and bourgeois interest in Dhaka where the poor and middle-class income litigants cannot even dream to go for legal assistance. It fails to accommodate the economic arrangement for all the people. Our legal system is resources-based and needs financial involvement in terms of travel costs, processing costs, advocate's fees, witness production, document production, and other related expenses.[24] The whole process is expensive. It is unattainable for marginal people who are living in a remote area to go to HCD. It is time to rethink another 8th amendment, particularly for decentralization of HCD branches, through which we can see the laughing face of people deprived of seeking legal remedies.

7. Economic Reflection through Amendment: Hope or Denial?

A State Constitution is a document of the hope and aspiration of the people. The beginning of the constitutional discourse of Bangladesh was promising. The original constitution of 1972 included leading provisions such as secularism as state policy, while no other South Asian country had such provisions.[25] However, it contained a few provisions contrary to the spirit of good governance, such as concentration of too much power in the Prime Minister (Article 48, 55) and the elimination of voting power in the parliament (Article 70).[26] Nonetheless, it kept a provision which can remedy the mischief through the amendment. The constitutions of many countries have progressed through amendments, such as the thirteen amendments of the American Constitution abolished slavery, enforceability of social and economic rights in 1996 South African constitution and right to water in some countries such as Ecuador and Costa Rica. As all powers belong to the people as ensured in Article 7 of the Constitution of Bangladesh, the needs of the people should be accentuated through the amendments of the Constitution. Though the Constitution of Bangladesh has been amended for 17 times, most of the amendments did not mirror the socio-economic condition of the general people rather than promoting political ideology of the respective political party. The comparative views on constitutional law demonstrate that constitutional amendments reflect collective aspirations. It is not limited to textual alteration of the Constitution.[27]

The constitutional amendment authority acts merely as a trustee of the will of the people. The amendments made by parliament or the authority in duty to make amendments should reflect the demand of the people.[28] Apart from the other constitutional bases, the Constitution of Bangladesh is also founded upon the economic and social welfare of the people of Bangladesh.

The waxing and winning during the constitutional life span was orchestrated in the 8th Amendment. Permanent seat of the High Court was decentralised in the six divisions through the 8th amendment by keeping the financial ability of the people in mind so that they could afford to the door of justice but in the vicissitudes of fate, the amendment was declared unconstitutional by the Bangladesh Supreme Court.[29] It salted down the interest of the bourgeois lawyers, denying the convenience of the common people. Every government amends the constitution without considering the past and future values of society. As we are hoping for a revolution in

[24] Osman, 'Problems of Formal Justice System in Bangladesh, BRAC Research and Evaluation Division' (2006)> Accessed 2 February 2023

[25] Asif Nazrul, 50 Years of Bangladesh Constitution: Intentions, Institutions and Implementations, (2021)< https://www.thedailystar.net/views/opinion/news/50-years-bangladesh-constitution-intentions-institutions-and-implementations-2122191> Accessed 2 February 2023.

[26] Ibid

[27] Rehan Abeyratne and Ngoc Son Bui, 'Unconstitutional Constitutional Amendments as Constitutional Politics' in Rehan Abeyratne and Ngoc Son Bui (eds), *Constitutional Politics over Unconstitutional Constitutional Amendments in Asia* (Routledge 2022) 4–5.

[28] Ibid 4

[29] *Anwar Hossain Chowdhury V. Bangladesh*, 41 DLR (AD) (1989) 165

terms of constitutional reforms, it is pertinent to shed light on the socio-economic reformation of the Constitution of Bangladesh. Though there are some specific rights enshrined in Part Two of our constitution, these are merely decorative, having no judicial enforcement obligation. Various constitutional commitments such as economic and social rights, environmental rights, and property rights, fiscal policy, and balanced budgets can create accountability, stability, and credibility, thereby protecting people's economic and social rights and encouraging investment and growth.[30] So, special attention should be paid to make certain core socio-economic rights justiciable. The right to education, the right to safe food, and a healthy environment are such socio-economic rights. Those rights should be guaranteed a constitutional mechanism to ensure their protection. As Bangladesh is prone to climate vulnerability due to climate change and environmental issues, this socio-economic reconstruction is particularly important in this regard. So, the constitutional protection relating to environmental rights is significantly necessary. Again, given the other contemporary constitutional jurisdictions, the right to clean and safe water is another socio-economic right that needs special consideration.[31]

By declaring fundamental human rights as a fundamental goal of the state, the preamble of the constitution does not differentiate between socio-economic and civil-political rights, and this non-differentiation integrates economic and social rights, such as social and economic freedom, equality, and justice, with the core duties of the state.[32] So, the Constitution of Bangladesh is pledged to ensure socialism and social justice through its fundamental principles. The Constitution must be reformed to address the socio-economic situation of the country and the problems of collective action, and to distinguish between the interests of the public and political leaders.[33] As we are approaching complete constitutional reforms, it is equally important to address matters that can eradicate economic and social inequality.

As a neutral entity, the constitution must always mirror existing social demands. Ronald Dworkin said that constitutional law is a mixture of both backward and forward-looking elements.[34] Every State constitution needs to undergo a continuous process of amendment to remain consistent with the changes of the time and the attitudes of society and its people.

Conclusion

The struggle of the people of Bangladesh in 1971 was one for economic emancipation and political sovereignty. There was no ambivalence in their battle against West Pakistan, underscoring that the people of the country would attain economic, social and cultural freedom. Following the liberation war and independence, all desires, hopes, expectations and needs were incorporated into the original Constitution of 1972. But society is changing, and its demands are evolving over time, which needs to be addressed. The Constitution of Bangladesh is clearly a living document. Therefore, it is essential to ensure that it reflects the demands and evolving aspirations of the common people. With such conviction, people always encourage any updates, changes of constitution. Many noble sentences can be written down in the Constitution, but it does

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[30] Jon Elster, "The Impact of Constitutions on Economic Performance" <https://documents. worldbank. org/curated/ en/614651468765582440/pdf/multi0page.pdf> Accessed 15 Jun 26

[31] John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79.

[32] Snehadri Chakravarty, Enforcing economic and social rights through constitutional interpretation (Published: 4 November 2024) < https://www.thedailystar.net/opinion/views/news/enforcing-economic-and-social-rights-through-constitutional-interpretation-3744451> Accessed 15 Jun 26

[33] Donald J. Boudreaux, 'Rewriting the Constitution' (1993) 62 Fordham Law Review 1.

[34] Ronald Dworkin, *Law's Empire*, (1st eds, Harvard Law Press 1986) 225

not guarantee a democratic system and good governance, unless the rule of law, providing equal opportunity, and protecting people from discrimination and oppression, are practiced.

The socio-economic rights are not merely decorative of a constitution. The enforceability of these rights cannot be denied absolutely. These rights cannot be kept as some black letters. However, in the present paper, it is shown that some of those rights can be enforceable by the judiciary. Bangladesh celebrated its Golden Anniversary as an independent and sovereign state. This post-independence journey was not pleasant enough due to various political issues. But presently our nation is moving forward socially and economically. The present paper demonstrates that it is high time the state should come forward to make some of those rights judicially enforceable, like safe water, medical treatment, and the environment. Though it is not a very easy task to do, but dedicated efforts by the government are necessary for achieving this goal. There should be an uncompromised attempt to ensure the constitution of Bangladesh to ensure people's rights. A good constitution reflects the image of a country. It introduces a country to the world as an exemplary one. The paper concludes with a hope that Constitution of Bangladesh will be a pioneer wheel in upholding and protecting rights of the people in congruence with society with the course of time.

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