

## **GOALS AND PURPOSES OF CRIMINAL JUSTICE SYSTEM IN BANGLADESH: AN EVALUATION**

Dr. Abdullah Al Faruque\*

### **Introduction**

The fundamental purpose of criminal law and criminal justice system is to control crime, punish the offenders, prevent crimes, protect innocents, and to maintain a fair degree of cohesion and stability in society. While criminal law is broadly seen as a tool of social control, criminal justice system is an institutional framework to enforce criminal laws. In general, criminal law refers to the following points: substantive norms for defining crime as well as prescribing punishment for offences; general principles upon which norms and practices of criminal law develop; rules of evidence and procedures through which criminal laws are applied. On the other hand, criminal justice system refers to the institutional aspect which conjures up the broad spectrum of a set of legal institutions, which include judiciary, police, prosecutors, defense lawyers, and prison authorities as well as a host of other support institutions and functions such as investigation, forensics, surveillance and so on. Effective application of criminal law is fundamentally connected to efficiency of administrative system of these legal institutions.

The goals and purposes of criminal justice system are often articulated in two predominant but competing models-‘due process model’ and ‘crime control model’-which should also be highlighted in order to have an in-depth understanding of the issues in hand.<sup>1</sup> The ‘Due process model’ puts emphasis on the right of the individuals in the process of criminal adjudication, while the ‘Crime Control model’ sees the regulation of criminal conduct as the most important function of the judicial system. Thus, these models represent two separate value system in the operation of the criminal process- the protection of individual liberty in criminal

---

\* Dr. Abdullah Al Faruque (LL.B. (Hons.) and LL.M., Dhaka University, Ph.D., Dundee University, UK) is an Associate Professor and Chairman, Department of Law, University of Chittagong. The author is grateful to Dr. Shahdeen Malik, Director, School of Law, BRAC University, Bangladesh for his guidance and helpful comments on the earlier draft of this article. The author would also like to thank Mr. Kakon De, a LL.M. student of Department of Law, University of Chittagong for providing research assistance.

<sup>1</sup> See Packer, L. Herbert, ‘Two Models of the Criminal Process’, in: George F. Cole (ed.), *Criminal Justice: Law and Politics*, 3<sup>rd</sup> ed., Massachesstes, (1980), pp. 17- 33.

proceedings and the goal of efficient and expedient enforcement of criminal law. But two models should not be highly polarised as neither corresponds to reality or representing the ideal to the exclusion of the other in the criminal process.<sup>2</sup> Actually they offer convenient tool in understanding the complex values underlying the criminal law. However, the detailed analysis of these two models is beyond the scope of the present article.

Criminal law of Bangladesh consists of a complex web of laws, institutions, distinctive techniques, processes and practices. The foundation of modern criminal justice system was laid down by adoption of Penal Code, 1860, which superseded all previous customary laws and regulations. The Penal Code is the reflection of common law of crime as well as the peculiar social customs of the sub-continent. The Criminal Procedure Code, 1898 and the Evidence Act, 1872 provide procedural framework, techniques, and processes for application of criminal law. Procedural aspect of criminal justice system is shaped by the structure of investigation, prosecution, general time-frame of the investigation and trial of an offence, and mechanisms devised for the protection of accused. Apart from these formal and substantive laws, the criminal justice system is shaped by informal social norms. According to one author:

“the power and meaning of criminal laws depend on a more context set of processes and underlying factors than the mere positing mere prohibitory norms to be enforced according to a particular procedure.”<sup>3</sup> Criminal justice system not only reflects formal legal characteristics but also social value and determinants of which criminal justice is an integral part.<sup>4</sup> Any evaluation of criminal justice system should take into account the informal factors such as social organizations, policies, and practices. Thus, one should locate the relationship between criminal law and the larger social context within which it is formed and operates. Understanding criminal justice requires that we should pay attention both to criminal law and to crime’s sociological dimension.<sup>5</sup> Criminal law codifies and reflects society’s widely accepted values. The criminal justice system of Bangladesh is no exception in this regard.

---

<sup>2</sup> *Ibid.*

<sup>3</sup> Lacey, Nicola, ‘Criminology, Criminal Law and Criminalisation’, in: Mike Maguire (ed.), *The Oxford Handbook of Criminology*, 2<sup>nd</sup> ed., (1997), p. 440.

<sup>4</sup> Samaha, Joel, *Criminal Justice*, West Publishing Company, (1988), p.15.

<sup>5</sup> *Ibid*, p. 34.

The main objective of the present article is to explore the present state of criminal justice system in Bangladesh, to analyse the recent legislative and judicial trends and investigate the problems of criminal justice system. How does one appreciate the evaluation of goal and purposes of criminal justice system - in terms of implementation of laws or performance of justice system? Perhaps one should appreciate both criteria. Focusing on goals and the criminal justice system as a whole, one should consider the underlying principles involved and criteria by which effectiveness of justice delivery system will be continually and objectively evaluated. Three important criteria of evaluation of achievement of goal and purposes of criminal justice can be set out: access of the ordinary person to criminal justice system, current level of satisfaction with delivery of justice and how far the basic principles of criminal justices are applied by the judiciary and other actors of criminal justice system.

### **Basic Principles of Criminal Law**

Criminal law should only be used as a 'last resort' against people who refuse to abide by social and legal values and commit crimes and operation of criminal law must be evaluated by a higher standard of justification because individual liberties are in stake in criminal proceedings. Therefore, application of criminal law should be guided by well-defined principles and norms. The general principles of criminal law fall into three broad categories: first are the general principles of criminal liability or the material elements of crime which include both physical element (*actus reus*) and mental element (*mens rea*);<sup>6</sup> presumption of innocence i.e., the prosecution in a criminal case must prove every material element beyond a reasonable doubt in order to convict the defendant. Second are the general principles of justification and excuse, or the defenses, such as self-defense and insanity. Third are the procedural principles which are also termed as the due process requirement.

The due process requirements include the constitutional protection against self-incrimination, unreasonable search and seizure, to examine witnesses, to be defended by a lawyer. Due process requirement also implies that laws should be consistent, of general application, certain in their effects, publicized and prospective rather than retrospective in

---

<sup>6</sup> See, Ashworth, Andrew, 'Belief, Intent and Criminal Liability', in: John Eekelaar and John Bell (ed.), *Oxford Essays in Jurisprudence*, Third Series, Clarendon Press, Oxford, (1987), pp. 1-31; Lacey, Nicola and Wells, Celia, *Reconstructing Criminal Law*, 2<sup>nd</sup> ed., Butterworths, (1998), chapter 1.

operation.<sup>7</sup> Since criminal law represents the coercive power of the state, observance of due process is a fundamental requirement for protecting individual's rights and liberties.<sup>8</sup> These procedural principles are necessary for maintaining legitimacy and fairness of criminal justice system.

The central issue of due process and fairness is how to strike a reasonable balance between interests of the state and rights of the accused. Achievement of proper balance between these two conflicting goals remains a perennial problem in criminal justice system. Protection of procedural safeguards for fair and impartial trial, and proper sentencing of offenders are central to maintaining proper balance between the public safety and rights of accused. Therefore, these safeguards are guaranteed in the international human rights instruments and entrenched in the constitution as fundamental rights. The constitution of Bangladesh also provides basic procedural safeguards that limit state's power at every step of criminal proceedings.<sup>9</sup>

In the following sections we scrutinize how recent legislation, judicial decisions and practices have deviated from the above core principles and norms.

### **Criminalisation of Civil Wrongs and Double Criminalisation**

In the last three decades, many acts which are purely civil in nature have been criminalised through defining them as crime and punishable offence under numerous legislation. These civil wrongs can better be prevented by means of imposing repressive financial obligations rather than being criminalised and subjected to criminal sentences. For instance, under the Control of Depository Act, 1999, violation of any provision relating to preservation and transfer of securities has been made a punishable offence with sentence of five years imprisonment or fine.<sup>10</sup> Such criminalisation of civil acts has the following consequences:

- it deprives the Government from huge amount of *ad valorem* court fees on one hand and cause the government to bear the expenses of the private litigation of the individuals on the other;
- it unduly overburdens the criminal courts and causes backlogging of cases;
- it gives rises to multiplicity of proceedings.<sup>11</sup>

<sup>7</sup> Trechsel, Stefan, *Human Rights in Criminal Proceedings*, Oxford University Press, (2005), pp. 7-8.

<sup>8</sup> Ashworth, Andrew, *Principles of Criminal Law*, Clarendon Press, Oxford (1991), p. 59.

<sup>9</sup> See, article 35.

<sup>10</sup> Section 15 of the Act (Act No. VI of 1999).

<sup>11</sup> Hoque, Muhammad Samsul, 'Trend against Policy of Law: Government is Deprived', 52 DLR (2000), p. 36(Journal section).

Closely associated with the criminalisation of acts, bureaucratisation of criminal law e.g., vesting enforcement of criminal laws in different governmental departments and agencies under different legislation adds complexity to the problem, as these public authorities lack independent prosecution service, adequate resource and expertise, institutional and managerial capacity to enforce criminal sanctions.<sup>12</sup> Widespread vesting of enforcement power also leads to arbitrary interpretation and inconsistent enforcement of laws which, in turn, may go against fairness of criminal proceedings.

Double criminalisation is also discernible in our criminal justice system. Double criminalisation refers to the situation where the same conduct is made punishable under two or more different enactments. This gives rise to the problem of whether it is permissible to prosecute an offender under either of the two provisions or whether the subsequent enactment has the effect of repealing the relevant provisions of earlier law. For example, many provisions on offences under the Special Power Act, 1974 are already covered by the Penal Code.<sup>13</sup> Furthermore, under section 23 of the Emigration Ordinance, 1982, receiving money on false pretext has been made a punishable offence. But ingredients of such offence are already available under section 406 and 409 of the Penal Code.

Such double criminalisation has a number of negative consequences:

- most of the ingredients of 'crimes' have been already defined and enumerated in general criminal law and further criminalisation of these acts leads to duplication of efforts often at the cost of efficiency of relevant authorities;
- most of newly created crimes have been formulated in broad fashion with consequent scope of their misuse and widespread discretion in application;<sup>14</sup> and
- punishing the same conduct under more than one enactment, even where it may be unavoidable, can create problem of procedural multiplicity and consequential confusion.

---

<sup>12</sup> See for instance, section 7(1) of the Environment Court Act, 2000; section 78 of Independent Commission for Telecommunication System and Telecommunication Service Improvement Act, 2001 (Act No. XVIII).

<sup>13</sup> See, section 4C of Schedule to the Special Powers Act, 1974 (amended in 1991 by Act of XVIII) by which section 376, 385 and 387 of Penal Code have been made punishable under the former.

<sup>14</sup> Malik, Shahdeen, 'Laws of Bangladesh', in: A.M. Chowdhury & Fakrul Alam, (ed.), *Bangladesh on the threshold of the Twenty-First Century*, Asiatic Society of Bangladesh, Dhaka, (2002), p. 444.

It is axiomatic that criminal sanctions should not be employed where they can not be expected to be reasonably effective.<sup>15</sup> This seemingly inexorable trend towards criminalisation of civil wrong and double criminalisation does not reflect popular notions of justice and consequently is habitually ignored.<sup>16</sup> This trend is also anti-thesis to the principle that criminal law should be used only as a 'last resort' and punishment should be imposed only by compelling justification.<sup>17</sup> It is well recognised that if non-criminal means to prevent the conduct in question succeed as well or better, the criminal sanction should not be employed.<sup>18</sup> Therefore, enactment of criminal law should be warranted only if no other means to prevent harm are equally effective.

### **Special Criminal Laws: Piecemeal Approach**

Although the Penal Code is a very comprehensive enactment and covers most aspects of crime, it does not fully meet the requirements of present day society after a century and half of its codification. New pattern of crime has evolved due to industrialisation, urbanisation, globalisation and changing view of morality. The Penal Code does not cover the economic offences like black-marketing, hoarding, adulteration of food-stuffs and drugs, trafficking in women and children, corruption, environmental crime and so on. The Penal Code is largely silent about the necessity of reformation and correctional methods like probation, parole, and compensation to victims of crime. In order to deal with inadequacies of penal code, many laws have been enacted to deal with the new forms of crime. These new forms of crimes have been defined as offence in ever increasing number of special criminal laws, regular statutes and administrative regulations. There is no exact number of criminal offences defined in different statutes besides the Penal Code.

---

<sup>15</sup> Bakshi, P.M., 'Limiting the Criminal Law' Vol. 36. No. 2 (1994) *Journal of the Indian Law Institute*, 147 at 165; See also, Ingram, David, *Law: Key Concepts in Philosophy*, Continuum, (2006), Chapter 4. (Punishment must be shown to be a general means that is both effective and indispensable for achieving necessary social goals.) p. 116.

<sup>16</sup> *Supra note* 14, p. 445.

<sup>17</sup> Husak, Douglas 'The Criminal Law as Last Resort, Vol.24, No.2 (2004), *Oxford Journal of Legal Studies*', pp. 207-235. See also Jareborg, Nils, 'What Kind of Criminal Law Do We Want?' in Nils Jareborg (ed.), *Scraps of Penal Theory*, Uppsala, Iustus Forlag, (2002). He writes: "Punishment is society's most intrusive and degrading sanction."

<sup>18</sup> *Ibid*, p. 217.

In many instances, the goals and purposes of the new criminal laws are not well defined. For instance, the preamble of the Prevention of Corruption Act, 1947 simply provides that “whereas it is expedient to make more effective provision for the prevention of bribery and corruption.”<sup>19</sup>

In number of special criminal statutes, legal action before the court can be initiated only with the written complaint or report of the officials authorised by the relevant department and hence, aggrieved individual has no direct access to the court under these laws. For instance, section 5(3) of the Environment Court Act, 2000, only persons authorised by the Director General of Department of Environment can inquire into matters for the purpose of trial by the Environmental Court and section 17 of the Environment Conservation Act, 1995 specifically provides that no court shall take cognizance of an offence or receive any suit for compensation except on the written report of an Inspector of the Department or any other persons authorised by the Director.<sup>20</sup>

Many of these special criminal laws are stringent in nature and characterised by severity of punishment and special procedures. The *Public Safety Act, 2000* and the *Nari O Shishu Nirjatan Domon Ain, 2000* are good examples of this trend. Given the rising phenomenon of acid crime in recent years, two special laws were enacted in 2002, namely, the Acid Control Act, 2002 and the Acid Offenses Act, 2002 – both providing for harsh punishment including the death penalty for a string of acid-related offences.

The underlying assumption behind such stringency derives from the popular notion that enhancement of punishment can deter criminal conduct. Viewing law and order situation from this singular approach of enacting criminal law fails to recognise the social, political and economic dimension of crime, which largely explains the prevailing nature and incidence of crime. Moreover, these special laws, invariably, take away a number of procedural safeguards, including bail. This legislative and mandatory denial of bail also violates the principle of presumption of innocence as it amounts to imposition of imprisonment on an innocent person before trial and conviction.<sup>21</sup>

---

<sup>19</sup> Act No. II of 1947.

<sup>20</sup> See also, section 26 of Foundation of Rural Poverty Alleviation Act, 1999 (Act No. XXIII); section 8 of the Prevention of Money Laundering Act 2002 (Act No. VII); section 58 of the Establishment of Upzilla Parishad as Local Government Act, 1998 (Act No. IV).

<sup>21</sup> *Supra* note 14, p. 446.

Sever character of many special criminal law can be further exemplified by the provision of appeal under the Special Power Act, 1974, section of which provides that an appeal from an order, judgement or sentence of a Special Tribunal is to be preferred to the High Court Division within thirty days from the date of delivery or passing thereof. The provision gives rise possibility of construction of two interpretation- on the one hand, the capital sentence cases should be brought before the High Court with the least possible delay to avoid the mental agony and torture which the condemned man has to suffer; on the other hand, this rigid time frame of appeal may go against convicted accused if he fails to prefer the same due to circumstances beyond his control. In particular, overriding application of this Act over all laws makes this time frame mandatory and provision of condonation of delay under Limitation Act, 1908 becomes inapplicable under the former. In fact, interpretation of this provision of appeal has resulted in conflicting judicial decisions. For instance, in the case of *Shamsul Haque vs. State*<sup>22</sup>, and *Bashi vs. State*<sup>23</sup>, it was held that application for condonation of delay in filing an appeal under the Special Powers Act is not maintainable when such appeal is barred by limitation. But in an earlier case of *Mustafa alias Mustafizur Rahman vs. State*<sup>24</sup>, the High Court Division allowed the appeal after expiry of period of limitation if there is sufficient cause for not preferring such appeal within time period. Similarly judicial approach is not consistent as to whether recourse to inherent jurisdiction of court under section 561A of Cr. P.C can be made to overcome rigour of this provision of appeal and to secure end of justice.<sup>25</sup>

Public consultation in law-making process is an important means to provide legitimacy and perceive the soundness of any legislation. But like all other branches of law, law-making process in criminal justice system in Bangladesh is not participatory and the criminal law gets marginalised through non-reflection of popular opinion of civil society in the law-making process. A number of special criminal laws originated from

---

<sup>22</sup> 43 (1991) DLR (HCD) 247

<sup>23</sup> 43 (1991) DLR (HCD) 209

<sup>24</sup> 5 (1985) BLD (HCD) 335

<sup>25</sup> In *Mir Mohammad Ali vs. State* 46 (1994) DLR (HCD) 175, the HCD held that section 561A of Cr. P.C can not be conceived to give it to retrieve the cases from the moratorium after they have been barred by limitation. Contrastingly, in the case of *Sohail Ahmed Chowdhury vs. State* 47 (1995) DLR, the HCD held that an appeal filed under section 30 of the Special Powers Act can be converted to a Miscellaneous case under section 561A of the Cr. P.C. for securing the ends of justice and as such technicalities of procedure may be avoided.



“ordinances” and “martial law regulations” which meant that there was no scope for adequate deliberation amongst the people at large and in parliament before their adoption.<sup>26</sup> Even before regular enactment by parliament, the draft laws are hardly consulted with wider public in order to gauge the policy and principles involved and assess their implementability and technical soundness. The public participation is essential for democratisation of law-making process and legitimacy of law and fulfilling general expectation of the public.<sup>27</sup> The fact that these special laws are adopted in haste coupled with non-consultation with the stakeholders means the actors of the criminal justice system and the general public is often unaware of these new legal provisions.

Many of the special criminal laws have been enacted to respond to particular incident that caused public indignation, rather than being shaped by considered principles of criminal law. As a result, many special laws have not made any purposeful impact in bringing desired objects of controlling and eliminating targeted crimes. The diverse procedures envisaged under special laws also create confusion and uncertainty in the administration of criminal justice system.

The special criminal laws have a number of features which distinguish them from other legislations:

- special rules of evidence and procedure;
- rigid time-frame for completion of investigation and trial. Usually, these laws contemplate 7-21 day timeframe for the police to complete the investigation and a 30-45 day timeframe running from the date of submission of police report to the Court to completion of the trial. Such rigid-time frame of completion of investigation and trial may sometimes prevent to prepare legal representation adequately by accused to defend himself.<sup>28</sup>
- primacy of special laws over other laws.

One important effect of special criminal laws is proliferation of special criminal courts and tribunals in which crime can be tried under different

---

<sup>26</sup> e.g., the *Emergency Powers Ordinance, 1974*, the *Martial Law Regulations 1975*, the *1990 Emergency Power Ordinance, 1990*.

<sup>27</sup> See, Faruque, Abdullah Al & Saha, Nirmal Kumar, ‘Participatory Legislation in Bangladesh: An Appraisal,’ 3 (1998) *The Chittagong University Journal of Law*, pp. 1-21; Baxi, Upendra, *Bentham’s Theory of Legislation*, Tripathi, (1986), Introduction, pp. ix-xxxii.

<sup>28</sup> See Islam, M. Rafiqul and S. M. Solaiman, ‘The New Speedy Trial law to maintain law and order in Bangladesh: Its constitutional and human rights implications’. Vol. 46, No. 1. *Journal of the Indian Law Institute*, (2004) pp. 79-98.

procedures. The underlying purpose of these special courts and tribunals is to ensure speedy trial of specified offences. Apart from special criminal laws that define crimes and make provision for special courts/tribunals, there is another emerging trend of enacting laws to establish special courts/tribunals. For example, the Law and Order Contravening Offences (Speedy Trial) Act, 2002 and the Speedy Trial Tribunal Act, 2002 are two special laws enacted for ensuring speedy disposal of certain criminal cases. Under the Law and Order Contravening (Speedy Trial) Act, 2002<sup>29</sup> speedy trial courts have been established in all districts for trying offences of extortion, toll collection, damage to private and government properties, obstruction in submitting tenders, obstruction in transportation and performance of official duties etc. The Speedy Trial Tribunals have been established under the Speedy Trial Tribunal Act, 2002<sup>30</sup>. It is striking that most of the cases in the Speedy Trial Courts/Tribunal have been disposed of within three to nine months. Another important feature is that in 65% of the cases, the accused have been found guilty and convicted, which otherwise might have been hardly 20% under the usual system.<sup>31</sup> This uneven performance of special courts/tribunals in dispensation of justice may be attributed to rigid time-frame and higher resource allocation to them compared to usual system.

### **Imposition of Harsh Sentences**

One of the fundamental principles of criminal law that the quantum of punishment should be regulated by the principle of proportionality between the sanction and the gravity of the offence.<sup>32</sup> A rational sentencing policy proportionate to the magnitude of harm inflicted on society is pre-requisite for a sound criminal justice system. But there is discernible trend of prescribing harsh punishment to solve the 'law and order' situation ignoring social dimension of the problem. It needs to be mentioned that the Penal Code which was enacted almost 150 years ago contained only 8 crimes which were punishable with the sentence of death. For only one of these 8, the sentence of death was made mandatory. The eight sections prescribing the sentence of death are as follows:

- 121 (waging war against Bangladesh),
- 132 (abatement of mutiny if mutiny is committed),

---

<sup>29</sup> Act No. 11 of 2002

<sup>30</sup> Act No. 28 of 2002.

<sup>31</sup> See, 'Reforms in Criminal Justice Delivery System', available at <http://www.minlaw.gov.bd/bdf2004.htm> (last visited on 3 September, 2007).

<sup>32</sup> *Supra* note 8, p. 58.

- 194 (giving or fabricating false evidence with intent to procure conviction of capital offence),
- 302 (murder),
- 303 (murder committed by life-convict, the mandatory sentence of death),
- 305 (abetment of suicide of a minor or insane),
- 307 (attempt to murder by a life convict), and
- 396 (dacoity with murder).

The *Criminal Law Amendment Act, 1958* (Act XXXIV ) added section 364A to the Penal Code under which kidnapping or abducting a minor under the age of ten for the purpose of murder, grievous hurt, or slavery was also made punishable with death.

Apart from this, the *Arms Act, 1878* and *Explosive Substance Act, 1908* enacted in the colonial period also provided for the death sentence. However, both these enactment originally did not contain death penalty. Newly added section 20A of the Arms Act provided for the death sentence for keeping arms with the intent of commission of any offence of murder.<sup>33</sup> Section 3 of the *Explosive Substance Act, 1908* provides for sentence of death for causing explosion likely to endanger life, person or property. This sentence of death was inserted in this Act in 1987.<sup>34</sup>

After emergence of Bangladesh, a large number of criminal statutes were enacted prescribing death as punishment for various crimes. During the period of 1972 to 1975, a total of six statutes provided for imposition of sentences of death which are following:

- i. *Bangladesh Collaborators (Special Tribunal) Order, 1972,*
- ii. *The International Crimes (Tribunal) Act, 1973,*
- iii. *The Emergency Powers Ordinance, 1974,*
- iv. *The Special Powers (Amendment) Act 1974*<sup>35</sup>,
- v. *The Emergency Powers Act, 1975, and*
- vi. *The Emergency Powers Rules, 1975.*<sup>36</sup>

During the martial law regime imposed in 1975, the trend of imposition of death penalty continued and many trivial crimes were made punishable by death sentence under a series of martial law regulations. For

---

<sup>33</sup> Bengal Act, 1934 (Act No. VII), section 4.

<sup>34</sup> Amending Act XXI of 1987.

<sup>35</sup> See section 25, 25A, 25B, 25C, 25D, 26 and the Schedule to the Act.

<sup>36</sup> Supra note 14.

example, under the *Martial Law Regulations 1975*<sup>37</sup> the possession of property obtained by 'unfair means' or 'misrepresentation' regarding property owned; under the *Martial Law Regulations, 1976* evasion of custom duties;<sup>38</sup> or attempt to ignite fire in Jute Mills;<sup>39</sup> were made punishable by sentences of death.<sup>40</sup> The second Martial Law proclaimed in 1982 also witnessed the similar trend of making frivolous offences punishable with death. For instance, the 1990 Emergency Power Ordinance, 1990 and the Drug Control Act, 1990 contains death penalty.

The above discussion also demonstrates how governments react to crime and administer justice reflects the nature of the political regime. The authoritarian regimes, in general, use criminal justice system and criminal law as a method of oppression that provide stringent punishment and produce higher rates of arrest, prosecution, conviction, and incarceration as well as sentences of death.

Even during democratic regime restored in 1990, many special criminal laws contained death penalty as a punishment. The two Acts, the *Terrorism Control Act of 1992* (lapsed as the Act was operative for two years only) and the *Woman and Children Oppression (Special Provisions) Act, 1995* have imposed sentences of death for more than 20 different criminal acts. The Prevention of Women and Children Repression Act, 2000 which repealed the *Woman and Children Oppression (Special Provisions) Act, 1995* contains 10 provisions on death penalty. The Acid Offences Act, 2002 makes provision of death penalty and other harsh punishment for different kinds of offences committed by unlawful use of acid.

The forgoing discussion reveals that most special penal statutes provide harsh punishments that are out of proportion to the gravity of the offence. In the age of human rights, when the sentencing policy is rationalized by humanitarian perspective and reformatory theory is becoming more and more popular with penologists, such widespread prescription of death penalty as a mode of punishment is inconsistent with modern trend of correctional approach and human rights norms. In fact, in many countries, death penalty has been abolished in view of the fact that efficacy of capital punishment to deter potential offenders is doubtful and correlation between the existence of capital punishment and lower rates of capital

---

<sup>37</sup> Section 11 and 12 of Rule 1 of 1975.

<sup>38</sup> Under the Martial Law (Ninth Amendment) Regulations, 1976.

<sup>39</sup> Under sections 2 and 21 of the Martial Law (Thirteen Amendment) Regulations, 1976.

<sup>40</sup> These offences are now incorporated in the Special Powers Act, 1974 through amendments.

crime is not proved by any convincing evidence. In democratic and welfare states, penal reforms have shifted punitive measures from death to life generally which means that life imprisonment is increasing going to be the rule and death penalty is restricted to the 'rarest of rare cases' and becoming the exception where special reasons compel to eliminate the offender.<sup>41</sup> But in Bangladesh, death penalty remains inevitable feature of almost every special criminal statute.

However, some sort of accountability had been introduced in 1978 in awarding this ultimate sentence. Previously death sentence was the normal sentence for murder and the court was required to give reasons if the lesser sentence of life imprisonment was given. But after reform in Cr. P. C. in 1978, now reasons have to be given in either case- a death sentence is to be justified in as much in the same way as in the case of lesser sentence of life term imprisonment.<sup>42</sup>

The notion of public protection by longer sentence or death sentence that is said to underlie many of the recent criminal justice reforms is not supported either by principle or evidence of effectiveness. Rather the stringent punishment under law is sometimes explained as one of the reasons for fewer convictions as such provision may, in fact, act as a deterrent to register cases against many offenders and may lead judges to acquit defendants rather than impose, what they feel to be, an unfair punishment, especially the death penalty.

The underlying assumption behind imposition of harsh punishment or death penalty is its perceived deterrent effect on criminal behaviour and consequent reduced crime rate. But this doctrinal formulation of criminal law liability and severity of punishment to optimise deterrent effect has been challenged and can hardly have desired effect because of the low levels of certainty that these punishments will be applied. Rather modern criminal law studies have given more importance to crime detection, increase of resource allocation, increase of police force to reduce the crime rate rather than harsh punishment.<sup>43</sup>

---

<sup>41</sup> See, Sing, Mahendra P., 'Capital Punishment: Perspective and the Indian Context', in: R. S. Agarwal and Sarvesh Kumar (ed.), *Crimes and Punishment in New Perspective*, Mittal Publication, Delhi, (1986), pp. 28-40.

<sup>42</sup> See subsection (5) of sec. 367 of Cr. P. C.

<sup>43</sup> See, Robinson, Paul H., and Darley, John M. 'Does Criminal Law Deter? A Behavioural Science Investigation', Vol. 24, No. 2 (2004), *Oxford Journal of Legal Studies*, pp. 173-205. The authors observe: "Potential offenders commonly do not know the legal rules, either directly or indirectly, even those rules that have

### Withering Away of Presumption of Innocence?

The idea that people accused of criminal offences should be presumed innocent until proven guilty beyond all reasonable doubt is a core tenet of criminal law doctrine. This is reflected in the principle of presumption of innocence<sup>44</sup> and corollary to this, is that there is no onus upon the accused to prove his innocence and the burden of proof rests upon the prosecution. Consequently the accused may remain silent, remains one of the core principles of criminal justice under adversarial system. Art. 14.2 of International Covenant of Civil and Political Rights, 1966, which Bangladesh acceded to in 2000, states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The principle of presumption of innocence implies two elements: a rule regulating the location and standard of the burden of proof and secondly a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of criminal proceedings irrespective of the probable outcome of the trial.<sup>45</sup>

Unfortunately, the principle of presumption of innocence is honoured more often in the breach than in the observance. Practices such as remand in custody, torture as a method of investigation, arbitrary refusal of bail, pressure on people charged to plead guilty are in contradiction with the principle of presumption of innocence. The phenomenal rise of extra-judicial killing of ‘criminals’ as a populist device to solve ‘law and order’ problem by law-enforcing agencies like ‘operation clean-heart’ or cross-fire in last few years not only violate many cardinal principles of criminal justice including presumption of innocence and the right to be defended, but also remains a unrequited form of violation of the rights of a citizen. In fact,

---

been formulated to produce a behavioural effect. Even if they know the legal rules, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational or chemical influences.” p. 204.

<sup>44</sup> Morgan, Edmund M. ‘Some Observations concerning Presumptions,’ Vol. 44, No.6 (1931) *Harvard Law Review*, p. 906. He observes: “The expression presumption may properly be used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone. Secondly such an assumption is compelled because it is believed to be justified on logical grounds by human experience, or because it accomplishes a procedural convenience, or because it furthers a result socially desirable, or because of a combination of two or more of these reasons.”

<sup>45</sup> Schwikkard, P J, ‘The Presumption of innocence: what is it?’ Vol. 11 (1998) *South African Journal of Criminal Justice* 396, at 403.

“cross fire” indicates a desperate attempt to keep crimes under control and points out serious failing of our criminal justice system.<sup>46</sup>

### **Trends of Judicial Interpretation**

In some instances like wife-killing cases the higher judiciary took the position that this cardinal principle can be discarded where the prosecution is called upon to prove the guilt by circumstantial evidence. In other words, if at the time of death of the wife, she was in custody of the husband, the husband shall be required to prove the circumstances as to how his wife met her death. In such a case, the prosecutor will be required to prove that at the relevant time the victim i.e., the wife was living with her husband and at the time of occurrence, husband was in the house. This judicial move is mainly articulated in response to unjust acquittal of accused husbands in dowry related deaths, which has eroded the confidence of public in the criminal justice system in Bangladesh. The several judicial pronouncements of the Appellate Division and the High Court Division reveal that the burden of proof can be shifted towards accused in such cases. Such decisions have been given on the basis of the circumstantial evidence, which requires motive and the opportunity to commit the crime.

In the case of *State vs. Md. Shafiqul Islam alias Rafique and another*, it was observed:

“where it is proved that the wife died of assault in the house of the husband, there would be strong suggestion against the husband that at his hands the wife died. To make the husband liable the minimum fact that must be brought on record, either by direct or circumstantial evidence, that he was in the house at the relevant time.”<sup>47</sup>

In the case of *State vs. Khandbker Zillul Bari*, the Appellate Division held:

“Normally, there is no burden on the accused to offer the reason of death of a person for which he is tried. But when the deceased is living with the husband in the same house he is to explain how the death occurred.”<sup>48</sup>

Similarly in *Shahjahan Mizji vs. State*,<sup>49</sup> and in *Illias Hussain (Md) vs State*,<sup>50</sup> it was observed that when a wife met with an unnatural death while in custody of the husband and also while in his house the husband is to explain under what circumstances the wife met with her death.

---

<sup>46</sup> Alam, Dr. M. Shah, ‘Cross-Examination of Crossfire’, The Daily Star, May 21, 2005.

<sup>47</sup> 43 (1991) DLR (AD) 92.

<sup>48</sup> 57 (2005) DLR(AD) 29.

<sup>49</sup> 57 (2005) DLR (HCD) 224.

<sup>50</sup> 54 (2002) DLR (AD) 78. See also *Shamsuddin vs State*, 45 (1993) DLR (HCD) 587.

In the case of *State vs. Kalu Bepari*, the High Court Division held:

“Ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death in question.”<sup>51</sup>

However, judiciary took inconsistent approach in shifting of burden of proof regarding a wife killing case. In the case of *Emdadul Hoque vs. State*, the court held that the only fact that the wife was killed while in custody of her husband, in absence of some other incriminating conduct of the accused-appellant, is not sufficient to convict him.<sup>52</sup> In this case trial court convicted accused under section 302 of Penal Code and sentenced to life imprisonment as the victim-wife of the accused died while in custody of her husband. In this case, post-mortem examination of the dead body revealed that the death of the deceased was due to asphyxia and suicidal in nature and there was no mark of external injury on dead body. Similarly, in *State vs. Khadem Mondal*<sup>53</sup> where the wife was found dead in the house of her husband, the Appellate Division held that there was no eye-witness of occurrence and fact that the wife was found dead in the house of her husband gives rise to very grave and definitely incriminating and a general moral conviction as to the guilt of the accused, but it is not sufficient to convict the husband in the absence of some other incriminating conduct. In this case, post-mortem report revealed that the death was homicidal in nature and the dead body has some mark of injury.

In India, the legislative deviation from the principle of presumption of innocence has been made both in the Penal Code and the Evidence Act by which, in certain prima facie facts, the onus would shift to the accused to refute the presumptions.<sup>54</sup> In India, the newly created offence of dowry death has been defined in section 304B: “When the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any

---

<sup>51</sup> 43 (1991) DLR (HCD) 249

<sup>52</sup> 57 (2005) DLR (HCD) 21

<sup>53</sup> 10 (1990) BLD (AD) 228.

<sup>54</sup> See, Rao, K. Sreedhar, ‘Criminal Justice System- Required Reforms’, Vol. 43, No. 2, (2001) *Journal of the Indian Law Institute*, p. 162.



demand for dowry; such death shall be called “dowry death” and such husband or relative shall be deemed to have caused her death.”

Similarly, the newly inserted section 113B of the Indian Evidence Act shifts burden on the accused in dowry related deaths. It reads as follows:

“When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the court shall presume that such person has caused the dowry death.”

But one might wonder why these two provisions have not been successfully challenged on the ground of their constitutional validity as the Constitution of India protects the right of presumption of innocence.

The mandatory presumption against the accused in the above mentioned situations virtually amounts to convicting him on grounds of suspicion. This constitutes infringement of centuries-old principle of presumption of innocence which is also constitutional requirement for fair trial. This also goes against the right of silence, which is an indispensable element of fair trial. It is a well established principle that the moment the person is considered as accused in the eye of law, he has a right to remain silent even during the investigation without answering any incriminating question. The right of silence for the accused is ensured in our Constitution<sup>55</sup> and considered as an essential element of due process from the stage of investigation. This constitutional provision ensures complete protection of the accused against self-incrimination.

It is our suggestion that the problem of wife-killing cases can be better solved by using forensic science and strengthening prosecutorial service rather than forsaking the established principle of law. Forensic science is now universally recognized and acclaimed in unraveling the mysteries of crimes in particular when there is no eye-witness.<sup>56</sup> Forensic Science enormously helps the crime investigation process by providing answers through scientific and irrefutable way but at the same time entailing no violation of basic principles of criminal law or human rights of accused. Use of forensic science and other technology such as Fingerprints,

---

<sup>55</sup> Art. 35(4). h

<sup>56</sup> See generally, Sharma, B.R., *Forensic Science in Criminal Investigation and Trials*, 3<sup>rd</sup> ed., Universal Law Publishing, New Delhi, (1990).

Anthropometry, and DNA test can discover the truth accurately.<sup>57</sup> In our criminal justice system, non-availability of adequate forensic facilities with the police organisations, inadequate knowledge and awareness makes the detection of crime and investigation increasingly difficult.

Another judicial trend of withering away of presumption of innocence in special laws on women and children is construing absconion as implying guilt and the absconding accused was frequently found guilty by the court. In *State vs. Md Delwar Hossain Faraji*, the High Court Division held that when the wife was killed in the house of the husband, the irresistible conclusion which flows is that it was the husband who was responsible for her death.<sup>58</sup> Here the accused decamped immediately after the commission of crime and had chosen to be an absconder and remained fugitive from law and justice till the conclusion of the trial and he was tried in absentia. The court held such abscondence to be very much an incriminating circumstance connecting him in commission of the crime. The court further held:

“Law on circumstantial evidence is well settled. It requires that prosecution is to prove each of the circumstances having a definite tendency pointing toward the guilt of accused person and though, each of the circumstances by itself may not be conclusive but the cumulative effect of proved circumstances must be so complete that it would exclude every other hypothesis of innocence and unequivocally point to the guilt of the accused.”<sup>59</sup>

In *Gias Uddin vs. State*, where it was found that the wife at the relevant time of occurrence was at her husband’s house and that she was subsequently found dead and then the husband had been absconding for more than five years, the Supreme Court held that although his long period of absconding is not itself conclusive proof of his guilt, it lends weight to the circumstantial evidence against him. The chain of evidence indicates that in all human probability the murder must have been committed by the husband.<sup>60</sup>

In the case of *Al-Amin vs. State*, the High Court Division held that long abscondence and non-submission to the process of the court speaks against the accused persons and clearly suggest corroboration of the

---

<sup>57</sup> Kumar, Kamal, ‘Inadequate Use of Forensic Science in Crime Investigation: Causes and Remedies’ *The Vo. XXII*, No. 2, (2001), *Indian Journal of Criminology & Criminalistics*, pp. 7-21.

<sup>58</sup> 57 (2005) DLR (HCD) 264.

<sup>59</sup> *Ibid*, p. 265.

<sup>60</sup> 7 (2002) BLC (HCD) 729

prosecution case and evidence against him.<sup>61</sup> Similarly, in the case of *Abdul Khaleque vs State*, the court observed:

“it is true mere abscondence is not sufficient to hold the accused guilty. But in this case his wife was in his house and her dead body was recovered from the nearby jute field. He neither informed her parents nor brought the matter to the police, he simply vanished from his house and remained absconding for months, from this circumstances there can be no other hypothesis except that of his guilt”.<sup>62</sup>

But this assumption of guilt due to abscondence denies the accused the right to defend him as all defendants may not abscond for the same reason. This assumption may discourage the police to trace the real criminal and bring him to justice.<sup>63</sup>

### **Legislative Trends**

Shifting of burden of proof from the prosecution to the accused has been made in some laws. The Control of Manufacturing, Import, and Selling of Acid Act, 2002 provides for mandatory presumption of offence if materials or machineries for manufacturing of acid is found with any person or under his control, then the burden of proof lies on the suspect that he or she has not committed such offence.<sup>64</sup>

The deviation from the principle of cross-examination of witness and acceptance of uncorroborated testimony of a witness has been made in several special legislation. For instance, section 22 of the Prevention of Oppression against Women and Children Act, 2000 provides that the uncorroborated testimony of a witness recorded outside the court as evidence if such a witness can not be present during trial. According to Shahdeen Malik, an eminent criminal law expert, acceptance of such testimony as admissible evidence without cross-examination undermines the fundamental principle of the criminal justice system.<sup>65</sup> In his account, by taking away this tested mechanism of eliciting truth from a witness by cross-examination, the law can seriously undermine fairness of the criminal justice system.

### **Victim and Witness Protection**

The criminal justice system in Bangladesh, based on the adversarial model, focuses heavily on the offender and his rights and is blamed for its

---

<sup>61</sup> 51 (1999) DLR(HCD) 154

<sup>62</sup> 45 (1993) DLR 75.

<sup>63</sup> See, *Judgements on Trafficking in Persons*, A publication of the Daywalka Foundation Bangladesh, Dhaka, (2007), p. 17.

<sup>64</sup> Section 46 of the Act.

<sup>65</sup> *Supra* note 14, p. 446.

insensitivity and inaction towards victim protection. The plea of innocence, rights against arbitrary arrest, right to fair trial are various measures designed to ensure the human rights of the accused. But the role of victims is restricted to that of informant and witness for the prosecution even though he or she has suffered physical, emotional, psychological injury as well as financial and property losses.<sup>66</sup> Victims of certain offences like human trafficking and rape suffer psychologically and experiences emotional distresses and trauma. In such cases, often victims have been and are being treated in the criminal process in ways that can be described as oppressive. In this way, victims who report crimes are often subjected to 'secondary victimisation' at the hands of police, prosecutors and courts.<sup>67</sup> The necessity of protection is particularly important for women and children victims in cases of organised crimes where witnesses may be intimidated not to give any witness.

However, recently the victim is receiving attention in many legal systems and there is increasing demand that the concerns of crime victims should be integrated in the criminal justice system and they should have access to<sup>68</sup> and participate in criminal proceedings. A victim sensitive criminal justice system is essentially based on restorative justice paradigm and should require that victim should be treated with compassion and dignity, and be entitled to access to mechanism of justice and compensation in appropriate circumstances.<sup>69</sup> Similarly, an efficient witness protection scheme is necessary for ensuring that witnesses are not intimidated and threatened because witnesses have no private stake in the decisions of the court when they are neither the accused nor the victim, rather by giving evidence, they performs an important public duty of assisting the court to discover the truth. In brief, a victim sensitive criminal justice system must be imbued with the following elements:

---

<sup>66</sup> On perspective of victims of crime, see generally, Rao, S. Venugopal, *Victims of Crime*, Allied Publishers Ltd., New Delhi, (1989).

<sup>67</sup> 'Secondary victimisation' can be caused by police indifference to the victim, insensitive, embarrassing and adverse questioning by the police and the lawyers, insecure or hostile environment at the police stations, and intimidation of the victims. See also, Maguire, M. and Pointing, J. (eds.), *Victims of Crime: A New Deal?* Open University Press, (1988).

<sup>68</sup> A.S., Justice Anand, "Rights of Victims of Crime: Need for a Fresh Look", R.V. Kelker Memorial Lecture delivered in Faculty of Law, University of Delhi on 30th April 2005.

<sup>69</sup> Vibhute, K.I., 'Justice to Victims of Crime: Emerging Trends and Legislative Models in India', in: K.I. Vibhute (ed.), *Criminal Justice*, Eastern Book Company, Lucknow, (2004), pp. 370 – 395, at 373.

- informing victims of their role and the scope, timing, and progress of the proceedings and of the disposition of their cases;
- allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- protecting the privacy of victims;
- avoiding unnecessary delay in the disposition of cases and the execution of orders; and
- making fair restitution to victims, their families and dependants and making the availability of necessary material, medical, psychological and social assistance through government, voluntary, community-based organizations.<sup>70</sup>

The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>71</sup> recalling the millions of victim of crime and of abuses of power are neither well-protected in criminal justice system nor are their reparatory rights adequately recognised and protected under criminal justice system urged the states to treat 'victims' with 'compassion and respect' but also to resort to appropriate measures to improve their access to justice and fair treatment (art. 4 to 7), restitution (art. 8-11), compensation (art.12-13) and assistance (art. 14-17).

In Bangladesh, there are no adequate victim and witness protection provisions under the main substantive and procedural laws. Although the criminal justice system in Bangladesh guarantees certain safeguards and confers a set of constitutional and statutory rights to the accused, it does not demonstrate equal concern for victims of crime for the losses incurred or physical, mental or emotional injury sustained by them. However, in some recent judgements, the Supreme Court expressed concern for the protection of victims and their well being. In the case of *Tayazuddin & another Vs. the State*, where the victim was burn by acid throwing, the High Court Division held that the State has a duty to protect and safeguard the rights of its citizens, including victims and witnesses, to equality before the law, equal protection of law and the right to life and personal liberty, to which corresponds a right to protection of those concerned.<sup>72</sup> It also emphasised on the right of a victim to

---

<sup>70</sup> See generally, Crawford and Goody (eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates*, Ashgate Dartmouth, Aldershot, (2000).

<sup>71</sup> General Assembly Resolution 40/34 of 29 November, 1985.

<sup>72</sup> *Tayazuddin and another v The State* 21 (2001) BLD (HCD) 503.

have a fair trial<sup>73</sup> and directed the responsible government agencies to take all steps to secure the safety of the informant, victim and witnesses to enable them to give testimony in support of prosecution case.

In rape cases, conviction on the basis of trustworthiness of testimony of victim is another trend of judicial sensitivity and conscientious attitude towards victim. In a number of cases, conviction was awarded on the basis of trustworthiness of victim's testimony. In rape cases, where there is no eye-witness, higher judiciary took the view that conviction may be given relying on her solitary and uncorroborated evidence if there is no reason to disbelieve the evidence of the prosecution. In the case of *Al-Amin vs State*, the High Court Division held that testimony of the victim of sexual assault is vital and unless there are compelling reasons for corroboration of her statement, the court can convict the accused on the testimony of a victim alone.<sup>74</sup>

In similar vein, in the case of *Md. Saidur Rahman Neoton vs. The State*<sup>75</sup>, the Appellate Division observed that although it has long been a rule of practice for insisting corroboration of the statement of the prosecutor, if the judge feels that without corroboration in a particular case the conviction can be sustained without independent corroboration, then the judge can convict the accused stating the reason for such non-corroboration.

Recent legislative reforms in criminal justice clearly reflect the concern for the well being of victims. One of main objectives of recent special criminal legislation is to balance the criminal justice in favor of the victim. The Prevention of Repression of Women and Children Act, 2000 as amended in 2003 makes provision for victim protection such as safe custody for women and children during trial outside the prison or to any government approved place, trial in camera, speedy medical examination of victim of rape, and so on.

---

<sup>73</sup> "...In a democratic country governed by the Rule of Law, the Government is responsible for ensuring free and fair trial not only to the accused but also to the victim of crime. It is, also, emphasised that the Court is not only to see the right of the accused persons, but also to see the right of the victim of crime and society at large. The Court is to see that the victim of crime can have a trial free from all fear and insecurity." *Tayazuddin and another vs. The State*, 21 (2001) BLD (HCD) 503, para.26.

<sup>74</sup> 51 (1999) DLR(HCD) 154

<sup>75</sup> 13 (1993) BLD (AD) 79.

Many special criminal statutes have made provision for accountability of investigating officers in case of failure of completion of investigation within the time frame.<sup>76</sup>

While these provisions for victim protection and compensation under special legislation are welcome development, the concerns of victims are nowhere reflected in the criminal justice system as a whole.

Provision for compensation to victim is now treated as an integral part of criminal justice system in many developed and developing countries since crimes represent a form of breakdown of the political and administrative structure of society.<sup>77</sup> Compensation and restitution are very important for providing relief to the victims for the injuries, privations and losses suffered by them. In fact, apart from providing relief to the victims, payment of compensation will help deter the criminals by making crime less profitable.<sup>78</sup> Moreover, the victim compensation scheme has been essential part of overall plan of crime control since provisions of compensation encourage victims to report the crime. In our society, many offences even when they are of a serious nature and involve substantial financial loss or bodily injury are not reported due to the personal inhibition of the victim, social difference or community intervention.<sup>79</sup>

Compensation to victim of crime is also treated an important element of the concept of restorative justice which suggests that state must be equally fair to victim by designing a comprehensive compensatory and protection scheme for rendering justice to him.<sup>80</sup> An effective scheme of

---

<sup>76</sup> Section 18(6) of the Prevention of Repression of Women and Children Act, 2000; section 15 of the Speedy Trial Tribunal Act, 2002; section 30B (6) of the Arms Act, 1878.

<sup>77</sup> See the Criminal Injuries Compensation Act, 1995 (UK); the Criminal Injuries Compensation Act, 1976, New South Wales (Australia); the Victims of Crime Act, 1984 (USA); Section 357 of Cr. P.C., 1973 of India.

<sup>78</sup> See, Chakraborty, Tapan, 'Compensation to Victims of Crime: A General Approach', Vol. XXVII, No. 2, (2006), *The Indian Journal of Criminology and Criminalistics*, pp. 29- 34.

<sup>79</sup> *Supra* note 66, p. 169.

<sup>80</sup> Restorative justice refers to the following points: (i) is far more concerned about restoration of the victim and victimized community than costly punishment of the offender, (ii) elevates the importance of the victim in the criminal justice process, through increased involvement, input, and services, (iii) requires that offenders be held directly accountable to the person and/or community that they victimized, and (iv) encourages the entire community to be involved in holding the offender accountable and promoting a healing response to the needs of victims and offenders. See, Vibhute, K.I., 'Justice to Victims of Crime: Emerging Trends and

compensation for victims is particularly important for the poorer sections, who lost life and property because of the failure of State to give adequate protection.<sup>81</sup> The three patterns of compensating victims of crime are discernible: i. compensation by the State; ii. compensation by an offender either by asking him to pay it from the fine imposed or a specified amount; (iii) duty to repair the damage done by the offence.<sup>82</sup> The state's obligation to compensate victims of crime is generally premised on the ground that victims suffered because of state failure to maintain law and order, suppress crime and protect people and their property.

It will be pertinent to mention that under section 545 of the Cr. P.C., 1898, both trial and appellate or revision courts can award compensation to victims. It provides that a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, inter alia, can order payment of compensation, out of fine recovered, to a person for any loss or injury caused to him by the offence.<sup>83</sup> However, section 545 is subjected to two limitations: firstly, compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal; secondly, quantum of compensation is limited to the fine levied and not in addition to it or exceed the fine imposed. But in India, under section 357 of 1973, the court is empowered to pass a compensation

---

Legislative Models in India', in: K.I. Vibhute (ed.), *Criminal Justice*, Eastern Book Company, Lucknow, (2004), pp. 370 - 395.

<sup>81</sup> Menon, N.R. Madhava, 'The Challenge of Crime and Social Defence in the 1990s: An Agenda for Reforms in Policies and Management', 2(1990), *National Law School Journal*, pp. 3-23, at 21.

<sup>82</sup> Vibhute, K.I., 'Justice to Victims of Crime: Emerging Trends and Legislative Models in India', in: K.I. Vibhute (ed.), *Criminal Justice*, Eastern Book Company, Lucknow, (2004), pp. 382.

<sup>83</sup> Section 545 reads as: "When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

- (a) in defraying the 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 compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- (c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.



order of a specified amount to victims of the offence even if fine does not form part of the sentence imposed on the accused.<sup>84</sup>

The courts of Bangladesh, however, have rarely resorted to section 545 to award compensation to the victim as this provision leaves it entirely to the discretion of the courts to grant compensation to crime victims and defray costs of the proceedings. The legal framework neither creates any legal rights of compensation in favour of victims nor mandate courts to assign reasons for not passing compensatory orders in appropriate cases.

However, in a recent case of *Dilruba Aktar vs. AHM Mobsin*<sup>85</sup>, the higher judiciary took proactive stand regarding awarding compensation to the victim. In this case, the respondent husband was convicted under section 6(5) (b) of the Muslim Family Law Ordinance, 1961 for second marriage without the permission of Arbitration Council, the High Court Division not only awarded the maximum amount of fine in combination with imprisonment for the breach of anti-polygamy law but also ordered that the fine to be converted into compensation to the victim-wife. While this judgement is indication of the higher judiciary to ameliorate the suffering of the victim-wife, it is striking to note that the court did not make any reference to section 545 of Cr. P.C. as a justification of such compensation.<sup>86</sup>

There is no comprehensive and effective institutional mechanism for recovering the ordered compensation from the fine imposed. There is need for creating victim compensation fund at the national level for victims that can be formed out of the fines collected. In such case, the victim need not be dependent on the recovery of the sum from the offender. Fine as a source of revenue is not significant for state, but as a nucleus for a compensation fund, it can be one of considerable importance.

Awarding compensation out of fine as sentence to the victim figures prominently in recently adopted special criminal legislation. For instance, compensation can be awarded to the victim of crime at the discretion of the tribunal under the Prevention of Repression of Women and Children Act, 2000. Similar provisions for compensation can be found in the Suppression of Acid related Offence Act, 2002 to be paid to the acid victim.<sup>87</sup> Provision for conversion of fine to compensation has also been

---

<sup>84</sup> Sub-section (3) of Section 357, Cr. P.C, of India was inserted in 1973.

<sup>85</sup> 55 (2003) DLR (HCD)568.

<sup>86</sup> For analysis of the judgement, see Hoque, Ridwanul, 'Some Reflections on the case of *Dilruba Aktar*,' 58 DLR (2006), Journal section, p. 51.

<sup>87</sup> Section 9 of the Act (Act No. II of 2002).

made for victim of environmental crime under the Environment Court Act, 2000.<sup>88</sup> However, these provisions have remained largely unused due to insensitivity of judges towards victims.

While these provisions on compensation is a trend in right direction for achieving restorative justice, criteria of awarding compensation is yet to be developed either through legal provision or judicial decisions.

### **Delay in Criminal Justice**

Our constitution guarantees the accused of criminal offence the right to speedy trial by an independent and impartial court or tribunal.<sup>89</sup> In such a normative context, protracted delay in criminal justice system not only constitutes violation of fundamental rights of accused but also causes frustration among victims. Delay also causes substantial public expenses. On the other hand, speedy trial helps build the confidence of the people in the system. The constitutional goal of speedy trial of criminal case, however, does not mean hurried justice rather it implies that decision should be reached within a reasonable time. The prevailing problem of delayed justice reveals only a dismal scenario of criminal justice system. In our country only approximately 12% cases are being disposed of by the higher judiciary as against its number of yearly filing whereas in subordinate judiciary the rate is not more than around 22%.<sup>90</sup>

The causes of delay in criminal proceedings are manifold in nature. Delay is a problem of both at investigation and trial stages. Delay at investigation occurs due to delay in starting investigation and submitting investigation report, non-submission of necessary documents like medical certificate, expert opinion, seizure list, delay in disposal of *naraji* petition with regard to acceptance and rejection of police report, and paucity of investigation officers corresponding to large number of cases in which each of them has to investigate. On the other hand, delay at trial stage occurs due to paucity of judges and other human resources compared to number of cases, frequent adjournments of hearing, delay in issue of processes by the court to witnesses, absence of the prosecution witnesses, lack of proper case management and so on.<sup>91</sup> Although provisions for speedy tribunals

<sup>88</sup> Section 9 of the Act ( Act No. 11 of 2000).

<sup>89</sup> Art. 35(3) of the Constitution of Bangladesh.

<sup>90</sup> Informal discussion with officials of Ministry of Law, Justice and Parliamentary Affairs, Dhaka, Bangladesh.

<sup>91</sup> Khan, ABM Waliur Rahman, 'Delay in Disposal of Criminal Cases', 58 (2006) DLR, Journal section, pp. 21-24; Bakar, Md. Khondakar, 'Fair and Speedy Trial: Bangladesh Context', 3 (1998) MLR, Journal section pp. 22-30.

and courts have been made, yet only few cases are disposed of by them compared to total caseload of the system.

Delay in criminal justice also affects the process of justice itself and may cause miscarriage of justice. The passage of long- time has the potential to detrimental effect on both the defence case and prosecution case. For instance, the major part of the criminal case has to be proved by the oral testimonies of the witnesses, but if there is a long delay in holding such testimony, there is a strong possibility that with the passage of time, the evidence may be compromised by the influence of various factors. In the case of *State vs. Babul Hossain*<sup>92</sup>, the High Court Division held that because of belated examination of the witness by the police officer for no plausible reason, possibility of embellishing the prosecution case by the witness can not be ruled out. Again in the case of *Moin Ullab vs. State*<sup>93</sup>, the High Court held that the examination of the prosecution witnesses under sec. 161 of Cr. P.C after a considerable lapse of time casts a serious doubt on the prosecution story.

Currently there is no system of screening of cases prior to filing in court. Due to lack of screening, almost every case is filed in court irrespective of merit and whether evidence is sufficient or not. As a result, there is a huge backlog of cases at all levels of the judiciary, which contributes delay in disposal of cases. This trend of indiscriminate prosecution leads to long under-trial detention, causes mass human rights violations and ultimately a high failure rate at trial with the resulting waste of time and resources. An effective screening system ensures that suspects initially are charged with the right offence and enhances the efficiency of the judiciary.

It needs to be mentioned that under the concept of screening was envisaged under chapter XVIII of Cr. P. C., which had been repealed by Law Reform Ordinance, 1978<sup>94</sup> on the apparent ground that screening system was a lengthy process. Under Commitment Procedure under this omitted chapter, there was a scope to determine prima facie case on the basis of evidence collected by police investigation and examination of a witness recommended by police. The statement of witnesses could be put in evidence. If there were inadequate evidence, the accused could be acquitted.

---

<sup>92</sup> 52 (2000) DLR (HCD) 400

<sup>93</sup> 40 (1988) DLR (HCD) 443

<sup>94</sup> Sections 206- to 220 have been repealed by 1978 Law Reform Ordinance (Ord. No. 49 of 1978). The Ordinance brought also important changes like abolishing of jury trial, introducing trial in absentia, repealing commitment procedure.

The concept of plea bargaining which is gaining ground as a means of mediation of minor offences, is relatively unknown in our criminal justice system.<sup>95</sup> In disposal of minor crimes, concept of plea-bargaining can be introduced to reduce the caseload and consequently enhancing efficiency of the system.

### **Linkage between Prosecutor and Investigation Branches**

Effective functioning of criminal justice system depends, to a large extent, on cohesive coordination between different actors of the criminal justice system, i.e. courts, prosecutors, police, and defense lawyers.

The role of police for crime investigations and maintenance of general law and order situation is not traditionally bifurcated in Bangladesh. Police performs criminal investigation in addition to their regular functions of maintaining law and order, which often results in poor investigation. On the other hand, centralisation of such powers in single agency also makes it unaccountable and inefficient.<sup>96</sup> Colonial mentality, corruption, use of third degree method of investigation, reliance too much on confession-oriented rather than evidence-oriented way of investigating crimes, discourteous attitude towards public, use by the ruling party as an instrument for political repression, are causes of lack of confidence in police force which, in turn, is also undermining process of criminal justice. Factors such as heavy work load, insufficient time for rest and recreation, low public esteem of the profession, inadequate opportunities for promotion, low pay structure, frequent transfer, political interference at all levels are also responsible for low morale of police forces. A service oriented, pro-active and human rights-conscious police force is considered as equally important for effective functioning of criminal justice system.

Proper investigation is crucial for delivering justice. Investigation is increasing becoming complicated due to changing nature and pattern of crime. Sometimes imprudence and lack of procedural skills and knowledge of law on the part of investigation officers also results in improper investigation.<sup>97</sup> About the flaws of the current investigation process, the following observations of the High Court Division in the case of *Md. Ali Akbar vs. The State* is pertinent:

---

<sup>95</sup> See, Hoque, Kazi Ebadul, 'Plea Bargaining and Criminal Work-Load', Vol. 7, Nos. 1& 2, *Bangladesh Journal of Law*, (2003), pp. 81-89.

<sup>96</sup> See, Shahjahan, Abu Sayed, 'Police Reforms in Bangladesh', in: *Strengthening the Criminal Justice System*, A Report of ADB, Dhaka, (2006), pp. 39-50.

<sup>97</sup> See also, Mithu, Aminul Hoque, 'Low Conviction rate in Bangladesh: Some Relevant Thoughts' available at <http://thedailystar.ws/law/2006/05/02/index.htm> (last visited on 8 August, 2007).

“We have come across many cases in which due to faulty investigation accused get benefit of reasonable doubt in spite of consistent and uniform evidence of prosecution witnesses about the occurrence. As a result, people of our country have been losing faith in the present system of administration of criminal justice mainly due to the failure of the police to properly investigate the case and collect the evidence.”<sup>98</sup>

The functional independence of an investigation officer is an essential requirement for a free and fair investigation. The very idea of separate and specialised branch of criminal investigation is yet to be fully developed. The benefits of such separate branch for investigation in police force are manifold: firstly, it will bring the investigating police under the protection of the judiciary and greatly reduce the possibility of political or other types of interference with the police investigation; secondly, it will facilitate the greater scrutiny and supervision of the judicial magistrate and public prosecutors; thirdly, it will reduce the possibility of unjustified prosecutions and consequently of a large number of acquittals in state prosecutions; fourthly, it will result in speedier investigation and as such a speedier overall disposal of cases as the investigating police would be completely relieved from performing law and order duties; and finally, separation will increase the expertise of the investigating police and would result in more of successful detection and state prosecution.<sup>99</sup>

The prosecutors play an important role in legal proceedings. A close linkage between the prosecution and investigation is considered as pre-requisite for dispensation of justice. Currently, the prosecutors have no control over the investigation and are fully dependent on the investigation of police force. If the police do not investigate a crime, the prosecutor has no responsibility. The prosecution and investigating branches are virtually detached. Duties of the prosecutors begin at the trial stage. A close collaboration between investigation branch and prosecution facilitates proper investigation as the investigators can be informed about the basic legal requirement regarding the rules of evidence and trial process and avoid prosecutions that lack sufficient evidence and also ensure successful cases.<sup>100</sup>

It is also essential that there should be a separate and permanent prosecution service, which should be recruited through separate agency like Judicial Service Commission. The prosecutors, in addition to conducting

---

<sup>98</sup> 4 (1999) MLR (HCD) 87.

<sup>99</sup> Deb, R., *Criminal Justice*, The Law Book Company, Allahabad, (1998), pp. 44-45.

<sup>100</sup> Haque, Justice Md. Hamidul, ‘Some loopholes and deficiencies in the existing laws relating to trial of Criminal cases’, 25 (2005) BLD (Journal section), pp. 1-28.

criminal cases, should give necessary advice and guideline to the investigators, especially in respect of important cases so that flaws, if any, in the investigation process can be identified at the earlier stage.<sup>101</sup> Current *ad hoc* nature of appointment and political consideration in the appointing process of public prosecutors dictate that they serve at the pleasure of the ruling party. *Ad hoc* nature of appointment process also prevents continuity in service and accountability. Moreover, there is no adequate number of public prosecutors. Statistics present a revealing picture. According to available data, the strength of the public prosecutorial service includes 63 public prosecutors, 40 additional public prosecutors, 88 special prosecutors, and 1249 assistant public prosecutors. The case load of each prosecutor is approximately 1,054 cases.<sup>102</sup> There are no indicators available to assess their performance on a regular basis.<sup>103</sup> Acute inadequacy of public prosecutors coupled with low budgetary allocation for the prosecutorial service, lack of accountability, lack of professional competence and proper training remain major weaknesses of our prosecutorial service that undermine the process of criminal justice system.

### Conclusion

Our criminal justice system is often characterised as oppressive, unjust, corrupt and ineffective. The ordinary people lack confidence in the criminal justice system's ability to deliver and such confidence is the lowest among the poor who need it the most. Many incidents of erroneous conviction, unjust acquittal, inordinate delay, double and over criminalisation, custodial torture and death, costly process, widespread corruption -all contribute to such a negative public perception and remain stumbling blocks to the realisation of the goals of the criminal justice system.

The criminal justice system has a broader goal of both crime control and crime prevention than simply the reaching of a judgement. Unfortunately, our criminal justice system has excessively focused on goal of 'crime control' through imposition of harsh punishment rather its

---

<sup>101</sup> Ibid, p. 12.

<sup>102</sup> Statistics of April-May, 2006, Ministry of Law, Justice and Parliamentary Affairs, cited in: Rahman, Justice Shafiur, 'Strengthening the Public Prosecutorial Service in Bangladesh', in: *Strengthening the Criminal Justice System*, A Report of ADB, Dhaka, (2006), pp. 20-33.

<sup>103</sup> Rahman, Justice Shafiur, 'Strengthening the Public Prosecutorial Service in Bangladesh', in: *Strengthening the Criminal Justice System*, A Report of ADB, Dhaka, (2006), pp. 20-33.

prevention. In keeping with the growth of human civilization, social values and knowledge of criminal behaviour, the penal philosophy has shifted its emphasis from retribution to deterrence and finally to reformation and social reintegration of the deviants. Therefore, our penal laws need to be re-examined in the light of current penal philosophy of reformation. The goals of the rehabilitation of the offender, establishing restorative-justice, access to court, and crime prevention should also be acknowledged and fully integrated in our criminal justice system.

Needless to say, the main objective of criminal justice system is not to convict the greatest possible number of accused but the main objective of a criminal law process is the search for truth, and convict the guilty and to discharge the non-guilty by seeking the truth by fair means. But recent judicial interpretation and legislative trend of withering away of presumption of innocence and other procedural safeguards as discussed above entails the risk of erroneous conviction, which may threaten the legitimacy of criminal justice system and undermine the value of criminal law. Judicial interpretation of criminal laws and principles does not indicate consistent approach to the issue of presumption of innocence.

Effective functioning of criminal justice is not only conditioned by fair application of rules and procedures but also logistic support, resource mobilization, adequate managerial capacity, scientific facilities like using electronic and audio-visual equipment in investigation of criminal offences. But criminal justice system in Bangladesh has failed to get necessary budgetary allocation and other resources in proportion to its importance in the social order. Similarly, coordination between various actors of the criminal justice system can hardly be over-emphasised to achieve its goals.

Our criminal justice system is in constant state of flux. The last few years have seen the enactment of various criminal laws bringing changes to the structure and orientation of the criminal justice system. But acceptability of these laws have never been assessed and scrutinised through public opinion and public participation in law making process. The pace of change in criminal justice system initiated by the flurry of legislation should be commensurate with the predictability and stability of legal order. These criminal laws and procedures have not developed in a coherent and consistent manner. While it should be admitted that a legal order should evolve over time in order to take into account the needs of a changing society, yet reasonable degree of predictability of legal order is also required and essential for a mature legal system. Such legal predictability and certainty can nowhere be more important than in the area of the criminal justice system.

Another issue that needs to be considered is the dearth of scholarship on criminal law and criminal justice system in Bangladesh. Criminal law is yet to be developed as systematic and unique academic discipline. Our criminal law textbook embodies the supreme positivism of the law and fail to perceive criminal law as a particular social construct of 'wrong doing'. The moral, political and social dimensions of the criminal law are hardly posited and discussed in academic circles resulting in strict discussions of technical rules and interpretations as an end in itself and not in relation to or in the context of comprehensive notion of justice which criminal law and procedure must strive to realise. Law by itself and without reference to a notion or system of justice often relegates itself to a mere tool and not a means towards an end.