PAROCHIAL PREDICAMENTS OF CRIMINAL JUSTICE SYSTEM IN BANGLADESH: TOWARDS ALTERNATIVES

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Declaration

I, Md. Zakir Hossain, do hereby declare that the thesis entitled 'Parochial Predicaments of Criminal Justice System in Bangladesh: Towards Alternatives' has not been submitted for the award of a degree to any other university or institution other than Dhaka University. To the best of my knowledge and belief, this thesis contains no copy or paraphrase of work published by another person, except of quotations and citations which have been duly acknowledged.

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Certificate of Submission

I have the pleasure to certify that this Ph.D. thesis titled **'Parochial Predicaments of Criminal Justice system in Bangladesh: Towards Alternatives'** has been prepared by Md. Zakir Hossain under my supervision.

The researcher has fulfilled all the requirements of submission of thesis as prescribed by the rules and regulations of the University of Dhaka. I, therefore, strongly recommend this thesis for submission and evaluation for the award of the degree of Doctor of Philosophy.

Dated: **12.2.2017**

.....

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Abstract

This thesis scrutinises major loopholes in procedural laws and institutional mechanism on criminal matters which are unable to answer the present day requirements and suggests that they need to be over- hauled, reviewed and updated to make them relevant to face the challenges of a modern society so far it relates to criminal justice system in Bangladesh. Be that as it may, this study is not comprehensive or conclusive; rather it has left some scope for change, alteration, addition, revision and delectation through further research, if necessary.

The study commences with in-depth analysis of all the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence and suggests some conspicuous modifications and amendments of existing laws in order to do away with the parochial predicaments which undermine the existing criminal justice of Bangladesh. The thesis next critically examines in the light of fundamental principles and aspects of criminal jurisprudence as to whether there is a need to re-cast the Code of Criminal Procedure to bring them in tune with the demand of the times and in harmony with the aspirations of the common people of Bangladesh. In other words, it brings all feasible and hidden obstacles in light and finds out the mechanism for surmounting those impediments to ensure speedy, inexpensive, unpolluted justice for the prosecution, victim and as well as accused persons who were falsely implicated in a criminal case.

This thesis eventually negates the longstanding concept that ten guilty persons may be acquitted than one innocent be punished and reveals that no innocent be punished and no perpetrators be escaped from criminal liability and thereby evolves a device to catch and punish the criminals who commit offence with impunity.

In fact, this thesis divulges the flaws of century old investigation and trial system of criminal justice and makes some pragmatic suggestions which can help assisting the policy makers and legislators to update the investigation and trial system of criminal justice to suite with need of the socio-economic perspective of the 21st century.

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It may be mentioned here that I have been working in the Supreme Court of Bangladesh under the direct control of the Hon'ble Chief Justice of Bangladesh, Mr. Justice Surendra Kumar Sinha for more than two years. It cannot be denied that he is a judge of great competence. His extraordinary legal acumen on contemporary jurisprudence and path making judgments bears a far reaching effect in our judicial history. His continuous, concentrated and laborious study impressed me to continue my study after performing my official duty. So, I owe to him abundantly.

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Table of Contents

List of Abbreviation

A

AIR	: All India Reporters (India)
All ER	: All England Law Reports
ALR	: Australian Law Reports
All	: All India High Court Cases (India)
All Cr. LR	: All India Criminal Law Reports (India)
All Cr R	: Allahabad Criminal Reports (India)
All ER	: All England Law Reports (UK)
All LJ / ALJ	: Allahabad Law Journal (India)
All WC	: Allahabad Weekly Cases (India)
All WR	: Allahabad Weekly Reporter (India)
Andh LT	: Andhra Pradesh Law Times (India)
Andh WR	: Andhra Pradesh Weekly Reporter (India)
APLJ	: Andhra Pradesh Law Journal (India)
AWR	: Andhra Weekly Reports (India)

B

BCR	: Bangladesh Case Reports (Bangladesh)
BLC	: Bangladesh Law Chronicles (Bangladesh)
BLD	: Bangladesh Legal Decisions. (Bangladesh)
BLT	: Bangladesh Law Times (Bangladesh)
Bom CR	: Bombay Cases Reporter (India)
Bom LR	: Bombay Law Reporter (India)

C

C & K	: Carrington &Kirwan (UK)
C & P	: Carrington & Payne (UK)
Cal Cr LR	: Calcutta Criminal Law Reports (India)
Cal Cr R	: Calcutta Criminal Reports (India)
Cal HN	: Calcutta High Court Notes (India)
CCC	: Canadian Criminal Cases

CPC	: Code of Civil Procedure
Cr CJ	: Current Criminal Judgments (India)
Cr LC	: Criminal Law Cases (India)
Cr. App. R.	: Criminal Appeal Reports (UK)
Cr. App. Rep.	: Criminal Appeals Reporter (India)
Cr.P.C.	: Code of Criminal Procedure
CrLJ	: Criminal Law Journal (India)
CrLR	: Criminal Law Report (India)
CrLT	: Criminal Law Times (India)
Cur LJ	: Current Law Journal. (India)
CWN	: Calcutta Weekly Notes. (India)

D

DLR	: Dhaka Law Reports. (Bangladesh)
DLT / Delhi LT	: Delhi Law Times (India)

E

East Cri C	: Eastern Criminal Cases (India)
ER	: English Reports (UK)

G

Gauhati LR	: Gauhati Law Reports (India)
Guj LH	: Gujarat Law Herald (India)
Guj LR	: Gujarat Law Reporters. (India)

I

ILR	: Indian Law Reports (India)

K

Kant LJ	: Karnataka Law Journal (India)
Ker LT	: Kerala Law Times (India)
Ker LJ	: Kerala Law Journal (India)
KB / KBD	: Law Reports, King's Bench Division (U.K.)
KLJ	: Karnataka Law Journal (India)
KLR	: Kerala Law Reports (India)

L

LG	: Law Guardians (Bangladesh)
LR	: Law Reports (India)
LW	: Law Weekly (India)

M

Mad LW	: Madras Law Weekly (India)
Mad. W. N.	: Madras Weekly Notes (India)

Mah LJ	: Maharashtra Law Journal (India)
Mah LR	: Maharashtra Law Reporter (India)
MLD	: Monthly Law Digest (Pakistan)
MLJ	: Madras Law Journals. (India)
MLR	: Mainstream Law Reports (Bangladesh)
MPLJ	: Madhya Pradesh Law Journal (India)

N

NLJ	: Nagpur Law Journal (India)
NLR	: National Law Reporter (Pakistan)
	: Nagpur Law Reports (India)

O

Orissa CR	: Orissa Criminal Reports (India)
Orissa LR	: Orissa Law Reports (India)

P

PCrLJ	: Pakistan Criminal Law Journal (Pakistan)
Pesh LJ	: Peshawar Law Journal (Pakistan)
PLD	: Pakistan Legal Decisions. (Pakistan)
PLJ	: Pakistan Law Journal (Pakistan)
PLR	: Pakistan Law Reports. (Pakistan)
PSC	: Pakistan Supreme Court Cases (Pakistan)
Pun LR	: Punjab Law Reporters. (India)

Q

QB/ QBD	: Law Reports, Queens Bench Division (UK)

R

Raj Cr. C	: Rajasthan Criminal Cases (India)
Raj LR	: Rajasthan law Reports (India)
Raj LW	: Rajasthan Law Weekly (India)
Rat Un Cr. C.	: RatanLal's Unreported Criminal Cases (India)
RCR	: Rajasthan Criminal Reports (India)
Rec Cr R	: Recent Criminal Reports (India)

S

Sau LR	: Saurashtra Law Reporter (India)
Scale	: Scale (India)
SCC	: Supreme Court Cases. (India)

SC Cr. R.	: Supreme Court Criminal Rulings (India)
SCJ	: Supreme Court Journal. (India)
SCMR	: Supreme Court Monthly Reporters. (Pakistan)
SCR	: Supreme Court Reports. (India)
SCWR	: Supreme Court Weekly Reporters. (India)
Sim LC	: Simla Law Cases (India)
SLJ	: Simla Law Journal (India)
Suth WR	: Sutherlands Weekly Reporters (India)
SLR	: Singapore Law Reports

U

UJ	: Unreported Judgment. (India)
UP Cri R	: Uttar pradesh Criminal Rulings (India)

W

Weir	: Weir's Law of Offences & Criminal Law
WLC	: Western Law Cases (India)
WLN	: Weekly Law Notes (India)
WLR	: Weekly Law Reports (UK)
WR	: Weekly Reporter (India)

Y

Yale LJ	: Yale Law Journal
YB Eur. Con. HR	: Year Book of European Convention on Human Rights

Chapter- I
Introduction

1.1 General Introduction and Background to the Study

The consumers of justice covet uncontaminated, inexpensive and expeditious justice. However, it will be not exaggerated to say that the present criminal justice system in Bangladesh is eroding justice seekers' confidence. The reason for people's lack of confidence in criminal justice mechanism is due to its colonial, faulty, non-scientific and disoriented state in present context.[1] This criminal justice system of Bangladesh emerged from an ancestry of British legacy that originated in the early 17th Century as traders of the East India Company advent to this sub-continent. Considering the religion based criminal law as disproportionate from their western democratic view, the Company brought about several reforms through a series of regulations which amended, modified or expanded the meaningful definitions of some heinous offences, introduced new offences and altered penalties to make them more logical and reasonable in the light of the then socio economic perspective of Indian subcontinent. In this backdrop, the Penal Code (PC) defining crime and prescribing appropriate punishments was adopted in 1860, following the painstaking work of the First Law Commission of British India, particularly its Chairman Lord Macaulay. Undoubtedly, the PC has stood the test of time. As a sequel to the PC, a Code of Criminal Procedure (CrPC) was enacted in 1898 and established the rules to be followed in all stages of investigation, trial and sentencing.[2] These two Codes, along with parts of the Indian Evidence Act, 1872, constitute the very essence of the India's criminal law and subsequently the criminal law of Pakistan. After our heroic independence from colonial Pakistani occupation forces in 1971 at the cost of the lives of 3 million martyrs and sacrificing the chastity of 2 lac mothers and sisters, the aforesaid criminal laws became part of the criminal justice system of Bangladesh. By lapse of 45 years of great independence, the government of Bangladesh enacted plethora of special criminal legislations in different times but still the criminal justice does not become the protector of victim rather it appears as savoir of the perpetrators.

In forming part of the criminal justice system, the law of criminal procedure is intended to

[1] Hari Om Maratha, *Law of Speedy 'Justice Delayed Is Justice Denied* (1st edn, LexisNexis Butterworths Wadha, Nagpur, India, 2008) 14.

[2] AR Lakshmanan, *The Judge Speaks* (1stedn, Universal Law publishing Co., India, 2009) 163.

provide a mechanism for the enforcement of criminal law. It was enacted because without proper procedural law, the substantive criminal law which defines offences and provides punishments for them, would be almost worthless. Further, in the absence of enforcement machinery, the threat of punishment held out to the law-breakers by the substantive criminal law would remain empty in practice. Again, since empty threats do not deter, and without deterrent effect, the law of crimes would have hardly any meaning or justification. Furthermore, if "thieves" and "murderers" are not detected, prosecuted, and punished, what is the use of meticulously defining the offences of "theft" and "murder" and prescribing "deterrent" punishments for them?[3]

Thus, the law of criminal procedure is meant to be complementary to criminal law and has been designed to ensure the process of its administration. In view of this objective, the law of criminal procedure creates the necessary machinery for the detection of crime, arrest of suspected criminals, collection of evidence, determination of guilt or innocence of the suspected person, and the imposition of proper punishment on the guilty person. The law of criminal procedure also aims at providing safeguard against possible harms and violation of human rights or innocent persons in its process of sifting criminals from non-criminals. It further attempts to strike a just balance between the need to give discretionary powers to the functionaries under the Code to make the investigative and adjudicatory processes strong and effective and the need for controlling the probable misuse or abuse of these powers. It is therefore right to say, as the Supreme Court has said, that it is the procedure that spells much of the difference between the rule of law and the rule of whim and caprice[4].

Further, while the general purpose of criminal procedure is to provide a mechanism for the administration of criminal law, its core object is "to ensure for the accused a full and fair trial in accordance with the principles of natural justice".[5] Therefore, the trial procedure becomes the pivotal part of any scheme of criminal procedure.

In addition, the criminal justice system ensures investigation which is an important segment of criminal procedure often regarded as the forerunner of trial procedure. However, the term "investigation" has been given a somewhat limited meaning when it is defined as including

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[3] KN Chandrasekharan Pillai, *RV Kelkar's Lectures on Criminal Procedure* (4th edn, Eastern Book Company, India, 2001) 1.

[4] *Iqbal Ismail Sodawala v. State of Maharashtra,* (1975) 3 SCC 140; 1974 SCC (Cri) 764; 1974 Cri LJ 1291

[5]Ibid 786.

all the proceedings for collection of evidence conducted by a police officer, or by any private person authorised by a magistrate. It brings in information as to the commission of any crime, detection and arrest of the suspected offender, collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons and (b) the search of places and seizure of things and documents useful as evidence in the trial. Investigation also includes the process whereby the case is brought before the court for trial. Therefore it would be considered more appropriate to describe this segment of procedure as pre-trial procedures. Having based on this, the trial is concluded and the accused is found guilty or innocent, and the trial procedure in fact comes to an end.[6]

1.2 Statement of the Problem

The criminal justice system started with all purposes suited to the conditions. Then with the passage of time and the increase of population, offences increased, new types of offences occurred, modes of commission of offences changed. However, the number of courts, judges, lawyers or officers were not increased, offences were not redefined, and criminal justice system is not restructured and tuned keeping pace with the time. As a result, there arises a lot of impediments to the criminal justice system.

Backlog of cases is the biggest impediment in the judiciary of Bangladesh. Currently there are more than 3 million cases pending in the Supreme Court and lower courts of the country. The huge backlog of cases is slowly overwhelming the justice delivery system, causing further delay in the disposal of cases and undermining people's access to justice.

Further, due to flaws in the investigation which is the heart of the criminal justice system, prosecution finds it difficult to prove its case and ultimately these flaws are responsible to a large extent for acquittal of a large number of the accused. The investigating officers, in many cases, are found to be not discharging their duties properly due to inefficiency or negligence; it is highly unfortunate that the investigating staff has not been able to win the confidence of the public. The investigating officer deliberately, being influenced by the accused, makes unnecessary delay in starting the investigation and recording statements of the witnesses. Sometimes they do not record the statements while examining the witnesses, but make a synopsis of what the witnesses said to him at the time of examinations. Then at his leisure, he prepares a record of those statements. Naturally, many vital points or facts then do not find place in the statements of those witnesses.

[6] Ibid.

It is also found that the witnesses, at that early stage of investigation (when most of the accused are at large) are afraid of divulging the truth before the Investigating officers. They feel a bit more secure in the court where they may not hesitate to tell the truth.

Further, the word “trial” is not defined in the present Code of Criminal Procedure 1898. However, it means as commonly understood the proceeding taken in Court from the stage of framing of a charge and ending with the conviction or acquittal. Wherever the word “trial” occurs in the Code of Criminal Procedure it appears to refer to proceedings in which an accused person stands before a Judge or Magistrate who is empowered to convict him upon a charge of an offence committed by him and sentences him to one of the punishments described in Penal Code 1860. There is also uniformity of judicial opinion that the, word “trial” has no fixed or universal meaning, and has to be considered with regard to the particular context which it is used, and with regard to the scheme and purpose of the particular act. Due to such flaws in the trial, the perpetrators get the benefit of doubt and as such they are acquitted. Consequently the prospective offenders encourage committing offence with attitude of impunity. The problems during trial stage are also immense for fair trial.

The Code of Criminal Procedure and the Evidence Act also provide that the entire onus is upon the prosecution except in few cases such as, where the accused pleads alibi, the accused shall be required to prove the same. Further, there is no onus upon the accused. In addition, the courts mainly follow the principle that the prosecution must prove its case beyond "reasonable doubt" and whenever the courts find any flaw in the evidence of the prosecution, for the sake of "fair trial", they give acquittal to the accused persons by resorting to "benefit of doubt". However, neither the expression "reasonable doubt" nor the expression "benefit of doubt" are defined in the Code or explained in any law. Therefore, for flimsy doubt the huge numbers of accused persons are being acquitted and as such people’s confidence is eroding in our criminal justice system.

Further, the criminal justice of Bangladesh is based on adversarial system. Here Judges and courts are given very limited scope to exercise inquisitorial power subject to the conditions laid down under section 165 of the Evidence Act, 1872. This power is not exhaustive and cannot be extended during the judicial inquiry conducted by Magistrate or Court. In addition, the longstanding notion in criminal justice system that ten guilty persons may be acquitted than one innocent is punished.

Further, sometimes while delivering a judgment in a criminal case, the Judges are confused due to conflicting decisions of the superior courts. Some Judges give emphasis on the old

precedents but some take into consideration the changes which have taken place in the society especially in the law and order field. Here is little co-ordination between the Investigating officer and the Public Prosecutor not even after a case is fixed for trial. This research has persistently noticed that most of the investigating officers and other police officers who appear before the court as witnesses have little idea about the rules of evidence, about how evidence is taken in a criminal case, what are the defects and loopholes in the evidence which leads to acquittal, on what grounds normally acquittal is given, how defense conducts the case, what evidence are to be led in the particular case, and on what points the prosecution evidence is likely to be attacked by the defense etc.

In addition, during investigation stage and in cases pending for trial before Magistrates records are called for, disposal of applications for bail in the Sessions Courts and then undue delay occurs in returning these records back to the Magistrate's Courts.

Again, after submission of charge-sheet in sessions triable cases, the Magistrates do not dispatch the records to the Sessions Judges expeditiously. After submission of charge-sheets, incomplete records are sometimes sent to the sessions courts by the Magistrates. There are other causes of delay including non-attendance of witnesses, particularly, of Government officials, such as, the medical witnesses, the investigating officer, or other police officers connected with investigation, the handwriting or the finger-print expert, etc., on the date of trial. Some of the problems *inter alia* cause great obstruction in dispensation of fair and speedy trial. Further, a huge number of backlog of cases in comparison to number of Judges and courts, and failure of police in ensuring the attendance of prosecution witness during trial, in spite of repeated issuance of processes are also responsible for hampering speedy and fair trial.

Moreover, lack of proper knowledge of Magistrates, Judges and conducting lawyers about connected substantive and procedural laws, lack of sense of responsibility and accountability of judges, magistrates, conducting lawyers and connected staff, lack of initiative of judges and magistrates to try cases in a speedy manner and non-execution of writ of proclamation and attachment under section 87 and section 88 of the Code for appearance of the absconding accused have been causing delay in getting a case ready for hearing for many decades.

Apart from the same, absence of efficient, knowledgeable public prosecutors and defense lawyers, absence of full and sincere co-operation of conducting lawyers towards the end of speedy trial and frequent adjournments of cases at trial stage on less important pleas, outdated and time consuming mode of recording evidence of witness, paucity of accommodation, trained manpower, machinery and other paraphernalia of courts and absence of proper

control, supervision and monitoring by the superior courts and authority over respective subordinate courts cause immeasurable impediments in ensuring justice.

There are also problems in taking cognizance of offence, which is the starting point in the criminal justice of Bangladesh. However, nowhere in the Code has the very concept of taking cognizance been defined. As soon as the court or magistrate takes cognizance of offence implicating a person as accused his right to free movement is curtailed. Under section 190 of the Code, the Magistrate has been given ample power to take cognizance even without any inquiry on the basis of a complaint. Apart from the same Magistrate may take cognizance *suo moto.* Resultantly, many innocent persons are falsely implicated and remain in the prison bar for no fault of their own.

There are also problems in framing charges. The object of framing charge *inter alia* is to ensure that the accused may have as full particulars as are possible of the accusation brought against him or her so that the accused concentrate on the case that he or she has to face. In other words charge is the formal acquisition as to the guilt so that the accused may take his defence and controvert the allegations brought against him by the prosecution. In our system, more than one person may be tried together under section 239 of the Code but there are legal bars in framing more than three charges committed in the same transactions within the space of twelve months. As a result multiplicities of criminal cases are created and thereby jam log of cases are increasing.

In addition, during the hearing on framing charge, the accused documents cannot be considered in view of section 241A of the Code wherein it is clearly provided that when the accused appears or is brought before the Magistrate, and if the Magistrate, upon consideration of the record of the case and the documents submitted therewith and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, considers the charge to be groundless, he shall discharge the accused and record his reasons for so doing. As a result innocent people are languishing in the jail for years together.

Additionally, introducing plea bargaining in criminal justice system in our neighboring countries like India and developed countries like USA, Australia, Canada and UK are yielding very positive result and in those countries rate of convictions are high but unfortunately the legislators of our country have not yet taken any positive step in order to incorporate plea bargaining in the criminal law.

Further, if a person is entangled with criminal case, he will either be on jail or bail, even before proving the charge against him beyond any doubt. This has great significance in our criminal justice system but the law of bail including anticipatory bail and cancellation of bail are absolutely obscure, outdated and outmoded. So, innocent people are languishing in the jail custody as such it impacts his personal life, family life and moreover he cannot play any role in economic development of the country.

Furthermore, the manual recording system of evidence is one of the major causes for delaying the criminal causes. Moreover, it is not always safe to produce hardened criminals to the court. It also entails unnecessary time in concluding the trial. So digital recording of evidence by means of video conferencing is essential. Therefore, the Code does require to be overhauled.

Apart from all, the criminal justice system suffers from colonialism. The Chief Justice of Bangladesh, Surendra Kumar Sinha opined that 40% of the Code Criminal Procedure is not applied in a case and the provisions of that code are obsolete because of its colonial system.[7] This statement clearly indicates that the Code of Criminal Procedure which contains the procedure of investigation, inquiry and trial should recast and therefore it needs thorough study.

Further, the challenge for delaying the investigation and trial of the criminal cases is a huge pendency of criminal cases. Statistics reveals that in 2012, the pending criminal cases in the different courts of the country were 1434380; in 2013 it stood 1571720; in 2014, 1723740; in 2015, it was 1755772 and 1774275 cases were pending in 2016.[8]

Having said the above, this research attempts to answer the following unresolved questions:

> Firstly, what are the pivotal or crucial problems of criminal investigation and criminal trial in Bangladesh?
>
> Secondly, how can we get rid of these menaces or pitfalls to make sure the speedy and cost effective disposal of criminal cases?

[7] Statement Published on *The Daily Manabkantha* (13 October 2015) 2.

[8] Collected from different courts of the country and reports prepared accordingly by the Statement Sections of the HCD of the Supreme Court of Bangladesh.

1.3 Objective and Rationale of the Study

In the aforesaid backdrop, the research faces all the lacking and loopholes through different method of data analysis and finally it puts forward my recommendations for doing away with those loopholes and a new model so far it is practicable for speedy and expeditious justice. In doing this, the present work identifies the loopholes at the investigation and trial stage of the criminal justice system in Bangladesh based on critical analysis of relevant statutes, newspaper reports, and interviews with public prosecutors, defence lawyers, trial-judges/magistrates, and some key persons whose role are very crucial during pre-trail stages, e.g. polices, magistrates and investigation officers. *Peshker*, *Nazir*, *Peon* to the judicial officers, victim of criminal cases, accused and experts on the subjects have also been interviewed.

While the purpose of justice system broadly is to protect and ensure the rights of the citizens, more precisely the purpose is to deliver justice for all by convicting and punishing the guilty and helping them to stop offending and protecting the innocent. However, for an unseen reason presently the criminal justice system is not serving its purpose. It is exaggerated by many unseen menaces. Ideas in many cases remain in surface. It is already mentioned that there is yet no substantial work on the proposed topic in Bangladesh. Therefore, an in-depth research is required to explore the roots of such problems. This instant endeavour intends to address some of the menaces. By identifying these flaws in pre-trial and trail stages, the study will also provide some possible alternatives that will enhance the capacity of our courts to dispose criminal cases within reasonable time and will improve the possibility of further case management. Furthermore, the attempt to conduct this research may be rationalized on the following grounds-

a) The study will help policy makers in reformulating policies and the lawmakers to introduce appropriate methods of intervention. It, in turn, will help to ensure speedy disposal of criminal trial and accordingly, in maintaining up to date principles for disposing criminal cases.

b) It is essential to create awareness among the law related people and mass in general by providing information and educating them regarding the nature of criminal policy.

Broad Objective: The study is to analyze the major barriers in criminal justice delivery system during investigation and trial stages in Bangladesh. In doing so, priority will be given

to trace out the crucial loopholes of existing system in comparison with a standard philosophy.

Specific Objectives: The specific objectives of the study are as follows:

(i) To argue why the system of investigation of criminal cases by the police alone may lose any chance of retrieving the system of criminal justice from the malaise it has been suffering from.

(ii) To examine whether existing philosophy and trends at the policy level are worthy anymore and what would be the future trends in criminal justice system in Bangladesh.

The possible outcome of the study will be of great importance for tracing out the pivotal problems of criminal trials, and for the identification of responsible factors and agents causing disruption of proper criminal trials in Bangladesh. The alternatives suggested in this research also pave the way of speedy disposal of criminal cases. It would be further helpful for an appropriate policy formulation and rubbing out the existing loopholes in the disposal of criminal cases in Bangladesh.

All these will confirm the thesis argument that the existing substantive laws and procedural laws on criminal matters in Bangladesh are unable to answer the present day requirements and they need to be over- hauled, reviewed and updated to make them relevant to face future challenges of a modern society. However, the proposed study is not comprehensive or conclusive; rather it has left some scope for change, alteration, addition, revision and delectation through further research, if necessary. It will hopefully add to the present body of knowledge and develop insight to the relevant field. Overall, the issues dealt with and addressed in the proposed study will be of great value to improve the criminal justice delivery system of Bangladesh.

1.4 Literature Review

For complete and comprehensive research, literature review is *sine qua non.* A literature review is the process of locating, obtaining, reading and evaluating the extent literature in particular area of interest. In fact the literature review is essential in order to understand what is currently known about for a problem. Literature review also helps to avoid duplication of effort. No matter what topic a researcher chooses, chances are that someone has already done

some research on it. If so, then conducting research as originally planned would be waste of time.[9]

Mohammad Hamidul Haque (2011)[10]

The book 'Trial of Civil suits and Criminal case' provides the trial practice, procedural law both civil and criminal prevalent in Bangladesh. In this second edition few more subjects such as jurisdiction of criminal courts, appeal by fugitive, framing of charges and holding of trial under Madak Drabbaya Niantran Ain, discharge under section 241/265C etc. and two chapters on the Children act and the limitation Act have also been added. Some latest decisions of the years 2010 and 2011 of both the HCD and AD have also been cited. This book is very important to understand the complex trial procedure in Bangladesh.

Zahirul Huq[11]

The discussion of this book completely depends upon the case laws reported in DLR, MLR, BLD, BLT, BCR and BLC etc. This book has not criticized any provision of Code of Criminal procedure so far it relates to investigation and trial.

Sarkar Ali Akkas (2009)[12]

The 2nd revised edition of 'Law of Criminal Procedure' has been brought out in a thoroughly revised form on the basis of the recent amendment of the Code of Criminal Procedure and up to date case laws.

The first edition of the book was divided into thirteen chapters, but for the sake of better management of the topics this new edition has been divided into fourteen chapters. In preparing this the author considered the subject matters of different chapters of the Code and arranged them mainly in line with the stages of a criminal procedure. In order to make the subject interesting the author explained the provisions of the law with reference to relevant and recent leading cases as far as practicable.

CK Takwani[13]

The book discusses with clarity and precision, the principles of criminal jurisprudence which are the core of criminal procedure. This fourth edition examines in detail the amendments

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[9] Abdulla Al Faruque, *Essentials of Legal Research* (2ndedn, Palal Prokashoni, Dhaka, 2010) 27-28.

[10] Mohammad Hamidul Haque, *Trial of Civil Suits and Criminal Cases (*2nd edn, Universal Book House, Dhaka, 2011).

[11] Zahirul Huq, *Law and Practice of Criminal Procedure* (11thedn, Bangladesh Law Book Company, Dhaka, 2010).

[12] Sarkar Ali Akkas, *Law of Criminal Procedure (*2nd rev edn, Ankur Prokashani, Dhaka, 2009).

[13] CK Takwani, *Criminal Procedure, (*4thedn, Lexis Nexis, India, 2015).

introduced by the Criminal Law (Amendment) Act, 2013. Landmark cases of the Supreme Court, Privy Council and High Courts have been critically analyzed. Several new topics have been added in this edition and existing ones further examined.

PS Atchuthen Pillai[14]

PSA Pillai's Criminal Law has deservedly been described as a classic text on the Indian Penal Code, 1860, ever since the publication of its first edition in 1956. It systematically and clearly provides an in-depth analysis of all the categories of offences incorporated in the Code. Retaining the scheme and essential facets of the previous editions, the revising editor has developed the work in the light of leading judicial pronouncements and emerging trends in the field.The book is primarily about the substantive law of crimes in India, however, it very helpfully explains relevant provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, and thus places the law in a practical context.

Nilakshi Jatar and Laxmi Paranjape (2012)[15]

The book 'Legal history: Evolution of the Indian Legal System' presented to general reading public is an attempt to describe the progress of Indian legal culture from ancient to the achievement of independence. The authored feel that change and continuity are the cardinal features of this long and arduous journey, fuelled by the inputs made by the different peoples that have entered the sub-continent from time to time. In this context it has been felt that curriculum reform should include historiography and the basic structure of civil law and common law systems.

Roy D King and Emma Wincup (eds) (2000)[16]

This edition brings together research principles with the practical issues of carrying out research to provide a clear and fascinating guide to the reality of contemporary criminological research. The experience of leading experts is combined with first-hand accounts from new scholars, to provide a text that students can refer to throughout their criminological studies.

Doing Research on Crime and Justice is divided into five parts, and covers practice and politics in criminology; theory, data and types of criminological research; research on crime, criminals and victims; research on criminal justice agencies and institutions, and concludes

[14] PS Atchuthen Pillai, *Criminal Law* (8thedn, NM Tripathi Private Limited, India, 1995).

[15] Nilakshi Jatar and Laxmi Paranjape, *Legal History: Evolution of The Indian Legal System* (1st edn, Eastern Book Company, India, 2012).

[16] Roy D King and Emma Wincup (eds), *Doing Research on Crime and Justice* (1st edn, Oxford University Press, United Kingdom, 2000).

with four case studies from new scholars. Incorporating a new international perspective, this volume also addresses contemporary issues such as cybercrime, and provides guidance on conducting research in situations of cultural diversity.

Richard Leofric Jackson (ed) (2010)[17]

This book 'Criminal investigation is a practical handbook for magistrates, police officers and lawyers' discussed evidence (in law), crimes and criminals. This volume is designed to be a working hand-book for all engaged or interested in Criminal Investigation. The aim of the adaptors has been, while omitting nothing of general or particular utility to any person investigating crime, no matter in what capacity or part of the world, to combine and include therewith a mass of information of peculiar interest in India. At the same time they have attempted to apply many of the illustrative criminal cases and principles contained in the original work to the Indian point of view.

Chandrasekharan Pillai (ed) (2011)[18]

Lectures on Criminal Procedure have a unique status in the realm of standard works on the subject and has become an instant success with the students and teachers alike. This edition includes the changes made in the code by the Criminal Law (Amendment) Act, 2013. The topic-wise arrangement of subject-matter, the analysis of relevant sections connected with each topic, and the critical appraisal of such sections in the light of judicial decisions, forms the core of the study materials for Criminal Procedure. The author has arranged the lectures topic-wise and in their logical order, a feature rarely found amongst the commentaries on the Code of Criminal Procedure. He has included under each topic all the connected provisions and explained the matter in a precise and easily understandable way. The exercise added at the end of each chapter is an innovative approach, which is sure to arouse the interest of the student as well as others interested in making a deeper study of the subject.

KM Musfiqul Huda (2015)[19]

This book 'A handbook on understanding Crimes and police investigation processes: criminal trial perspective' has been written keeping in mind the procedural improprieties or defect which are incurable legal defect and because of which a proposed criminal proceeding may

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[17] Hans Gross, *Criminal investigation*, Richard Leofricjackson (ed), (5th edn, Universal law publishing Co Pvt. Ltd., India, 2010).

[18] RV Kelkar, *Lectures on criminal procedure including probation and juvenile justice*, Chandrasekharan Pillai (ed) (4th edn, Eastern Book Company, India, 2011).

[19] KM Musfiqul Huda, *A Handbook on Understanding Crimes and Police Investigation Processes: Criminal Trial Perspective* (1stedn, Vol I-II, Mullick Brothers, Dhaka, 2015).

well be vitiated in law. The author is also mindful in discussing the procedural improprieties or defects which do not necessarily vitiate a criminal. The relationship of police department with the other government department and local representatives is another important aspect of police works and this particular issue has been emphasized in this book in greater details. The structure and hierarchy of the police department have been dealt giving full importance in this book. This first edition contains as many as 50 chapters under 15 specialized parts.

Manjula Batra (1989)[20]

The book 'Protection of Human rights in Criminal Justice Administration: a study of the rights of the accused in Indian and Soviet legal systems , provides Protection of Human rights in Criminal Justice Administration along with Comparative law ,Criminal procedure, Political Science, Political Freedom & Security and Civil Rights. One suspects that the rights of the accused would have changed substantially in Russia, if not India, since the time the book came out. However Professor Batra has carried out an interesting historical survey. She has had a clear advantage in writing this comparative survey by virtue of having studied the Russian language for many years and lived in Moscow.

KK Dutta (1987)[21]

This book is 'Treatise on Criminal Law'. The changes arising as a result of amendments of some of the statutory provisions dealt with in the book have been duly noted and incorporated along with observation relating to the effect of such amendments, wherever necessary. Relevant decisions of the Supreme Court, which have been published after the preparation of the previous edition have been noticed and incorporated at the appropriate places with comments as and where found necessary.

BB Mitra (2003)[22]

The name of the book is 'Code of Criminal Procedure, 1973'. This set of two volumes contains concise commentary on the Code of Criminal Procedure 1973 with latest case and judgments on all sections. The present edition has not only been updated by incorporating all the important decisions of the Apex court and the High Courts but has also been revised at places by chronologically discussing the important decisions, mainly of the apex court, to elucidate points which frequently come up for consideration in different legal proceedings.

Shaukat Mahmood and Nadeem ShauKat (2010)[23]

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[20] Manjula Batra, *Protection of Human rights in Criminal Justice Administration: A Study of The Rights of The Accused in Indian and Soviet Legal Systems* (1st edn, Deep and Deep Publications, India, 1989).

[21] KK Dutta, *Treatise on Criminal Law* (2nd edn, Eastern Book Company, India, 1987).

[22] BB Mitra, *Code of Criminal Procedure 1973* (20th edn, Vol I-II, Kamal Law House, Kolkata, 2003).

The name of the book is 'The Code of Criminal Procedure (Act V of 1898) '. This set of three volumes contain concise commentary on the Code of Criminal Procedure 1898 with latest case and judgments on all sections.

Daniel R White (ed) (2003)[24]

A collection of the best legal humor by famous humorists and legal humorists such as Mark Twain, Robert Benchley, Groucho Marx, S. J. Perelman; William Prosser, Thurman Arnold, and John Mortimer. Also contains the best work of such contemporary legal humorists as S. Sponte, Arnold B. Kanter, and Daniel R. White himself. Also included are cartoons from the New Yorker, Punch, and the Wall Street Journal.

PK Das (2011)[25]

The Contents of this book 'Supreme Court on Rarest of Rare Cases' are Part 1. 1. Introduction 2. Statutory Provisions in India in Respect of Rarest of Rare Cases 3.Indian Penal Code 4.Criminal Procedure Code 5. Constitution of India Capital Punishment-The Death Penalty 6. Guidelines of Rarest of Rare Cases Machhi Singh Case Part-2.1. Supreme Court on Rarest Of Rare Cases 2.Coldblooded Gruesome and Heinous Killing 3. Domestic Servant Killing Three Members of A Family For Robbery 4.Brutal Murder without Any Provocation 5.Brutal Killing of Brother and His Family Members 6.Killing of All Family Members In Brutal And Heinous Nature 7.Killing Of Five Persons in an Extremely Brutal Grotesque Diabolical Revolting and Dastardly Way 8.Dacoity And Murder of All The Six Male Members of A Family Including Children 9 .Kidnapping of Children and Their Killing In Systematic Casual And Most Dastardly Manner 10.Brutal Killing of Wife Three Daughters and a Son Diabolic and Planned Killing of Wife 11.Killing by Couple the Wife's Step Brother and His Family Members Including Babies 12.Brutal and Heinous Killing of Wife and Three Children during Asleep 13.Rape and Murder of Seven Years Old Girl 14.Killing Of Five Persons to Exterminate Entire Family 15.Preplanned Calculated Cold-Blooded Murder Of Five Women 16.Cold Blood Brutal Killing of Four Members ofa Family for Theft 17.Rape and Brutal Killing of a Girl below Six Years 18.Domestic Servant Killing Diabolically and Brutally Three Members of Masters Family 19.Kidnapping For Ransom and

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[23] Shaukat Mahmood and Nadeem ShauKat, *The Code of Criminal Procedure* (10th edn, Vol I, II, III, Legal Research Centre, Lahore, Pakistan, 2010).

[24] Daniel R White, *Trials and Tribulations: Appealing Legal Humor* (2nd edn, Universal Law Publishing Co. pvt Ltd., India, 1989).

[25] PK Das, *Supreme Court on Rarest of Rare Cases* (2011-edn, Universal Law Publishing Co. pvt Ltd., India, 2011).

Brutal Killing of 10-Year Boy 20.Wiping Out Entire Family to Grab Property 21.Gruesome Killing 22.Gruesome Cold Blooded Heinous Atrocious and Cruel Mass Killing 23.Extremely Brutal and Dastardly Killing for Money and Property.

Universal (2010)[26]

This book 'Landmark Judgment' covers more than 85 leading cases of India, starting from 1950s, which have re-shaped the face of the country.

Vinayak D Kakde (2009)[27]

In this edition the author endeavored to include latest and significant judgments of various High Courts and the Apex Court touching the subject. The purpose of this book is not to write the section-wise commentary but to show the readers the judicial process at work and how a judge arrives at his conclusions.

VR Krishna Iyer (1984)[28]

The theme and object of this book are of universal interest 'Human rights' which are being discussed and challenged in all the spheres of the Society. The author has discussed all the aspects on this subject through his lectures and articles contained in this book.

Alastair N Brown (1996)[29]

'Proceeds of Crime' is an ideal dedicated portable reference guide for practitioners. This guide contains full text annotated copies of the Proceeds of Crime (Scotland) Act 1995 and the Proceeds of Crime Act 2002 offering guidance on the interpretation, implications and application of this highly topical legislation in practice. Practitioners in every area of the law will need to know the acts, regulations (especially the Money Laundering Regulations), codes of practice and relevant SIs and SSIs.

1.5 Methodology of the Study

1.5.1 Nature of Study: This is an applied research which aims at solving specific practical problems. It is concerned with generating new information to serve current needs, solve problems or develop alternatives. To attain the objectives of the study the following research methods will be applied-

[26] Universal, *Landmark Judgment,*(3rdedn, Universal Law Publishing Co. Pvt Ltd., India, 2011).

[27] Vinayak D Kakde, *Criminal trial: Practice and Procedure* (2009-edn, reprint 2010, Universal Law Publishing Co. Pvt Ltd., India, 2009).

[28] VR Krishna Iyer, *Human Rights and the Law* (1stedn, Vedpal Law House, India, 1984).

[29] Alastair N Brown, *Proceeds of Crime: Money Laundering, Confiscation and Forfeiture* (1st edn, W. Green and Sweet & Maxwell, Edinburg, 1996)

(a) **Survey method:** This method is selected to get inputs from face-to-face interview through a semi-structured questionnaire survey with a large number of stakeholders of criminal justice system in Bangladesh (i.e. public prosecutors, defense lawyers, trial-judges/magistrates, and some key persons whose role is very crucial during pre-trail stages, e.g. polices, magistrates and investigation officers) and to record their understanding on the realities of the problem. *Peshker*, *Nazir*, and *Peon* to the judicial officers, victim of criminal cases, accused and experts on the subjects will also be interviewed. The entire experimental method to observe cases from beginning to end is not adopted in this research due to the uncertainty involved in the disposal of cases and time constraint of the research. Therefore, survey method is adopted as it will be the most suitable scientific method for collecting cross-section data for this research.

(b) **Observation and consultation:** Since many qualitative aspects of the problem many not be clearly addressed through semi-structured questionnaire survey mentioned earlier, few observation of criminal cases will be made to get firsthand knowledge on how client and service providers are struggling with this system. Further, consultations will be conducted at a later stage of the research to collect relevant details on different important issues surfaced through questionnaire survey and observations made earlier.

1.5.2 Area of Study

Some potential sites are purposively selected for this research. These are:

- Judge Court of Different Districts
- Dhaka Metropolitan Police Headquarters
- Police Stations At Different Locations
- Bangladesh Judicial Service Commission
- Bangladesh Law Commission
- Judicial Administration Training Institute (JATI)
- Dhaka Central Jail
- Brahminbaria District Jail
- High Court Division Of The Supreme Court Of Bangladesh
- Ministry of Law, Justice and Parliamentary

- Ministry of Home Affairs
- Others

These areas are chosen as these are the representative parts of the criminal justice delivery system in the country. Moreover, these areas are related with dealing with criminal trials, training on the agent of criminal trials and most importantly developing policy thereon.

1.5.3 Methods of Data Collection

The information and data mentioned earlier will be collected by following the steps stated below:

(a) **Empirical data:** The following data collection methods will apply for collecting primary data for this research. As indicated earlier, a method of triangulation will be used to increase the reliability of the conclusion drawn through data collected for this research.

i. **Interview survey:** This method is selected for the collection of information directly from respondents with the help of a semi-structured survey questionnaire. This is also helpful for the collect of information from illiterate service recipients.

ii. **Observation:** Observation can fairly be called the classic methods of scientific enquiry. The process of both pre-trial, trial and execution of trial cases will be observed for this purpose.

iii. **Consultation:** This method of data collection will be employed for gathering information from researchers, policy makers and experts of the relevant field. The policy makers, judges, and high officials of police and court administration will be chosen to conduct such consultation.

(b) **Documentary data:** The documentary sources of data include the survey of documents, outcome of recent research works on relevant field, critical analysis of relevant statutes.

1.5.4 Sample Design

(a) **Types of sampling**: Purposive sampling procedure will be followed for collecting empirical survey data. Nevertheless, a proper balance will be maintained on the selection of respondents from different groups so that the sampling frame will be a representative one.

(b) **Respondents:** The Judicial officers (Judges and Magistrates), members of the bar association (lawyers, public prosecutors), *peshker*, *nazir*, and *peon* to the judicial officer, victim of criminal cases, accused and experts on the subjects.

(c) **Sample size:** A total of 300 sample respondents will be interviewed for this purpose. This sample size would be able to draw a necessary inference about the research hypothesis and can be further clarified through consultation to be made with other 20 professionals/experts in this area. The process of the disposal of criminal cases will be observed for another 10 cases.

1.5.5 Instruments for Data Collection

The data will be collected by using different types of tools including the semi-structured questionnaires for interview survey, and pre-specified observation and interview schedules for conducting observations and consultations with experts. The process of data collection will be conducted into the following two phases:

(a) **Developing primary questionnaire**: A semi-structured survey questionnaire will be developed for collecting empirical data. Initially, the questionnaire will be developed based on literature survey and personal experience of the researcher regarding the limitations of criminal justice delivery system in Bangladesh.

(b) **Pre-testing & finalizing questionnaire:** The whole set of questionnaire will be pre-tested before finalizing it for the questionnaire survey. Pre-testing will be done through interviewing of some (5-10%) respondents included in the sampling frame of the original survey. Some question may be excluded/ included or modified, based on the results of such pre-test.

1.5.6 Data Analysis and Presentation

The collected data through completed questionnaires, observations, and consultations will be arranged and scrutinized carefully. Simple analytical tools available in Microsoft XL will be used to process data through editing, coding, classification and tabulation. Furthermore, the classified data will be analyzed by applying different qualitative and quantitative tools including graphs, charts, maps and pictogram. Results will be interpreted within and among the relevant scope of the study.

1.6 Limitation of the Research

In an era of information explosion, one of the most serious problems for doing this research is to find enough time to search and to digest voluminous materials. But often the reverse is the case, and the researcher faces the more frustrating problem of lack of sufficient information of research materials concerning legal development in certain countries or on certain topics.[30]I n the field of research, scope and limitations refers to parameters that prevent researchers from pursuing further studies due to time and budgetary constraints. Every research study has some limitations in true sense. So this research monograph is not exception of this limitation and limitation reduced the scope of the study. Having a time limit is a limitation because it excludes the opportunity for individuals to make further discoveries in their subject areas, which influences the amount of information that can be relayed to an audience. However, the heads of limitation are-

- Topic related books & review of literature are not sufficient
- No research or exclusive work on the criminal justice system in Bangladesh
- Rare access to relevant information.
- Time management and budgetary constraints.

1.7 Outline of the Research

This thesis has been divided into eight chapters; the first one is the introductory chapter where general introduction, objective and rational of the study, methodology and possible outcome of the research and statement of the problem have been given to put the thesis into a

[30] Bakshi, PM, *Legal Research and Law Reform, in Verma,* SK and Afzalwani, M (eds), Legal Research and Methodology (Indian Law Institute, New Delhi, 2001) 112.

broader academic perspective to accomplish the objective to solve the loopholes of Criminal Justice so far it relates to investigation and trial.

Chapter II deals with the Historical Background of the Criminal Justice System in Bangladesh, the Jurisdiction of the Court, sentencing power of the Criminal Courts and the powers and functions of the Special Tribunals, Courts and Special Judges are given therein. It has been clearly spelt out that jurisdiction of the Court is the very root of the matter, if the Court does not have jurisdiction, Court should not enter into the merit of the case. If so, everything shall fall through. In this Chapter the opinion of the researcher as to expansion of jurisdiction of the Criminal Courts especially Magistrate Courts, so that litigant people can easily access to justice and thereby their unnecessary time, cost and harassment will be reduced. Moreover, restrictions upon extra territorial jurisdiction under section 188 of the Code of Criminal Procedure should be withdrawn for the greater welfare of the litigant people of the country at large. In our system the decision of conviction and sentencing of the accused is settled down in one occasion by the court as per the mandate of the existing law. But in our neighboring country India that after convicting an accused, a date be fixed for hearing to award appropriate and reasonable sentence considering the socio-economic condition of the convict especially his/her antecedents and previous criminal record.

Chapter III reflects pre-trial procedure of a Criminal Case. The importance of pre-trial stage is Investigation and Inquiry in order to find out the truthfulness or falsity of the case. Investigation is heart of Criminal Justice. If there is a flaw in investigation, the entire trial will be vitiated and to have justice will be a far cry. In this chapter the lacunas and challenges of investigation have been clearly pointed out on the basis of the statistics and suggested the ways to surmount those challenges. During judicial inquiry the role of Magistrates and Courts are not defined in our law. Therefore, the Courts or Magistrates while conducting judicial inquiry play passive role in view of adversarial judicial system. So, in the said chapter taking thread from section 165 of the Evidence Act, 1872 which provides inquisitorial power to the Judges during trial, Researcher's tried to way out whether inquisitorial power may be exercised by the Magistrates while conducting judicial inquiry, in order to make it more reliable and reducing the chance of false implication of the innocent persons in a criminal case.

Chapter IV focuses trial of criminal cases. Criminal trial begins with the framing of charge. The importance of charge and under what circumstances more than three charges may be

framed together in order to minimize time, cost and energy of both the prosecution and defense. In this chapter trial conducted by Magistrates has been clearly stated and the loopholes of trial conducted by Magistrate have been revealed and how that can be done away with has also been suggested, so that trial may be concluded within the prescribed time. Sessions trial cases and trial by other Special Tribunals are also facing serious problem in dispensing speedy trial. In this chapter those lacunas have been found out and the way how that can be rid of has also been conspicuously so on therein. Repeated adjournment prayer of the prosecution is one of the greatest bars in disposing Sessions cases within the reasonable time. In fact, this chapter pointed out the major challenges in criminal cases and suggested some measures to overcome the same.

Chapter V highlights appeal, revision and execution and quashment proceedings. In fact, it contains the post-trial challenges and difficulties and also suggested some practical and pragmatic measures to face those challenges.

Chapter VI presents law on bail and bail bond. In Criminal Jurisprudence Bail as significant role, One third of the Court hours are required to engage to dispose bail petitions. As soon as a criminal case is started against a person, his/her fundamental right to free movement is curtailed in that case the accused has to live either in jail or in bail. In Criminal Justice System of Bangladesh the provisions of bail and bail bond mentioned in the different legislation are ambiguous, therefore, in this chapter the existing best practice of different countries have been stated and the flaws in the jurisprudence in bail have been located and the solutions were clearly pin pointed therein.

Chapter VII narrates the causes of delay in criminal cases and how to minimize the delay. Every accused has a right to have speedy trial of a criminal case as per mandate of the Constitution of Bangladesh. Moreover, the victim also has a right to see speedy trial of perpetrators, so that other prospective perpetrators or culprits do not dare to do the same offence. In fact, delay in different stages of criminal trial including initiation of criminal case to pronouncement of judgment has been clearly delineated in this chapter so that all stakeholders may take proper step to help mitigating the delays.

Chapter VIII deals with plea bargaining that is ADR in criminal litigation. It has clearly depicted in the aforesaid chapter why plea bargaining should be incorporated in our Criminal Justice System to do speedy Justice and to enhance the rate of conviction of the perpetrators who commits with the hope of impunity. ADR is the flower of the east but by that flower the

western countries introduced ADR in Criminal Justice System and yield in tremendous benefit without exhausting cumbersome procedure of Criminal Justice. Consequently, the purpose of Criminal Justice is to protect the innocent and to punish the culprits.

Chapter IX is concluding part of the thesis. In the chapter the findings of the different chapters have been summarized so that law makers and policy makers may understand their obligation to overhaul the century old procedural laws so far it relates to Criminal Justice System in Bangladesh.

Chapter II

Criminal Justice System in Bangladesh: Constitution, Jurisdiction and Powers of Criminal Courts

2.1 Introduction

Criminal justice is a generic term for the procedure by which criminal conduct is investigated, arrests made, evidence gathered, charges brought, defenses raised, trials conducted, sentences rendered, and punishment carried out.[1]Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, or sanctioning those who violate laws with criminal penalties and rehabilitation efforts. Those accused of crime have protections against abuse of investigatory and prosecution powers.[2]The criminal justice system consists of three main parts:

- Legislative (creation of laws);
- Adjudication (courts); and
- Corrections (jails, prisons, probation and parole).[3]

In the criminal justice system, these distinct agencies operate together both under the rule of law and as the principal means of maintaining the rule of law within society. So it can be said that criminal justice system includes, in particular, the investigation of offences and the treatment of offenders.

Typically, legal theorists and philosophers consider four distinct kinds of justice: corrective justice, distributive justice, procedural justice, and retributive justice. Criminal law falls under retributive justice, a theory of justice that considers proportionate punishment a morally acceptable response to crime. Retributive justice is perhaps best captured by the phrase *lextalionis* (the principle of "an eye for an eye"), which itself traces back to the book of Exodus. The principle of *lextalionis* received its philosophical defense from Immanuel

[1]KN Chandrasekharan Pillai, *Lectures on Criminal procedure including Probation and Juvenile Justice* (4th edn, Eastern Book Company, India 2010) 50.

[2] Wikipedia (The free Encyclopedia), *'Criminal justice'* (2016)<https://en.wikipedia.org/wiki/Criminal_justice > accessed 27 January 2016.

[3]Correspondent, '*How Does the Criminal Justice System Work?'* (2010), Find Law< http://criminal.findlaw.com /criminal-law-basics/how-does-the-criminal-justice-system-work.html> accessed 28 January 2016.

Kant. Criminal law is no longer considered a purely retributive undertaking; deterrence figures prominently in the justification of the practice and in the rules themselves.[4]

Comparative criminal justice is a subfield of the study of Criminal justice that compares justice systems worldwide. Such study can take a descriptive, historical or political approach. It is common to broadly categorize the functions of a criminal justice system into policing, adjudication (i.e.: courts), and corrections, although other categorization schemes exist.[5]

2.2 A Brief Historical Background of Criminal Justice system in Bangladesh

Bangladesh which emerged as an independent and sovereign State on the 16th December, 1971, has a long political and legal history. In the ancient times it was ruled by the local Hindu rulers who administered justice according to local customary laws based on religion. At the beginning of the 13th century it was invaded by the Muslims who ruled the country up to the middle of the 18th century. They introduced Islamic administration of justice in which reflection of the legal system of the Hindu period could not be ignored. Though the British came to Indian Sub-continent at the beginning of the 17th century, they were able to establish political sovereignty over Bengal and ultimately over the whole of Indian Sub-continent at the middle of the 18th century. They infiltrated their legal system and replaced the earlier one in course of time. The British left the Sub-continent in 1947 giving Independence to colony of India by dividing it into two independent dominions, India and Pakistan. On independence in 1947, Bangladesh which was previously a part of province of Bengal became a province of Pakistan named as East Pakistan and was ruled by the Pakistani neo-colonial rulers up to 1971 when it emerged as a sovereign State.[6]

So, the roots of the development of legal system of Bangladesh go back to the ancient times of Indian Sub-continent. It passed through various stages and has gradually developed as a continuous historical process. The process of the development can be conveniently divided into the four important periods-Hindu periods, the Muslim period, the British period and the Modem period. The Hindu period extended for nearly 1600 years before and after the

[4]John Adam and J Collyer Adam, 'Criminal Investigation' in Richard Leofric Jackson (ed),*Criminal Investigation: A Practical textbook For Magistrates, Police Officers and Lawyers* (5thedn, Universal Law Publishing Co. Pvt Ltd-India, 2010) 3.

[5] Ibid 10.

[6]ABM Mofijul Islam Patwri, *Legal System of Bangladesh,* (3rd edn, Malika Publishing House, Dhaka, 2012) 9-10.

beginning of the Christian era. Muslim period began with the first major invasion by Muslims in Indian Sub-continent in 1100 A.D. The British period began with the consolidation of their power in 1757 A.D. in India, and lasted for nearly two hundred years. The Modern period has begun with the withdrawal of the British colonial rule from the Indian Sub-continent and the establishment of the independent States of India and Pakistan in 1947.[7]

After independence of Indian Sub-continent in 1947 A. D. Bangladesh became a province of Pakistan which was run in accordance with the provisions of the Government of India Act, 1935, read with the Indian Independence Act, 1947. Under the new constitutional arrangement, a new Federal Court of Pakistan was set up at Karachi. The Federal Court (Enlargement of Jurisdiction) Act, 1950, provided that civil appeals which previously lay to the Privy Council would lie to the Federal Court and the Privy Council (Abolition of Jurisdiction) Act. 1950," transferred on the 22nd April, 1950, to the Federal Court all the appellate jurisdiction of the Privy Council in respect of Pakistan. To exercise powers and jurisdictions over the territory comprising the then province of East Bengal a new High Court for East Bengal was set up at Dhaka in 1947. This High Court had exercised same power and authority in the administration of justice as the High Court of Calcutta did. After the emergence of Bangladesh the High Court of East Pakistan was replaced by the High Court of Bangladesh and later on by the Supreme Court of Bangladesh under the Constitution of Bangladesh, 1972. The Supreme Court of Bangladesh administers justice according to those laws which were in force in Bangladesh on the 25th March, 1971, subject to the provisions of the Constitution of Bangladesh and the consequential changes made by the competent authority.[8]

From the above discussion it is revealed that the present legal system of Bangladesh is not an outcome of a revolution but evolution starting from an undated ancient Hindu period. It passed through the Muslim period for some centuries and took a positive shape at the later part of the British period. So, it emanates from a mixed system of Indo-Mughal and English law, both common law and equity, the English law predominating. After the end of the British rule in 1947, though sovereignty and independence of the people of this region have been established but no change in the basic structure of the legal system as established by the British has yet been made.

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[7] Abdul Halim, *The Legal System of Bangladesh* (7th edn, CCB Foundation, Dhaka, 2014) 40.

[8] Md Ansar Ali Khan, *Legal System of Bangladesh* (2nd edn, National Law Book House, Dhaka, 2013) 206-215.

2.3 Jurisdiction of the Criminal Courts

Jurisdiction may be defined as power or authority of a court to hear and determine a case, to adjudicate and exercise any judicial power in relation to it by taking cognizance of matters presented before the court.[9]Sections 177 to 186 of the Code of Criminal Procedure deal with the venue or the place of the trial of crimes. Section 177 reiterates the well-established common law rule referred to in Halsbury's *Laws of England* Vol. 9, para 83 that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occurred and are alleged to constitute the crime. But this rule is subject to several well-recognized exceptions and some of those exceptions are contained in the subsequent sections of the Code.[10]

Jurisdiction of courts is of two kinds. One type of jurisdiction is the power of the courts to try particular kinds of offences. That is the jurisdiction which goes to the root of the matter and if the court is not empowered to try a particular offence tries it, the entire trial is void, and the decision is no decision in the eye of law. The other jurisdiction is what may be called territorial jurisdiction. Equal importance is not attached to it.[11]

The question whether a court has jurisdiction to try a case is the first question which is to be decided by the court-both civil and criminal. The question of jurisdiction must be determined first in criminal case, before taking cognizance. If the court has no jurisdiction, not only taking of cognizance will be illegal but all subsequent steps taken or orders passed may also be illegal. Not only the court is to see whether it has jurisdiction but court is also required to see whether the person filing the complaint has any authority to file the complaint.[12] The jurisdiction of a criminal Court is to be determined on the basis of the facts disclosed in the petition of complaint or in the FIR.[13]

[9]*Ujjam Bai v. State of U.P.,* AIR 1962 SC 1621 (1629).

[10] BB Mitra, *Code of Criminal Procedure, 1973* (20th edn, Kamal Law House, Kolkata) 701.

[11]*Purushottamdas v. State of W.B.,* AIR 1961 SC 1589.

[12]Mohammad Hamidul Haque. *Trial of Civil Suits and Criminal Cases* (2nd edn, Universal Book House, Dhaka, 2012) 271.

[13]Ibid 272.

2.4 The Supreme Court and the General Hierarchy of Ordinary Courts

The general hierarchy includes both civil and criminal courts. At the top of the hierarchy is the Supreme Court of Bangladesh. The Supreme Court consists of Appellate Division and High court Division.[14]

The Appellate Division has supreme powers in the judicial system. The High Court Division is given independent powers and jurisdiction by the Constitution of Bangladesh. Thus the High Court Division though being the subdivision of Supreme Court, works completely in its own style and follows different laws than the Supreme Court. The High Court Division hears original legal matters as well as appeals against the subordinate court judgments. The High Court Division has been assigned authority to control and administer all the lower Courts and tribunals.

2.4.1 Sub-Ordinate Courts (Criminal) and Tribunals in Bangladesh

The Subordinate Courts are the basic courts of the judicial system in Bangladesh. These subordinate courts can be classified broadly as

I. Criminal Courts
II. Civil Courts.

Criminal courts are further subdivided as:

a) Sessions Courts
b) Metropolitan Sessions Courts
c) Special Criminal Courts (Tribunal)
d) Metropolitan Magistrate Courts
e) Magistrate Courts

The Court of Sessions is presided over by three types of judges

i. Sessions Judge
ii. Additional Sessions Judge
iii. Joint Sessions Judge

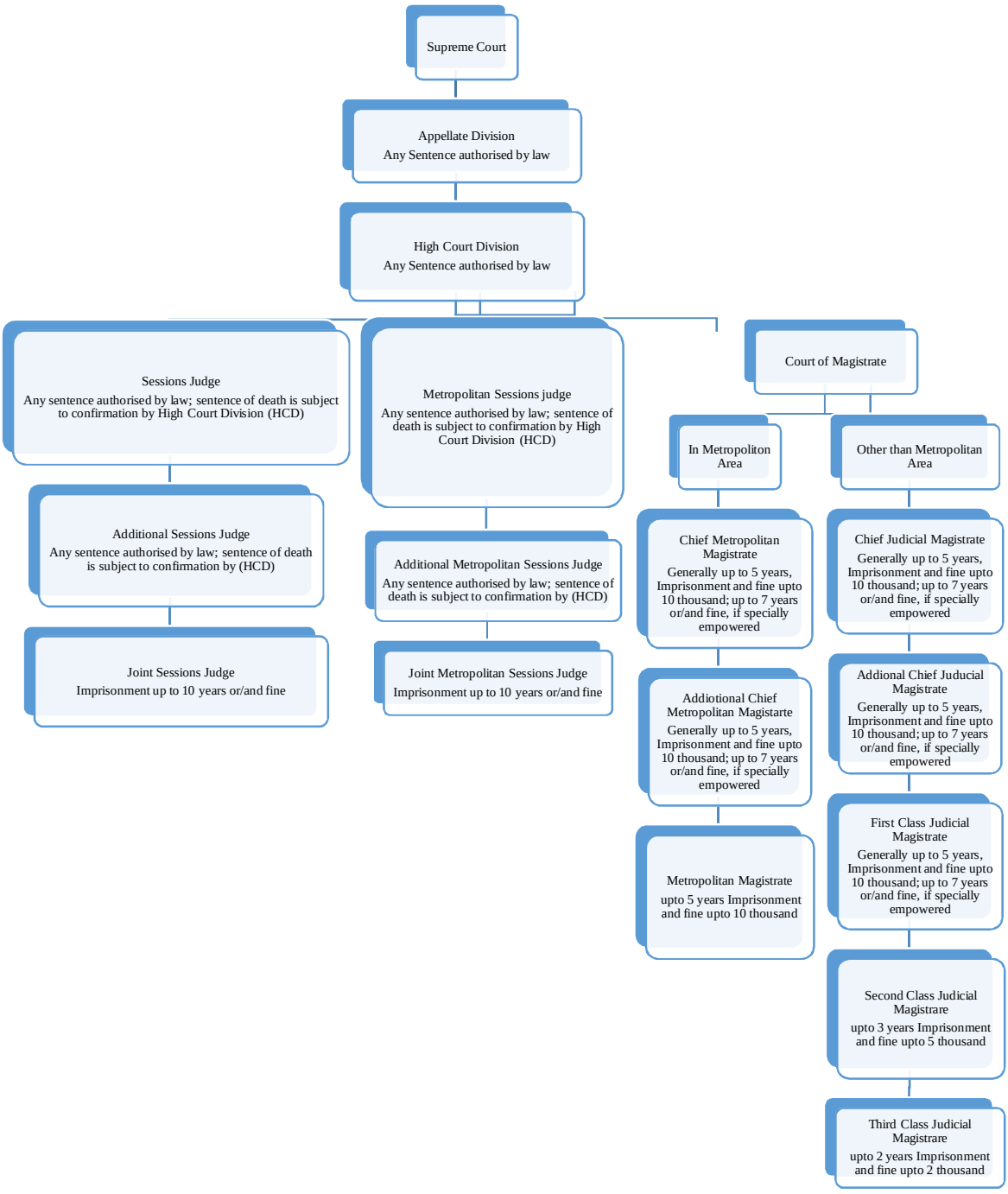
On the other hand, Magistrate courts may be presided over by as many four types of magistrates-

a. Chief Judicial Magistrate
b. Additional Chief Judicial Magistrate

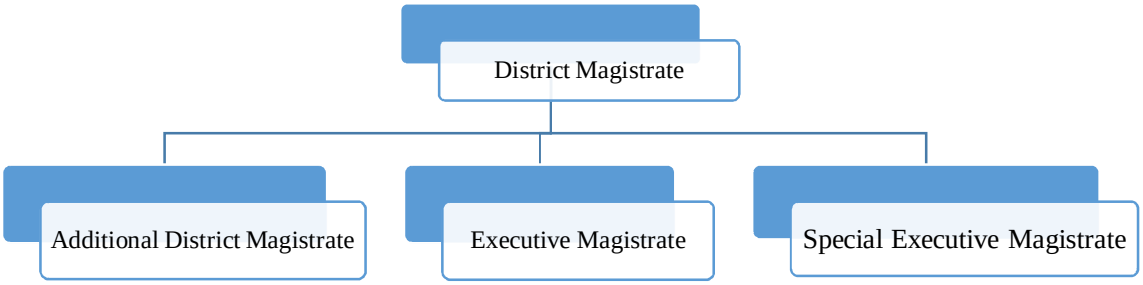
[14]The Constitution of the People's Republic of Bangladesh 1972, Art 94(1).

c. Senior Judicial Magistrates (1st Class Magistrates)

d. Judicial Magistrate (2nd/ 3rd Class Magistrate)



2.4.2 Hierarchy of Executive Magistrates



After separation of the Judiciary from the Executive, the Code has adopted a separate category of courts which are distinct from the courts of Judicial Magistrates. The object of the policy of separation is to ensure the independent functioning of the Judiciary free of all suspicion of executive influence and control. Therefore, the Judicial Magistrates and Metropolitan Magistrates are put under the control of the High Court Division, while the Executive Magistrates are kept under the control of the Government.

Some examples of ordinary powers of an Executive Magistrate[15]:

1. Power to arrest, or to direct the arrest of and to commit to custody, a person committing an offence in presence of the Magistrate, section 64.
2. Power to arrest, or direct the arrest in his presence of a person for whose arrest he can issue warrant, section 65.
3. Power to endorse a warrant or to order the removal of an accused person arrested under a warrant section 83, 84, 86.
4. Power to issue search-warrant for discovery of persons wrongfully confined, section 100.
5. Power to require security for good behavior form vagrants and suspected persons, section 109 etc.

Some examples of ordinary powers of District Magistrate[16]:

1. The ordinary powers of an Executive Magistrate.
2. Power to define local areas within which an Executive Magistrate may exercise his powers, section 10(4).
3. Power to require delivery of letters, telegrams etc. section 95(1)

[15] The Code of Criminal Procedure, 1898 (Act No. V of 1898), Sch III.

[16] Ibid.

4. Power to issue order in urgent cases of nuisance of apprehended dangers, section 144.
5. Power to make orders etc. in possession cases sections 145, 146, 147 etc.

The Executive Magistrates may exercise judicial powers when they conduct mobile court as per the Mobile Court Act, 2009 and they can award any sentence not exceeding two years and/or fine up to the amount as authorized by the particular Act. Even an Executive Magistrate may impose fine taka 5 lacs if that fine is authorized by the particular Act.

2.4.3 Special Criminal Courts (Tribunal)

Apart from this court there are some other special courts in Bangladesh these may be of different types. The parliament by its legislative power may create special courts with special jurisdiction. Whatever may be their jurisdiction as a special court, one common element attached to them is that they are all subordinate courts under the supervisory power of the High Court Division of the Supreme Court.

However some of the important special courts are given below:

a. The International Crimes Tribunal under International Crimes (Tribunal) Act 1973
b. The Speedy Tribunal under Speedy Tribunal Act 2002
c. The Nari O Shishu Nirjatan Daman Tribunal under Nari O Shishu Nirjatan Daman Ain (The Suppression of Violence Against Women And Children Act) 2000
d. The Children's Court under The Children Act (Sishu Ain) 2013
e. The Court of Special Judge under Money Laundering Prevention Act (Money Laundering Protihad Ain) 2012
f. The Anti-Human Trafficking Tribunal under Anti-Human Trafficking and Prevention Act(Manob Pacher Protirod O Daman Ain) 2012
g. The Anti-Terrorism Tribunal under Anti-Terrorism Act (Sontras Birodhi Ain) 2009
h. The Cyber Tribunal under Information and Communication Technology Act (Tattho O Jogajog Ain) 2006
i. The Labor Court under Labor Act (Sromo Ain) 2006
j. The Environment Court under The Environment Courts Act (Poribesh Adalat Ain) 2010
k. The Court of Special Judge under Anti-Corruption Commission Act (Durniti Daman Commission Ain) 2004
l. The Acid Crimes prevention Court Under The Acid Crimes Prevention Act (Acid Oporadh Daman Ain) 2002

m. The Special Tribunal under The Special powers Act 1974

2.5 Judges and the Sentencing Process

The essence of sentencing is the balancing of interests within the framework of law. The interests to be balanced are the community, the accused, the accused's family, the victim, and the victim's family. The balance is easier said than done. It is constrained by the framework of law-this is the public misconception of the process; it is more difficult than the public thinks. It is the most difficult job that a District Court judge does; it is the complexity of the balancing which is emotionally draining.[17] Sentencing is not solely science, art or intuition. It is a balancing act, between the interests of the community, the concerns of the victim, and the best interests of the offender.[18]Sentencing is also the exercise of discretion. Discretion is guided by the Act, circumscribed by the appellate system and guided by what alternatives are actually available i.e., the effectiveness of community corrections. Discretion may be exercised differently by different judges. As pointed out in many cases, that does not mean that the particular judge is wrong if someone else would have exercised their discretion in a different way. It is probably the most unpredictable aspect of sentencing[19].

Renowned jurist, Justice A.M. Ahmadi clearly spelt out as to the discretion of sentencing that by and large, sentences are constrained by law to the extent of fixing the maximum, thereby leaving an area of discretion with the judge. The prescription of the minimum sentence by the legislature is generally frowned upon as it limits judicial discretion.[20] To overcome the displeasure of the legal and judicial fraternity, the legislature introduces the special reason clause to award a lesser than the minimum sentence. Judicial discretion in the manner of sentencing is necessary as legislature cannot conceive of all situations. It is equally true that there are no principles or guidelines for exercise of discretion, the matter is left entirely with the sentencing judge. Wide discretion also poses problems for the sentencing judge in the matter of choice of sentence remains in a grey area and it will always attract the charge of being arbitrary.[21]

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[17]Speech Delivered by the Queensland judge.

[18]Geraldine Mackenzie, *How Judges Sentence* (1st edn, Universal Law Publishing Co., India, 2011) 14.

[19] Ibid 41 & 44.

[20]*Mithu V. The State of Punjab,* AIR 1983 SC 473.

[21]Lokendra Malik & Manish Arora (eds), *The Chief Justice Speaks: Selected Judicial and Extra Judicial Reflections of Justice, A.M. Ahmadi,* (1st edn. Universal Law Publishing, India 2016) 280 & 281.

Sentence is a difficult task particularly where the choice is to be made from a wide range. Many diverse data must go into the mix, before the decision is made. That is why it is often said that sentencing decisions are mostly 'intuitive', 'bland' and 'standardized'. It is commonly observed that the formula of nature and gravity of the offence is invoked to support the choice of sentence rather than a well-thought reasoned case-specific justification. In the absence of a stated sentencing policy, the quantum of punishment depends on the notion and philosophy of the individual judge. To my mind the litmus test is whether the sentence awarded meets the society expectation.[22]Therefore, judicial discretion is very important, because it is important to tailor sentencing to individual circumstances.

2.6 Inherent Defects and Shortcomings of Criminal Laws and Findings

There are some grey areas or inadequacy of exhaustive legal provisions in our criminal justice system, particularly in case of jurisdiction and cognizance of criminal cases. Some of these issues are very vital for the continuance of criminal cases and for the sake of maintaining balance of powers. In the instant effort let us specify some these areas and offer some possible solutions therein.

In fact, the issue of jurisdiction is very important in speedy and proper disposal of criminal cases. The dialogue on jurisdiction can be best traced in the Code of Criminal Procedure, 1898. But a question arises that whether these provisions are exhaustive at all. To have sound response, the researcher intends to put some question and justify the potentiality of present provisions with reference to the result of those questions. At the same time, the researcher will give a sincere effort to offer some alternative routes. To that end, the researcher put fourteen (13) questions to ten (10) judges, ten (10) lawyers and ten (10) law students. The answer of those questions will be designed in terms of percentage.

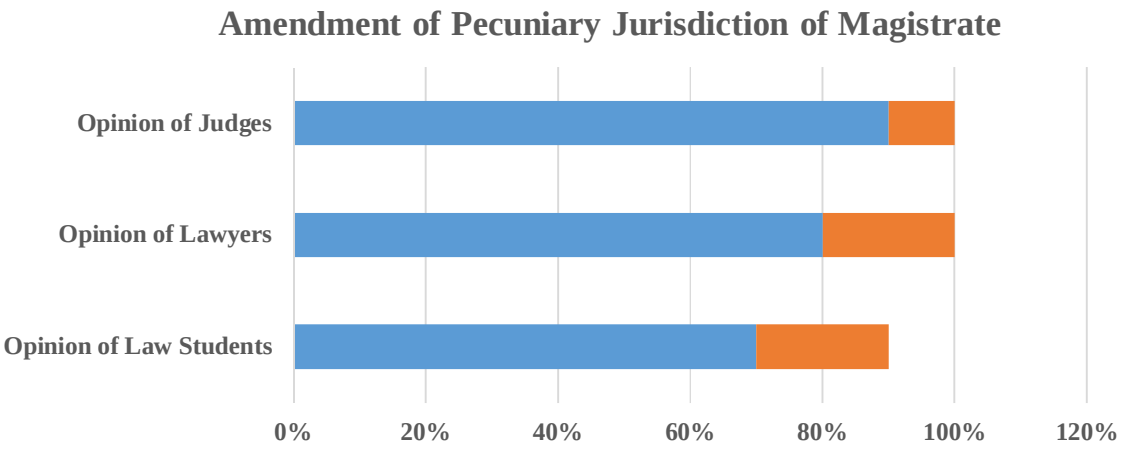
2.6.1 Validation of Existing Sentencing Authority

Though lower judiciary has been separated from the executive clucks, still executive authority exercises some judicial function through Mobile Court Act, 2009. In doing so, the Executive Magistrate may sentence the accused not exceeding 2 years and he may impose fine upto the limit as mentioned in the concerned law.[23] That means executive magistrates

[22] Ibid 281.

[23]The Mobile Court Act 2009 (Act No. LIX of 2009), s 8.

have no pecuniary limit in imposing fine. But presently the Judicial Magistrate, as per section 32 of the Code, can imposes fine as punishment not exceeding 10,000/- whereas the executive magistrates exercises unlimited amount. In response to the question that whether pecuniary sentencing authority of Judicial Magistrates be extended, 9 of the judges, 8 of the lawyers and 7 of the law students opined 'Yes'. That means 90% of the judges, 80% of the lawyers and 70% of the law students opined for extending the pecuniary sentencing authority of Judicial Magistrates. Side by side, 10% of the judges, 20% of the lawyers and 30% of the law student opined for following the present law.



	Opinion of Law Students	Opinion of Lawyers	Opinion of Judges
Yes	70%	80%	90%
No	20%	20%	10%

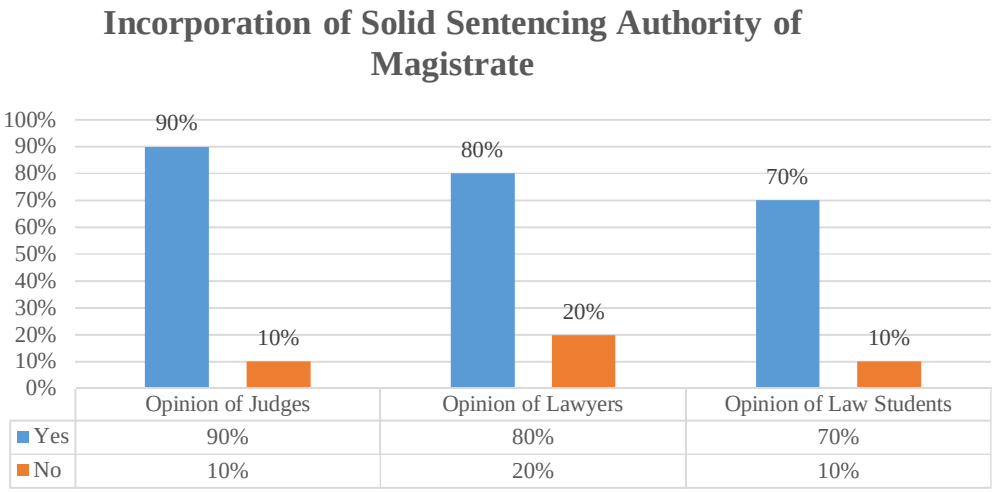
In this regard Section 32of Cr.PC should be amended to extend the pecuniary jurisdiction & sentencing authority of judicial Magistrate to cope up with the situation.

2.6.2 Contradictory Sentencing Authority of Magistrates

The provisions as provided in sections 29C & 33A are contradictory in nature. The government may, after having consultation with the High Court Division, invest the Chief Judicial Magistrate and Additional Chief Judicial Magistrate to try all offences except the one punishable with death sentence. Similarly Metropolitan magistrate or magistrate of the first class may be entrusted with the power to try all offences not punishable with death or life imprisonment or imprisonment for a term exceeding ten years.[24] On the other hand, the magistrates as empowered under section 29C can pass any sentence except death or life

[24]The Code of Criminal procedure 1898 (Act No. V of 1898), s 29C.

imprisonment or imprisonment for a term exceeding seven years.[25] This sort of self-contradictory provisions in the code makes the trying magistrate puzzle. In response to the question that whether smooth & consistent sentencing provision should be inserted in the present law 9 of the judges, 8 of the lawyers and 7 of the law students opined yes. That means 90% of the judges, 80% of the lawyers and 70% of the law student opined for making the present law more consistent by amendment. Side by side, 10% of the judges, 20% of the lawyers and 30% of the law student opine for following the present law.



Therefore, as per the result of the survey, plain & consistent provisions should be inserted in the present law i.e. the Code by way of amendment.

2.6.3 Trial of an Accused Who Committed the Offence beyond Bangladesh

When a citizen of Bangladesh commits an offence at any place without and beyond the limits of Bangladesh, or when any person commits an offence on any ship or aircraft registered in Bangladesh wherever it may be, he may be dealt with in respect of such offence as if it had been committed at any place within Bangladesh at which he may be found. Provided that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in Bangladesh except with the sanction of the Government.[26]

[25]Ibid, s 33A.

[26]The Code of Criminal procedure 1898 (Act No. V of 1898), s 188 .

In the case of *Om Hemrajani v. State of U.P.*[27] the victim who suffered at the hands of the accused on a foreign land, can file complaint about the offence to the competent court which he may find convenient.

When complaint is laid before a court which has not territorial Jurisdiction to entertain it, the proper, course to follow is to return the complaint for presentation to the proper court under section 201 the Code of Criminal Procedure *Govt. of E. Pak. v. Sokil.*[28]

In the case of *MG Towab Ali Air Vice Marshal (Rtd.) v. State*[29] it was held that offence committed outside Bangladesh-Court in Bangladesh has jurisdiction to try the accused. In the case of *Dr Taslima Nasrin v. Md. Nurul Alam*[30] it was observed that the alleged offence having been committed in India, the trial of the case in question cannot be proceeded with without sanction of the Government for the purpose in view of the proviso to section 188 of the Criminal Procedure Code and sanction obtained in his case under section 196 of the Code cannot do away with the requirement of proviso to section 188.

In another case *Abdus Sattar v. State*[31]it was held that since in the sequel of the criminal acts of accused Nos. 3 and 4 by way of obtaining signatures of the complainant in black papers at Jeddah money was withdrawn in Bangladesh, a Criminal Court of competent jurisdiction in Bangladesh can take cognizance in the case in accordance with illustration (c)[32] of section 179 of the Code.

2.6.3.1 Justification of Permission of Government

To file a case against a person, who commits the offence beyond the territory of Bangladesh, the permission from the Govt. is required by present law.[33] It just makes the administration busy for no cause. In response to the question that whether permission to try the accused should be made compulsory, 8 of the judges, 6 of the lawyers and 6 of the law students says no. That means 80% of the judges, 60% of the lawyers and 70% of the law student opined for

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[27] AIR 2005 SC 392.

[28] (1964) 16 DLR Dacca 334; (1975)27 DLR (AD) 16.

[29](1982) 34 DLR 390.

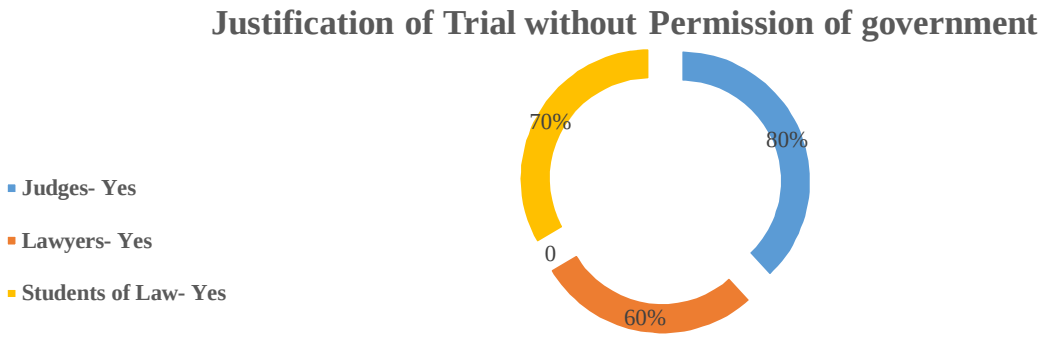
[30](1996) 48 DLR 280.

[31](1998)50 DLR (AD) 187.

[32] A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on a may be inquired into or tried either by X or Y.

[33] The Code of Criminal procedure 1898 (Act No. V of 1898), s 188.

making the present law more consistent by allowing the court to try the accused without prior sanction of government through amendment. Side by side, 20% of the judges, 40% of the lawyers and 30% of the law student opine for following the present law.



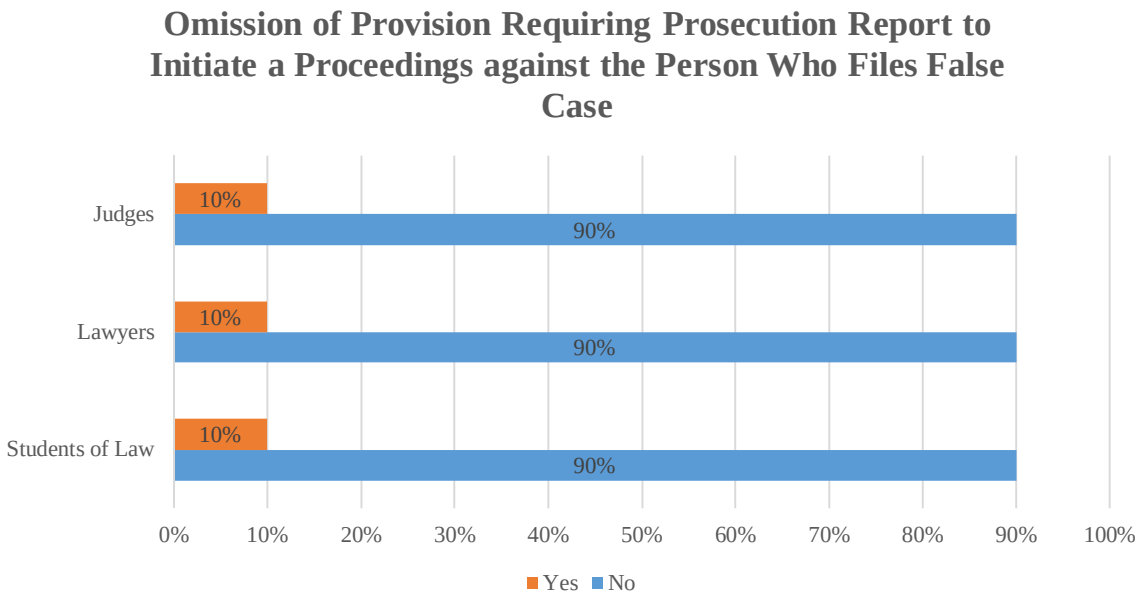
Therefore, the issue of prior permission of government should be abolished for the speedy disposal of criminal proceeding. It also helps the judiciary to diminish the backlog of thousands cases and thereby it will expand access to justice.

2.6.4 Direct Action against the Accused Who Files False Case

In the present Criminal justice system a prosecution report is needed to initiate a proceeding against a person who files a false case as provided in section 250 of the Code.[34] It clearly hampers the speedy disposal criminal proceeding. If it is proved by evidence that a case is false in nature, the concern judge or magistrate should have the authority to *suomoto* convict the accused for a particular period authorized by law. In response to the question that prosecution report is needed to initiate a proceeding against a person who files a false case, 9 of the judges, 9 of the lawyers and 9 of the law students says 'No'. There is no need to prefer any prosecution report to initiate criminal proceedings against the person who files false case. That means 90% of the judges, 90% of the lawyers and 90% of the law student opined for making the present law more consistent by amendment so that the court can punish the

[34] If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate or any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is or opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.

accused if his case is, proved by evidence, false in nature. Side by side, 10% of the judges, 10% of the lawyers and 10% of the law student opine for following the present law.



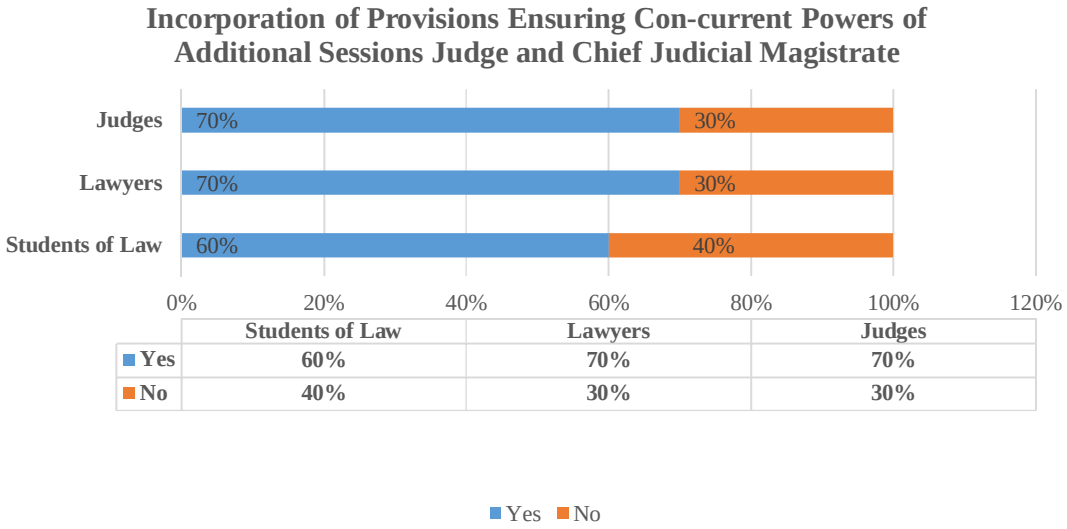
If the law is enacted in line with that provision,it would also reduce the backlog of criminal cases largely. On the other hand, the rate of filing false criminal case may be decreased.

2.6.5 Authority of Additional Sessions Judge and Chief Judicial Magistrate

In the present Criminal Justice System Additional Sessions Judge and Chief Judicial Magistrate are appointed from and amongst the Additional District Judge. Where the Additional Sessions Judge tries the case involving sentences up to life imprisonment or death sentence, the Chief Judicial Magistrate exercises the mere power of 1st class Magistrates, who can impose sentence not more than 5 years or 7 years if specially empowered.[35]On the other hand, Additional Sessions judge, if permitted by Sessions Judge, hears the appeal and revision from and among the decision of Chief Judicial Magistrates where both of them hold

[35] The Code of Criminal procedure 1898 (Act No. V of 1898), s 33A-The Court of a Magistrate, specially empowered under section 29C, may pass any sentence authorized by law, except a sentence of death or of transportation or imprisonment for a term exceeding seven years. The Code of Criminal procedure 1898 (Act No. V of 1898), s 32-The Courts of Magistrates may pass the following sentences namely:-(a) Courts of Metropolitan Magistrates and of Magistrates of the first class: Imprisonment for a term not exceeding five years, including such solitary confinement as is authorized by law; Fine not exceeding ten thousand taka; Whipping.

same rank. In response to the question that whether sentencing authority of Additional Sessions Judge and Chief Judicial Magistrate should be same as they belong to same tier case,7 of the judges, 7 of the lawyers and 6 of the law students says 'Yes'. That means 70% of the judges, 70% of the lawyers and 60% of the law student opined for making the present law more consistent by amendment by allowing Chief Judicial Magistrate to try the cases involving sentences of life imprisonment or Death Sentence. Side by side, 30% of the judges, 30% of the lawyers and 40% of the law student opine for amending the existing law.

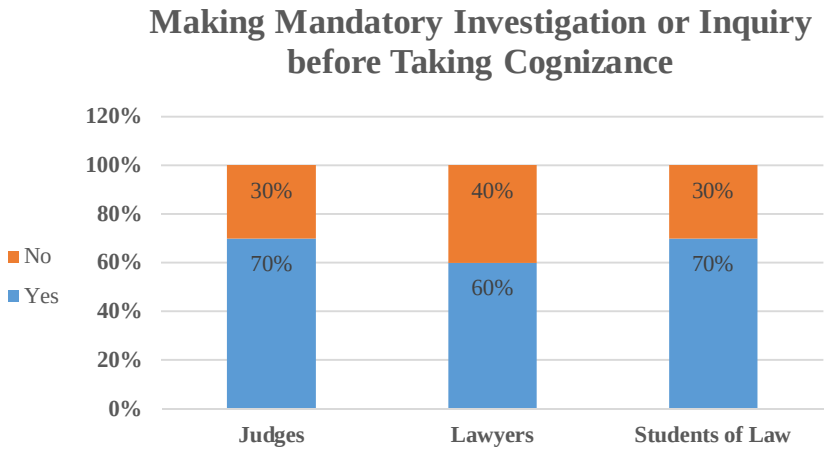


As the Additional Sessions Judge and Chief Judicial Magistrate hold the same rank the later one should be entrusted with the authority to try the cases involving sentence of life imprisonment. In this regard the Sessions judge may transfer Sessions cases to the Chief Judicial Magistrates for trial as all the judicial magistrates are subordinate to Sessions judge. To that end, necessary amendment to the Code is a demand of time. Thus the loads of work in the Sessions Division may be reduced and ensure the balance of sentencing authority of the judges of same tier.

2.6.6 Justification of Taking Cognizance without Investigation or Inquiry

In the present socio-economic context of the country peoples are very keen to file a criminal case even for very trifling matter against his opponent to harass him, though their dispute is civil in nature. In some cases they even file false cases. It is not an easy task to justify the prima facie case of the complaint at first instance. Presently the judicial magistrates are empowered to take cognizance of a case directly after examining the complainant or after having an investigation or inquiry. Direct cognizance in some cases paves the way for filing

false case. To check the trends of filing false case, the concern judicial magistrate should not proceed with the case without having any investigation or inquiry as he deem fit. In response to the question that whether investigation or inquiry should be made compulsory for taking cognizance of an offence 7 of the judges, 6 of the lawyers and 7 of the law students says 'Yes'. That means 70% of the judges, 60% of the lawyers and 70% of the law student opined that provisions should be made compulsory, requiring the judicial magistrate to take cognizance of a case only after having an investigation or inquiry. Side by side, 40% of the judges, 20% of the lawyers and 30% of the law student opine for following the present law.



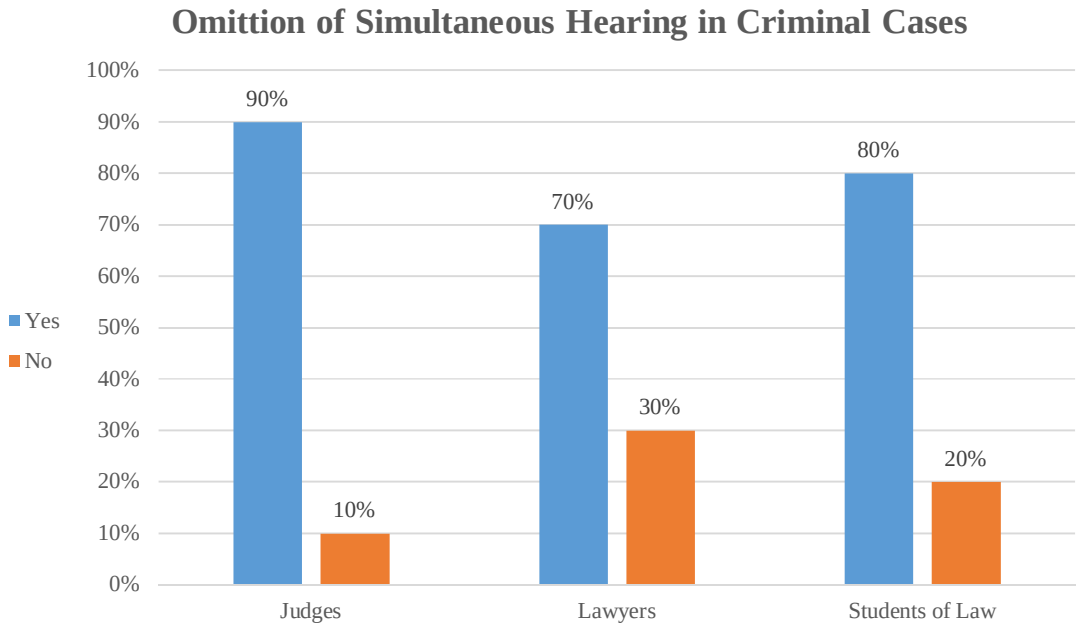
If the provisions are made compulsory, requiring the judicial magistrate to take cognizance of a case only after having an investigation or inquiry, the rate of filing false case may reduce largely. If investigation entails unnecessary time or increases harassment to the complainant at least a judicial inquiry by the same judicial magistrates should be made compulsory. Thus the judiciary may get rid of from the backlog of criminal cases.

2.6.7 Tenability of Institution of Double Case for Single Incident

As regards to the filling of more than one case for single incidence section 205D of the Code[36] comes forward to the effect that where it is seen that a case has already been initiated,

[36]The Code of Criminal procedure 1898 (Act No. V of 1898), s 205D-(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, to the -offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police-officer conducting the investigation. (2) If a report is made by the investigating police-officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the

no 2nd caseshouldbe allowed to proceed until and unless the report on the first case be submitted. That means only one case is expected in a single incident. But the present trends are some extent different from the present legal provisions in some cases. It is clearly provided in our law that there should be one case for single incident against the accused. Filling of 2nd or 3rd case is not compatible with our jurisdiction. Nonetheless, if there is more than one case upon same subject matter, the subsequent one will be stayed until disposal of the prior one as per section 205D of the Code. But it is a tragic for our criminal legal system that there lodged more than one case upon same offence, particularly where the accused is political or national figure. This unjustified practice is nothing but an attempt to cause the society suffers from lawlessness. This unwarranted practice also enlarges the list of pending cases and creates huge backlog and burden for the judiciary. In response to the question that whether continuance of double case be allowed though not supported in law 7 of the judges, 6 of the lawyers and 6 of the law students says 'No'. That means 90% of the judges, 70% of the lawyers and 80% of the law student opined that no 2nd case shall be allowed to proceed. Side by side, 10% of the judges, 30% of the lawyers and 20% of the law student opine for following the present unwarranted practice.



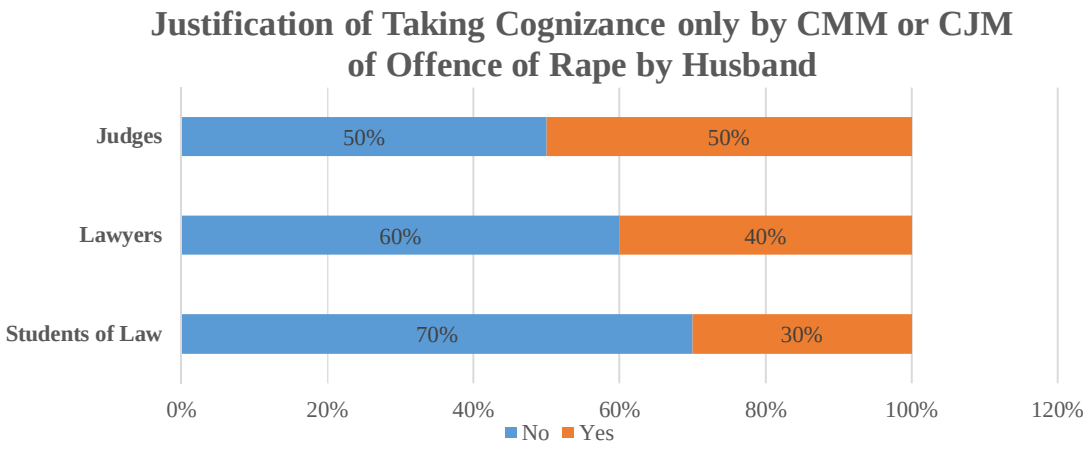
cases were instituted on a police report.(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

Therefore, the legislature, as well as concerned authority, should give immense thought on the matter to ensure Rule of law in Bangladesh.

2.6.8 Special Jurisdiction to Take Cognizance

There is a special type of offence i.e. rape by husband, in our Penal System. As to the Magistrate who will take cognizance of said distinct offence is provided in section 561 of the Code.[37] Only the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, authorized to take cognizance of the same offence after satisfaction of due procedure. Now the question is, whether it is rational to restrict the power of cognizance with the Chief Metropolitan Magistrate or Chief Judicial Magistrate to take cognizance of this case in the year of modern era where the concern judicial magistrates take cognizance of cases involving more vibrant issues. The issue of taking cognizance is some extent different from trial of a criminal case where the prior one relates to quasi-judicial job and which requires maintenance of separate Cause list, Diary and Registers. In response to the question that whether the power of taking cognizance of offence of rape by husband should be restricted only to Chief Judicial Magistrate or Chief Metropolitan Magistrate 5 of the judges, 6 of the lawyers and 7 of the law students says 'No'. That means 50% of the judges, 60% of the lawyers and 70% of the law student opined for the power of jurisdiction of offence of rape by husband need not be restricted only to the Chief Metropolitan Magistrate or Chief Judicial Magistrate as the case may be. Side by side, 50% of the judges, 40% of the lawyers and 30% of the law student opine for following the present law.

[37] The Code of Criminal procedure 1898 (Act No. V of 1898), s 561- (1) Notwithstanding anything in this Code, no Magistrate except the Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall–(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or (b) send the man for trial for the offence.



For the sake of smooth court administration and management the power of taking cognizance of offence of rape by husband need not be restricted only to the Chief Metropolitan Magistrate or Chief Judicial Magistrate as the case may be. It would also pace the administration and management of the Chief Metropolitan Magistrate courts or Chief Judicial Magistrate courts like other criminal courts.

2.6.9 Compensatory Jurisdiction

Compensation means anything given to make things equivalent; a thing given to or to make amends for loss, recompense, remuneration or pay; it need not therefore necessarily be in terms of money. Compensation cannot be based on imagination and expectation. It could only be based on actual loss and injury.[38]

2.6.9.1 Provisions of the Code Awarding Compensation out of Fine

wherever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied–

(a)in defraying expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

[38]*BCCI v. Bangladesh Electrical Industries Ltd &Ors* 12 BLT (HCD) 502.

(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser, of such property for the loss of the same if such property is restored to the possession of the person entitled thereto

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.[39]At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.[40]

Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may in addition to the penalty imposed upon him, order him to pay to the complainant–

(a) the fee (if any) paid on the petition of compliant or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused, and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court Division, when exercising its powers of revision.[41]

In the Book Public Law Remedy authored by Mr. Justice G.S. Singhvi, published by Asia Law House, Hyderabad, 2010 has almost deal with every aspect of compensatory jurisprudence i.e. doctrine of victimlogy from Indian perspective. For research and practice on this subject matter, the book will be of great importance for all concerned.
In the said book at page 1, the author aptly observed:

> "Victims of crime are the forgotten people in our justice system because the history of the whole-civilized world shows a steadily increasing concern with the treatment of

[39]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 545.

[40] Ibid, s 546.

[41]Ibid, s 546A.

the offender but is virtually blind to the helpless situation of the victim. Law focuses its attention on the rights of the criminal while it ignores the competitive claims of the unfortunate victim. Speedy trial is the fundamental right of the accused whereas there is no such right of expeditious rehabilitation of the victim of crime whose person and property the State has failed to protect. While the accused by enforcing his fundamental right of speedy trial and legal aid can get prompt disposal of his case or the proceedings quashed, the poor victim is left to languish because of the delayed, expensive and complicated procedure of civil law for the recovery of the damages for the crime. Denial or delayed award of compensation to the victim of crime through civil law amounts to denial of justice to the unfortunate victim. This is fact deprives him of the basic right of equality before the law and equal protection of the law. The payment of compensation by the criminal court will be an interim relief for the needy victim and enables him to recover damages from the offender. It is very difficult for the victim to recover compensation or damages on the basis of a Civil Court Decree if the accused is a poor person. The poverty of the accused does not exonerate the State from its duty of protecting the interests of the law-abiding citizens. A welfare State like India owes a responsibility of rehabilitation of the victims of crime and discharges it honestly and efficiently. Otherwise, it would be correct to use the words of *Barnes and Teeters*:" Our barbarian ancestors were wiser and more just than we are today, for the adopted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned. Even where fines are imposed today, the State retains the proceeds and the victim gets no compensation. The State must perform its constitutional obligation by ensuring justice to the victims of crime especially the poor, who are the worst sufferers in the current judicial framework."

The 7th United Nations Congress on Prevention of Crime and Treatment of Offenders came out with a declaration of basic principles of Justice of Victims of crime and abuse of power, which was later adopted by the U.N. General Assembly. In the declaration, the U.N. defined the “Victims of Crime” as follows:

> “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.

A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim "also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

In the case of *Md. Shahanewas v. Govt. of Bangladesh*[42] it was held that "Abul Hossain son of late Habibullah was arrested by police in place of absconding accused AbulHashem. son of late Habibur Rahman as a result of which the former was being held in custody to serve out the sentence of imprisonment for life due to sheer negligence of the police officer in executing the warrant of arrest. This has been viewed by the High Court Division as a dangerous dereliction of duty by a police servant causing immense sufferings to an innocent citizen. A cost of Tk. 20,000/- was awarded to the detenue as compensation and the said cost was to be realized from the delinquent police officer.

The Supreme Court of India in a writ petition granted compensation of Rs. 7, 50,000/- to the relatives of an Advocate who had died in police custody.[43]

2.6.10 Jurisdiction of Criminal Courts of Bangladesh upon the Military Personnel

The Provisions regarding Jurisdiction of Criminal Courts of Bangladesh upon the Military Personnel is very much obscure. It will be crystal clear on plain reading of the relevant provisions of the law. Section 549 of the Code, The Government may make rules consistent with this Code and the Army Act, 1952 (XXXIX of 1952), the Air Force Act, 1953 (VI of 1953), and the Navy Ordinance, 1961 (XXXV of 1961), and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law, shall be tried by a Court to which the Code applies, or by Court martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the commanding officer of the nearest military, naval

[42](1998) 18 BLD 337.

[43]*Sudha Rasheed v. Union of India,* 1995 (1) SCALE77 (SC).

or air-force station, as the case may be, for the purpose of being tried by Court-martial. Chapter XXXII of the Criminal Rules and Orders, Volume I, rules 633-636 enumerates the procedure of trial of the military personnel like army, navy and air force. But it is still ambiguous so it does require some simple procedure.

2.7 Conclusion

In the aforesaid discussion it is revealed that jurisdiction of the Judicial Magistrates should be enhanced so far it relates to awarding sentence and fine in order to dispose of the long pending cases within reasonable time. Moreover, the Courts should be given discretionary power to award sentence considering the facts and circumstance of the case and gravity of the offence. The prior sanction of the government for prosecuting Bangladeshi nationals beyond the territory of Bangladesh should be abolished so that victim may get Justice easily.

Chapter-III

Pre-Trial Stage of Criminal Cases

3.1 Introduction

Investigation" according to the Code, is to be conducted always by a police officer or any other person authorized person (other than a Magistrate) who is authorized by Magistrate; it includes all the proceedings under the Code for the collection of evidence.[1]An "inquiry", according to the Code, includes every inquiry other than a trial conducted under this Code by a Magistrate or Court.[2] An inquiry is never conducted by the police though in common parlance people talk of police inquiry. An investigation is not normally a judicial act; it is an administrative act; while an inquiry may be judicial or administrative. The terms 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal cases.

The investigation officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore, the foundation stone on which the whole edifice of criminal trial rests....[3] Once investigation fails, the court will be faced with a fait accompli. Proper and uninfluenced investigation is necessary to bring about the truth. Truth will be a casualty if investigation is derailed due to external pressure and guilty gets away from the clutches of law.[4]

Of all the duties that an official can be called upon to perform in the course of his service those of an investigator are certainly not the least important. That his service to the public is great and his labors full of interest will be generally admitted, but rarely, even among specialties, is full credit given to the difficulties of the position. He should possess abundant energy and initiative. On many occasions ingenuity will have to be displayed. He must know men, and be eternally vigilant. Tact is indispensable, for many awkward situations will be circumvented by its use. Occasions will arise when his courage will be called to account, as when tackling an armed criminal or a combination of two or more vicious aspects.[5]

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[1] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 4 (h); *Narayana Swamy v State of Karnataka*, 1991 Cri LJ 2115 (Kant HC); *Tung Nath Ojha v Haji Nasiruddin Khan*, 1989 Cri LJ 1846 (Pat HC).

[2] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 4 (k).

[3] Sumeet Malik, *Thus Spake Their Lordships*! (1st edn, Eastern Book Company, Lucknow, India, 2016) 570.

[4] *Shahid Balwa v. Union of India*, (2014) 2 SCC 687.

[5]Hans Gross, *Criminal Investigation* (4th edn, 2010, Universal Law Publishing Co., New Delhi) 1.

3.2 Initiation of Criminal Case

3.2.1 Information in Cognizable Offence

Any individual who is acquainted with the facts of commission of a cognizable offence may file information (First Information Report) under section 154 relating to it in the concerned Police Station. F.I.R. is made in B.P. Form no.27 in accordance with the instruction printed on it.

Four copies of FIR are to be made of which the first carbon copy of the FIR has to be sent to the Superintendent. The second copy of the FIR shall be kept at the Police Station for future reference. Third copy has to be sent to the circle inspector at the same time as the original and first copy is dispatched.[6]

Police may come to know about the commission of a cognizable offence from any other source, e.g. on a phone call, from hearsay source or on their own. If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.[7]Every report sent to a Magistrate shall, if the Government so directs, be submitted through such superior officer of police as the Government, by general or special order, appoints in that behalf.[8]Such superior officer may give such instructions to the officer in charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.[9]Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in the Code.[10]

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[6] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 246.

[7] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 157.

[8] Ibid, s 158 (1).

[9] Ibid, s 158 (2).

[10] Ibid, s 159.

After taking cognizance of a cognizable offence for investigation under section 190 of The Code, a Magistrate may send the same under section 156(3) of The Code[11] to a police station for investigation and report. When a Magistrate directs the police to enquire into the complaint of a cognizable offence, of which n& previous information has been laid before the police, the written information sent by the magistrate to the police shall be treated as the first information. Magistrate.[12]

However, having accepted a complaint under section 200 of The Code a Magistrate may send the same under section 202(1) of The Code to a police station for investigation.

3.2.1.1 Information Treated as First Information Report

There is no clear guideline regarding it in the code. The word "Every Information" is used in section 154 of The Code instead of the word "First Information Report". The word "first information" has been used in regulation 243 of the PRB, 1943. Earlier view was that information which reaches first in point of time in police station will be treated as first information report.[13]

In many decisions, the information first in point of time was considered as FIR and all subsequent information's were considered as statements under section 161 of the Code of Criminal Procedure. Another view is that if investigation has started on the basis of a G.D entry that G.D. entry shall be considered as FIR and subsequent FIR lodged after commencement of investigation shall be considered as a statement under section 161 of the Code and shall not be admissible in view of the provisions of section 162.[14]

There is another line of decisions wherein it has been held that the information received first in point of time may not necessarily be considered as FIR and a subsequent information may be considered as FIR in consideration of the facts and circumstances, that a vague or incomplete information though may be first in point of time may not be considered as FIR, that there are basic differences between a G.D Entry which is made under section 44 of the

[11] Any Magistrate empowered under section 190 may order such an investigation mentioned in the Code.

[12] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg245 (a).

[13] Ibid, reg 243(c).

[14]*Muslim uddin & ors. v. The State,* (1986) 38 DLR (AD) 311; *Ansar Md. Chan Mia v. the State* (2001) 6 MLR (AD) 279; *State v. Al Hasib Bin Jamal alias Hasib and five others* (2007) 59 DLR 653; *Shahjahan v. State,* (1994) 46 DLR 575; *Zilluh & others v. the State,* (1988) 8 BLD 418.

Police Act 1861 and FIR which is recorded under section 154 of the Code of Criminal Procedure.[15]

It has also been observed that very often the first information lodged with the police is not a complete document and if during the interval between the first information and taking of steps in the nature of investigation, further information is furnished to the police, such further information is merely supplemental to the FIR and cannot be considered as statement made to the police during the course of investigation.

In a case reported in, the Court examined the question: which one of the several information about the same occurrence is to be regarded as FIR. After examination of the legal position, the Court has come to the finding that it is a question of fact and is dependent upon the facts and circumstances of each case. It this case, two vague and indefinite information's were given to the police on the basis of which police went to the place of occurrence and subsequently police *suomoto* lodged FIR after getting the post mortem report.

The FIR lodged by the police was considered as FIR and the earlier two vague and indefinite information were not considered as FIR.[16]

3.2.2 Information in Non-Cognizable Offence

When a police officer receives information as to the commission of a non-cognizable offence, he cannot investigate it without the order of a Magistrate, he shall enter in a book (General Diary) to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.[17]General Diary is to be kept in B.P. Form no.65 as referred to in section 44 of the Police Act, 1861 and detailed in regulation no.377 of P.R.B, 1943.

On receipt of a copy of the complaint from the Magistrate directing an investigation to be made by the police under section 155, Code of Criminal Procedure, in a case which is not cognizable by the Police or ordering the Police to enquire under section 202 of that Code together with the intimation of the date by which the report of the investigation or enquiry shall reach him. The police officer concerned shall, if he is unable to report by the date fixed, send a report on or before such date explaining the delay and stating on what date the report is expected to reach him. The complainant should be informed of the date so fixed and

[15]*Abdul Khaleque v. The State* (2001) 6 MLR (AD) 170; *Bachchu Sarder and others v. The State*, (2003) 11 BLT (AD) 53; *Minhaz & another v. The State*, (2001) 21 BLD (AD) 103; *Touhid Alam v. The State*, (1986) 38 DLR 289; *State v. Ershad Ali Sikder and others*, (2003) 8 BLC 275; *State v. Golam Mostafa and anr, (2004) 9 BLC 63*; *Badal and others v. State*, (2005) 10 BLC 565

[16]*Touhid Alam v. The State*, (1986) 38 DLR 289.

[17] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 155 (1).

directed to appear before the investigation officer at the scene of the scene of the occurrence.[18]

3.2.3 Complaint before Magistrate

Any individual who is acquainted with the facts of commission of a non-cognizable offence may file information under section 190 relating to it to a competent Magistrate having power to take cognizance. Then, the magistrate may send it for investigation or may take cognizance.

After filing of a complaint before Magistrate:

i. He may examine the petitioner u/s 200 of the Code[19];
ii. He may take cognizance under section 190 of the Code and issue process against the accused under section 204 of the Code[20];
iii. He may dismiss the complaint either under sections 203;
iv. He may order for investigation u/s 202 of the Code;
v. He may take the case for judicial inquiry or may order to any subordinate magistrate for conducting such and filing report;
vi. He may send the same under section 156(3) of the Code to the concerned police station for investigation and report under section 173 of the Code.

3.2.4 Unnatural Death Case

When the officer-in-charge of police station or such other officer empowered by the government receives any information that a person has committed suicide or has been killed by another or by an animal or by an accident or has died under circumstances raising reasonable suspicion that someone has committed an offence, the officer by submitting a FIR in B.P. Form No 48 starts an U.D. case and after giving information to the nearest Executive

[18] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 268.

[19] A Magistrate taking cognizance of an offence on complaint shall at once examine upon oath the complainant and such of the witnesses present, if any, as he may consider necessary, and the substance of the examination shall be reduced to writing and shall be signed by the complainant or witness so examined, and also by the Magistrate.

[20] If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

Magistrate proceeds to the place where the dead body is lying. He is required to hold an investigation, draw up a report of the apparent cause of the death describing the nature and marks of injuries found on the dead body stating what weapons or instruments were used to inflict such injuries.[21]

Therefore, in U.D. cases, FIR is submitted and investigation is also held but such a FIR cannot be considered as FIR. When, after post mortem examination, it is ascertained that it was a culpable homicide amounting to murder or not amounting to murder, police proceeds further by making formal a formal FIR under section 154 of the Code. Thus it is clear that the FIR submitted under section 174 of the Code read with Regulation 299(a) of the PRB is the FIR.[22]

3.3 Investigation and Procedure Followed in Conducting Investigation

Investigation includes all the proceedings under The Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by Magistrate in this behalf.[23]

An investigation consists of the following steps*:*

1. Proceeding to the spot.
2. Ascertainment of facts and circumstances of the case.
3. Discovery and the arrest of the suspected offender or offenders.
4. Collection of evidence relating to the commission of the offence alleged which may consist of -

   a) Examination of various persons including the accused and the reduction of their statements into writing if the officer thinks fit.

   b) The search of places or seizure of things considered necessary for the investigation and to be produced at the trial.
5. Formation of opinion as to whether on the materials collected there is a case to place the accused before a court for trial and if so, taking the necessary steps for the same by filling of a charge sheet u/s.173.[24]

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[21] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 174 (1) & The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 299

[22] Mohammad Hamidul Haque. *Trial of Civil Suits and Criminal Cases*, (2nd edn, Universal Book House, Dhaka, 2012) 269

[23] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 4 (l)

[24] KN Chandrasekharan Pillai, *Lectures on Criminal procedure including Probation and Juvenile Justice*, (4thedn, Eastern Book Company, India 2010) 46-47.

6. Making a case diary containing the record of facts ascertained by the officer during investigation and action he taken showing the time and date against every action he has taken.

Investigator will receive information from all quarters; alleged eye-witnesses and others will be eager to make statements more or less important; he does not wish to dismiss them, for they may tell him something which he will be able to turn to account in forming at once, if he is so disposed, a definite opinion. His work at this important stage of the inquiry must enter into great detail. Let him make notes of everything. This is very important. His brain cannot retain every detail imparted to him by everyone. Later he will be able to separate and assess the value of the information he has received, and he will be able to return to the person who imparted it. Let the Investigator not keep notes and often he will fail to recapture some vital information and the name of the person who gave it to him. Little by little, as the work advances, certain opinions and ideas become separated and fixed: such-or-such a witness makes a good impression and one begins to believe what he states; an idea is obtained of the way in which the criminal has reached the spot; account is taken of the method and instruments has employed.[25]

3.3.1 Police When to Investigate

The principal agency for carrying out investigation of offences is the police; and the police can proceed to investigate-

I. On the information received from any person as to the commission of any cognizable offence;[26] or
II. Even without any such information, but if they have reason to suspect the commission of any cognizable offence;[27] or
III. On receiving any order to investigate from any judicial magistrate empowered to take cognizance of any offence under section 190 of The Code[28]

General speaking, the Code considers non-cognizable offences as essentially private (criminal) wrongs, and its general policy is not to use the State agency i.e. police for the

[25]Hans Gross, *Criminal Investigation*,(4th edn, 2010, Universal Law Publishing Co., New Delhi) 4&5.

[26]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 157 (l); *H.N. Rishad v State of Delhi*, 1955 Cri LJ 526, 531; AIR 1955 SC 196; *Vijayaraghavan v CBI*, 1984 Cri LJ 1277 (ker HC); *Pappa Rao v State*, 1985 Cri LJ 546 (Cal HC); *State v Jai Bhagwan*, 1985 Cri LJ 932 (Del HC); *MuthurajiaSatyanrayana v State of A.P.*, 1997 Cri LJ 374 (AP); *BijalRevashankar Joshi v State of Gujarat*, 1997 Cri 4170 (Guj)

[27] Ibid.

[28] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 156 (3).

investigation of such offences. However, if a competent Judicial Magistrate considers it desirable that a non-cognizable in particular case should be investigated into by the police, he can order the police to do so. In that case, such a non-cognizable offence would be almost on par with the cognizable offence, and the police will have all the powers in respect of investigation except the power to arrest without warrant as they would have had if the offence were a cognizable one. If the facts reported to the police would investigate the whole case as a cognizable one.[29]

There is a further limitation to the power of the police to investigate. The Code does not confer the power to investigate on every police officer. Only an officer-in-charge of a police station (or any other officer of a higher rank)[30] is empowered to investigate. It may be that such an officer may depute his subordinate officer (not below the rank prescribed by the Government in this behalf) to investigate the facts and circumstances of any particular case.[31]

3.3.2 Duration of Investigation

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.[32]No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.[33]

Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the case, and shall at the same time forward the accused to such

[29] Ibid, s 155; *State of Orissa v Sharat Chandra Sahu,* (1996) 6 SCC 435: 1996 SCC (cri) 1387

[30] Ibid, s 551.

[31] Ibid, s 157 (1).

[32] The Constitution of people's republic of Bangladesh 1972, Art 33(2) .

[33] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 61.

Magistrate.[34]If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation-(a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and (b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court.[35] However, every investigation shall be completed without unnecessary delay.[36]Circle Inspectors shall see the concerned investigating officer complete their investigations as required by section 173 of Code of Criminal Procedure, and that the provisions of investigation are not abused. If the directions to pursue the investigation to its completion without a break in continuity are strictly observed, it should rarely be necessary to prolong the investigation of even the most difficult case beyond 15 days.[37]

3.3.3 Maintaining Case Diary

The Case Diary is of crucial importance for both the court and the prosecuting authority. It gives a pen picture of facts, circumstances and other activities of the officer in respect of a crime and also his findings.

Every police-officers making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth

i. the time at which the information reached him,
ii. the time at which he began and closed his investigation,
iii. the place or places visited by him, and
iv. a statement of the circumstances ascertained through his investigation.[38]

Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, not shall he or they be entitled to see them merely because they are referred to by the Court; but, if they

[34]Ibid, s 167(1).

[35] Ibid, s 167(5).

[36] Ibid, s 173 (1) .

[37] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 261(c).

[38] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 172 (1).

are used by the police-officer who made them, to refresh his memory or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.[39]

According to section 172 the contents of a Police diary are not evidence but are to be used as aids to the enquiry or trial, as for instance, to assist the Court in questioning witnesses and elucidating by legal evidence points which need clearing up.[40]

The Case Diary of an Investigating Officer which is not a public ducument cannot be made public by swearing affidavit.[41]

Police in the matter of investigation enjoys wide powers to complete the same and the High Court cannot interfere at the investigation stage. Submission of charge sheet cannot be treated as a finality of investigation until cognizance of the case is taken.[42]

Case diaries (B.P. Form No. 38) shall be written up as the enquiry progresses, and not at the end of each day. the hour of each entry and name of place at which written shall be given in the column on the extreme left, A note shall be made at the end of each diary of the place from, the hour at, and the means by which, it is dispatched, The place where the investigation officer halts for the night shall also be mentioned.[43]

3.3.4 Inspection of Crime Scene

The purpose of crime scene investigation is to help establish what happened (crime scene reconstruction) and to identify the responsible person. This is done by carefully documenting the conditions at a crime scene and recognizing all relevant physical evidence. The ability to recognize and properly collect physical evidence is oftentimes critical to both solving and prosecuting violent crimes. It is no exaggeration to say that in the majority of cases, the law enforcement officer who protects and searches a crime scene plays a critical role in determining whether physical evidence will be used in solving or prosecuting violent crimes.[44]

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[39] Ibid, s 172 (2).

[40] *1956 PLD (Sind) 262.*

[41] *Bangladesh v. Dr Shamima Sultana Rita, 54 DLR (AD) 151.*

[42] *Bangladesh v. Tan Kheng Hock*, 31 DLR(AD) 69.

[43] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 264 (a).

[44] Robert Allison, *Investigation of Crime Scene* (1st edn, Global Vision Publishing House, India, 2008) 223.

No officer of lower rank than a Sub-inspector shall be employed in investigation of criminal cases except in unavoidable emergencies when an Assistant Sub-Inspector may be so employed as laid down in regulation207 (c).[45]

Now in every Police Station of Districts and Metropolitan areas of our country an Inspector, in addition to general is appointed by the Govt. who is known as Inspector (investigation). His function is to conduct the investigation by himself or by other officers (S.I., or A.S.I).It has to be bore in mind that an A.S.I. is not empowered to investigate a case containing cognizable sections. An A.S.I may be allowed by the Officer in Charge concerned to investigate a case in exceptional circumstances only (in Non F.I.R.case).After filing of a case (F.I.R. or G.D.) in Thana or receiving a complaint under section 156 (3) of the Code, officer in charge of the Police Station refers the same to the Inspector (investigation) for taking necessary steps in this regard.

If the Officer-in-charge of a police-station decides that an investigation is necessary, after dispatching a first information report[46]

i. he shall himself proceed to the spot or depute a subordinate to hold an enquiry, who shall not be below the rank of Assistant Sub-Inspector[47]
ii. If necessary arrest the accused[48]
iii. Where offence is not of a serious nature and information is given against any person by name; there, proceeding to the spot is not necessary.[49]

3.3.4.1 Preparing Sketch Map

A map or plan shall always accompany the charge sheet in cases of

1. Murder,
2. Dacoity,
3. Serious Riot,
4. Mail Robbery,
5. Highway
6. Robbery,
7. Extensive Burglary or

[45] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 255(b).

[46] Ibid, reg 258.

[47] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 157 (1).

[48] Ibid.

[49] Ibid, proviso (a) to s 157 (1).

8. Theft where Rs.600 or more are stolen.

Ordinarily, maps will not be required in cases other than those mentioned above; but the investigating officer may at his discretion, prepare and send up a map in any other case. The map shall be prepared at as early a stage of the investigation as possible.[50]

The following particulars should be followed-

- Should be prepared in scale.
- The number of the case and the name of the accused shall be given at the top of the map and the signature of the person who prepared it at the foot.
- Sketch map should be prepared in a page.
- Should use additional page for explanations and the positions of eye witnesses.
- Building, trees, roads, paths, entrances, exits, doors, tangible points connected with the case such as blood stains, foot prints, cloth and corpse etc. should be identified identically by using letters (A, B, C etc.).
- Position of eye witnesses and his distance of watching should be mentioned by numbers.
- Draftsman may be used. If used, taking the signature of draftsman mentioning his name as witness in the charge sheet is mandatory.[51]

3.4 Search, Seizure and Examination of Alamats

The law in regard to searches is contained in Chapter VII and sections 102 and 103. 163 and 166, Code of Criminal Procedure. These sections must be scrupulously followed. The officer conducting a search should take precautions to prevent the possibility, on the one hand, of any articles being introduced into the house without the knowledge of the inmates, and en the other, of any articles being taken out of the house while the search is in progress. Search should he made in the presence of the owner or someone on his behalf. Search and Seizure list shall be prepared in B.P. Form No.44 (Bengal Form No.5276).[52]

It appears that provisions of section 103 cannot have a universal application regarding search and seizure. The provisions of section 103, as it appears from the very first sentence of the section, cannot be applicable in making all sorts of search. Very first sentence of the section “before making a search under this Chapter" - indicates that the searching officer is required

[50] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 273 (a).

[51] Ibid, reg 273 (c,d,e).

[52] Ibid, reg 280.

to follow the provisions only when he makes a search under this Chapter that means under Chapter VII wherein this section has been incorporated.

3.5 Inquest and Inquest Report

When the Officer-in-charge of a police station or such other officer empowered by the Government receives any information that a person has committed suicide or has been killed by another or by an animal or by an accident or has died under circumstances raising reasonable suspicion that someone has committed an offence, the officer by submitting a First Information Form in B.P. Form No. 48 starts an U.D case and after giving information to the nearest Executive Magistrate proceeds to the place where the dead body is lying. He is required to hold an investigation, draw up a report of the apparent cause of the death describing the nature and marks of injuries found on the dead body stating what weapons or instruments were used to inflict such injuries.[53]

Inquest should be made in front of two person (if possible in front of relatives) and also have to take their signature in the report. Where deceased is a women, such examination should be made by a lady police officer (if possible) and in front of women present therein. I.O may take some pictures of the deceased. Name of the deceased, address, age, profession, identification marks, significant change in the body due to injuries or any other cause, apparels with mark of blood etc should be mentioned in the report. In investigating unnatural and suspicious deaths, the direction in Appendix XIX shall be observed by the police with a view to obtaining as much medico-legal evidence as possible.[54]

Law on Inquest had been engrafted in section 174 of the Code of Criminal Procedure. Inquest is mandatory if a person died under suspicious circumstances. In inquest information and Inquest Investigation, the police person holding Inquest is to ascertain the cause of death, authors in causing death and other information in respect of death. Inquest Report, thus, is an evidence and the same can be used to test the veracity of the prosecution case, evidence of prosecution witnesses in respect of scene of occurrence, cause of death and nature of wounds generated upon the deceased.[55]

3.6 Post Mortem and Post Mortem Report

The Post-Mortem Report is an invaluable prosecutorial document, particularly in conducting trial of a homicidal case, because it carries vital practical information along with medical

[53] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 174.

[54] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 303.

[55] *Rustum v. State 11 BLC 46.*

opinion as to the cause and manner of death. The other issues that are covered by the Post-Mortem Report are as follows:-

- ❖ Date and time of death of the deceased;
- ❖ Method employed in causing death to deceased;
- ❖ Weapons used for causing death to deceased;
- ❖ Deadly injuries which caused death to deceased;
- ❖ Conclusion with regard to actual cause of death of deceased.[56]

Post Mortem examination is done by a forensic expert according to the direction of Civil Surgeon. At least three doctors will sign in the report including the civil surgeon. Concerned doctor will collect the relevant part from the body of the deceased for viscera examination. After completion of the examination, concerned investigating officer may seize the apparels of the deceased for DNA examination etc.[57]

Benefit of discrepancy between medical evidence and inquest report ought to be given to the accused.[58] The post-mortem report or an inquest report is not a substantive evidence.[59]

When a corpse is sent in for post-mortem examination, it shall be accompanied by a copy of the surathal report and a chalan in duplicate in B. P. Form No. 49 one copy of which shall be addressed to the Court officer who shall forward it to the Superintendent and the other copy to the medical officer holding the post- mortem examination. All corpses shall be sent to the headquarters of the district, unless the medical officer at the subdivision has been authorized by the Provincial Government to conduct post-mortem examinations.[60]

On completing the post -mortem examination the medical officer shall fill up the whole of the B. P. Form No. 50 in triplicate by the pen-carbon process. One of the carbon copies shall be sent to the investigating Officer through the constable who brought the corpse. The original report with the Chalan form and surathal shall be forwarded to the Superintendent, direct or in the case of a subordinate Medical Officer, dispatched to the Superintendent, through the Civil Surgeon for his remarks. The Superintendent shall then forward the report to the Court officer to lay before the Magistrate concerned. The register of post-mortem examinations

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[56] KM Musfiqul Huda, *A Handbook on Understanding, Crimes & Police Investigation Process* (1st edn Vol-2, Mullick Brothers, Dhaka, 2015) 834.

[57] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 174 (3).

[58] *Maula Vux v. State (1983)1 SCC 379, 38.*

[59] *Munshi Prasad v. State(2002) 1 SCC 35.*

[60] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 304 (a).

shall be kept by the medical officer.[61]Police officers shall refer to the Civil Surgeon if they have any doubt in regard to any part of the medical report.[62]

Doctor who held post-mortem made two in correct post-mortem reports with the intent to injure one of the parties in the case and he was found guilty for misconduct committed by him as public document.[63]

The police officer sent in charge of a corpse need not be present throughout the details of the post-mortem examination. It will suffice if he stands sufficient near to be able to testify that the body which had been in his charge was the one examined by the medical officer. He should be present at the court when the medical officer‘s testimony as to the result of the examination is given, in order that the identity of the body examined, with the body to which the criminal case relates, may be established, if necessary.[64]

3.6.1 Disinter Corpse

Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may, cause the body to be disinterred and examined.[65]

Primarily this is the power of an executive magistrate. But, when it relates to a formal case i.e. u/s 302 etc. of Penal Code 1860 direction should be given by judicial magistrate to District Magistrate for taking necessary arrangements and further order thereto.

3.6.2 Recording Dying Declaration

Police officer, any person present at the time of making (saying), Magistrate, Doctor may record a dying declaration. Provisions of sec.164 and 364 of the Code are to be followed.

A dying declaration may be recorded by any person who is available and it may be written or it may be verbal; it may also be indicated by signs and gestures, in answer to questions, if the person making it is not in a position to speak. There is no requirement of law that a dying declaration should be recorded by a Magistrate as in the case of the confessional statement of an accused under section 164(3) the Code.[66]

Statements, written or verbal, of relevant facts made by a person who is dead are themselves relevant facts when the statement is made by person as to the cause of his death, or as to any

[61] Ibid, reg 306 (a).

[62] Ibid, reg 306 (b).

[63] *Md. Azizul Haque Khan v. the State* 36 DLR (AD) 151.

[64] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 307 (a).

[65] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 176 (2).

[66]*Sahab uddin v. State*, 61 DLR 54.

of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.[67]

If it is not possible to have the statement of a person whose evidence is required and who is in imminent danger of death recorded record a dying declaration, this shall be done, whenever possible, in the presence of the accused or of attesting witnesses. A dying declaration made to a police officer shall be signed by the person making it.[68]If a seriously injured person, not in imminent danger of death, is seat to hospital the investigating officer shall warn the medical officer having the person‘s statement recorded by a Magistrate, should the necessity for such a course arise. [69]In case of doubt whether which action should be taken, the investigating officer shall act in accordance with former provisions.[70]

3.7 Examination of Witnesses by Police (Examination of Accused)

Any police-officer making an investigation or any police-officer not below such rank as the Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer

- May examine orally any person supposed to be acquainted with the facts and circumstances of the case.
- May examine orally “any person”(accused) and may also reduce into writing. If he does so he shall make a separate record of the statement, of each such person whose statement he records.[71]

No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose at any inquiry or trial
in respect of any offence under investigation at the time when such statement was made.[72]

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[67] The Evidence Act 1872 (Act No I of 1872), s 32 (1).

[68] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 266 (a).

[69] Ibid, reg 266 (b).

[70] Ibid, reg 266 (c).

[71] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 161 (1,3).

[72] Ibid, s 162 (2).

3.8 Confession and Verification of Confession

Any Metropolitan Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial.[73]

3.9 Granting Remand

If after arrest of a person it appears that investigation cannot be completed within twenty four hours and if there are grounds for believing that the accusation or information is well-founded, then the officer-in-charge in the police station or the I.O. of the case, shall transmit a copy of the case diary and also forward the accused to the nearest Judicial Magistrate.[74] When such accused is forwarded and produced before the Magistrate, the Magistrate may authorize detention of the accused in custody of the police for a term not exceeding fifteen days in the whole.[75] But if such an order of detention is made, the Magistrate shall record the reasons for doing so and also shall forward a copy of his order to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate as the case may be.[76] When such order is passed by the Chief Metropolitan Magistrate or Chief Judicial Magistrate he shall forward a copy of his order with reasons for making it to the Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate.[77] No Magistrate of third class and no Magistrate of the second class, not specially empowered in this behalf by the Government, shall authorize such detention.[78]

3.9.1 Detention and Remand & Confessional Statement

As regards detention in police custody, remand and custodial death, BLAST moved the High Court Division in its writ jurisdiction. The question was thoroughly examined in the case of *BLAST v Bangladesh*[79]. It laid down a set of fifteen guidelines with regard to exercise of powers of arrest and remand:

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[73] Ibid, s 164 (1).

[74] Ibid, s 167 (1).

[75] Ibid, s 167 (2).

[76] Ibid, s 167 (3,4).

[77]Ibid, s 167 (4A).

[78] Ibid, proviso to s 167 (2).

[79](2003) 55DLR (HCD) 363.

- No Police officer shall arrest anyone under Section 54 for the purpose of detention under Section 3 of the Special Powers Act, 1974
- A police officer shall disclose his/her identity and show his/her ID Card on demand to the person arrested or those present at the time of arrest
- A record of reasons of arrest and other particulars shall be maintained in a separate register till a special diary is prescribed
- The concerned officer shall record reasons for marks of injury, if any, on the person arrested and take him/her to nearest hospital or government doctor
- The person arrested shall be furnished with reasons of arrest within three hours of bringing him/her to the Police Station
- If the person is not arrested from his/her residence or place of business, the relatives should be informed over the phone or through messenger within one hour of bringing him/her to Police Station
- The person concerned must be allowed to consult a lawyer of choice or meet nearest relations
- While producing the detained person before the Magistrate under Section 61 of the CrPC, the police officer must forward reasons in a forwarding letter under Section 167 (1) of the CrPC as to why the investigation could not be completed within twenty four hours and why s/he considers the accusation and information to be well founded
- On perusal of the forwarding letter, if the Magistrate satisfies him/herself that the accusation and information are well founded and materials in the case diary are sufficient for detaining the person in custody, the Magistrate shall pass an order of detention and if not, release him/her forthwith
- Where a person is released on the aforesaid grounds, the Magistrate shall proceed under 190(1)(c) of the CrPC against the Officer concerned under Section 220 of the Penal Code.
- Where the Magistrate orders detention of the person, the Officer shall interrogate the accused in a room in a jail until a room with glass wall or grille on one side within sight of lawyer or relations is constructed
- In any application for taking accused in custody for interrogation, reasons should be mentioned as recommended
- The Magistrate while authorizing detention in police custody shall follow the recommendations laid down in the judgment

- The police officer arresting under Section 54, or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations
- The Magistrate shall inquire into the death of any person in police custody or jail as per the recommendations.

The question also was discussed in the case of *Saifuzzaman v. State*[80].In the case, the views taken in the first case were followed and some more detailed discussions were made. It has been clearly stated in the first case as to when and under what circumstances prayer for remand may be considered. It was observed that in view of the provisions of clauses (a) and (b) of sub-section (1) of section 167 of the Code, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the arrested person is well founded. It has also been observed that the police officer along with the arrested person must also produce the case diary and on consideration of the entries in the case dairy, the Magistrate shall decide whether the person shall be released or shall be detained further.

3.9.2: Judgment on Police Custody, Arrest and Remand Case

In the Case of Government of *Bangladesh v. BLAST*[81], the Appellate Division of Supreme Courtin its historical judgment traced out the background of criminal jurisprudence of this sub-continent and elaborately discussed arrest, detention and remand of the accused person and set out the responsibilities for law enforcing agencies and provided some guidelines for them. Apart from the saying, it also prescribed some guidelines to the Magistrate, Judges and Tribunals having power to take cognizance of an offence.

3.9.2.1: Responsibilities of Law Enforcing Agencies

(I) Law enforcement agencies shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

(II) In the performance of their duty, law enforcement agencies shall respect and protect human dignity and maintain and uphold the human rights of all persons.

[80](2003) 24 BLD 205; (2004) 56 DLR 324.

[81]8 ALR [Special Issue] 2016.

(III) Law enforcement agencies may use force only when strictly necessary and to the extent required for the performance of their duty.

(IV) No law enforcement agencies shall inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor shall any law enforcement agencies invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

(V) The law enforcing agencies must not only respect but also protect the rights guaranteed to each citizen by the constitution.

(VI) Human life being the most precious resource, the law enforcing agencies will place its highest priority on the protection of human life and dignity.

(VII) The Primary mission of the law enforcing agencies being the prevention of crime, it is better to prevent a crime than to the resources into motion after a crime has been committed.

3.9.2.2 Guide lines for the Law Enforcement Agencies

(i) A member law enforcement officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

ii) A member law enforcement officer who arrests a person must intimate to a nearest relative of the arrestee and in the absence of his relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 12(twelve) hours of such arrest notifying the time and place of arrest and the place in custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the law enforcing officer to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the law enforcing officer in whose custody the arrestee is staying.

(iv)Registration of a case against the arrested person is sine-qua-non for seeking the detention of the arrestee either to the law enforcing officer's custody or in the judicial custody under section 167(2) of the Code.

v) No law enforcing officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(vi) A law enforcing officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

vii) If the law enforcing officer find, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital for treatment and shall obtain a certificate from the attending doctor.

viii) If the person is not arrested from his residence or place of business, the law enforcing officer shall inform the nearest relation of the person in writing within 12 (twelve) hours of bringing the arrestee in the police station.

ix) The law enforcing officer shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

(x) When any person is produced before the nearest Magistrate under section 61 of the Code, the law enforcing officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation cannot be completed within twenty four hours, why he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P.Form 38 to the Magistrate.

3.9.2.3 Guidelines to the Magistrates, Judges and Tribunals Having Power to Take Cognizance of an Offence

(a)If a person is produced by the law enforcing agency with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per section 167(2) of the Code, the Magistrate or the Court, Tribunal, as the case may be, shall release him in accordance with section 169 of the Code on taking a bond from him**.**

(b)If a law enforcing officer seeks an arrested person to be shown arrested in a particular case, who is already in custody, such Magistrate or Judge or Tribunal shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case and if that the prayer for shown arrested is not well founded and baseless, he shall reject the prayer.

(c) On the fulfillment of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the arrested person as required under section 167(2) and if the case is exclusively triable by a court of Sessions or Tribunal, the Magistrate may send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(d)If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter and the case diary that the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in such custody as he deems fit and proper, until legislative measure is taken as mentioned above.

(e)The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report disclose that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(f) It shall be the duty of the Magistrate/Tribunal, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused person under section 167 of the Code.

(g) If the Magistrate has reason to believe that any member of law enforcing agency or any officer who has legal authority to commit a person in confinement has acted contrary to law the Magistrate shall proceed against such officer under section 220 of the Penal Code.

(h)Whenever a law enforcing officer takes an accused person in his custody on remand, it is his responsibility to produce such accused person in court upon expiry of the period of remand and if it is found from the police report or otherwise that the arrested person is dead, the Magistrate shall direct for the examination of the victim by a medical board, and in the event of burial of the victim, he shall direct exhumation of the dead body for fresh medical examination by a medical board, and if the report of the board reveals that the death is homicidal in nature, he shall take cognizance of the offence punishable under section 15 of Hefajate Mrittu (Nibaran) Ain, 2013 against such officer and the officer in-charge of the respective police station or commanding officer of such officer in whose custody the death of the accused person took place.

(i) If there are materials or information to a Magistrate that a person has been subjected to 'Nirjatan' or died in custody within the meaning of section 2 of the Nirjatan and Hefajate Mrittu (Nibaran) Ain, 2013, shall refer the victim to the nearest doctor in case of 'Nirjatan' and to a medical board in case of death for ascertaining the injury or the cause of death, as the case may be, and if the medical evidence reveals that the person detained has been tortured or died due to torture, the Magistrate shall take cognizance of the offence *suo-moto* under section 190(1)(c) of the Code without awaiting the filing of a case under sections 4 and 5 and proceed in accordance with law.

3.10 Test Identification Parade (T.I Parade)

It should be borne in mind that the primary object of identification proceedings is to the ability of the witness to identify a suspected person and to ascertain whether there is sufficient evidence to place him on trial. A Magistrate is chosen merely as a person whose impartiality and honesty is less likely to be called into question by the defense when the case is under trial, and when conducting the proceedings he is not acting in a judicial capacity (unless the case is under trial before him). It is not his duty, therefore, to record statements or put questions in suspects or witnesses except such as are necessary for the purpose of identification.[82]

When TI parade is held after an inordinate delay from the time of commission of the crime, the chance of mistake increases and this is a major reason for not depending on such TI parade.[83]

3.11 Disposal of Seized Goods

When the court makes an order under section 516A of the Code for the custody of any property during any inquiry or trial, it may order that the person in whose custody the property is ordered to be kept should execute a bond, with or without sureties, to the satisfaction of the court, to place the property at the disposal of the court, whenever so ordered.[84] Subject to exception, orders for the disposal of material objects shall be passed in the judgment itself.[85]

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[82] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 282 (d).

[83] *Mizanur Rahman v. State,* 49 DLR 83.

[84] The Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009, r 205.

[85] Ibid, r 206.

3.11.1 Disposal of Seized Goods before Pronouncing Judgment

When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.[86]

3.11.2 Disposal of Seized Goods after Pronouncing Judgment

When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.[87]When High Court Division or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the Chief Metropolitan Magistrate or District Magistrate.[88]

3.12 Procedure to be Followed on Completion of Investigation

1. **Release of Accused When Evidence Is Deficient**

If, upon an investigation, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial.[89]

2. **Case to be Sent to Magistrate When Evidence Is Sufficient**

If, upon an investigation, it appears to the officer-in-charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused

[86] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 516A.

[87] Ibid, s 517 (1).

[88] Ibid, s 517 (2).

[89] Ibid, s 169.

under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or send him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.[90]

When the officer-in-charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.[91]

3. Report of Police on Completion of Investigation

Every investigation shall be completed without unnecessary delay.[92] As soon as the investigation is completed a report is to be submitted to the Magistrate or Judge having jurisdiction. If the report alleges the commission of a crime by an accused person, the report is commonly called the 'Charge sheet' and if the report does not alleges the commission of a crime, the report is called 'Final Report'. However Final report is of different types.

4. Supplementary Report on Further Investigation

Nothing shall be deemed to preclude further investigation in respect of an offence after a report has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the police-station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed.[93]

3.13 Police Report

Police enjoys an unfettered right on an investigation to submit either a charge sheet or a final report in a particular case and without any interference from the court. On conclusion of investigation the Investigating Officer is required to submit either Final Report or Charge Sheet.

Following matters should be mentioned in Police report-

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[90] Ibid, s 170 (1).

[91] Ibid, s 170 (2).

[92] Ibid, s 173 (1).

[93] Ibid, s 173 (2A).

i. It should be prepared in the form prescribed by the Government.

ii. Names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case should be mentioned in the report.

iii. Whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties; should be mentioned in the report.[94]

iv. The officer-in-charge shall inform the informant about the action taken on the basis of his information in the B. P. Form no.40, 40A.[95]

v. Report should be filed through the superior officer appointed u/s 158. Superior officer may also order of further investigation pending the report in the court.[96]

vi. When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station.[97]

3.13.1 Charge Sheet

When such report is in respect of a case to which section 170 applies, the police-officer shall forward to the Magistrate along with the report-

a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

b) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses.[98]

When the officer-in-charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him.[99]

When an officer in charge of a police-station on completion of an in investigation, finds the charge proved and proposes to proceed against any person, he shall, notwithstanding that he has failed to arrest all or any of the persons against whom the charge is proved, at once submit a charge-sheet B.P. Form No. 39, which is the report presented under section 173,

[94] Ibid, s 173 (1) (a).

[95] Ibid, s 173 (1) (b).

[96] Ibid, s 173 (2).

[97] Ibid, s 168.

[98] Ibid, s 173 (3A).

[99] Ibid, s 170 (2).

Code of Criminal Procedure. Thus a charge-sheet shall be submitted when the accused is absconding or is sent up for trial m custody or on bond.[100]

Charge-sheet may be submitted in a particular case even when a final report has been submitted, if found necessary, on fresh evidence.[101] There cannot be any reinvestigation into a case after charge-sheet is submitted.[102]

3.13.2 Final Report

In any case which does not result in submission of charge sheet, the police shall submit final report before the Magistrate.[103]A final report in B. P. Form No. 42 shall be drawn up by the investigating officer in every investigated case which does not result in charge-sheet.[104]In the final report, the investigating officer shall furnish a clear statement of the case and of the materials collected by him with the reasons for not sending up any person for trial.[105]

The investigating officer shall also suggest with reasons how the case may be entered by the Magistrate in the General Register for statistical purposes whether as true, intentionally false intentionally of fact, mistake of law, of non-cognizable.[106]Therefore, final report may be as many as Five Types for the purpose of statistical purpose in General Register.

These are-

a. FRT – (Final Report True) - Final Report True is filed where the offence or incident is true, but, there was no evidence to implicate the accused.
b. Final Report as MF (Mistake of Fact) - FR as MF (Mistake of Fact) is filed where informant filed a different version of case which was totally different what happened in the P.O.
c. Final Report as False- FR as False is filed where the version of case is totally intentionally false. In that case police will seek permission from the court to proceed against the accused under section 211 of the code.

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[100] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 272 (a).

[101] *KhorshedAlam v. State,* 27 DLR 111.

[102] *Mubashwir Ali v. State, 46* DLR 535.

[103] The Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009, r 76 (1).

[104] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1), reg 275 (a)

[105] The Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009, r76 (1).

[106] The Police Regulations of Bangladesh, 1943 (Order No. 9471-P1),reg 275 (a): The Criminal Rules and Orders (Practice And Procedure Of Subordinate Courts) 2009, r 76 (3).

d. Final Report as ML (Mistake of Law) – Final report mistake of law is filed where the case is recorded under totally wrong section. Extortion- theft. In this case, police has to file another case.
e. Final Report as Non-cog. - Where the offence is non-cognizable in character. Prosecution Report has to be filed after obtaining the permission of court.

The submission of final report does not create any vested right in favour of the accused so as to disentitle the prosecution to prosecute if evidence discloses the commission of an offence. After submission of final report the Magistrate may direct enquiry and after examination of the complainant if satisfied may take cognizance of the case.[107]

3.14 Inquiry

In the general sense inquiry of a case means a process to discover the truth and authenticity of case. “Inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court.[108] Inquiry is a legal proceeding in which facts are found on basis of which liability of person is judged and it connotes act of seeking truth, information or knowledge about something.[109]

An investigation is not normally a judicial act; it is an administrative act; while an inquiry may be judicial or administrative. The terms ‘investigation’, ‘inquiry’ and ‘trial’ denote three different stages of a criminal cases. The first stage is reached when a police officer either by himself or under order of a Magistrate investigates a case.[110] If he finds that no offence has been committed he reports to the Magistrate who drops the case. But if he is of a contrary view, he sends up the case to a Magistrate. When a case is sent up to a Magistrate, the second stage which is either trial or inquiry begins. The object of an inquiry is to determine the truth or falsity of certain facts in order to undertake further action therefrom. The term ‘inquiry’ includes every inquiry other than a trial. For instance, a proceeding under section 205C of the Code by a Magistrate is in the nature of an inquiry within the meaning of section 4 of the Code. In words Inquiry relates to proceeding before a Magistrate prior to trial.[111]

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[107] *Munshi Lal Meah v. Khan Abdul Jalil,* 1985 BLD 24

[108] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 4 (k)

[109] AIR 1978 Bom. 200

[110] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 202

[111] Abdul Halim, *Text Book on Code of Criminal Procedure,* (5th edn, CCB Foundation, Dhaka, 2011) 108.

3.15 Cognizance and Issuing Process

3.15.1 Cognizance of Offence

Any Chief Metropolitan Magistrate, Metropolitan Magistrate, Chief Judicial Magistrate, Magistrate of the first class, and any other Magistrate specially empowered in this behalf may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a report in writing of such facts made by any police officer;

(c) Upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.[112]

Criminal proceeding is started after cognizance by the court is taken.[113] The expression 'taking cognizance of an offence' has not been defined in the Code. In its broad and literal sense, it means 'taking notice of an offence' and would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purpose.[114]

Cognizance is taken of cases and not of persons, and there seems to be nothing in theory to prevent a Magistrate from taking cognizance of a case even when the offenders are unknown. The fact that a Magistrate has taken cognizance does not necessarily mean that there will be judicial proceedings against anyone.[115]

Similarly, cognizance is taken upon a police report, the Code seems to contemplate that it shall be taken upon the preliminary report which is sent up by the police with the first information.[116] Proceedings commence only when the accused is made a party before the court.[117]

However, there may be a bar in taking cognizance which are enumerated in some sections under the different heads in the Code.[118]

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[112]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 190 (1): The Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009, rr72-92.

[113]*Nasiruddin Mahmud & others v. Momtazuddin Ahmed & another*, (1984) 36 DLR (AD) 14.

[114] 52 CR.LJ 1376.

[115]Zahirul Huq, *Law and Practice of Criminal Procedure* (11thedn, Bangladesh Law Book Company, Dhaka, 2011) 385.

[116] Ibid.

[117] AIR 1943 Pat 245.

[118] The Code of Criminal Procedure 1898 (Act No. V of 1898), ss 195, 196, 196A, 196B, 197, 198, 199, 199A.

A Magistrate taking cognizance of an offence under section 190, CrPC is not bound to accept the police report submitted under section 173, CrPC. Even in a case where police submits final report, recommending for discharging the accused persons, the Magistrate is not bound to accept the same and if upon perusal of the case diary and on examination of the witnesses recorded under section 161 CrPC, he finds a *prima facie* case, he may take cognizance against the accused under section 190(1)(b), CrPC. If the Magistrate does not agree with the police report, he may send for further investigation after examining the complainant. He may also send for judicial enquiry under section 202 CrPC. If, however, the Magistrate accepts the police report and discharge the accused against whom final report has been submitted, the said order becomes a judicial order as per provisions of section 202(2B), CrPC and the said order attained into finality so far as it relates to him. He cannot make any further order relating to the said matter unless the said order is set aside by the High Court Division or the Court of Session under section 436, of the Code. Magistrate can reopen the matter only when a naraji petition is filed or a fresh complaint is filed.[119]

3.15.2 Issue of Process

If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.[120]

No summons or warrant shall be issued against the accused until a list of the prosecution witnesses has been filed.[121]In a proceeding instituted upon a complaint made in writing, every summons or warrant issued shall be accompanied by a copy of such complaint.[122]

When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.[123]

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[119]*Shera Khatun v. State and others*, 6 BLC 604.

[120] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 204 (1).

[121] Ibid, s 204 (1A).

[122] Ibid, s 204 (1B).

[123] Ibid, s 204 (3).

The following process in a criminal case may be issued one after another or simultaneously[124]

- Summons; or
- Warrant of Arrest (W/A); or
- Proclamation or/and Attachment (P&A); or
- Paper Declaration (Publication).

Section 204 of the Code is the only section authorizing a court to issue process to an accused, whether he takes cognizance on a private complaint or on a police report or any information or knowledge other than a complaint or police report.[125] It relates to the procedure for affecting attendance of the accused. Unless and until the court issues process for the attendance of the accused, judicial proceeding cannot be deemed to have been commenced against him.[126] That is to say proceedings before a court starts when the Magistrate takes cognizance of an offence on police report or on complaint. 'Initial stage' does not mean any stage prior to submission of the charge-sheet by the police, but it means a stage after submission of the charge-sheet.[127]

When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him, and he is entitled to have the person, against whom he complaints, brought before the court and tried.[128]

3.16 Shortcomings of Procedure in Investigation and Inquiry

a. Taking Long Time in Investigation/Inquiry Stage

In the pre-trial stage of a criminal case primarily lengthy process of a case starts from the investigation /inquiry stage. In most of the cases the investigation agencies take long time to submit the report. In some special laws this problem is identified and to resolve this problem, these kind of special laws fix the time frame for submitting the investigation/inquiry report. For example in Nari Sishu Nirjatan Domon Ain 2000, section 19 fixes the time for submitting inquiry report which can be extended to 60 days. On the other hand there is no time frame for submitting in the Code of Criminal Procedure 1898.

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[124] The Code of Criminal Procedure 1898 (Act No. V of 1898), ss 68-93C: The Criminal Rules and Orders (Practice And Procedure of Subordinate Courts) 2009, rr 35-71.

[125] AIR 1932 Pat 72.

[126] AIR 1943 Pat 245.

[127] *Nasiruddin Mahmud v Momtazuddin Ahmed*, 36 DLR 14 (AD).

[128] 40 Cal. 444.

b. Taking Long Time in Execution of W/A or Summons

When the cognizance Magistrate takes cognizance of a Criminal case basing on the police report or inquiry report, then to ensure the appearance of the accused person the court issues W/A or summons. This is another lengthy process to execute the warrant of arrest or summons. Even where the accused person lives in any other remote district from the place of occurrence, this takes long time to arrest that accused person. If police does not become able to arrest the accused person, the court concerned Proclamation of Warrant of Attachment. But in practice this takes long time to exercise such proclamation.

c. Weak, Vague and Ineffective Police Report

If, after filing the case, the police or any other investigation agency submits weak, vague or ineffective police report, this does not reveal the actual truth of a case and as a result the person who files ajahar would submit naraji petition against that and as investigation was not properly done, the Magistrate would accept the naraji petition and the Magistrate usually sends the case for further investigation and this is really time consuming and this frustrate the way to ensure justice.

d. Filing Naraji Petition for Harassment

Sometimes people try to use the court as the weapon to harass the other parties and as the part of this harassment they false case against the person with whom he has enmity. For example if one person in Khulna files a case of theft against another person who lives in Dhaka. At the first instance this is not possible for the court to understand the correctness of the suit. However after investigation if it appears to the court that the fact of theft is not correct, court accepts the final report. After that the party who files the case files a naraji petition againt the final report. Then the revision may lie. Therefore, this process is very time consuming.

e. Frequent Transfer of Investigating Officer

In good number of cases police as ajaharkari files the case and in most of the GR cases police investigates the case. However in some other cases e.g. under Narcotics Control Act 1990 together police files the case, members of the raiding part are police and investigating officer is police. Sometimes police becomes the witness of a seizure list. In such circumstances if police frequently transfers from one place to another, this causes delay and frustrates the justice as well.

f. Malafide Trend to Show Arrest

This is often alleged that there is a trend in the police prosecution to show arrest of an accused person in a case even where he has no name in the ajahar of that case. The position of law is that where a person is arrested in one case and subsequently where police finds

information that he may have involvement in other case and in such a situation investigating officer can give prayer to the cognizance Magistrate court to show arrest of that person.

3.17 Suggestions

i. Amendment of Laws and Regulations

The Police Regulation, Bengal 1943 was written with a view to fulfill the demands and needs of the British Government. Now that Bangladesh is an independent country, this regulation is no longer relevant nor productive. Moreover, as there was no constitution yet at the time these regulations were formulated, many provisions are not consistent with the spirit of the present Constitution. The immediate modification of these laws and regulations is therefore necessary.

The Special Power Act of 1974 should be repealed as most offences there under are already conversed by the Penal Code and other laws. What needs to be done is a comprehensive review of the Penal Code, the Criminal Code of Procedure, and the Evidence Act to determine their appropriateness, effectiveness, and practicality. Parameters for the exercise of police discretion in effecting arrests and other legal processes should be set to prevent abuse. Particular attention should also be given to the situation of female victims and accused. For women and minor girls who are witnesses / victims of abduction, appropriate shelter should be provided pending trial, preferably with their legal guardian, or in a protected shelter maintained by NGOs or through special government arrangements. The practice of putting females in prison on the pretext of ‘safe custody’ should be discontinued. A strategic law cell/commission composed of former judges, lawyers with relevant expertise, former inspector generals of policy, attorney generals, and other experts should be established to review these laws and regulations and propose new or a mandatory legislation where necessary.

The present Police Act 1861 should be replaced by a new one, which should determine the responsibility and accountability of police. The Act should establish effective police management and promote professionalism in the department. We may establish a Public Safety Commission or a Security Commission, which should “i) lay down broad guidelines for preventive and service-oriented functions by the police; ii) evaluate the performance of the police every year; iii) function as a forum of appeal to dispose representations from officers regarding their being subjected to illegal orders and regarding their promotions; iv) generally review the functioning of police force.

ii. Institutional Administration

Use of the police for political, economic, and personal interests is a practice that must cease altogether. To do this, attitudes of both those in power and the police should be changed. Those in power should realize that the police are not to be used for political and personal ends.

Similarly, the police themselves should also realize that they are servants of the state and the people, not of any ruling party or privileged segment of society. In this regard, grant of full operational independence to the police is crucial. The police must be given sufficient independence in the performance of its duties and functions, free from external pressure or influence.

iii. Capacity Building

Both long-and short-term measures should be undertaken to increase the number of police personnel. Taking into consideration the poor ratio between the population and the police as well as the economic situation of Bangladesh, a mechanism should be devised to appoint police officers from the community. The number of women police should also be increased to deal with women-related issues. In terms of increasing competence, a new curriculum for police education and training should be developed with a view to making the Bangladesh Police more capable, service-oriented, people-friendly, and efficient.

iv. Photo of the Ajaharkari in Ajahar

Sometimes this is very difficult for the court to identify the ajaharkari or the accused persons before the court. There is no legal requirement prescribed in law by which the ajaharkari can be properly identified by the court. Identification of the real person is really problematic. Sometimes this is alleged that in place of one person, another person comes before the court. Therefore for effective and proper identification of the ajaharkari, at the time of filing of ajahar, ajaharkari must have to present his photo with the ajahar.

v. Specific Charge in Charge Sheet

When the police investigate the case, the police will submit the police report which may be the final report or the charge sheet. After the investigation if the police authority finds the truth of a case the investigation officer will submit charge sheet against the accused person. But there is a common practice that in Bangladesh that the investigation officer submits charge sheet giving the general statement against the accused persons, not specifying the allegation. Therefore, the law should be more specific to direct the investigation authority to submit the police report more specifically.

vi. Transparent Policy of Transfer of Police

There should have a transparent policy of transfer of the police. If the polices are frequently transferred from one place to another place, this becomes very difficult to continue the investigation by appointing another investigation officer. Therefore, in order to prevent the unexpected, sudden transfer of police, this is very important to promulgate a transparent, fair transfer policy of police.

3.18 Inherent Defects of the Code relating to Investigation and Inquiry and Suggestions

1. Summons to be Served on Adult Person: Sections 68, 70

In a criminal case summons is served on a person to compel his presence before the court.[129] Such summons is served by a police-office or by an officer of the Court issuing it or other public servant.[130]Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family.[131] But there is no provision in the Code to enable the authority to serve the summons on "Female Adult" person who has always been at home. In this situation, if the male adult person is out of home, the summons will not be served. As a result delay and waste of money follows.

Suggestion

There is a need of amendment of Section 70 of the Code in such a line that in the absence of person summoned, summons may be served upon any "Adult Person".

2. Summons to be Served over Fax, E-Mail or Electric Device: Section 72 (Proposed)

Where the person summoned is in the active service of the Republic, the Court issuing the summons ordinarily sends it in duplicate to the head of the office in which such person is employed and such head causes the summons to be served.[132] In a criminal case, public servant including investigating officers may be one of the important witnesses. The public servant or investigating officer may be transferred from one jurisdiction to another

[129]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 68.

[130]Ibid, s 68 (2).

[131]Ibid, s 70.

[132]Ibid, s 72.

jurisdiction during investigation or trial of case concerned. Sometimes summons cannot be served in time upon those person because of such distance. As a result delay occurs.

Suggestion

If it appears to the court that it is just and necessary to serve the summons upon that public servant over fax or email or any electric device in order to compel his appearance before the court, it shall serve the summons in that way and it shall be deemed that summons has been duly served. Such provisions may be incorporated in the Code under the head of section 72A.

3. Investigation in Case of Arrest without Warrant: Sections 61, 167 (1)

The police-officer cannot detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.[133] The Magistrate to whom an accused person is forwarded may, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole.[134] In such situation the person arrested has always been harassed. Because there does not exist any such example in our country that the police officer has completed the investigation and submitted the police report within 24 hours. The reasons of not completing the investigation within 24 hours are *inter alia* that inadequacy of police officers, huge duty of investigation of many cases upon a police officer, different type of executive duty, irresponsibility of the investigating officer etc.

Suggestion

Sections (6), (7), (7A) should be revived by repealing the Repealing Act Criminal Procedure (Second Amendment) Act, 1992 (Act No. XLII of 1992) or the similar provisions of Nari o Shishu Nirjatan Daman Ain, 2000 regarding investigation should be incorporated in the Code.

4. Examination of Witnesses by Police: Sections 161, 162

Any police-officer making an investigation or any police-officer not below such rank as the Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person shall be bound to answer all questions

[133]Ibid, s 61.

[134]Ibid, s 167 (1,2).

relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.[135] But No statement made by any person to a police-officer in the course of an investigation shall, if reduced into writing, be signed by the person making it.[136] In almost all cases, the investigating officers at his own will or negligently does not proceed to the place or examine the witness in time and even he does not record the statement of witnesses in a line as the witnesses said. Because there is no provision of signing it by the witnesses at the body of record. Even, most importantly such statement or part thereof, if duly proved, is being used to contradict the witness making it in the manner provided by section 145 of the Evidence Act, 1872.

Statement to the Police recorded under the section cannot be used by the prosecution to corroborate or explain the evidence of the witness in Court but the defence can use it for the purpose of contradicting the witness and testing his veracity and never for any other purpose.[137] Statements of witnesses to the police under section 161 of the Code not at all admissible in law.[138]

Suggestion

Statement of a witness under Section 161 needs to be compulsorily signed or fingerprinted, and if need be or possible, be recorded by audio-visual electronic devices. Likewise, statement or confession by an accused before a magistrate under Section 164 should also be recorded by such electronic devices.

5. Submission of Police Report: Section 173

Every investigation shall be completed without unnecessary delay and the officer in charge of the police-station shall communicate, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.[139] This section does not provide any kind of limit to complete the investigation and to submit the police report. As a result year after year the case remains at investigation stage. In reality, the police-station does not communicate, the action taken by him to the person by whom the information

[135]Ibid, s 161.

[136]Ibid, s 162.

[137]*Sona Mia v. State,* 11 DLR 17; 1959 PLD Dac. 400.

[138]*Ansar Ali v. State* 35 DLR 303.

[139]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 173 (1) (a, b).

relating to the commission of the offence was first given. In such situation the aggrieved party lodges a Naraji Petition to magistrate against submission of Final Report and if the petition is dismissed, the aggrieved party prefers revision. Then the magistrate may make an order to conduct a further investigation. As a result the numbers of old cases are being increased day by day.

Suggestion

A concrete time limit with only one extension for concluding the investigation and submitting the police report should be incorporated in the Code, and the information of action taken by the police officer must be given to the person by whom the information relating to the commission of the offence was first given.

6. Proclamation for Person Absconding and Attachment of Property: Sections 87, 88, 89, 339B

If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time.[140] Proclamation cannot be ordered without ordering arrest without warrant. The Court issuing a proclamation under section 87 may at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person.[141] In fact, this procedure of proclamation and attachment is very time consuming.

Where after the compliance with the requirements, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order published in at least two national daily Bengali Newspapers having wide circulation, direct such person to appear before it and if such person fails to comply with such direction, he shall be tried in his absence.[142] However the authority of Newspaper is commonly reluctant to publish this news without case on demand and there is no adequate budget regarding this in the government fund.

[140]Ibid, s 87 (1).

[141]Ibid, s 88 (1).

[142]Ibid, s 339B (1).

Suggestion

i. There must be a provision for adequate budget in the government fund in order to make effective circulation of News of absconded person under section 339B of the Code.

ii. There should be a gazette notification on the part of government in line with that 'the Newspaper shall circulate the news with priority.'

7. Search to be Made in Presence of Witnesses: Section 103

Before making a search, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.[143]The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses.[144]

But the context of Bangladesh has been drastically changed and the rate of commission of crime is increasing especially in the border area in the Mid-night. In such situation it may not be possible to find out two or more respectable inhabitants of the locality. As a result the search is not properly and lawfully made.

Suggestion

The law enforcement agency or other agency have to search in the mid Night, in open space or on the river in order to prevent the smuggling of arms, narcotics etc. Therefore, in such special circumstance the provision of compliance of having two or more witnesses under section 103 should not be made applicable.

8. Absence of Accused Person in Case of Prevention of Offences: Section 114, 117

The provisions relating to security for keeping peace and good behavior have been enumerated in sections 106 to 153 of the Code. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause, he shall make an order in writing.[145]If the person in respect of whom such order is

[143]Ibid, s 103 (1).

[144]Ibid, s 103 (2).

[145]Ibid, s 112.

made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.[146]If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court.[147] When any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.[148]

But there does not exist any provision in order to have the person present before the Court after issuing the summons or warrant and there is no legal consequences if the accused does not comply with the order of summon or warrant.

Suggestion

There should be an amendment in line with that 'If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court and nevertheless if such person is not present in court, the inquiry shall be conducted in the absence of such person.'

9. Receipt of Copy of Ajahar and FIR: Section 154

Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf.[149] But there is no provision anywhere in the Code that the Ajaharkai shall get the copy of FIR. If the ajaharkari gets the copy, accuracy of the fact will be more effectively ensured and the transparency will be established and complexity will be reduced.

[146]Ibid, s 113.

[147]Ibid, s 114.

[148]Ibid, s 117.

[149]Ibid, s 154.

Suggestion

The provisions of getting copy of ajahar and FIR at the time of lodging ajahar and FIR without any cost should be incorporated in the Code and PRB 1943.

10. FIR Lodged and Investigation Conducted by Same Police Officer: Sections 154, 156

In case of cognizable offence, the police officer may lodge FIR on the information given or *suo moto,*and that officer of police-station may, without the order of a Magistrate, investigate that cognizable case.[150] It is ocular that same police officer is able to conduct investigation along with lodging FIR. In this case if the police officer becomes wicked, he may do harmful acts from grudge and anti-pathy during conducting investigation. As a result impartiality of law enforcement agency becomes questioned.

Suggestion

Section 156 of the Code should be amended in line with that same police officer shall not lodge FIR and conduct the investigation at a time subject to some exceptional circumstances.

11. Power to Record Statements and Confessions: Section 164

Any Metropolitan Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial.[151] But during trial it can be seen that the confessor retracts the confessional statement without any proper excuse. As a result, the case becomes more complex and the unusual delay occurs.

Suggestion

The provision of recording the confessional statement by Audio-Visual should be incorporated under the Head of section 164 of the Code.

12. Cognizance of Offences by Courts of Session: Section 193

Except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been to it by a Magistrate duly empowered in that behalf.[152] Here the word 'accused' has been used and transferred by a Magistrate to Courts of Sessions. But the word 'case' is more reasonable and just instead of word 'accused'.

[150]Ibid, s 156 (1).

[151]Ibid, s 164 (1).

[152]Ibid, s 193 (1).

Suggestion

The word ‘accused’ should be omitted and the word ‘case’ should be inserted at the place of accused in section 193 of Code.

3.19 Conclusion

There is a very high degree of responsibility placed on an investigation agency to ensure that an innocent person is not subjected to a criminal trial. A fair and proper investigation is always conducive to the ends of justice and for establishing the rule of law and maintaining proper balance in law and order. These are very vital issues in a democratic set up which must be taken care of by the courts. They should not be singularly relied upon to prevent crime. In Bangladesh there is a widely held view that crime prevention should largely be a police responsibility rather than being the collective responsibility of the police, the community and other stakeholders. Greater collaboration on mutually complementary initiatives between all institutions of the justice sector, government, business community and civil society is required to reduce crime and fear of crime. In Bangladesh there are many loopholes in police organization. It needs to be reformed. The Government of People’s Republic of Bangladesh has recognized the importance of improving human security and the need for comprehensive police reform as part of this process. The government has made numerous statements about its priority to strengthen the rule of law and improve the state of security in the country. Establishment of police Bureau of Investigation is really one of the tremendous job of the government which is doing very splendid job so far it relates to investigation.

Chapter-IV

Trial of Criminal Cases

4.1 Introduction

The criminal justice system is the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws.[1] In other words, Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, or sanctioning those who violate laws with criminal penalties and rehabilitation efforts. Those accused of crime have protections against abuse of investigatory and prosecution powers.[2]

The criminal justice system is comprised of three major institutions which process a case from inception, through trial, to punishment. A case begins with law enforcement officials, who investigate a crime and gather evidence to identify and use against the presumed perpetrator. The case continues with the court system, which weighs the evidence to determine if the accused is guilty beyond a reasonable doubt. If so, the corrections system will use the means at their disposal, namely incarceration and probation, to punish and correct the behavior of the offender. Throughout each stage of the process, constitutional protections exist to ensure that the rights of the accused and convicted are respected. These protections balance the need of the criminal justice system to investigate and prosecute criminals with the fundamental rights of the accused (who are presumed innocent).[3]

The Criminal Process in Bangladesh is, essentially, adversarial or accusatorial in nature meaning that the whole process is a contest between two parties. As regards crime, these two parties are the state on the one hand (however not in all cases) and the person accused of crime concerned on the other hand. In the process court takes a non-partisan role; court plays no significant role in preparation of case; the trial itself is not an investigation into allegation but rather a hearing to decide within a complex set of rules, whether the accused is proved to

[1]National Center for Victims of Crime, *The Criminal Justice System.* (2015) <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the criminal justice-system> accessed 22 Nov 2015.

[2]Wikipedia, (the Free Encyclopedia) *Criminal Justice* (2015)<https://en.wikipedia.org/wiKi/Criminal justice> accessed: 22 Nov 2015.

[3]Find Law, *How Does the Criminal Justice System Work?*(2015) <http://criminal.findlaw.com/criminal-law-basics/how-does-the-criminal-justice-system-work.html>accessed 22 Nov 2015.

be guilty of the particular offences which the prosecution have charged him with.[4] However the stages of criminal proceedings are of three types, Pre-trial stage, Trial Stage and Post-trial Stage.

4.2 Provisions Relating to Charge

Charge is an important step in a criminal proceeding and the accused is answerable to the charges levelled against him or her. It separates the inquiry stage from trial of a criminal case.[5]The whole object of framing a charge is to enable the defense to concentrate its attention on the case that he has to meet, and if charge is framed in such a vague manner that the necessary ingredients of the offence with which the accused is convicted are not brought out in the charge, then the charge is defective. The framing of a proper charge is vital to a criminal trial and this is a matter on which the Magistrate or judge should bestow the most careful attention.[6]

4.2.1 Meaning of Charge

The Code of Criminal Procedure 1898 does not define charge: it simply states that "charge" includes any head of charge when the charge contains more heads than one.[7] In fact, the meaning of charge is to be gathered from judicial interpretation which defines "charge" as the 'precise formulation of the specific accusation made against a person who is entitled to know its nature at the very earliest stage.[8] In other words, it is a written document containing the description of the offence which the court finds *prima facie* proved by evidence before it or it have been committed by the accused, so as to require him or her to defend himself/herself. The word 'charge' within the meaning of the Code denotes a charge formulated after inquiry and distinguished from its popular meaning implying inculpation of a person for an alleged offence as used, for instance, in s 224, Penal Code 1860.[9]

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[4] Abdul Halim, *Text Book on Code of Criminal Procedure* (5th edn, CCB Foundation, Dhaka, 2011) 45.

[5]Sarkar Ali Akkas, *Law of Criminal Procedure* (2nd rev edn, AnkurPrakashani, Dhaka , 2009) 129.

[6]Zahirul Huq, *Law and Practice of Criminal Procedure* (11thedn, Bangladesh Law Book Company, Dhaka, 2011) 142-143.

[7] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 4 (1) (c).

[8]*Abdur Razzaque v State* (1996) 48 DLR 457; AIR 1945 All 81; 5 CWN 866 PC.

[9]The Penal Code 1860, s 224-Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes

4.2.2 Object of Framing Charge

The object of framing charge is to ensure that the accused may have as full particulars as are possible of the accusation brought against him or her so that the accused concentrate on the case that he or she has to face.[10] An accused is entitled to know with the greatest precision and particular the acts said to have been committed and the section of penal law infringed. One of the main purposes of charge is to give opportunity to the accused to prepare his defense. Another purpose of a charge is to serve the principles of natural justice that, "No one should be condemned unheard". To give effect to this principle the accused must be given in advance with all particulars of the offence he is accused of; otherwise the accused cannot be heard properly. The third purpose of a charge is to substantiate the principle of criminal standard of proof. A formal charge also makes the trial process easier and methodic for the judges and lawyers.[11] This is why it has been observed by Lord Chancellor that:

"The necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure."[12]

4.2.3 Alteration of the Charge

In certain cases alteration of the charge may be necessary. If such alteration is necessary, court is to follow the provisions laid down in sections 227-231 of the Code In the case of *Hossain Mohammad Ershadv. The State,*[13] it has been observed that the court may, at any time alter or amend the charge during the trial in accordance with the provisions of section 227 of the Code If a charge is altered, it must be read and explained to the accused afresh. After such alteration, if the court is of the opinion that neither the prosecution nor the accused will be prejudiced, it shall proceed with the trial as if the altered charge had been the original charge.[14] But if the Court is of the opinion that alternation may cause prejudice to the prosecutor or the accused, the court may direct a new trial. If such alteration is made during commencement of the trial and after examination of the witnesses, either party may be

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or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[10]*Moslem Ali Mollah v State*, (1996) 48 DLR 297.

[11] Abdul Halim, above note 90, 147-148.

[12]*Subramania*, 5 CWN 866.

[13]14 (1993) BLD (AD) 161.

[14] 15 (1994) BLD 217.

allowed to re-call or re-summon and examine those witnesses and may also call further witnesses.

Section 236 of the Code empowers the Court to frame charge in the alternative. An act or series of acts may be of such a nature that it is doubtful which offence can be proved. In such a circumstance, an accused may be charged with all the offences or in the alternative any of the offences. If charge is framed by taking into consideration the provisions of section 236 of the Code and if the accused is charged with one offence but from the evidence if it appears that he committed a different offence for which he might have been charged, he may be convicted for the offence proved though he was not charged with that offence. This is provided in section 237 of the Code. Illustrations to section 236 and 237 of the Code are very much relevant to have a clear idea about the provisions of the above two sections.

It is well settled that criminal trial begins with framing of charge. In view of section 239 of the Code more than one persons may be tried together. BDR mutiny case may be mentioned here that even hundreds of accused may be charged together. But unfortunately more than three offences can be charged together in view of sections 233 and 234 of the Code. For better appreciation, the relevant provisions of the Code may be stated below:

For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.[15]When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.[16]

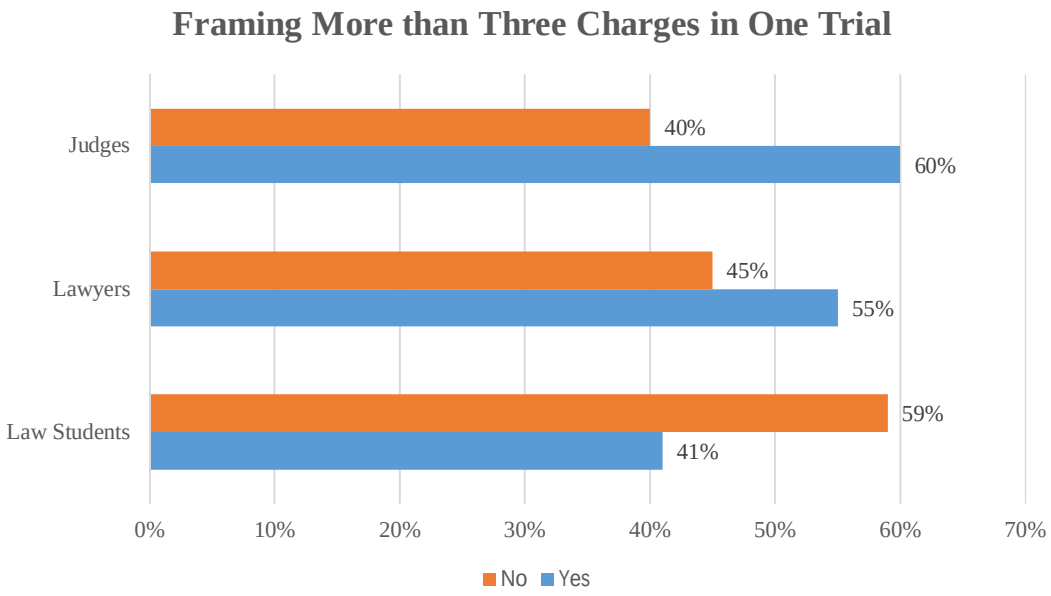
In International Crimes Tribunal Rules of Procedure, 2010, it has been provided that person accused of the same offence committed in the course of the same transaction, or persons accused of abatement or attempt to commit such offence, or persons accused of conspiracy or planning or design in the commission of an offence or more than one offence or persons accused of more than one offence may be charged with and tried at one trial for, every such offence.[17]

[15]The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 233.

[16] Ibid, s 234.

[17]International Crimes (Tribunal) Rules 2010, r 23.

Study shows that 60% of the judges, 55% of the lawyers and 41% law students suggest to change the existing provisions and to provide a procedure for framing more than three charges in one trial in order to prevent multiplicity of criminal cases. This will help reducing backlogs of the criminal cases. If it is possible to frame more than three charges or unlimited charges by International Crimes Tribunal, there is no problem in framing more than one charge by any other criminal courts of Bangladesh.



4.2.4 Discharge

If there are no ingredients of offence or there is a legal bar in framing charge the court shall discharge the accused. Section 241A and 265C of the Code may be stated below to conceive the existing provisions of the charge:

When the accused appears or is brought before the Magistrate, and if the Magistrate, upon consideration of the record of the case and the documents submitted therewith and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, considers the charge to be groundless, he shall discharge the accused and record his reasons for so doing.[18]

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Court

[18]The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 241A.

considers that there is no sufficient ground for proceeding against the accused, it shall discharge the accused and record the reasons for so doing.[19]

In the case of *Mahbuba Akter v. Mozemmel Hoque*[20]it was held that at the stage of framing the charge the Magistrate is to consider the documents of the prosecution and not those of the defence which could form part of the record after the charge is framed. In another case it has been held that the time of producing defence alibi is during the trial and after the prosecution has adduced its own evidence and they must be given a chance to prove their case.[21]

When the question whether allegations disclosed any offence or not cannot be decided without evidence, in such case charge should be framed. Only when it is clear from the statement made in the FIR or in the petition of complaint that the allegations, even if taken to be true, do not attract any specific offence, in that case charge cannot be framed and the accused should be discharged.[22]

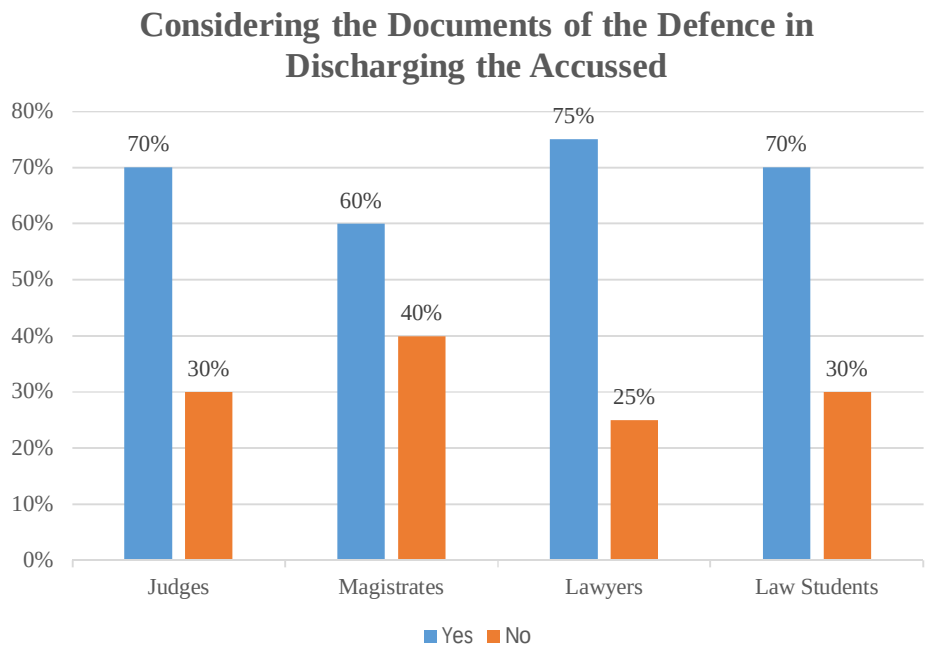
On perusal of those provisions, it is found that there is no scope for the court to consider the documents of the accused. At times, it is found that the plea of alibi or the documents produced by the accused find support from the prosecution documents nevertheless the court cannot consider the documents of the accused and frame charge and thereby put him inside the net of long pending trial. After five or six years of framing charge he is acquitted as persecution fails to prove charge against him during trial. In this respect 70% judges, 60% Magistrates, 75% of lawyers, 70% of the law students clearly opine their view that the court should have power to consider the documents of the defense in an appropriate case which will relieve the person for implicating in an unfounded criminal case.

[19]Ibid, s 265C.

[20] 47 DLR 404.

[21]*Jalaluddin Bhuiyan v. AbdurRouf* , 51 DLR 408.

[22]*Syed Mohammad Hashem alias Hashim v. State,*48(1996) DLR (AD) 87; *Latifa Akhter and others v. State and another,* 51 (1999) DLR (AD) 159; *Habib (Md) and another v. State represented by the Deputy Commissioner,* 52 (2000) DLR 105; *S.M.H. Rizvi v. Abdus Salam and The State,*12 (1960) DLR (SC) 103.



4.3 Trial of Criminal Cases

4.3.1 Meaning of Trial

The word "trial" is not defined in the present Code of Criminal Procedure 1898. However, it means as commonly understood the proceeding taken in Court from the stage of framing of a charge and ending with the conviction or acquittal. Wherever the word "trial" occurs in the Code of Criminal Procedure it appears to refer to proceedings in which an accused person stands before a Judge or Magistrate who is empowered to convict him upon a charge of an offence committed by him and sentences him to one of the punishments described in Penal Code 1860.There is uniformity of judicial opinion that the, word "trial" has no fixed or universal meaning, and has to be considered with regard to the particular context which it is used, and with regard to the scheme and purpose of the particular act. These views received the stamp of approval of Supreme Court in the case of *State of Bihar v. Ram Naresh Pandey*.[23] It was observed therein by the Apex Court of India.

'Trial' according to Stroud's Judicial Dictionary[24] means "the conclusion by a competent Tribunal of questions in Issue of the legal proceedings, whether civil or criminal". According

[23] AIR 1957 SC 389; 1957 Cr LJ 567; 1957 1 SCR 279.

[24] J Burke and P Allsop (eds), *Strouds Judicial Dictionary of Words and Phrases* (3rd edn, Vol-4, Sweet & Maxwell, United Kingdom, 1953) 3092.

to Wharton Law Laxlcon[25] trial means "The hearing of a cause civil or criminal before a judge who has Jurisdiction over it according to the laws of the Land. The words "tried" and "trial" appears to have no fixed or universal meaning. No doubt in quite number of sections of the Code the words "tried" and "trial" have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in these sections having regard to the context in which they are used, there is no reason why were these words used in another context In the Code, and they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the scheme and purpose of the provision under consideration"

The story of the presence and absence of definitions of the word trial in successive Codes (It was only in the Code of 1823 that "trial" was defined, but the same was deleted in the Code of 1872 and was not taken back in the Codes of 1898) which ultimately resulted in the delineation of giving a limited meaning to "trial" and limiting "Inquiry" only to the preliminary stage, which is not the determination of the cause, clearly in our view brings out that the etymological meaning of "trial" alone has to be employed as best suits the context and the situation in which it is used In the Code."[26]

The definition of "inquiry" impliedly defines "trial" as every proceeding which is not "inquiry". The word "trial" undoubtedly has two meanings. It may mean the trial of a controversy that arises from an issue. It may equally mean the trial of an election petition or a complaint or an action from beginning to end. A "trial" means all proceedings including the sentence. Further "trial" includes appeal.

The word "trial" in the Criminal Procedure Code, as well as in other special enactments is used in some places in a restricted sense indicating the stage after framing of charges and in other places in a broad sense comprehending the totality of the proceedings before the Court from the beginning i.e. from the stage of supply of copies to the accused.

The word "trial" is not defined in the Code of Criminal Procedure. All steps which a Criminal Court adopts subsequent to the framing of charge and until the pronouncement of Judgment can be treated as trial proceedings within the meaning of Section 11 of the said Code.

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[25] AS Oppe (ed.), *Wharton's Law Laxicon* (14th edn, Stevens & Sons Ltd, United Kingdom, 1938) 1011.

[26] *Fakruddln v. The State Police,* 1962 (2) Cri. L.J. 14 (18-19).

The proceedings before the Magistrate from the time the accused is produced or appeared before him, furnishing copies to the accused under Section 207 or 208, Criminal Procedure Code 1973[27], and till the commitment order is passed, is an "enquiry" as contemplated by Section 2(g) of the Code[28]. But scope of enquiry under this section is very limited confining only to the matters in the sections.

At the time of taking cognizance of any offence the court should not proceed to analysis the case of the complainant in the light of all probabilities in order to determine whether conviction would be sustainable.[29]However, the word "case" is not defined by the Code. But its meaning is well understood in legal world. In criminal Jurisdiction it means ordinarily a proceeding for the prosecution of a person alleged to have committed an offence. In other contexts it may represent other kinds of proceedings.[30]

4.3.2 Existing Legal Provisions Relating to Trial before Court of Magistrate and of Sessions

4.3.2.1 Trial before Court of Magistrate under Chapter XX of the Code

When accused shall be charged or discharged by Magistrate

When the accused appears or is brought before the Magistrate, and if the Magistrate, upon consideration of the record of the case and the documents submitted therewith and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, considers the charge to be groundless, he shall discharge the accused and record his reasons for so doing.[31]

Conviction on admission of truth of accusation

If, after such consideration and hearing as aforesaid, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence, the Magistrate shall frame a formal charge relating to the offence of which he is accused and he shall be asked whether he admits that he has committed the offence with which he is charged.[32]

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[27]Corresponding Law: The Code of Criminal Procedure, 1898 (Act No V of 1898) ss 206-220, Omitted by section 2 and Schedule to the Law Reforms Ordinance, 1978 (Ordinance No. XLIX of 1978).

[28] Corresponding Law: The Code of Criminal Procedure, 1898 (Act No V of 1898), s 4(k).

[29]*Mrs. DhanaLakshml v. R Prasanna Kumar*, 1990 (1) Crimes 26; 1990 Cri. LJ.

[30]*The State of Karnataka v. LaxmlnarayanaBhat&Anr.*, 1991 (2) Crimes 251 (Karn.); 191 Cr L.J. 2126.

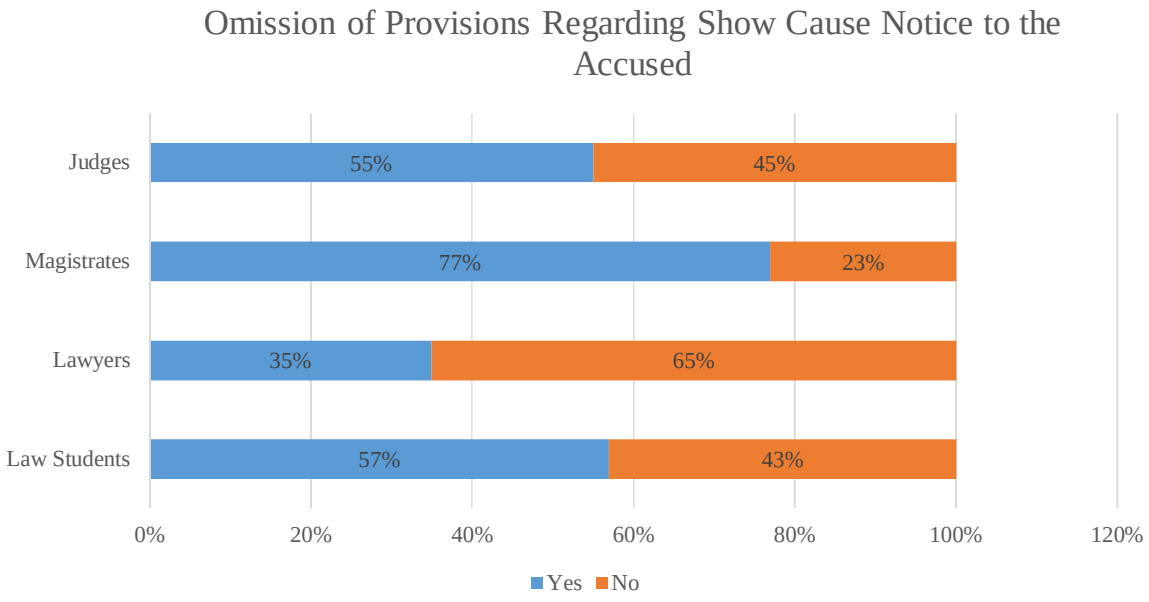
[31] The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 241A.

[32]Ibid, s 242.

If the accused admits that he has committed the offence with which he is charged, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.[33]

If the accused admits voluntarily that he has committed the offence, it is redundant to issue show cause upon the accused why he shall be convicted. In sessions cases, the sessions judge may convict the accused if he pleads guilty under section 265E of the Code.

Therefore, 55% of the judges, 77% of the Magistrates, 35% of the lawyers and 57% of the law students suggested that the followings words 'and, if he shows no sufficient cause why he should not be convicted' has to be omitted from section 243 of the Code.



Examination of prosecution witnesses

If the Magistrate does not convict the accused under the preceding section 243 of the Code or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his

[33]Ibid, s 243.

defense: Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.[34]

The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directed him to attend or to produce any document or other thing.[35]

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.[36]

If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.[37]

Where the Magistrate does not proceed in accordance with the provisions of section 349, he shall, if he finds the accused guilty, pass sentence upon him according to law.[38]

Consequence of Non-appearance of the complainant

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks proper to adjoin the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.[39]

The words 'summons cases' was amended by the Code of Criminal Procedure (2nd amendment) Ordinance, 1982 by deleting the words 'summons' and therefore there is no distinction between summons cases and warrant cases in our jurisdiction. But the word 'summons' has not been deleted from section 247 of the Code so, in warrant cases Magistrate is reluctant to acquit the accused though the complainant remains absent during hearing for

[34]The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 244 (1).

[35]Ibid, s 244 (2).

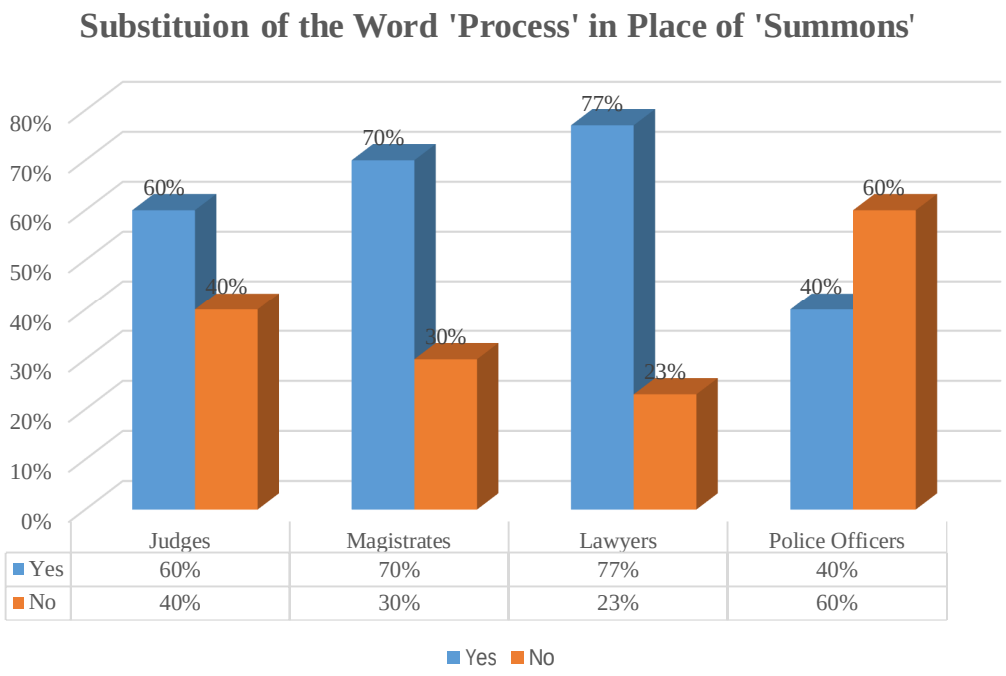
[36]Ibid, s 244 (3).

[37]Ibid, s 245 (1).

[38]Ibid, s 244 (2).

[39]Ibid, s 247.

consecutive days. Therefore, the 70% of the Magistrate, 60% judges, 77% of lawyers and 40% of Police officers opined that the word 'summons' to be omitted and instead of that, the word process be substituted, it may be either summons or warrant and moreover they have suggested to define the word 'hearing' as mentioned under section 247 of the Code to do away with the confusion.

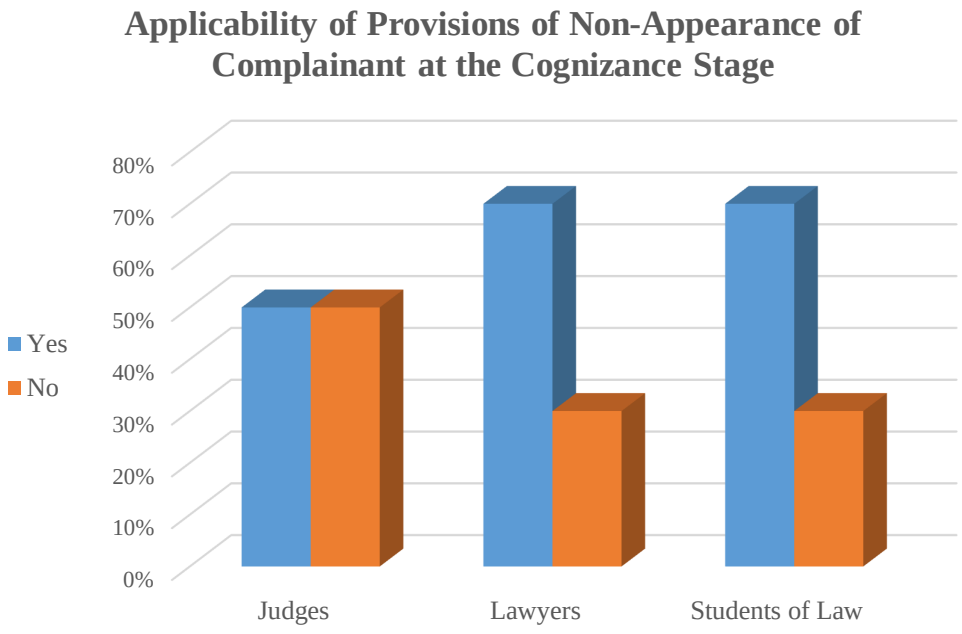


4.3.2.2 Applicability of Provisions of Non-Appearance of Complainant at the Cognizance Stage

Section 247 of the code prescribes that if the complainant fails to appear before the court at the date of hearing the case would be close by acquitting the accused.[40] So, what requires law is to ensure the presence of the complainant at the date of hearing. Now, the question is when a case is fixed for hearing. Generally hearing starts from and during framing charge in a case. But if it is after cognizance and before the case being ready for trial, does it really mean for

[40]Ibid, s 247- If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks proper to adjoin the hearing of the case to some other day: Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

hearing? If no, does it binding for the complainant to be present at the fixed date. More specifically, is it justified to acquit the accused in absence of the complainant where his presence is not compulsory. To make it more clear let me give an example. A person files a complainant petition and the court after having prima facie case takes cognizance and issue summon to the accused for their appearance. On the next date the summon backs after due service and unexpectedly neither the complainant nor the accused appears before the court. Now is it possible to issue warrant against the accused in absence of the complainant, or does this stage mean for hearing and if means so, is it tenable to acquit the accused at this stage. Once again, if warrant has already been issued and it fixed for execution of warrant of arrest is it binding for the complainant to appear. Where the warrant of arrest is not executed in the repeated fixed dates is it possible to acquit the accused for want of appearance of the complainant. In practice it is seen that a case is pending for years together for execution of warrant. That means if the accused yet not appears or cause to be appeared and the complainant sits idly, what would be the fate of the case.

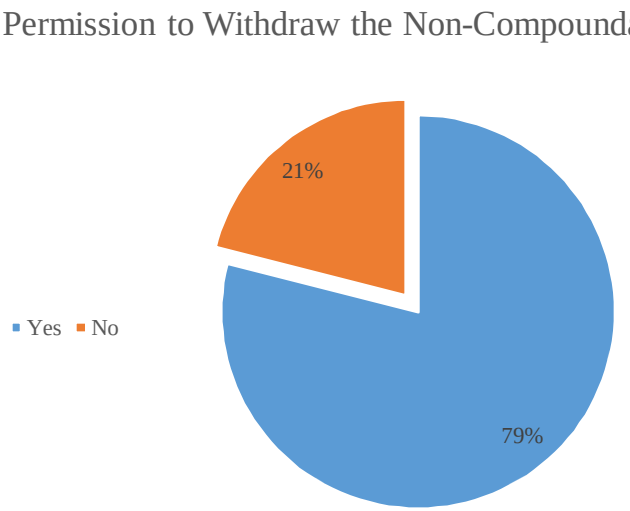


In response to the question that whether section 247 be applicable before framing charge 5 of the judges, 7 of the lawyers and 7 of the law students say ‘Yes’. That means 50% of the judges, 70% of the lawyers and 70% of the law student opined for acquitting the accused even before framing charge. Side by side, 50% of the judges, 30% of the lawyers and 30% of the law students opined for not to acquit the accused before framing of charge.

4.3.2.3 Withdrawal of Complaint

If a complainant, at any time before a final order is passed in any case under Chapter XX of the Code, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.[41]

But in non-compoundable complaint cases magistrates are not entitled to allow the complainant due to the principles enunciated by the Apex court of the country. Therefore, the complainant cannot withdraw the complaint case though they settled-down the dispute outside the court. Therefore, 79 % of the litigant people opined that the complainant should be given permission to withdraw the complaint case though it is non-compoundable subject to the consent of the Magistrate.



4.3.2.4 Power to Stop Proceedings When No Complainant

In any case instituted otherwise than upon complaint, a Metropolitan Magistrate, a Magistrate of the first class, or with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage

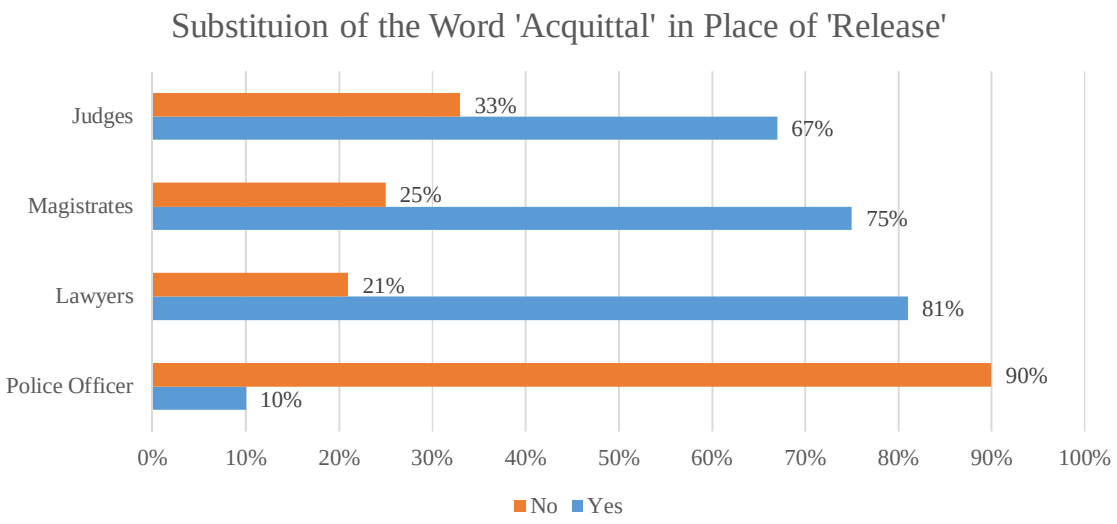
[41]Ibid, s 248.

without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.[42]

We know that criminal case may be instituted by a petition of complaint to the Magistrate having jurisdiction to take cognizance which is called CR case or by lodging FIR to the concerned police station which is called GR case. Apart from the same, on General Diary or upon the simple petition, the police may start non GR case with the permission of the concerned Magistrate. The words' power to stop proceeding when no complainant' used in the marginal note is confusing, therefore, the study suggests the provisions should be reframed for the greater interest of the accused which will save unnecessary time, money and energy in a fruitless criminal litigation.

Section 249A of the Pakistan Code of Criminal Procedure 1898 provides that nothing in the this chapter that is chapter XX shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if, after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence.Sections 249 may be amended applying in all cases including CR, GR and Non GR cases. The amendment may be made thus in any case Metropolitan Magistrate or any other Magistrate may for reasons to be recorded by him stop the proceedings at any stage and thereby acquit the accused.

Therefore, the 75% of the Magistrate, 67% judges, 81% of lawyers and 10% of Police



[42]Ibid, s 249.

officers opined that the procedure should be simple and the word ‘release’ should be substituted by the word ‘acquittal’ and it should be applicable in all cases without fetter.

4.3.2.5 Power to Award Sentence by Magistrate for False Case

Section 250 (1) of the Code states that if in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate or any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is or opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or information may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one thousand Taka or, if the Magistrate is a Magistrate of the third Class, not exceeding five hundred Taka, as he may determine be paid by such complainant or informant to the accused or to each or any of them.

(2A) The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

(2B) When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Penal Code shall, so far as may be, apply.

(2C) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him: Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other

Magistrate to pay compensation exceeding one hundred taka may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if any appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order. (5) Notwithstanding anything contained in this section, the Magistrate may, in addition to the order directing payment of the compensation under sub-section (2), further order that the person ordered to pay such compensation shall also suffer imprisonment for a period not exceeding six months or pay a fine not exceeding three thousand Taka.

Section 17 (1) of Nari O shishuNirjatan Daman Ain 2000 clearly provides that if any person with the motive causing loss to any other person knowing that there is no cause of accusation under this act even then files case or causes, the person who files the case or causes to file the case shall be liable for conviction up to seven years rigorous imprisonment and also be liable for fine.

As per section 15 of the Manab Pacher Protirodh O Daman Ain 2012 provides that for false case the tribunal may *suomoto* or on the application of the aggrieved person award sentence which may be extended to 5 years.

The provisions laid down under section 250 of the Code are absolutely obscure and 90% of Magistrates opined that the provisions of section 250 of the Code should be recast in line with the provisions of aforesaid special laws.

4.4 Summary Trial before Court of Magistrate

In Summary trials, the procedure prescribed in Chapter XX shall be followed except as in some cases mentioned. It is to be noted Chapter XX deals with the trial procedure before Court of Magistrate.

4.4.1 Cases which are to be Tried Summarily

Sections 260 and 261 of Code outline specific cases which shall be tried summarily by Magistrates. A brief list of them is as follows:

a. offences not punishable with death, transportation or imprisonment for a term exceeding two years;
b. offences relating to weights and measures under sections 264, 265 and 266 of the Penal Code;
c. Hurt, under section 323 of the same Code;
d. theft, under section 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed 300 ten thousand taka;
e. dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed 301 ten thousand taka;
f. receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed 302 ten thousand taka;
g. assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed 303 ten thousand taka;
h. mischief, under 304 sections 426 and 427 of the same Code;
i. criminal trespass, under section 447, and house trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 or the same Code;
j. insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, 306 and offences under sections 509 and 510 of the same Code;
k. offence of bribery and personation at an election under sections 171E and 171F of the same Code;
l. abetment of any of the foregoing offences;
m. an attempt to commit any of the foregoing offences, when such attempt is an offence;
n. offences under section 20 of the Cattle-trespass Act,1871.

Executive Magistrate conducting Mobile Court is empowered to award sentence up to 2 years therefore, study suggest the sentencing power of the judicial magistrate conducting summary trial may be extended up to 3 years. The list of summary trial may be extended including the offences of the Penal Code and any other laws where maximum sentence is not more than 5 years.

4.4.2 Procedure in Summary Trial

Unlike in regular trials the court in summary trial has to simplify and shorten trial procedure by dispensing with the recording of evidence and not allowing many adjournments. There is a limit of imprisonment in summary trial and this is that a Magistrate cannot impose a sentence exceeding two years.[43] In summary trials the Magistrate has to follow all the steps of regular trial but the difference between the two is that in summary trial of offences where no appeal lies the Magistrate need not have to record the evidence of the witness or frame a formal charge.[44] Secondly, in case of summary trials of offences where appeal lies, the Magistrate has to record the substance of evidence (still not the full evidence).[45]

4.5 Trial before Court of Sessions under Chapter XXIII

In every trial before a Court of Sessions, the prosecution shall be conducted by a Public Prosecutor (PP).[46]

The Public Prosecutor, Special Public Prosecutor, Additional Public Prosecutor are appointed by the government under section 492 of the Code But there is no specific provisions regarding age, qualifications to be appointed as Public Prosecutor. At times, it is found incompetent persons are appointed as Public Prosecutor who are not capable to prosecute the cases and due to flaw in prosecution accused are acquitted. Therefore, study suggests that there should be a cadre service for the government lawyers so that competent persons may be appointed which will strengthen the existing prosecution system.

When the accused appears or is brought before the Court in pursuance of section 205C, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.[47]

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Court

[43]Ibid, s 262 (2).

[44]Ibid, s 263.

[45] Abdul Halim, above note 90, 171 and the Code of Criminal Procedure, 1898 (Act No. V of 1898), s 264.

[46]The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 265A.

[47]Ibid, s 265B.

considers that there is no sufficient ground for proceeding against the accused, it shall discharge the accused and record the reasons for so doing.[48]

If, after such consideration and hearing as aforesaid, the Court is of opinion that there is ground for presuming that the accused has committed an offence, it shall frame in writing a charge against the accused.[49]

Where the Court frames a charge under sub-section (1), the charge shall be read and explained to the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.[50]

If the accused pleads guilty, the Court shall record the plea and may, in its discretion, convict him thereon.[51]

If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 265E, the Court shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.[52]

On the date so fixed, the Court shall proceed to take all such evidence as may be produced in support of the prosecution.[53]The Court may, in its discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.[54]

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Court considers that there is no evidence that the accused committed the offence; the Court shall record an order of acquittal.[55]

It is found that after exhausting all procedures for securing the attendance of the witnesses, no witness turns to the court to depose but the accused persons are languishing in the jail custody

[48]Ibid, s 265C.

[49]Ibid, s 265D (1).

[50]Ibid, s 265D (2).

[51]Ibid, s 265E.

[52]Ibid, s 265F.

[53]Ibid, s 265G (1).

[54]Ibid, s 265G (2).

[55]Ibid, s 265H.

for years together. So, there should be specific provisions after section 265H of the Code that if the prosecution fails to produce the witnesses within the specified time, the accused will be acquitted.

Where the accused is not acquitted under section 265H, he shall be called upon to enter on his defense and adduce any evidence he may have in support thereof. If the accused puts in any written statement, the Court shall file it with the record. If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Court shall issue such process unless he considers for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.[56]

When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:

Provided that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Court, make his submissions with regard to such point of law.[57]

After hearing arguments and points of law (if any), the Court shall give a judgment in the case.[58]

Judgment is of two types that is judgment of conviction and sentence, and judgment of acquittal. If the case is proved beyond any reasonable doubt in same sitting court convicts the accused and award him sentence accordingly. As a result the court cannot exercise judicial discretion in awarding sentence thereby the theory of dispensation of justice must be blended with mercy fall through. Therefore, in case of conviction court should fix a short period for sentence hearing.

In a case where a previous conviction is charged under the provisions of sub-section (7) of section 221, and the accused does not admit that he has been previously convicted as alleged in the charge, the Court may, after it has convicted the said accused under section 265E or section 265K, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Court nor shall the

[56]Ibid, s 265I (1,2,3).

[57]Ibid, s 265J.

[58]Ibid, s 265K.

accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 265E or section 265K.[59]

After conclusion of trial by the court of sessions that if it is clear that false, frivolous and vexatious case was filed to harass the innocent person, he cannot impose penalty upon the perpetrator who lodged the planted case. Therefore, a provision may be made under Chapter XXIII of the Code that the court may, *suomoto* or the application of the aggrieved person, award sentence not exceeding five years for filing false etc. case.

4.6 Examination of the Accused

Examination of the accused under section 342 is important to arrive at a correct decision in a criminal case. The object is to bring to the notice of the accused the evidence produced by the prosecution against him in the trial so as to enable him to explain every circumstances appearing in the evidence against him. The first part of the section empowers the court, at any stage of the trial, to put any question to the accused which it considers necessary. So, it is up to the court to decide whether there is necessity of asking any question to the accused at any stage of the trial. But it is imperative upon the court to examine the accused after the witnesses of the prosecution have been examined and before the accused is called on for his defense. So, even if the court asked any question to the accused before close of the evidence on the side of the prosecution, the accused shall have to be examined again by the court after the close of the evidence on the side of the prosecution.

While examining the accused, all the incriminating evidence and the circumstances appearing against him shall be brought to his notice and he be asked to give his own explanation as regards those evidences and circumstances.[60] It is the duty of the court to examine the accused under this section. A wrong practice is prevalent in courts – such a statement is prepared by the prosecution and the Judge/Magistrate just read it. This will not be the compliance of the requirement of the section.

[59]Ibid, s 265L.

[60]*State v. Monu Miah and others*, 54 (2002) DLR (AD) 60, *MizazulIslam @Dablu v. The State*, 41 (1989) DLR (AD) 157.

It is not proper to put questions in the following form:

Have you got anything to say or Are you guilty?[61]

Instead, the statements of each and every P.Ws. who in their statements implicated the accused should be brought to his notice including evidence about recovery of any *alamat* from him, his confessional statement, if any, extra-judicial confession, if any, etc., and then he shall be asked to give explanation about such evidences and circumstances. When there are several accused in a case, each should be examined separately. However, when evidences and circumstances against all of them are same, they may be examined jointly. After such examination of the accused persons, their signatures are to be obtained. If the accused persons express their willingness to produce witnesses in support of their defense, then a date shall be fixed for defense witnesses and if they do not express such desire, a date for hearing arguments is to be fixed.[62]

The Study also suggests that the provisions of section 342 of the Code is responsible for delaying the trial, therefore, the provisions should be recast in line with that after conclusion of prosecution evidence, the court will fix up a date for written statements by the accused or defence witness if any, failing which the case will be fixed for hearing argument.

4.7 Time for Disposal of Cases

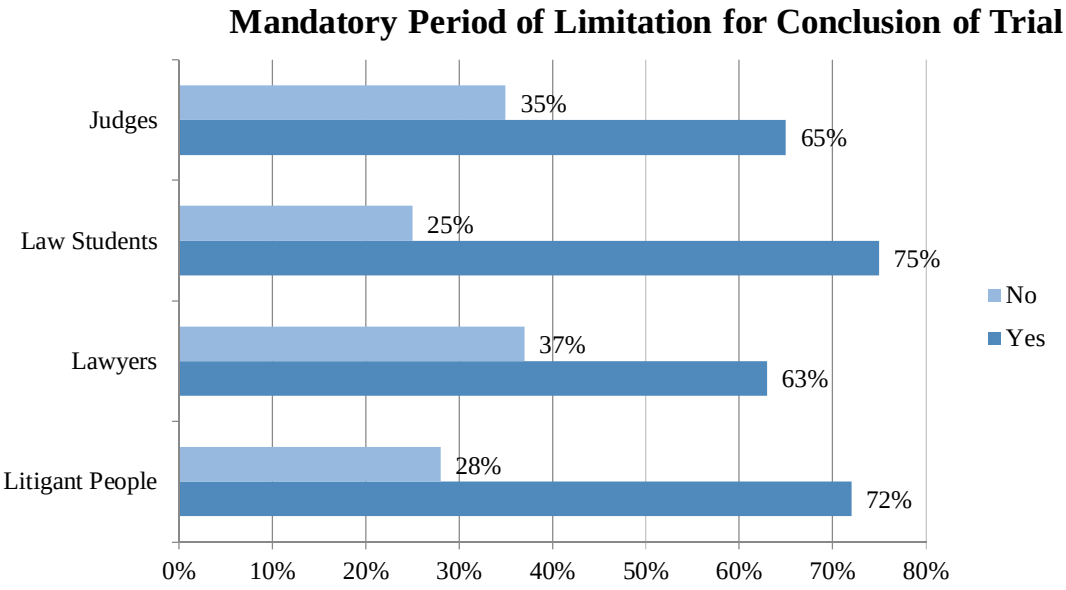
A Magistrate shall conclude the trial of a case within one hundred and eighty days from the date on which the case is received by him for trial. A Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge shall conclude the trial of a case within three hundred and sixty days from the date on which the case is received by him for trial. Notwithstanding anything contained in sub-section (1) or sub-section (2), where a person is accused in several cases and such cases are brought for trial before a Magistrate or a Court of Sessions, the time limit specified in sub-section (1) or sub-section (2) for the trial of such cases shall run consecutively. Notwithstanding the transfer of a case from one Court to another Court, the time specified in sub-section (1) or sub-section (2) shall be the time for concluding the trial of a case.

[61]*Abdul Razzak Talukder v. State, represented by the Deputy Commissioner, Barisal*, 51 (1999) DLR 83.

[62]Mohammad Hamidul Haque, *Trial of Civil Suits and Criminal Cases,* (2nd edn, Universal Book House, Dhaka 2012)374-375.

If a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail to the satisfaction of the Court, unless for reasons to be recorded in writing, the Court otherwise directs. Nothing in this section shall apply to the trial of a case under section 400 or 401 of the Penal Code (Act XLV of 1860), or to the trial of case to which the provisions of Chapter XXXIV apply. In this section, in determining the time for the purpose of a trial,- (b) the days spent on account of the absconsion of an accused after his release on bail, if any, shall not be counted.[63]

The study suggests that there should be mandatory period of limitation for conclusion of trial. 72% litigant people, 63 % Lawyers, 75% of Law Students and 65% Judges suggest to incorporate mandatory period of limitation of disposal of criminal cases with grave consequences.



4.8 Trial Procedure in Special Tribunals or Courts

Section 5 (1) of the Code provides that all offences under the Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. Section 5(2) of the Code also provides that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or

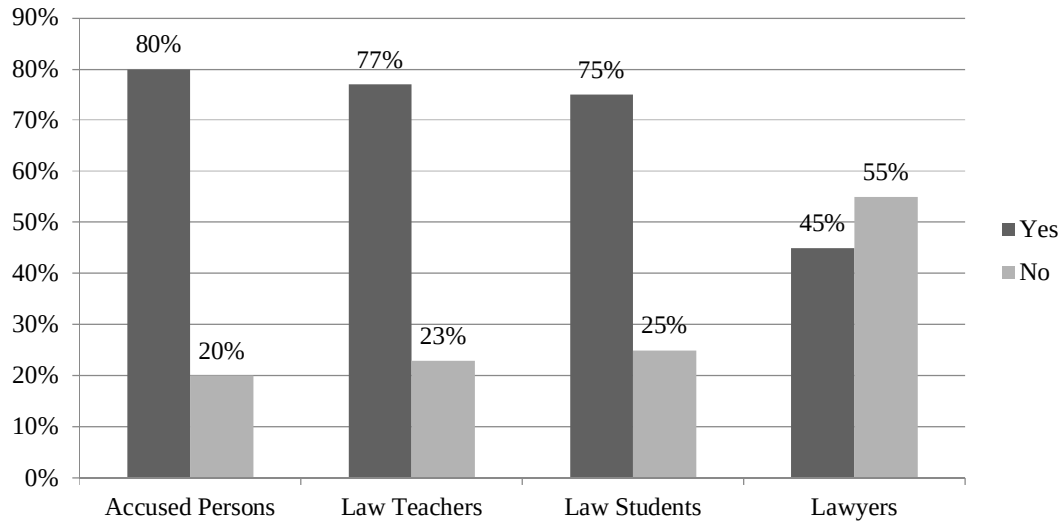
[63]The Code of Criminal Procedure, 1898 ((Act No. V of 1898), s 339C (1) (2) (2A) (2B) (4) (5) (6).

place of investigating, inquiring into, trying or otherwise dealing with such offences. The International Crimes Tribunal under International Crimes (Tribunal) Act 1973 follows its own procedure because the Code shall not be applicable in the trial procedure of that tribunal. The other tribunals like the Nari O Shishu Nirjatan Daman Tribunal under Nari O Shishu Nirjatan Daman Ain (The Suppression of Violence against Women and Children Act) 2000, or the Cyber Tribunal under Information and Communication Technology Act (Tattho O Jogajog Ain) 2006 or special courts either follows trial procedure by Magistrate or by Court of Sessions. Therefore, trial procedure should be recast for speedy and effective disposal of heinous criminal cases.

4.9 Power to Postpone or Adjourn Proceedings: Section 344

According to section 344 of the Code, If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. But in this section there does not exist any kind of time limit of such postpone or adjournment of a proceedings, or how many times postpone or adjournment can be ordered by the court. Sometimes adjournment or postpone takes place for having huge number of cases upon a Magistrate. As a result day by day, backlog of cases follow.

Frequent Adjournment of Hearing during Trial



During trial stage adjournment has to be discouraged. Heavy cost may be awarded for unnecessary adjournment petition and in that line section 344 of the Code has to be amended.77% of Law teachers, 75% of Law students, 45% of Lawyers, 65% of Litigant people and 80% of the accused disapprove the frequent adjournment of hearing during trial.

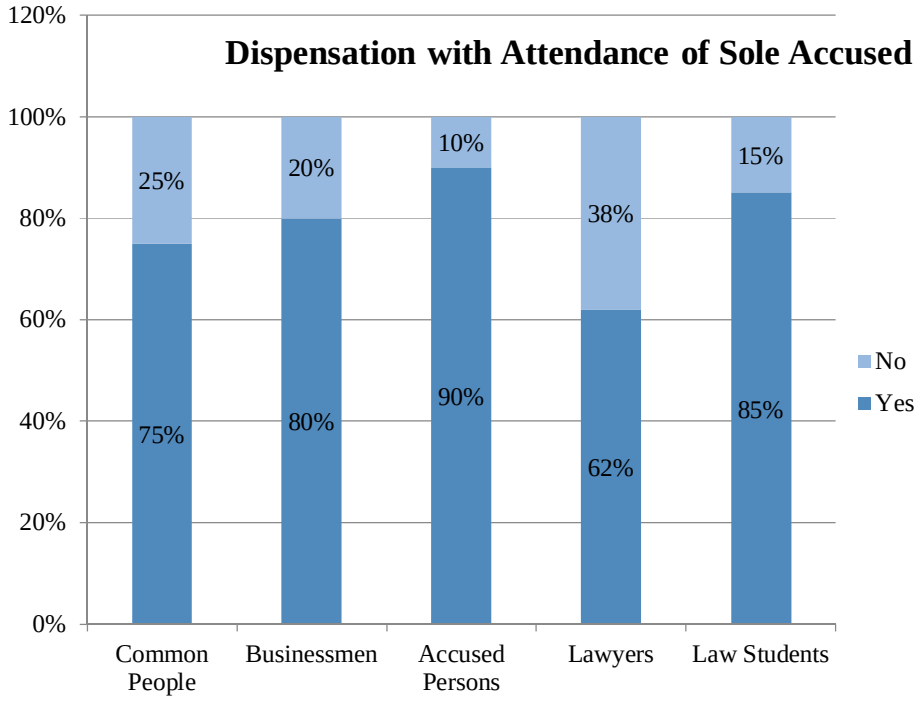
4.10 Dispense with the Attendance of Accused during Trial

Section 353 of the Code provides that all evidence taken under Chapters XX, XXII and XXIII shall be taken in the presence of the accused or when his personal attendance is dispensed with, in presence of his pleader.

Under section 205 of the Code provides that whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader. Section 540A of the Code provides that at any stage of an inquiry or trial under the Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by an advocate, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

Study reveals that in a case a business magnate who has great contribution in the economy of the country, court cannot exempt his personal attendance as he is the sole accused in that case due to the words ‘two or more’ under section 540A of the Code. Therefore, Judges, Magistrates, Lawyers, Litigant public strongly suggest that the words ‘two or more’ should be omitted so that sessions court may dispense with the attendance of the single accused and record evidence in presence of his appointed lawyers.

75% of the Common People, 80% of the Businessmen, 90% of Accused persons, 62% of Lawyers, 85% of Law students are in favor of dispensed with the attendance of sole accused of a criminal case.



4.11 Conclusion

In criminal cases, trial has great significance to punish the perpetrators and acquit the innocent; therefore, trial procedure should be flawless. Study shows that the existing procedure of trial should be amended including some possible alternatives so that speedy, less expensive and quality justice is ensured. If the lawmakers consider the aforesaid suggestions and accordingly trial procedure of criminal cases are amended in the present socio-economic condition of 21st century, the very purpose of criminal trial will be achieved and thereby no innocent be punished and perpetrators be escaped and the day of committing offence with impunity will be done away with by lapse of time.

Chapter-V

Post-Trail Stage of Criminal Cases

5.1. Appeals in Criminal Cases

The word "appeal" means the right of carrying a particular case from an inferior to a superior court with a view to ascertaining whether the judgment is sustainable. An appeal is a creature of the statute and there is no inherent right of appeal.[1] An appeal is a continuation of the trial of the lower.[2]In a case in which no appeal lies from an order, the proper course is to make an application for revision. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code of Criminal Procedure or by any other law for the time being in force.[3]In criminal proceedings, appeals can be filed by

a) Any person aggrieved by an order of the criminal court or convicted on a trial held by the criminal court
b) Public Prosecutor
c) Complainant.[4]

5.1.1 Appeal by the Person Aggrieved or Convicted (Appealable Order)

I. Any person whose application under section 89 of Code. for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.[5]

II. Any person who has been ordered by a Magistrate under section 118 to give security for keeping the peace or for good behavior may appeal against such order- to the Court of Session.[6]

III. Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,-

   a) if made by the Chief Metropolitan Magistrate or the Chief Judicial Magistrate or a District Magistrate, to the Court of Session;

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[1] AIR 1941 Lah. 414.

[2] 37 Mad 119.

[3] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 404.

[4]Sarkar Ali Akkas, *Law of Criminal Procedure* (2nd rev edn, Ankur Prakashani, Dhaka, 2009) 193.

[5] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 405.

[6] Ibid, s 406.

b) if made by a Metropolitan Magistrate other than the Chief Metropolitan Magistrate, to the Chief Metropolitan Magistrate; or

c) if made by any other Magistrate, whether Executive or Judicial, to the District Magistrate or the Chief Judicial Magistrate.[7]

5.1.2 Appeal from Conviction

I. Any person convicted on a trial held by any Magistrate of the second or third class may appeal to the chief Judicial Magistrate who may himself hear and dispose of the appeal or transfer it to any Additional Chief Judicial Magistrate for disposal, and may withdraw an appeal so transferred.[8]

II. Any person convicted on a trial held by a Joint Sessions Judge, Metropolitan Magistrate or any Judicial Magistrate of the first class, may appeal to the Sessions Judge. However, when in any case a Joint Sessions Judge passes any sentence of imprisonment for a term exceeding five years, the appeal of all or any of the convicted persons shall lie to the High Court Division. But when any person is convicted by a Metropolitan Magistrate or Judicial Magistrate specially empowered to try an offence under section 124A of the Penal Code, the appeal shall lie to the High Court Division.[9]

III. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court Division.[10]

It is to be noted that when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.[11]

5.1.3 Appeal by the Public Prosecutor

I. In case of an acquittal, the Government may direct the Public Prosecutor to present an appeal-

a) to the High Court Division from an original or appellate Order of acquittal passed by any Court of Session;

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[7] Ibid, s 406A.

[8] Ibid, s 407.

[9] Ibid, s 408.

[10] Ibid, s 410.

[11] Ibid, s 415A.

b) to the Court of Session from an original or appellate Order of acquittal passed by any Magistrate.[12]

II. In any case of conviction on a trial held by any court, the Government may direct the Public Prosecutor to present an appeal to the High Court Division against the sentence on the ground of its inadequacy.[13]

It is to be that the Public Prosecutor cannot *suomoto* file an appeal against the order of acquittal or against inadequacy of sentence unless the government directs him or her to do so.

In FIR cases, the Government may direct the Public Prosecutor to file the appeal against an order of acquittal. But if the state does not file any appeal against an order of acquittal, the informant may file a revision under section 439 of the Code against such an order passed in a case initiated on police report.[14]

As regards the hearing and disposal of appeal against the judgment of acquittal, the power of the court is limited and the court is to be very much careful in arriving at a decision in such an appeal. The reason is that when a person is acquitted after a full scale trial, his innocence is more strengthened and as such the order cannot be reversed lightly, there must be very good and cogent reasons for reversal. Such principle is laid down in some earlier cases.[15] It has been decided in these cases that in an appeal against the order of acquittal, the appellate court has power to review the evidence and if it is found that the findings of the trial court are not based on the evidence and are in wanton disregard of good and unblemished evidence or that there was misreading of evidence or that the findings are absolutely against the evidence, speculative and perverse, the appellate court may reverse the Judgment and order of acquittal and pass an order of conviction and sentence against the accused in accordance with law. But if it finds that there is a valid ground for retrial, it may send back the case for fresh trial. If the accused is convicted in such an appeal, there shall be a direction upon him to surrender before the trial court within a specified date to suffer the sentence. If he fails, the trial court may issue warrant of arrest.[16]

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[12] Ibid, s 417 (1).

[13] Ibid, s 417A (1).

[14](1986) 6 BCR (AD) 368; (1984) 36 DLR (AD) 42.

[15](1964) 16 DLR (SC) 605; *The State v. Umed Ali & others*(1967) 19 DLR (WP) 93; (1951) 3 DLR (FC) 378;*Ghulam Mohammad v. Muhammad Sharif & The State*(1969) 21 DLR (SC) 206.

[16]*State v. Wasikur Rahman and another,*(2006) 58 DLR (AD) 60; *The State v. Ashraf Ali alias Ashraf and another,* (1991) 11 BLD (AD) 117; *State v. Shamima Arshad,*(2000) 52 DLR 617; *The State v. Mrs. Shamima*

In an appeal, the High Court Division, after perusal and assessment of the evidence concluded that the prosecution case was doubtful and as such the convicts were entitled to get benefit of doubt and on such findings acquitted the convict. Then the State moved the Appellate Division against that judgment and order of acquittal. The Appellate Division held that the findings of the High Court Division was not based on any cogent reasons and after giving such a finding, set aside the order and judgment of the High Court Division and restored the conviction given by the trial court under section 302 of the Penal Code.[17]

5.1.4 Appeal by the Complainant

I. In case of an order of acquittal, if such an order is passed in any case instituted upon complaint, and if the order involves an error of law occasioning failure of justice, the complainant may present an appeal-

   a. to the High Court Division from an original order of acquittal passed by any Court of Session;
   b. to the Court of Session from an original order of acquittal passed by any Magistrate.[18]

II. In any case of conviction on a trial held by any Court, a complainant may present an appeal to the Appellate Court against the sentence on the ground of its inadequacy.[19]

When the complainant is dead before filing an appeal, it cannot be filed by anybody else. However, when the complainant dies after the appeal has been filed, the appeal does not abate.[20]

In an appeal filed under section 408 against conviction, the court has no power to enhance the sentence. Such enhancement can be made only in an appeal filed under section 417A read with section 423 (I) (bb) of Code.[21]

Ashad, (2000) 20 BLD 315 ; *Dilruba Aktar v. AHM Mohsin,*(2003) 55 DLR 568; *State v. Khandker Zillul Bari*(2005) 57 DLR (AD) 129; *The State v. Munia Alias Monia and 7 ors* (2010) 15 MLR 318.

[17]*The State v. Md. Haroon*, (1985) 37 DLR (AD) 167; *The State v. Nantu Biswas & others*, (2009) 6 ADC 254.

[18] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 417 (2).

[19] Ibid, s 417A (2).

[20]*NaniLal Samant v. Rabin Ghose* (1964) AIR (cal) 1964.

[21]*Mukter Ali Bepari v. The State & another*, (1999) 19 BLD 259: (1999) 51 DLR 439; *GMM Rahman v. State and another*,(2010) 62 DLR (AD) 410.

5.1.5 When No Appeal Lies

I. Where an accused person has pleaded guilty and has been convicted by a Court of Session or any Metropolitan Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.[22]

Such a plea of guilty should be related to the facts of the prosecution case as stated against the accused and as disclosed in the accusation.[23]

II. There shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or Chief Judicial Magistrate or Metropolitan Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty Taka only.[24]

III. There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed and there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred Taka only.

An appeal may be brought against any sentence by which any punishment therein mentioned is combined with any other punishment, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.[25]

5.1.6 Appeal by a Fugitive

At present there is a procedure of trial of an accused in his absence. If an accused cannot be arrested or if he does not surrender before the court after publication of notices in newspapers, law permits to start trial against him in his absence.[26] After trial if such an accused is convicted and if he is arrested on the basis of conviction warrant, an appeal may be

[22] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 412.

[23] *Ayaruddin v State* (2004) 56 DLR 494, 497.

[24] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 413.

[25] Ibid, s 415.

[26] Ibid, s 339B; the Special Powers Act, 1974 (Act No. XIV of 1974), s 27 (6); the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Act No. VIII of 2000), s 21.

filed on his behalf. The settled principle is that as he was a fugitive during the entire process of trial, he is not entitled to get any relief or any protection from any court of law.[27]

5.1.7 Form of the Petition of Appeal

Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall, unless the Court to whom it is presented otherwise directs, be accompanied by a copy of the judgment or order appealed against. [28]

If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.[29]

5.1.8 Procedure of the Court of Appeal

On receiving the petition, the Appellate Court shall pursue the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. No appeal presented shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.[30] Before dismissing an appeal, the Court may call for the record of the case, but shall not be bound to do so.[31]

5.1.8.1 Notice of Appeal

If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal.[32]

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[27] *Khalilur Rahman and another v. The State*, (1981) 33 DLR 12;(1998) 3 BLC (AD) 72; *Md. Monsur Ali & others v. The State*, (2003) 23 BLD (AD) 208; (2003) 55 DLR 131; *A.C.C v. A.T.M. Nazimullah Chowdury & others* (2010) 15 MLR (AD) 213;*Anti-Corruption Commission v. ATM Nazimullah Chowdhury and others*, (2010) 62 DLR (AD) 225; *Anti-Corruption commission v. Md. Abul Kalam Shamsuddin and others,* (2009) 6 ADC 323.

[28] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 419.

[29] Ibid, s 420.

[30] Ibid, s 421 (1).

[31] Ibid, s 421 (2).

[32] Ibid, s 422.

If an appeal is filed against acquittal or against the inadequacy of sentence, the Appellate Court shall cause a like notice to be given to the accused.[33]

5.1.8.2 Power of Appellate Court in Disposing of Appeal

The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of Public Prosecutor, if he appears, and, in case of an appeal against acquittal, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

1. in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retired or sent for trial, as the case may be, or find him guilty and pass sentence on him according to law ;
2. in an appeal from a conviction,
    a) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or
    b) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence or,
    c) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106(3), not so as to enhance the same;
3. in an appeal for enhancement of sentence,
    a) reverse the finding and sentence and acquit or discharge the accused or order him to be retired by a Court competent to try the offence, or
    b) alter the finding maintaining the sentence, or
    c) with or without altering the finding, alter the nature or the extent, or the nature and extent, or the sentence, so as to enhance or reduce the same;
4. in an appeal from any other order, alter or reverse such order;
5. make any amendment or any consequential or incidental order that may be just or proper

[33] Ibid, ss 417A, 422.

However, the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement. Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed than might have been inflicted for that offence by the Court passing the order or sentence under appeal.[34] Unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.[35]

5.1.9 Summary Disposal of Appeal

Section 421 of Code empowers an Appellate Court to dismiss an appeal summarily if it considers that there is no sufficient ground for interfering. However, from the proviso, it is clear that no such power can be exercised unless the appellant or his advocate has had a reasonable opportunity of being heard. To determine whether there is any sufficient ground or not, the court is to peruse carefully the petition of appeal and other documents filed along with it specially the copy of the Judgment. There cannot be any hard and fast rule laying down the circumstances under which an appeal may be summarily rejected. However, from the judicial pronouncements it is now settled that even while dismissing an appeal summarily, the court must state reasons in support of such a decision in the Judgment. In other words, the court must apply its judicial mind to all the relevant questions, either of fact or of law raised in the appeal.[36]

In a case, it has been observed that while exercising power under section 421, the Court must take care to make it apparent that the power has been exercised with due regard to judicial considerations and should give some reasons which may indicate that the questions raised in the case has been duly appreciated.[37]

The High Court Division disposed of an appeal acquitting the accused person. In the appeal filed before the Appellate Division by leave, the Appellate Division deprecated the manner in which the appeal was disposed of by the High Court Division. The following are the observations:

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[34] Ibid, s 423.

[35] Ibid, s 424.

[36] *Government of East Pakistan v. Murzuqullah, Ex-C.O. and others*, (1967) 19 DLR (SC) 486.

[37] *Ekabbar Ali and others v. State* (1970) 32 DLR 48.

"The appeal was disposed of practically in a summary manner without properly considering the entire evidence on record, particularly the evidence of eye witnesses and upon making a wrong approach based on untenable premises."[38]

5.1.10 Period of Limitation for Appeal

The period of limitation for filing an appeal is as follows:

i. In the case of an appeal filed by the Public Prosecutor under section 417(1) of Code against an order of acquittal or inadequacy of sentence, the period of limitation is six months from the date of conviction.[39]

ii. In the case of an appeal by the complainant under sections 417(3) and 417A (2) of Code against an order or inadequacy of sentence, the period of limitation is sixty days from the date of conviction.[40]

iii. In the case of an appeal against an order of sentence of death, the period of limitation is seven days from the date of conviction.[41]The limitation is very inadequate and therefore, the period should be extended at least 60 days.

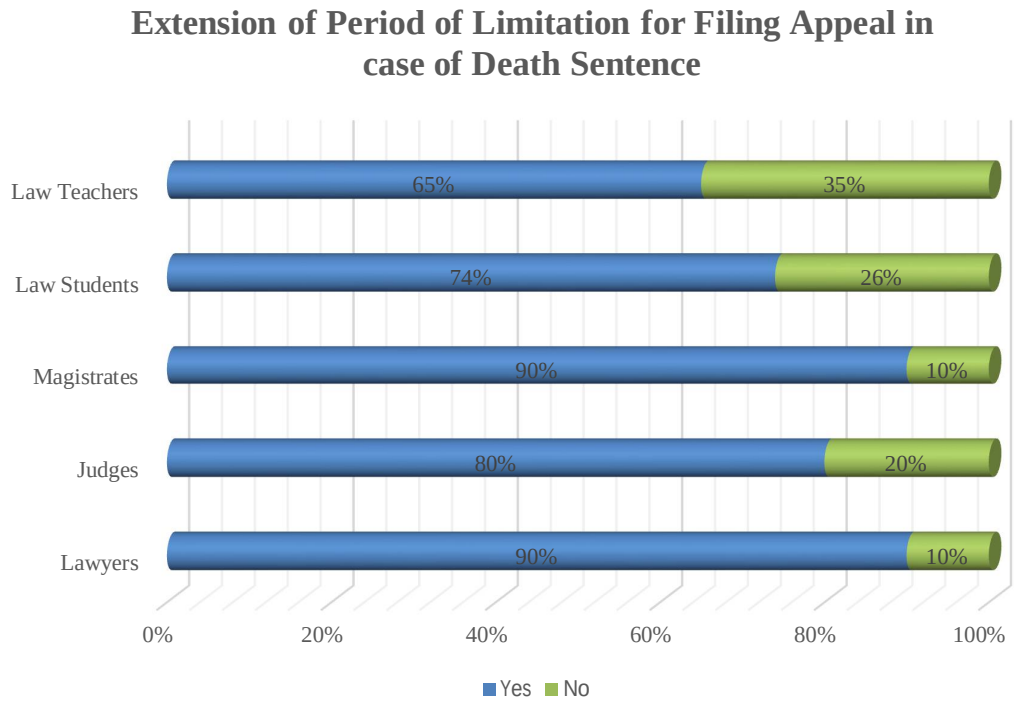
90% of Lawyers, 80% of Judges, 90% of Magistrates, 74% of Law students and 65% Law teachers are in favor of extension of period of limitation.

[38]*The State v. Abdul Khaleq alias Abdul Khaleq Howlader*,(1997) 17 BLD (AD) 187.

[39] The Limitation Act 1908 (Act No. IX of 1908), Sch I, Art 157.

[40] The Code of Criminal Procedure, 1898 (Act No. V of 1898), ss 417(3), 417A(2).

[41] The Limitation Act 1908 (Act No. IX of 1908), Sch I, Art 150.



iv. In the case of an appeal against an order of sentence, the period of limitation for filing appeal to any court other than the High Court Division is thirty days from the date of conviction.[42]

v. In the case of an appeal against an order of sentence, the period of limitation for filing the appeal to the High Court Division, except in cases stated above in (i) and (iii), is sixty days from the date of conviction.[43]

Period of limitation to move the Session Court by way of revision, is that provided in cases of appeals under Article 154 of the Limitation Act. No period of limitation has been prescribed in Limitation Act for revision.[44]

When the appellant satisfies the court that he or she had sufficient cause for not preferring the appeal within the prescribed period, the court can admit an appeal after the prescribed period of limitation.[45]However the court will not entertain an appeal by the complainant, if it is submitted after the expiry of sixty days. The court is not competent to condone delay in case

[42] Ibid, Sch I, Art 154.

[43] Ibid, Sch I, Art 155.

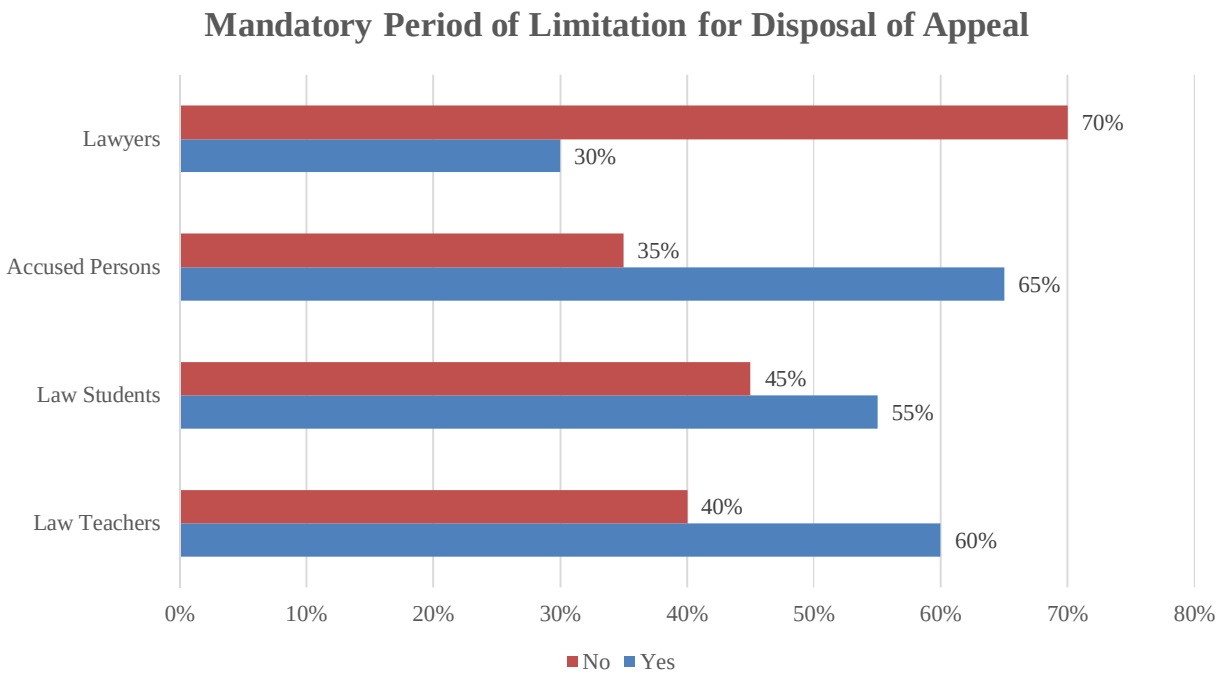
[44]*Md. Nur Ali v. The State* 12 DLR 681.

[45] The Limitation Act 1908 (Act No. IX of 1908), s 5.

of such an appeal after the prescribed period because unlike the Limitation Act 1908 Code. is a special law.[46]

5.1.10.1 Time for Disposal of Appeal

An appellate court will dispose of an appeal filed before it within ninety days from the date of service of notice upon respondents. In determining the time, only the working days will be counted.[47] However, this provision of time limit is directory and not mandatory because non-compliance of the provision has got no penal consequence.[48] The appeal should be disposed of by the judge himself on merit on perusal of the entire record of the case if none appears at the time of hearing so the period of limitation should be made mandatory. Study suggests so.



30% of Lawyers, 65% of Accused persons, 55% of Law students, and 60% of Law teachers suggest for mandatory period of limitation so far it relates to disposal of appeal.

5.2 Revision in Criminal Cases

The provisions for revising the decision of criminal court are essential for the due protection of life and liberty and are rooted in the conception that men including the judges and

[46]*Authorised Officer, CDA v. State* (1986) 38 DLR 27; *MA Mazed v. State* (2004) 56 DLR (AD) 198,200.

[47] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 442A (1) (3).

[48]Sarkar Ali Akkas, above note 116, 209.

Magistrates are fallible. In cases where no appeal has been provided by law or in cases where the remedy of appeal has for any reason failed to secure fair justice, the Code provides for another kind of alike procedure, namely, revision.[49]

Revision is purely discretionary remedy granted by a Higher Court with a view to correcting miscarriage of justice. This is a kind of supervisory jurisdiction exercised by the superior courts over inferior courts. Revision is applicable both in civil and criminal matters though there are differences between criminal revision and civil revision.[50]

Very wide discretionary powers have been conferred on the Court of Sessions and the HCD for the purpose of 'revision'. While making provision for extensive the powers of revision for ensuring correctness, legality and propriety of the decision of criminal courts, the code has also taken care to see that this revisional procedure does not make the judicial process unduly cumbersome, expensive or dilatory.

5.2.1 Revisional Power of High Court of Division and Courts of Sessions

Revisional power has been conferred to the High Court Division under section 439 and to the Sessions Judge under section 439A. The Sessions Judge has not been given a separate power under section 439A and it has been provided in that section that the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court Division under section 439. The High Court Division may exercise any of the powers conferred on a court of appeal by sections 439, 426, 427, 428, and the power conferred on a court under section 338. While deciding a revision, the power of the High Court Division has been restricted to some extent.[51]

In exercise of revisional power, the High Court Division shall not inflict a greater punishment for the offence than might have been inflicted for the offence by a Magistrate of the first class and the court cannot convert a finding of acquittal into one of conviction.[52] As the Revision Court is empowered to exercise all or any of the powers conferred on a court of appeal, the High Court Division or the Sessions Judge may allow compounding of offences at the

[49] KN Chandrasekharan Pillai (*Lectures on Criminal procedure including Probation and Juvenile Justice*, 4thedn, Eastern Book Company, India 2010) 230.

[50]Abdul Halim, *Text Book on Code of Criminal Procedure* (5thedn, CCB Foundation, Dhaka, 2011)196.

[51] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 439 (1).

[52] Ibid, s 439 (3) (4).

revisional stage also. But the High Court Division cannot entertain any proceeding in revision with respect to an order made by the Sessions Judge under section 439A. No revision can also be entertained at the instance of the party who could have filed an appeal.[53] However, in exercise of the revisional power, after giving an opportunity to the convict of showing cause why sentence shall not be enhanced, High Court Division may enhance the sentence.[54]It is clear that an order passed by the Sessions Judge under section 439A shall be final and against that order, no further revision shall lie.[55]

There are several decisions as to whether second revision will lie under section 439 when a person already moved the Sessions Judge under section 439A and got an order. In some important cases, the uniform view taken is that a second revision does not lie after a judgment or order is passed by the Sessions Judge in a revision filed under section 439A. In some of those decisions it has also been held that even inherent jurisdiction under section 561A should not also be exercised unless such exercise is essential and justified.[56]

5.2.2 Who May File Petition

It is open to any person to move High Court[57] on its revisional side. It is not always necessary that only an aggrieved person can invoke revisional jurisdiction of High Court.[58]

A revision application could not be brushed aside as incompetent if it had not been moved by the complainant.[59] Under section 435 of Code. it is open to any person to move the court on its revisional side and the High Court can, on its own motion, in the case of any proceeding the record of which has been called by itself or which has been put up for orders or which otherwise comes to its knowledge, proceed to enquire into the matter in order to satisfy itself

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[53] Ibid, s 439 (5).

[54] Ibid, s 439 (6).

[55] Ibid, ss 439 (4), 439A (2).

[56]*Shafiqur Rahman and others v. Nurul Islam Chowdhury and others*, (1983) 35 DLR (AD) 127; *Haji Golam Hossain v. Abdur Rahman Munshi and others*, (1988) 40 DLR (AD) 196; *Aminul Islam v. Mujibur Rahman and others*, (1993) 45 DLR (AD) 9; *Aminul Islam v. Mujibur Rahman & others*, (1992) 12 BLD (AD) 54 ; *Mariam Begum v. State & another*, (2001) 53 DLR 226; *Nader Ali Shaikh v. State & other*(1984) 4 BCR (AD) 87.

[57] Corresponding Court in Bangladesh: High Court Division of the Supreme Court.

[58]*Haleem Shah v. The State* NLR 1997 Cr. 200; PLD 1996 Kar. 306; PLJ 1996 Cr.C 1070 (DB).

[59] 1991 P.Cr.L.J. 728.

as to the regularity of such proceeding. Therefore, even if the petitioner had no *locus standi*, High Court is still competent to examine the matter in exercise of its revisional powers.[60]

5.2.3 No Direct Application to High Court Division

The revisional jurisdiction of the Sessions Judge is concurrent with that of the HCD. No party can approach the High Court Division without moving the Sessions Judge at the first instance in revision. When a power is co-extensive with two or more court in ordinary circumstances the litigant must first resort to the remedy in the court of lowest jurisdiction which can finally decide his case.[61]

The practice of direct approach to the High Court Division without first seeking remedy from the Sessions Court should be avoided. Such petitions in ordinary course should be first filed in the Sessions Court.[62] The practice is firmly established that the High Court[63] will not entertain an application for revision where the applicant could have applied to the Sessions Judge.[64] Where party seeks his remedy from the Sessions Judge, the entertainment of any further proceeding by the High Court Division in revision with regard to an order made by the Session Judge under section 439A of Code would be barred under section 439(5) of Code.[65]

A fresh application for revision on the same grounds as those on which previous application was based is not maintainable.[66] An application for revision dismissed for default can be restored to the file and re-heard. When a matter comes up in revisional jurisdiction the petitioner has no right whatsoever beyond the right of bringing his case to the notice of the

[60] *Qazi Fazlullah and others v. The State and another,* PLD 1965 Kar. 105 (DB); 17 DLR (W.P.) 102.

[61] Zahirul Huq, *Law and Practice of Criminal Procedure* (11th edn, Bangladesh Law Book Company, Dhaka, 2011) 764.

[62] *Abdul Wahid v. Mohammad Shafi & Asst. Commr. Pishin,* NLR 1978 Cr. 475; PLD 1978 Quetta 66; PLJ 1978 CR.C. 144; 1972 P. Cr.L.J. 982; *Mohammad sharif Atta Mohammed v. Mithabhai Nathoo,* PLD 1960 Kar. 12.

[63] Corresponding Court in Bangladesh: High Court Division of Supreme Court.

[64] 1983 P. Cr.L.J. 27; *Muhammad Ehsan v. The State,* PLD 1968 Lah. 451; PLD 1960 Kar. 42; PLD 1959 Dacca 192 (DB); PLD 1952 Bal. 25; AIR 1959 A.P. 377 (FB).

[65] 1980 P. Cr.LJ 191.

[66] AIR 1935 All 466.

court. It is for the court to interfere in cases where it seems that some real and substantial injustices has been done.[67]

5.2.4 Significance of the Words 'Finding', 'Sentence', or 'Order'

The High Court Division or any Sessions Judge, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.[68]

The words "finding, sentence or order" in this section are three separate matters and are separated by the disjunctive conjunction "or finding or sentence or order". There are, therefore, three matters in regard to which the revision may be heard. One is finding, another is sentence and the third is an order.[69] In this section 'finding' includes a conviction or an acquittal. The word 'sentence' means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. 'Order' covers commands or directions that something shall be done, discontinued or suffered. The word 'proceedings' is wider than the expression 'judicial proceeding' and covers everything done and recorded by an inferior criminal court as a court.[70]

5.2.5 Limitation for Filing a Revision

There is no prescribed period of limitation either in the Code. or in the Limitation Act for revision, but in the case of *Nur Ali v. State*[71] it was held that the period of limitation to move the Courts of Sessions by way of revision, is that provided in cases of appeals under Art 154 of the Limitation Act 1908. Accordingly, under Art 154 of the Limitation Act 1908, a revision against any order can be filed to a Court of Sessions within thirty days from the date

[67]Zahirul Huq above note 129, 765.

[68] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 435.

[69] 41 Cr.L.J 876.

[70]Zahirul Huq, above note 129, 764.

[71] (1960) 12 DLR 681.

of order. However, under section 5 of the Limitation Act 1908, the Court can, for sufficient reason shown, admit a revision after the prescribed period of limitation.

In the case of *Bangladesh v. Kobad Ali*[72]the Appellate Division of the Supreme Court held:

"There is a long practice being followed since the days of Dhaka High Court that a revisionsal application is to be within the period of ninety days, prescribed by law for an appeal, and that the HCD may, in its discretion, entertain an application beyond that period in a suitable case where there is no negligence or laches on the part of the petitioner. There is a long standing practice, which is sound and reasonable and does not call for any departure."

Referring to the above principle laid down by the Appellate Division, the HCD, in *Khaled Ahmed Chowdury v. Bagladesh*[73]observed that a revisional application is to be filed within the period of ninety days, but there is no legal bar to entertain, in the interest of justice, such revisional application even after the period of ninety days provided by sufficient cause to move the HCD.

In the event of condonation of delay, as the HCD observed, 'the court is bound to consider each court and every fact on the basis of which such condonation is sought and then pass an order manifesting by itself reasons which is persuaded' the court to form a particular opinion.[74]

5.2.6 Time for Disposal of Revision

Actually there is no time frame in the Code of Criminal Procedure for filing revision against any kind of order. For such practice this takes long time to finish the trial of case. However, There is no prescribed period of limitation either in the Code or in the Limitation Act for revision, but in the case of *Nur Ali v. State*[75] it was held that the period of limitation to move the Courts of Sessions by way of revision, is that provided in cases of appeals under Art 154 of the Limitation Act 1908. Accordingly, under Art 154 of the Limitation Act 1908, a revision against any order can be filed to a Court of Sessions within thirty days from the date of order. However, under section 5 of the Limitation Act 1908, the Court can, for sufficient reason shown, admit a revision after the prescribed period of limitation.

[72] (1987) 39 DLR (AD) 205.

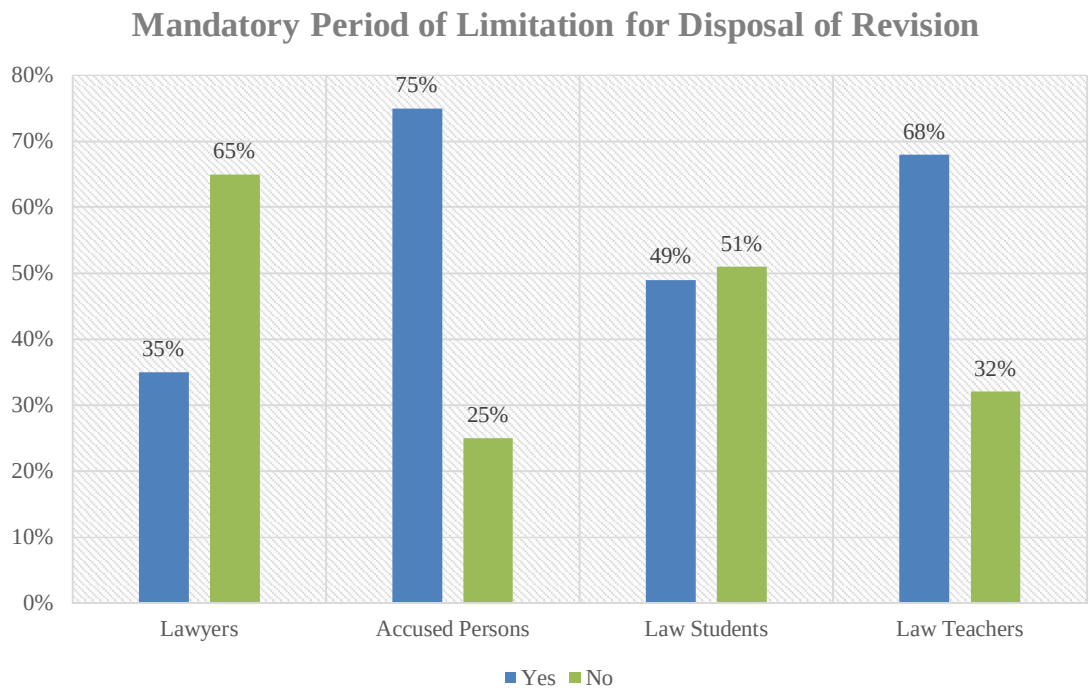
[73] (2005) 57 DLR 694, 696.

[74]*Khaled Ahmed Chowdury v. Bagladesh* (2005) 57 DLR 694, 697.

[75] (1960) 12 DLR 681.

A court having power of revision must dispose of a proceeding in revision within ninety days from the date of service of notice upon the parties. In determining the time, only the working days will be counted.[76] However, this provision of time limit is directory and not mandatory because non-compliance of the provision has got no penal consequence.[77]

35% of Lawyers, 75% of Accused persons, 49% of Law students, and 68% of Law teachers suggest for a different mandatory period of limitation so far it relates to disposal of revision.



5.3 Realization of Fine through Execution

Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the District authorizing him to realize the amount by execution according to civil process against the movable or immovable property, or both, of

[76] The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 442A (1) (3).

[77]Sarkar Ali Akkas, above note 116, 216.

the defaulter: Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing is considers it necessary to do so.[78]

The Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.[79]

Where the Courts issue a warrant to the Collector under sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the Decree, and all the provisions of that Code as to execution of decrees shall apply accordingly: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.[80]

A warrant issued under section 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Metropolitan Magistrate within the local limits of whose jurisdiction such property is found.[81]

Execution means the carrying out of some act or course of conduct to its completion andthe completion, fulfillment, or perfecting of anything, or carrying it into operation and effect.[82]It is styled "final process," and consists in putting the sentence of the law in force.[83]In other words, it is the method of carrying into effect of the sentence or judgment of a court.[84] On close

[78]The Code of Criminal Procedure 1898 (Act No. V of 1898), s 386 (1).

[79]Ibid, s 386 (2).

[80]Ibid, s 386 (3).

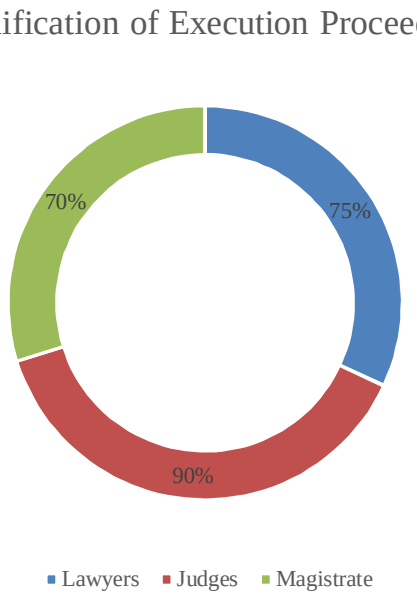
[81] Ibid, s 387

[82] The Law Dictionary <http://thelawdictionary.org/execution/> accessed on 9.12.2016.

[83] 3 Bl. Comm. 412.

[84] U. S. v. Nourse, 9 Pet. 28, 9 L. Ed. 31;Griffith v. Fowler, IS Vt. 394; Pierson v. Hammond. 22 Tex. 5S7; Brown v. U. S., 0 Ct.CI. ITS: Ilurlhutt v. Currier. 08 N. II. 94, 38 Atl. 002; Darby v. Carson, 9 Ohio, 149.

perusal of the aforesaid provision of the Code so far it relates to realization of fine is cumbersome, therefore, a simple procedure may be evolved for realization of fine. Study suggests for simplification of execution proceedings making some alternatives of existing procedure of execution as laid down under Chapter XXVIII of the Code. 75% of Lawyers, 90% of Judges and 70% of Magistrates suggest for amending the execution proceedings so that the state or victim may enjoy the fruit of the judgment of a criminal case.



5.4 Inherent Power of the HCD of the Supreme Court

An inherent power of the HCD is extra-ordinary and unusual power to quash any criminal proceedings including judgment or any other orders to secure the ends of justice or to prevent abuse of the process of the court. In other words, to do justice and to undo injustice, inherent power may be exercised so that innocent persons are saved from unnecessary harassment.

The inherent power, so far as the criminal jurisdiction of the High Court Division is concern, is of paramount importance. Before venturing into the full discussions in connection with the inherent power of the High Court Division of the Supreme Court of Bangladesh U/S 561 A of the Code, it will be wise to mention the original Section of the said Code that reads as follows-

“Nothing in this section shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this

Code, or to prevent abuse of process of any court, or otherwise to secure the ends of justice."[85] Application for quashment may be filed at any stage of the proceeding even at the pre-trial stage.

In the case of *Abdul Quader Chowdhury and others vs. The State*[86] the Appellate Division has clearly spelt out the categories of cases where the HCD should interfere to quash criminal proceedings:

- Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stand against the accused.
- Where institution or continuance of criminal proceedings against an accused person may amount to an abuse of the process of the court or when the quashing of the impugned proceedings would secure the ends of justice.
- Where there is a legal bar against institution or continuance of a criminal case against an accused person.
- In a case where the allegation in the FIR or the complainant even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged and in such cases no question of weighing and appreciating evidence arises.
- The allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.

However, before taking of cognizance of a case by the competent court or tribunal a proceedings cannot be said to be pending and accordingly, a proceeding cannot be quashed unless cognizance in respect thereof has been taken and process issued.[87] But the point is that the harassment of the accused starts not from the cognizance of a case but from the lodging of FIR or filing complaint. As soon as the FIR is lodged, the police may arrest the accused and court may enlarge him on bail or put him in jail. And thereby it causes serious prejudice to him and right to free movement[88] as enshrined in the Constitution of Bangladesh. If the power is bestowed upon the sessions judge as of revisional power, the backlog of cases to the

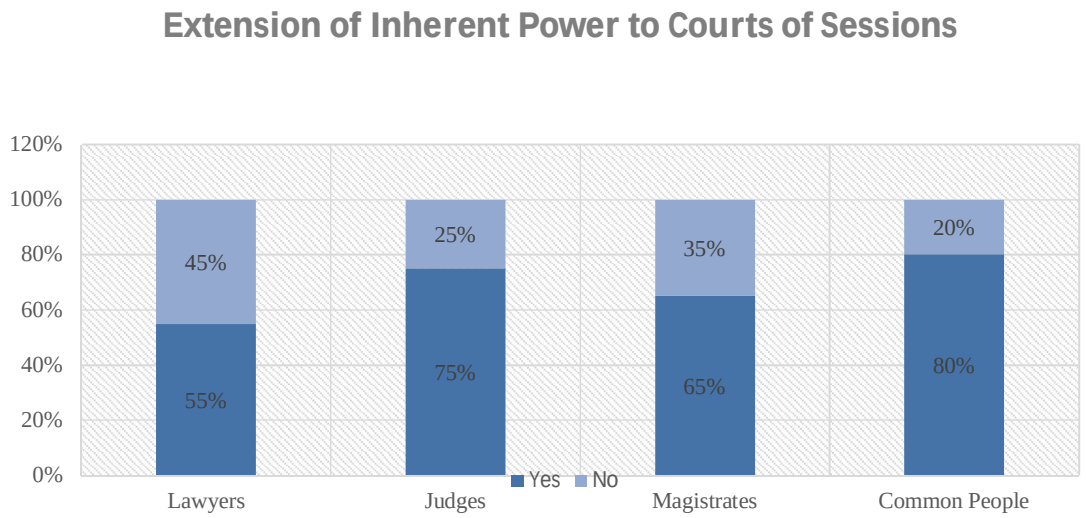
[85] The Code of Criminal Procedure 1898 (Act No. V of 1898), s 561A.

[86] 28 DLR (AD) 38; *Ali Akkas v. Enayet Hossain and other*, 2 MLR 166.

[87] *Abdul Huque and Others v. State* , 60 DLR (AD) 1.

[88] The Constitution of the People's Republic Of Bangladesh, Art 36-Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh.

HCD will be reduced and poor and indigent people may get the benefit of the same without incurring unnecessary time, money
and energy.



Study clearly supported for giving concurrent jurisdiction of exercising inherent power to the courts of session. 55% of Lawyers, 75% of Judges and 65% of Magistrates and 80% of Common people expressed their opinion to extend inherent power to the courts of sessions.

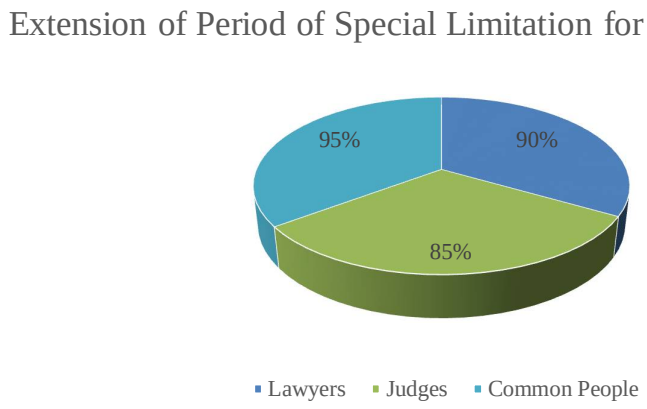
5.5 Special Limitation for Filing Appeal

Section 28 of the Suppression of Violence against Women and Children Act 2000, it has been provided that the aggrieved party may appeal to the HCD within 60 days against the judgment, order and sentence inflicted by the Nari O Shisu Nirjatan Daman tribunal and section 26 of the Acid Aparadh Daman Ain 2002 also made such provisions. Section 30 of the Special Powers Act 1974 provides that An appeal from any order, judgment or sentence of a Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery or passing thereof. In the case of *Shamsul Haque v. State*[89] it was held that application for condonation of delay in filing an appeal under the Special Powers Act is not maintainable. In another case of Elahi Bux v. State[90], it was held that section 5 of limitation Act has no manner of application for condonation of delay in filing an appeal under section 30 of the Special Powers Act 1974. It is true, the aggrieved person may file petition under

[89] 1990 BLD 360.

[90] 1987 BLD 126.

section 561A of the Code for quashing the judgment or order if it is barred by special limitation in view of section of 29(2) of Limitation Act 1908. But the power of quashment is not as extensive as of appellate court. So study suggest to make a proviso after the relevant provisions of special laws so far it relates to appeal to that effect- provided that the Appellate Court or HCD may, for sufficient reason, extend the said period of limitation. 90% of Lawyers, 95% of the Common people and 85% of Judges support this view.



5.6 Conclusion

A simplified procedure should be evolved for early and speedy disposal of Appeal, Revision and Execution Proceedings. Specific provision should be made as to the limitation of filing revisional application. Mandatory period of limitation has to be made in order to dispose of appeal and revision. Inherent power may be bestowed upon the Sessions Judges to do justice and to undue injustice so far it relates to false, frivolous and unfounded criminal cases.

Chapter- VI

Ramifications of Law on Bail and Bail Bond under Existing Criminal Justice System in Bangladesh

6.1 Introduction

Bail has a great impact upon the parties concerned in a criminal case. Prosecution always wants the accused to be in the custody of the jail *hajot.* On the contrary, accused persons want to secure bail at the first instance from the court of law to better prepare for the legal battle in which they have been entangled either justly or falsely. The basic conception of the word "Bail" is release of a person from the custody of police and delivery into the hands of sureties who undertake to produce him in Court whenever required to do so.[1]An accused person is said, at common law, to be admitted to bail, when he is released from the custody of the officers of the Court and is entrusted to the custody of persons known as his sureties, who are bound to produce him to answer, at a specified time and place, the charge against him and who in default of so doing are liable to forfeit such sum as is specified when bail is granted.[2] The principle underlying release on bail is that an accused person is presumed in law to be innocent till his guilt is proved and as a presumably innocent person, he is entitled to freedom and every opportunity to look after his case, provided his attendance is ensured by proper security.

Bail is a technique which has been evolved for effecting a synthesis of the two basic concepts of human value, namely, the right of an accused to enjoy his personal freedom and the public interest on which a person's release is conditioned on the surety to produce the accused person in Court to stand the trial.[3]

Again, if a person is falsely implicated in a criminal case and he is detained until such case is disposed of, the total purpose of justice would definitely be frustrated. Another consideration in relation to bail is-detention of a person is such irreparable loss, that nothing can be compensation to it and in a false case the whole mechanism of justice will be a farce if bail is not granted to the accused.[4]

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[1]*The Crown v. Khushi Muhammad,* PLD 1953 Federal Court 170.

[2] PLD 1978 SC (Aj& K), 92.

[3] MR Mollick, *Bail: Law & Practice* (4th edn, Eastern Law House, India 2008) 1-2.

[4]*Mohd. Haroon & Ors. v. Union ofIndia & Anr.*4 S.C.R 2014, 972.

Therefore, bail is procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority.[5]

6.2 Concept and Meaning of Bail

Black's Law Dictionary

According to Black's Law Dictionary what is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court".[6]

Wharton's Law Lexicon

"To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a date at a certain place, which security is called bail because the person arrested or imprisoned is delivered into the hands of those who find themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which if they have, if they fear his escape, etc., the legal power to deliver him."[7]

Webster's 7th New Judicial Dictionary

"Bail is a security given for the due appearance of a prisoner in order to obtain his release from imprisonment; a temporary release of a prisoner upon security; one who provides bail".[8]

Concise Oxford Dictionary

"Bail is when a man is taken or arrested for felony, suspicion of felony, indicted of felony or any such case, so that he is restrained of his liberty. And being by law bailable offence surety to those which have authority to bail him, which sureties are bound for him to the Kings use in a certain sum of money, or body for body, that he shall appear before the Justices of Goal delivery at the next sessions, etc.[9]

Chambers 20th Century Dictionary

The meaning of the word 'bail' is a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free. Etymologically the word 'bail' is said to derive from an old French verb 'bailor' which

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[5]Urvashi Saikumar, *Indian System of Bail – Anti Poor<http://www.legalserviceindia.com/articles/bail_poor.htm> accessed 4 November 2015*.

[6]Bryan Garner ,*Black's Law Dictionary* (9thedn,Thomson West, USA, 2009).

[7] John Mounteney Lely & John Jane Smith Wharton, *Wharton's Law-Lexicon* (Nabu Press, USA, 2010).

[8]Susan Ellis Wild (ed), *Webster's New Judicial Dictionary*, (7th edn, Webster's New World, USA, 2006).

[9] *Public Prosecutor v. G. Manikyarao*, AIR 1959 AP 639; 1959 Cr LJ 1398.

means 'to give' or to 'deliver'. Another view is the word is derived from the Latin term '*Bajulare'* which means, 'to bear a burden'.[10]

Venkataramaiya's Law Lexicon

Bail is defined as-"To set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day and at a place certain because the party arrested or imprisoned is delivered into the hands of those who find themselves or become bail for his due appearance when required in order that he may be safely protected from the prison".[11]

In words of Krishna Iyer J.

The subject of bail"..... Belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. "In fact bail is transitory immunity of the offender by the order of the Court conditioned by surety to face his trial ultimately.[12]

6.3 History and Development of Concept of Bail in Different Legal Arena

The concept of bail can be traced back to 399 BC, when Plato tried to create a bond for the release of Socrates. The modern bail system evolved from a series of laws originating in the middle ages in England.

6.3.1 Evolution of Bail in England

During the medieval times in Britain a concept of circuit courts was in existence. From time to time Judges used to go on circuit to various parts of the country to adjudicate cases. The terms Sessions and Quarter Sessions are thus derived from the intervals at which such courts were held. In the meanwhile, the under trials were kept in prison awaiting their trials. These prisoners were kept in very unhygienic and inhumane conditions which caused the spread of a lot of diseases. This agitated the under trials, who were hence separated from the accused. This led to their release on their securing a surety, so that it was ensured that the person would appear on the appointed date for hearing. If he did not appear then his surety was held

[10]EM Kirkpatrick (ed.), *Chambers 20th Century Dictionary*, (New edn, Edinburgh, 1983).

[11] R Venkataramaiya , Venkataramaiya's Law Lexicon (2nd edn, Vol-I, Delhi Law House, Delhi,1986) 260

[12]Shobha Aggarwal, *India: Revisiting Krishna Iyer's Treatise on Bail In the Context of Tejpal's Case,*<http://www.sacw.net/article8657.html>accessed 5 November 2015.

liable and was made to face trial. Slowly the concept of monetary bail came into existence and the said under trials was asked to give a monetary bond, which was liable to get forfeited on non-appearance.

In the Magna Carta, in 1215, the first step was taken in granting rights to citizens. It said that no man could be taken or imprisoned without being judged by his peers or the law of the land. Then in 1275, the Statute of Westminster was enacted which divided crimes as bailable and non bailable. It also determined which judges and officials could make decisions on bail. In 1677, the Habeas Corpus Act was added to the Right Of Petition of 1628, which gave the right to the defendant the right to be told of the charges against him, the right to know if the charges against him were bailable or not. The Habeas Corpus Act, 1679 states, "A Magistrate shall discharge prisoners from their imprisonment taking their recognizance, with one or more surety or sureties, in any sum according to the Magistrate's discretion, unless it shall appear that the party is committed for such matter offenses for which by law the prisoner is not bailable."

In 1689 came the English Bill of Rights, which provided safeguards against judges setting bail too high. It stated that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required."[13]

6.3.2. Bail in India

When a person is arrested in a bailable case, bail is a right to the arrested person.[14] Section 437, Cr. P.C relates to non bailable offences.[15] Section 438 Cr. P.C is relating to direction for grant of bail to person apprehending arrest.[16] When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or Court of Sessions for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Section 439 of Cr. P.C. is relating to special powers of High Court or Court of Sessions regarding bail. The directions of the Supreme Court should strictly be followed in the matter of arrest of any person under any law.

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[13]The History of Bail Laws<http://www.bountyhunterforhire.com/training/historyofbail.html> accessed 6 November 2015.

[14]The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s 436-In what cases bail to be taken.

[15]Ibid, s 437-When bail may be taken in case of non- bailable offence.

[16]Ibid, s 438 -Direction for grant of bail to person apprehending arrest.

The Apex Court in *Gudikanti Narsimloo vs. Public Prosecutor*[17], laid down the principle of bail not jail. In recent cases, the Apex Court has recommended the enlargement of under trial prisoners on bail on personal bond even without sureties. But in spite of that millions of people are jail pending trial because of their illiteracy to obtain bail or poor to furnish bail accounts.

The Apex Court in *R.D. Upadhyay vs. State of Andhra Pradesh and others*[18], ordered the release of under trial prisoners being confined in jail for periods ranging from 1 to 11 years *suo-moto* without any application for bail.

In *Mahesh Kumar vs. State of N.C.T., Delhi*,[19]the Apex Court directed the Trial Court to complete the trial within a period of three months of else release the accused on bail. Similarly, in *Sriram Choubey vs. State of Maharastra*[20]the accused has been kept in jail for a period of one year and he found that there was no need of keeping him as and under trial prisoner and hence he was directed to be released on bail. In *Shailendra Kumar vs. State of Delhi*[21]the appellant had been tried and convicted for offences under sections 304-B and 498-A and he had been sentenced for 7 years. He had already spent three years in prison and there was no prospect of early hearing of the appeal, it was held that it was a fit case for bail.

In *Maneka Gandhi v. Union of India*[22]it was held that the amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond, it would be very harsh and oppressive if he is required to satisfy the court-and what is said in regard to the court must apply equally in relation to the police while granting bail-that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often resulting denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond.

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[17]*GudikantiNarsimloo v. Public Prosecutor* AIR 1978, SC 429.

[18]*Upadhyay v. State of Andhra Pradesh and others* [1996(1) ALD (Crl.) 257].

[19]*Mahesh Kumar v. State of N.C.T., Delhi,* 2000 Cr..L.J. 2786.

[20]*SriramChoubey v. State of Maharastra,* AIR 2002, SC 2338.

[21]*Shailendra Kumar v. State of Delhi* , 2000 (4) SCC 178.

[22]*Maneka Gandhi v. Union of India* (1978) 2 SCR 621.

It also stated that there is a need to provide by an amendment of the penal law that if an accused willfully fails to appear incompliance with the promise contained in his personal bond, he shall be liable to penal action.

J. Per Bhagwati & Koshal, JJ. further observed that it is now high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases.

6.3.3 Bail in USA

Still, American bail law is actually rooted in legislation. The Judiciary Act of 1789[23] stated that all noncapital offenses (crimes that did not carry the possibility of the death penalty) were bailable. In the case of capital crimes, the possibility of bail was at the judge's discretion. The act also placed limits on judges' powers in setting bail -- think back to the English Bill of Rights' prohibition against "excessive bail."

In Colonial America, bail law was based off English law. Some of the colonies simply guaranteed their subjects the protections of British law. In 1776, after the Declaration of Independence, those which had not already done so, enacted their own versions of bail law.

"Excessive bail ought not to be required..."[24]"Excessive bail shall not be exacted for bailable offenses."[25]

In 1785, the following was added, "Those shall be let to bail who are apprehended for any crime not punishable in life or limb...But if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail."

The Eighth Amendment in the US Federal Bill of Rights is derived from the Virginia Constitution, "Excessive bail shall not be required...", in regards to which Mr. Livermore commented, "The clause seems to have no meaning to it, I do not think it necessary. What is meant by the term excessive bail...?!"

The Eighth Amendment, to the Constitution, like the English Habeas Corpus Act of 1678, requires that a suspect "be informed of the nature and cause of the accusation" and thus enabling a suspect to demand bail if accused of a bailable offense.[26]

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[23]The Judiciary Act of 1789 (ch. 20, 1 Stat. 73), Enacted by the 1st United States Congress, introduced in the Senate as the Judiciary Act by Richard Henry Lee on June 12, 1789.

[24]The Virginia's 1776 Constitution, June 29, 1776 (Bill of Rights; June 12, 1776), s 9.

[25]The Pennsylvania Constitution of 1776, s 29.

[26] The History of Bail Laws <http://www.bountyhunterforhire.com/training/historyofbail.html> accessed 5 October 2015

A community protection aim ("danger to the community or any other person") appeared for the first time in an American law, but it applied only to the special case of a defendant seeking release after conviction, while awaiting sentencing or appeals[27].*Stack v. Boyle*[28]supported the reformers' appearance view and *Carlson v. Landon*[29] supported the danger-prevention function. The debate about the legitimacy (and constitutionality) of a danger-prevention purpose of the bail decision reached a crescendo during and after the passage by Congress of the Bail Reform Act of 1966. In that landmark legislation, the only stated purpose of the pretrial release decision for accused persons was to ensure appearance in court[30].

The American Bar Association's Standards Relating to Pretrial Release, published in 1968, mirrored the bail reform tenets and spirit of the federal legislation, but they also signaled a shift in the debate about the purpose of the pretrial release decision. Although draft standards for preventive detention based on danger were not approved by the ABA, they were discussed and included in an appendix as a model for discussion. Then, in 1970, Congress took the historic step of enacting legislation for the District of Columbia that permitted outright pretrial detention in noncapital cases of defendants posing a danger to "any other person or the community"[31]. The D.C. Code was a modified version of the model outlined in the ABA's draft preventive detention standards. The "Preventive Detention Code" of the District of Columbia constituted the first enactment of a law in the United States authorizing preventive detention of criminal defendants based on estimations of their possible dangerousness. The D.C. preventive detention law could not have been enacted without support from both bail reform advocates as well as supporters of the public safety agenda.

The early reform advocates attacked the discretionary and discriminatory practice of detaining defendants sub rosa through manipulation of financial bail. They demanded more objective and explicit procedures. Public safety advocates demanded that danger be an acknowledged and explicit concern of the bail process. The compromise was to accept community safety as a legitimate concern but only to allow it pursuant to narrowly defined procedures and criteria. Moreover, the D.C. law was notable because it expressly prohibited detention of defendants through the use of financial bail conditions. Thus, early reformers

[27]18 U.S.C.A. 3146 (b).

[28](1951)342 U.S. 1.

[29](1952)342 U.S. 524.

[30]18 U.S.C.A. 3146(a).

[31]D.C. Code: 23–1321, 1322(a).

lost the argument against the public safety agenda, but gained more explicit procedures and a detention-decision mechanism that responded more to due process concerns, and a system that did not authorize confinement on the basis of cash.

Between 1970 and 1984, a growing number of states revised their laws to permit the consideration of dangerousness at the bail stage. No court ruled authoritatively on the constitutionality of the danger agenda until the D.C. Circuit of Appeals in *U.S. v. Edwards*[32] approved the provisions of the D.C. law. Shortly thereafter, Congress enacted the Federal Bail Reform Act of 1984[33]. Adapting provisions and concepts from the D.C. law, Congress revised federal law to permit detention of defendants who pose a danger "to the community or any other person." In 1987 in *U.S. v. Salerno*[34], the U.S. Supreme Court upheld the constitutionality of pretrial detention under the "danger" provision of the Federal Bail Reform Act of 1984. It declared "preventing danger to the community" to be "a legitimate regulatory goal." Although laws in all states do not explicitly recognize a community safety agenda for pretrial release or have preventive detention statutes, the effect of this legal history—the second transformation of bail—has been to make danger concerns at the bail stage legally acceptable.

6.4 Constitutional Validity of Granting Bail in Bangladesh

The Constitution of the People's Republic of Bangladesh is the supreme law of that country. The constitution provides fundamental rights to the citizen which includes security of life and liberty of the people. The constitution provides that no person shall be deprived of life and personal liberty save in accordance of law.[35]It indicates that there have to be certain norms and regulations except which a person not to be detained. Provision of the article 31 is to protect the citizen's life, liberty, property which is inalienable right of the citizen.

That's why constitution provides safeguard and other measures in the case of arrest and detention.[36]These include the right of being in relation to the ground of detention and right to consult a lawyer on behalf of the detainee and rights of being to produce before a magistrate within 24 hours. These rights are excluded for the enemy alien. Thus it's clear that though the constitution don't mention the name of bail but the right to bail is under the constitutional guarantees.

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[32](1981)430 A.2d. 132.

[33]18 U.S.C.A.: 3141–3156.

[34]481 U.S. 739.

[35]The Constitution of The People's Republic of Bangladesh 1972, Art 32

[36]Ibid, Art 33

6.5 Factors in Considering the Amount of Bail Bond

Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be. If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court Division, Court of Session or other Court to answer the charge.[37] Section 499 of the Code contemplates the execution of a bond with sureties and not a cash deposit.[38]

The object of releasing the accused on bail is not to penalize him. Therefore, the amount of bail demanded shall be fixed in view of S. 440 of the Code with due regard to the circumstances of the case and shall not be excessive.[39]

The Bail Reform Act of 1966 in USA provides for the release of defendant on his personal recognizance or upon execution of an unsecured appearance bond in an amount specified by the judicial officer before whom he appears, unless the officer determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of defendant as required, in which event specified conditions of release which will reasonably assure defendant's appearance for trial may be imposed. The Bail Reforms Act, 1966 was initiated by President Johnson who felt that under the Federal Rules, bail amount is higher than reasonably calculated to be necessary to assure the presence of the accused.

However in Empirical Study, Majority of respondents suggested that Maximum and Minimum amount of the bond should not be fixed but to be determined having regard to relevant factors and nature of the charge. The amount of every bond executed shall be fixed with due regard to the circumstances of the case, and shall not be excessive.[40]

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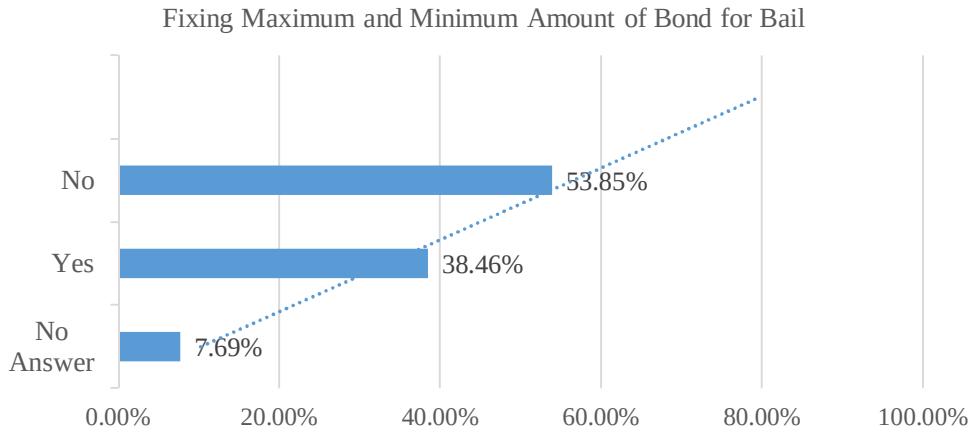
[37]The Code of Criminal Procedure, 1898 (Act No v of 1898), s 499

[38]*Lakhi Narayan v. Crown* 4 DLR 352.

[39]*Ekbal Singh v. State AIR* 1960 Punj. 572; 1960 Cr. LJ 1493.

[40]The Code of Criminal Procedure, 1898 (Act No v of 1898), s 498.



It has been found from the Empirical Method that financial capacity of the accused, socio-economic condition of the accused, social impact of the offence and the gravity and nature of offence should be considered in fixing the figure of maximum and minimum amount of bond. However one of them (Respondents) suggested that the minimum amount of bond should be 20,000/= and maximum amount be 50, 0000/=, and another respondent put his statement stating the maximum is 20,000/= and minimum is at the discretion of the court.

However, it has been stated that the factors to be taken into consideration in determining the amount of bail are:

1. Ability of the accused to give bail,
2. Nature of the offense the accused is charged with,
3. Penalty for the offense charged,
4. Character and reputation of the accused,
5. Health of the accused,
6. Character and strength of the evidence,
7. Probability of the accused appearing at trial,
8. Forfeiture of other bonds, and
9. Whether the accused was a fugitive from justice when arrested

6.6 Application of Forfeiture of Bond for Bail in Practice in Bangladesh

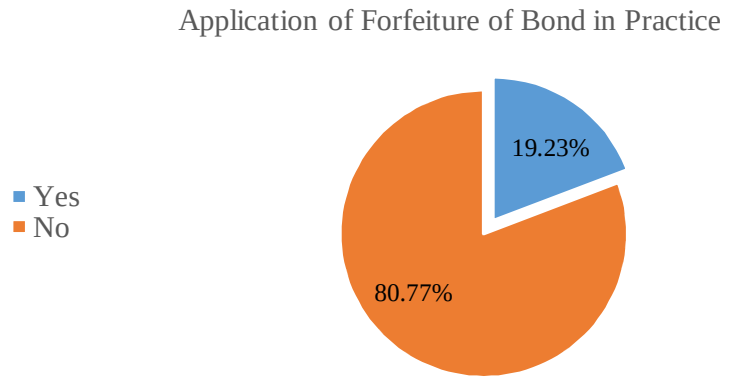
The monetary value of the security, known also as the bail, or, more accurately, the bail bond, is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional

bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security.

Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of a Metropolitan Magistrate or Magistrate of the first class, or, when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.[41]

Even though there is no provision for issuing a notice to show cause before a bond is forfeited, the Court must be satisfied and should record its satisfaction that the bond has been forfeited. The court has to record the grounds of such proof and thereafter on being satisfied it may call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.[42]

However, in practice, the provisions regarding the forfeiture of bond are not being applied. Some of the respondents suggested that practice regarding the forfeiture of bond be introduced in every District Court but before doing that, in order to compel the bar to undertake the obligation in this respect, mutual discussion between bar and bench on forfeiture of bond in the prolonged absence of accused by misusing the privilege of bail should be held on with the leadership of Sessions Judge.



80.77% respondents opined that the provisions regarding the forfeiture of bond are not being applied and on the other hand 19.23% respondents were positive about the application of forfeiture of bond for bail.

[41]Ibid, s 514 (1).

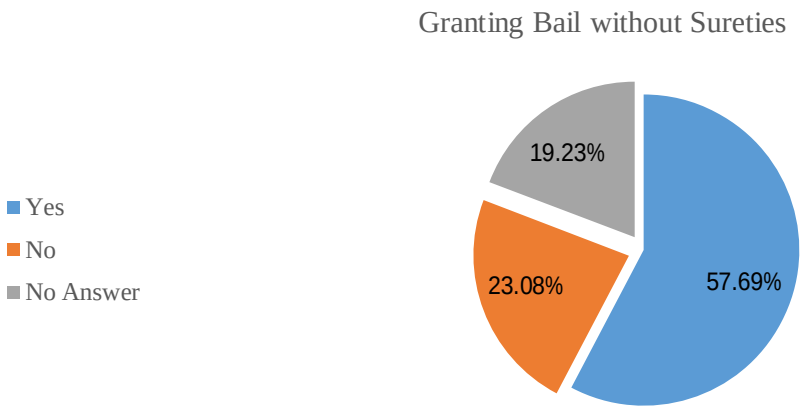
[42]*Vishnu Dalai v. State* AIR 1960 Ori 108; 1960 Cr Lj 842.

One of the respondents suggested that the provisions of depositing sureties money should be strictly followed and maintained which is a barrier of the court for the pressure of local Bar. However someone opined that a provision should be clearly made regarding the forfeiture of bond.

6.6.1 Granting Bail without Sureties

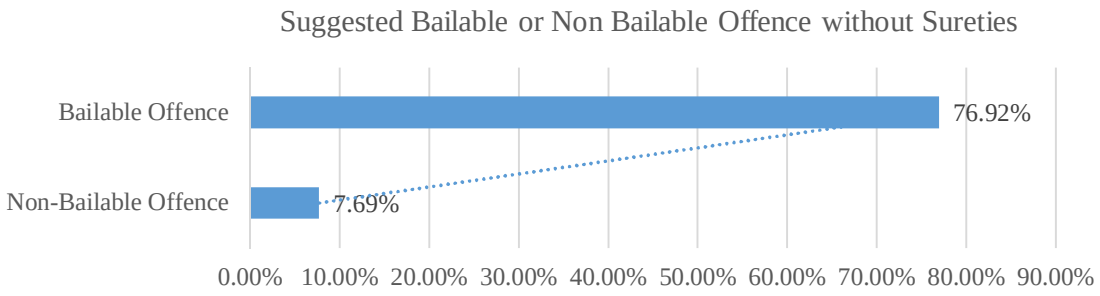
The Apex Court in *Gudikanti Narsimloo vs. Public Prosecutor*[43], laid down the principle of bail not jail. In recent cases, the Apex Court has recommended the enlargement of under trial prisoners on bail on personal bond even without sureties. But in spite of that millions of people are jail pending trial because of their illiteracy to obtain bail or poor to furnish bail accounts.

Empirical Study suggested that the Court should be empowered to grant bail in any kind of offence without sureties. 57.69% respondents argued in favor of Yes and 23.08% respondents disfavored Yes, and 19.23% respondents were silent.



Of all respondents, 76.92% respondents opined that in bailable offence granting bail without sureties would be more justified than in non-bailable offence. However, 7.69% respondents said that it might be justified in non- bailable offence as well.

[43] (AIR 1978, SC 429).



6.7 Factors Relating to Accused Taking into Consideration in Granting Bail

A proper scrutiny may be done to determine whether the accused has his roots in the community which would deter him from fleeing from the court. The court can take into account the following facts concerning the accused before granting him bail:

a. The nature of the offence committed by the accused.
b. The length of his residence in the community.
c. His employment status history and his financial condition.
d. His family ties and relationships.
e. His reputation character and monetary conditions.
f. His prior criminal records, including any record or prior release on recognizance or on bail.
g. Identity of responsible members of the community who would vouch for his reliability.
h. The nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance.
i. Any other factors indicating the ties of the accused to the community or barring on the risk of willful failure to appear.

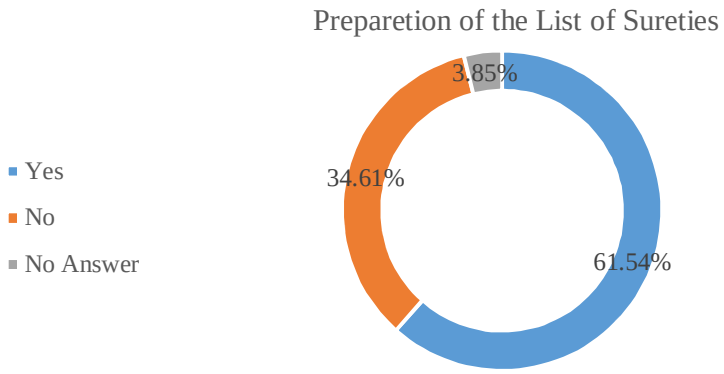
6.7.1 Preparation of the List of Sureties and Persons to Be Enlisted as Sureties

Before any person is released on bail by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.[44]

[44]The Code of Criminal procedure, 1898 (Act No V of 1898), s 499.

All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants. On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.[45]

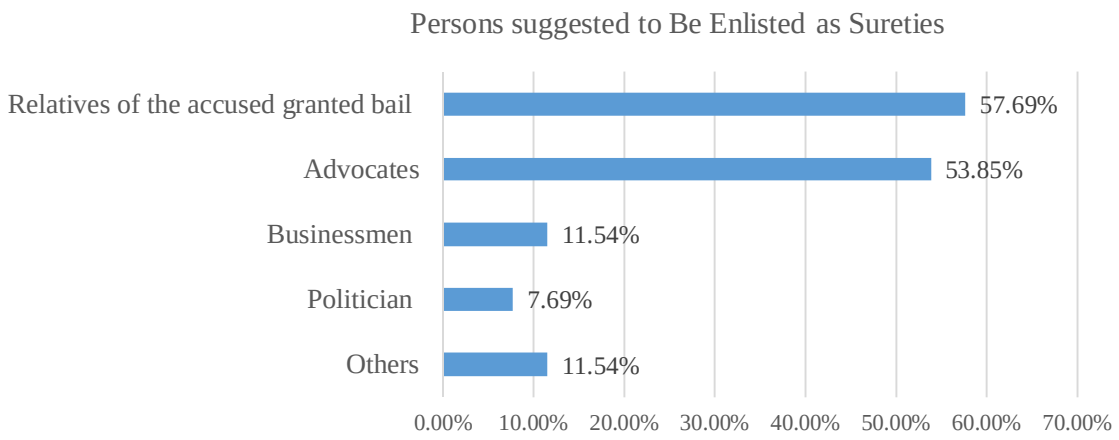
Majority of the respondents opined in Empirical Study that List of the sureties should be prepared in every District Court, whereas 34.61% respondents said negative about the preparation of the list of sureties.



One of the respondents suggested that list of sureties should not be prepared because those enlisted sureties may abuse their position, they might demand money from the parties for their being sureties.

It has been found from the study that respondents suggested the following persons be enlisted as sureties in every District Court if it is practicable. How many respondents (in percentage) suggested what categories of persons to be enlisted as sureties have been enumerated below:

[45]Ibid, s 502 (1).



6.8.1 Permissibility of Application of Successive Bail

The right guaranteed by Article-21 of Indian Constitution does not permit an accused to make successive bail applications when they have been earlier rejected by the higher courts. The decision of a superior forum, even on a bail application, is binding on the lower courts unless there is a material change in the fact situation warranting a different view. [46]

6.9 Legal Provisions of Bail in National and International Laws

6.9.1 Provisions Enshrined in the Universal Declaration of Human Rights[47]

Article 9- No one shall be subjected to arbitrary arrest, detention or exile.

Article 10- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1) - Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

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[46] *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2005) 2 SCC 42, 53: AIR 2005 SC 921.

[47] Universal Declaration of Human Rights, (Adopted on 10 December 1948 and Ratified on16 December 1948), General Assembly resolution 217 A, (UDHR).

There are thus several reasons which have been enumerated as to why bail ought to be allowed to prevent pre-trial detention.

6.9.2 Provisions Relating to Bail in Different National Laws

Chapter XXXIX of the Code of Criminal Procedure including section 496 to 502, sections 86, 167(5), 169, 426 (2) (2A), 339C(4), 435, schedule 2, column 5, schedule 2 under the heading offence against other laws save the Penal Code; section 32 of Special Powers Act,1974; section 19 of the Nari-o-Shishu Nirjatan Daman Ain, 2000; section 15 of the Acid Aparadh Daman Ain; order 16, Rule 18 of CPC; section 31A of the Narcotics Control Act, 1990; section 22(5) of the Manab Pachar Pratirodh O Daman Ain, 2012; section 48 of the Children Act, 1974 and chapter VII of the Criminal Rules and Orders narrate the provisions relating to bail in connection with the offences described in the concerned Acts/ Laws. Other than these, many other Minor Acts have the provision relating to bail.

6.9.2.1 Provisions in the Code of Criminal Procedure 1898

Section 86 of the Code of Criminal Procedure provides that-

(1). Such Executive Magistrate or District Superintendent of Police or Police Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent of Police or Police Commissioner or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction the Magistrate, District Superintendent of Police or Police Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

Provided further that, if the offence is a non-bailable offence or no direction has been endorsed under section 76 on the warrant, the Sessions Judge or The Metropolitan Sessions Judge, the Chief Judicial Magistrate or the Chief Metropolitan Magistrate or a Magistrate of the first class, specially empowered in this behalf, in whose local jurisdiction the person is arrested, may, subject to the provisions of section 497 and for reasons to be recorded in writing, release the person on an interim bail on such bond or security as the Judge or the

Magistrate thinks fit and direct the person to appear by a specified date before the Court which issued the warrant and forward the bond to that Court.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

Section 167(5) of the Code provides that-

If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation-

(a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and

(b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it.

Provided further that in cases in which sanction of appropriate authority is required to be obtained under the provisions of the relevant law for prosecution of the accused, the time taken for obtaining such sanction shall be excluded from the period specified in this sub-section.

Explanation-The time taken for obtaining sanction shall commence from the day the case, with all necessary documents, is submitted for consideration of the appropriate authority and be deemed to end on the day of the receipt of the sanction order of the authority.

Section 169 of the Code provides that-

If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial.

Section 426 (2) (2A) of the Code provides that-

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court Division in the case of any appeal by a convicted person to a Court subordinate thereto.

(2A) When any person is sentenced to imprisonment for a term not exceeding one year by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

Section 339C (4) of the Code provides that-

If a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail to the satisfaction of the Court, unless for reasons to be recorded in writing, the Court otherwise directs.

Section 435 of the Code provides that-

(1) The High Court Division or any Sessions Judge, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of it or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation-All Magistrates, whether Executive or judicial, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section.

(3) Repealed by section 116 of the Code of Criminal Procedure (Amendment) Act, 1923 (Act No. XVIII of 1923).

Sections 496 to 502 of the Code provides that-

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such

person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

497(1). When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been 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 years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) The High Court Division or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

497A. Omitted by section 2 the Code of Criminal Procedure (Amendment) Ordinance, 1982 (Ordinance No. IX of 1982).

498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court Division or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court Division, Court of Session or other Court to answer the charge.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

6.9.2.2 Provisions in Special Powers Act 1974

Section 32 of Special Powers Act provides that-

Notwithstanding anything contained in the Code or in any other law for the time being in force,-

(a) all offences triable under this Act shall be cognizable ;and

(c) no person accused or convicted of [an] offence triable under this Act shall, if in custody, be released on bail or on his own bond unless-

(i) the prosecution has had opportunity of being heard in respect of the application for such release; and

(ii) where the prosecution opposes the application, the Magistrate, Special Tribunal or Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence.

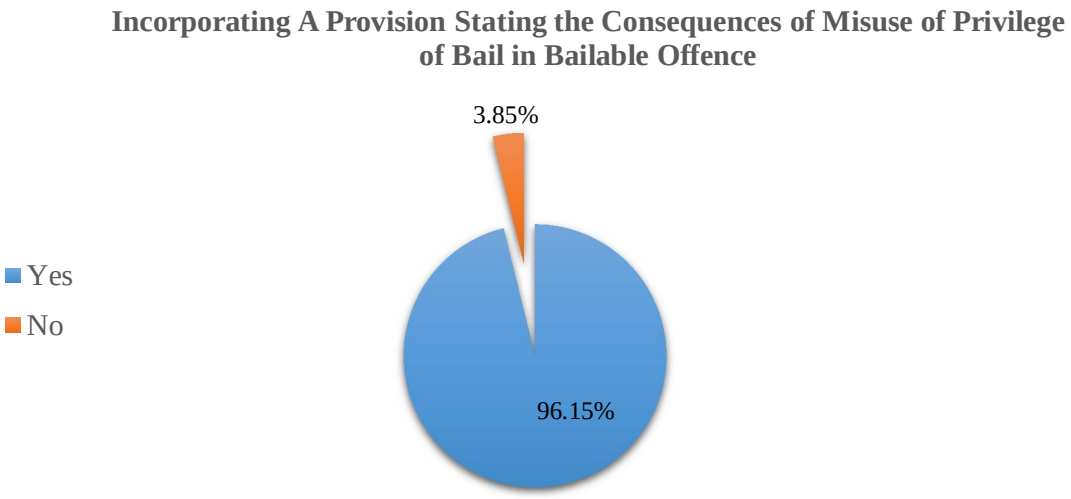
6.10. Nature of Offence upon the Basis of Bail

6.10.1BailableOffence

Under section 496 of the Code of Criminal Procedure a person arrested on the allegation of a bailable offence shall be released on bail if an application for bail is made before the Court.

If a person is convicted for an offence which is bailable, in the appeal, he is also entitled to get bail as of right. Which offences under Penal Code, 1860 are bailable that has been mentioned in the Fifth column of the Second Schedule of the Code of Criminal Procedure, 1898. Offences under other special laws, whether bailable or not, has been mentioned in those laws. However, if nothing is mentioned in any special law in regard to any offence as to whether it is bailable or not, it can be presumed from the amount of punishment provided for that specific offence. If the punishment is up to less than two years imprisonment, it is bailable. If the punishment is two years imprisonment or more, the offence is to be treated as non-bailable one. If the punishment is only fine it is generally presumed that the offence is bailable.

Empirical Study on Law of Bail and Bail Bond suggested a provision should be clearly made in the code stating the consequences of misuse of privilege of bail granted in Bail-able offence. That is to say in case of bail in Bail-able offence, grant of bail in second time or in case of presence of the accused after avoiding the trial or absconding from sureties should be discretionary upon Court. In answer to the Questions of Questionnaire 96.15% of the respondents suggested the incorporation of a provision stating the consequence of misuse of privilege of bail in bail-able offence, on the contrary, 3.85% of the respondents said NO.



However, Empirical Study suggested that in case of misuse of Privilege of bail the court can cancel the bail and further consideration of bail shall be the exclusive jurisdiction of the court.

6.10.2 Non-Bailable Offences

Section 497 provides that when any person accused of any non-bailable offence is arrested, he may be released on bail, but he shall not be so released if there appears a reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

This section has provided discretion to the Court for releasing an accused who was allegedly involved in commission of a non-bailable offence.

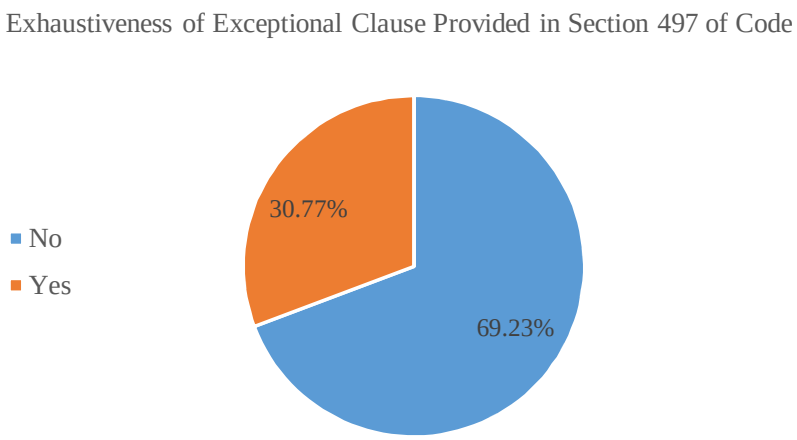
6.10.3 When Court May Grant Bail in Non-Bailable Offence

If the Court, upon assessing primary evidence, or if there is no primary evidence available other than only the allegation, then upon counting the probability of commission of offence by the person accused of, taking into consideration various factors including character and social standing of him, believes that the allegations are not well founded, it may release the accused person on bail though he is accused of committing a non-bailable offence. But a general prohibition on granting bail to the persons accused of committing a crime the punishment of which is death penalty or imprisonment for life, has been provided in section 497 with the exception that the Court is empowered to release any such person on bail who is under the age of 16 years or woman or sick or infirm person. In this section though there is no bar for the magistrate courts to grant bail in grave offences, the practice is different. Generally magistrate courts having cognizance power, do not grant bail to the persons accused of grave offences like murder, dacoity, smuggling etc.

Other circumstances under which bail may be granted to a person who is accused of a non-bailable offence: Sub-section (2) of section 497 provides that when further inquiry will be necessary, the accused shall be released on bail pending such inquiry. Moreover, if after conclusion of the trial and before delivery of judgment, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, he shall be released on bail.

However, there cannot be any hard and fast rule on this point, the court is to decide whether there is any reasonable ground on consideration of the facts and circumstances of each case. But the exceptional clause provided in section 497 of the Code of Criminal Procedure 1898 i.e. provisions for granting bail in Non Bailable offence, are not exhaustive and it has been

said by 69.23% of the respondents. Some respondents opined other category of persons to be included under Exception Clause of section 497 of the Code.



Empirical Study suggested following persons be enlisted in the Exceptional Clause of Section 497 of the Code

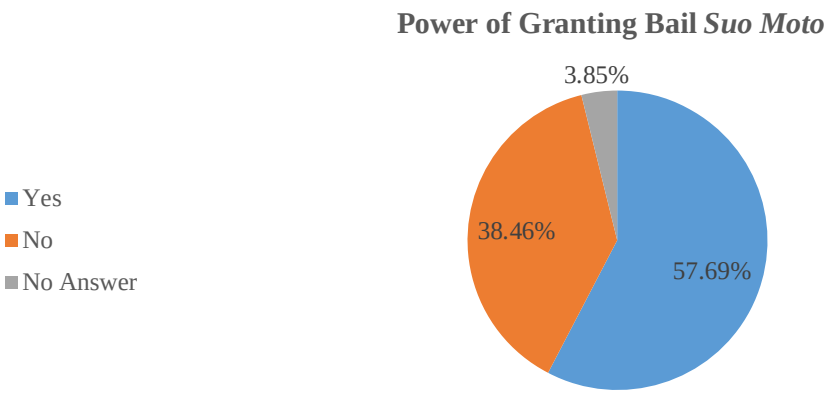
- Children
- Disable Person
- Sick Person
- Student
- Person having renowned social status
- Comminity of *Hizra* (Hermaphrodite)
- Government Servant or officials having committed an offence in personal capacity
- Person in inhumane condition

6.11. Bail at Different Stages

6.11.1 Granting Bail by the Court *Suo Moto*

Both in Bailable and Non- Bailable Offence when any person accused of such offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he shall be released on bail only upon application made in that behalf. But the real scenario of the court is that many innocent persons have been lingering in custody for many years for not having any sureties.

However, in Empirical Study 57.69% respondents suggested that It would be just and reasonable to empower the Court to grant bail *suomoto* in any kind of offence, Bailable or Non- Bailable, while 38.46% respondents disfavored this empowerment by saying No.



Someone suggested in Empirical Study that only in bailable offence court may be empowered to grant bail *suomoto*. One of them made a reason from his valuable experience behind granting that power that poor, destitute accused remained in jail for years only because they could not afford lawyers and no harm will be done if the court is empowered to do so. Bailable and Non-bailable provisions should be omitted, and to ensure practicable social justice, bail matter should be the inherent power of the court.

6.11.2 Bail before Submission of Police Report

If an application for bail is made in an FIR case before submission of the police report under section 173 of the Code the materials before the court at that stage will be scanty, the only document for consideration will be the FIR. So, at that stage, the court is to consider whether the accused for whom petition for bail has been made is an FIR named accused, whether there is any allegation of any overt act against him, whether any eye-witness of the occurrence recognized him etc.

6.11.3 Anticipatory Bail

Section 498 of the Code of criminal procedure 1898 deals with the issue of anticipatory bail without using the term. The theme of `Anticipatory bail' is to protect the accused and non-accused free man from going to prison bar from the onslaught of executive or high-handedness of police with oblique motive to humiliate him in a false and frivolous accusation of a cognizable non-bailable offence and imminent threat of arrest due to social and political rivalry and enmity.'

The concept of anticipatory bail or bail before arrest or pre-arrest bail stems from a man's entertainment of apprehension that he may be arrested on an accusation of having committed a non-bailable offence. In an application for pre-arrest bail attracting section 498 of the Code is the domination of an apprehension of arrest.

Law Commission of India in its 41st report dated September 24, 1969 recommended insertion of a provision as to anticipatory bail. The recommendation was as follows:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commissions. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction in necessary in the interests justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.

Section 438, the Indian Code.: Direction for grant of bail to person apprehending arrest

1. When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.
2. When the High Court or the Court of Session makes a direction under sub-section (1), it may include conditions in such direction in the light of the facts of the particular case, as it may think fit including:

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly; make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

3. If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a

Magistrate taking cognizance of such offence decided that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

6.11.3.1 Blanket Anticipatory Bail

A blanket order of anticipatory bail, namely, an order which serves as a blanket to cover or protect any or every kind of allegedly unlawful activity, in fact or any eventually likely or unlikely, regarding which no concrete information can possibly be had, cannot be passed because such a blanket order is bound to cause serious interference with the function of the police.[48]Normally under section 438 of the Code[49] a direction should not issue to the effect the applicant shall be released on bail "whenever arrested for whichever offence whatsoever".[50]

The filing of FIR is not a condition precedent to the exercise of the power under Section 438 of the Code, and that, the imminence of a likely arrest based on a reasonable belief if shown to exist will be sufficient to confer the court the jurisdiction to grant anticipatory bail even if no FIR has been lodged or no case registered.[51]

6.11.3.2 Principles of Granting of Anticipatory Bail

It is only in genuine cases that the exercise of power under section 498 of the Code of Criminal Procedure for anticipatory bail should be invoked. Such an order might be eminently called for in circumstances of grave character affecting the liberty of a citizen. Indiscriminate grant of bail amounts to an act of judicial extravagance which cannot be countenanced. Such cases would necessarily be extremely rare and that by its very nature the power to interfere with the discretion of an official such as a police officer exercising statutory power at the very earliest stages of investigation would require to be exercised with the very greatest care. The Court would need to be satisfied that if it stayed its hands until the police officer has "himself exercised his discretion in the matter and refused, upon arrest, to grant bail; a grave or irreparable wrong or injustice might result which it was in the highest degree desirable to avoid, while at the same time preserving the interests of justice so far as they related to the charge against the accused person."

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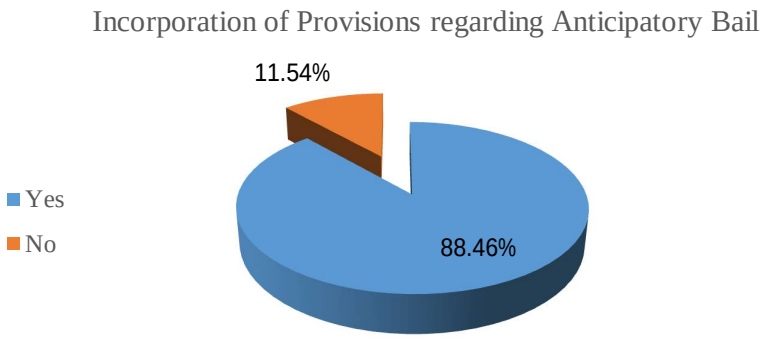
[48]*Gurbaksh Singh v. State of Punjab,* AIR 1980 SC 1632; (1980) 2 SCC 565.

[49] Corresponding Law: The Code of Criminal Procedure, 1898 (Act No. V of 1898), s 498.

[50]*Adri Dharan Das v. State of W.B.* AIR 2005 SC 1057; (2005) 4 SCC 303; 2005 SCC (cri) 933; 2005 Cr Lj 1706; (2005) 107 DLT 685; (2005) 2 Mah LJ 259.

[51]*Purna Chandra* 1975 Cr LJ 1815; 75 CWN 890 9(cal).

88.46% of the Respondents in Empirical Study opined that the provision regarding the Anticipatory Bail (Advanced Bail) should be incorporated precisely in the Code of Criminal Procedure, 1898?



One of the respondents suggested that the provisions for Anticipatory Bail should be abolished in toto. Other suggested that it be ousted because the Subordinate Courts are enough to consider such kind of bail. However it should be clarified and elaborate, suggested by one of them

In the case of *Md. Liton vs. the State*[52]the Division Bench of the High Court Division was constituted by Md. Badruzzaman and Mohammed Asaduzzaman, JJ. and on behalf of the Division Bench Md. Badruzzaman, J., observed:

"The High Court Division and the Sessions court have concurrent jurisdiction under section 498 of the Code of Criminal Procedure in matters of bail and the practice of this Court is that when two Courts have concurrent jurisdiction, the court of inferior jurisdiction should be moved first. If the petitions for anticipatory bail are first moved in the High Court Division as a matter of routine, the jurisdiction of the Sessions Judge would become redundant. If the petitioner has any genuine apprehension of his arrest in connection with any cognizable offence, he should have moved the Sessions Judge under section 498 of the Code without moving this Court first bypassing the Sessions Judge, Dhaka who has concurrent jurisdiction in the matter."

Under section 498, an accused may be admitted to bail and the power has been given to the High Court Division and also to the Courts of Sessions that means, both the High Court

[52](1995) 3 BLT (HCD) 253.

Division and the Courts of Session have concurrent Jurisdiction to admit a person to bail under this section.[53] The latest decision on the point may be found in the case of *The State v.. Zakaria Pintu and others*[54]. In this case, the Appellate Division observed:

> "This kind of direction is very much improper and tantamount to interfering with the discretion of the Sessions Judge, in considering the petition for bail on merit. The Sessions Judge, in considering a petition for bail, is at liberty either to grant or to refuse it in his discretion, subject to merit of the case, without being influenced by any order of the High Court Division."

In the case of State *v. Abdul Wahab Shah Chowdhury*[55] considered the scope of granting of an anticipatory bail in the following words:-

> Now we come to the real point at issue as to the conditions and circumstances under which an application for pre-arrest or anticipatory bail can be considered under section 498 of the Code of Criminal Procedure. We wish to lay down as a first proposition that it is an extraordinary remedy, and a exception to the general law of bail which can be granted only in extraordinary and exceptional circumstances upon a proper and intelligent exercise of discretion. The ordinary law is that a person accused of a non-bailable offence must appear before the Court taking cognizance for making a prayer for bail. The prayer can be made when he is arrested or detained with or without warrant and is brought before the said Court. Pre-arrest bail is an exception to the general law...

In the case of *the State v. Zakaria Pintu & others*[56] the Appellate Division observed:

> In the instant case, the FIR disclosed direct allegations of offences of very serious nature against the accused respondent No. 1 and other accused respondents in which one person died and another one seriously injured on 26.11.2009. Naturally, the police tried to apprehend them, but was unsuccessful, yet within 10 (ten) days. 14 (fourteen) of them very conveniently appeared before the concerted Bench of the High Court Division and prayed for bail. Held: the question of anticipation did not arise here since they are admitted fugitives and sure to be arrested in connection with investigation into the allegations contained in the FIR and to bring the offenders

[53](1999) 51DLR (AD) 243; (1999) 4 MLR (AD) 291; (1998) 19 BLD (AD) 189; (1999) 4 BLC (AD) 195; (1998) 50 DLR 242.

[54](2010) 18 BLT (AD) 491.

[55](1999) 51 DLR(AD) 243.

[56](2010) 18 BLT (AD) 491.

before the Court for trial. In the present case, the learned Judges ought to have remembered that anticipatory bail is an extra-ordinary relief and this power should be exercised sparingly, only in an extraordinary and exceptional circumstances, not otherwise. The Court must bear in mind that granting of anticipatory bail is an exception to the general rule.

It has further observed that if a fugitive surrender before the High Court Division and prays for bail, it may either grant bail under section 498 of the Code, or is obliged to hand him over to the police, to be dealt with in accordance with law. But directing the police not to arrest a fugitive, which the police is duty bound to do under the law, is an order beyond the ambit of the Code of Criminal Procedure or any other law, known to us. This kind of order may impede the investigation and ultimately frustrate the administration of criminal justice.

In the case reported in *DC Bola-vs- Md. Monirul Islam*[57] it was held:

It should be considered in dealing with this question that there is no legislative sanction, allowing anticipatory bail. Only on construction of section 498, the power of granting anticipatory bail is exercised by the Superior Courts but other interpretation of the said provision is also possible as held by the Federal Court in *Khushi Muhammad's* case. Besides, on consideration of the decision discussed we have already decided that ad-interim anticipatory bail should be granted if at all, for a very limited period with a direction to appear before the concerned Magistrate as such, issuance of a Rule is not necessary, especially when a copy of the petition for bail is filed before hand in the office of the Attorney General, for the information of State. Besides our experience shows that after obtaining an anticipatory bail, hardly the accused persons appear for hearing the Rule for bail. Consequently, thousands of such Rules on anticipatory bail are still pending.

Broadly speaking, the court while considering the question of grant of anticipatory bail must be kept in mind the two basic principles.[58] These are

1. That there should be no likelihood of the accused absconding, and
2. That there should be no likelihood of the accused misusing his liberty.

Besides all over these, learned Judges also ought to be satisfied before allowing anticipatory bail, ad interim or otherwise as under:

[57] 1 Counsel (AD) (2013)

[58] Jai Janak Raj, *Bail: Law and Procedure* (1st edn , Universal Law Publishing, Delhi, 1995)

(i) the allegation is vague,

(ii) no material is on record to substantiate the allegations,

(iii) there is no reasonable apprehension that the witnesses may be tempered with,

(iv) the apprehension of the applicant that he will be unnecessary harassed, appears to be justified before the Court, on the materials on record,

(v) must satisfy the criteria for granting bail under section 497 of the Code,

(vi) the allegations are made for collateral purpose but not for securing justice for the victim. There is a compelling circumstance for granting such bail.

(vii) There is a compelling circumstance for granting such bail.

The Appellate Division in the case of *Durnity Daman Commission vsDr KM Hossain*[59] directed as follows:

23. Having dissected the ratio and the ordains that emanated from high profile authorities, we are inclined to set forth the following criteria the High Court Division shall follow while disposing of anticipatory bail applications;

a. To open the jurisdictional door they shall satisfy themselves that reasons for apprehension have specifically, explicitly, plausibly, credibly and with sufficient clarity been assigned, instead of relying on any generalized pretension. That must be treated as the precursor.

24. A metaphorical avowal that the Magistracy/ lower judiciary is controlled by the executive should not be treated as specific because Magistrates/lower court/tribunal Judges do no longer dwell in the realm governed by the executive. If allegation of bias is aired against a particular or a group of Magistrates/Judges, cause of suspicion must be specifically spelt out. The Judges concerned, shall give reasons for their satisfaction on this unraveling point.

b. Political threshold of the petitioner or claimed rivalry, by itself, without further ado, shall not be a ground for entertaining an application.

c. Non-bailability of the offence cited in the FIR cannot be a reason for the High Court Division's intervention for even the Magistrates/lower court/tribunal Judges are competent enough to enlarge on bail a person accused of non-bailable offences in deserving cases.

[59] 66 DLR (AD) 92.

d. Effect of the accused's freedom on the investigation process must not be allowed to float on obfuscation.

e. The High Court Division must scrutinize the text in the FIR with expected diligence and shall ordinarily be indisposed to grant anticipatory bail where the allegations are of heinous nature, keeping in mind the ordains figured at paragraph 19 of the case reported in 51 DLR (AD), *supra*. Claim that the allegations are cooked up shall also not be adjudged at that of point if the FIR or the complaint petition, as the case is, *prima facie,* discloses an offence. Whether the allegations are framed or genuine can only be determined through investigation and sifting of evidence.

f. Interest of the victim in particular and the society at large must be taken into account in weighing respective rights.

g. If satisfied in all respects, the High Court Division shall dispose of the application instantaneously by enlarging the accused on a limited bail, not normally exceeding four weeks, without issuing any Rule. It must be conspicuously stated in the bail granting order that in the event of any filance of bail application, the Court below will consider the same using its own legal discretion without reference to the High Court Division's anticipatory bail order. Anticipatory bails shall not survive post charge-sheet stage.

6.11.3.3. Anticipatory Bail in Absence of the Accused

The former President of Pakistan Parvez Musharraf gets anticipatory bail before his planned return. The Sindh High Court on 21.03.2013 granted a 10 day bail period to the 69-year-old former president who is expected to return to Karachi on March 24 after being in exile since 2009.

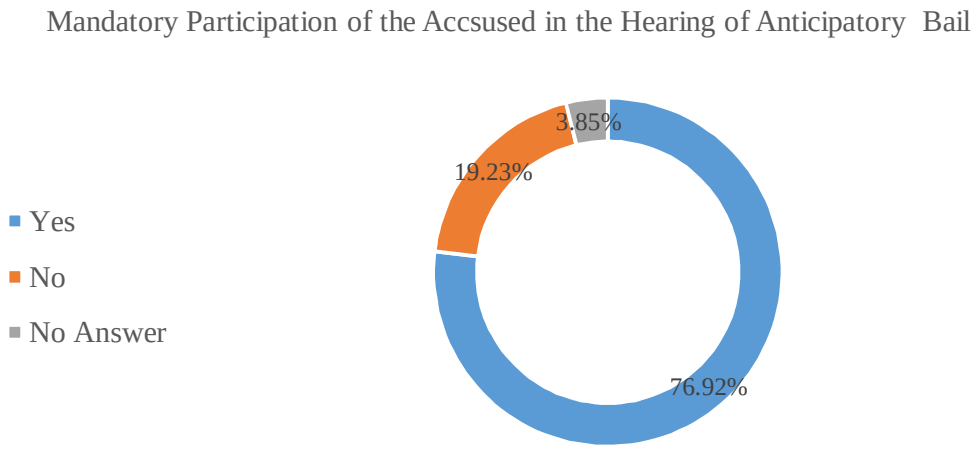
The High court also granted Musharraf a pre-arrest bail in the Akbar Bugti and Benazir Bhutto murder cases.60

The Indian Supreme Court held that when the bail application is moved in terms of Section 439 of the Code before the court concerned, the same shall be considered in its proper perspective in accordance with law. If an application for bail is moved, the Court concerned would do well to dispose of it on the day it is filed. No adjournment shall be asked for on the

[60]PTI, Musharraf *gets anticipatory bail before his planned return,* The F. World. (2013) <http://www.firstpost.com/world/musharraf-gets-anticipatory-bail-before-his-planned-return-671835.html> accessed 14 November 2015.

ground of non-availability of the records, if the accused intimates the date on which they propose to surrender three days in advance.[61]

However, In Empirical Study, of all Respondents, 76.92% respondents opined that participation of the accused in the hearing of Anticipatory Bail should be made mandatory.19.23% respondents said No and 3.85% respondents were silent.



6.11.4 Bail at the Instance of Police

Another very important matter in respect of which the police all over the country seem to misunderstand the law is the discretion given to the officer in charge of a police-station in certain circumstances to grant bail to persons accused of "non-bailable" offences. In view of what has just been said of the special hard-ship sometimes involved in India in arrest and detention, it is clear that the practically total neglect by the police to use this discretion must have been (as the evidence before the Commission shows) a source of great hardship and wrong for which the law itself is not responsible. The law of England is that "the test whether a party ought to be bailed is, whether it is probable the party will appear to take his trial." This test ought to be limited by the three following considerations. When you want to know whether a party is likely to take his trial, you cannot go into the question of his character or of his behavior at a particular time, but must be governed by answers to three general questions: The first is, what is the nature of the crime? Is it grave or trifling?

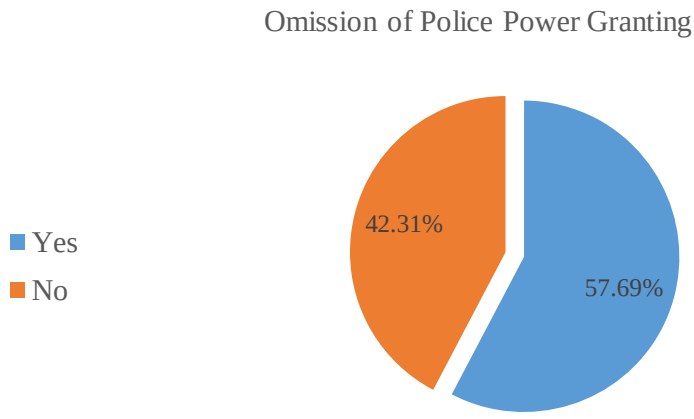
The second question is what is the probability of a conviction? What is the nature of the evidence to be offered for the persecution?

[61] *Naresh Kumar Yadav v. Ravindra Kumar,* (2008) 1 SCC 632, 638-39 (Para-8).

The third question is, is the man liable to a severe punishment?[62] This is precisely the law of bail of India as laid down in the Criminal Procedure Code. The first and third and third questions regarding the gravity of the offence and the severity of the punishment are answered in the second Schedule of the Code. The second question is necessarily left by section 497 to be answered by the Court or by the officer in charge of the police station, according to his discretion.

Empirical Study suggested that the power should be limited in cases of petty offences. Rules and Regulations be made in order to restrict the abuse or misuse of power of granting bail by police. It could be provided by adding proviso like grounds of petty nature bailable offences and when such power be exercised.

In answer to the question “should the Police power to grant bail be omitted?” 57.69 % respondents argued in favor of omission, whereas 42.31% respondents disfavored the omission.



It is the failure on the part of the police to exercise that discretion that has led to much hardship and has induced many witnesses to urge that more offences (some even of the gravest character) should be made bailable. This failure to exercise discretion arises from the fact that the difference between the justification, for arrest (section 54) and the justification for refusing bail in non-bailable cases (section497) has not been sufficiently or generally realized. "Reasonable suspicion" will justify the arrest of an accused; but the refusal of bail requires "reasonable grounds for believing that the accused has been guilty of the offence of which he is accused." If it appears, "at any stage of the investigation, that there are not reasonable grounds for believing that the accused has committed such offence, but there are

[62](Per Coleridgej,inre Robinson, 23 L.]., Q.B., 286-B.C.).

sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail" [section 497 (a)]. If there is a reasonable complaint or credible information or reasonable suspicion against a man, the police officer has power to arrest; but unless the evidence against the accused is such as to constitute "reasonable ground by the offer of release on bail. These provisions of the law appear to the Commission to be adequate, and should be maintained. They do not, therefore, propose any alteration in the law in respect of the conditions of release on bail in non-bailable cases. They are, however, of opinion that the power of taking bail given to an officer in charge of a police station under sections 169, 496 and 497 should also be given to an officer making an investigation. The Commission hope that investigations will in future be conducted ordinarily by the officer is charge of a police station or by the junior Sub-Inspector posted there to assist him, and, only exceptionally and in trifling cases, by a head constable. It might be unsafe to entrust head constables with the power of releasing on bail in non-bailable cases; for they belong to a subordinate class on whose honesty and capacity full reliance can never be placed. But Sub-Inspectors conducting investigations should certainly have the power to release on bail; and this would save the accused from being dragged under arrest from the scene of the occurrence to the police station. The Commission has also received considerable evidence that Magistrates are often unready to consider fully the question of bail. The Commission do not consider that this question falls directly within the scope of their inquiry; but they think that it should be impressed on Magistrate, as well as police officers, that every consideration which would justify bail should be taken into account and that evidence to show that the case falls under section 497 (a) should be received at the earliest date. No man should be kept in custody who can properly be released on bail.

6.12 Cancellation of Bail

If the courts have the discretion or power to grant bail, they have also the power to cancel bail already granted to a person accused of an offence under the penal code or under any other provision of law. In *Sanjoy Ghandhivs Delhi Administration*[63] the Supreme Court held that a person whom bail has been granted the court has power to cancel his bail.

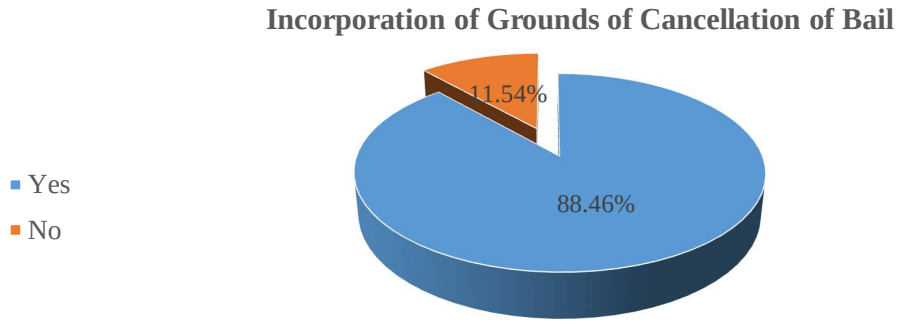
The power to cancel bail is to be exercised very carefully. In bailable offence the magistrate has no power to cancel the bail already granted but in non- bailable offence he, if it thinks just and proper, may cancel the bail granted by him earlier. It is the High Court Division or

[63] 1978 Cr.LJ 952.

the court of sessions upon which this power has been vested to cancel the bail already granted as per section 439 (2) of the Indian Code of Criminal Procedure.[64]

In Bangladesh there is no definite law to deal with the matter. When bail is granted in case of a non-bailable offence, the court granting the bail or the High Court Division or the Courts of Session may pass an order to arrest the person who was earlier released on bail and may commit him to custody. But nothing is mentioned in sections 497,498 or in any other section of Chapter XXXIX as to under what circumstances bail of a person may be cancelled and he may be committed to custody again.

In Empirical Study, 88.46% respondents supported the incorporation of grounds of cancellation of bail precisely in the Code of Criminal Procedure, 1898 and 11.54% respondents stand on No.



One of the respondents opined that every case is different on its merit and circumstance, No legislative assembly can foresee the possible variety of circumstances those might arise in a case. However on the contrary grounds of cancellation of bail may be sought out from the Legal Precedent set by the different Court

However, from judicial pronouncements, now it is settled that under the following circumstances bail may be cancelled:-

a. *if the person hampers the investigation,*
b. *if he tempers with the evidence by giving threat to the witnesses or to the complainant or to the informant,*
c. *if he runs away to a foreign country or conceal himself so that he could not be found by his sureties,*

[64] Jai Janak Raj, *Bail: Law and Procedure* (1st edn, Universal Law Publishing Delhi 1995).

d. *if he commits the very same offence or offence of the similar nature after being enlarged on bail,*
e. *if he commits acts of violence in revenge, or (f) in any other way misuses the privilege of bail.*

However it is pertinent to mention that a Magistrate who has granted the bail in a non bailable offence can cancel the bail if he finds it necessary but the Magistrate granting bail in bailable offence is not competent to cancel the bail. The prayer for cancellation of bail should be considered cautiously and judiciously.[65] Before cancellation, a notice is to be given to the accused and he also must be heard.[66]

6.13 Recommendation of the Law Commission as to Bail

This is a reference by the Government under section 6 of the Law Commission Act, 1996, seeking opinion of the Law Commission as to whether there is any necessity to enact any new law, change the existing law, or adopt any other measures in order to streamline the existing provisions for bail. Pendency of more than one case against them and then obstruct the course of justice, repeat commission of similar offences thereby creating horrible situation in social life and cause deterioration of law and order as a cumulative result of which desirable developments in all spheres of life are hampered. The Government have also expressed that such situation cannot continue and requires immediate change. Under such circumstance, the Government has requested the Law Commission to examine whether-

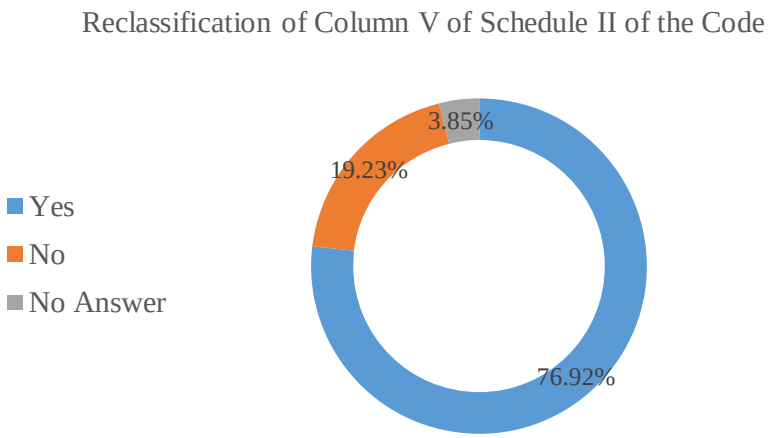
a) the scope of bail can be limited;
b) the jurisdiction of the Courts to grant bail to such accused persons as are listed as identified criminals by a quasi-judicial authority established by law should be ousted;
c) the criminals can be classified according to the degree of the offence and the category of bail can be classified accordingly;
d) new laws are required to be enacted for achieving the objectives mentioned in paragraphs (a) and (c).

So far as the reference contained in paragraph (a) is concerned offences for the purpose of bail are classified according to the nature and gravity of offence as bailable and non-bailable in the Code of Criminal Procedure, 1898.

[65]*Tayazuddin and another v. The State*, (2001) 21 BLD 503; *Babar Hossain v. Stat*e, (2000) 52 DLR 326.

[66]*Riasat Ali v. Ghulam Muhammad, State,*(1968) 20 DLR (SC) 339; (2000) 5 BLC 348.

One of the Respondents, in Empirical Method, opined that Now-a-days the rate of commission of some offence has been increased. For example relating to road accidents. Therefore some offences mentioned as bailable in the Schedule II should be reclassified as non-bailable and vice-versa. Another suggested that "I think that mentioned as bailable and non-bailable is a great problem. Sometime an offence under Section 420 of the Penal Code, 1860 for taka or property of a huge amount must not be bailable but that can be bailable in petty amount, but it is mentioned in Schedule II as bailable offence.



76.92% respondents argued that the offences, Bailable or Non-Bailable, mentioned in Column V of Schedule II of the Code of Criminal Procedure, 1898 should be reclassified and 19.23% respondents said No. However the respondents did not show any reason behind answering No.

However Respondents suggested following bailable offences of the Penal Code, 1860 to be reclassified into non- bailable:

- Section 324- Voluntarily Causing Hurt By Dangerous Weapons Or Means
- Section 325-Punishment For Voluntarily Causing Grievous Hurt
- Section 304(B)- Causing Death By Rash Driving Or Riding On A Public Way
- Section 420- Cheating And Dishonestly Inducing Deliver Of Property
- Section 494- Marrying Again During Lifetime Of Husband Or Wife
- Section 509- Word, Gesture Or Act Intended To Insult The Modesty Of A Woman

Some Respondents suggested following Non-bailable offences of the Penal Code, 1860 to be reclassified into bailable:

- Section 379-Punishment For Theft
- Section 385-Putting Person In Fear Of Injury In Order To Commit Extortion
- Section 411- Dishonestly Receiving Stolen Property

The principles as to how the Courts empowered to grant bail to an accused charged with a non-bailable offence should use this discretion have developed in this country through judicial decisions handed down in the Sub-continent including Bangladesh thorough ages extending to more than a century.

These principles are, briefly, as follows:-Clause (b) of sub-section (1) of section 4 read with the First Schedule, Code of Criminal Procedure, 1898.

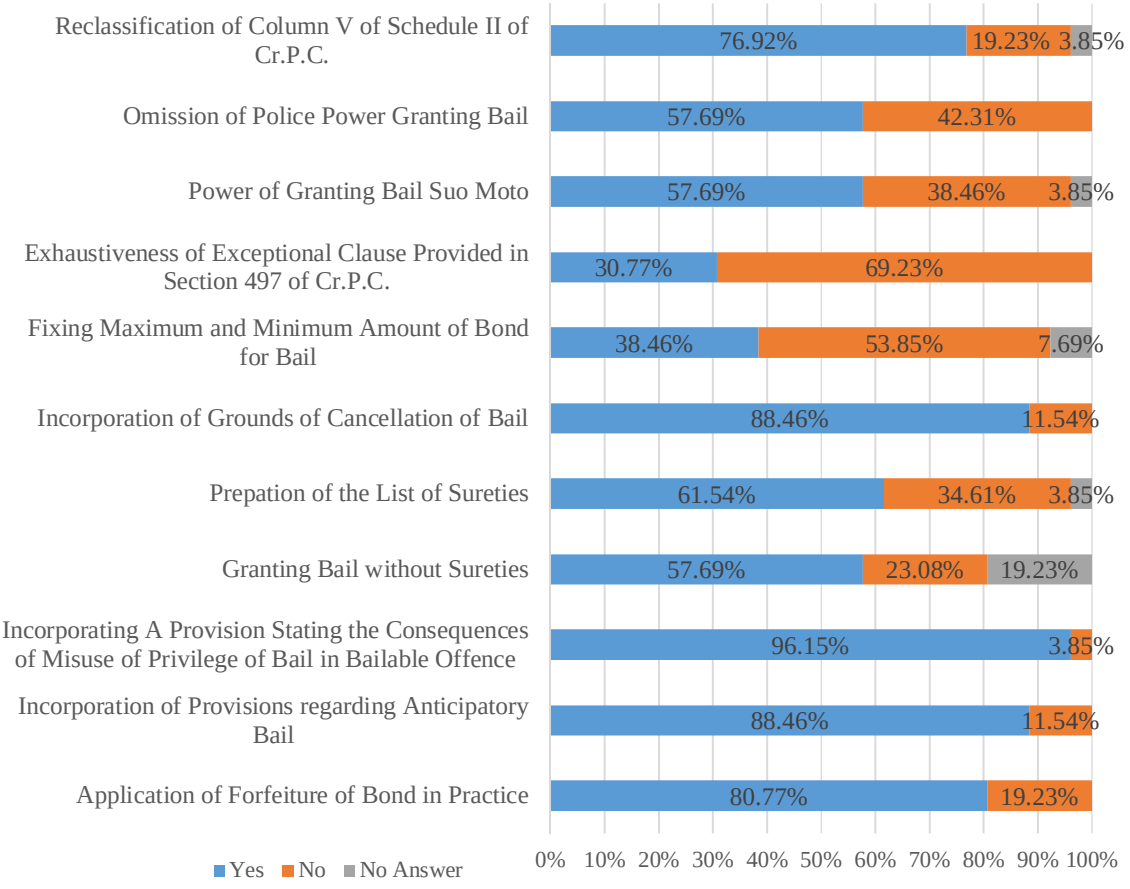
These have to be followed regarding to bail:

a. Whether there is a reasonable ground for believing that the applicant has committed the offence with which he is charged;
b. Whether the offence is of serious and grave nature;
c. Whether the punishment that may be imposed on conviction is likely to be severe;
d. Whether the accused is likely to abscond if enlarged on bail;
e. Whether the character of the applicant is not satisfactory;
f. Whether the accused is likely to continue or repeat commission of offences if enlarged on bail;
g. Whether the accused is likely to tamper with witnesses or evidence;
h. Whether the accused is in custody for long period and trial is not likely to conclude within a reasonable time;
i. Whether the accused cannot prepare his defence if in custody; etc.

It has been held that if the answers to any of the questions specified in paragraphs (a) to (g) are in the affirmative, bail should not be granted. The affirmative answer to the questions in paragraphs (h) and (i) may be considered as grounds for granting bail. It must, however, be remembered that the principles for refusing or granting bail can by no means be confined in a straitjacket and must be determined by the Court by the application of judicial wisdom in each particular case taking into consideration the prevailing social condition and environment, law and order situation, index of crime, etc. The law relating to bail provided in the Code of Criminal Procedure, 1898, is full of checks and balances and is, to my view, adequate to meet the prevailing situation. The provisions regarding the grant of bail to an accused charged with a non-bailable offence are sufficiently stringent and in addition, the Law Commission has already proposed certain amendments to the relevant sections of the

Code of Criminal Procedure, 1898 relating to bail in order to make the law more stringent in cases of applications for bail by previously convicted accused persons.

Percentage on Statement Regarding Different Topic of Bail, Recommended By Distinguished Respondents in Empirical Study



6.14 Conclusion

It is indisputable that an unnecessarily prolonged detention in prison of under trials before being brought to trial is an affront to all civilized norms of human liberty and any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and to give way to the

humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.

Chapter VII

Delay in Criminal Case: A Multidimensional Problems

7.1 Introduction

As far back as in the sixteenth century, William Shakespeare's Hamlet cited "law's delay" as a reason for preferring suicide to continuing life. Then, in the nineteenth century William E. Gladstone said that "Justice delayed is justice denied". In 1958, Chief Justice Earl Warren of the United States observed that "Interminable and unjustifiable delays in our Courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional Government in the United States."[1]

Justice delayed is justice denied. This maxim has become hackneyed and a large number of people all over the world are affected by this very common problem, directly or indirectly. Delay in the court proceeding is a global problem and the world suffers great economic diminution every year. The principal driving force for case management was the acceptance of the existence of delays in the court system.[2]Most notably delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressurize judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of fact finding and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination. If the facts are not fully and accurately determined, then even the wisest judge cannot distinguish between merit and demerit. If we do not get the facts right,

[1]Judge, Roderick Joyce QC, and Dr. Berry Zondag, 'The Case for Enhanced Case Management and Greater Judicial Clarity' (Paper presented at the New Zealand Bar Association Annual Conference, New Zealand, 2010) <http://www.scribd.com/doc/36566675/The-Case-for-Enhanced-Case-Management-and-Greater-Judicial Clarity> accessed 13 October .2015.

[2] Judge Colin Doherty Judge Jan-Marie Doogue, Jeff Simpson, *'Accountability for the Administration and Organisation of the Judiciary; How should the Judiciary be accountable for their work beyond the Courtroom?*' (Paper presented at the Asia Pacific Courts Conference 2013 'the Pursuit of excellence and innovation in courts and tribunals', Auckland, Newzealand, 2013) <http://www.aija.org.au/Asia%20Pacific% 202013/Presentations/ Doogue % 20Doherty.pdf> accessed 14 October 2015.

there is little chance for the judgment to be right.In his most exhaustive study of the sluggishness of case-flow, Professor H. Zeisel of the University of Chicago has observed:-

Delay in the courts is unqualifiedly bad. It is bad because it deprives citizens of a basic public service, it is bad because the lapse of time frequently causes deterioration of evidence and makes it less likely that justice be done when the case is finally tried; it is bad because delay may cause severe hardship to some parties and may in general affect litigants differentially; and it is bad because it brings to the entire court system a loss of public confidence, respect and pride.[3]

Delay in the dispensation of justice *per se* is perceived as inimical to the attainment of substantial justice. But the seemingly balance between delayed justice and hurried justice remains the cornerstone of any civilized legal system. Chief Justice Spigelman clarified that though it is often said that justice delayed is justice denied, at the same time it is to be remembered that not all lapse of time can be called 'delay'.[4] Most of the countries in the world are not free from this problem and its effect is much more severe in a least developing country like Bangladesh where most of the public organisations shamble due to inefficiency. Keeping all these in mind, Law makers mandated speedy and fair trial in Article 34 Clause 4 of the Constitution of the People's Republic of Bangladesh. With the insertion of this provision in our constitution it has become a citizens' constitutional right to get speedy trial. In spite of the constitutional guarantee, speedy trial, however remains a far cry for the citizens of Bangladesh due to some practical problems which causes in ordinate delay in disposal of cases.[5]

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[3] H Zeisel, H Halven & B. Bucholz, *Delay In The Court*, Boston (Little Brown & Co., USA, 1959) XXIII.

[4]Chief Justice J Spigelman, *'Case Management in New South Wales*' (Paper presented at the 'the Judicial Delegation from India' Sydney, 21 September 2009) <http://www. awlink.nsw.gov.au/lawlink/ Supreme_Court/ll_sc.nsf/vwFiles/spigelman210909.pdf/$file/spigelman210909.pdf7>accessed 15 October .2015.

[5]Md Akhtaruzzaman, 'Speedy Disposal of Criminal Cases And The Scope of Introducing ADR In Criminal Justice Administration In Bangladesh: Some Observations' (2010) Vol. IX, *Jati Journal*, 22.

7.2. Comparative Statistics of Crimes, Pending Cases and Disposal of Cases

7.2.1 Comparative Crime Statistics: 2001– 2015[6]

(Number of Registered Cases)

SL	Name of Offence	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
1	Dacoity	758	963	949	885	796	795	1047	885	764	656	650	593	613	651	491
2	Robbery	1265	1397	1170	1207	898	843	1298	1583	1298	1059	1069	964	1021	1155	933
3	Murder	3678	3503	3471	3902	3592	4166	3863	4099	4219	3988	3966	4114	4393	4514	4035
4	Speedy Trial Act	2396	1693	2179	2053	1814	1638	1980	1700	1817	1666	1863	1907	1896	1716	1544
5	Rioting	2161	1276	890	754	570	570	263	203	112	130	109	94	172	79	93
6	Cruelty to Women	12958	18455	20242	12815	11426	11068	14250	14284	12904	16210	21389	20947	19601	21291	21220
7	Child Abuse	380	512	475	503	555	662	967	962	1093	1542					
8	Kidnapping	834	1040	896	898	765	722	774	817	858	870	792	850	879	920	806
9	Police Assault	344	281	271	280	240	337	278	296	357	473	581	659	1257	702	629
10	Burglary	3654	3959	3883	3356	3270	2991	4439	4552	3456	3101	3134	2927	2762	2809	2494
11	Theft	7432	8245	8234	8605	8101	8332	12015	12188	9171	8529	8873	8598	7882	7660	6821

[6]Bangladesh Police, Comparative Crime Statistics: 2001 – 2015 (Crime Statistics, 2015) <http://www.police.gov.bd/Crime-Statistics-comparative.php?id=208> accessed 28 January 2016.

12	**Arms Act**	3151	3060	2293	2370	1836	1552	1746	1529	1721	1575	1269	1115	1517	2023	2081
13	**Explosive Act**	746	570	499	477	595	308	232	239	227	253	207	289	1007	520	725
14	**Narcotics**	5936	9018	9494	9505	14195	15479	15622	19263	24272	29344	31696	37264	35832	42501	47692
15	**Smuggling**	3076	4746	4499	4182	4334	4734	5202	7962	7817	6363	5714	6578	6437	6788	6179
16	**Others**	65422	68898	66194	67531	70046	76381	93224	87417	87022	87139	88355	96112	93930	90400	84137
	Total	**114191**	**127616**	**125639**	**119323**	**123033**	**130578**	**157200**	**157979**	**157108**	**162898**	**169667**	**183407**	**179199**	**183729**	**179880**

7.2.2 Statement for All Cases from 01.01.2014 to 31.12.2014 in the High Court Division of Supreme Court of Bangladesh

Cases	Opening Balance	Institution	Restored	Total	Disposal	Current Pendency	Remarks
Civil	**82807**	6282	189	89278	4862	**84416**	Increased by 1609
Criminal	**177995**	39290	11	217296	7745	**209551**	Increased by 31556
Writ	**57094**	12843	18	69955	8688	**61267**	Increased by 4173
Original	**5550**	1436	00	6986	1182	**5804**	Increased by 254
Grand Total	323446	**59851**	218	383515	22477	**361038**	**Increased by 37592**

Figure 1: Vertical Bar Chart of Pendency, Institution and disposal of all cases in the year 2014 in the High Court Division of the Supreme Court of Bangladesh.[7]

7.2.3 Analysis of the Pending Balance for the High Court Division in 2014

To understand the balance of pending case, the following tables may be examined. The pending balance for all cases for the year 2014 is 361038, while the pending balance for Civil Cases is 84416, that for Criminal Cases is 209551, for Writ is 61267 and for Original Cases is5804.

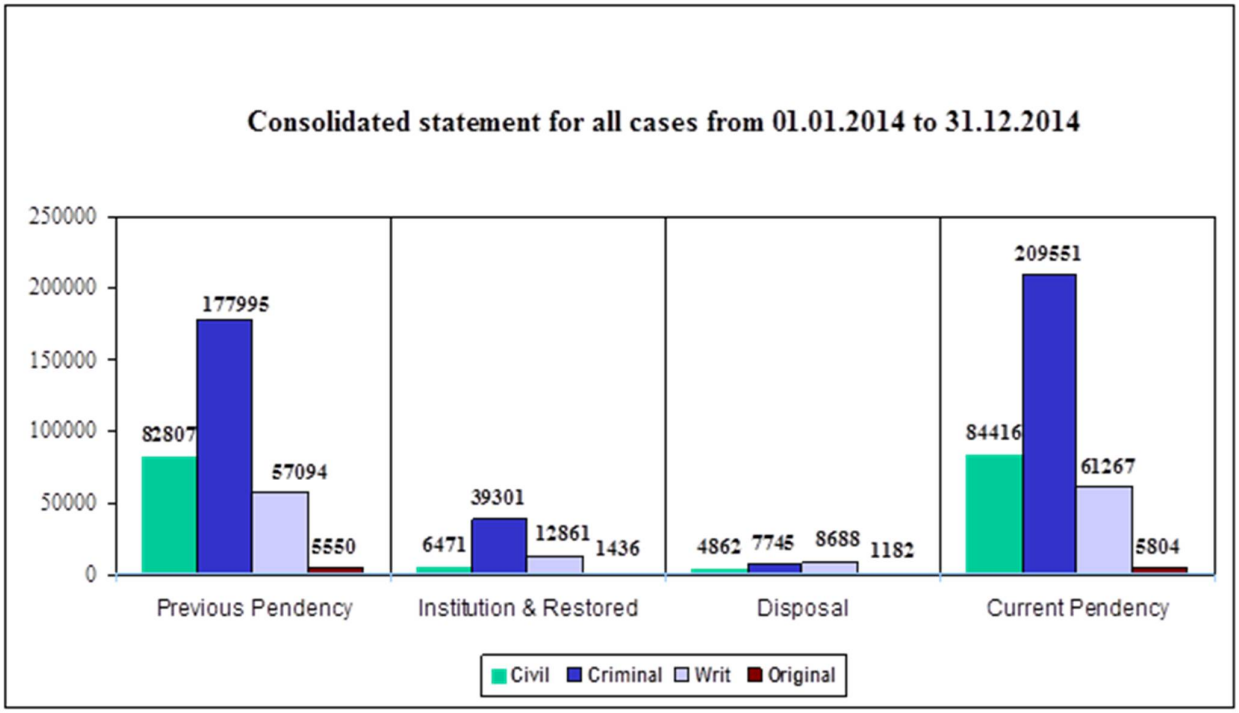


Figure 2: Vertical Bar Chart of Pendency, Institution and disposal of all cases in the year 2014 in the High Court Division of the Supreme Court of Bangladesh.[8]

[7] The Supreme Court of Bangladesh, Annual Report-2014<http://www.supremecourt.gov.bd/nweb/?page=notices.php&menu=11&notice_type=5 > accessed 30 January 2016.

[8]Ibid 84.

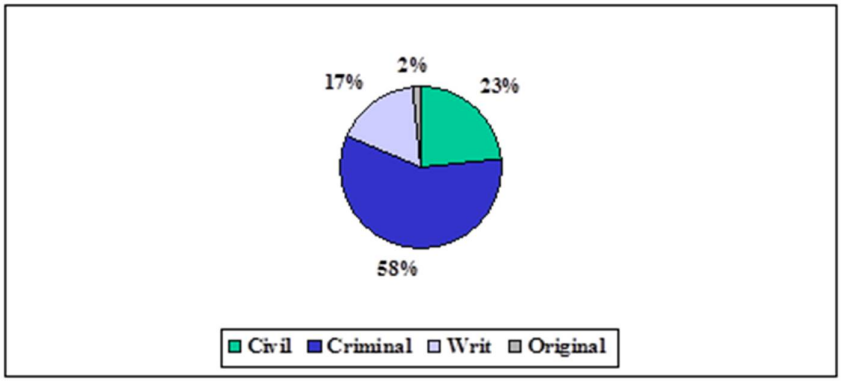


Figure 3: Pie Chart of all pending cases in the High Court Division in the year 2014.[9]

There are 58% Criminal cases, 23% Civil cases, 17% Writ and 2% Original cases of all the pending cases.

7.2.3.1 Pending Criminal Cases in High Court Division

Opening Balance	Institution and Restoration	Total	Disposal	Pending for Disposal
177995	39301	217296	7745	209551

7.2.4. Institution, Disposal and Pendency of Criminal Cases in the High Court Division from 1972 To 2014[10]

Year	Opening balance	Fresh institution	Total	Disposal	Pending
1972	3391	544	3935	1016	2919
1973	2919	1964	4883	784	4099
1974	4099	3349	7448	826	6622
1975	6622	1767	8389	1041	7348
1976	7348	1093	8441	2720	5721
1977	5721	1876	7597	2051	5546
1978	5546	1881	7427	1678	5749

[9]Ibid 89.

[10] Ibid 91.

1979	5749	1718	7467	2058	5409
1980	5409	1597	7006	2006	5000
1981	5000	1397	6397	1076	5321
1982	5321	320	5641	674	4967
1983	4967	663	5630	985	4645
1984	4645	595	5240	490	4750
1985	4750	748	5498	486	5012
1986	5012	1248	6260	529	5731
1987	5731	1264	6995	371	6624
1988	6624	3950	10574	289	10285
1989	10285	4487	14772	1579	13193
1990	13193	4664	17857	3053	14804
1991	14804	4679	19483	1399	18084
1992	18084	4822	22906	1879	21027
1993	21027	6170	27197	2507	24690
1994	24690	6189	30879	2131	28748
1995	28748	7786	36534	5417	31117
1996	31117	8279	39396	5978	33418
1997	33418	8560	41978	4927	37051
1998	37051	11508	48559	7021	41538
1999	41538	10881	52419	5910	46509
2000	46509	12445	58954	5790	53164
2001	53164	15092	68256	9219	59037
2002	59037	27000	86037	13192	72845
2003	72845	21363	94208	13300	80908

2004	80908	18297	99205	9332	89873
2005	89873	25179	115052	10760	104292
2006	104292	27747	132039	7833	124206
2007	124206	27779	151985	9035	142950
2008	142950	34492	177442	7071	170371
2009	170371	36725	207096	8096	199000
2010	199000	39631	238631	56705	181926
2011	179698	25573	205271	52149	153122
2012	153122	31258	184380	24108	160272
2013	160272	30137	190409	12414	177995
2014	177995	39301	217296	7745	209551

7.2.5 Statistics of Criminal Cases at District Court Level

At District level there are no separate courts or judicial officers to deal with civil and criminal matters; instead, the same court is a District Court when hearing civil matters and a Court of Sessions when hearing Civil matters. The term District Court is therefore generally understood by Bangladeshi as the court in the district that hears all serious cases-criminal and civil-and is often referred to this way in the literature. In line with this, and to simplify both the survey and this report, the term ‘District Court’ in this court is used to cover both District Courts (civil) and Court of Sessions (criminal).

The volume of work has undoubtedly increased during the past few years due to increase in crime as a result of increase in population, and mass migration of rural population to urban areas on account of industrialisation.

GrowingCase-Loads at District Court Level in Bangladesh[11]:

Case Loads	**Civil**	**Criminal**	**Others**	**Total**
Number of Civil/Criminal Cases pending at beginning of year, 2011				2010324
Number of Civil/Criminal Cases filed during 2011				1083827
Number of Civil/Criminal Cases disposed of during 2011				9498989
Number of Civil/Criminal Cases pending at beginning of year, 2012	786570	1293920	51556	2132046
Number of Civil/Criminal Cases filed during 2012				1359589
Number of Civil/Criminal Cases disposed of during 2012				1023264
Number of Civil/Criminal Cases pending at beginning of year, 2013				2454360
Number of Civil/Criminal Cases filed				1505167

[11] Greg Moran, Full Report (Final Draft) on Access to Justice In Bangladesh- Situation Analysis, (Submitted to UNDP Bangladesh, Submitted by Data Management Aid, February 2015)79.

during 2013				
Number of Civil/Criminal Cases disposed of during 2013				1119294
Number of Civil/Criminal Cases pending at beginning of year, 2014	1113059	1571720	62689	2747468
Number of Civil/Criminal Cases filed and disposed of for 2014 to February 2015	N/A	N/A	N/A	N/A

Number of Criminal Cases Reported to Courts Per Annum

In our neighboring country India there are approximately 300 million (3 Crore) cases pending and there are nearly 13000 judges to deal with such a huge number of cases. This uneven statistics obviously cause a backlog of cases causing extreme delay and the clients suffer. Financial experts opined that the delay is eating up 2.0 per cent of the GDP (gross domestic product) on an average creating a hostile environment for investment. In China, there are approximately 1, 30,000 courts to deal with more than 11 million cases with a 6.3 per cent

increase year-on-year.[12]This problem also affects the whole Europe. Developed countries like UK, France and Italy are struggling to deal with the backlog of cases. On January 31, 2014, some 152,200 cases were pending before the European Court of Human Rights. This situation poses a serious threat to the effective functioning of the Courts throughout the Europe. However, they have taken many measures like wide application of Alternative Dispute Resolution (ADR) and track allocation system of the court case. To get rid of backlog of cases the USA enacted the Speedy Trial Act of 1974 which has fixed standard time requirements for timely prosecution and disposal of criminal cases in district courts. In 1990, the US Congress enacted another legislation that directs each District Court to devise and adopt a civil expense and delay reduction plan. Similar laws need to be enacted in Bangladesh.[13]

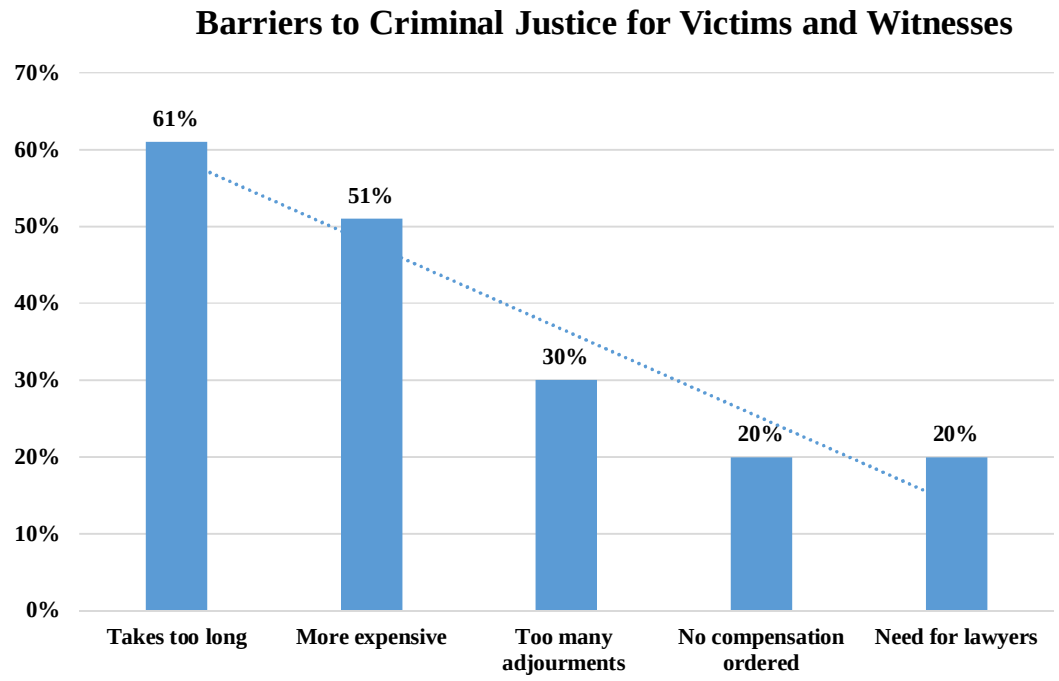
7.3 Barriers to Criminal Justice for Victims and Witnesses

According to the experts surveyed, the five main problems that victims of crime face in accessing justice in District Courts are:

- Takes too long
- More expensive
- Too many adjournments
- No compensation ordered
- Need for lawyers

[12]CL Aggawwal, 'Laws, Delay and Accumulation of arrears in the High Courts' (2014), 38(1), *The Journal of Bar Council of India*, 41.

[13] Syed Emran Hossain, '*Delay in justice: An abysmal crisis*, The Financial Express, Views and Analysis' (2010) Vol. 20 No. 162, <http://www.thefinancialexpress bd.com/old/innerpage.php?page_category_id=87 &date=2012-09-06> accessed 17 October 2015.



Although most of the problems are the same though as those reported for all people generally, the addition of the fact that no compensation is ordered provides a barrier is a notable addition to the list. Lawyers (36%) prosecutors (26%) and Judges and Magistrates (23%) were the most likely to mention this.[14]

Experts were also asked whether or not victims have become more reluctant to attend trials over the past three years and, if so, what the reasons for this might be. Opinions were fairly equally split, with 44% of the opinion that they have become less reluctant and 42% that they have become more reluctant.[15]

The biggest barriers therefore, other than lack of protection, are clearly related to the length of time it takes to finalize cases and the cost involved in repeatedly attending cases that are frequently adjourned

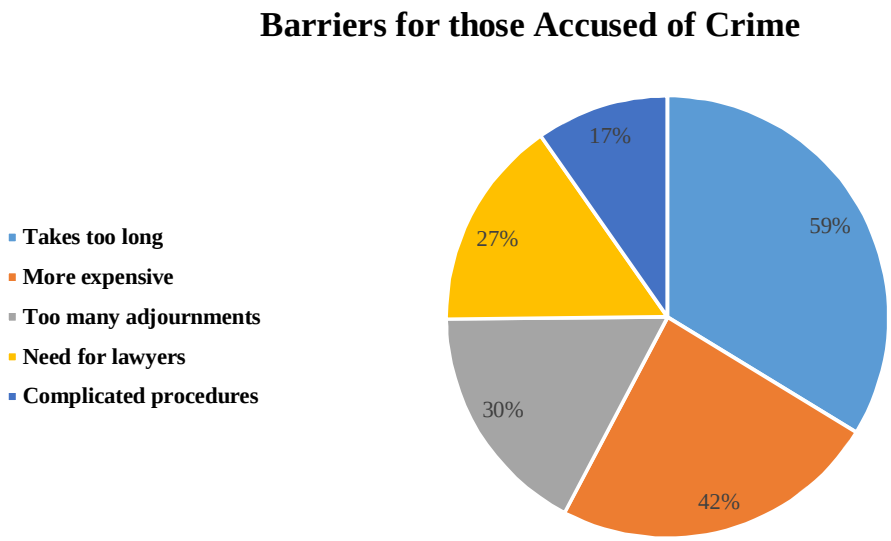
[14] Greg Moran, above note 185, 84.

[15] Ibid 85.

7.3.1 Barriers for those Accused of Crime

The biggest barriers faced by those accused of crime in the District Courts according to the expert survey are essentially the same as those everyone also faces and closely linked to the need for expensive legal representation.

- Takes too long
- More expensive
- Too many adjournments
- Need for lawyers
- Complicated procedures



Only relatively small numbers of experts listed corruption (14%), lack of legal aid (10%) and the fact that bail is not awarded (7%) as barriers to accused people.

Most experts (57%) do not believe that women accused face any particular problems while a further 27% believe that they may, but only sometimes. When asked what these problems may be, most listed the same problems as others (length of time, cost, the need for lawyers

etc.) only 15% mentioned harassment by court staff and only 10% discrimination or unfair treatment.[16]

7.4 Delay at Every Stage of the Case

A thorough and detailed enquiry into the matter by inviting replies to its questionnaire and interviewing a large number of persons, both officials and non-officials, has disclosed that delay in the disposal of cases by the courts does not occur at anyone particular stage of the case but, on the other hand, it occurs at every stage through which it has to pass. It would accordingly be necessary to examine each such stage separately.

The causes for delay may broadly be classified into two categories, viz.:

(a) Those arising from, and inherent in, the prescribed procedure, and

(b) Those operating more or less independently of the prescribed procedure, and generally arising out of administrative, social and economic factors and attitudes connected with the working of the criminal courts.

Respondents in the current survey were asked specifically what the main causes of delays are in criminal cases. To some extent mirroring the research, the following have been most frequently reported[17]:

Main Causes of Delay	**Criminal Trials (Respondents)**
Not enough Magistrate to cope with workload	56%
Lawyers requesting too many adjournments	44%
Investigation take too long to complete	40%
Witnesses lose interest because they have to attend too many times	21%

[16]Greg Moran, above note 185, 86.

[17] Ibid, 88.

Lawyers absent when required in the court	19%

Magistrates were most likely to mention insufficient Magistrate to cope with workload (80% in relation to criminal trials). Lawyers on the other hand were the least likely to mention frequent requests by lawyers for adjournments in criminal trials (28%). Nonetheless the fact that so many lawyers mentioned this is an indication that they too are aware of this as a barrier.

The following factors causing impediments in criminal proceedings and trials[18]:

a. Like civil suits the numbers of criminal cases as well as the number of courts are also not distributed duly, properly and proportionately.

b. Delay in starting investigation. At the same time delay in submitting the investigation report.

c. Shortage of number of investigation officers corresponding to a large number of cases waiting for investigation.

d. Absence of separate, independent well-equipped and well- trained investigating agency.

e. Delay in disposal of *Naraji* petition in pursuance of the acceptance and rejection of police report.

f. Non-submission of allied documents like seizure list, medical certificate, expert opinion, and inquest reports etc. along with the police report under section 173(3) of the Code of Criminal Procedure.

g. Non-execution of writs of proclamation and attachment under section 87 and 88 of the Code of Criminal Procedure for appearance of the absconding accused before the court causing delay in getting a case for hearing.

h. It is the duty of the police to ensure the attendance of witness. But the reality is that in spite of repeated issuance of process, police personnel hopelessly and miserably fail to perform their duty duly and properly.

[18]Md Akhtaruzzaman, above note 179, 23.

i. Absence of efficient, conversant and knowledgeable Public Prosecutor and Defence Lawyers.

j. During Investigation stage and in cases pending for trial before the Magistrates, records are called for, for disposal of applications for bail in the Sessions' Courts and then undue delay occurs in returning these back to Magistrates' courts.

k. After submission of charge sheet incomplete records are sometimes sent to the Sessions' Courts by the Magistrate

There are others some other important factors causing impediments in criminal proceeding and trials[19]:

1. Too many adjournments are being indulgently granted.
2. Too much time elapses between individual hearings, or between the filing and disposition of criminal cases.
3. Judges are not captains of their courtrooms; power and authority has been usurped by the bar/ litigants.
4. Witnesses are neither effectively managed nor efficiently co-ordinated.
5. Significant monetary sanctions are not imposed to compel disobedient advocates, litigants, witnesses' compliance with codes, rules, policies, processes and procedures.

Unlike original criminal cases which, under the statutory provisions, may be disposed of within the time-limit fixed in the Code of Criminal Procedure, the files of criminal appeals and revisions were found to be heavy with backlog and low disposal in almost all the Sessions Courts.[20] The main Causes are as follows:

a. Reluctance of the appellate courts to hear and dispose of criminal appeals and revision in sufficient numbers.

[19]Jakhongir Khaydarov, 'Forward On Timely Justice for All in Bangladesh, A Challenges for Change : Court Processes, Problems And Solutions' *Supreme Court of Bangladesh And UNDP* [2015] 1

[20]The Committee Constituted By The Honorable Chief Justice Of Bangladesh, Report On The Causes Of Delay In Disposal Of Cases And Recommendation For Their Elimination And Better Management Of Courts, Supreme Court Of Bangladesh, [1989] 23-24.

b. Delay in despatch of records from the trial courts to the appellate courts.

c. Sessions Judge heavy file coupled with absence of Additional Sessions judges were said to be the main reason for arrears in revision cases.

d. Most of the Sessions Judges , Additional Sessions Judges and Joint Sessions Judges stated that since they were mostly engaged in hearing original criminal cases in view of the provisions relating to disposal of original criminal cases within a certain time limit, they had no time to hear and dispose of appeals and revisions

e. Judges were under the impression that the purpose of assessing adequacy or otherwise of their work, disposal of criminal appeals and revisions was not being taken into consideration by the Supreme Court as a result they were not interested in disposal of criminal appeals and revisions.

7.5 Delaying Factors inside Courts

Criminal proceeding are generally initiated either on a report made to the police or by a complaint filed in the court. In the latter case, the court proceeds to examine the complainant under section 200 of the Code of Criminal Procedure, 1898[21]after which it may inquire into the matter itself or may refer it for inquiry or investigation by another court subordinate to it or by a police-officer or by any other person. In complaint-cases, the first stage where delay occur is the stage after the court has recorded the statement of the complainant and has referred the matter for further inquiry to some other agency or court. Invariably the inquiry reports are delayed mainly for the reason that complaint-cases are not regarded as sufficiently important. On the receipt of the report, the court may either dismiss the complaint if it comes to the conclusion that there is no sufficient ground for proceeding further in the matter, or may summon the accused to appear before it if the result of the inquiry shows that there is a prima facie case against the accused[22]. After the appearance of the accused in court, the case has to pass through the same stages as a case where a charge-sheet has been submitted by the police.

[21]A Magistrate taking cognizance of an offence on complaint shall at once examine upon oath the complainant and such of the witnesses present, if any, as he may consider necessary, and the substance of the examination shall be reduced to writing and shall be signed by the complainant or witness so examined, and also by the Magistrate.

[22]The Code of Criminal procedure (Act No V of 1898), s 203.

The cases which are initiated upon report made to the police reach the court after the police has carried out necessary investigation and submitted the charge sheet. In such cases, the first stage where the delay is caused is the investigation stage.

7.6 Delay at the Initial Stage of a Complaint

A complaint of a cognizable case[23]is filed only where the police has refused to take action on a report made to it while in a non-cognizable case[24] the complainant is required under the law to file a complaint in court. There is a general tendency on the part of the courts to pay less attention to complaint-cases as against police-cases (usually described as General Register Cases) because the former are considered as less important having been brought to court by private citizens. The complaints in cognizable cases are looked upon with suspicion because, generally, the impression is that there is not much substance in these cases as otherwise the police would cases, the offences complained of are not serious enough to call for prompt action. The complaints which are not dismissed at the initial stage are referred for inquiry or investigation. Normally, this inquiry or investigation is entrusted to some subordinate court or a police-officer or a member of the public.

Table: Why People Reports to Courts rather than Police Station[25]

If you did not report to the police, why not?	Respondents
• The police are corrupt or demand bribes	49%
• Do not trust the police	37%
• The police would not have done anything about it	16%
• Scared to report to the police	12%

[23]Ibid, s 2 (f) -cognizable offence" means an offence for, and "cognizable case" means a case in, which a Police-officer, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant.

[24] Ibid, s 2 (n) -"non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police-officer, may not arrest without warrant.

[25] Greg Moran, above note 185, 58

There are many flaws in the law enforcement mechanism of both criminal and civil justice system. In the criminal cases, police reports are the foundation of criminal justice. The police arrests, frames the case, investigates and submits charge sheet to the court inspector.

7.6.1 Delay at Investigation Stage

Police does all the preliminary work of justice, based on which judgment is delivered from the court. As the police are the framer, investigator and reporter of the case, there is huge scope for manipulation. In some cases, charge sheet depends on the amount of the bribe. Sometimes they even manipulate the murder case by tampering evidence. Justice is affected due to corrupt practices of police. Moreover, police personnel are often used by the ruling political party. The ruling party also appoints police personnel from the party cadre. As such, police normally cannot work independently. Corruption in police seriously affects criminal justice.

7.6.1.1 Difficulties of the Investigating Officers

It has been found from the experience that the police officers have been facing the following difficulties in ensuring speedy, effective and fair investigation:

a. Excessive workload due to inadequacy of manpower and long working hours even on holidays and the absence of shift system;
b. Non co-operative attitude of the public at large;
c. Inadequacy of logistical and forensic back up support;
d. Inadequacy of trained investigating personnel;
e. Inadequacy of the state-of-the-art training facilities in investigation, particularly in-service training;
f. Lack of coordination with other sub-system of the Criminal Justice System in crime prevention, control and search for truth;
g. Lack of laws to deal effectively the emerging areas of crime such as organized crime, money laundering etc.
h. Misuse of bail and anticipatory bail provisions;
i. Directing police for other tasks which are not a part of police functions;
j. Interrupting investigation work by being withdrawn for law and order duties in the midst of investigation.
k. Political and executive interference;

l. Existing preventive laws being totally ineffective in curbing criminal tendencies of hardened criminals and recidivists.[26]

7.6.1.2 Inadequacy of Investigating Staff

In the first place, there is inadequacy of the investigating staff. The police officers are hard pressed for time with multifarious commitments and, thus, not able to devote adequate time for investigational work. The investigating officer is able to devote only 27% of his time on investigational work, while the rest of the time is taken by other duties connected with the maintenance of law and order, VIP conditions, petition investigation, court attendance, collection of intelligence and other administrative work.

7.7 Non-attendance of Witnesses

Another stage of delay in criminal cases comes when the court has to record the prosecution evidence. In complaint-cases after the accused has been summoned, the complainant is required to produce his witnesses which he generally summons through the court. In police-cases or the G. R. cases after the submission of the charge-sheet, the prosecution is required to produce evidence and here again the witnesses are submitted through the court. One of the main causes of delayed trials in criminal courts is the non-attendance of the witnesses.

Table: **A Bird's View Showing Causes of Delay Due to Absence of Witnesses in Different Criminal Courts of Rajshahi Judgeship**[27]:

Courts	Total Number of Cases Delayed	Number of Cases Delayed Due to Absence of I.O.	Number of Cases Delayed Due to Absence of Medical Officer	Number of Cases Delayed Due to Absence of Informant or Complainant	Number of Cases Delayed Due to Absence of Other Important Witnesses
Nari O ShishuNirjatan Daman Tribunal-2, Rajshahi	179	88	40	----	65

[26]Committee on Reforms of Criminal Justice System (Government of India, Ministry of Home Affairs), Report on Reforms of Criminal Justice System (Vol-I ,March 2003) 89-90

[27], Law Commission of Bangladesh, *Report on The Delay in Criminal Cases and Steps Taken in Rajshahi Judgeship*, [May 2015] 13, <http://www.lc.gov.bd/reports.htm> accessed 18 October 2015

Court of Additional District and Sessions' Judge-2, Rajshahi	96	46	14	11	29
Court of Additional District and Sessions' Judge-2 and Special Tribunal-3, Rajshahi	67	43	----	04	19
Court of Joint District and Sessions' Judge-2 and Special Tribunal-6, Rajshahi	90	30	01	20	35

7.7.1 Proximity and Travel Cost

For more than half of respondents that is 56% the closest District Court is more than 15 Kilometre away although 20% could not say. This is almost as likely to be the case in rural areas (55%) as in urban areas (57%). Knowledge of how far away the court is far greater amongst men than women, with 34% of women stating they did not know compared to only 5% of men.

Similarly, it would cost 57% of respondents more than Tk-50 to get there, with those in rural areas (60%) more likely to answer this way than those in urban areas (48%). For 31% of respondents it would take between 45 minutes to an hour to get to the court, while for 41% it would take between 1 and 2 hours to get there (41%--rural 43%; urban 36%). Almost three-quarters (74%) would go the court themselves if they had to contact it. 30% would contact the court through their lawyer and 14% would someone to the court if they needed to contact it.[28]

7.7.2 Causes of Non-Attendance of the Witnesses

Non-attendance of the witnesses may be due to various factors. We may mention below some of these important factors:-

a. In cognizable cases, the service of processes is effected by the police whereas in non-cognizable cases the district Nazarat[29] is entrusted with this work. The number of police-constables earmarked in each police-station for the service or processes is too small with the result that the work-load is so heavy that sometimes it becomes

[28]Greg Moran, above note 185, 80.

[29]Nazarat is meant to a central administrative office of a court dealing with service of summons etc.

physically impossible for this meagre staff to effect service of processes before tile date of hearing. Similarly, the staff in the district Nazarat is also inadequate to cope with the volume of work.

b. Apart from inadequacy of the process-serving stall, the existing rules regarding payment of travelling allowance and daily allowance to the process-serving staff are also unsatisfactory inasmuch as the process-serving staff, in certain circumstances, does not get any travelling allowance for performing journeys to effect service of processes. This is one of the main causes which is responsible for false reports by the process-serving staff because they generally avoid undertaking long journeys for effecting service or processes as they know that they will not be paid anything for performing them. They write down reports while sitting in the office without going to the villages or visiting the places where the persons to be served are residing.

c. There is also a general tendency on the part of the witnesses to avoid attendance in courts. This again is due to various factors. It is a matter of common knowledge that the people who are summoned to appear as witnesses in courts have to face a lot of inconvenience. First of all, they have to wait for long hours outside the court before the case in which their evidence is to be recorded is called. Secondly, there is no proper seating arrangement for them both in the court-room and outside. Thirdly, the witnesses are generally treated with lack of courtesy and sometimes even with rudeness. The right or cross-examination is also sometimes misused by the counsel of the opposing party because all sorts of personal and embarrassing questions are put to the witnesses in cross- examination. Fourthly, the travelling allowance and the diet money paid to the witnesses is quite inadequate because, the existing scales were fixed by the Government long ago and since then the cost of living has considerably gone tip. Beside the inadequacy of the travelling and daily allowances payable to the witnesses, there is also a general complaint that not infrequently the witnesses who attend courts are not paid any travelling or daily allowance because, funds are not available which is due to inadequate provision in the annual budget and the practice of calling the same witness on more than one occasion to give evidence in court

d. Quite a large number of cases remain pending for long in the courts for non-appearance of Government officials as witnesses who generally are Investigating Officers, Medical Officers and Magistrates. The reason for their non-attendance is

that by the time the case is ripe for hearing they are transferred to other stations and summonses for their appearance are sometimes not returned to the courts in time or they are received with a report of non-service.

7.8 Non-Attendance of the Accused

In a criminal trial, the personal appearance of the accused is a legal requirement unless the court has dispensed with his attendance under sections 205 of the Code of Criminal Procedure[30] which, however, give very limited discretion to the court in this behalf. Accordingly, the non-attendance of the accused necessarily leads to the postponement of the case. It is one of the major causes of delay in the disposal of criminal cases. From the history of old cases, it was found that certain cases were adjourned several times by the courts due to the non-appearance of the accused. In some cases, the number of adjournments occasioned on this account has not been specified though the time during which the court was unable to proceed with the case due to the absence of the accused.

The failure of the accused to attend the court may be for various reasons. Sometimes, the absence may be intentional or wilful with some ulterior motive, as for instance, to gain time to tin over the prosecution-witnesses or to cause harassment to the complainant but, sometimes this absence may be due to circumstances beyond his control such as illness or when he is in custody, the failure of the jail authorities to take necessary steps for his production in court on the date of hearing.

7.9 Unequal Distribution of Workload for Judges

The District Judge and Sessions Judge is directly responsible for distributing the workload of the various judges. The District Courts consists of different levels of judicial officers which can pose problems due to its precise or rigid organisational strata established to correspond with the complexity or value of case. For example, in the Dhaka District Courts there are at

[30]The Code of Criminal Procedure,1898 (Act of V of 1898), s 205- Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader. But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in a prescribed manner.

least four strata of judicial officers, each of whom hear cases at different jurisdictional levels, segregated by territorial or pecuniary demarcations.[31]

However, despite these dedicated "Jurisdiction", most of these courts have a workload that cannot be managed effectively by the judges and staff assigned. Moreover, some jurisdiction may have too much work and others, not enough. The current hierarchy and process of distributing cases to the judges of lower court imposes a significant constraint on their effective utilization.[32]

7.10 Dilatory Tactics of the Defence Lawyers

Ordinarily, no defence lawyer is personally interested in delaying the disposal of the case in which he has been engaged but, sometimes the accused may persuade him to adopt such tactics as may ultimately lead to the prolongation of the trial. The lawyer may embark upon unnecessarily lengthy cross-examination of the prosecution-witnesses or he may challenge the admissibility of evidence on every conceivable occasion, or simply ask the accused to apply for adjournment on the ground of his counsel being busy elsewhere. And if all else fails, then he may intimate the court his desire to move the High Court Division or Sessions Judge for transfer of the case in which event the Magistrate is bound to adjourn the trial under the law. The transfer applications, unfortunately, remain pending for long thus delaying the trials for months and even years.

7.10.1 Bench-Bar relationship

It appears that there are underlying tensions between the Bench and the Bar. There are frequent complaints that the authority of judge has been apparently usurped by the bar, evidenced by the numerous granting of request for adjournments from the parties' lawyers in individual cases. However, there are also similar complaints that the adjournment are often due to court congestion because a court could not possibly hear the huge number of cases on its cause-list in one day. In addition, a politically divided Bar also leads to tension inside the

[31] District Judge and Sessions Judge, Additional District Judge and Sessions Judge, Joint District Judge and Sessions Judge, Senior Assistant Judge, Assistant Judge (none).

[32] Judge, Roderick Joyce QC, and Dr. Berry Zondag, 'The Case for Enhanced Case Management and Greater Judicial Clarity' (Paper presented at the New Zealand Bar Association Annual Conference, New Zealand, 2010) \<http://www.scribd.com/doc/36566675/The-Case-for-Enhanced-Case-Management-and-Greater-Judicial-Clarity> accessed 19 October 2015.

courtroom where a lawyer's political identity can often dominate as a factor of influence.[33]

7.11 Increase in the Volume of Work and Shortage of Magistrates

The volume of work has undoubtedly increased during the past few years due to increase in crime as a result of increase in population, and mass migration of rural population to urban areas on account of industrialisation.

Growing case-loads at District Court level in Bangladesh[34]:

Case Loads	**Civil**	**Criminal**	**Others**	**Total**
Number of Civil/Criminal Cases pending at beginning of year,2011				2010324
Number of Civil/Criminal Cases filed during 2011				1083827
Number of Civil/Criminal Cases disposed of during 2011				9498989
Number of Civil/Criminal Cases pending at beginning of year,2012	786570	1293920	51556	2132046
Number of Civil/Criminal Cases filed during 2012				1359589
Number of Civil/Criminal Cases disposed of during 2012				1023264
Number of Civil/Criminal Cases pending at beginning of year,2013				2454360
Number of Civil/Criminal Cases filed during 2013				1505167
Number of Civil/Criminal Cases disposed of during 2013				1119294
Number of Civil/Criminal Cases pending at beginning of year, 2014	1113059	1571720	62689	2747468

[33]Business Process Mapping for Bangladesh Courts, above note 192, 25.

[34] Greg Moran, above note 185, 79 .

Number of Civil/Criminal Cases filed and disposed of for 2014 to February 2015	N/A	N/A	N/A	N/A

In our neighboring country India there are approximately 30 million (3 Crore) cases pending and there are nearly 13000 judges to deal with such a huge number of cases. This uneven statistics obviously cause a backlog of cases causing extreme delay and the clients suffer. Financial experts opined that the delay is eating up 2.0 per cent of the GDP (gross domestic product) on an average creating a hostile environment for investment. In China, there are approximately 1, 30,000 courts to deal with more than 11 million cases with a 6.3 per cent increase year-on-year.[35] This problem also affect the whole Europe. Developed countries like UK, France and Italy are struggling to deal with the backlog of cases. On January 31, 2014, some 152,200 cases were pending before the European Court of Human Rights. This situation poses a serious threat to the effective functioning of the Courts throughout the Europe. However, they have taken many measures like wide application of Alternative Dispute Resolution (ADR) and track allocation system of the court case. To get rid of backlog of cases the USA enacted the Speedy Trial Act of 1974 which has fixed standard time requirements for timely prosecution and disposal of criminal cases in district courts. In 1990, the US Congress enacted another legislation that directs each District Court to devise and adopt a civil expense and delay reduction plan. Similar laws need to be enacted in Bangladesh.[36]

Table: Judge-Population Ratio in Some Advanced Countries[37]:

Country	No. of Judges Per Million.
Australia	41
Canada	75

[35]CL Aggawwal, above note 187, 41.

[36] Syed Emran Hossain, *Delay in justice: An abysmal crisis*, The Financial Express, Views and Analysis, Vol-20, No. 162, <http://www.thefinancialexpress bd.com/old/innerpage.php?page_category_id=87 &date=2012-09-06> accessed 17 October 2015.

[37]Bharucha 'Speech Delivered in Kerala' (2014) XX VIII (4), *India Bar Review*, 2.

England	51
USA	107

The Judge- Population ratio in Bangladesh is the Second lowest in the world. There are now six judges for the Appellate Division, 97 judges for the High Court Division and around 1,700 judges for the lower courts across the country and the total population in our country is 160 Million.[38]

Table: Judge-Population Ratio in Bangladesh:

Court/ Division	No. of Judges	No. of Judges Per Million (Population)
Appellate Division	6	1 for 27 Million
High Court Division	97	1 for 1.65 Million
Lower Courts	1700	1 for 0.09 Million

7.12 Non-Observance of Court Hours by the Presiding Officer of Courts

There is a general complaint that the Magistrates are not punctual in attending the courts. Generally, they come late to the court and do not start the court work in time as the early hours of the clay are spent by them in their retiring and chambers where they either attend to some miscellaneous executive duties or receive and entertain visitors. Non-observance of court-hours besides causing inconvenience to the litigants, the members of the Bar and the court-staff also result in unusual delay in the disposal of cases. Cases are adjourned for want of time and the witnesses in attendance are sent away without recording their statements. As noticed earlier, this leads to the tendency on the part of the witnesses to avoid service process because they are required to attend the court on more than one occasion for giving evidence.

7.12.1 Delay in Pronouncing/Signing Judgment/Order

Though induction of more Judges may help in reducing the arrears it is the competence and proficiency of the Judges that contributes to better quality of justice. Unfortunately adequate

[38]Correspondent for The Daily Star, *Backlog of cases*, (2013), <http://archive.thedailystar.net/beta2/news/backlog-of-cases/>accessed 15 October 2015 .

attention is not paid to look for competent person proficient to handle criminal cases. Some Judges do not deliver Judgements for years. If there is delay, the Judge may forget important aspects thereby contributing to failure of justice. There is also a complaint that the Judgements are not promptly signed after they are typed and read causing great hardship to the parties.

7.13 Frequent Adjournments

The Magistrates generally do not exercise their discretion properly in granting adjournments which is due to a number of factors, as for instance, the matter of fixation cases for hearing is mostly left to the ministerial staff of the court who, without having any idea of the time which a case is like1y to take, fix too many cases per day for hearing. Incomplete cases i.e. cases where the witnesses are not in attendance, or where the accused is not present are generally left to be dealt with by the Reader or the Peshkar who adjourns them to a future date at his discretion. The Daily Cause List of a Magistrate's court is generally heavy and so the presiding officer readily succumbs to the requests of both the prosecution and the defence to adjourn the case for one reason or the other.

7.13.1 Time Taken to Finalize and Number of Adjournments

Of those victims or family of victims who had reported the crime to the police or the courts that led to the case being dealt with by a District Court, the case had been finalised in 27% of the cases. For those whose cases were finalised, it took less than a year in 42% of the cases; between 1-2 years in 21%; 2-3 years in 18%; 3-4 years in 11% and more than 4 years in 9%. For those whose cases had yet to be finalised , the matter had been going on for less than a year in 36% of the cases; between 1-2 years in 15%; 2-3 years in 18%; 3-4 years in 8% and more than 4 years in 23%.[39]

Table: Time Taken in Court[40]

	Where case finalised	**Where case not finalised**
Less than a year	42%	36%
Between 1-2 years	21%	15%

[39] Greg Moran, above note 185, 95.

[40] Ibid.

2-3 years	18%	18%
3-4 years	11%	8%
More than 4 years	9%	23%

All of the respondents were asked how many times the case had been adjourned to date:

Table: Number of Adjournments[41]

No. of adjournments	Percentage of Respondents
0	15%
1-5	30%
6-10	14%
11-20	17%
21-30	7%
>30	16%

The Most Common Reasons Given for Adjournments Were:

- Accused' lawyer asked for it-28%
- Accused not at court -13%
- Further investigation required-12%
- Do not know-12%. A further 6% answered that they were not told, and 5% that no reason was given the court.
- Prosecutor asked for it- 9%

7.14 Lack of Proper Supervision

Lack of effective and regular supervision is another major cause of delay. The District and Sessions Judge, who is in charge of the Courts in the district, seldom finds time to supervise their work. No doubt he receives periodical reports about the performance of the Magistrates, but little action is taken on these reports because, the District and Sessions Judge is more concerned with his multifarious executive duties than the disposal of judicial work. This lack of attention on the part of the Judge indirectly encourages the Magistrates to take the judicial work lightly. Because, they feel that their performance in some specific cases alone is sufficient to earn them a good report from the District Judge and appreciation of the higher authorities. Senior administrators in both wings of the country made no secret of the fact that

[41] Ibid.

the remarks recorded by the Sessions Judges and the High Court Division on the judicial work of the Magistrates were hardly ever regarded as the determining factor for promotion of such Magistrates.

7.15 Frequent Transfer of the Magistrates and Case, From One Court to Another

Sudden and frequent transfers of Magistrates often without substitutes cause considerable dislocation and delay in the disposal of judicial work. The accused generally claim de novo trial and that obviously means delay.

7.16 Stay of Proceedings and On-Receipt of Record

The disposal of cases by the criminal court is sometimes delayed on account of stay of proceeding by the higher courts or due to non-receipt of record from the appellate court or some other court. Early disposal of proceedings in which the proceedings of the case are stayed and prompt return of the record to the trial court can save a lot of time which otherwise is taken in the disposal of such cases.

7.17 Lack of Proper Working Conditions

The working condition of the court-buildings was far from satisfactory, At most of the places, the courts were congested and over-crowded. Lack of proper attention to the maintenance of the court-buildings and furniture was quite evident. At some places, the Magistrates were occupying impoverished court-rooms, lacking both dignity and comfort. There were hardly any amenities for the litigant public and the witnesses. A large number of courts were without adequate libraries and many Magistrates did not have even the bare enactments which they are called upon daily to administer. Facilities provided for the members of the Bar were usually inadequate. Many of the officers complained of non-availability of official residential accommodation, and of the high rent they had to pay for private houses.

Administration of justice is the foremost duty of a civilized State, and the importance of providing adequate accommodation and dignified surroundings for the courts can hardly be overemphasized. The litigant public is also entitled to be treated with greater consideration.

7.17.1 Lack of Security and Accommodation

There is no courthouse security equipment such as metal detectors, X-Ray machines, hand-held scanners etc. While some courts such as the Dhaka District Court did have some several police officers stationed at the entrance, there seemed to be no comprehensive security measures. In addition, although the Supreme Court has now established rest rooms for female litigants, there is no suitable accommodation such as ramps for wheelchairs for elderly citizens or those with mobility issues, nor sufficient elevators.

7.18 Outdated Laws

In the case of criminal court, some of the primary legislations are almost 150 years old. The British heritage still plays an important role and the judiciary still follows some Penal Statute the sole purpose of which is to restrict the movement of the poor. Ignoring the dynamicity of law is placing it in a static position where laws are not keeping pace with the changing pattern of crime.

7.19 Suggestions

A strong foundation for the rule of law, a key pillar of democracy, rests on a court system that is independent, transparent and effective. Bangladesh has a strong and competent judiciary but backlogs and outdated administrative systems impede justice delivery system and more work is needed to making justice services more accessible, acceptable and affordable.[42]

A careful analysis of the causes of delay enumerated above will show that the fault does not lie so much with the existing procedure as with the administrative machinery and the facilities provided for working that procedure. The judicial officers must also take their share of the blame and responsibility for failing to act efficiently and conscientiously in the discharge of their duties in accordance with law, and the very comprehensive instructions and guidelines issued by the High Court Division and the Governments from time to time. These causes can, in our view, be remedied by appropriate administrative measures without requiring any legislative action. We would, accordingly, recommend that the following steps be taken to remedy the situation:-

[42]Justice Surendra Kumar Sinha, above note 192, VII.

1. A Human Rights- Based Criminal Justice System

All systems, be they adversarial or inquisitorial, must comply with international human rights law. International human rights law is, in principle, indifferent to the internal criminal law system, as long as its features are compatible with international human rights. A country seeking a change in its criminal procedure system has to be aware that most systems have had to adapt gradually to international human rights standards. The European Convention on Human Rights is a good example for this, as the European Court of Human Rights made clear that each country, while free to adopt its own system of criminal justice, evidence, proceedings, etc., is nevertheless bound by the fair trial standard laid out in the Convention.[43]

2. Modernization and Computerization of Courts

In this era of globalization and rapid technological developments, which is affecting almost all economies and presenting new challenges and opportunities, judiciary cannot afford to lag behind and has to be fully prepared to meet the challenge of the age. Inter-court and Intra-court communication facilities, developed through use of Internet not only save time but also increase speed and efficiency. Day-to-day management of Courts at all levels can be simplified and improved through use of Technology including availability of Case Law and administrative requirements. Using various I.T. tools it is possible to carry out bunching/grouping of the cases involving same question of law. If this is done, all such cases can be assigned to the same Court, which can dispose them of by a Common Order. If point of law involved in the matter is identified in each case, it is possible to allocate subsequently cases involving the same question of law to the same Court, for being heard along with the previously instituted case.

As of now the Courts communicate with the Advocates/litigants through the process serving agency or the conventional postal system. It is possible to generate notices, summons etc. on computer and serve them through the use of electronic communications such as E-Mail. Addresses of advocates and the litigants can be entered in computer for the purpose of communication. Faster communication will lead to faster progress of the case and eventually help in reducing arrears.

[43]ECtHR, *Salabiaku v France*, Judgment of 7 October 1988, Series a No 141-A, para 27.

3. Video Conferencing

It is not uncommon for the criminal cases getting adjourned on account of inability of the police or jail authorities to produce them in the Court. Sometimes the witnesses are residing at far off places or even abroad. It is not convenient for them to attend the Court at the cost of considerable time and expense.

Video conferencing is a convenient, secure and less expensive option, for recording evidence of the witnesses who are not local residents or who are afraid of giving evidence in open court, particularly in trial of gangsters and hardened criminals, besides savings of time and expenses of traveling. Recently, Code of Criminal Procedure has been amended in some States to allow use of Video Conferencing for the purpose of giving remand of accused persons thereby eliminating need for their physical presence before the Magistrate.[44]In the cases of *Amitabh Bagchivs Ena Bagchi*[45] on 16 February, 2004, and *The State of Maharashtra vs Dr. Praful B. Desai*[46] on 1 April, 2003 and *R.Sridharan v R.Sukanya* on 30 March, 2011 and *Harbhajan Singh v. Jaspal Pahwaand Others*on 10 September, 2013[47], It was held that

> "The interpretation of the Supreme Court on that score is that in the Court physical presence of a person may not be required for the purpose of adducing evidence. Evidence includes video conferencing. Although the Supreme Court dealt with the criminal matter in delivering the judgment but the necessary explanation given therein is that it is applicable to all cases including criminal matter. Therefore, there cannot be any embargo so far as the present matter is concerned. Video conferencing is an advancement of science and technology which permits one to see, hear and talk with someone far away with the same facility and ease as if he is present herein. The only difference is that one

[44] European E-Justice action plan 2009-2013-The Ministers of Justice of the Member States of the European Union have decided to assign a high priority to E-Justice. The European E-Justice action plan 2009-2013 is intended to improve European and national procedures by making use of the possibilities offered by modern technology. <(2009/C 75/01) http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:EN:PDF> accessed 15 October 2015.

[45] AIR 2005 Cal 11, (2004) 3 CALLT 263 HC.

[46] (2003) 4 SCC 601.

[47] Kanoon, *Judgment Of Video Conferencing*, Union of India, <http://indiankanoon.org/docfragment/390051/?formInput=video%20conferencing>accessed 22 October 2015.

cannot touch the person concerned. Even then, it will not disentitle a person to give evidence in such way because of various reasons which we are now considering".

4. Need For Specialization in Judicial System

Over the years all the branches of law have grown enormously. The laws have multiplied, judicial precedents have grown, and lot of literature and information is available for study in each of these branches. It is not easy for every Judge to be able to master all the branches. That is why in the legal profession many leading lawyers specialize in one field of law or the other. There are lawyers who specialize in labor laws, administrative laws, tax laws, civil laws, criminal laws, company laws, or constitutional laws etc. Similarly in the medical profession, the Doctors are required to specialize in different branches such as Cardiology, Neurology, Nephrology, Ophthalmology, Oncology, and Urology etc. Scientific advances have thrown new challenges in the field of law such as Environmental laws, Telecommunication laws, Cyber laws, Space laws etc. There is therefore growing need for the lawyers, Judges to specialize in these emerging fields of law. A citizen, who wants to avail the best service, chooses a specialist in the particular branch. It is only when one specializes that he can give the best possible service in that field. A generalist may know all the branches but would not have deep knowledge or expertise in any particular branch of law. Realizing the importance of specialization, specialized tribunals have been established for dealing with tax matters, service matters, labor matters etc. This is a growing trend. The future is of specialization.

Judges who never did any criminal work before their elevation to the Supreme Court are often assigned criminal work. This does not contribute to efficient management of the work. Therefore, a separate criminal division should be constituted consisting of one or more criminal division benches as may be required depending upon the work load, to deal exclusively with criminal cases. Judges who have acquired good experience in criminal law and known for quick disposal should be assigned to sit on the criminal division. Once assigned to the criminal division they should sit in that division only. If among them there are any Judges, who in addition to expertise in criminal law, are proficient in any other branch of law may if necessary be assigned work in that branch of law

4.1. Promoting Punctuality

As regards punctuality, apart from the Chief Justice advising the concerned Judge about his duty to be punctual and the adverse effect on the image of the court and the rights of parties,

the Chief Justice may issue a circular requiring the court officer attached to every court to make a record of the time when the Judge assembles and the time when he rises and send a copy of the same at the end of each day to the Chief Justice and put it on the notice board for information of the public.

There were similar problems in USA where also the Judge can be removed only through impeachment process which is not easy to enforce. Therefore Judicial Councils Reform and Judicial Conduct and Disability Act 1980 was enacted. Under the Act there is a judicial council for each circuit and a National Judicial Conference at the Apex. They have been given power to censure a Judge, request him to seek retirement or direct that no cases be assigned to the Judge for a limited period. This will go a long way in bringing better discipline in the Higher Court or lower court.

5. Transfer of Petty Cases from Regular Courts

As many as cases involving petty offences has been pending in Magisterial Courts since many years. Since the pendency before Magisterial Court is very high, there is a need to transfer such cases to Courts of Special Magistrates, to be manned by retired Judicial Officers who can make extensive use of I.T. tools in disposal of such cases viz. by entering their particulars such as next date and the order passed on computer, issuing computerized receipts against which document, if any, impounded by police in traffic. Challans may be returned and issuing computer generated cause list of such cases. Governments should take immediate steps to appoint such Judicial Magistrates in adequate number to deal with such cases and provide necessary infrastructure including accommodation and Court staff for them.

6. Minimization of Old Cases

As many as more than ten years old cases were pending in the High Court Division alone. The pendency of such cases in Subordinate Courts is bound to be many times more. The High Court Division should consider segregation of courts so as to earmark separate courts to deal with old cases and new cases, in order to ensure that new cases do not become old cases of tomorrow. The High Court Division should set up benches exclusively for regular hearing of criminal appeals/petitions pending for more than 3 years, cases in which the accused is in custody or the proceedings before the trial Court have been stayed, so as to take up them on priority basis and as far as possible dispose them of within one year.

The cases in which proceedings before the trial Court have been stayed by the Courts of Sessions'/ Sessions Judges, sessions cases in which the accused is in jail for more than 3 years should be identified and disposed of on priority basis, as far as possible within one year. A suitable mechanism should be devised to ensure that stay of proceedings before the trial court terminates at the end of six months, unless extended, for adequate and special reasons to be recorded in writing.

7. Procedural Improvements in Trial of Criminal Cases

In a case instituted on police report, the accused is entitled to true copies of statements and documents proposed to be used against him during trial. It is frequently seen that the cases are adjourned many a times only on account of failure of the prosecution to supply these statements and documents to all the accused. Photocopiers can be provided to all the Courts so that instead of calling the investigating officer and directing him to provide the deficient copies, it is possible to supply the sufficient copies then and there, thereby eliminating the need for adjourning the case only for this purpose.

Table: Recommending Timely Management Procedural System:

Procedure	Time Taken	Recommended Time Limit
Filing of a Case	1 Day	1 Day
Investigation	6 months – 2 years	Maximum 1 month
Cognizance/Accepting Charge Sheet	1 month- 12 months	Maximum 1 month
Making Case Ready for Trial	1 month-2 years	1 month
Conclusion of Trial	Must be Concluded within Time Prescribed by the Code or Act	N/A

a. **Exemption from Personal Appearance of the Accused**: No useful purpose is served from insisting upon personal appearance of the accused except when he is required to be identified by the witnesses during the course of evidence. Therefore, trial courts should be liberal in granting exemption wherever the accused is represented by a

counsel, who is ready to proceed with the hearing of the case and the accused is not required to be identified by the witnesses.

b. Framing of Charge: Many a times, framing of charge is to be deferred merely because the accused or some of them are not present to answer the charge. Even where exemption from personal appearance of the accused has been dispensed with and they are represented by a lawyer, trial courts insist upon personal appearance of the accused to answer the charge. There is no justification for insisting upon personal appearance of the accused to answer a charge if his counsel is ready to carry out the task on his behalf on his instructions and has been duly authorized in this behalf.

c. Public Prosecutor: It is not infrequent that either no regular public prosecutor is posted in a Court or in case a regular prosecutor is on leave, no alternative arrangement is made. Even if alternative arrangement is made, the public prosecutor deputed as a substitute, having not read the file, does not take much interest in the case and either the witnesses are not examined or their examination is cursory. Many a times, one public prosecutor is given charge of two or three courts and consequently the work of some or the other courts suffers on account of non-availability of the prosecutor. It is, therefore, necessary that the number of prosecutors should not be less than the number of criminal courts and leave vacancy reserve of prosecutors should be available to the Chief Prosecution, so that the work of any court does not suffer on account of leave of regular prosecutor.

8. Equal Distribution of Workload for Judges

a. The court should eliminate the assignment of cases according to territorial criteria or any other means that do not ensure randomness. As a matter of policy, consideration may be given to considering the pecuniary jurisdiction of courts to evenly distribute some of the case load within the courts.

b. Effective use of a random case assignment application would help to ensure that the judges' workloads are equitably distributed and that each judge has approximately the same number and the same type of cases assigned to him or her. Many judiciaries such as the Philippines use a random lottery system to allocate cases to respective judges.

c. The Sessions Judge and the court administrator should work together to ensure that the respective judges workloads are equitable and that each is making diligent effort to dispose of cases effectively and efficiently.
d. In the interim, the Sessions Judges should also take active steps to redistribute the caseload of any Magistrate who reports to him or her an unmanageable load of pending cases. The Sessions Judge, under section 526B of the Code of Criminal Procedure, has the power to transfer a reasonable number of cases to other similar courts that have a minimum number of cases.

9. Delay at the Initial Stage in Complaint-Cases

Instructions be issued to the presiding officers of criminal courts that they should take equal interest in complaint-cases as they do in police-cases. They should also be directed to fix a time limit not exceeding one month within which the report should be submitted by the court or police-officer or any other person to whom the case is referred for inquiry or investigation, and in cases of non-receipt of the report by the date fixed by the court, it should itself proceed with the inquiry. The complainant should be encouraged to bring his own- witnesses for this preliminary inquiry.

10. Separation of Investigation Wing from Law & Order Wing

As of now, the police have a combined Cadre of Officers and men who perform both investigational and law and order duties, resulting in lack of perseverance and specialization in investigations, especially of the serious cases. It needs to be emphasized that the duties of the police as prescribed in section 23 of the Police Act, 1861, have become totally outdated. Much water has flown down the Padma since then. Terrorism, particularly State sponsored terrorism from across the borders, has drastically changed the ambit and role of police functions and duties in certain parts of the country. Besides, organized crime having inter-State and trans-national dimensions has emerged as a serious challenge to the State authority. This has compelled the Police Departments to divert a large chunk of their resource to these areas, leaving as much less for the routine crime work.

The need for expeditious and effective investigation of offences as contributing to the achievement of the goal of speedy trial cannot be gain said. The investigation of crime is a highly specialized task requiring a lot of patience, expertise, training and clarity about the legal position of the specific offences and subject matter of investigation. It is basically an art of unearthing hidden facts with the purpose of linking up of different pieces of evidence for

successful prosecution. Therefor it is high time to separate the investigation wing from law and order wing.

10.1 Investigation by a Team

Investigations of even grave and sensational crimes having inter-State and even trans-national ramifications are being conducted by a single I.O. By virtue of the nature of such cases, application of a single mind is not enough to respond to the modern needs of the art and science of investigation — may it be inspection of site, picking of the clues and developing them and handling of other multidimensional related matters. The investigation of all such crimes needs to be conducted by a team of officers, the size and level of the team depending on the dimensions of the case, with the senior most officer working as the leader of the team. This would ensure continuity between investigative efforts as also proper appraisal of evidence and application of law thereto. It will also avert or minimize the scope of misuse of discrimination by the police and ensure greater transparency in the investigations. Integrity of the team, needless to mention would obviously be higher.

11. Non-Attendance of Witnesses

The delay which occurs in the disposal of cases on account of non-attendance of witnesses can be eliminated by taking the following steps:—

a) The strength of process-serving staff should be increased so that only a reasonable amount of work is given to each member of the staff.
b) The terms and conditions of service of process-serving staff should be improved so that they may undertake all types of journeys. For longer distances, they should be entitled to draw travelling allowance while for shorter distances they should be paid motor-cycle allowance where it is possible for them to use motor-cycle for effecting service of processes,
c) Instructions for holding trials from day to day and promptly examining the witnesses in attendance already. The attention of the courts should once again be drawn to these instructions for strict observance.
d) Proper seating facilities and other conveniences should be provided in the court-premises both for witnesses and the litigants visiting the courts and the Government should take early steps in this behalf.

e) Adequate provision should also be made in the budget so that the courts are able to pay these expenses promptly on the dates of attendance.

f) As regards Government officials, instructions should be issued to the heads of departments to whom summonses are sent for service that they should forward the summonses to the officials concerned at their new addresses if they have been transferred meanwhile to some other station and failure of a Government servant to appear as a witness, without reasonable cause, in a criminal trial, should render him liable to departmental action, besides action by the court.

12. Non-Attendance of the Accused

The existing law gives ample power to the court to procure the attendance of the accused. The presiding officers must not leave the scrutiny of bail bonds and surety bonds to their subordinates nor should professional sureties he countenanced. In case of non-attendance of the accused where he is confined in the judicial lock-up or where he is undergoing imprisonment in some other case, the courts and the jail authorities should follow the instructions already issued in this behalf.

13. Supervision of Subordinate Courts

Simultaneously with an increase in the Magisterial Courts and improvement in their training, arrangements should be made effective and constant supervision of their day to day working. Lack of supervision is apparent not only in the case of criminal courts but also obtains more or less equally on the civil side as well. By taking adequate and appropriate measures in this direction alone it may be possible to effect an all—round improvement in the working of both Civil and Criminal courts. It may be considered that the time has come for the establishment in what may be call the institution of a “Judicial Ombudsman’’ in Bangladesh. The long delays attaching to the disposal of judicial business and the wide-spread complaints of malpractices in and outside the courts definitely call for an elaborate machinery for inspection and quick intervention wherever necessary.

14. Working Conditions

As already pointed out, the Government should take immediate steps to improve the working conditions of the courts inasmuch as it should undertake the construction of new courtrooms where necessary and improve the condition of the existing court-buildings. Adequate funds should be made available ii the provision of libraries, furniture and other amenities in the

court-premises and for residential accommodation for Judicial Officers, especially in large and expensive in towns. A ten year programme may be usefully drawn lip for each lower court.

a. Sufficient funds should be budgeted for the installation of a metal detector and an X-Ray machines at the main entrance of the court house and for equipping police officers with hand-held scanner. Budget needs to be allocated for the assessment and installation of wheelchair ramps and other relevant accommodation.
b. A citizen charter may be drawn up and conspicuously displayed in the court so that the court users/litigants may obtain the information of their desired device.
c. A staffed help-desk may be set up in the court to be the official point of contact for all court-related information to court-users. Pamphlets and other materials should be developed, informing court users of the services and facilities available, as well as how to access the court's service
d. A complaints section or mechanism should be set up whereby court users can lodge complaints. Each complaint should be carefully scrutinised and anyone found guilty of misconduct should be held accountable.

7.20 Inherent Defect in Criminal Procedure and Proposal for Reforms[48]

1. Summons to Be Served On Adult Person

In a criminal case summons is served according to section 68 on a person to compel his presence before the court. According to section 68(2), such summons is served by a police-office or by an officer of the Court issuing it or other public servant. According to section 70,Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family. But there is no provision in the Code to enable the authority to serve the summons on "Female Adult" person who has always been at home. In this situation, if the male adult person is out of home, the summons will not be served. As a result delay and waste of money follows.

[48]Law Commission of Bangladesh, *Recommendations In Order To Ensure Speedy Trial* (2014) <http://www.lc.gov.bd/reports.htm> accessed 19 October 2015.

Suggestion

There is a need of amendment of Section 70 of the Code in such a line that in the absence of person summoned, summons may be served upon any "Adult Person".

2. Summons to Be Served Over Fax, E-Mail or Electric Device

According to Section 72, where the person summoned is in the active service of the Republic, the Court issuing the summons ordinarily sends it in duplicate to the head of the office in which such person is employed and such head causes the summons to be served. In a criminal case, public servant including investigating officers may be one of the important witnesses. The public servant or investigating officer may be transferred from one jurisdiction to another jurisdiction during investigation or trial of case concerned. Sometimes summons cannot be served in time upon those person because of such distance. As a result delay occurs.

Suggestion

If it appears to the court that it is just and necessary to serve the summons upon that public servant over fax or email or any electric device in order to compel his appearance before the court, it shall serve the summons in that way and it shall be deemed that summons has been duly served. Such provisions may be incorporated in the Code under the head of section 72A.

3. Investigation in Case of Arrest without Warrant

Section 61 of the Code provides for that the police-officer cannot detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. The Magistrate to whom an accused person is forwarded may, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. In such situation the person arrested has always been harassed. Because there does not exist any such example in our country that the police officer has completed the investigation and submitted the police report within 24 hours. The reasons of not completing the investigation within 24 hours are *inter alia* that inadequacy of police officers, huge duty of investigation of many cases upon a police officer, different type of executive duty, irresponsibility of the investigating officer etc.

Suggestion

Sections (6), (7), (7A) should be revived by repealing the Repealing Act Criminal Procedure (Second Amendment) Act, 1992 (Act No. XLII of 1992) or the similar provisions of Nari o ShishuNirjatan Daman Ain, 2000 regarding investigation should be incorporated in the Code.

4. Examination of Witnesses by Police

According to Section 161 of the Code, Any police-officer making an investigation or any police-officer not below such rank as the Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. But According to section 162 of the Code, No statement made by any person to a police-officer in the course of an investigation shall, if reduced into writing, be signed by the person making it. In almost all cases, the investigating officers at his own will or negligently does not proceed to the place or examine the witness in time and even he does not record the statement of witnesses in a line as the witnesses said. Because there is no provision of signing it by the witnesses at the body of record. Even, most importantly such statement or part thereof, if duly proved, is being used to contradict the witness making it in the manner provided by section 145 of the Evidence Act, 1872.

Suggestion

Statement of a witness under Section 161 needs to be compulsorily signed or fingerprinted, and if need be or possible, be recorded by audio-visual electronic devices. Likewise, statement or confession by an accused before a magistrate under Section 164 should also be recorded by such electronic devices.

5. Submission of Police Report

According to section 173, every investigation shall be completed without unnecessary delay and the officer in charge of the police-station shall communicate, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. This section does not provide any kind of limit to complete the investigation and to submit the police report. As a result year after year the case remains at investigation stage. In reality, the police-station does not communicate, the action taken by him to the person by whom the information relating to the commission of the offence was first given. In such

situation the aggrieved party lodges a *Naraji* Petition to magistrate against submission of Final Report and if the petition is dismissed, the aggrieved party prefers revision. Then the magistrate may make an order to conduct a further investigation. As a result the number of old cases are being increased day by day.

Suggestion

A concrete time limit with only one extension for concluding the investigation and submitting the police report should be incorporated in the Code, and the information of action taken by the police officer must be given to the person by whom the information relating to the commission of the offence was first given.

6. Clear Definition of Beyond Reasonable Doubt and Benefit of Doubt

In our legal system, the prosecution is the person who will prove the case beyond reasonable doubt in order to sustain the conviction of the accused. One of the principles of criminal litigation is that ten guilty person should be acquitted but an innocent person shall not be punished. But the socio-economic condition of our country has been critically changed. For the lack of security and fear of life of his own or his relatives, none wants to make any kind of statement, either in court or out of court, against the culprit. Thus it becomes huge tough for prosecution to prove the case beyond reasonable doubt and the prosecution cannot enforce the presence of the witnesses, and day by day the prosecution makes petition for adjournment. But ultimately the accused is released for having the principle of Benefit of Doubt. It is to be noted that there is no clear definition of Beyond Reasonable Doubt and Benefit of Doubt in the Code or in our legal system.

Suggestion

There should be a clear, proper and specific definition of Beyond Reasonable Doubt and Benefit of Doubt. It is time to follow the principle that no innocent person shall be punished and no guilty person shall be released. There must be provisions of security for the witnesses in order to ensure their presence and speedy trial.

7. Enabling Court of Sessions to Discharge or Acquit the Accused in Case of False, Frivolous or Vexatious Accusations

In many cases innocents are critically harassed by being implicated false, frivolous or vexatious accusations. According to section 250, if in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate or any offence triable by a Magistrate, and is or opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear before the court. Accordingly, the Magistrate can punish such person in accordance with law. But there is no such provision anywhere in the code to enable the Court of Sessions to punish such person who makes false, frivolous or vexatious accusations. In such circumstances, day by day the tendency of filing false etc. cases are being increased and huge backlog of cases follows.

Suggestion

Section 250 of the Code should be amended by incorporating the Court of sessions or any other Criminal Court in this section enabling those court to punish those who makes false, frivolous or vexatious accusations in order to reduce the tendency of making such complaint.

8. Power to Postpone or Adjourn Proceedings

According to section 344 of the Code, If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. But in this section there does not exist any kind of time limit of such postpone or adjournment of a proceedings, or how many times postpone or adjournment can be ordered by the court. Sometimes adjournment or postpone takes place for having huge number of cases upon a Magistrate. As a result day by day, backlog of cases follow.

Suggestion

a. The number of Magistrates should be increased as soon as possible and the case shall be distributed to Magistrate in accordance with number of case, not with territorial jurisdiction.

b. There should be a time limit of adjournment or postpone under section 344 of the code and this limit may be for 30 days and not more than 6 adjournment, upon need basis, should be ordered in trial of a case.

9. Criminal Appeal

With some exceptions, the convicted person has right to prefer appeal to Appellate Court against conviction or sentence. The Appeal or procedure of appeal or Appellate Court or grounds of appeal have been described under Chapter XXXI of the Code. Huge number of appeal are pending before the Appellate Court but the number of judges of Appellate court and the number of judges are fewer than the number of cases. Sometimes the judges become busy with their original filed cases rather than disposal of appeal.

Suggestion

a. Number of Appellate Courts should be increased in pursuance of number of original courts.

b. In order to ensure fair and speedy trial, in every district or sessions division exclusive Appellate Court of Sessions shall be established.

c. Grounds of Remand of cases by the Appellate Court to Trial Court should be clear and specified, and if possible, Remand of cases should be discouraged.

d. After establishing the Appellate Court, Mandatory time limit for disposal of appeal shall be framed and in order to give effect this proposal, Section 442A of the Code may be amended.

7.21 Conclusion

The first and the biggest problem is of the delay in disposition of cases. Due to huge pendency, the cases take years for its final disposal, which would normally take few month time. The arrears cause delay and delay means negating the accessibility of justice in true terms to the common man. The very core of a civil society and rule of law is the provision of justice, but the decision must be delivered within a reasonable time. It is totally unfair if a

suspected criminal waits for trial for years and is ultimately found innocent. Similarly, the victim of the crime will be also not satisfied if there is no punishment to the criminal for so long. Only speedy justice could ensure effective maintenance of Law and order. Quality of justice not only promotes peace in the society but also strengthens internal security of the country

We will have more litigation in future when those sections of the society, who have remained oppressed and unaware of their legal rights, become more aware of their rights due to spread of legal literacy, and increased awareness equipped by effective legal aid and advice. While laying stress on the urgent need of elimination of delay and reduction of backlogs, we cannot afford to act in undue haste so as to substitute one evil for another one. Stress on speed alone at the cost of substantial justice may impair the faith and confidence of the people in the system and cause greater harm than the one caused by delay in disposal of cases.

I will conclude by referring to the observation made by Justice Warran Burger, Former Chief Justice of the American Supreme Court observed in the American context:

> "… The notion – that ordinary people want black-robed judges, well dressed lawyers, fine paneled courtrooms as the setting to resolve their disputes, is not correct. People with legal problems. Like people with pain, want relief and they want it as quickly and inexpensively, as possible,"

Chapter-VIII

Alternative Dispute Resolution (ADR) in Criminal Justice System

8.1 Introduction

Man lives in a society. With a view to lead a harmonious life in the society, human being undertakes their social interaction, through the different forms of social process-cooperation, competition and conflict. Conflict creates Suits and cases. Unlike the suits and trial cases, Alternative Dispute Resolution (ADR) includes processes that are out of court proceedings. Due to fact that pendency of court cases and suits have gone through roofs, ADR has gained paramount significance in almost every civilized dispensation.

The System for resolving dispute alternatively did not evolve in a day or even in a country rather it has been developed in different times, places, and forms of the need of people. The provisions of Alternative resolution exist at 450B.C. in the Twelve Tables adopted by the Romans. According to the rules of Twelve Tables the judges applied their reasonable discretionary power with respect to the settlement of stipulations arising from the contracts and the partition of lands acquired by inheritance. However, Alternative Dispute Resolution (ADR) is a term which is frequently used in civil suits and proceedings. Like many other countries Bangladesh has also introduced this process in civil litigation system. With regard to criminal litigation the adoption of the process of ADR has been advocated by some researchers.

Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime or sanctioning those who violate laws with criminal penalties and rehabilitation efforts. There are arguments both for and against with regard to ADR in criminal justice system. Because the criminal justice system emphasizes the role of the state in resolving offences to ensure peace and to protect the life and property of its subjects. State can never compromise. However, it should be noted that many offences do not fall under the category of crimes affecting the state, but affecting only a particular individual or a group of individuals, ADR can be more effective there. In spite of the objection with regard to ADR in criminal cases, it has been a revolution for speedy trial. The Constitution of Bangladesh ensures justice but still there are so many pending cases because of which it is tough to ensure proper justice and ADR can play a big role here to speed up the dispute resolution and thus ensure people' right to justice.

8.2 Meaning of Alternative Dispute Resolution

The Alternative Dispute Resolution (ADR) is used to describe resolution mechanisms that are short of, or alternative to, full scale court processes or judicial processes. When dispute between parties are resolved through means which are alternative to formal litigation, this is known as alternative dispute resolution.[1]

Alternative Dispute Resolution (ADR) is a collection of processes used for the purpose of resolving conflict or disputes informally and confidentially. ADR provides alternatives to traditional processes, such as grievances and complaints; however, it does not displace those traditional processes. Alternative Dispute Resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement to mitigate litigation outside the court.[2]

However, the term 'alternative' in ADR needs to be understood as an additional means to access justice, not as a means which may replace the traditional court system.[3] The term "Alternative" lies in the judicial proceeding system. There are three judicial proceeding systems- The accusatorial or adversarial system, the inquisitorial or non- adversarial system, the mixed system.[4]

Thomas J. Stipanowich states that the name of ADR is an outmoded acronym that survives as a matter of convenience only.[5] Professor Jean R. Sternlight has preferred the phrase ADR as "Appropriate Dispute Resolution" rather than "Alternative Dispute Resolution".[6]

8.3 Alternative Dispute Resolution in Criminal Justice System

The Criminal Justice System is one of the most recent ADR adopters and has been gaining popularity in many parts of the USA and around the world as an alternative to traditional

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[1]Abdul Halim, ADR in Bangladesh: *Issues and challenges* (3rdedn, CCB Foundation, Dhaka, 2013) 31.

[2]Duhaime.org, Legal Dictionary, <http://www.duhaime.org/LegalDictionary/A/AlternativeDisputeResolution.aspx> Accessed 3 November 2015.

[3] Jamila A Chowdhury, *ADR Theories and Practices* (1stedn, London College of Legal Studies (South), Dhaka, 2013) 42.

[4]Ansar Ali Khan, *An introduction to Alternative Dispute Resolution (ADR)* (1stedn, Hira Publication, Dhaka 2010) 52.

[5]Thomas J Stipanowich, 'ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution, (2004) 1(3) *Journal of Empirical Legal Studies*, 845.

[6] Jean R. Sternlight, 'Is Binding Arbitration a Form of ADR?' [2000] 1, *JDR Journal* , 97.

retributive justice. Restorative justice generally brings the offender, the victim, and the affected community meets in the presence of trained facilitator to discuss the incident and the behavior and to seek solutions. The offender, the victim and the community each has equal responsibility within the process, and solutions are achieved through consensus, currently restorative justice is most often used in juvenile's cases.[7]Although widely known for its propensity for litigation, the USA has one of the world's most advanced and successful systems for settlement of disputes outside the formal legal system through mechanisms of mediation and arbitration. More extensive use of this system internationally and by other countries can dramatically enhance the speed and quality of social justice globally. Usage within the USA varies widely.[8]

Plea bargaining, a model of ADR, is the process by which a prosecutor and a criminal defendant, in the USA the accused is called defendant, negotiate an agreement , where the defendant pleads guilty to lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as more lenient sentence or a dismissal of other charges. Thus, plea bargaining gradually become a widespread practice and it was estimated that 90% of all criminal convictions in the USA were through guilty pleas. In 1970, the constitutional validity of plea bargaining was upheld in *Brady vs. United States*[9]where it was stated that "it was not unconstitutional to extend a benefit to a defendant who in turn extends to a benefit to the state." One year later, in *Santobello vs. New York*[10] the United States formally accepted that plea bargaining was essential for the administration of justice. From that Validity, in the USA plea bargaining becomes a significant part of the criminal justice. The vast majority of criminal cases are settled by plea bargaining rather than by a jury trial. For successful adoption of plea bargaining for first time in USA, this concept is speedily evolving in many countries, and different states and jurisdiction have different rules on this.

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[7] David J Hines, *Restoring Juvenile Justice*, <http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/restoringjuvenilejustice.html>Accessed 4 November 2015.

[8] Michael McManus and Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States* <http://www.cadmusjournal.org/node/98>accessed 3 November 2015

[9](1970)397 US 74.

[10](1971)404 US 257.

8.3.1 Concept of Plea Bargaining in Bangladesh

There is no direct provision in our criminal jurisprudence on plea bargaining and it is an emerging concept in Bangladesh. But there is a beacon of hope that is becoming bright from the ruling of the higher courts on this concept. The Appellate Division, Supreme Court of Bangladesh in the case *of Md. Joynal and others vs. Mohammed Rustum Ali Miah*[11] and others considering the nature of section 345 observed that our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided under section 345 of Cr. P.C. It says that the law encourages settlement of disputes either by Panchayet or by Arbitration or by way of compromise. However it is good to say that section 345(6) says that the composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded and section 345(7) provides that no offence shall be compounded except as provided by this section.

Further in the case of *Abbdus satter and others v. The State and another,*[12]the Appellate Division observed that "our criminal administration of justice encourages compromise of mere certain disputes and some of the particular cases can be compounded as provided by section 345 of Cr. P. C. The complainant has filed an affidavit praying for composition of the offences as the parties in the litigation are inter-related. As we have noticed that the law encourages the composition of the offences and since this matter is pending by way of special leave before this court, we have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused." From the terms "mere certain disputes" in the judgment it is ocular that all are concerned to rethink whether the existing principles and philosophy of our criminal justice system are efficacious anymore.

In a case[13] it is also observed that "the common law adversarial system in our criminal administration of justice is not working well with the colossal failure in matters of punishing the real offenders due to technical flaws of the laws which eventually goes to provide premium to the criminals in the proliferation of crimes shaking at the root the social peace and security."

[11] 36 DLR (AD) 240, 245; 4 BCR (AD) 29.

[12] 38 DLR (AD) 38, 40.

[13] 4 MLR (HCD) 87

Since the present criminal justice mechanism suffers with numerous flaws and consequently makes the system vitiated, it is high time to introduce a new method that bring real pace to human existence through consensus. The criminal justice system machinery must also meet the challenges of effective dealing with the emerging forms of crime and behavior of the criminals.

8.5.2 Evolution of Plea Bargaining in India

The 154th report of the Law Commission recommended that plea bargaining should be included as a separate chapter in the Indian criminal jurisprudence. In the 12th Law Commission Report the conception of idea behind incorporating the idea of plea bargaining was mentioned wherein it was stated that there needs to be some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the sufferings of under trial prisoners awaiting the commencement of trials. The NDA government formed a committee, headed by the former Chief Justice of the Karnataka and Kerala High Courts, where Justice V.S.Malimath came up with some suggestions to tackle the ever-growing number of criminal cases. In its report, the Mali math Committee recommended that a system of plea bargaining be introduced in the Indian Criminal Justice System to facilitate the earlier disposal of criminal cases and to reduce the burden of the courts. Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament. The statement of objects and reasons, *inter alia*, mentions that, the disposal of criminal trials in the courts takes considerable time and that in many cases trial do not commence for as long as 3 to 5 years after the accused was remitted to judicial custody. Though it could not be recognized by the criminal jurisprudence, it is seen as an alternative method to deal with the huge arrears of criminal cases. The bill attracted enormous public debate. Critics say that it should not be recognized as it would go against the public policy under our criminal justice system.

Plea Bargaining was introduced in India by the Criminal Law (Amendment) Act, 2005 by the Parliament in the winter session of 2005, which amended the Code of Criminal Procedure and introduced a new chapter XXIA in the code containing sections 265A to 265L which came into effect from July 5, 2006. It was due to the inspiration that has been gained from America which made Indian to experiment the concept of plea bargaining in the country.

8.5.3 ADR in Criminal Litigation in Pakistan

Plea bargaining as a legal provision was introduced in Pakistan by the National Accountability Ordinance 1999, an anti-corruption law. Special feature of this plea bargain is that the accused applies for it accepting his guilt and offers to return the proceeds of corruption as determined by investigators/prosecutors. After endorsement by the Chairman National Accountability Bureau the request is presented before the court which decides whether it should Plea Bargain as a form be accepted or not. In case the request for plea bargain is accepted by the court, the accused stands convicted. He is disqualified to take part in elections, hold any public office, obtain a loan from any bank and is dismissed from service if he is a government official[14].

8.5.4 ADR in Criminal Litigation in UK

'Plea Bargaining' is allowed only to the extent that the prosecutors and defense can agree that the defendant will plead to some charges and the prosecutor shall drop the remainder[15].

Plea-bargaining is originally an Anglo-American system of bypassing juries to reduce workload of the courts although, today it is probably most actively used in the US. A fair number of other common law jurisdictions have also incorporated plea-bargaining. Courts in the UK have insisted on being the primary actor in the determination of the punishment. It was formally introduced in England by the Criminal Procedure and Investigations Act, 1996.

The Criminal Justice Act 2003[16] has laid down the powers of the judge as regards sentence reduction in case of guilty pleas, expressly, in section 144-

Section: 144-Reduction in Sentences for Guilty Pleas

1. In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account-

[14] Zafar Iqbal Kalanauri, *Tracing the Future of ADR in Pakistan*, < http://www.ADR under Criminal Litigation in Pakistan.com> accessed 5 November 2015.

[15]Loukas Mistelis, *ADR in England and Wales*, <https://www.academia.edu/262766/ADR_In_England_and_Wales_12_Am >accessed 5 November 2015.

[16] 2003 c.44.

a. The stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
b. The circumstances in which this indication was given.

2. In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 of the Sentencing Act, nothing in that subsection prevents the court, after taking into account any matter referred to in subsection (1) of this section, from imposing any sentence which is not less than 80 per cent of that specified in that subsection.

This is a direct reproduction of the section 152 of the Powers of Criminal Courts (Sentencing) Act, 2000[17], whereby the judge has the discretion to reduce sentence if a plea of guilt is made early enough in the trial.[18]

In *R. v. Turner (F.R.)*[19], it was held that any discussion must be between the judge and the counsels on both sides. If counsel is instructed by a solicitor who is in court, he too should be allowed to attend the discussion. This freedom of access is important because there may be matters calling for communication or discussion of such a nature that the advocate cannot, in his client's interest, mention them in open court, e.g. the advocate, by way of mitigation, may wish to tell the judge that the accused has not long to live because he is suffering maybe from cancer, of which he is and should remain ignorant. Again, the advocates on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence. It is imperative that, so far as possible, justice must be administered in open court.

In *Att.-Gen.'s Reference (No. 44 of 2000) (R. v. Peverett)*[20], it was stated that it was only in wholly exceptional circumstances that counsel should have recourse to the judge in his room for the purpose of discussing pleas or sentence; an example of such circumstances was that of the defendant who was unaware that he was dying. In response to the court's comments, the Attorney-General issued specific guidelines to prosecution authorities as regards acceptance of pleas and discussion about sentencing with the judge. The Attorney-General has clarified in the section entitled "Acceptance of Pleas" that:

[17] 2000 c.6.

[18] Explanatory Note on the Criminal Justice Act 2003, <www.opsi.gov.uk.> accessed 6 November2015.

[19] [1970] 2 Q.B. 321.

[20] [2001] 1 Cr.App.R. 27.

- Hearing except in the most exceptional circumstances, should be conducted in public. This includes the acceptance of pleas by the prosecution and sentencing.
- The Code for Crown Prosecutors sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted. Where this is done, the prosecution should be prepared to explain their reasons in open court.
- The Court of Appeal has said on many occasions that justice should be transparent; only in the most exceptional circumstances should plea and sentence be discussed in chambers. Where there is such a discussion, the prosecution advocate should at the outset, if necessary, remind the judge of the principle that an independent record must always be kept of such discussions. The prosecution advocate should make a full note of such an event, recording all decisions and comments. This note should be made available to the prosecuting authority.[21]

8.5.5 ADR in Criminal Litigation in Canada

In Canada, it appears that about 90% of criminal cases are resolved through the acceptance of guilty pleas: many of these pleas are the direct outcome of successful plea negotiations between Crown and defense counsel. Where a plea bargain has been implemented, the Crown and the accused effectively determine the nature of the charge(s) that will be laid. Since the nature and *quantum* of sentences are primarily based on the charge(s) brought against the accused, it is clear that the parties to a successful plea negotiation enjoy the *de facto* power to exercise a considerable degree of influence over the sentence that is ultimately imposed by the trial judge[22].

8.5.6 Plea Bargaining in USA

Plea bargaining in the United States is very common; the vast majority of criminal cases in the United States is settled by plea bargain rather than by a trial. They have also been increasing in frequency—they raised from 84% of federal cases in 1984 to 94% by 2001.[23]

[21]Atreyee Majumdar, *Plea-bargaining – Guilty. But of a Lesser Offence?* <http://www.indlaw.com /legalfocus/focusdetails.aspx?ID=77>accessed 6 November 2015.

[22]ADR Institute of Canada < http://www.adrcanada.ca/about/faq.cfm> accessed 5 November 2015

[23]George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (1st edn, Stanford University Press. USA) 203

Plea bargains are subject to the approval of the court, and different States and jurisdictions have different rules. Game theory has been used to analyze the plea bargaining decision.[24]

The constitutionality of plea bargaining was established by Brady v. United States in 1970,[25] although the Supreme Court warned that plea incentives which were sufficiently large or coercive as to over-rule defendants' abilities to act freely, or used in a manner giving rise to a significant number of innocent people pleading guilty, might be prohibited or lead to concerns over constitutionality.[26]*Santobello v. New York* added that when plea bargains are broken, legal remedies exist.[27]

Several features of the American justice system tend to promote plea bargaining. The adversarial nature of the system puts judges in a passive role, in which they are completely dependent upon the parties to develop the factual record and cannot independently discover information with which to assess the strength of the case against the defendant. The parties thus can control the outcome of the case by exercising their rights or bargaining them away. The lack of compulsory prosecution also gives prosecutors greater discretion. And the inability of crime victims mount a private prosecution and their limited ability to influence plea agreements also tends to encourage plea bargaining.[28]

8.5.7 Plea Bargaining under Civil Law Countries

Plea bargaining is extremely difficult in jurisdictions based on civil law. Nevertheless, France, Estonia, Italy and Poland introduced plea bargaining in a limited form. In Poland plea bargaining is applicable only to minor teionies punishable by no more than 10 years imprisonment. In Italy, the procedure of 'pentito' (literally, he who has repented) was introduced for counter-terrorism purposes, and generalized during the Maxi trial against the mafia in 1986-1987. The procedure has been contested, as the *pentiti* received lighter

[24]Baker S Mezzetti, '*Prosecutorial Resources, Plea Bargaining, and The Decision To Go To Trial' (2015) 17(1), Oxford Journals,* 149-167 <http://jleo.oxfordjournals.org/content/17/1/149.>6 November 2015

[25] 397 U.S. 742 (1970).

[26]Lucian E Dervan, 'Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve' 2012] 1, *Utah Law Review* 51, 97.

[27] Westin Peter, 'Westin David," 'A Constitutional Law of Remedies for Broken Plea Bargains' (1978) 66 (3) *California Law Review* 471, 539.

[28] JE Ross. 'The Entrenched Position of Plea Bargaining in United States Legal Practice' [2006] 54, *American Journal of Comparative Law* 717, 732.

sentences as long as they supplied information to the magistrates. The European countries are also slowly legitimizing the concept of plea bargaining, though the Scandinavian countries largely maintain prohibition against the practice.

8.5.7.1 Plea Bargaining in France

The introduction of a limited form of plea bargaining (*comparutionsur reconnaissance préalable de culpabilité*or CRPC, often summarized as *plaider coupable*) in 2004 was highly controversial in France. In this system, the public prosecutor could propose to suspects of relatively minor crimes a penalty not exceeding one year in prison; the deal, if accepted, had to be accepted by a judge. Opponents, usually lawyers and leftist political parties, argued that plea bargaining would greatly infringe on the rights of defense, the long-standing constitutional right of presumption of innocence, the rights of suspects in police custody, and the right to a fair trial.[29]

8.5.7.2 Plea Bargaining in Italy

Plea bargaining *(patteg giamento*), the bargaining is not about the charges, but about the sentence, reduced of one third. When the defendant deems that the punishment that would, concretely, be handed down is less than five-year imprisonment or that it would just be a fine, the defendant may plea bargain with the prosecutor. The defendant is rewarded with a reduction on the sentence and has other advantages such as that the defendant does not pay the fees on the proceeding. The defendant must accept to plead guilty to the charges even if the plea-bargained sentence has some particular matters in further compensation proceedings, no matter how serious the charges are. Sometimes, the prosecutor agrees to reduce a charge or to drop some of multiple charges in exchange for the defendant's guilty plea, often to a lesser offense. When both the prosecutor and the defendant have come to an agreement, the proposal is submitted to the judge, who can refuse or accept the plea bargaining.[30]

[29]John Tagliabue, *Adoption of Plea Bargaining in Legal Overhaul*, <http://www.nytimes.com/2003/04/10/world /france-proposes-adoption-of-plea-bargaining-in-legal overhaul.html> accessed 5 October 2015.

[30]Federica Iovene, *Plea Bargaining and Abbreviated Trial in Italy, <http://papers.ssrn.com/sol3/papers.cfm?ab stract_id=2286705>*accessed 4 October 2015.

8.5.7.3 Plea Bargaining in Poland

Poland also adopted a limited form of plea bargaining, which is applicable only to minor felonies (punishable by no more than 10 years of imprisonment). The procedure is called "voluntary submission to a penalty" and allows the court to pass an agreed sentence without reviewing the evidence, what significantly shortens the trial. There are some specific conditions that have to be simultaneously met:

- the defendant pleads guilty and proposes a penalty,
- the prosecutor agrees,
- the victim agrees,
- the court agrees.

However, the court may object to the terms of proposed plea agreement even if already agreed between the defendant, victim and prosecutor and suggest changes (not specific but rather general). If the defendant accepts these suggestions and changes his penalty proposition, the court approves it and passes the verdict according to the plea agreement. In spite of the agreement, all the parties of the trial: prosecution, defendant and the victim as an auxiliary prosecutor (in Poland, the victim may declare that he wants to act as an "auxiliary prosecutor" and consequently gains the rights similar to official prosecutor) - have the right to appeal.[31]

8.6 Alternative Dispute Resolution in Criminal Legislations: Bangladesh Perspective

Alternative Dispute Resolution (ADR) is a term which is frequently used in civil suits and proceedings. Like many other countries Bangladesh has also introduced this process in civil litigation system. However, with regard to criminal litigation the adoption of the process of ADR has been advocated by some researchers, politicians, of the society. India introduced the system of plea bargaining in 2005. There are arguments both for and against with regard to ADR in criminal cases. The Supreme Court of Indian in Murlidhar*MeghrajLoyat v. State of Maharashtra,*[32] observed that although in civil suits we find compromises actually

[31]Plea Bargain-Use in Civil Law Countries–Poland, <http://www.liquisearch.com/plea_bargain/use_in_civil_law_countries/poland>accessed 4 October 2015.

[32] 2000 CrLJ 384 (386).

encouraged as a more satisfactory method of settling disputes between individuals, such mechanism of compromise seems immoral in criminal cases. This is because crimes are against the state and the "State" can never compromise. It must enforce the law. Therefore open methods of compromise are possible in criminal litigation.

8.6.1 Compounding Offences

The appellate Division, Supreme Court of Bangladesh in the case of *Md. Joynal and others vs. Mohammad Rustum Ali Miah and others*[33], considering the nature of section 345 observed that our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided under section 345, Cr.P.C. Section 345(6) says that the composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded. Section 345(7) provides that no offence shall be compounded except as provided by this section.

Section 345(3) provides that when any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner. Section 345(4) says that when the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence. Section 345(5) provides that when the accused has been sent for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is sent or, as the case may be, before which the appeal is to be heard. Section 345(5A) provides that the High Court Division acting in the exercise of its powers of revision under section 439, and a Court of Session so acting under section 439A, may allow any person to compound any offence which he is competent to compound under some specific sections.[34]

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[33] 4 BCR (AD) 29.

[34]As per Code of Criminal Procedure 1898, compoundable offences without permission of the court are:- Sections 298, 323, 334, 341, 342, 352, 355, 358, 374, 426, 427, 447, 448, 490, 491, 492, 500, 501, 502, 504, 506, and 508 of the Penal Code. Offences compoundable with the permission of the courts:- Sections 147, 148, 324, 335, 336, 337, 338, 343, 344, 346, 347, 348, 354, 356, 357, 379, 380, 381, 403, 406, 407, 408, 411, 414, 417, 418, 419, 420, 421, 422, 423, 424, 428, 429, 430, 451, 482, 483, 486,493, 494,509, and 511 of the Penal Code.

8.6.2 Proposed Compoundable Offence against Penal Laws

It is absolutely established in the criminal justice system that all the offences permitted by section 345 of Code of Criminal Procedure are only be compromised except those, others are non-compoundable. But it is a prevalent feeling that some offences those are non-compoundable cause injustice and harassment to the litigating parties. Some examples may clear this proposal.

Section 143 of the Penal Code, 1860 enumerates the punishment of Unlawful Assembly. It says whoever a member of an unlawful assembly is, shall be punished with imprisonment of either description for a term which may extend to six months or with fine or with both. But this section is not compoundable under section 345 of Code of Criminal Procedure whereas In spite of having two years imprisonment or fine or both for the offence of rioting, section 147 is compoundable.[35]

Section 138 of Negotiable Instrument Act 1881 is non-compoundable. But practically it is observed that after being dishonored and complaining a case, the prescribed amount complained of is paid by the accused to the complainant during the trail of that case. After being paid, the prosecution may not be eager more to forward the case ahead. For the reluctant of prosecution ultimate the consequence is of acquittal of accused. But the point is that if section 138 becomes compoundable, it might reduce the number of cases in the court.[36]

This observation may be enlightened by the Decision of Appellate Division-

"The category of offence compoundable have been enlarged by the Law Reforms Ordinance and at the moment all the offences which are subject matter of criminal case No: 207 of 1973, 400 of 1973 e.g. offence under sections 380/148/448/143 and 379 of the Penal Code are compoundable."[37]

In the light of this observation, some offences of the Penal Code 1860 may be made compoundable and which have been mentioned in the **Annexure- II**.

8.6.3 Proposed Compoundable Offences against Other Laws

In the schedule of the Code of Criminal Procedure provides that any offence other than penal code is punishable with imprisonment for less than two years and not more than 5 years were made bailable but non compoundable, and any offence other than penal code is punishable

[35] Md Aktaruzzaman, *Concept and Law of ADR and Legal Aid, (*5thedn, Shabdokali Printers, Dhaka, 2013) 236.

[36]Ibid 240.

[37]*Md Joynal And Others v. Md. Rustam Ali Miah and Others,* 36 DLR (AD) 240.

with imprisonment for less than two years or with fine only also made bailable but non compoundable. If those offences are made compoundable, back log of criminal cases will be reduced.

For Example, Section 138 of the Negotiable Instrument Act 1881 says dishonor of cheque for insufficiency of fund etc. which may be made compoundable and some other compoundable offences against other have been mentioned in **Annexure- III**.

8.6.4 Provisions Mentioned in Village Courts Act

In addition to the practice of judicial ADR, different forms of quasi-formal ADR are also practiced in Bangladesh. Unlike Judicial ADR, quasi formal ADR are conducted by local government representatives under a statutory mandate, not by courts or tribunals rather performed by local government representative under a statutory mandate. Different forms of quasi- formal ADR are being practiced in Bangladesh , Village Courts Act, 2006 is one of them.

Section 3 (1) of the Village Courts Act, 2006 authorizes the courts to try the criminal cases as incorporated in the 1st Part of the Schedule.[38]

8.7 Introducing ADR Mechanism in Criminal Justice System in the Form of Plea Bargaining

Over the years taking advantage of several lacunae in the adversarial system large number of criminals are escaping convictions. This has seriously eroded the confidence of the people in the efficacy of the system.[39]Plea Bargaining is essentially derived from the principle of 'Nolo Contendere' which literally means 'I do not wish to contend'. The apex court has interpreted this doctrine as an 'implied confession, a quasi-confession of guilt, a formal declaration that

[38] The offences under purview of section 323, 426, 447 of penal code read with section 143 and if the unlawful assembly does not exceed 10 persons. Section 160, 334, 340, 341, 352, 358, 504, 506 (part one), 508, 509 and 510 of the penal code. Section 379, 380 and 381 if the offence is committed by and in connection with cattle and the value of the said cattle is not more than Taka Twenty Five Thousand only. Section 379, 380 and 381 of penal code for the offences other than cattle related and the value of the case does not exceed Taka Twenty Five Thousand only. Section 403, 406, 417 and 420 of penal code when the value of the case does not exceed Taka Twenty Five Thousand only. Section 427 of penal code when the value of the case does not exceed Taka Twenty Five Thousand only. Section 428 and 429 of penal code when the value of the case does not exceed Taka Twenty Five Thousand only. Section 24, 26 and 27 of the Cattle Trespass Act. 1871 (Act I of 1871). To make any attempt or to abet such crime as mentioned above.

[39]Suman Rai, *Law relating to Plea Bargaining* (2nd edn, Orient Publishing Company, India, 2013) 192

the accused will not contend, a query directed to the Court to decide on plea-guilt.[40] However in a criminal trial the accused has three options as far as pleas are concerned: guilty plea, not guilty plea or plea of *nolo contendere* (plea bargain).[41]

8.7.1 Meaning of Plea-Bargaining

The oxford dictionary quotes plea bargaining as "an arrangement between prosecutor and defendant whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an agreement to drop other charges.[42]

Plea bargaining is the process by which a prosecutor and a criminal defendant (in the USA the accused is called defendant) negotiate an agreement, where the defendant pleads guilty to a lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as a more lenient sentence or a dismissal of other charges. Plea bargaining may be defined as an agreement in a criminal case between the prosecution and the defense by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty. It is an instrument of criminal procedure which reduces enforcement costs for both parties and allows the prosecutor to concentrate on more meritorious cases. It is generally seen in these days that most of the criminal defendants are offered plea bargain because of the fact that it gives an opportunity to the criminal to reduce his/her punishment by honestly accepting his own guilt.[43]

8.7.2 Types of Plea Bargaining

Three different types of plea bargaining may be practiced in criminal cases:

- Charge bargaining,
- Fact bargaining,
- Sentence bargaining.

Charge Bargaining can be further classified into multiple charge and unique charge. In multiple charges some charges are dropped in return for a plea guilty to one of them. In a

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[40] Dirk Olin, '*Plea Bargain*', The New York Times Magazine, September 29, 2002.

[41]Ansar Ali Khan, *An Introduction to Alternative Dispute Resolution (*2nd edn, Hira Publication,Dhaka, 2010) 54

[42]Definition of Plea Bargaining, <http://www.oxforddictionaries.com/definition/english/plea-bargaining> accessed 5 November 2015.

unique charge, a serious charge is dropped in exchange for a plea of guilty to a less serious charge. In fact bargaining, a prosecutor agrees not to contest an accused version of the facts or agrees not to reveal aggravating factual circumstances to the court. There is an agreement for a selective presentation of facts in return for a plea of guilty. In cases of sentence bargaining, trial judges, ordinarily, opt to impose sentences not more severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas

8.7.3 Constitutional Validity of Plea Bargaining due to Multiple Forms of Coercion in Plea Bargaining

On a scale, it is needed to classify coercion which may occur in cases of plea bargaining into three categories. In descending order,

a. Coercion by force,
b. Hard coercion,
c. Soft coercion, as distinct from a situation of free consent.

Even in the Bangladeshi scenario there are sufficient measures to deal with coercion by force in plea bargains. The legal affidavit to be filed by the accused followed by an in-camera proceeding ensure that the accused is not forced into accepting an unfavorable bargain. However, not all circumstances can be classified into the categories of force and free consent. There are other inducements which the accused faces in criminal trials. The authors distinguish these 'other inducements' in two forms: cases of hard coercion and of soft coercion. The authors submit that plea bargaining inherently assumes one of the two types of coercive forces. In order to establish this, it is essential to differentiate these situations from that of free consent, to demonstrate that in no circumstance can plea bargaining occur on the basis of free consent of the accused.

The adequacy of the test as envisaged in the Code of Criminal Procedure, 1898[44] is highly doubtful as coercion is not restricted to decisions taken under the threat of brute force. It can be argued that there are various kinds of coercive forces acting on the accused during such negotiation which contravene the assumption of voluntariness. It is argued that plea bargaining inherently is coercive in nature and any offer to any accused can be qualified under one of the categories of coercion. Broadly, these categories include two categories, namely, hard and soft coercion, apart from the blatantly apparent concept of force. Soft

[44]The Code of Criminal Procedure, 1898 (Act No V of 1898).

coercion refers to manipulation of the defendant in such a manner that he is goaded to take a decision which he normally would not have. Hard coercion is an aggravated version of its soft counterpart as it involves inducements which a rational person would certainly not reject under normal circumstances.

8.7.4 The Initial Reasons for the Introduction of the Concept of Plea Bargaining:

The initial reasons seen for introduction of this concept in Bangladesh are:

- Speedy disposal of pending criminal cases
- Less time consumption for new cases
- Ending uncertain cases by giving a chance to accused to plead guilty
- There will be more sentences then acquittals
- The justification for introducing plea bargaining cannot be expressed any better than what the 12 Law Commission in its 142nd Report[45] have already done as below:-

1. It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on power with an accused who claims to be tried at considerable time cost and money cost to the community.
2. It is desirable to infuse life in the reformative provisions embodied in Section 360 of Cr. P. C. and the Probations of Offenders Act which remain practically unutilized as of now.
3. It will help the accused who have to remain as under trial prisoners awaiting the trial as also other accused on whom the of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefit such as …..
    a. End of uncertainty
    b. Saving in litigation cost
    c. Saving in anxiety cost

[45] The Twelfth Law Commission was established in 1988 under the Chairmanship of Justice M. P. Thakkar. It stayed in office till 1989. It presented inter alia 142nd Report-Confessional treatment for offenders who on their own initiative choose to plead guilty without any bargaining.

d. Being able to know his or her fate and to start a fresh life without fear of having to undergo possible prison sentence at a future date disrupting his life or career.
e. Saving avoidable visits to lawyer's office and to Court on every date or adjournment.

4. It will, without detriment to public interest, reduce the backbreaking burden of the Court cases which have already assumed menacing proportions
5. It will reduce congestion in jails.[46]
6. In the U. S. A. nearly 75% of the total convictions are secured as a result of plea bargaining.[47]

8.7.5 The Objects of Plea Bargaining

Although the Indian Supreme Court has time and again blasted the concept of plea bargaining, the Government has introduced the concept in the Code of Criminal Procedure. The legislature has introduced Plea Bargaining under law so as to benefit such accused persons who repent upon their criminal act and are prepared to suffer some punishment for the act[48]. The purposes of plea bargaining in court may include[49]:

a. Quick remedy to the aggrieved person in small-claim criminal cases.
b. Easy remedy for those accused of small claim criminal charges.
c. Reduced case load for prosecution
d. Beneficial to the wider community
e. Quick resolution of small cases leaving more time for resolution of complicated cases.

8.7.6 Benefit in Relation to the Criminal Justice System (Public Interest)

The rate of conviction in Bangladesh is very low. Although there is no official statistics on conviction and acquittal, one researcher suggests that the conviction rate in all courts of Bangladesh is only around 10%. In other words, at the end of long awaiting trial if majority

[46]Muriel AvitaFernandes, *Law And Social Change : Plea Bargaining It's Relevance In India* (2015) 8-9, <http://website-box.net/site/www.grkarelawlibrary.yolasite.com > accessed 6 November 2015.

[47] Suman Rai, *Law relating to Plea Bargaining* (2nd edn, Orient Publishing Company, India) 221.

[48] In its 154th report the law commission 2006 reiterated the need for remedial legislative measures to reduce the delays in the disposal of criminal trials appeals also to alternative the suffering of under trial prisoners. The 177th report of the law commission 2001 also sought to incorporate the concept of plea bargaining.

[49] Jamila A Chowdhury, above note 224, 203.

offenders get acquittal, the merit-based trial system is bound to come under serious question. The reasons for this low rate of conviction is weak, faulty and manipulated police investigation, inefficient, political and transitory nature of public prosecutors work and large scale corruption practiced in the law courts by stakeholders. Thus if the legal system cannot for these reasons provide easy and speedy substantive justice, there are strong grounds for providing justice through plea bargaining.[50]

Resources both in the form of finance and manpower would have to be significantly increased to provide a trial for every charge which is almost impossible for a country like Bangladesh. If plea bargaining is introduced, this burden on the part of the state would be reduced considerably. Considerable resources of the state would be saved. It would also enable the court to avoid dealing with cases that involve no real dispute and try only those where there is a real basis for dispute.[51]

8.7.7 Benefit to the Accused and Prisoner

For most of the accused the principal benefit of plea-bargaining is receiving a lighter sentence than what might result from taking the case to trial and losing. Another benefit which the accused gets is that they can save a huge amount of money which they might otherwise spend on advocates. It always takes more time and effort to bring a case to trial than to negotiate and handle a plea bargain. Incentives for accepting plea-bargaining, as far as judges and prosecutors are concerned are obvious. Overcrowded courts do not allow the judges to try every case that comes before them. It also reduces the case loads of the prosecutors.

The defense is saved from the anxiety of uncertainty of the result of the trial and the cost of defending the case on the assurance of lighter known sentence to be suffered by him. If an accused deprived of the privilege of bail, especially indigent ones, spends long period in jail custody he may be persuaded to enter a guilty plea in exchange for his release from jail custody. This initiative can be taken by the prosecutor or the judge in case the accused is undefended.[52]

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[50]Abdul Halim , *ADR in Bangladesh: Issues and challenges* (3rd edn, CCB Foundation, Dhaka, 2013) 201.

[51] Ibid.

[52]Kazi Ebadul Haque, 'Plea Bargaining and Criminal Workload' (2003) 7, *Bangladesh Journal of Law* < https://www.academia.edu/6775405/Plea_Bargaining_and_Criminal_WorkLoad_1_Plea_Bargaining_and_Criminal_Work-load> accessed 5 November 2015

Rehabilitation process of offender would be initiated early. Alleviating the suffering of under trial prisoners and prison conditions would certainly improve. In the trade-off between languishing in jail as an under trial prisoner and suffering imprisonment for a lesser or similar period, the latter would be the rational choice as long periods in jail brought about economic and social ruin.

8.7.8 Benefit to the Prosecutors

The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts. By using plea bargaining both the prosecution and judges can save times and avoid uncertainty of the result of a contested trial in disposing of criminal cases.[53]

8.7.9 Benefit to the Victim

Victims would be spared the ordeal of giving evidence in court, which could be a distressing experience depending on the nature of the case. Victim would be benefited in the sense that accused is at the end of the day coming out with a guilty verdict, although with a lesser punishment. At present through a long and tiring saga of trial in lower court, appeal and/or revision in the higher court when the accused comes out with acquittal in almost 90-95% criminal cases, every languishing hope of the victim is dashed and very often he or she feels cheated by justice system itself. In such a situation the victim will get the sense of justice by introducing plea bargaining.[54]In any other way the victims of crimes might be benefited as they could get the compensation.[55]

8.7.10 Advantages of Plea Bargaining

Benefit of plea bargaining cannot be ignored. When we look into the conceptual aspect of plea bargaining, the notion comes in our mind is that, well now the back logging in courts will be reduced and justice can be delivered quickly and efficiently. But when we check the reason as to why the criminals go for plea bargaining, then it comes to the fact that because they are able to reduce their punishment, which if they would not do quickly will make them stay in arrest for more time through litigation. Moreover, it is presumed that when an accused pleads guilty, the punishment of the accused gets reduced. Also the benefit which the guilty gets by plea bargaining is the reduction of the costs and time consuming trial of his case. It is

[53]Abdul Halim, above note 242, 203.

[54]Ibid.

[55] Muriel Avita Fernandes, *Law and Social Change: Plea Bargaining its Relevance in India*, 25,<http://website-box.net/site/www.grkarelawlibrary.yolasite.com > accessed 6 November 2015.

also presumed that the accused gains responsibility in his favor to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time. The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for either side. Another reason for introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are overburdened and hence unable to dispose of the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. However, by observing the hoard of criminal cases in the courts Plea Bargaining galvanized in the real life as prescriptive process not as coercion. The motto behind this is only to fasten the judgment process, which ultimately reduce the burden of courts and decrease the population of jail. Nevertheless, some cons are also associated with it. Well, on this account, I would like to say it that everything on this earth (either living or non-living) has pros and cons then there is only difference of degree.

8.7.11 Disadvantages of Plea-Bargaining

The disadvantageous part of the story is that sometimes the prosecutor forces the accused to admit his guilt with unconscionable pressures. Even the accused may go escape with less punishment by pleading his guilt and thereby diverting a little favorable decision in his favor But most of the times it happens that the accused do not have the required amount of resources available at their disposal to minutely investigate each and every case. There are following points which talk against it viz:

1. **Unfair:** The system will be too soft for the accused and allow them unfair means of escape in a dishonesty ridden society in Bangladesh. It is an alternative way of legalization of crime to some extent and hence not a fair deal. It creates a feeling that Justice is no longer blind, but has one eye open to the right offer. Prosecutors and police, foreseeing a bargaining process, will overcharge the defendant, much as a trade union might ask for an impossibly high salary.
2. **Contempt for system:** It may create contempt for the system within a class of society who frequently come before the courts. A shortcut aimed at quickly reducing the number of under-trial prisoners and increasing the number of convictions, with or without justice. While countless numbers of poor languishing in the country's prisons while awaiting trial, only a few might get a chance of bargaining.
3. **Conviction of innocent:** This process might result in phenomenal increase in number of innocent convicts in prison. Innocent accused may be paid by the actual

perpetrators of crime in return to their guilty plea with assured reduction in penalty. Thus illegal plea bargaining between real culprits and apparent accused might get legalized with rich criminals corrupting police officials ending up in mockery of the system of justice. When plea bargaining is certainly not resulting in acquittal or limited to penalties or payment of damages, accused may not find it as useful and plea bargaining may not operate as incentive at all.

4. **Coercion:** Element of coercion is not ruled out as the police is involved in the process. i.e. forcing the accused to avail plea bargaining to put an end to the trial.
5. **Derailment of Trial**: Once the guilty plea comes forward and recorded on the file and in the mind of the judge, the trial will be surely derailed. The court may not strictly adhere to or depart from the requirement of proof of beyond reasonable doubt and might lead to conviction of innocent.
6. **The right to appeal:** A plea bargain may be arranged in a few minutes time, but once entered into, it does not always allow a further appeal in the matter. However, the right to appeal is not a fundamental right as envisaged by the constitution. It is a mere 'creature of the statute'[56]which may be granted or abridged. Also, an adequate alternative to appeal, that is, writ petition in the HCD of Supreme Court. The objective of introducing plea bargaining was stated as reducing the time-frame of criminal trials. Hence, its very purpose and intent, that is, to expedite the trial process, will be defeated if all cases which have already been disposed of by the court, be allowed to go for appeal.

8.7.12 No Immoral Compromise through Plea Bargaining

In 2007, *Sakharam Bandekar Case*, became the first such case in India where the accused Sakharam Bandekar requested using plea bargaining lesser punishment in return for confessing to his crime. However, the court rejected his plea and accepted CBI's argument that the accused was facing serious charges.

"*Corruption is a serious disease like cancer. It is so severe that it maligns the quality of the country, leading to disastrous consequences. Plea bargaining may please everyone except the distant victims and the silent society*." Agreeing with the CBIs reasoning the court rejected

[56]*Swaran Singh and Ors.v. State of Punjab and Ors* , (2000) 5 SCC 668.

Bandekar's application.[57]Finally, the court convicted Bandekar and sentenced him to 3 years imprisonment.[58]

In *State of Uttar Pradesh v. Chandrika*[59], the Supreme Court held that it is settled law that on the basis of Plea Bargaining court cannot dispose of the criminal cases. Going by the basic principles of administration of justice merits alone should be considered for conviction and sentencing, even when the accused confesses to guilt, it is the constitutional obligation of the court to award appropriate sentence. Court held in this case that mere acceptance or admission of the guild should not be reason for giving a lesser sentence. Accused cannot bargain for reduction of sentence because he pleaded guilty.

8.8 Prospects and Impediment of ADR Mechanism in Criminal Litigations

No ADR mechanism exists in criminal litigations in Bangladesh. But under the Code of Criminal Procedure there are some offences which are compoundable. Section 345 of the Code of Criminal Procedure implies about compoundable offences. The reality is that there exists a limited scope of effective ADR mechanism in Bangladesh and that is why the courts cannot give the parties speedy remedy. This is the reason for that day by day Backlog is increasing in criminal courts. For that victims and sufferers are being faced critical harassment and other severe problems in criminal litigation. In criminal litigations there are many small cases which should be resolved by the ADR.

8.8.1 Prospects of ADR in Criminal Cases in Bangladesh

The opportunity of ADR in Criminal Cases can be increased by enlarging the scope of Section 345 of the Code of Criminal Procedure carefully. It would eliminate the various malpractices now resorted to be the parties to put an end to criminal proceedings pending in the Courts in which a non-compoundable offence has, in fact, been compounded out of court.

In an Indian case of *Vijay Moses Das v CBI*,[60] The second reported case from Uttarakhand was successful. A person who was accused of supplying substandard material to ONGC and also at a

[57] "First plea bargaining case in city". Oct 15, 2007. Retrieved 2 January 2014 <http://timesofindia.indiatimes.com/city/mumbai/First-plea-bargaining-case-in city /articleshow/2458523.cms?referral=PM> accessed 5 November 2015.

[58] RBI clerk sent to 3 yrs. in jail". Oct 16, 2007. Retrieved 2 January 2014,<http://timesofindia.indiatimes.com/city/mumbai/RBI-clerk-sent-to-3-yrs-in jail/articleshow/2461828.cms?referral=PM.>accessed 5 November 2015.

[59] 2000 Cr.L.J 384 (386).

[60]Crl. Misc. Application (C-482) No. 1037 of 2006, Reported on 29 March, 2010.

wrong Port causing immense losses to ONGC sought plea bargaining. The CBI investigated and initiated prosecution under sections 420, 468 and 471 of IPC. Accused proposed to plea bargaining and the ONGC (Victim) and CBI (Prosecution) had no objection to such request, but trial court rejected on the ground that Affidavit under section 265B was not filed by accused and compensation was not fixed. Justice Prafulla Pant of Uttarakhand High Court, hearing the Criminal Miscellaneous Application directed the trial court to accept the plea bargaining application.

In Criminal Jurisdiction, thousands of cases filed under section 138 of the Negotiable Instrument Act, 1881[61] which are not compoundable. But in this case, ADR system may be very much effective and the Complainants will be benefited. A considerable number of cases filed under section 385 of the Penal Code[62] are pending in the Courts of Session for years together. These types of cases are suitable for compromise through Court if necessary amendment be made in the procedural laws. ADR system can also be introduced to confirm juvenile justice under the Children Act (Amendment) 2013. This system can also be effective for the trial of environmental cases under the Environmental laws. To preserve Human Rights it is necessary to introduce ADR system in Criminal Justice delivery system. In the case of *Md. Joynal and others v. Rustam Ali and others*[63], Supreme Court encourages compromise in criminal cases. Establishment of ADR training institute and allocation of fund is another requirement for introducing ADR in Criminal Justice. For the success of this system, mass awareness should be built. The policy of the legislature adopted in section 345 of code of criminal procedure is that in the case of certain minor offences, where the interests of the public are not vitally affected, the complainant should be permitted to come to compromise with the party whom he complains.

ADR is effected when:[64]

a. Backlog of cases impairs court effectiveness.
b. Complex procedures Impair court effectiveness.

[61]The Negotiable Instruments Act, 1881 (Act No. Xxvi Of 1881), s 138 -Dishonor of Cheque for insufficiency, etc., of funds in the account.

[62]The Penal Code, 1860 (Act No XLV of 1860), s 385 -Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to [fourteen years and shall not be less than five years], or with fine, or with both.

[63] 36 DLR (AD) 240.

[64]Ibid 193.

c. The poor cannot afford the cost and fees of the courts.

d. Small informal systems can better reach geographically dispersed population.

ADR can support a mission to reform the court system in several ways. ADR can be used by the judiciary to test and demonstrate new procedures that might later be extended to or integrated with existing court procedures. ADR systems can be created as an option within the judicial system, either associated with the courts as a way of managing existing caseloads, or separate from the courts to provide dispute resolution for conflicts or constituencies not well served by the courts. ADR can provide streamlined procedures to accelerate case disposition. In some cases, these procedures may serve as models that can later be incorporated into formal court procedures. If so, court-annexed ADR may turn out to be a catalyst for more extensive court reform.

8.8.2 Impediment of ADR in Criminal Litigation in Bangladesh

Bangladesh is an over populated and poor country. This society is facing different types of crime, if in Bangladesh the process of ADR in criminal litigation is exercised then the crime could be decreased from our society. ADR in criminal litigation does not set precedent, define legal norms, or nor do they promote a consistent application of legal rules. As noted earlier, ADR programs are tools of equity rather than tools of law. They seek to resolve individual disputes on a case-by case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms. Furthermore, ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify, and protect reasonable standards of justice, ADR programs can function well to resolve relatively minor, routine, and local disputes for which equity is a large measure of justice, and for which local and cultural norms may be more appropriate than national legal standards. These types of disputes may include family disputes, neighbor disputes, and small claims, among others. It cannot correct systemic injustice, discrimination, or violations of human rights. ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. When this is true, ADR systems may hinder standards of group or individual rights.

It does not work well in the context of extreme power imbalance between parties such like in Bangladesh. These power imbalances are often the result of discriminatory norms in society, and may be reflected in ADR program results. Even when the imbalance is not a reflection of

discriminatory social *norms*, most ADR systems do not include legal or procedural protections for weaker parties. A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. For the same reason, ADR programs may not work well when one party is the government. When the program design has been able to enhance the power or status of the weaker party, ADR has been effective in conditions of discrimination or power imbalance. In Bangladesh, for example, women who have submitted cases of spousal abuse to mediation have found that the village mediation system, which includes women mediators, provides better results than the court system which is even more biased against women in these cases. In general, however, ADR programs cannot substitute for stronger formal protections of group and class rights.

ADR in criminal cases settlements does not have any educational, punitive, or deterrent effect on the population. Since the results of ADR programs are not public, ADR programs are not appropriate for cases which ought to result in some form of public sanction or punishment. This is particularly true for cases involving violent and repeat offenders, such as in many cases of domestic violence. Social and individual interests may be better served by court-sanctioned punishment, such as imprisonment. It is important to note, however, that victim-offender mediation or conciliation may be useful in some cases to deal with issues unresolved by criminal process. It is inappropriate to use ADR to resolve multi-party cases in which some of the parties or stakeholders do not participate. This is true because the results of most ADR programs are not subject to standards of fairness other than the acceptance of all the participants. When this happens, the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups, such as environmental disputes. When all interested parties cannot be brought into the process, however, ADR may not be appropriate for multi- stakeholder public or private disputes.

8.9 Recommendations

A new chapter like Chapter XXA or XXIIIA may be incorporated in the Code of Criminal Procedure, 1898 (Act V of 1898) which will exclusively deal with Plea Bargaining in respect of offences relating to Penal Code & other special penal laws like, the Women and Child Repression Act, 2000, the Special Powers Act, 1974 etc.

There are some other important recommendations; those have been given below, which may be necessary to make effective ADR mechanism in criminal litigations.

a. The offences listed out under section 345 of Criminal Procedure Code and schedule 11 column 6 (Compoundable with the Consent of the court & compoundable without the consent of the court) must be brought under the aforesaid Chapter for Plea Bargaining. There must be provision for fact bargaining, Charge Bargaining and Sentence bargaining.
b. The "Plea Bargaining" may be applicable in respect of those offences of Penal and other special penal laws for which punishment of imprisonment is up to a period of 7 years.
c. The "Plea Bargaining" may be applicable in respect of all offences where child is accused except the offences for which the highest punishment is life imprisonment or death sentence. On behalf of Child the legal guardian will take part in negotiation.
d. The application for Plea Bargaining shall be made in the court while the offence is pending for trial. The plea Bargaining is to be initiated after the accused makes an application to the court or Court may *suomoto* make an offer for plea Bargaining and may fix a certain period for Plea Bargaining.
e. The Court shall play the dominant role in Plea Bargaining. The court may hold a preliminary examination in camera to be sure as to whether the accused filed the application voluntarily. If it is found the Plea Bargaining involuntary the court may reject the petition for Plea Bargaining. And if the Plea Bargaining is rejected the proceedings can't be used as evidence.
f. There may be provision that the accused may be released on probation and to the effect Probation of Offenders Ordinance, 1960 (Ordinance No. XIV of 1960) may be amended.
g. If a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such punishment.
h. The accused may also avail of the benefit of section 35A of the Code for setting off the period of detention undergone by the accused against the sentence of imprisonment on the basis of Plea-Bargained settlement.
i. The court must deliver the judgment in open court according to the terms of the mutually agreed disposition and the formula prescribed for sentencing including victim compensation.
j. The judgment delivered in Plea Bargain cases is final and no appeal or revision lies

against such judgment.

k. Plea Bargaining may be applicable in respect of anti-corruption cases. In this respect the accused may apply to the Anticorruption Commission accepting his guilt and offers to return the proceeds of corruption as determined by commissions. After endorsement by the commission the request shall be presented before the court of Special Judge which will decide whether it should be accepted or not. It will be the absolute domain of the court whether it would accept the Plea Bargain or not. In the case the request for plea bargain is accepted by the court, the accused stands convicted but is neither sentenced if in trial nor undergoes any sentence previously pronounced by a lower court if in appeal. He is disqualified to take port in elections, hold any public office, obtain a loan from any bank and is dismissed from service if he is a government official.

l. Plea Bargaining may be made at any stage of the case, Pre-trial, Trial or Post Trial stage

m. Plea bargaining should not be applicable in respect of habitual offenders,

n. Consequential amendment has to be made in different legislations relating to offence where there is scope for plea bargaining.

8.10 Recommendations, in Light of Indian Provisions, to Rectify the Defects in Plea Bargaining

To put an end to the criticism, the following changes would be appropriate which appears desirable to enable the plea bargain to achieve the purpose for which it has been introduced:

1. The involvement of police in disposition process of plea bargain should be limited. It would be desirable if its role ends with revealing before the court the information required by the court in the disposition process and it shall not assist either party in the satisfactory disposition process of plea bargain.
2. Transparency is the very basic ingredient for public confidence. So it would be proper to have the examination of accused in open court rather than in camera. It would afford an opportunity for the public to ascertain the bona-fide process of plea bargain
3. Though the application of plea bargain is limited only to certain offences, it would be more effective if it is not made applicable to certain graver degree offences such as human rights abuse, which enables the accused to make use of plea bargain and escape with lighter penalties than what is contemplated under law.

4. Although the victims play a major role in plea bargain, I would like to suggest that it would be more appropriate if the courts after ascertaining the willingness of the victim for the plea bargain process exclude him in working out the disposition process, as his participation may at times lead to corruption and bargaining over the amount of compensation. The court or the public prosecutor or the counsel on behalf of the victim, as the case may be, should work on behalf of the victim to ensure that his desires in the disposition process are fulfilled.
5. Unlike USA, in India the courts though participate in plea bargain process, their authority is limited. It is better to have a provision in the Act empowering the courts to set aside the disposition process, or to make any changes with regards to the compensation or sentence worked out in the disposition process, if it is of opinion that it has not been worked out in accordance with due process of law.

The researcher must conclude recalling the famous words of US President Abraham Lincoln emphasizing the deep significance of ADR.

> "Discourage litigation; persuade your neighbors to compromise, whenever you can. Point out to them the nominal winner is often a real loser, in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person."

8.11 Conclusion

Plea bargaining will undoubtedly remain a disputed concept. Few people have welcomed it while others have abandoned it. It is true that plea bargaining speeds up caseload disposition, but it does that in an unconstitutional manner. But perhaps there is no other choice but to adopt this technique. The criminal courts are too overburdened to allow each and every case to go on trial. Only time will tell if the introduction of this new concept is justified or not. Even the Supreme Court has upheld that delay of one year in the commencement of trial is bad enough; how much worse could it be when the delay is as long as three or five or seven to ten years or more. Speedy trial is the essence of criminal justice and there is no doubt that delays in trial itself constitutes denial of justice.

Alternative Dispute Resolution (ADR) is used when there is any conflict between two groups regarding a specific situation. When the two parties are not able to come to any solution, then they go for ADR. Only ADR processes have the potentiality to reduce significantly the costs

and delays associated with traditional court proceedings. This system has already been introduced in Civil Litigation System. To introduce this system in Criminal Justice System like Code of Civil Procedure, Code of Criminal Procedure should be amended. ADR can be introduced in Code of Criminal Procedure by enlarging the scope of section 345 and inserting a new section, chapter and empower the Criminal Courts to dispose of criminal cases through ADR. Critics believe that ADR encourages compromise. Compromise can be good way to settle some dispute but it is not appropriate for others. Though there exists criticism, it's still helping the common people in getting the judicial service cheaply. Also the judiciary system is getting speed as it is facing less petty case of charge. That is why ADR mechanism may be timely medicine for all those who suffer because of the serious-delay in disposal.

Chapter IX

Concluding Remarks

The Government of Bangladesh is keenly aware of the shortcomings of the prevailing Legal and Judicial situation and the need for reforms to overcome them. The concern of the Government is regard to necessity of legal reform has been expressed in the 5th Five Year Plan (FYP) 1997-2002 document as below:

> Judicial and Legal reforms are necessary to support the emergence of a liberalized economy. Such reforms are essential for the creation of an enabling environment for the private sector to flourish and maximize its contribution to a sustained growth. The present legal system cannot adequately support the efficient growth of the private sector and several laws need to be redrafted and modified to make them more supportive of the present development strategy. Further, the judicial process is observed as cumbersome and time-consuming... Objective of such legal reform will be to ensure settlement of trade and industrial dispute through speedier disposal of cases and to simplify the cumbersome legal procedures as is observed at times and which impose cost on private businesses.

In the 6th Five Year Plan (FYP) 2011-2015, it is an utmost commitment of the Government that attention will be given to the review of the national laws and their proper implementation by strengthening the law enforcement agencies and the judiciary.

In the 7th five year plan (FYP) 2016-20, the government of Bangladesh has ascertained the importance of strengthening of judiciary. Strengthening judiciary will be far cry if the outdated laws are not overhauled and reformed keeping conformity with the change of social perspective. It has been pointed out in the said five year plan that-

In the civil and criminal justice system, the case management process is slow, costly and time consuming, which restricts access to justice for the poor and the marginalized groups of the society. This results in high transaction costs for the citizens seeking justice. The vision of a just judiciary system consists of three major components: (a) ensuring citizens' easy and affordable access to judicial services; (b) eliminating pending cases through digitization of case and court management process; and, (c) improving legal enforcement system through integration of ICTs in all stages of legal process, e.g., digitization of case record management. As a result of responsive judicial process, it is hoped that there will be no more

pending cases and justice will no longer be delayed for citizens, particularly for the disadvantaged.

The government of Bangladesh has firm commitment to expedite case management process; the present system would be transformed into a digital system, starting from filing, recording of presence to witness and evidence production. This will automatically generate cause list of the day in the respective court with specified time. Court and other process fees should be paid online or through mobile phones.

The government has further committed for digitalization of judiciary and modern record keeping system. A modern record keeping, filing and maintaining case proceedings using ICT based management system will be introduced to strengthen the judiciary governance mechanism. Digitization of current files and introduction of e-filing will be introduced at the same time. Indexation of digitized record will be completed for easy retrieval. Orders and judgments dictated in the courts/ chambers will be signed using digital signature and will be automatically added to the respective e-Case file. The websites of courts at all levels would be developed which will ideally provide information on: general court information, cause lists, roster, court fees, case status, orders etc. Online forms for application for urgent listing, inspection, process fee, information about certified copies, online filing, web casts and live streaming of certain cases, archived court cases, court functions, swearing in of judges and full court references. All digital data will be archived and will be backed up each day to two different locations in the same jurisdiction and to a third in a relatively disaster-free area, saving them from destruction by unforeseen calamities.

This is also within the purview of commitment of government that case and court procedure related information will be made available online or sent using SMS. Citizens will be able to monitor progress without travelling to the court premises. This will also reduce transaction costs for citizens. Agencies will maintain liaison with the local government institutions to use their information access points as their first face for filing any plea. The Information Commission has put in place a *Proactive Information Disclosure Policy* to specify the requirement for government institutions in complying with the RTI Act, 2009. It is important that the Commission, in collaboration with the Cabinet Division, monitors compliance of all government institutions.

In the words of Dr. Cyrus Das (Advocate & Solicitor, Malaya and Singapore):

> "Justice is a consumer product and must therefore meet the test of confidence, reliability and dependability like any other product if it is to survive market scrutiny. It exists for the citizenry `at whose service only the system of justice must work'. Judicial responsibility, accountability and independence are in every sense inseparable. They are, and must be, embodied in the institution of the judiciary."

Hon'ble former Chief Justice of India, Mr. Justice A.S. Anand delivered a lecture on the occasion of D.M. Singhvi Memorial on the topic of "Approaching the 21st Century: The State of Indian Judiciary And The Future Challenges", in which he conceded that a very large number of acquittals are eroding the people's confidence in the effectiveness of Criminal Justice System and he declared the reason for that sordid state of affairs was faulty, non-scientific and disoriented probe, *inter alia.* He stressed that the consumer of justice wants unpolluted, expeditious and in-expensive justice. In the absence of which instead of taking recourse to law, he may be tempted to take law into his own hands. He further exhorted that the courts must respond to the society's cry for justice and punishes the guilty by a proper and judicious approach to assess the evidence.

Mr. Justice Surendra Kumar Sinha, Chief Justice of Bangladesh preached that 40% of the Code of Criminal Procedure is not applied in a case and the provisions of that Code are obsolete because of its colonial system. The Code in fact deals with investigation, inquiry and trial of criminal case. It cannot be denied that the Code has been outdated by lapse of time which was framed by alien people with their prime object to rule this country. All these confirmed that existing major criminal procedural laws in its present form are unable to answer the present day requirements of Criminal Justice System. Therefore, they need to be overhauled. In this thesis the loopholes of investigation and trial has been detected by means of scientific and statistical mechanism and accordingly, the ways and means of updating the Code has been clearly depicted in the earlier chapter to assist the law makers to undertake reform activities.

Some grey areas or inadequacy of exhaustive legal provisions in our criminal justice system, particularly in case of jurisdiction and cognizance of criminal cases have been focused. Some of these issues are very vital for the continuance of criminal cases and for the sake of maintaining balance of powers.

Pre-trial of criminal cases both of regular court and of special court has been elaborately and critically analyzed. Some important shortcomings of procedure in investigation and inquiry have been focused, they are: taking long time in investigation/inquiry stage, taking long time in execution of warrant or summons, weak, vague and ineffective police report, filing *naraji*petition for harassment, frequent transfer of investigating officer, *malafide* trend to show arrest.

The significance findings emanated in the earlier chapters of the thesis may be summarized for better appreciation and understanding-

Firstly, taking cognizance of an offence is the first and prime step towards trial of criminal cases. Section 190 of the Code has given ample power to a magistrate to take cognizance *suomoto or* upon simple complaint petition without holding any proactive inquiry or investigation. Consequently it causes serious prejudices to the innocent people to be tapped with false and frivolous cases. Therefore, the provisions do require amendment that no magistrate shall take cognizance of any offence without prior investigation or inquiry.

Secondly, it has been mandated under section 167(5) of the Code that investigation has to be concluded within 120 days but no consequences has been incorporated if the investigating officer does not complete investigation within the stipulated time, so investigating officer does not take it seriously. Consequently, the prosecution and victim even accused do not have the opportunity of fair and speedy trial. Therefore, a mandatory time limit having consequence for non-completion of investigation within the prescribed time should find place in the Code.

Thirdly, section 339C of the Code has spelt out that a Magistrate shall conclude the trial within 180 days from the date of receiving the case for trial and similarly the sessions judge has to conclude within 360 days from the date of receiving the case for trial without any consequence for non-compliance of the provisions. Hence, the provision should be re-cast fitting in a reasonable period with grave consequences for the Magistrate and judges who have intentionally failed to conclude the trial within the prescribed time. Accordingly similar provisions should be made under section 442A so far it relates to time for disposal appeal and revision.

Fourthly, remand is one of the important steps during pre-trial that is investigation stage in a heinous offence. The apex court of the country in a leading case of Blast vs. Bangladesh (55 DLR (2003) 363) has given guidelines and recommendations to recast the whole law relating

to arrest, detention and remand. The Code should carry those directions and recommendations so that arbitrary arrest, detention and remand are come to the tolerable limit.

Fifthly, there is no specific provision for granting anticipatory bail in the Code. On the basis of judicial pronouncements courts take resort of section 498 of the Code though not a single word find therein so far it relates to anticipatory bail. The contradictory judicial pronouncements at times confuse the judges to take decision on the application for anticipatory bail. Our neighboring country India under section 438 of the Code made comprehensive provisions under what circumstances the anticipatory bail may be granted. Therefore, a similar provision may be included in the Code so that innocent persons may be enlarged on pre-arrest bail. There should be a clear cut provision when and how a bail may be cancelled. A provision may be added to pass bail order suomoto by the court without surety if it is found the accused person is languishing in jail for unjustified reasons. As a result, poor and indigent accused may get the legal aid. After all, the entire law on bail is required to be overhauled with the changing need of a society to help the innocent free from prison bar vis-a-vis keep the perpetrators in the prison bar.

Sixthly, some powers of the HCD should be extended to the district and sessions judge like inherent power under section 561A of the Code and writ jurisdiction so far it relates to habeas corpus by amending the constitution and relevant provision of section 491 of the Code.

Seventhly, A Magistrate may stop the proceeding under section 249 of the Code but there is no provision found under Chapter XXIII of the Code empowering the session's judge to acquit the accused at any stage of the proceedings that the charge is groundless or there is no probability of the accused being convicted of any offence and as such section 265H of the Code be amended accordingly for speedy disposal of long pending criminal cases.

Eighthly, criminal trial begins with framing charge. Charge or indictment is very crucial in a criminal trial. As per section 239 of the Code, one or more persons may be tried together. In BDR (BGB) mutiny, more than 700 persons were tried together. But sections 233 and 234 of the Code made a bar to frame charge more than 3 offences committed within the space of 12 months. But there is no bar in framing more than three charges in a single case against the perpetrator who committed War Crimes, Genocide, Crime against Humanity under the International Crimes (Tribunals) Act 1973 and Rules made thereunder. In order to save time, money and unnecessary harassment to the accused, there should be a provision in the Code empowering the Courts to frame charge of more than three offences.

Ninth, dispensation with the attendance of accused during inquiry or trial may help him to attend through his lawyer and without appearing to the court he may contribute to the economy by doing his job. But where there is a single witness in a criminal case it is difficult for the court to dispense with attendance of the accused due to wordings of section 540A of the Code. If the words 'two or more' are omitted from section 540A of the Code, it will empower the court to dispense with the single accused who has a great role in economic activities of the country.

Tenth, when military personnel commit offence outside the cantonment or beyond his official duties, how or where he can be tried has not been clearly mentioned under section 549 of the Code. As a result, judges or Magistrate faces serious problems in dealing with the military personnel committing offence outside the purview of their official duties. Therefore a crystal provision should be made in the Code keeping conformity with the Bangladesh Army Act 1952 (XXXIX of 1982), the Bangladesh Air Force Act, 1953 (VI of 1953) and the Bangladesh Navy Ordinance, 1961 (XXXV of 1961).

Eleventh, the underlying object of administration of criminal justice is to ensure justice according to law. But justice must be to the accused and also to the victims of the crime. While protecting and safeguarding legitimate rights of the accused, the law and the courts of law should not forget that there is another person also who is injured, sufferer and affected. An ideal system must take care of both, accused as well as victim. Ignorance of one or the other would result in injustice and people would lose faith in the entire system. Victim and witness sometimes do not dare to depose against the harden criminals due to fear of life and property. In the Code, there is no provision for victim and witness protection. So, a suitable amendment may be made in the Code as to the effect that court may by its own motion or on the application of the victim or witness as the case may be direct the concerned authority to protect them with the satisfaction of the court.

Twelfth, under section 545 of the Code, the court may direct accused to pay compensation to the victim out of fine but there is no scope to direct the accused to pay compensation to the victim in addition to fine. therefore, it is required that the provisions should be amended to the effect that after conclusion of trial in appropriate case court may direct the convict to pay the compensation in addition to fine.

Thirteenth, in our system, it is easy to award sentence than that of realization of fine due to obscure legal provisions as enumerated under sections 386 and 387 of Chapter XXVIII of the Code, therefore huge amount of fine remains outstanding and also the convict finds it

difficult to deposit the fine due to ambiguous provisions relating to realization of fine. In this backdrop, the provisions for realization of fine should be simplified.

Fourteenth, investigation is the heart of criminal justice. Investigating power should be exclusively vested with Police Bureau of Investigation.

Fifteenth, as per section 172 (2) of the Code, it is the responsibility of the police officer to ensure that the complainant or the witness appears before the court at the time of hearing of the case. In practice after issuance of summons, warrant of arrest and exhausting all procedure, the court becomes unavailable to produce the witness resultantly criminal trial prolong years together for no fault of the accused. As there is no consequence if police does not comply with the provisions of the law, so they defy the order with impunity.

Sixteenth, in view of section 188 of the Code When a citizen of Bangladesh commits an offence at any place without and beyond the limits of Bangladesh, or When any person commits an offence on any ship or aircraft registered in Bangladesh wherever it may be, he may be dealt with in respect of such offence as if it had been committed at any place within Bangladesh at which he may be found, unfortunately by a proviso it has been stated that charge of committing offence outside cannot be inquired into without the sanction of the government. Consequently the aggrieved person discourages to take shelter of the court so the first proviso to the section 188 of the Code should be repealed to extend easy access to justice to the aggrieved person.

Seventeenth, Service of summons is one of the measures and essential for complying with the natural justice. The provisions of service of summons to the accused person and witnesses as provided Chapter VI to the Code. By afflux of time some provisions of service of summons become outdated. It has been provided under section 70 of the Code that where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family. But there is no provision in the Code to enable the authority to serve the summons on “Female Adult” person who may be available at home. The law is discriminatory to the women. So, the word ‘male’ should be omitted to ensure speedy service of summons. Considering the latest technological development, provisions may be made for servicing summons by way of email, fax and other electronic means.

Eighteenth, the object of 'Plea Bargaining' is to reduce the risk of undesirable orders for either side. Another reason for introducing the concept of 'Plea Bargaining' is the fact that most of

the criminal courts are overburdened and hence unable to dispose of the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. However, by observing the hoard of criminal cases in the courts Plea Bargaining galvanized in the real life as prescriptive process not as coercion. The motto behind this is only to fasten the judgment process, which ultimately reduce the burden of courts and decrease the population of jail. So, a broad-based amendment of the Code is the demand of time so far it relates to plea-bargaining that is ADR in criminal law, the flower of the east, which will reduce the period of trial, cost will be minimal and the rate of conviction will increase. As India, we may incorporate a Chapter like Chapter XXXIIIA of the Indian Code of Criminal procedure including Plea-bargaining.

Nineteenth, section 165 of the Evidence Act, 1872 has provided inquisitorial power during trial subject to fulfillment of the conditions made therein so far it relates to trial of the case. During judicial inquiry conducted by the court or the Magistrate, it is found that Judges do not put questions to the witnesses due to the bar. As a result some tutored witnesses support the complainant who filed false case to entangle the innocent people, therefore, the inquisitorial power should be extended during judicial inquiry in order to save the innocent from the illegal vindication.

Twentieth, Bangladesh Criminal Justice System suffers from serious underfunding and understaffing, especially lack of infrastructure, inadequate judges in comparison with the ratio of the pending cases. In the USA 107 judges, Canada 75 judges, England 51 judges, Australia 41 judges, India 18 judges and in Bangladesh there are 10 judges for 1 million people (the ratio of judges to population in different). At least 50 judges should be appointed for 1 million people to cope with the huge backlog of cases. Moreover, lack of adequate training of judges and investigation officers do not yield positive result for efficient dispensation of justice, so they should impart proper training both at home and abroad.

Twenty-first, section 353 of the Code provides except as otherwise provided in the code all evidence taken under Chapters XX, XXII and XXIII shall be taken in the presence of the accused or when his personal attendance is dispensed with, in presence of his pleader. Such provisions had been amended by India by an Act 9 of 2009 and thereby, created a system for recording the evidence of witness through video conferencing. In the code under section 353 a proviso may be added to the effect: Provided that evidence of a witness under this sub-section may also be recorded in the virtual presence of those who are not physically present in the court by audio-video electronic means in the presence of the advocate representing the

accused or the witness as the case may be. If it is made without producing the harden criminals from the jail and witnesses from home and abroad before the court evidence may be taken, and thereby, it will save time, cost and risk to produce the veteran criminals to the court at time of trial.

Twenty-second, it cannot be denied that digitization of judiciary is essential for speedy disposal of cases and huge backlog of cases may be reduced by introducing technological knowhow. Finding solutions to barriers and removing obstacles to accessing justice as much a collective challenge to people in the Justice sector as it is a technological issue. While technology must be used for the service of the people, justice must protect their rights. The law must assume new dimensions to suit the needs of an IT-based modern society and it should play a dynamic role like a living organ. Technology is such that as soon as the case is taken up the litigant must get on his mobile an alert as to when his next date is on the case. Similarly, when a case is unduly adjourned the trial judge must get an alert. If we can create a situation where on a click of a button the judge can get leading judgments, reference books and relevant statutes his life would be simpler and we will see that in his judgments (Justice Dr.G C Bharuka, former Chairperson, e-Committee of the Supreme Court of India). So, necessary legal frame work is *sine qua non* for introducing e-Judiciary.

Twenty-third, all interrogations should be carried out in the presence of a lawyer throughout the interrogation; interrogated persons should be informed of their right to legal assistance; they should be given the opportunity to have recourse to a lawyer through legal aid.

Twenty-fourth, pecuniary sentencing authority of Judicial Magistrates has been found inadequate, the provisions as provided in sections 29C & 33A of the Code are contradictory in nature. Authority of Additional Sessions Judge and Chief Judicial Magistrate is absolutely contradictory and dissimilar; therefore, it should be recast and amended accordingly

Twenty fifth, the terms and conditions of employment of public prosecutors should be stringent and their emoluments should be revised upward to attract meritorious lawyer to match competent defense lawyer and similarly lawyers of reasonably good talent should be appointed to defend the poor, destitute and disadvantaged accused under the legal aid scheme of Bangladesh

Twenty sixth, various technologies can also be used in the courtroom to help manage cases, to reduce trial time and litigation costs, and to improve fact finding, Judges understanding, and access to court proceedings. To those ends, the paper suggested the use of technologies in

the courtroom including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record-be considered necessary and integral parts of courtrooms undergoing construction or major renovation; and the same courtroom technologies be into existing courtrooms.

We cannot deny that all systems be they adversarial or inquisitorial, must comply with international human rights law. International human rights law is, in principle, indifferent to the internal criminal law system, as long as its features are compatible with international human rights. A country seeking a change in its criminal procedure system has to be aware that many systems have had to adapt gradually to international human rights standards. Human rights must be the benchmark for any criminal justice system. A judiciary that is effective in enforcing the rule of law would not only be conducive to trade, financing and investment but would also promote social peace and trust. Any reform for the Criminal Justice System must take into account and seek to eradicate the root causes of its malfunctioning, i.e. discrimination, lack of resources, corruption and the practice of torture. "Law should not sit limply, which those who defy it go free and those who seek its protection lose hope"[Jenison v. Baker, (1972) 1 ALL ER 997 (1006)]. The famous adage Justice delayed is justice denied is an eye opener to begin reform. Changes and evolution are a continuing process. Neither criminal law nor administration of justice can be static. Criminal law jurisprudence demands that perceptions of law and justice must keep pace with changing times. Holistic reform entails that the police, the prosecution, the prisons department and the Courts, introspect and review their own processes before seeking changes from outside to rectify problems in the system. Besides, those responsible for nourishing the system i.e., the executive and the legislature need to fulfill their part of the obligation. Not only Justice delayed is justice denied but Justice delayed is truly injustice. Transparency and Accountability to citizens of this proud country demands that justice should not believe to be done but must appear to be done (Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India). In the aforesaid backdrop, the people of Bangladesh who earn their independence after supreme sacrifice of the three million peoples and great sacrifice of 2 lacs mother and sister dream of having a criminal justice system where no innocent be punished and where no guilty person be escort free and the day of committing offence with impunity will do away with from the criminal jurisprudence of Bangladesh and as such the hope of cultural impunity will be nipped in the bud.

In fine, it can be reiterated that the society cannot make the criminal justice system so inefficient as to result in an acquittal ratio of over 91% and so time consuming. After all, the security of life and property of every citizen must be of paramount importance. It is high time that within the system such changes should be introduced in order to ensure that a guilty man cannot escape and the innocent stands protected. Therefore, a comprehensive reform to be made in the Criminal Justice System to suite the technologically changing society where crimes have multidimensional effects and further research i.e. broad-based research may be evolved to fulfill the end.

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B

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C

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D

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E

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F

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G

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H

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I

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J

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K

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L

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M

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N

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O

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P

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Q

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R

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S

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Annexure-I: Questionnaire

Questionnaire-I

Judges and Advocates

Name and Designation of Respondent: Date:

E-mail:

Workplace:

Subject: Law on Bail and Bail Bond

1. Whether it will be just and reasonable to empower the Court to grant bail *suomoto*in any kind of offence, Bailable or Non- Bailable. Do you have any suggestion regarding this concept?

   ☐Yes ☐No ☐ Suggestion (If any)-

2. Does the exceptional clauseprovided in section 497 of the Code of Criminal Procedure

   1898 i.e. provisions for granting bail in Non Bailable offence, is exhaustive? If not, what other category of personsshould be included under exception clause of section 497 of the Code?

   ☐Yes ☐No ☐ Suggestion (If any)-

3. Should the period enjoyed in bail always be deducted from the period of imprisonment in case of conviction? If not, what is your suggestion regarding this deduction?

   ☐Yes ☐No ☐ Suggestion (If any)-

4. Should the minimum amount of the bond be fixed and determined having regard to relevant factors and nature of the charge?If yes, what do you suggest regarding the figure of minimum amount of bond?

   ☐ Yes ☐ No ☐ Suggestion (If any)-

5. Whether the grounds of cancellation of bail should be incorporated precisely in the Code of Criminal Procedure, 1898? Do you suggest any new grounds (without existing Legal Precedents) to be incorporated in the Code?

☐Yes ☐No ☐ Suggestion (If any)-

6. Should the list of sureties (person entrusted to produce the accused before court) be prepared in every Court? What kind of persons should be enlisted as sureties?

☐Yes ☐No ☐ Advocates ☐ Businessmen
☐ Relatives of the accused granted bail
☐ Politicians☐Others

7. Whether the Court should be empowered to grant bail in any kind of offence without sureties? If yes, in what type offence it will be more justified?

☐Yes ☐No ☐Bailable Offence ☐ Non-Bailable Offence

8. Whether in case of bail in **Bail-able offence**, grant of bail in second time or in case of presence of the accused after avoiding the trial or absconding from sureties should be discretionary upon Court?

☐Yes ☐No ☐ Suggestion (If any)-

9. Should the provision regarding the Anticipatory Bail (Advanced Bail) under Code of Criminal Procedure, 1898 be omitted? Is the scope of Anticipatory Bail being abused in our country? If yes, what is the percentage of that?

☐ Yes ☐ No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

10. Whether the power of granting Anticipatory Bail should be exercised only by the Sessions Judge and will it be just and proper to curtail the power of HCD in granting Anticipatory bail? Do you have any suggestion regarding this concept?

☐Yes ☐No ☐ Suggestion (If any)-

11. Whether, in practice, the provisions regarding the forfeiture of bond are being applied and pragmatic? Do you suggest that the amount of Bail Bond be deposited in the court before granting Bail?

☐ Yes ☐ No ☐ Suggestion (If any)-

12. Should the participation of the victim be made mandatory in the hearingof granting or cancellation of bail, bail-able or non-bailable, and be given opportunity to adduce the evidence, in case of failure or reluctant of prosecution, against the accused?

☐ Yes ☐ No ☐ Suggestion (If any)-

13. Whether the offences, Bailable or Non-Bailable, mentioned in Column V of Schedule II of the Code of Criminal Procedure, 1898 should be reclassified? If yes, what is your suggestion regarding this reclassification?

☐ Yes ☐ No ☐ Suggestion (If any)-

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Questionnaire-II

Judges and Advocates

Name and Designation of Respondent: Date:

E-mail:

Workplace:

Subject: ADR in Criminal Litigation

1. Should the Plea-Bargaining Mechanism be incorporated specifically in the Code of Criminal Procedure, 1898 under a Head of different Chapter? If yes, what do you suggest?
   ☐ Yes ☐ No ☐ Suggestion (If any)-
2. Whether it will be just and reasonable to empower the Court to make an offer *suomoto*for Plea- Bargaining between complainant and accused concerned? Do you have any suggestion regarding this concept?
   ☐ Yes ☐ No ☐ Suggestion (If any)-
3. Should the Table of Compoundable offences under Section 345 of Code of Criminal Procedure, 1898 be reclassified? If yes, what offenses you suggest to be included in that table?
   ☐Yes ☐No ☐ Suggestion (If any)-

4. Shouldall kind of offences, Penal Offence, Special Penal Offences or Offence against other Laws be brought in the scope of Plea-Bargaining Mechanism? If no, what kind of offences you suggest to bring in under that mechanism?
   ☐Yes ☐No ☐ Suggestion (If any)-

5. According to your opinion, what kind of effect should be given to the accused on the basis of successful settlement through Plea-bargaining?

   ☐Discharge ☐Release ☐ Acquittal ☐ None of them

6. Which Maximum Portion of punishment, provided by the Law, you suggest should be reduced upon successful disposition of the case through Plea-Bargaining?

   ☐One-fourth ☐Two-fourth ☐ Three-fourth ☐ Half ☐ Full

7. According to your opinion, Up to what stages it would be appropriate and justified to allow, by the court, the application of Plea-bargaining?

   ☐Pre-trail ☐Trial ☐ Post-trail ☐ Appellate Stage ☐ Other

8. Should the accused be given an opportunity to avail of the benefit of section 35A of Code of Criminal Procedure, 1898 for setting off the period of detention undergone by the accused against the sentence of imprisonment on the basis of Plea-Bargained settlement? If no, what do you suggest?

   ☐Yes ☐No ☐ Suggestion (If any)-

9. What categories of offences, in terms of punishment, you suggest should be excluded from the scope of Plea-bargaining Mechanism?

   ☐Offence punishable with death ☐Offence punishable with imprisonment exceeding 7 years ☐Offence punishable with imprisonment exceeding 10 years☐Others-

10. Whether incorporation of Plea-Bargaining Mechanism in the Code of Criminal Procedure, 1898 would reduce the backlog of cases in different court and congestion in jails?

    ☐ Yes ☐ No

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Questionnaire-III

Judges and Advocates

Name and Designation of Respondent: Date:

E-mail:

Workplace:

Subject: Delay in Criminal Cases

1. Whether the further inquiry at initial stage referred by the Magistrate empowered to take cognizance is a reason for causing delay in criminal case? If yes, what is the percentage of that?

   a. ☐Yes ☐No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

2. Whether there is a general tendency on the part of the courts to pay less attention to complaint-cases as against police-cases (usually described as General Register Cases)?

   a. ☐ Yes ☐ No

3. Whether non-attendance of witnesses is one of the reasons for causing delay in criminal cases? What is the percentage of attendance of witnesses in due time and date before the court?

   a. ☐Yes ☐No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

4. Whether non-attendance of the accused necessarily leads to adjournment of the case? If yes, what is the percentage of that?

   a. ☐Yes ☐No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

5. Whether the Advocate engaged in a case is liable for adapting such tactics as may ultimately lead to the prolongation of the trial? If yes, do you suggest to take action against him according to The Bangladesh Legal Practitioners and Bar Council Order, 1972?

   a. ☐ Yes ☐ No ☐ Suggestion-

6. Whether increase in the volume of work and shortage of Magistrates is one of the reasons for causing delay in criminal cases? If yes, what number of Magistrate you suggest to be recruited is essential to reduce the volume of works rapidly?

    a. ☐ Yes ☐ No ☐Suggestion-

7. Are the Magistrates and Advocates punctual in attending the courts? What is percentage of those Magistrates and Advocates who start the court works in time?

    a. ☐Yes ☐No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

8. Whether frequent adjournment is one of the main reasons for causing delay in criminal case? If yes, do you suggest to make every unnecessary adjournment with exemplary cost?

    a. ☐ Yes ☐ No ☐Suggestion-

9. Is working condition at the court is good? What type of suggestion you give to improve the working condition at the court?

    a. ☐ Yes ☐ No ☐E-Judiciary ☐Increase of Court Rooms

        ☐ Increase of Staffs ☐Others

10. Do sudden and frequent transfers of Magistrates often without substitutes cause considerable dislocation and delay in the disposal of judicial work? If yes, what is the percentage of that?

    a. ☐Yes ☐No ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

11. Do you suggest to improve proper supervision over the court works and activities to reduce the backlog of criminal cases?

    a. ☐ Yes ☐ No

12. In what type of cases delay are mostly occurred?

    a. ☐ Murder & Culpable Homicide ☐ Children & Women Oppression
    b. ☐Offences relating to Human Trafficking ☐Cheque dishonor
    c. ☐Petty offence ☐Others

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Questionnaire-IV

Judges and Advocates

Name and Designation of Respondent: Date:

E-mail:

Workplace:

Subject: Confessional Statement

1. How many of the accused confess their guilt voluntarily?
    a. ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%
2. If the accused do not want to confess, are they sent back to Police Remand?
    a. ☐ Yes ☐ No
3. What is the percentage of giving confessional statement before Police Remand?
    a. ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%
4. What is the percentage of giving confessional statement after Police Remand?
    a. ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%
5. Are all the legal requirements complied with during recording confessional statement? If yes, what is the percentage of that?
    a. ☐ Yes ☐ No ☐ Percentage-
6. Does any of the accused make complaint during recording confessional statement against police officer regarding any kind of inducement, torture etc. for extracting confession? If yes, what is the percentage of that?

a. ☐ Yes ☐ No ☐ Percentage-

7. Is there any visible examination at the time of recording confessional statement on the whole body of the confessor regarding any kind of marks of wounds, fractures and bruises etc.?

   a. ☐ Yes ☐ No

8. If any mark of injury is found on the body of the confessor upon examination, is any kind of legal action taken against police officer? If yes, what type of action?

   a. ☐ Yes ☐ No ☐ Judicial ☐ Departmental

9. According to your opinion, how many of the accused know that "Police has no authority to record confession"?

   a. ☐ 0-10% ☐ 10-30% ☐ 30-60% ☐ 60-100%

10. In what type of cases confessions are mostly recorded?

    a. ☐ Murder & Culpable Homicide ☐ Children & Women Oppression
    b. ☐ Grievous Hurt ☐ Petty Offences
    ☐ Others

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Annexure- II

Proposed Compoundable Offence against Penal Laws

Section of the Penal Code,	Offences
279	Driving or Riding on a public way so rashly or negligently as to endanger human life etc.
304A	Causing death by rash or negligent act.
304B	Causing death by rash driving or riding on a public way.
307	If such act cause hurt to any person.
325	Voluntarily causing hurt by dangerous weapons or means.
326	Voluntarily causing grievous hurt by dangerous weapons or means.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.
382	Theft, preparation having benefit made for causing death, or hurt, or restraint, in order to the committing of such theft, or to restring after committing it, or to retiring after committing it, or to retaining property taken
384	Extortion.
385	Putting or attempting to put in fear of injury, in order to commit extortion.
399	Making preparation to commit dacoity.
402	Being one of five or more persons assembled for the purpose of committing dacoity.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.
436	Mischief by fire or explosive substance with intent to destroy a house, etc.
449	House trespass in order to the commission of an offence punishable with death.
457	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment. If the offence is theft.
462A	Negligent conduct of bank officers and employees.
462B	Defrauding banking company.
465	Forgery.
468	Forgery for the purpose of cheating.
510	Appearing in a public place, etc. in a state of intoxication, and causing annoyance to any person.

Annexure- III

Proposed Compoundable Offence against Other Laws

Offences other than penal laws	Offences
Section 138 of the Negotiable Instrument Act 1881	Dishonor of cheque for insufficiency of fund etc
Section 6(5)(b) of the Muslim Family Laws ordinance, 1961	Any man who contracts another marriage without the permission of the Arbitration council
The Forest Act 1927	Offence relating to forest, the transit of forest and duty leviable on timber.
Section 11(c) of The Women and Child Repression Act 2000	Causing simple hurt for dowry.
The Children Act , 2013	Any offence commited by child except murder
The Narcotics Act, 1990	Section 19 clause kha highest punishment is five years lowest six months and clause ga highest punishment is one year lowest six months.
Anti- Corruption case	Offences relating to corruption
The Protection of Conservation of Fish Act, 1950	Offence relating to catching, carrying, transporting, offering, exposing or possession for sale or barter of fishes below the prescribed size and prohibition of using current jal.
The offenses which are permitted to be tried summarily for any Penal offences under section 260 of Cr.P.C.	
The Public Examination (offences) Act 1980	Publication or distribution of question paper before public examination, helping examinees, obstruction in public examinations.
The Cattle trespass Act, 1871	All Offences