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Research Monograph
On

Evolution of the Criminal Justice System in Bangladesh: Colonial Legacies, Trends and Issues

A thesis submitted in the partial fulfillment of the requirements for the degree of Bachelor of Laws (Hon's).

Submitted to	Submitted by
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Letter of transmittal

To,

Sharmin Jahan Runa
Assistant Professor
Department of Law
Sonargaon University (SU)

Subject: For the submission of research Monograph titled ‘‘Evolution of the Criminal JusticeSystem in Bangladesh: Colonial Legacies, Trends and Issues”

Dear Mam,

This is a matter of joy for me to submit the research monograph title **‘‘Evolution of the Criminal Justice System in Bangladesh: Colonial Legacies, Trends and Issues”** While doing this research monograph, I have tried my level best to keep the required standard. I Hope, this dissertation will fulfill your expectation. I hope that you would be kind enough to go through this dissertation for your kind evaluation. I am always available for any clarification or any other necessity of any part of this research Monograph at your convenience.

Yours obediently

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Certification by the Supervisor

The thesis entitled "**Evolution of the Criminal Justice System in Bangladesh: Colonial Legacies, Trends and Issues"** by **Fahmida Sarna** under my supervision is satisfactory for submission to the department of Law, Sonargaon University for the award degree of Bachelor of Laws (Hon's). The information's collected from different sources have been duly acknowledged in this thesis.

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Declaration

To the best of my knowledge, I confirm that, this thesis contains no material previously published or written by another person except by way of quotation and duly acknowledged. It is based on my own research work and has not previously been submitted for a degree or diploma of any university at home or abroad.

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Abstract

Election is called the basic pillar of democracy. It is a very important and only method in a democracy to established democratic government or a other democratic institution in a democratic country. Election is the foundation or bedrock on which democracy stands. The word "Election" implies those who are toelect, called the "electors", the office to which election is to be made, the person is to be elected called the candidate. Democracy is a concept derived from political philosophy which main requirement is the process of election. Election commission or election laws lay down on the manner in which the electoral right isto be exercised. In our constitution under the chapter of fundamental principles of state policy it has been declared in article 11 that "The republic shall be a democracy in which fundamental human right, freedom and respect for dignity andworth of the human person shall be guaranteed, and which the effective participation by the people through their elected representatives in administrationat all level, shall be ensured." On the strength of these fundamental principal of thestate policy election is being held in the country by the election commission. If I carefully go through and study the Articles 118 to 126 of the constitution about the election commission it will be seen that to ensure free, fair, neutral election,the election commission shall be independent in the exercise of its function and all of the executives authorities are under obligation to assist the Election Commission inthe discharge of it's function. The parliamentary election are held under the representation of the people order 1972 and the rules made thereunder.

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Chapter 1
INTRODUCTION

1.1 Introduction:

Bangladesh inherited a system of administration of justice from the British colonial rulers who gradually replaced the *Mughal* system of administration of justice which was mostly based on the Islamic principles[1]. Some elements of pre-*Mughal* elements of indigenous rules also ostensibly permeated the British- imposed legal system in Indian Sub-continent. Colonial legacies including Penal Code 1860, Police Act 1861, Evidence Act 1872, Code of Criminal Procedure1898, Jail Codeare still in force in Bangladesh with only peripheral amendments. During Pakistan period (1947–1971) the criminal laws remained almost the same with some sporadic reforms including promulgation of Probation of Offenders Ordinance, special laws and the abolition of the jury system.

Apart from certain nominal amendments in nomenclature of laws after achieving our glorious independence in 1971, it has also become an on-going tendency to make amendments and changes to explore some measures aiming at speedy trial. The ethos of constitutional law, the precedents of the Supreme Court, inter- national treaty obligation, and enactment of special laws also bear an impact on the administration of criminal justice in Bangladesh. In 2007 separate judicial Magistracy made its debut in compliance of *Masder Hossain case*[2].Subsequently, some piecemeal attempts were made to legislate on domestic violence, human trafficking, parental maintenance, custodial torture etc.

However, such amending provisions have not been developed in a consistent approach. Against this backdrop, present article basically makes a pen-picture of the evolution of criminal laws in Bangladesh. The challenges of criminal justice system are also highlighted in brief.

[1] Kazi Ebadul Haque, Administration of Justice in Bangladesh (Asiatic Society of Bangladesh 2016) Preface.

[2] Secretary, Ministry of Finance v Masdar Hossain [2000] 20 BLD 104 (AD) (Arisingout of Writ Petition no. 2424 of 1995).

While essentially highlighting the growth of the criminal justice system, this research argues for holistic review of colonial legislation.

1.2 Objective of the Work

The specific objectives of the Research were:

- The fundamental principle of criminal law and the criminal justice system is to control crime, punish the offenders, and prevent crimes in society.
- The functioning of the criminal justice system is wide enough to achieve its goals and objectives.
- The right to a fair trial is Human Right,
- This process is reasonably well-defined in that it takes an offender through a series of steps beginning with his/her arrest and concluding with his/ her reentry into society.

1.3 Historical Background

According to *Code of Criminal Procedure, 1898* and *Penal Code, 1860,* all of criminal offences are related with punishment in Bangladesh. The treatment or conduct of criminal behavior is known as punishment in our criminal justice system or society.

The Constitution of Bangladesh states: "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." This provision is nearly duplicated in *Article 7 of the ICCPR*, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The government of People's Republic of Bangladesh had registered some declarations and reservations to particular articles of the treaties and furthermore, Bangladesh has not yet ratified nor has it acceded to a number of international human rights treaties, particularly the Optional Protocols to the two International Covenants, i.e., the *ICESCR* and the *ICCPR.*

The ICCPR expressly states in *Article 6(2)* that a sentence of death may be imposed only for the most serious crimes. The Human Rights Committee has stated that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure."

1.4 Methodology

I have taken opinion from my teacher and some other advocates to whom I work as an appreciative. As secondary source, books, Acts, Journal, Newspapers and law reports have been used. Research Methods include theoretical procedure procedures, experimental studies, numerical schemes, statistical approaches, etc. It helps us collect samples, and data and find a solution to the problem. The functioning of the criminal justice system is wide enough to achieve its goals and objectives. Its ultimate goal is undoubtedly to make society safer for its people and protect Human Rights in the process of the criminal justice system.

Chapter 2

Evolution, aims and elements of criminal justice

2.1 Evolution, aims and elements of criminal justice

Dispute between individual's *vis-a-vis* their urge to settle the dispute is quite natural in human society. In the pursuit of better ways of dispute-resolution and fighting crimes, formal judiciary in the body of courts and tribunals was created within the framework of the State or empire[3]. For centuries, formal state judiciaryco-existed with the informal way of dispute resolution[4]. In fact, the criminal just- ice system has undergone various phases of development before it could be formally re-shaped with the notion of due process and right to fair trial accorded to the offenders. Reforms in administration of justice also encompass the development of justice sector agencies including police, correction officials and judges. These developments have reflected changing customs, political principles, eco- nomic issues and values of members of the society. Initially, criminal dispute has been a contest between two individuals before state takes the centerstage when ithas been deemed that criminal offence victimizes the state and the victim.

That is, the societal response to criminal conduct traces back to time immemorial. Obviously, organization of judiciary is one the great achievements of human civilization. Historically, it passed many crude stages and forms of administration of justice, before it acquired the present form as democratic manifestationof theory separation of powers propounded by Montesquieu in 18th century.

In principle, the concept of state sponsored criminal justice system (CJS) empowers the state to punish the wrongdoers. In essence, the citizenry delegates their 'natural rights' to use force against those who attack their interests and hand

it over to the state, in return of the state's promise to protect them by maintaining law and order[5]. The modern criminal law is based on an assumption that, in absence of evidence to the contrary, people are able to choose whether are to engage in criminal conduct or not, and that a person who chooses to commit a crime is responsible for the resulting wrong and deserves

[3]M Shah Alam, Bangladeshe Ainer Sangskar o Ain Commission (Law Reforms in Bangladesh and Law Commission) (New Warsi Book 2016) 54.
[4] Ibid 55.

[5] Andrew Ashworth, Sentencing and Criminal Justice (Butterworth 2010) 74; A CKapoor, Principles of Political Science (Delhi S C & Company 1997) 113–114.

punishment[6].

In other words, the criminal law is basically concerned with dealing with the persons who committed crime. It is also important that trial of those charged with crimes is just and fair[7]. The ultimate aim of criminal law is protection of right to personal liberty against invasion by others- protection of the weak against the strong, law-abiding against the lawless, peaceful against the violent. To protectthe rights of the citizens, the State prescribes the rules of conduct, sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery.

A full-fledged criminal case is a drama in three acts, namely (a) information; (b) investigation or inquiry; and (iii) trial[8]. The first act has two scenes information or complaint. Section 154 of the Code of Criminal Procedure prescribes the mode of recording the information received by officer-in- charge of a police station in respect of a cognizable offence. Section 156 of Code authorizes such an officer to investigate it. This is the second scene. Third scene commences with theframing of charge and it advances with turns and twists of evidence taking and finally wraps up with pronouncement of verdict.

The object of criminal trial is to determine whether the offender is guilty ofthe offence he is charged with and to prescribe suitable sanction if he is found guilty on the basis of an elaborate system of substantive and procedural criminal law[9].

2.2 Criminal laws during pre-independence period

Having identified the evolution and conceptual ideas of criminal justice system inbrief, let us now move to the evolution of criminal law in Bangladesh. In essence,the present legal system of Bangladesh owes its origin mainly to about 190-year British rule in Indian Sub- continent, mostly founded on remnants of pre-British period tracing back to *Mughal* administration and also Hindu regime[10].

[6] David Ormerod, Criminal Law (Oxford University Press 2008) 4.
[7]Ridwanul Hoque, 'Criminal Law and Constitution: The Relationship Revisited' SpecialIssue (2007) Bangladesh Journal of Law 47.
[8] Saifuzzaman v State and others [2004] 56 DLR 324 (HCD).
[9] M A Qadri, Criminology (Eastern Book Company 1997) 350.
[10] Md. Abdul Halim, Legal System of Bangladesh (Dhaka CCB Foundation 2012) 42.

Criminal law during Pre- Mughal regime

From ancient times in Bangladesh there existed local assemblies in villages known as *panchayets. Panchayets,* though not official courts, had played major role in the administration of justice. At local level, apart from *panchayets,* the castes and even sub-castes used to exercise somewhat autonomous authority to administer justice[11]. They settled disputes mostly in the form of compromise. By lapse of time, there was transition to centralized rule by King. Tribal customary law and dicta emanating from religion were regarded as major source of law[12].

Before the conquest of India by the Muslims, the penal law prevailing here was Hindu Criminal Law which was termed as mostly systematic and well- defined[13]. The King protected the subjects and the subjects in return owed him allegiance and paid him revenue. The King or his entrusted Judge administered justice. The punishment of a criminal was mostly considered to be sort of expiation which purified and reformed the character of the offender. Apart from admonition, fine, imprisonment, death penalty, forfeiture of property, branding, banishment, expulsion from caste and corporeal punishments by way of whipping and mutilation, the practices of ordeal, blood money, compensation to the victim were also in practice.

Though some principles of restorative justice, reformation and retribution were amalgamated, by and large, the major theory of sentence was deterrent[14]. However, capital punishment and severe corporeal punishments were rarely inflicted[15]. Admonition, severe reproof, fine and corporal punishment were in vogue in early Bengal. This system prevailed until the end of twelfth century[16]. However, the severity of punishment varied on caste in the sense that there was sentencing disparity for the offenders depending on the respective castes of the offenders and the victims. For instance, if a *Brahmin* was killed by a person of lower caste, the murderer would get death penalty and his property confiscated. If a *Brahmin* was killed by another *Brahmin*, the murdered would be banished.

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[11] Romila Thapar, Ancient Indian Social History Some Interpretations (Delhi OrientLongman 2004) 32.
[12] Bangladesh v Bangladesh Legal Aid and Services Trust (BLAST) and others CivilAppeal no. 53 of 2004 (AD), available at < www.supremecourtbd.com > accessed 01 February 2018 (BLAST AD case in brief hereafter).
[13] V D Kulshreshtha, Landmarks in Indian Legal and Constitutional History (EasternBook Company 2000) 212–234.

[14] Damayanti Doongaji, Crime and Punishment in Ancient Hindu Society (Delhi AjantaPublications 1986) 241–243.
[15] Jaytilok Guha Roy, Prisons and Society: A Study of the Indian Jail System (Mumbai Gian Publishing House 1989) 4.
[16]BLAST AD case (n 12).

In general, a *Brahmin* was exempt from death penalty and corporeal punishments. Another principle was that the lower the caste, the more severe the corporeal punishments[17]. Commentators observed that Hindu criminal law sometime offered a system of despotism and 'priestcraft' that did not put all persons on equal footing and even provided occasional discriminatory punishments[18].

However, unbridled sentencing disparity on the basis of caste was not so rigid in the then Bengal where caste-hierarchy was not so acutely felt[19].

The judicial proceedings were inquisitorial in the sense that provided more pro-active role of the judges. Lawyers' role was not recognized, though some- times the opinion of neutral experts *(pundits)* was sought to clarify some facts or exposition of laws. The proceedings were public hearings, attended by people of all strata of the society. During that time crimes and sins are essentially synonymous[20]. Further, the victims of crimes took the responsibility of prosecutorial roleas neither society nor the state took role in this regard. *Danda, prayaschtta* and ordeal were the major modes of punishment. For instance, different modes of corporeal and severe punishments were in place and execution of punishment was invariably a matter of public display[21].

Criminal law during Muslim era

Before the advent of the British, Muslim Criminal Law prevailed in this locality. During Sultanate period (1100–1526) the Sultan or the King was the supreme authority to administer justice. When the foundation of Muslim dominion waslaid towards the beginning of the thirteenth century, the earlier system of customary laws based on Hindu religious dicta remained operative in this country with some sporadic reforms until the *Mughals* established their rule in this part of sub- continent in the sixteenth century[22].

During *Mughal* period (1526–1857) the *Mughal* emperor was considered the fountain of justice[23]. In particular, *Mughals* applied Muslim Criminal Law on its subjects irrespective of

[17] Muhammad Mahbubur Rahman, Criminal Sentencing in Bangladesh From ColonialLegacies to Modernity (Leiden BRILL 2017) 81.
[18] Ranchhoddas, Ratanlal et al, The Indian Penal Code (Delhi Wadhawa and Company1999)
[19] Rahman (n 17) 82.
[20] Ibid 77.
[21]Warner Menski, Crime and Punishment in Hindu Law Under Modern Indian Law(Recueils de la Societe Jean Bodin 1991).
[22] BLAST AD case (n 12).
[23] Halim (n 10) 50.

their religious beliefs. *Quran, Sunna, Ijma* and *Qyias* would regulate the principles and practice of penal laws. In principle, rulers were not absolutely free to criminalize any act at their caprice; rather they could legislate in the form of imperial regulations within the ambit of *sharia* that could supplement it.

Besides these holy sources, there were secular elements including ancient customs also that played an important role in the legal system of the *Mughals*. Further, there was scope for the judges to apply the dictum of equity, good conscience,and justice as at times *Isthsan* was applied to arrive at a just decision[24]. In practice, the judges used to exercise wide discretionary powers in their own spheres[25]. Basically, the royal pronouncements of the emperor were the explicit laws. *Qisas,Diyat, Hadd* and *Tazir* were modes of punishments permitted in Islamic Law. The basis Islamic sentencing principles were vividly depicted by a scholar[26]:

Though only few offences were criminalised with *sharia*-based principles, *hadd, qisas, diyat* and *tazir* tend to resemble deterrent, retributive, reformative theories respectively. It may be mentioned that 'blood money system' *(diyat)* involved some kind of pecuniary compensation paid to the victim or the nearest relative of the deceased victim in lieu of other form of punishments prescribed for the offender.

As the rulers did not disturb grass-roots institution of justice, principles of crime and punishment of Hindu law were also in unofficial application at local levels as both the landlords and the tenants mostly belong to the majority Hindu population in the then Bengal[27].

The hallmark of Muslim jurisprudence was that with little exceptions, the crime was considered to be a private wrong done to the injured party alone, notan offence against the state and the punishment was regarded as the private right of the aggrieved party[28]. In principle, Muslim law of evidence was highly technical. For instance, no Muslim could be convicted with capital punishment on the

evidence of an infidel. Further, a Muslim's depositions were equivalent to thoseof two infidels. Evidence of two females was equal to that of one male. The testimony of ocular witnesses was of paramount importance. Though examining the witnesses was adversarial in nature with rare

[24] BLAST AD case (n 13).
[25] R P Khosla, Mughal Kingship and Nobility (Delhi Press 1976) 33.
[26] Rahman (n 17) 86.
[27] Menski (n 21).
[28] T K Banarjee, Background to Indian Criminal Law (Eastern Book Company 1997) 62.

presence of lawyers in court pro- ceding's, the judges used to exercise inquisitorial power with a view to ascertain the real controversy.

The judicial administration system was sporadic and to some extent vague in the sense that Muslim Criminal Law was not always certain and uniform. Further, criminal law was regarded as a branch of private law. In many cases, murderer could escape simply by paying money to the dependents of the deceased. Too much discretion was given to the judges[29]. It is true that though there was no check on arbitrary powers of the *Mughal* Emperors, the people were left undisturbed in their traditional village life and their life, liberty and property were most of the part safe in the days of Great *Mughals*[30]. In essence, *Mughals* were credited for introducing and developing a well-organized system of law[31].

Mughals retained the ancient system of village *panchayets* that used to settle the petty dispute in mostly the form of compromise. In town, there was a regular Town Court presided over by a *Quazi* known as *Quazi-e- Parganah*. Town Courts had jurisdiction over both civil and criminal matters. There were also *Fauzders* who tried petty criminal cases. There was existence of *Kotwal* who functioned as chief of town police. He performed the functions of Police Magistrate and tried petty criminal cases. The principal judicial authorities in district level were the District *Quazi* who exercised appellate power against the decisions of *Quazi-e- Parganah* and *Kotwals*. At province- level, there existed Provincial Governor's Court namely, *Adalat-e- Nizam-e-Subah*, presided over by the Governor or *Subadar*. *Adalat-e- Nizam-e-Subah* had original and appellate jurisdiction. Its original jurisdiction included trial of serious offences like murder while its appellate jurisdiction included hearing of appeal preferred against the judgments of the District *Quazi* and *Fauzders*. Appeals from and against the decision by this Court would lie to the Emperor's Court or to the Court of Chief Justice.

In courts and prisons the European convicts arguably received soft treatment while growing unrest and mass uprising of peasants and political workers, dissidents, writers were governed through criminal laws. Though mutilation was replaced with capital punishments and imprisonment was replaced with transportation in apparently just legal system, the application

[29] Halim (n 10) 52–56.
[30] Haque (n 1) 1.
[31] BLAST AD case (n 12).

of criminal laws was excessively harsh, disproportionate and even racial[32]. Capital punishment of Raja NanaKumar is a classic example of judicial killing among series of punishments to many nationalists and poor natives. In particular, the preferential treatment of the Europeans in court left plethora of tyranny, misdeeds, oppressions and serious crimes committed to Bengali peasants in the name of indigo plantation and man- aging law and order in most cases virtually unpunished during colonial era.Though criminal justice agencies including police, courts and prisons were employed to further colonial dominance, mass-uprising and nationalist movements virtually challenged and ridiculed the legal system as 'trial as festivals, prisons as temple'.

Obviously, newly imposed legal regime, standard court structure, the Penal Code and the value system of justice, though not applied equally, are fair legacies.In the process, the British however, have saddled the natives with colonial prejudices, pecuniary greed and brutal coercion[33]. For instance, draconian concept of sedition was enacted as an offence in 1870 to suppress any criticism of British policies. A new justice system was installed by a foreign race and imposed upon aconquered people who had never been consulted in its creation[34]. Sentences handed down by the British judges showed marked disparity as justice either imposed less sentence or exonerated for defence plea in case a European was rarely found guilty. Among series of incidents of brutal assault, physical injury and murder committed to the servants and peasants by the British during 190 years' rule, only very few European were reportedly awarded capital punishment in Bengal[35].

[32] Shashi Tharoor, An Era of Darkness The British Empire in India (Delhi Aleph 2017) 114.

[33] Ibid 110.
[34] Ibid.
[35] See John Rudd case (1861); George Nairns case (1880).

Chapter 3

Criminal laws in independent Bangladesh

3.1 Colonial legacies continue to function

Pakistani forces' denial to hand over power to Bangabadhu Sheikh Mujibur Rahman along with brutal mass-killing and oppression prompted the declaration of independence of Bangladesh on 26 march 1971. On 10 April 1971, the elected representatives assembled in Mujibnagar and formally declared Bangladesh to be a sovereign Republic. Acting President Syed Nazrul Islam promulgated the Laws Continuance Enforcement Order 1971[36]. In fact, Bangladesh did not immediately achieve a *de jure* position as a country, and on 16 December 1971 Bangladesh attained real statehood. The Constitution would follow afterwards and until then the law-making process was characterized by Presidential Orders emanating from the President or Acting President in the exercise of powers conferred on them by the Proclamation of Independence of 10 April 1971[37]. Accordingly, the Constitution was adopted on 4 November 1972 and it came into force on 16 December 1972. After independence, all laws inherited from British and Pakistan-era necessarily continued to function in Bangladesh.

Reference may be made to provisions of our Constitution that made a catalog of fundamental rights that include right to fair trial and protection against arrest and detention[38]. In fact, constitutional recognition of right to fair trial bears an overarching effect on all criminal laws.

3.2 Major reforms in criminal laws

On January 1972, Bangladesh Collaborators (Special Tribunals) Order 1972 was promulgated for the trial of those who were collaborators during liberation war.

As newly independent state became hostage to decline in law and order, food autarky, natural disaster, black marketing, hoarding and other prejudicial activities, enactment of Scheduled Offences (Special Tribunals) Order 1972 followed. In 1973 International Crimes (Tribunal) Act 1973 was set in motion with a view to book the perpetrators of killing, arson, rape etc. committed

[36] Laws Continuance Enforcement Order 1971.
[37] Kazi Habibul Awal, Moinul Kabir and Gavin Murphy, The Legislative Process inBangladesh (The International Cooperation Group 2004) 3–6.
[38] The Constitution 1972, arts 33, 35.

during liberation war. In the meantime, Constitution (Second Amendment) Act 1973 was passed that contained preventive detention and emergency power to the President. In combating a series of prejudicial activities Special Powers Act 1974 was passed. On 28 December 1974, President imposed emergency that suspended enforcement of major fundamental rights. In the meantime, the fundamentals of standard juvenilejustice system were initiated with the passing of Children Act 1974. Ultimately, the Constitution (Fourth Amendment) Act 1975 was passed with drastic change inthe constitutionalism.

3.3 Creation of separate judicial magistracy:[39]

The twin functions of the Magistrates (viz. executive vis-a-vis judicial) and also the dependency of the judiciary upon the executive has been a colonial legacy. After independence in 1947, Pakistan government enacted East Pakistan Act XXIII of 1957 with a view to making separation of judiciary from the executive. However, that law was never come into effect for want of a simple gazette notification. The Constitution in unequivocal term states that 'the state shall ensure the separation of the judiciary from the executive organs of the State[40].' Nevertheless,as one of the fundamental principles of state policy, art 22 was not readily judicially enforceable.

There was undercurrent of demand of implementation of constitutional obligation from the very inception of Bangladesh. The subsequent upheavals of politics rather eluded it. In 1976 Law Commission recommended that subordinate judiciary on the criminal side should be separated from the executive. In 1987 initiatives were taken to separate the magistracy by amending code of Criminal Procedure 1898. Successive governments may be blamed for delaying with implementation of such constitutional obligation. In 1999 the Supreme Court issued 12 point directives in *Masdar Hossain case*[41] to ensure separation of lower judiciary from the executive. In 2007 in line with such directives of Supreme Court,Military-backed interim government ultimately effected the amendment of Code of Criminal Procedure thereby separating the lower judiciary from the executive[42].

[39] H M F Bari, 'Separation of judiciary: How long it will take?' The Daily Star (11June 2004).
[40] The Constitution 1972, art 22 [68]Masdar Hossain case (n 2).
[41] Masdar Hossain case (n 2).
[42] Ordinance nos. II & IV of 2007.

3.4 A new paradigm in juvenile justice system

In 2013 Bangladesh enacted Children Act in view of Convention on the Rights ofthe Child 1989. Beijing Rules, Riyadh Guidelines, Havana Rules and the directives of the High Court Division also appear to have permeated the provisions of the new statue. It is an epoch-making legislation for the protection and care of thejuveniles involving law. This law offers a standard legal regime and institutional framework for juvenile justice in Bangladesh. It sets out a child-friendly approachin the adjudication and disposition of matters in the best interest of children. Children Act 2013 repealed the Children Act 1974.

It appears that a new statute with clear aims, objectives, underlying philosophyand thematic issues proposes a new horizon in our system. However, procedural and functional challenges in disposing of pre-trial issues during investigation, absence of child- friendly Court infrastructure, *ad hoc* Children Court, confusion over jurisdiction of Judicial Magistracy on investigation issues, overlapping of jurisdiction of Children Court and Tribunal for Suppression of Cruelty to Woman and Children, ill-equipped Child Desk in Police Station, additional duties of the Probation Officers, lack of facilities in scare child development centers, paucity of budgetary allocation for juvenile justice sectors and lack of awareness among the common people are few major challenges that tend to encumber the proper application of Children Act 2013[43].

[43] Hussain Mohammad Fazlul Bari, Hussain, 'The Children Act, 2013: A New Paradigmin the Juvenile Justice System', in Faruque, Abdullah Al et al (eds), New Dimension of Law: Analysis of Selected Laws in Bangladesh (University of Chittagong 2017) 33.

Chapter 4
Analytical Developing Crime and Criminal Courts

4.1 Punishment in the Criminal Justice System and Human Rights

According to the *Code of Criminal Procedure, 1898* and the *Penal Code, 1860*, all of criminal offences are related with punishment in Bangladesh. The treatment or conduct of criminal behavior is known as punishment in our criminal justice system or society. But under different Human Rights Treaty and Convention, protection of Human Rights must be insured during these punishments. With new criminological developments, particularly in the field of penology, it has been generally accepted that punishment must be in proportion to the gravity of the offence. It has been further suggested that reformation of the criminal rather than his expulsion from society is more purposeful for his rehabilitation. With this aim in view, modern penologists have focused their attention on individualization of offender through treatment methods.

The Constitution of Bangladesh states: "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." This provision is nearly duplicated in *Article 7 of the ICCPR*, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The People's Republic of Bangladesh (Bangladesh) has bound itself to upholding human rights law by committing to a number of international human rights treaties. The government of People's Republic of Bangladesh had registered some declarations and reservations to particular articles of the treaties and furthermore, Bangladesh has not yet ratified nor has it acceded to a number of international human rights treaties, particularly the Optional Protocols to the two International Covenants, i.e. the *ICESCR* and the *ICCPR*. *The Second Optional Protocol of 15 December 1989 to the ICCPR* aims at abolishing the death penalty. Likewise, it has not yet ratified or acceded to *the Optional Protocol to the Convention against Torture (CAT)*.

The ICCPR expressly states in *Article 6(2)* that a sentence of death may be imposed only for the most serious crimes. The Human Rights Committee has stated that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure." But the shocking breadth of crimes that attract the death penalty under Bangladeshi law breaches the *ICCPR* due to the economic and non-lethal nature of several of the crimes, such as dealing goods on the black market or counterfeiting.

Although it is a main purpose of police is to protect the innocent from the depredation of criminals. This involves two main tasks *viz.*, to act as the watch and ward to prevent crime and to chase out criminals who have committed crime and bring them before a court of law for trial and punishment. The Constitution of Bangladesh expressly prohibits torture, Bangladesh fails to create a specific definition of torture and therefore allows impunity of law enforcement officials to engage in torture and torture is continuing here, that is proved by the cases of human rights violations handled by the NHRC involved misuse of power by police authorities, torture of detainees or under trial prisoners, killing of civilians under police custody, abduction allegedly perpetrated by Rapid Action Battalion (RAB), killing in "cross fire", and illegal arrest and detention. That is why, it is suggested that the police should honor the culture of human rights rather than the technique of torture for their investigation. It should also provide additional powers to the National Human Rights Commission (NHRC) for creating a conductive atmosphere for the protection of human rights of the accused, suspects and under trial prisoners.

4.2 Human Rights in Criminal Justice and Criminal Laws and Sentencing

Human Rights in Criminal Justice System is a burning question in the field of Human Rights which is executed by sentencing under the domestic criminal laws. In most of the cases, national criminal justice system fails to maintain the international standard of human rights. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts. With respect to the criminal justice system, the State has an obligation to establish criminal law and systems sufficient to deter and respond to attacks on individuals. On the other hand, however, criminal laws must not go so far as to deny individual rights, including due process rights. Indeed, once accused of a criminal offence, an individual benefits from rights-based procedural and substantive safeguards. In this context, the State must establish a balance that ensures both the freedom and the protection of the individual as well as public safety and well-being. For the criminal justice system, this balance can be considered at three levels:

- With respect to what should, or should not, be a criminal offence;
- With respect to criminal justice penalties; and
- In the criminal justice process.

Though International Laws are soft law, so with some notable exceptions-such as the obligation to make all acts of torture a criminal offence and the prohibition on non-retroactive criminal offences, international human rights law does not usually specify directly what should, or should not, be a criminal offence in national law. Similarly, international human rights law does not usually specify directly the appropriate punishment for a particular crime. This is not to conclude that international human rights law has little to say on these matters. Rather, while the content of criminal laws and criminal penalties are left primarily to the discretion of States, there is the important proviso that criminal law and penalties must always avoid denying the rights of individuals. As such, international human rights law provides an agreed normative framework, against which criminalization and penalties are to be assessed. The question of whether a particular criminal law is inconsistent with international human rights must be assessed on a right-by-right basis. One reason for this is that while some rights (such as freedom of expression, for example) may be limited on the grounds of public safety, order, health, morals and the rights and freedoms of others, other rights may not be limited under any circumstances. In particular, the balance between State action and individual rights can be different when it comes to vulnerable groups. Indeed, human rights law can be said to have a particular focus on marginal groups, vulnerability, disadvantage

and discrimination. Those accused of a criminal offence, those in prison, victims of human trafficking, persons suffering from health disorders, persons who are drug dependent, and broad groups such as women and children, all have particular vulnerabilities that human rights law aims to protect. Responses to crime, drugs and terrorism must be sure to protect the rights of vulnerable individuals who risk becoming the subject of criminal law and penalties. But what we see in practice? Though this concept is not providing an exhaustive list of possible rights violations related to criminal law and sentencing, it can provide some examples. Such as, with respect to victims of trafficking in persons, for instance, human rights guidelines are clear that trafficked persons should not be prosecuted for violations of immigration laws or for the activities in which they are involved as a direct consequence of being trafficked. Rather, victims of human trafficking must receive assistance and protection. With respect to children who use drugs and abuse alcohol, the United Nations Committee on the Rights of the Child considers that the right of the child to protection demands that such children should be treated as victims and not as criminals. Indeed, the United Nations Convention on the Rights of the Child, as the only core United Nations human rights treaty to refer specifically to drug use — has a strong focus on protection rather than punishment. With respect to human rights and drug laws, such statements do not mean that international human rights law can support a general "right to abuse drugs". However, a number of human rights-based drug law cases including cases engaging the right to property and the right to freedom of religion, have found drug-related criminal laws to be legitimate limitations necessary to protect public safety, order, health or morals in the individual; at least in the individual circumstances of the case. This is not inconsistent. As set out above, whether State action is incompatible with international human rights law must be assessed on a right-by-right basis. Criminal laws may at the same time, infringe certain rights but not others. Where the establishment of criminal offences is required by other bodies of international law, such as the international drug conventions, human rights law still continues to apply. The International Narcotics Control Board recognizes that the obligation to establish certain criminal offences is subject to each State party's constitutional principles and to basic legal concepts, including human rights. Whether or not an action is defined as a criminal offence in law is not however the only issue at hand. In some countries, administrative (non-criminal) penalties may be as severe, if not more severe, than under criminal law. International human rights law does not set out specifically what penalty should be applied for what crime. Nonetheless, the principle that the severity of penalties must not be

disproportionate to the criminal offence is found in a wide body of human rights related standards. This principle includes the notions that imprisonment should be used as a penalty of last resort, and that the choice between penalties should take into consideration the likelihood of the offender being rehabilitated. While the principle applies equally to adults and children, the rule has seen particular development in the context of children in conflict with the law. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), for example, encompass the "principle of proportionality" hereby any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence. In particular, the imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. In the context of drug laws and sentencing, the drug-control conventions generally require parties to establish a wide range of drug-related activities as criminal offences under their domestic law. Nonetheless, they permit parties to respond to them proportionally, including through alternatives to conviction or punishment for offences of a minor nature. Serious offences, such as trafficking in illicit drugs, must be dealt with more severely and extensively than offences such as possession of drugs for personal use. In this respect, it is clear that the use of non-custodial measures and treatment programmes for offences involving possession for personal use of drugs offer a more proportionate response and the more effective administration of justice. Moreover, the criminal justice response should not be considered proportionate if it results in the denial of another individual human right. Where imprisonment for possession or use offences precludes access to appropriate drug-dependence treatment, for example, this may constitute a denial of the right to the highest attainable standard of health or even the right to freedom from cruel, inhuman or degrading treatment, rendering the criminal justice response de facto disproportionate. Where severe sentences for less serious offences such as personal possession can be passed on a summary or administrative basis, the door may be opened to acts of corruption by individual law enforcement officers, border police or criminal justice officials. At the extreme end of the scale of punishment, the use of the death penalty for those convicted solely of drug-related or economic offences raises grave human rights concerns. The International Covenant on Civil and Political Rights specifies that in countries which have not abolished the death penalty, the sentence of death may be imposed only for the "most serious crimes". The concept of "most serious crimes" is limited to those where it can be shown that there was an intention to kill which resulted in the loss of life. The weight of opinion indicates that drug

offences (such as possession and trafficking) and those of a purely economic nature do not meet this threshold. Moreover, States that have abolished the death penalty are prohibited to extradite any person to another country where he or she might face capital punishment. Despite such prohibitions, a considerable number of the retentionist States that continue to use capital punishment have carried out executions for drug offences in recent years. Overall, while human rights law does not usually direct the content of criminal laws or penalties per se, it does demand strict scrutiny to ensure that laws do not deny the rights of individuals. In the case of drug laws in particular, obligations to establish offences under the international drug conventions must be fulfilled while at the same time respecting a range of rights, including the right to health, to the protection of the child, to private and family life, to non-discrimination, to the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right not to be subjected to arbitrary arrest or detention.

4.3 Relation between Criminal Justice System and Human Rights

Criminal justice system and Human Rights are strongly related with each other. Though criminal justice system deals with human, so question of Human Rights and quality of criminal justice is very simple in a criminal justice system. A criminal Justice system attuned to the tenets of human rights needs a harmonious correlation between legislators, police, lawyers, witnesses, courts and prisons. It is primarily for the common need for prevention and detection of crime, maintenance of law and order and development of a culture that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. And no one shall be subjected to arbitrary arrest, detention or exile. It represents an enormous human and physical investment; its problems have become the common place of contemporary dissertation and often occupy centre stage in our media. We should think of it as having four successive stages. First of all, comes the enactment by Parliament and state t legislatures of the criminal law secondly, the task of the police to enforce the laws correctly, thirdly to hold a fair criminal trial, where the question of guilt is decided with the help of lawyers and witnesses and finally, the fourth stage is prisons been considered in isolation. Each tends to be special province of a different group of people and each group thinks in its own independent way, disregardful of the importance of the other, so that an integrated approach, which is essential for a hearty development of the criminal justice system as a whole, is never achieved. Political representatives on the legislature make the laws, police enforce them,

lawyers with the help of witnesses and an appreciative court run the trials and the prison or probation services deal with the convicted offenders. None of these groups is obliged to give much thought to the problems of others or to consider the working of the system as a whole. This is unfortunate because the different parts of the system are intimately connected. I t is no use passing good legislation if the police cannot enforce them or honor the spirit of the laws in the inherent perspective of implementing them. There is no point ‘in catching criminals if the system great change is the diminution in the respect for authority and deterioration in the basic human values, political, social and economic changes during the last fifty years, have brought benefit to a vast number of people by greatly improving their living standard. However at the same time sophisticated crimes with international links have appeared in the horizon, civil disorders have become fairly common place and the growing complexity and mechanization of society has made necessary a considerable expansion of legislations an expansion that has contributed towards deterioration in the relationship between the pubic and the authority.[44]

[44] http://www.undp.org.bd/Human%20Security/KeyNoteCPD.pdf [Last visited on 05 July 2012].

Chapter 5

ADMINISTRATION OF CRIMINAL JUSTICEC IN BANGLADESH

5.1 Criminal Justice Process

It is important to realize that criminal justice refers to a process as well as to a system of agencies and organizations. A comprehensive view of this process would normally include the following ten critical points:

1. Investigation;
2. Arrest and booking;
3. Custody;
4. Formal complaint;
5. Initial court appearance- preliminary hearing;
6. Arraignment;
7. Bail-detention;
8. Adjudicating;
9. Disposition (sentencing);
10. Appeal.[45]

The criminal justice process normally proceeds in a step-by-step fashion. When a criminal statute has been violated, a police officer first seeks to locate the possible offender. If the officer succeeds, s/he then arrests the offender, files a criminal complaint against him/her, and has him/her brought before a judge or magistrate as quickly as possible. If the offense is relatively minor, the judge may dispose of the case immediately; if the crime is more serious, the judge formally acquaints the defendant with the charge, seeks to have counsel provided, and takes possible action on bail. The public prosecutor is then notified of the case and, if the defendant pleads not guilty to the charge, the case goes to trial. The facts and evidence of the case are then developed by the prosecution on behalf of the defendant. A trial on the merits is then held either before a judge alone or before a jury under direction of a judge to determine the guilt or innocence of the defendant. If

[45] Wayne Morrison, Theoratical Criminology from Modernity to Post Modernism, 1st ed. (London: Cavendish Publishing Limited, 1995), p. 105.

the defendant is found guilty, s/he is then sentenced by the judge to a period of incarceration or directed to remain in the community under the supervision and control of probation authorities.[46]

5.2 Right and Protection of the Accused

Criminal justice system is not only for punishing accused but also for reforming him as suitable and law-abiding person of the society, and that is why they are allowed to have following rights-

Right to be Produced Before a Magistrate

The police cannot keep a person under arrest for a longer time than is necessary without producing him before a magistrate. There are provisions in the Constitution of Bangladesh and the *Code Criminal Procedure*, according to which a maximum time of 24 hours is allowed to the police to produce an accused person before a magistrate. These portions go a long way in guarding the personal liberty of the individual.[47]

Right to Bail

A person is guilty of an offence only after being found to be so by a competent criminal court. Since the processing of a case by the police and the subsequent trial in the court may take a fairly long time, it is desirable that wherever it is expedient to do so, the accused person must be released on bail since his guilt is yet to be established under the scheme of the Code of Criminal Procedure.[48]

Bail is no more Safeguard

This right of arrested persons is being violated in the Judicial System of Bangladesh, though they are arrested under bailable section of the *Code of Criminal Procedure*. The important procedural safeguard of bail is denied for many offences which could lead to the death penalty. Section 497 of the *Code of Criminal Procedure, 1898,* provides that an accused shall not be so released on bail if there appear reasonable grounds for believing that he is guilty of an offence punishable with death or transportation for life. Provided that, the court may direct that any person under the age of sixteen year or any woman or any sick or infirm person accused of such an offence be realized

[46] Ibid., p.106.
[47] S. M. Afzal Qqdri, Criminology Problems & Perspectives, 5th ed. (Lucknow: Eastern Book Company, 2005), p. 41.
[48] Ibid.

on bail. The special laws for the protection of women and children provide that all offences under those Acts are non-bailable, which means that bail is *per se* unavailable unless, at the judge's discretion, the court decides to grant bail.

As discussed further below, criminal trials in Bangladesh regularly last for months or years. As a result, the presumption against bail for offences which involve the death penalty can result in a *de facto* pre-trial conviction of the accused who may spend months or years in jail before ultimately being acquitted at trial.

Right to Counsel and Legal Aid

The concept 'legal aid' denotes a wide meaning and includes counseling payment of lawyer's fees and other incidental cost for expenses of the litigation. A person facing trial must have a counsel in order to be defended effectively. The Constitution provides that 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 be defended by a legal practitioner of his choice. One of the basic fundamental rights is that all citizens are equal before law and are entitled to equal protection of law.[49]

Inactiveness of Legal Aid in Bangladesh

Most of the people in Bangladesh cannot access themselves to justice to protect and vindicate their legal rights and lawful access. To address this problem legal aid services have been activated under the Legal Aid Act, 2000. But in practically this act is not enforceable in the criminal justice system of Bangladesh, though the need for legal aid is felt more in criminal matters as the life, property and personal liberty of a person are inseparably connected there. As regard criminal matters, section 340 of Code of Criminal Procedure, 1898- states that an accused should be defended by a lawyer and he must pay the fees and nothing more. Commenting on the section 340(1) of the Code of Criminal Procedure, 1898- that the right conferred by this section does not extend to rights in an accused person to be provided with a lawyer by the state or by the police or by the Magistrate. But legal aid is facilities are very necessary in criminal justice system to ensure human rights.

The principle of Legality

[49] Ibid., p. 43.

The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some predetermined law defining a prohibited conduct. The principle is expressed by the maxim *nullum peona sine lege*. In other words, unless there is violation of some existing law defining a crime clearly and unequivocally, no crime is committed.[50]

Presumption of Innocence

There are two systems, i.e. the accusatorial system and the inquisitorial system, followed in different parts of the world in administration of criminal justice. In Bangladesh, where the accusatorial system is followed, there is a presumption in favor of the accused that the offence has not been committed by him and the presumption continues to be operative until the prosecution is able to prove its case according to the rules of procedure and evidence prescribed by law. The same principle has been incorporated in the Evidence Act. "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist''.[51]

Protection against Self-incrimination

A cardinal principle of the English system of criminal jurisprudence is that an accused cannot be compelled to give evidence against him. The principle has been recognized in the Indian legal system. The constitutional guarantee of the right in India is that no person accused of any offence shall be compelled to be a witness against himself.[52]

Protection Against Double Jeopardy

It is a well established principle of the English legal system that no man shall be twice punished if it appears to the court that it is for one and the same case. The principle is expressed in the well-known maxim, *nemo debet bis vexari, si constat curia quod sit pro una et eadem caussa*. The principle has been incorporated in the Indian Constitution thus.

[50] Ibid., p. 44.
[51] Ibid., p. 45.
[52] Ibid., p. 46.

According to section 403 of the *Code of Criminal Procedure, 1898 (Cr.P.C.)*, person once convicted or acquitted not to be tried for same offence (CrPC1898). So no person shall be prosecuted and punished for the same offence more than once.[53]

Right to Speedy Trial

Justice delayed is justice denied is the well-known maxim highlighting the importance of quick justice. In the context of the administration of criminal justice, it has a dual significance. Viewed from the angle of the accused person, if he is interested that there should be a speedy trial then there may be an early end of proceeding against him resulting in acquittal or conviction. The accused may have to spend long periods full of uncertainty and mental anxiety possibly in jail or in police look-up if the proceedings against him are not expedited. Speedy train also limits the possibility of long delay impairing the ability of an accused person to defend himself effectively or handicapping the prosecution in the trial. Either of the two sides may suffer because witnesses may die, their memories may fade and testing may become more vulnerable to cross-examination. The legal basis of the right was provided by the Magna Carta (1215) which proclaimed that justice or right will neither be sold nor denied or deferred to any man.[54]

Delay of Justice

It is said that, "delay justice is denied of justice". Delay plagues the administration of justice in Bangladesh at each level of the judiciary, with a backlog of 43,000 criminal cases in Dhaka alone. The government's Ministry of Law estimated that approximately 1,200 prisoners had made no court appearance in six months, often surpassing the maximum sentence possible had they been found guilty. Such backlog seems to be chronic in all 64 district courts that serve the country of 150 million populations. Such lengthy delay compounds concerns about denial of bail to accused and raises serious questions about the presumption of innocence in Bangladesh's criminal justice system.

In order to address this, a number of Speedy Tribunals have been established under the Law and Order Infringement (Speedy Trial) Bill of 2010, which has been extended several times and is

[53] Ibid., p. 47.
[54] Ibid.,p. 48.

now set to expire in June 2014. Under this Act, special tribunals get assigned certain cases such as murders, vandalism, and extortion, and must dispose of them within 90 days with a possible extension of 30 days in special circumstances. While welcoming the government's attempts to address delays in criminal trials that leave accused people in remand for years awaiting a verdict, it is concerned that these Speedy Tribunals sacrifice other vital safeguards such as rules of evidence and other rights of the accused, which also affect the right to equal protection under the law. Finally, the Speedy Trial courts provide an outlet for government interference with the judiciary because the assignment to these special courts is often politically motivated. For example, 86 of the Bangladesh Rifles mutineers who took part in the bloody 2009 mutiny are subject to high-profile trials under the Act.

Chapter-6
OBSTACLES TO CRIMINAL JUSTICE

6.1 Torture

A point frequently raised was the lack of awareness of the absolute nature of the prohibition of torture among law enforcement and prison officials, resulting in the trivialization of torture as a "mistake" rather than condemning it as a serious crime. In addition, interrogation techniques and restrictions on the use of force by law enforcement officials are often not regulated by domestic law, leaving police officers with considerable uncertainty as to which methods can be legally applied. According to several interlocutors of the delegation, ill-treatment and torture have become so entrenched in the country that once someone is arrested it can be assumed that he or she that will be subject to abuse. The culture of forcibly extorting confessions is deeply rooted within the law enforcement agencies in Bangladesh and is reportedly considered a normal practice. Furthermore, different interlocutors, including politicians who were in prison, consider that members and sympathizers of opposition political parties who are arrested are almost systemically subject to ill-treatment and torture.

Act of Law Enforcing Agency

The arrested person is being victim of serious torture by police or RAB. As for example, the arrest of Mr. Asraful who was arrested by Detective Branch (DB) police in 16 November 2012 and presented to court on 20 November. But in this period of 4 days, he was physically tortured by DB police. Another example is arrest of Mr. Kamal in Dr. Narayon Chandro murder case, who presented to court after passing 2 days of his arrest. After his bail, he complained to the journalist, RAB physically torture him for giving confession of murder. In most of the cases, common people are being victim of law enforcing agency's illegal acts who are weak politically or economically. "In many cases, family members complain that victims died after being arrested by RAB and not in encounters as RAB claimed. It said RAB allegedly killed more than 700

people and injured or tortured scores more since its formation in 2004. Former detainees also told how they were routinely tortured in custody, suffering beatings, food and sleep deprivation, and electric shocks. The authorities failed to investigate these incidents credibly. Referring to the case of Jhalakati college student Limon Hossain, who was shot in the leg by RAB officers on 23 March, RAB officials alleged that he was a member of a criminal gang and that he was injured when RAB officers returned fire after the gang shot at them. Limon Hossain said he was alone, bringing cattle home, when RAB personnel arrested and shot him. The conclusions of a separate government inquiry never made public reportedly confirmed his claim. The police charged Limon with trying to kill RAB officers.

Instead that, Abdul Kadar, a Dhaka University student, who was recently tortured and arrested on trumped-up charges on his way home from his sister's house. He said police beat him and used sticks and sharp objects to make him confess to crimes, that he did not commit. He was charged with possessing lethal weapons, robbery and carjacking, then put in jail. Following the interference of Prof. Dr. Mizanur Rahman (Chairman NHRC) and campaigns by the media and rights activists, the high court ordered him to be released on 3 August after 18 days in illegal detention. He was not served water while he was crying out in pain and was not taken to hospital even 18 hours after his arrest. As a signatory of the UN Convention against Torture, Bangladesh's government takes a hard line on torture on paper, but each year there are more stories like Kadar's or worse.

6.2 The Death Penalty

The reality regarding the criminal justice system must be understood to evaluate how dangerous the use of the death penalty can be in Bangladesh. Realistic policies followed by prompt actions must be in place in order to reduce the recurrence of crimes that are currently punished by the death penalty instead of continuing with this failed deterrent. There can hardly be any debate that the death penalty does not amount to cruel punishment, which is prohibited in the country's supreme law. In fact, such cruel punishment comprises a violation of the Constitution by undermining the natural dignity of human beings. Article 32 of the Constitution provides: "No person shall be deprived of life . . . save in accordance with law." Bangladesh applies the death penalty for such crimes as murder, sedition, offenses related to possession and drug trafficking, treason, espionage, military crimes.

Mandatory Death Sentences

Under the *Women and Children Repression Prevention Act* of 2000, causing death for dowry is a crime punishable with mandatory death penalty, in other words no other sentence is available. Mandatory death sentences are cause for grave concern as they deprive the judiciary of the discretion to consider extenuating circumstances relating to the crime or the accused. The obvious injustice that can result from a mandatory death sentence is illustrated in the case of *State v. Shukur Ali,* decided in 1995, where the High Court Division confirmed the death sentence of a minor boy who was 14 years old when he committed the rape and murder of a 7-year-old girl, *under s.6* of an earlier version of the *Women and Children Repression Prevention Act, 1995.* The Court noted that it was compelled to confirm the death sentence.

"No alternative punishment has been provided for the offence that the condemned prisoner has been charged and we are left with no other discretion but to maintain the sentence if we believe that the prosecution has been able to prove the charge beyond reasonable doubt. This is a case, which may be taken as hard cases make bad laws.[55]

The Court proceeded to note that the age of the convicted person, who was only 16 at the time of the trial, would have meant that his sentence would have been commuted to life imprisonment had he been charged under the Penal Code which provides alternatives to the death sentence.

On 16 May 2010, the High Court Division of the Supreme Court of Bangladesh declared unconstitutional such a provision providing for a mandatory death sentence.[56] The Court ruled that, regardless of the nature of the offence, legislation may not require that the death penalty is the only punishment available. This would impermissibly constrain the judiciary's discretion under the constitution to consider the individual circumstances of each case, including the credibility of evidence and witnesses.

As a consequence, the legislator should amend all the laws establishing mandatory death sentences in order to provide for an alternative prison sentence when there are extenuating circumstances. However, if it fails to do so, it remains to be seen how the courts of law of Bangladesh will give effect to this ruling in practice.

Executions of Death Sentence

[55] State v. Sukur Ali, 9 (2004) BLC, 238.
[56] BLAST v. State, Writ Petition No. 8283 of 2005.

All executions in Bangladesh are, by law, required to be done by hanging. All convicted prisoners facing the death sentence are, by law, to be detained on 'death row', in separation from other prisoners.[57]

While government data on the numbers of hangings in Bangladesh are not available, sources indicate that, since the liberation of Bangladesh in 1975 and as at January 2008, 247 individuals had been hanged.[58] At least 1500 convicted criminals now face the death penalty, of which more than 950 convicts are in custody on death row (including 28 women), and more than 500 have absconded. A number of recent hangings have followed two significant periods of time with no executions: 1989-92 and 1998-2001.[59] These tentative steps toward abolition were reversed when executions resumed after several years of a de facto moratorium.

Method of Execution

Government representatives and jail administrators that it is customary to request a fellow prisoner in the prison, who is not facing a death sentence to carry out the execution. Since executions are done by hanging, this means that a fellow prisoner or two prisoners are responsible for placing the person to be executed under the beam, place a rope around his neck and open the trap door by level so that the convicted person is hanged. Incentives were offered to prisoners to carry out the execution, such as a remission of sentence.

When asked about the ethics and legality of such practice, numerous respondents explained that the use of fellow prisoners was authorized by the Bengal Jail Code. However, while the Jail Code makes detailed reference to the 'duty of the executioner', requires the hanging of the body for half an hour, and specifies that the government department is responsible for expenses of the hanging, nothing in the Code authorizes the practice of offering prisoners reduced sentences as incentives to perform an execution.[60] Actually it was a colonial practice introduced by the British and has been performed in South Asia since independence from British rule. Regardless of the provenance of this custom, it is urges Bangladesh to dispense with it. It is readily understandable that it is difficult to find an official or administrator to personally carry out the execution. For this

[57] The Prisons Act 1894, s. 30(2); Bengal Jail Code, amended 1989.
[58] The Daily Star, (26 January 2008).
[59] David T Johnson and Franklin E Zimring, 'Taking Capital Punishment Seriously' Asian Criminology, (January 2006), pp. 89-95.
[60] httpwww.fidh.orgIMGpdfReport_eng.pdf [Last accessed on 18 October 2012].

reason, among others, different Human Rights organizations we urge Bangladesh has to abolish the death penalty for ensure Human Rights.

6.3 Extra-judicial Killing

Extrajudicial killing is the killing of a person by governmental authorities without the sanction of any judicial proceeding or legal process. Extrajudicial punishments are by their nature unlawful, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial killing referring to actions outside the judicial (court) system, such as an extra-legal confession, which, if brought in as evidence, may be recognized by the judge during a trial. Extrajudicial killings often target leading political, trade union, dissident, religious, and social figures and may be carried out by the state government or other state authorities like the armed forces and police. With this killing, 155 people were killed extra judicially in Bangladesh under the present Awami League government. Extra judicial killings were started by RAB during BNP-Jammat government in 2004. RAB was created in March 2004, to much public acclaim, as the government's response to a breakdown in law and order, particularly in western and central Bangladesh.

In Rajshahi, Khulna and Dhaka districts, armed criminal groups or powerful mercenary gangs colluded with local politicians to run smuggling rings or extort money from local people. Within months of its creation, RAB's operations were characterized by a pattern of killings portrayed by the authorities as 'deaths in crossfire', many of which had the hallmarks of extrajudicial executions.

Rapid Action Battalion (RAB) is powerful. And, though the saying goes that with great power comes great responsibility, this is not the case with RAB. Officers have been accused of human rights violations and the use of excessive force, and most importantly, for extrajudicial killings. Extrajudicial executions continued despite a government pledge to end them. The Rapid Action Battalion (RAB) personnel were reportedly involved in more than 54 unlawful killings in 2011 which were neither investigated independently nor brought the offenders to justice. But

unfortunately the home minister refused to even acknowledge the need for accountability. The Home Ministry even went to the extent of ignoring its own previous findings that RAB was behind at least two cases of extrajudicial killings.[61]

There is a dearth of accountability mechanisms in Bangladesh, and even less so where RAB is concerned. The government seems sluggish at best, if not completely disinterested in bringing any of these officers to book, as indicated by both past and current patterns. For example, the year 2003 saw so much illegality on the part of RAB, but the government's inaction was clear.[62]

Extra judicial killing: perspective Bangladesh

Extrajudicial killings are a serious concern in Bangladesh. Police and the Rapid Action Battalion (RAB) allegedly kill people in their custody. Extra-judicial killing in Bangladeshis becoming like the breakfast of the rich people or like the lunch of that poor people who eats for a time in a day. Every day in the getting up, or in the fast reading of daily newspaper we watch only an issue or occurrence was occurred in any place of Bangladesh which killing is occurs by RAB or police of terror, Which is known to us as extra-judicial killing. All of the human rights organizations and concern association criticize this extra judicial killing. “Bangladesh authorities must honor their pledge to stop extrajudicial executions by a special police force accused of involvement in hundreds of killing. Hardly a week goes by in Bangladesh without someone being shot by RAB with the authorities saying they were killed or injured in ‘crossfire’ or a ‘gun-fight’. However the authorities choose to describe such incidents, the fact remains that they are suspected unlawful killings. There can be no justice if the force is the chief investigator of its own wrong-doings. Such investigations cannot be impartial. There is nothing to stop the RAB from destroying the evidence and engineering the outcome. Former detainees also told how they were routinely tortured in custody, suffering beatings, food and sleep deprivation, and electric shocks.

[61] http://news.priyo.com/politics/2012/05/24/amnesty-decries-extr-52262.html [Last visited on 29 October 2012].
[62] http://www.thedailystar.net/newDesign/news-details.php?nid=239201 [Last Visited on o4 November 2012].

At least 200 alleged RAB killings have occurred since January 2009 when the current Awami League government came to power, despite the Prime Minister's pledge to end extrajudicial executions and claims by the authorities that no extrajudicial executions were carried out in the country in this period. In addition, at least 30 people have been killed in other police operations since early 2010, with the police also portraying them as deaths in "shoot-outs" or "gun-fights". "By failing to take proper judicial action against RAB, successive Bangladeshi governments have effectively endorsed the force's claims and conduct and given it carte blanche to act with impunity. All we have seen from the current government are broken promises or worse, outright denial". In many cases the investigations blamed the victims, calling them criminals and portraying their deaths as justified even though available public evidence refuted that.

Unseen Crime

Extrajudicial executions in Bangladesh also documents how the Rapid Action Battalion (RAB) justify these killings as accidental or as a result of officers acting in self-defense, although in reality many victims are killed following their arrest. "Hardly a week goes by in Bangladesh without someone being shot by RAB with the authorities saying they were killed or injured in 'crossfire' or a 'gun-fight'. However the authorities choose to describe such incidents, the fact remains that they are suspected unlawful killings". The RAB has been. Any investigations that have been carried out into those killed have either been handled by RAB or by a government-appointed judicial body but the details of their methodology or findings have remained secret. They have never resulted in judicial prosecution. RAB has consistently denied responsibility for unlawful killings and the authorities have accepted RAB claims. "It is appalling that virtually all alleged instances of illegal RAB killings have gone unchallenged or unpunished. There can be no justice if the force is the chief investigator of its own wrong-doings. Such investigations cannot be impartial. There is nothing to stop the RAB from destroying the evidence and engineering the outcome. "By failing to take proper judicial action against RAB, successive Bangladeshi governments have effectively endorsed the force's claims and conduct and given it carte blanche to act with impunity. All we have seen from the current government are broken promises or worse, outright denial. In many cases the investigations blamed the victims, calling them criminals and portraying their deaths as justified even though available public evidence refuted that.

6.4 Bribery

Now a day's bribery is consisting in the vain to vain of the court and police administration of Bangladesh. Most often abuse of power and personal gain occur in both the public and private domains and usually by a collusion of individuals or groups of individuals from both sectors. A more elaborate description of bribery is "the abuse of office whether in Government, administration or business, it is about the giving and seeking of favors, it is about buying political influence, taking kickbacks, bribing officials. It is about subverting public good for private gain". Corruption may also include any or a combination of such acts as embezzlement, fraud, nepotism, negligence of duty for private gain or promoting any vested interests - financial, political or otherwise, misuse of public or institutional fund and extortion. Corruption, therefore, is more than bribery.

In terms of actors, distinction is also made between grand bribery and petty bribery. Grand bribery usually involves people in high positions of power – political and Government leaders and public sector officials. In contrast, petty bribery is usually the fallout of grand bribery, and involves public officials at varying levels from top to bottom who use their respective positions of power or links with power, to solicit unauthorized payments or bribes for services to the members of the public that are in her or his jurisdiction. Petty bribery is also often called speed money or grease money in return for quicker than otherwise disposal of a service. When bribery becomes pervasive access of the citizens to the basic public service deliveries become a function of capacity to make unauthorized payments. In other words, bribery affects the poor and disadvantaged more than others in the society.

It should be noted that when corruption becomes systemic and widespread, distinction between grand and petty bribery becomes blurred and together they give the total picture of corruption. Another focus of the discourse on bribery is on whether it happens nationally or internationally, which are also linked with each other. Distinction is further made between political and economic bribery, though one is the other side of the same coin.

It recognizes motivational importance of personal gains from bribery, but also stresses values, norms and behavioral modes in different societies. In terms of implications, it warns that a "high level of corruption can make public policies ineffective and can also draw investment and

economic activities away from productive pursuits towards the towering rewards of underhanded activities". Bribery is an insidious menaces that breeds and increases poverty. It prevents development, undermines democracy and governance. Bribery prevents rule of law, distorts market and stifles economic growth. It creates and perpetuates social and economic deprivation and inequality, and leads to violation of basic constitutional and human rights, breeds crimes, social frustration, discontent and insecurity.

Bribery of court officials

Bribery is continuing each and every sector of Bangladesh, especially in governmental offices and different sections of court and police administration. In general register office (GRO) gives long or short dates in against money. At the same time they show appearance of accused person in against of money, though the accused is not present. Following this, Complain register (CR) also doing same things in against of money. Even they take money from the lawyers, if they like to see record of cases or remand back or put up or production or for any other papers or documents related to cases. At the same time, every lawyer must have pay bribery to send the bail bond whether accused arrested or not. Even the orders of the magistrate court are being sell likes goods of market and the warrant copy which have to send to police station, is being serve to the accused or remove without delivery to police station in against of money. The magistrates give bail and remand in against of bribe. In addition these same things are happen in the criminal miscellaneous case (Cri. Mis case) in the Session courts. They give bail or not by taking bribe. Most of the Magistrate, Judges, Peshkar, Clarks and others official are engage with unauthorized payment of bribe. Following these, the police of custody take bribe from the lawyers and accused relatives if they like to meet with them. Actually it an unwritten rule in the court system or criminal justice system of Bangladesh. It keeps general people far from judicial system of Bangladesh. Actually it is the main obstacle in breach of Human Rights criminal justice system of Bangladesh. To get these illegal benefits from the court, police give large amount of bribe to their higher authority or related Ministry for their posting in the court.

6.5 Political Bias

From the eighteen century that means after 1975 our criminal justice system is being randomly bias by politics. Judiciary have become victims of politicization, losing their due effectiveness and independence. Use of religion in politics is also not new to Bangladesh, nor is it over politicization. What is new is the kind of militancy, particularly the way they have been allowed to spread, including the unprecedented phenomena of simultaneous bombings and suicide attacks. Ironically, in spite of the bitter experience of the use of religion in politics as a cover up to political and economic exploitation by Pakistan, coupled with deep-rooted values of pluralism and multiculturalism that catalyzed the assertion of national identity leading to independence of Bangladesh, religion has been used in politics also in post-independence period by successive regimes. The two main political parties or outside the Government as well as military rulers courted the religious parties directly or indirectly.

Eventually, not only has the space for militancy been allowed, but also nothing was done to prevent the recruitment and training activities of the so-called jihadi cadres and other terrorist groups whose links with, or patronage of, the Government including protection by the law enforcement agencies is an open secret by now. The political patronage of militancy and its reported linkage of the sections of the government have left the police and administration initially inactive and now ineffective, in taking any measures against growing insecurity ranging from petty crimes and violence, repression against women, children and minorities including minorities within Islam. Indiscriminate killings of citizens have now created a widespread sense of human insecurity and despair. Actually they use religion for their political purpose other than establish Soriah Law.

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Exercise Culture of Pardon

Now a days culture of pardon is exercise in the criminal justice system of Bangladesh. According to Article 49 of our constitution- the president shall have power to grant pardons, respites and remit suspend or commute any sentence passed by any court, tribunal or other authority. But this prerogative of mercy of honorable president is used politically by every government of Bangladesh. In the period of former ruling BNP- Jamat Allegation government they exercise this prerogative power of president politically by their obedient present. For example- mercy of Jiltu who was accused for double murder and sentenced for death penalty by Appellate Division of Supreme Court. Following this, present government also exercises that culture of pardon. For example- the mercy of ruling party's leader Abu Taher's son Biplob who was also accused for murder and sentenced for death penalty. At same time, the mercy of Gama murder accused persons also questionable and criticized by national and international jurists.

Withdraw of Cases

Following the previous government, present government also withdraws the criminal cases politically. Even the National Committee for Withdrawing Political Harassment Cases, withdraws assault or criminal force to women with intends to outrage her modesty cases politically which punishable under section 354 of Penal Code and Nari O Shisu Nirjaton Dhomon Ain 2000. Even there was no recommendation of district committee for withdrawing of that case, though it was the proceeding. For example- withdraw of Mr. Mithun case who is a local Jubolig leader of Pabna. That case was withdrawn in the basis of recommendation of Awamolig leader without any recommendation of District Committee.

In addition this the accuses of Porag Mondol's kidnapping cases got bail but session and district public prosecutor did not knew anything about their bail. Though he was the government solicitor and powered to defense against bail of that case. Actually, one of the parliamentarians of ruling

party creates presser to the court for bail. Even the police arrested Jubolig leader Mr. Juwel Molla in order of High Court who was creating master plan for kidnapping Porag Mondol.

Following these, the Home Ministry has taken decision for withdrawing of famous journalist Tipu Sultan torture case as a political harassment case. But he was tortured by local Parliamentarian Joinal Hajari in 2001 and police did not take his FIR in that time. Then in the period of previous Caretaker Government police record the case in the order of higher court. But unfortunately, present government's Home Ministry has taken decision to withdraw that case as political case.

Chapter 7

Challenges of criminal justice system

The criminal justice system of Bangladesh, an offshoot of common law system, isaccusatorial in nature. Bangladesh's contemporary laws are still largely colonialin nature and in spirit and the colonial legacy of power-facilitative, command- based and top-down law making continues to haunt the country's legislative his- tory that tends to deter popular participation in law making process and their chance of getting better justice[63]. The trends, patterns, developments and challenges of criminal laws and criminal justice system may be summarized thus.

7.1 Lawyer-centric adversarial system

As an inheritor of common law system, Bangladesh follows the adversarial system, where generally state bears the onus to prove the case against the offender.In fact, the state plays the significant role in prosecuting the accused. The court takes a rather neutral and passive role in deciding the guilt of the accused in view of evidence adduced by the prosecution witnesses.

According to Akbar Ali Khan, owing to introduction of lawyer-centric acutelyadversarial system, legal reforms introduced by the British in this area turned out to be 'isomorphic mimicry' which apparently looked like western counterpart, but in reality, was a system of exploitation for the poor, marginal, dissidents and disadvantaged groups[64]. In fact, too much reliance on lawyers and too much passivity of the judges remain a perennial challenge for the administration of justice in Bangladesh.

7.2 Outdated penal laws

According to Lord Macauley, Penal Code was enacted as an exhaustive law. Obviously, Penal Code 1860 prescribed the consistent principles of criminalresponsibility along with definitional statement of corpus of crimes, however it requires comprehensive updating. Abdullah Al

[63] Ridwanul Hoque, Judicial Activism in Bangladesh A Golden Mean Approach (Cambridge Scholars Publishing 2011) 100.

[64] Akbar Ali Khan, Gresham's Law Syndrome and Beyond: An Analysis of the Bangladesh Bureaucracy (University Press Limited 2015) 318; Lant Pritchett et al, Fragile States: Stuck in a Capability Trap? (World Bank 2010).

Faruque rightly pointed out that Penal Code is largely silent about the necessity of reformation and correctional methods including probation, parole and restorative justice[65]. Shahdeen Malik pointed out that during 1790 s to 1820 East India Company imposed a new regime of legal norms concerning crimes and punishments and from 1820 s the amendments were mostly procedural in nature[66]. He further argued that rationale for punishment was clearly recognized to be deterrence and new law making process of the new colonial rulers were rational and modern only on the surface. He further advanced that it was not the enlightened rationality of law but perceptions about Indians and their laws that shaped the formulations of these rules by colonial rulers[67].

A celebrated author rightly pointed out that Britain had controlled the natives with an adversarial legal system, excessively bogged down in procedural formalities that were far removed from traditional system of justice[68]. Since the Penal Code was enacted in the year 1860, many developments have taken place, new forms of crimes have come into existence, punishment for some crimes are proving grossly inadequate and the need for imposing only fine as a sentence for smaller offences is felt. Although Penal Code was the product of intellectual genius of Lord Macaulay, presumably he was hostage to particular time and place,cultural and imperial context. More so, there are few ambiguous provisions in Penal Code. In fact, Penal Code has become antiquated in some respects and encumbered with random judicial modification and legislative amendment[69].

7.3 No explicit penal policy

The criminal justice system of Bangladesh declares no explicit statutory ration- ales. Nor does it provide for as to what definite goals and aims can be thus achieved. There is no explicit penal policy in vogue in Bangladesh. Rather, basic foundation and development of criminal laws of

[65] Abdullah Al Faruque, 'Goals and Purposes of Criminal Justice' Special Issue (2007) Bangladesh Journal of Law 6.
[66] Malik (n 32) 276–278.

[67] Malik, Shahdeen, 'Perceiving Crimes and Criminals: Law Making in the Early 19th Century Bengal' (2002) 6 Bangladesh Journal of Law 59.
[68] Tharoor (n 37).
[69] Wing-Cheong Chan, Barry Wright, and Stanley Yeo (eds), Codification, Macaulayand the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform (Routlegde 2012).

this region owed its origin to Indian Penal Code 1860. The subsequent reforms and developments of criminal laws tend to offer the palliative fix for addressing the incoherent behavioral challenges of its population. It is also explicit that successive authoritarian regimes often resort to many draconian laws with a view to imposing harsh punishment that may deter the potential criminals. An observer stated that ironically, harsh laws have often seriously undermined the constitutional notion of justice and the due process of law[70]. It was also observed that widespread prescription of death sentence is inconsistent with modern trend of correctional approach and human rights[71]. Similarly, Mahmudul Islam pointed out that a death sentence should not be permissible unless it appears that there is a compelling state necessity to take the life[72].

Lackadaisical and defective investigation

There is no separate investigating agency in Bangladesh. The investigating officers belong to the regular police force. In many instances the investigating officers are alleged to be discharging their duties in a casual manner that ends in poordetection of crime[73]. Today there is no denying that delayed, defective and biased investigation of crimes is one of the major bottlenecks that tends to paralyses the criminal justice system in Bangladesh. The age-old enactments including Police Act 1861, Police Regulations of Bengal 1943 are often touted as serious impediment for ensuring liberty jurisprudence to the accused. Apart from challenge in recruitment process as well as poor training facilities, the investigators are also mostly handicapped in undertaking effective investigation for want of modern- gadgets and equipment etc.

7.4 Arbitrary remand and unregulated arrest on suspicion

In Bangladesh, a police officer has the unbridled discretion to arrest an individualon the pretext of reasonable suspicion and credible information even without a warrant of arrest from the Magistrate. Criminal law also empowers the police officer to keep the arrested person in his

[70] Hoque (n 7) 45.
[71] [79]Faruque (n 73) 16.
[72] Mahmudul Islam, Constitutional Law of Bangladesh (Mullick Brothers 2011) 274.
[73] Hussain Mohmmad Fazlul Bari, 'An Appraisal of Criminal Investigation in Bangladesh: Procedure and Practice' (2015) 60 Journal of the Asiatic Society of Bangladesh (Humanities) 139–140.

custody with the sanction of the Court. Though there are statutory and constitutional safeguards to protect the liberty, security and human rights of the arrestee, practically there are numerous allegations of misuse or abuse of sections 54 and 167 of Code of Criminal Procedure by the police officer[74]. It is widely believed that the police officers frequently use 'third degree method' while conducting the interrogation of the arrested accused.

High Court Division observed that the very system of taking an accused on remand for the purpose of interrogation and extortion of information by application of force is totally against the spirit and explicit provisions of constitution. After rigorous hearing for long Appellate Division (AD) dismissed the appeal preferred against this judgment[75]. While AD concurred with the observations and findings of the HCD, it found recommendations and directives of the HCD either redundant or exaggeration or non-viable with the passing of Custodial Torture and Death (Prevention) Act 2013. AD also promulgated two set of responsibilities and guidelines for the police and the judges to check abuse and misuse of section 54 and 167 of Code of Criminal Procedure. I am of the view that AD had taken a rather conservative approach while disposing of this judgment touching liberty of citizens.

7.5 Lack of victim protection

Now-a-days, it goes without saying that right to fair trial involves consideration of a popular triangulation entailing the interests of the victim, the accused and the society[76]. However, the victims generally serve as mere witnesses to the proceedings[77]. The criminal justice system in Bangladesh focuses heavily on the offender and is often blamed for its insensitivity towards victim protection[78]. In absence of legal and institutional victim protection, overall practice of criminal procedure is bound to suffer[79].

The Code of Criminal Procedure provides that a court at its discretion, can direct monetary fine

[74] Abdullah Al Faruque and Hussain Mohmmad Fazlul Bari, 'Arbitrary Arrest and Detention in Bangladesh' (2019)
[75] BLAST AD case (n 12).
[76] W Morrison et al, Common Law Reasoning and Institutions (University of London Press 2006).
[77] Hussain Mohmmad Fazlul Bari, 'An Appraisal of Victim Protection in Bangladesh'(2016) 61 Journal of the Asiatic Society of Bangladesh (Humanities) 184.
[78] Abdullah Al Faruque, 'Victim Protection in Bangladesh: A Critical Appraisal of Legal and Institutional Framework' (2013) 13 Bangladesh Journal of Law 63.

[79] Hussain Mohmmad Fazlul Bari, 'An Appraisal of Sentencing in Bangladesh: Between Conviction and Punishment' (2014) 14 Bangladesh Journal of Law 114–116.

to be paid to the crime- victim as the sole or additional punishment[80]. However, in practice, this power of sentencing judge is rarely exercised, and even if it is, compensation is minimal. In many cases, the courts have paid compensation depending upon the number of dependents of the deceased and capacity of the accused to pay. That is, compensation to the victim is solely depend- ent upon the conviction of the accused. Nevertheless, such remedies remainlargely unexplored due to insensitivity of judges towards victims.

7.6 Absence of plea bargaining

Pleading guilty is, in itself, good mitigation in sentencing[81]. However, in absence of specific legislature-sanctioned plea-bargaining scheme, an offender cannot take advantage of discounted sentence in mitigation as of right. For petty offences, guilty plea by the accused may relieve the both the defence, prosecution, judges, accused, victim and all other stakeholders. Absence of plea bargaining: Though plea bargaining has gained currency all around world in reducing backlog of cases, it has not statutorily recognized in our criminal procedure. Under present procedure, an accused can make confession implicating his involvement to the occurrence before a Magistrate. Further, during framing of charge an inducted offender can plead his guilt. Such confession and guilty plea of the accused do not statutorily receive an accused can take the advantage of some mitigation to his sentence. Nevertheless, in practice, the judges at their discretion can give them discounted sentence in such circumstance. Therefore, considering the backlog of cases in the criminal courts of our country and also considering the human rights of the accused, it will not be over- ambitious to consider inclusion of the concept of plea bargaining in the criminal justice system of Bangladesh[82].

[80] Code of Criminal Procedure 1898, s 545.

[81] Peter Hungerford- Welch, Criminal Litigation and Sentencing (Oxford UniversityPress 2009) 294.

[82] Alam (n 3) 67.

7.7 Presumption of innocence of accused shifted

Another fundamental tenet of criminal law is that an offender shall be presumedto be innocent unless being proven guilty within the provisions of law. This is intended to provide the opportunity to the accused persons so that he can defend himself[83]. The fundamental principle of criminal jurisprudence is that onus of proving everything essential to establishment of charge against accused lies upon the prosecutor which must prove charge substantially. Proof of charge mustdepend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny.

However, recent criminal jurisprudence has developed to the extent that if the presence of the surviving spouse or inmate is proved at the time of the deceased person, onus would be shifted to the surviving partner and even other inmates to explain how the deceased met the tragic end[84]. If legal burden shifts to theoffender, the Courts would in some cases convict those who failed to establish their innocence. There is a remote chance that the reverse burden may create a substantial risk to the extent that innocent individuals might be convicted. Further,it can be really daunting task for an innocent individual to prove that he has not participated in the commission of crime.

7.8 Ad hoc prosecutor

Once an offender is put on trial to determine his guilt or innocence in the face ofa criminal charge, the prosecutor incurs the burden of establishing against the accused a prima facie case of guilt. It is often argued that the *ad hoc* appointment of the prosecutor is root cause for very mediocre performance of the prosecution in Bangladesh. They are often alleged to be biased, lack required independence and accountability. The office of the prosecutor is also awfully ill-equipped. The remuneration of the prosecutor is abysmally low. Lack or absence of orientation and training facilities for the prosecutor is also huge challenge, though in recent times they are

[83] The Chief Prosecutor v A T M Azharul Islam ICT BD 5 of 2013 (International Crimes Tribunal).
[84] State v Md. Shafiqul Islam alias Rafique and another [1991]43 DLR 92 (HCD); Statev KhandhkerZillul Bari [2005]57 DLR 29 (AD); Shahjahan Mizi v State [2005] 57 DLR 224 (HCD); Shamsuddin v State [1993] 45 DLR587 (HCD).

receiving some short training courses under the auspices of the Ministry of Law, Justice and Parliamentary Affairs. In practice, there is no effective conference between investigator and prosecutor during investigation period. Nor is there functional meeting between the prosecutor and the witnesses. Therefore, the prosecution witness feels like out of water during cross examination led by the defence lawyer.

7.9 Mobile court

A popular justice mechanism in Bangladesh is Mobile Court, being run by executive officers. Over the years more than hundred laws have been appended to the schedule of the Mobile Court Act[85]. However, such massive cognizance, summarytrial, disparate sentencing powers and laconic procedure by executive officers may arguably be called into question from jurisprudential point of view. Nevertheless, High Court Division declares the Mobile Court, being run by Executive Magistrates, is illegal[86]. A Leave to Appeal was granted by the Appellate Division in which a stay was granted on operation of the order of the HCD. In my opinion, imposing little fine alone by the Executive Officers may be okay. However, in case of imposition of custodial sentences that essentially cur-

tails personal liberty, a pertinent question may arise how far it is morally and legally correct to rely on mere alleged 'forcible guilty plea' of the commission of offence. As recurrence of many petty crimes tends to jeopardize the life, property and peace of the members of the society, summary trial may be reorganized. Enactment of Mobile Court Ordinance 2007 (that was effectuated into Mobile

Court Act 2009) was a perhaps a compromise in the sense that Magistracy hither to exercise by Executive Magistrates went to the hands of Judges with a new nomenclature as Judicial Magistrate. Efficient use of summary trial with clear guidance and supervision of Supreme Court will definitely yield better outcome with the satisfaction of the offender, victim and public at large. It may, if crafted with clear policy, ultimately lessen the strain and pressure of the criminal courts.

[85] Mobile Court Act 2009.

[86] Kamruzzaman Khan v Bangladesh and another [2018] (WP nos. 8437 of 2011, 10482 of 2011, 4879 of 2012) (Moyeenul Islam Chowdhury J).

7.10 Informal control mechanism

It may be also noted that various informal justice mechanisms including mediation, arbitration etc. have long played or arguably still play a major role in amicably settling both civil and criminal disputes in Bangladesh. For instance, Supreme Court of Bangladesh rightly recalled that the compromise had been a mode of settlement of dispute in this sub-continent from time immemorial[87]. In fact, societal distaste for cumbersome courts and collective feeling of settling theirdisputes by themselves, the rural society has a long tradition of handling most disputes, both civil and criminal, in compromise forms[88]. Though gender, economy, power, politics or even clan often expose some negative dynamics on the outcomeof the decision of the *shalish*, in most cases rural arbitration is still a preferred mode of settlement. Nevertheless, sometimes such control mechanism of informaljustice system often tends to cause acute sufferings to the weaker sections of the society for a plethora of reasons[89]. In particular, *fatwa*-based arbitration has long been a repressive tool to punish the poor and women in the name of society and morality. However, such menace of criminalization by non-state actors has almost come to naught following the pro-active intervention of the Supreme Court that declared the practice of extra-judicial sentencing in local arbitration as such is quite illegal[90].

7.11 Under-functioning of law

Though in course of its journey Bangladesh is heading towards some economic acceleration, it has still become hostage to many governance issues relating to yawning economic disparity, fairness and effectiveness of state institutions[91]. All these issues have been allegedly accentuated by mode and approach of the justice sector officials. In fact, the overall scenario of administration of criminal justice here may be now depicted as coercive, dilatory, time-consuming and adversarial with acute arrear of cases at different tiers of courts. In particular,

[87] [95]Md. Zoynal and others v Md. Rustam Ali and others[1984] 36 DLR 242 (AD)(Badrul Haider Chowdhury J, as he was then).
[88] Rahman (n 17) 158–159.

[89] Dina M Siddiqui, 'Islam, Gender and the Nation: The Social Life of Bangladeshi Fatwas' in Heath, Deana and Mathur (eds), Communalism and Globalisation in SouthAsia and Its Diaspora (Routledge New York 2011) 181–203.

[90] BLAST v Government of Bangladesh and others [2011] 31 BLD 1 (HCD).
[91] Hussain M F Bari, 'Colonial Legacies of the Criminal Justice System' Dhaka Tribune (16 June 2019).

legal system of Bangladesh has become crippled due to mounting backlog of cases and delay in disposal of cases. Over the years, Bangladesh is experiencing some sort of litigation explosion. According to one author, it will take more than 100 years to dis- pose of pending cases of 3.5 million[92]. However, the deterioration in terms of quality of justice is much starker than mounting backlog of cases.

Alleged instances of extra-legal mishaps, mob violence, compelled compromise of serious crimes at the behest of local touts and under-functioning of justice sector officials also tend to expose the vulnerability of criminal legal regime in Bangladesh. Though over the years, some indifferent and half-hearted endeavorshave been made to remove the procedural trappings and ensure effective justice, crisis in the system of justice is infinitely complicated given the decline in social values[93]. Lawlessness in the forms of impunity and abuses of the coerciveauthority of the state is not only widespread but also systematic within state centric formal justice arrangements.

7.12 Scarcity of empirical study and legal scholarship

In Bangladesh there is dearth of scholarship on criminal law and empirical study on the principles, purpose and practice on criminal litigation in Bangladesh. Of late 'Justice Audit Program' has made an endeavour to depict a picture of the criminal justice system.

Evaluative reflections

As depicted above, most of the criminal laws, procedures, institutions and principles that evolved during the British period (1757–1947) still govern the functioning of the criminal justice system with only nominal amendments. Alongside the steady growth of series of special laws in 1970s and afterwards, some half-hearted reforms have also been initiated with a view to easing the challenges in criminal procedure. In particular, inherited colonial mentality, corruption, too much reliance on confession of the accused rather than evidence-orientedway of investigation, discourteous attitude towards public are major causes for lack of confidence in

[92] Khan (n 72) 316.
[93] Moudud Ahmed, Democracy and the challenge of development: A study of politicsand military intervention in Bangladesh (University Press Limited 1995) 279.

police force which in turn, undermines the process of criminal justice[94].

I am in agreement with observations of Shahdeen Malik and Shashi Tharoor who are highly critical of the rationale and objectives of the British-imposed criminal laws. They have essentially unmasked the imperial *raison d'etre* and *modus operandi* of colonial rule of law[95]. While echoing the genuine concerns of those

scholars, it may be added that British colonial rulers may be genuinely creditedfor developing a systematic and standard criminal justice system in this region. Infact, the modern court system, the penal code, the respect for jurisprudence and the value system of justice- even if they were not applied fairly to natives in the colonial era- are all worthy legacies[96]. It however follows that upon decolonialization the subsequent amendments to antiquated penal laws have also not been developed in a consistent approach

Today there is no denying that philosophy, morale and aims of colonial rulers can in no way be readily applicable for a democratic nation in this age of human rights, due process and rule of law. While the Victorian definitional statements of offences and principles of litigation still remain static, more changing dynamicsof values and rise of human rights surely call for an exhaustive revision and fair application of Penal Code, Police Act, Police Regulations of Bengal, Prisons Act,Jail Code and Evidence Act.

It has also been advocated that any reforms in the criminal justice should be initiated first with the reforms in criminal investigation. It is also important to include victim protection in the agenda of criminal justice reforms. Non- custodialsentences including community service order, forfeiture, fine, economic sanction should dominate mainstream sentencing in place of recurrent death penalty and long custodial sentence. Most importantly, permanent and well-equipped prosecutors will help develop the professionalism and ultimately ensure quality of criminal justice. Most importantly, apart from introducing drastic legal reforms, erecting some pragmatic tools including tech-savvy mechanism to contain

'Litigation explosion' and increase the quality of justice is a must. In fine, the observations of Appellate Division on its stance for framing a new code of criminal procedure may be

[94] Faruque (n 73) 30–32.
[95] Malik (n 32); Tharoor (n 37)

[96] Tharoor (n 37).

reproduced:[97]

The present Code [of Criminal Procedure] was promulgated by the colonial rulers to consolidate their imperial power through the exercise of abusive powers by the police. There was no constitution at that time andthe fundamental rights was a far cry which was being not at all recognized.

After driving out colonial rulers, we cannot detain and prosecute an offender under draconian provisions of law. The object of the Code for which it was implemented on this soil is non-existent. The present Code is not at all suitablefor the administration of criminal justice after so many changes made in the meantime and it is high time to promulgate a new Code.

[97] BLAST AD case (n 13).

Chapter 8
CONCLUSION

8.1 Recommendations

Following Recommendations Can Be Exercised in Our Criminal Justice System:

 Establish oversight of the police by an independent authority separate from the chain of command of law enforcement (“police over police”)

 Legal regulation of the use of force by police officials in accordance with the “Basic Principles on the use of force and firearms by law enforcement officials”

 Open police custody and pre-trial facilities to independent external monitoring, such as the National Preventive Mechanism under OPCAT

 Bring suspects “physically” before a judge for an independent review of detention and possible ill-treatment

 Grant access to a medical doctor and a mandatory medical examination upon admission to pre-trial detention

 Ensure effective safeguards during interrogation by police and prosecutors, such as video/audio recording and presence of the defense counsel

 Ensure the non-admissibility of evidence extracted by torture in any proceedings

 Ensure the strict separation of police custody, detention on remand and imprisonment of convicts in terms of location and chain of command

 Separate juvenile from adult detainees

 Implement a mandatory and periodic system of effective, independent and impartial judicial control of pre-trial detention

 Provide compensation to victims of arbitrary and/or prolonged police custody and detention on remand

Bangladesh have to ratified international or regional human rights treaties, particularly the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto.

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 Bangladesh have to take step to establish a regional mechanism, followed by a court similar to the European Court of Human Rights, for the promotion and protection of human rights.

Government reaffirmed the fundamental obligation to ensure the prevention, investigation, prosecution and punishment of any individual involved in such ill-treatment. In addition, ensured the duty of all actors in the administration of justice, including police, judges, prosecutors, lawyers and prison officials to actively combat torture.

 Governments should prioritize the provision of adequate resources, including appropriate salaries and conditions of work for police, prosecutors, judges and prison officials, to ensure the independent, impartial and effective functioning of their criminal justice systems.

 Specific groups, such as children, women or minority groups, have special needs when it comes to the criminal justice process which should be appropriately recognized in domestic law and practice.

 Rights of victims should be better promoted and protected, including access to justice, the right to reparation and other forms of assistance, in accordance with the 1985 UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power. However, the participants agreed that greater recognition for the rights of victims should not be achieved at the expense of the rights of the accused.

 Training and awareness raising about international human rights standards was frequently highlighted as a crucial way of ensuring better protection of human rights. Actors in the criminal justice system, including judges, prosecutors, lawyers, police, prison officials, and other officials in enforcement agencies should be provided with training on international and regional human rights standards. Consideration should also be given to institutionalizing human rights education in schools, both secondary and tertiary.

 Independent monitoring bodies, such as national human rights commissions, ombudsmen, regional and international supervisory bodies and NGOs could play in monitoring compliance with relevant human rights standards at the different stages of the criminal justice system.

. Our law enforcers need to train up on human rights to stop torture and extrajudicial killings. To achieve this goal, “the government’s political will is needed.

.To reduce the bribery of court official, their Clarkial work can be computerized: Put up, Production, Hajira can be Sent to Magistrate by online.

The death penalty

Considering the large potential for abuse and violations of due process in Bangladesh, it calls upon the authorities, as a first step towards abolition, to:

– Examine existing law with a view towards diminishing the scope of crimes that attract the death penalty to only those with lethal consequences, in conformity with *Art. 6 of the ICCPR.*

– All mandatory death penalty sentences should be repealed as unconstitutionally restricting the discretion and independence of the judiciary, as required under international standards, and as stressed by the High Court Division in its 1995 ruling.

– Other prisoners may under no circumstances be delegated to carry out an execution, a practice that is not in conformity with the domestic legal framework and constitutes an inhuman and degrading treatment for concerned prisoners.

– Make public statistics on the number of death sentences and executions to allow an informed public debate on the death penalty.

– Appoint a committee of high level jurists to report on the application and conditions of implementation of the death penalty in the country.

Reassess the need for anti-terrorism legislation

Parliament and the Ministry of Law to reassess the need for the ATA. If maintained, this law should definitely be amended:

– If the ATA is maintained, it must be amended in order to eliminate vagueness in its wording and the potential for abuse in its application, including regarding the length of police custody, the systematic non-bailable character of the crimes, and the establishment of anti-terrorism special tribunals.

– Judicial oversight should be instituted for all surveillance, searches, and wire tapping.

– The ATA should not be used as a repressive tool against political dissidents.

–Bangladesh government to take all available actions to prevent enforced disappearances and oversee and train police forces in proper arrest and detention practices

Bolster the National Human Rights Commission

We urge the Parliament to approve further allocation of funds for staff improvement and hiring within the NHRC in order to maintain the Commission's effectiveness and independence without any hindrance from the government.

Treaty Ratification

Bangladesh must withdraw its reservation to *Article 14(1) of the CAT* and to ratify the following international human rights instruments:

– Optional Protocol to *the ICESCR (1966)*, allowing individual complaints from citizens of member states.

– Optional Protocol to *the ICCPR (1966)*, allowing individual complaints from citizens of member states.

– *The second Optional Protocol to the ICCPR*, aiming at the abolition of the death penalty (1989)

– *Optional Protocol to the CAT (2002)*, allowing site visits to the country and requiring establishment of National Preventive Mechanisms.

– International Convention for the Protection of All Persons from Enforced Disappearance (2006)

– Convention on the Protection of the Rights of All Migrant Workers & Members of Their Families (1990)

To the international community

– Third states are invited to raise the issues of concern addressed in this report and echo the afore-mentioned recommendations in the framework of their bilateral meetings with the government of Bangladesh at all levels.

– Support civil society initiatives in favor of abolition in Bangladesh

– Provide technical assistance in the field of criminal investigation, in particular concerning forensic and ballistic expertise and others methods that would allow relying less systematically on confessions that are often obtained under duress.

– To support efforts to develop professional and public human rights education and judicial and prosecutorial training

– To condition its cooperation with the police and other forces of Bangladesh (like the RAB) to concrete progress in the field of the fight against impunity for extrajudicial killings and torture and to ensure transparency and accountability in all the actions undertaken.

8.2 Conclusion

It can be brought an ideal criminal justice system in Bangladesh if above mentioned recommendation are maintained properly. And that criminal justice system will help victim as well as accused person to be adjudicated by a fair trial where the due process of law will ensure such fairness of trial and proceedings of the case. And I also believe that such criminal justice system will ensure non-violence of human rights and will ensure procedural and substantive safeguard. Whereas the police force is an integral part of criminal justice system, so human rights must form an integral part of the training programme of police personnel at all levels. Regrettably, this is either lacking altogether or is given minimum importance in the syllabus. This subject must also figure prominently in the periodical refresher courses organized for the police personnel at various levels. In such programmes, persons who have been victims of human rights violations by the police and other sections of society, as also representatives of various sections of society should be invited to talk to the police. It would also be useful to familiarize them with the important judgments regarding human rights pronounced by courts from time to time. Thus, sensitization of the police to the importance of human rights has to be the cornerstone of the efforts to improve the present situation. And that should be because police are the only organizational part who can go immediately to protect the victim as well as to through the accused person in a fair trial where his human right will not be breached and he will not be convicted for non-commencement of crime or guilty.

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