

## **CRIMINAL LAW AND THE CONSTITUTION: THE RELATIONSHIP REVISITED**

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### **I. Introduction**

The adherence to basic constitutional norms and principles can nowhere be more important than in the area of criminal process, because criminalising and punishing invariably bear upon a person's right to life and liberty. For ages, it has remained a daunting challenge for human societies to minimise the "evils" of, or to ensure the protection of human rights in, the criminal justice process.<sup>1</sup> As back as in 1972, the Constitution of the People's Republic of Bangladesh incorporated certain most fundamental, universally practised principles of criminal justice, which are of mandatory nature. Three decades after the Constitution's coming into force, however, the impact of these constitutional norms on the country's criminal law generally, and in the litigation process in particular, has been frustratingly minimal. Apart from the Constitution, a number of international human rights instruments have cast obligations upon Bangladesh to ensure a fair, effective, accessible, and just criminal justice system.

Yet, disappointingly, issues of crime and responses to them, and the justness of the criminal justice system have not attracted adequate legal and socio-economic-political analyses in Bangladesh. My aim in this article is to try and assess the Constitution's impact on criminal law by examining the extent and utility of using the Constitution as a foremost guarantor of justice in the Bangladeshi criminal process. Building on constitutional rights, guarantees, and safeguards, the present article will critically examine the important but less-visited question of whether Bangladeshi criminal laws and practices, including judicial interpretations, conform to fundamental constitutional principles. These analyses descend into a more important inquiry: why is it that the Constitution is quite infrequently and inadequately invoked in criminal trials and defences? Does this problem

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<sup>1</sup> Almost two centuries ago Bentham wrote: "Penal justice, in the whole course of its operation, can only be a series of evils – evils arising from the threats and constraint of the law, evils from the prosecution of the accused before it is possible to distinguish innocent from guilt, [...]" Bentham, J., *Theory of Legislation* (with an introduction by Upendra Baxi), Bombay, N. M. Tripathi, 1975, at p. 222.

bespeak any setbacks deep-seated in the legal cultural orientation or distortion? Or is it merely a result of non-deliberate laxity of legal instruments and institutions of the legal system? To substantiate the arguments advanced here, the article incorporates comparative insights into how, *inter alia*, the South African Constitution, 1996, the UK Human Rights Act, 1998 and the Canadian Charter of Rights and Freedoms, 1982 have influenced the course of, and judicial interpretations relating to, criminal laws of these countries. The article concludes by arguing that the constitutional principles of justice, fairness, and human dignity must increasingly guide and inform the criminal justice process and all its actors.

## **II. The Constitution and the penal justice system: A comparative view**

The Constitution is ideally recognised as the primordial protector of those accused with criminal charges. The entrenchment in the Constitution of certain rights, safeguards, and overriding principles concerning the criminal process is almost universally regarded as a potent means of preventing criminal injustice. While the Constitution of every country provides for mandatory rules and normative principles to be applied in the administration of criminal law, the actual criminal law and practices, the world over, have often contained elements of injustice. Having said this, it must, however, be admitted that the adherence to the constitutional values by the administration, legislature, and the judiciary have significantly improvised the situations in terms of achieving better justice. This is not to undermine the role of ordinary laws and practices in the protection of rights of the accused. But the Constitution has been determinative of the course and scope of these general laws and the yardstick to measure their reasonableness, and has often increased their potential. Thus, the adoption of a Constitution or a constituent statute in many countries across the world has ushered in a new dawn of criminal jurisprudence that is being increasingly founded on the principles of justice, human dignity, and the rule of law. In the discussion that follows, I will analyse how the constitutionalisation of criminal procedural safeguards and rights in few countries have impacted on their criminal justice systems.

Before turning to this analysis, it is important to look into what the core norms of the criminal justice system are. This enquiry is inextricably linked with the purposes any criminal justice system is supposed to serve. The criminal law is a multilayered phenomenon, not solely concerned with 'the law', which aims at getting people to behave pro-socially by punishing those who commit crimes and thus spoil social tranquillity. To effectively attain this social purpose of the criminal law, it is important that trials of those charged

for crimes are just and fair, because without the “defendant’s assent” (in the sense that he is convinced that he is not unfairly tried) to the process, the legitimacy and “moral authority” of the conviction stand eroded.<sup>2</sup> In short, the protection of the right of the accused to a fair and just trial, which depends on the preservation of his certain other human rights, became internationally recognised as the central purpose of a criminal justice system designed to achieve the rule of law.<sup>3</sup> Constitutions usually want to provide this overarching purpose of criminal law, which arguably is best served by a ‘due process model’ as opposed to a ‘crime control model’ of criminal justice system.<sup>4</sup> The due process model, primary goal of which is ‘justice’, is best exemplified by the American practice,<sup>5</sup> and is described as constituting such rights of the accused as the right to counsel and to be informed of grounds of arrest and charge, the right to be presumed innocent until proved guilty, the right to be tried in an impartial and independent tribunal, the right of freedom from inhuman and degrading punishment, and the right against self-incrimination which embraces the rule of exclusion of evidence improperly obtained.<sup>6</sup> Ordinary criminal laws, however, often tend to adhere to the crime control (or bureaucratic) model, where focus is given on punishing offenders and hence on the police being able to obtain convictions. In almost every jurisdiction, there is often a tension between the constitutional principles concerning the criminal law and the ordinary criminal law and practices, i.e., between the goal of ‘justice’ and the goal of efficient and expedient enforcement of criminal law.

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<sup>2</sup> This argument is developed from an identical argument of Allan that the defendant’s assent leads to his remorse and rehabilitation. Allan, T. R. S., *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2001, at p. 272.

<sup>3</sup> On the centrality of the right to fair trial as an international human right see Steyn, J., “The Centrality of the Right to Fair Trial as a Human Rights Norm”, in Steyn, J., *Democracy Through Law: Selected Speeches and Judgments*, Aldershot, England & Burlington, VT, Ashgate & Dartmouth, 2004, pp. 185-94. For an early source on this see Harris, D., “The Right to a Free Trial in Criminal Proceedings as a Human Right”, 16 (1967) *International and Comparative Law Quarterly*, pp. 352-78.

<sup>4</sup> On different theories of criminal justice, see King, M., *The Framework of Criminal Justice*, London, Croom Helm, 1981.

<sup>5</sup> Morton, F. L., “The Political Impact of the Canadian Charter of Rights and Freedoms”, 20:1 (1987) *Canadian Journal of Political Science*, pp. 31-55, at p. 37.

<sup>6</sup> Indeed, these are certain composite rights of the right to a fair trial. For further components such as the accused’s right to have time for adequate preparation for defence and the rights to be present at trial and to appeal to a higher judicial body, see Chenwi, L., “Fair Trial Rights and Their Relation to the Death Penalty in Africa”, 55:3 (2006) *International and Comparative Law Quarterly*, pp. 609-33, at p. 616 ff.

Therefore, the challenge for a Constitution vis-à-vis the administration of criminal law is to ensure justice or protect the fundamental rights of the accused, and at the same time to respect the concerned government's prerogative to punish the offenders.

### **The Canadian Charter (1982) and criminal law**

The Canadian Charter of Rights and Freedoms 1982<sup>7</sup> guarantees for everyone a number of fundamental freedoms, rights, and procedural safeguards subject only to such 'reasonable' legal limits as can be demonstrably justified in a free and democratic society (s. 1). Apart from guaranteeing that no one shall be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice (s. 7), the Charter also provides for certain fundamental safeguards against arbitrary arrest/detention, imprisonment and search and seizure (s. 8),<sup>8</sup> and, importantly guarantees in section 11 a bundle of rights that lie at the core of a just criminal trial, including the rights of the accused to a free and prompt trial, to consult counsel, and to be protected against self-incrimination.

With such a focus on justice for, and the protection of rights of one against whom a criminal process has been initiated, it is only logical that the Canadian Charter would have both retrospective and prospective impacts on criminal laws and practices of the country. Defying the initial characterisation of the Canadian Charter's impact on the criminal justice system as 'marginal',<sup>9</sup> significant impacts of the Charter on the criminal processes indeed began to appear immediately after its entry into force.<sup>10</sup> Importantly, constitutional traditionalists' criticisms notwithstanding, the Supreme Court of Canada (hereafter SCC) and other courts have largely adopted a generous and purposive approach to the interpretation of Charter rights in the area of criminal law.

The Court has practicably purified the criminal justice system with reference to the Charter principles of criminal due process and fair trial,<sup>11</sup> which constitute

<sup>7</sup> The Canadian Charter is Part I of the Constitution Act, 1982 which is enacted as Schedule B to the *Canada Act, 1982* (U.K.), c. 11, which came into force on April 17, 1982.

<sup>8</sup> Other rights were: the rights of every arrestee to be informed promptly of the reasons of arrest, and of the right to counsel, and the right to challenge the validity of the detention. See sections 9 and 10.

<sup>9</sup> Friedland, M. L., "Criminal Justice and the Charter", 13 (1983) *Manitoba Law Journal*, p. 551.

<sup>10</sup> Morton, supra note 5.

<sup>11</sup> A good analysis of this impact is to be found in Cameron, J., *The Charter's Impact on the Criminal Justice System*, Toronto, Carswell, 1996.

the greatest part of judicial activity under the Charter.<sup>12</sup> As Morton argued, the Charter decisions have remoulded the Canadian criminal law process along the line of the ‘due process’ model and away from the ‘crime control’ model of the pre-Charter era.<sup>13</sup> In an early famous case, *R v. Oakes* (1986),<sup>14</sup> for example, the SCC struck down a ‘reverse onus’ clause in the Narcotics Control Act imposing a burden on a person arrested for illegally possessing narcotics to rebut the presumption that he possessed the substance for the purpose of trafficking. The Court ruled that this clause violated the accused’s Charter right (Art. 11) to be presumed innocent until found guilty. In a recent similar Ontario decision in *R v. D. B.*,<sup>15</sup> the Ontario Court of Appeal found certain provisions in the Youth Criminal Justice Act, 2002 (YCJA) to be in violation of s. 7 of the Charter (the right to life, liberty and security of the person) because they reversely placed an onus on the young offender to justify a youth sentence rather than an adult sentence.<sup>16</sup> In a series of outstanding criminal due process cases, the SCC also reinforced the right to be tried within reasonable time,<sup>17</sup> the right against self-incrimination,<sup>18</sup> and the right to counsel, and also crafted the rule of exclusion of improperly obtained evidence, thereby helping to reduce the rate of police torture and pressures on the accused.<sup>19</sup> These decisions reflect a shift in the focus of the Canadian courts from the object of effective law enforcement in the field of criminal law to the object of justice or the protection of the rights of the accused.

### The South African Constitution and criminal law

The South African Constitution of 1996,<sup>20</sup> which came with the hard-earned political rebirth of the country at the end of the apartheid era in the

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<sup>12</sup> Hirschl, R., *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Mass., Harvard University Press, 2004, at p. 109.

<sup>13</sup> Morton, *supra* note 5, at p. 32.

<sup>14</sup> [1986] 1 SCR 103.

<sup>15</sup> [2006] O.J. No. 1112.

<sup>16</sup> Earlier, the Québec Court of Appeal in a reference, *Québec (Minister of Justice) v. Canada (Minister of Justice)* (2003) 175 C.C.C. (3d) 321, drew a similar conclusion about the YCJA’s Charter-incompatibility.

<sup>17</sup> *Askov v. The Queen* [1988] 2 S.C.R. 1199.

<sup>18</sup> *Dubois v. The Queen* [1985] 3 S.C.R. 350, in which despite the accused’s confession to the killing in the first trial the Court overturned a murder conviction on the ground that the confession was used in the second trial without his consent, thus violating his right against self-incrimination.

<sup>19</sup> *R v. Feeney* [1997] 2 S. C. R 117.

<sup>20</sup> The “final” Constitution (Act 108 of 1996) came into force on 4 February 1997, replacing the Interim Constitution of 1993.

early 1990s, contains an activist and justice-focused Bill of Rights (ss. 7-39) that has radically altered the situation of the rights of the offender in the criminal justice system.<sup>21</sup> Apart from guaranteeing a wide range of rights and procedural safeguards for every arrested, detained and accused person [s. 35(1), (2)], the Constitution specifically ensures the right of every person to a fair trial, which is to be conducted in public by an ordinary court without unreasonable delay, and with adequate legal assistance being made available [s. 35(3)].<sup>22</sup> What is fascinating is that the SA Constitution, in its activist and reformist thrust, requires the promotion of “spirit, purport, and objects” of the Bill of Rights in legal and constitutional interpretation and the maintenance of the nation’s fundamental values of “human dignity, equality, and freedom” (ss. 39 & 10). With such a broad mandate for the achievement of justice, the SA Constitution came to have an inevitable impact on the South African criminal justice system, an impact that in fact began to appear immediately after the adoption of the Interim Constitution of 1993, core values of which were retained in the 1996’s.

Thus, the Constitution became an important instrument at the hands of both the judiciary and the legislature with which to reshape the criminal justice processes towards a due process structure. For the judiciary, the first notable action on this front was taken in *State v. Zuma and Others* (1995)<sup>23</sup> involving the Interim Constitution, in which the South African Constitutional Court (hereafter SACC) struck down a law introducing reverse onus of proof for being unjustifiable in a democratic society, reasoning that the right to fair trial embraces a concept of substantive fairness.<sup>24</sup> In its next but the most famous judgment in *State v. Makwanyane and Another* (1995),<sup>25</sup> the SACC outlawed the death penalty as an unconstitutional punishment for contravening constitutional values of ‘human dignity’ and the ‘right to life’. In *Makwanyane* the Court even ignored public opinion favouring the death penalty in order to give

<sup>21</sup> Kgosimore, D., “The Bill of Rights in the Constitution of the Republic of South Africa and Its Application within the Criminal Justice System”, 1:1 (2000) *Crime Research in South Africa*, available at: <http://www.crisa.org.za/downloads/billofrights.pdf> (critiquing the Constitution’s silence about the victim’s rights).

<sup>22</sup> The right to fair trial in s. 35(3) importantly includes an accused’s right to have a legal practitioner at state expense, “if substantial injustice would otherwise result”. (1995) 2 SALR 642 (CC).

<sup>23</sup> *Ibid.*, at pp. 651-2.

<sup>24</sup> *Ibid.*, at pp. 651-2.

<sup>25</sup> 1995 (3) SA 391 (CC), at p. 327. See also *S v. Williams and Others* 1995 (3) SA 632 (CC), outlawing juvenile whipping.

expression to “the underlying values of the Constitution,” to materialise the South African society’s will to break with its past, and to build a future based on respect for all human beings.<sup>26</sup> In some other high profile cases, the Court strengthened the constitutional guarantee of criminal due process by concretising the right to speedy trial, and the right of the accused to legal representation and to consult relevant police documents and state witnesses<sup>27</sup>

### **Criminal law and the UK Human Rights Act, 1998**

As in Canada and South Africa, the Human Rights Act, 1998 (hereafter HRA) in the UK became a central point of reference in matters and actions concerning criminal justice. Coming into force on 2 October 2000, the HRA incorporated and gave force to the European Convention of Human Rights (the ECHR) as a domestic law, by giving ‘the Convention rights’ including, inter alia, the right to a fair trial (Art. 6, ECHR) a constitutional stature.<sup>28</sup> It was therefore rightly foretold by commentators, even before the HRA came into force, that the effects of the new regime would be felt first and most keenly on the criminal justice system.<sup>29</sup>

Although the HRA has not generally had a radical impact on pre-HRA criminal laws,<sup>30</sup> partly because of the existence of values of common law in the criminal justice system, it has surprisingly had a good impact upon anti-terrorism laws. In *A and Others v. Home Secretary* (2004),<sup>31</sup> for example, the House of Lords found the provision for detention without trial of suspect foreign nationals under s. 23 of the Anti-terrorism, Crime and Security Act, 2001 incompatible with the ECHR (Art. 14), because it discriminated on the ground of nationality status. Lord Hoffman forcefully pronounced that “such a power in any form is not compatible with our

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<sup>26</sup> *Ibid.*, at ¶9 (¶=paragraph).

<sup>27</sup> See, respectively, *Sanderson v. Attorney General, Eastern Cape* 1998 (2) SA 38 (CC), *State v. Vermass* 1995 (3) SA 292 (CC), and *Shabalaa v. Attorney General, Transvaal* 1996 (1) SA 725 (CC).

<sup>28</sup> The relevant Convention rights incorporated via Schedule 1 to HRA are: right to life, prohibition on torture, right to liberty and security, and right of privacy (respectively Arts. 2, 3, 5, and 8 of ECHR).

<sup>29</sup> Parsons, D., “The Human Rights Act 1998 Part I – Constitutional Context and Effect on the Substantive Criminal Law of the United Kingdom”, available at: [http://portal.nasstar.com/3/Files/Articles/PDF/DP\\_HRA.pdf](http://portal.nasstar.com/3/Files/Articles/PDF/DP_HRA.pdf)

<sup>30</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, London, UK Department for Constitutional Affairs, 2006, at p. 13.

<sup>31</sup> [2004] UKHL 56= [2005] 2 WLR 87.

constitution,”<sup>32</sup> although his Lordship’s reasoning was based not on the HRA but on common law values. It is undeniable, however, that this judgment as a whole reflects the influence of the HRA on judicial interpretations of a harsh criminal law.

More recently, the Court of Appeal in the Secretary of State for the Home Department v. JJ and Others<sup>33</sup> examined the lawfulness of measures under the Prevention of Terrorism Act, 2005 (PTA), and quashed the Home Secretary’s stringent ‘control orders’ issued in order to monitor six Iraqi ‘terror suspects’ for breaching the ECHR, Art. 5 (the right to liberty).<sup>34</sup> Earlier, the judge at the first instance held that procedures for judicial supervision of non-derogating control orders under s. 3 of the PTA, 2005 were inadequate to comply with the right to a fair trial. At a more general level of procedural fairness, the House of Lords in the recent case of A and Others v. Secretary of State for the Home Department<sup>35</sup> established the exclusionary rule, holding that evidence obtained through torture is inadmissible in a UK proceeding.

### III. The Constitution of Bangladesh and the protection of rights of the accused

As it will shortly become clear, the Constitution of Bangladesh (hereafter ‘the Constitution’)<sup>36</sup> has mandated a just criminal justice system, modeled on the due process imperative, although the term ‘due process’ has nowhere been mentioned. The Preamble to the Constitution proclaims the national “fundamental aim” of realising a society based on the rule of law, fundamental human rights and freedom, and equality and justice. Art. 11 makes it a fundamental principle of state policy to establish a democracy based on the fundamental value of respect for human “dignity and worth”. These inviolable values of equality and justice, and human dignity, which have regrettably remained rather under-focused in the country’s criminal justice system, provide the golden thread that binds the justiciable Bill of Rights in Part III (Arts. 26-47A).

<sup>32</sup> Ibid., at para. 97. Lord Hoffman also made the following famous statement: “the real threat to the life of the nation . . . comes not from terrorism but from laws such as these”. Ibid.

<sup>33</sup> [2006] EWCA Civ 1141.

<sup>34</sup> Confirming the ruling of the High Court in [2006] EWHC 1623, *per* Sullivan J.

<sup>35</sup> [2005] UKHL 71.

<sup>36</sup> Adopted on 4 November, and entered into force on 16 December 1972. There is a paucity of literature on the history of Bangladesh’s Constitution-making. A useful historical reference is Huq, F., “Constitution-making in Bangladesh”, 46:1 (1973) *Pacific Affairs*, pp. 59-76.



Thus, one's right to equality and of equal protection of law (Art. 27), right to enjoy the protection of the law and to be treated "in accordance with law" (Art. 31), and the right to life and liberty (Art. 32) are specifically guaranteed by the Constitution. The more direct provisions concerning the administration of criminal justice are found in Arts. 33 and 35. Art. 33 provides for certain safeguards as to arrests and detention, by guaranteeing to every arrestee or detainee the right to be promptly informed of the grounds of his arrest/detention, and the right to be produced before a magistrate no later than 24 hours of his arrest, a violation of which arguably renders his custody unlawful.<sup>37</sup> It has also guaranteed the arrestee's right to consult and be defended by a legal practitioner of his choice, a right which if generously interpreted will also include a right for the indigent accused to have legal aid at state expense.<sup>38</sup> It needs no stressing that the operation of these fundamental safeguards commences from the moment a person is arrested and continues thereafter, and that the arrestee undoubtedly has a right to be informed of these safeguards despite the absence of constitutional specification of this right to information. Founded on these pre-trial rights, the Constitution in Art. 35 then categorically guarantees certain rights, which are the core components of the right to a fair and just trial. It guarantees the right of every accused person "to a speedy and public trial by an independent and impartial court or tribunal" [Art. 35 (3)]. Art. 35 further guarantees the right of everyone against the retrospective operation (ex post facto) of criminal laws and penalties [Art. 35(1)], the right against double jeopardy (repeated prosecution or conviction),<sup>39</sup> and the right to remain silent or the right against self-incrimination.<sup>40</sup> Moreover, the Constitution has absolutely prohibited torture and has guaranteed the right not to be subjected to cruel, inhuman, or degrading punishment or treatment [Art. 35 (5)].

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<sup>37</sup> Note the following: Art. 33 (1): "No person who is arrested *shall be detained in custody without* being informed, as soon as may be, of the grounds for such arrest, [...]"; Art. 33(2): "[...] *no such person shall be detained* in custody beyond the said period [twenty four hours of such arrest] without the authority of a magistrate". (emphasis added).

<sup>38</sup> Islam, M., *Rule of Law in Bangladesh*, (Syed Ishtiaq Ahmed Memorial Foundation Lecture 2005), Dhaka, Asiatic Society of Bangladesh, 2005, at p. 25.

<sup>39</sup> Art. 35 (2): "No person shall be prosecuted and punished for the same offence more than once".

<sup>40</sup> Art. 35 (4): "No person accused of any offence shall be compelled to be a witness against himself".

There are a few more provisions in the Constitution that are of fundamental relevance to the administration of criminal law, both procedural and substantive. For example, the object of the provision for the presidential prerogative of clemency (Art. 49) is to ensure that rights of the accused to his life and liberty are not infringed by a harsh law or court verdict or due to indelible errors of the legal process.<sup>41</sup> More importantly, the constitutional bar on Parliament to enact legislation in breach of fundamental rights [Art. 26(2)] along with every person's right to be treated in accordance with law (Art. 31) can be taken as having given the accused a right against unreasonable criminal laws. Moreover, the right of everyone to judicially enforce fundamental rights (Art. 44) and the authority of the High Court Division (hereafter the 'HCD') of the Supreme Court to issue any appropriate direction or writs to enforce these rights [Art. 102(1)] as well as the principle of legality [Art. 102(2)] can be interpreted as giving the accused a right to have effective and just constitutional remedies.

The above, therefore, makes it abundantly clear that the Constitution has incorporated what in the US Constitutional jurisprudence is called the principle of due process, although there might be a debate as to the degree and nature of due process in criminal law.<sup>42</sup> By referring to Articles 27, 31, and 32 (the right to life), Mahmudul Islam, a leading constitutional jurist of the country, argued that the Constitution has provided for the substantive and procedural due process.<sup>43</sup>

Starting off from this background exposition of the Constitution and criminal law nexus, the rest of this part analyses how the Constitution has in practice been used in criminal trials and in assessing the justness of criminal laws.

#### **A. The invocation or application of the Constitution in criminal trials**

One who has taken a critical look into the country's criminal justice system will acknowledge that the problem of injustice prevailing therein is not trivial. While the government's and prosecution authorities' failures to uphold the constitution in criminal processes have been being increasingly challenged in recent times,<sup>44</sup> the degree of reliance on basic constitutional safeguards seems to be less than proportionate to legal breaches in criminal processes.

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<sup>41</sup> A similar provision empowering the government to suspend or remit sentences is in s. 401, Cr.P.C.

<sup>42</sup> See the observation of S. Huda J in *Afzalul Abedin* (2003) 8 BLC (HCD) 601, at pp. 666-7, at ¶¶242-3.

<sup>43</sup> Islam, *supra* note 38, at pp. 16-18, and especially at p. 50.

<sup>44</sup> See, e.g., certain pending and unreported writ petitions: WP Nos. 2852 of 1997; 2192 of 2004, and 4269 of 2005.

A particular area of concern is unlawful arrests, prolonged detention beyond the statutory and constitutional timeframe, unlawful searches and seizures, torture in police custody, and other forms of police abuses and atrocities. These clearly unconstitutional abusive practices are the most common sources of violation of human rights of the accused, and they attack at the very heart of his right to a fair trial. Yet instances of striking down the whole trial on the ground of unfairness caused by any of them are lacking. Appreciably, however, the Appellate Division (hereafter AD) of the Supreme Court in *State v. Zahir*<sup>45</sup> held that a writ of certiorari will lie against an unlawfully awarded conviction such as one arising from a trial vitiated by procedural irregularities causing prejudice to the accused. In this case the defendant was not given a chance to cross-examine previous statements of prosecution witnesses, which the Court considered a “valuable right” and for the infringement of which the conviction was set aside. Also, in the case of *Alam Hossain (Md.) v. Government of Bangladesh and Others (2003)*<sup>46</sup> involving a more substantial issue, the maintainability of judicial review (writ) against a conviction based not on evidence on record was upheld. Without drawing on specific constitutional principles of fair trial, the HCD in *Alam Hossain* mentioned of ‘the principle of law’, which the Court thinks makes the constitutional remedy vis-à-vis an unsafe conviction inevitable.

### **The rights to defence, and to legal assistance**

The above cases are concerned with rights in the category of the right to defence. The higher courts, as opposed to trial courts, have generally been found keen in remedying the breach of this right. In addition to the arrestee’s constitutional right to consult and be defended by a lawyer at the time of arrest, which arguably spills over into the trial process, s. 340 of the Code of Criminal Procedure, 1898 (hereafter Criminal P.C. or CrPC) provides that any person accused of an offence before a criminal court may of right be defended by a pleader.<sup>47</sup> Two important questions of constitutional importance arise from this right: is there a right to have legal assistance at state expense when an accused cannot afford to engage a lawyer, and what is the impact of a breach of this right on the accused’s trial? These issues were squarely taken up by the Court in *Babu Khan v. State (2003)*<sup>48</sup> and some

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<sup>45</sup> (1993) 45 DLR (AD) 163.

<sup>46</sup> (2003) 8 MLR (HCD) 13, *per* Amirul K. Chowdhury J. This involved an appeal from a conviction made under the Special Powers Act, 1974.

<sup>47</sup> This has been reinforced in *Hossein M. Ershad v. State (1996)* 48 DLR (HCD) 95.

<sup>48</sup> *Babu Khan v. State (2003)* 55 DLR (HCD) 547, *per* Amirul K. Chowdhury J.

other similar cases in which trials of those accused went undefended. A pre-Independence legislation, namely the Legal Remembrancer's Manual, 1960, provided that every accused person charged with committing an offence punishable with death shall have legal assistance at his trial at state expense when he cannot afford to appoint a lawyer.<sup>49</sup>

In *Babu Khan*, the HCD sitting in appeal drew on the combined force of the above provision of the Manual, 1960, s. 340 of the CrPC, and Art. 33 of the Constitution, and recognised that the accused's right to be defended by counsel in a case punishable with capital punishment is an "inalienable" and "fundamental" right, non-compliance with which renders the trial, judgment and conviction unlawful.<sup>50</sup> Curiously, such a declaration of unlawfulness or the vitiation of a trial does not in practice lead to the accused's acquittal but to his re-trial. In *Babu Khan*, as well as in some other cases, the court after having turned down the conviction remanded the case to the trial court for "fresh trial".<sup>51</sup> This is another aspect, which calls for an analysis from the perspectives of the right to a fair and speedy trial. Appellate courts often send back cases to the courts below for retrial even when prejudices to the accused's right of defence occur as was the case in *Babu Khan*, in which the trial court faulted by not appointing a defence counsel. A pertinent question is whether this practice comes within the mischief of the rule against double jeopardy. While remanding of a case to the trial court, which is an established practice in other jurisdictions too, cannot be said to be an instance of double jeopardy since there is no fresh proceeding, the practice is definitely a case of double-trial which jeopardises the accused's constitutional right to a speedy trial. It, therefore, follows that indiscriminate exercise by an appellate court of its remand power may be of constitutional implications.

One might also draw it logically from the above dictum in *Babu Khan* that the state is not under an obligation to appoint a defence lawyer in

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<sup>49</sup> See R. 1, Ch. XII of the Legal Remembrancer's Manual 1960, which reads: "Every person charged with committing an offence punishable with death shall have legal assistance at his trial and the Court should provide advocate or pleaders for the defence unless they certify that the accused can afford to do so".

<sup>50</sup> *Babu Khan*, supra note 48, at p. 549, at ¶8. Earlier, the Court in *Mobarak Ali v. Bangladesh* (1998) 50 DLR (HCD) 10 extended this right of defence to an absconding accused.

<sup>51</sup> *Babu Khan*, supra note 48, at p. 549. See also *State v. Imdad Ali Bepari* (1984) 36 DLR (HCD) 333. Plausibly, however, the *Babu Khan* Court (at p. 350) directed the trial court "to dispose of the case with utmost expedition".

cases involving non-capital punishments. While this may be supported by taking a positivist approach to the law and the Constitution, the wider values of the Constitution such as justice and equality, and a spirit-based interpretation of the right to life would bespeak such an obligation, particularly when an unfair trial is likely to occur to offenders with ordinary charges. Unlike in India, this dimension of the right to fair trial, i.e., the view that the right to life includes a right of the indigent accused to have legal assistance as part of his right of defence, has not yet been addressed in Bangladeshi jurisprudence.<sup>52</sup> Seen in this aspect, it is worth questioning whether the rule of trial in absentia, which is possible under Bangladeshi law subject to compliance with certain procedures, is constitutionally sustainable and compatible with the idea of fairness in trial.<sup>53</sup> Although trial in absentia is legal *stricto sensu*,<sup>54</sup> it bypasses the important issue of the right of defence and raises concerns about justice particularly in the face of an adverse judicial presumption against the fugitive accused.<sup>55</sup> One thus needs to rethink about the constitutional propriety of a trial in absentia without according a proper legal defence to the absentee accused.

To take a further case concerning the right to defence, in *Abu Bakkar Siddiqui and Others v. State*<sup>56</sup> an accused was awarded murder conviction even though no charge of committing murder was initially framed against him. This kind of judicial mistake meant that the accused was effectively deprived of the right to defend himself and thereby of the constitutionally based right to receive a fair trial.<sup>57</sup> But the constitutional safeguards in Arts.

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<sup>52</sup> See, e.g., *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1360. But see the article on sections 54 & 167 of the Code of Criminal Procedure in this volume, at pp. ....

<sup>53</sup> Before the court can frame a charge, it has to publish a notification in newspapers requiring the absentee accused to appear on a date fixed (s. 339B, the Code of Criminal Procedure, 1898).

<sup>54</sup> It needs to be mentioned that, while ratifying (on 6 Sept 2000) the International Covenant on Civil and Political Rights, 1966, Bangladesh made a reservation to its paragraph 3d of art. 14 which provides for the accused's right to be tried in his presence.

<sup>55</sup> *Zakir Hossain v. State* (2003) 55 DLR (HCD) 137, at ¶49. But in *Zahid Hossain v. State* (2003) 55 DLR (HCD) 160, at ¶38, it was held that fugitiveness by itself does not prove any offence.

<sup>56</sup> (2004) 9 BLC (HCD) 250.

<sup>57</sup> See, however, s. 237, CrPC, which empowers the court to convict the accused for an offence with which he was not charged. This provision does not say anything about the accused's right of defence, nor is it clear whether it is applicable to capital offences where defence is a fundamental issue.

35 and 32 (right to life) were not invoked in this case by either the defence or the Court, although the HCD on appeal rightly acquitted the accused.

### **Fair trial, and the pre-and-post-trial rights of the accused**

The concept of fair trial includes the fairness in both pre-trial and post trial stages. Prolonged incarceration of the accused persons pending their trials (who are known as ‘under-trials’) raises concern regarding the procedural fairness as well as their right to speedy trial, and thus implicating several constitutional safeguards. In *BLAST v. Bangladesh*<sup>58</sup> the Court stressed the human rights of under-trial prisoners, entitling them to be released on bail, or to get their charges withdrawn. Moreover, the objective of giving expression to the accused’s right to a speedy trial often latently acts in influencing the judicial discretion to commute sentences, especially the death penalty,<sup>59</sup> or to grant his bail when delays have occurred in a trial or there is a failure to conclude a trial within a statutory timeframe.<sup>60</sup>

As regards the rights of post-trial prisoners, the HCD in *Faustina Pereira v. The State and Others* (2001) adjudged the detention of prisoners in jails after they have served out the sentences as a violation of their fundamental rights guaranteed in the Constitution, especially the right to life.<sup>61</sup> It is a pity that the light of judicial constitutional activism exercised in this case failed to adequately spread further. The case of *Hiru Miah v. The State*<sup>62</sup> provides an example, in which it was held that section 35A of the Criminal P.C. requiring the court to deduce from the accused’s sentence the period which he has already spent in custody is inapplicable to offenders tried under the Special Powers Act, 1974. The Court reasoned that the SPA’s overriding enforceability excludes the applicability of the Criminal Procedure Code. The legal sustainability of this interpretation is open to doubt, because section 35A is a general provision concerning a post-trial concession to be enjoyed by prisoners who have spent in custody a considerable time before their trials. The object of this is to compensate the accused delays in his trial in response to his constitutional right to have

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<sup>58</sup> (2005) 57 DLR (HCD) 11.

<sup>59</sup> For an excellent study of the exercise of judicial discretion to commute death sentence, see Malik, S., “Waiting to Be Executed: Delay as a Matter of Life and Death”, 4:1 & 2 (2000) *Bangladesh Journal of Law*, pp. 47-82 (noting incoherent exercise of discretion).

<sup>60</sup> *Captain (Retd.) Nurul Huda v. The State* (2003) 8 MLR (AD) 53.

<sup>61</sup> (2001) 53 DLR (HCD) 414.

<sup>62</sup> (2005) 10 MLR (HCD) 388.

a speedy trial, irrespective of the law governing his offence. Nor did the legislature expressly and specifically limit the application of s. 35A only to general offences. Enacting s. 35A in 2003 the legislature could have specifically made it inapplicable to the SPA, had they so wished. By disapplying the general benefit of s. 35A to the SPA-offenders, the HCD therefore seems to have deprived a section of prisoners of the right of equal protection of law.

### **Right to freedom from torture**

Despite the accused's constitutional right to remain silent and not to be self-incriminated, and the total constitutional ban on torture underpinned by Bangladesh's concerned international obligations, the police often take resort to torture to extract confessions from the accused or for other purposes. Courts themselves are aware of the fact that torture has become deep-seated in the country's criminal process, and have often admonished police torture. Nonetheless, there is simply not enough activism on the part of the court to outlaw torture or brutality from the country's criminal justice system. In particular, magistrates' courts have often sidetracked allegations of torture from arrestees produced before them. This is, however, not to belittle the court's understanding of the seriousness of the problem. For example, the HCD in *Alhaj Md Yousuf Ali v. The State*<sup>63</sup> asserted against police torture and spoke of a duty on the part of the police not to exercise their power of arrest "capriciously and fancifully" but with circumspection.<sup>64</sup>

The boldest ever judicial pronouncement against torture came in the famous public interest litigation of *BLAST v. Bangladesh* (2003),<sup>65</sup> in which the HCD displayed its outmost judicial dismay about the continuing brutality in the country's criminal justice system. Following the brutal killing of an innocent university student by members of the police, a rights organisation, BLAST, sought through this litigation judicial directions against police torture and misuses of police power. The Court offered a conscientious response by formulating a well-thought legal amulet against

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<sup>63</sup> (2002) 22 BLD (HCD) 231.

<sup>64</sup> In *Ain O Salish Kendro and BLAST v. Bangladesh* (2004) 56 DLR (HCD) 620, the HCD by referring to Art. 35 (4)-(5) of the Constitution ordered the police not to physically torture the accused petitioner while in custody.

<sup>65</sup> *BLAST and Others v. Bangladesh* (2003) 55 DLR (HCD) 363. For an insightful comment on this see Malik, S., "Judgment on Sections 54 and 167: The Onus is Now on Civil Society", Issue Nos. 90 & 91, *Law and Our Rights, The Daily Star*, Dhaka, 4 & 11 May, 2003.

misuses of arresting power of the police and of the discretion of the magistrates to remand arrestees to police custody.

Two legal provisions relating to arrest and criminal investigation by the police have been the premier sources of misuse of police power, often ending up in atrocities. These are ss. 54 and 167 of the Code of Criminal Procedure. S. 54 empowers the police to arrest without warrant any person on some widely-worded grounds such as ‘reasonable’ suspicion of the commission of crime, while s. 167 (2) authorises the concerned magistrate to order further detention of the accused “in such custody as [he] thinks fit”, and not exclusively in police custody, when the investigation can not be completed within twenty four hours.<sup>66</sup> As already seen, Arts. 33 and 35 of the Constitution guarantee every arrestee’s rights to be informed of the grounds of his arrest, to consult and be defended by a legal practitioner, and to freedom from self-incrimination, torture, and inhumane punishment. Ironically, these constitutional guarantees are often honoured more through their violations than by observance. Resultantly, wanton misuses of s. 54 power by the police coupled with torture and killing in police custody became, and now increasingly continue to be part of the prosecution system, a form of injustice facilitated to some extent by the magistrates’ “parrot-like” passing of orders remanding arrestees to police custody.<sup>67</sup>

Following an in-depth scrutiny of the relevant legal provisions and the prevalent practice, the Court found the unfettered arresting power of the police under s. 54, and the magistrates’ unguided discretion to remand arrestees to police custody under s. 167 largely inconsistent with constitutional fundamental rights. Having so found, it then issued detailed guidelines and made various policy suggestions as to how to bring these provisions into conformity with the Constitution,<sup>68</sup> and laid down some criminal due process principles, which in the American jurisprudence are called Miranda safeguards.<sup>69</sup> The HCD established the accused person’s

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<sup>66</sup> This is the legal time within which the police have to produce every arrestee before the nearest magistrate (s. 61, CrPC; Art 33 (2), the Constitution).

<sup>67</sup> *BLAST and Others v. Bangladesh* (2003) 55 DLR (HCD) 363, at p. 370.

<sup>68</sup> For example, the Court (*ibid.*, at p. 377) laid down that in case of any death in police custody it would be the burden of the police to explain how that death occurred, and suggested legislation providing for compensation to victims of police torture or, in case of killings, to their legal representatives.

<sup>69</sup> This refers to safeguards established in the US case of *Miranda v. Arizona* 384 US 436 (1966) SC. The HCD in this case also drew inspirations from the Indian case of *D. K. Basu v. West Bengal*, AIR 1997 SC 610.



rights to be informed of the grounds of arrest and to consult a lawyer before being sent to the magistrate.<sup>70</sup> Moreover, it virtually prohibited the practice of sending arrestees to police custody by imposing strict conditions on magistrates' discretion in this regard.<sup>71</sup> Importantly, although it did not award compensation itself, the Court asserted its power under judicial review jurisdiction to award compensation for violation of fundamental rights such as police torture or custodial deaths. Unfortunately, this extraordinary decision has yet to have impact on the country's faulty criminal justice system, although it influenced a later decision in *Saifuzzaman v. State* (2004),<sup>72</sup> which, like *BLAST*, has a similar focus on principles of constitutional justice and the rule of law. Also, relying on Art. 33, *Saifuzzaman* nudged the rationale of the *BLAST*'s case further forward, and issued a 11-point guideline to be followed in all cases of arrests so that harassment of citizens and the use of "third method degrees" (torture) can be eliminated.<sup>73</sup>

An appeal against the humanising decision in *BLAST v. Bangladesh*, the most celebrated judicial defence of people's liberty so far, has till date remained pending in the Appellate Division. Silence of the country's apex court respecting this important public matter has virtually left the police and other law enforcers with carte blanche to continue to bend the law and commit human rights violations.

### **Compelled confession, and 'the fruits of the poisonous tree'**

Now the impact of using the evidence obtained through torture on the accused's right to a fair trial can be considered. A combined reading of the constitutional provision banning torture [Art. 35(4)] and the rules of the law of evidence that render inadmissible a confession made to the police or procured through inducements or threats would suggest that the law has proscribed the use of improperly obtained confession, which has recently

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<sup>70</sup> *BLAST v. Bangladesh*, supra note 67, at p. 372.

<sup>71</sup> It recommended (ibid., pp. 371, 376-7) that there should be no remand to police for more than three days and unless extremely necessary, and that quizzing of the accused be made in prisons, recommending a legislation providing for transparent (glass-walled room) facilities for interrogation.

<sup>72</sup> (2004) 56 DLR (HCD) 324.

<sup>73</sup> Ibid., at pp. 342-344 (suggesting, e.g., the taking of signature of arrestee confirming the place and time of arrest to be written in a memorandum of arrest). Surprisingly, the *Saifuzzaman* Court suggested a long period (15 days) of police remand which contradicts the dicta in *BLAST*'s case. On these cases see also the article .....in this volume, at pp. xx-xx.

been endorsed in *BLAST v. Bangladesh* (above). Moreover, the HCD in a number of cases drew a presumption of compelled confession where the accused was kept in police custody for some days preceding the recording of his confessional statement.<sup>74</sup> Yet the judicial practice of striking out tainted confessions is not coherent. Intriguingly, however, the rule in s. 27 of the Evidence Act 1872, that any corroborative material evidence resulting from a statement by the accused in police custody is admissible, continues to challenge the authority of constitutional provisions banning torture and providing for a freedom against self-incrimination. The constitutionality of this legal leverage to use the ‘fruit of the poisoned tree’ (i.e. to use material evidence obtained through torture)<sup>75</sup> in a criminal trial is seriously doubtful, and the Court’s pronouncement about its impact on the accused’s right to fair trial has been long due.<sup>76</sup>

#### **Inadequate focus on right to liberty and security**

It appears from the above that the accused’s right to liberty and the issue of ‘dignity and worth’ of his person have received inadequate attention from the bar and the bench. To take an indicative instance from the area of unlawful searches, my search in the principal law reports of the last 15 or so years has yielded one result in which a constitutional remedy was issued against an unlawful search. In *Mohammed Ali v. Bangladesh* (2003),<sup>77</sup> police searched the house of a renowned journalist without warrant and during midnights on repeated occasions. The HCD found the police liable for “excesses in abuse of their power” in the name of search and thereby for causing loss, injury, humiliation and harassments to the petitioner. This led the Court to award what it called “token compensation” of 5000 taka against each of the two concerned police officers personally.<sup>78</sup> Also, in cases of false imprisonment arising from judicial mistakes, or gross prosecutorial negligence, or malicious prosecution, the Constitution has hardly been invoked by those

<sup>74</sup> See e.g., *Md. Akbar Ali v. State* (1999) 19 BLD (HCD) 286; *State v. Rafiqul Islam alias Gadan and Others* (2003) 23 BLD (HCD) 318 (acquitting the accused).

<sup>75</sup> See REDRESS, *Torture in Bangladesh: 1971-2004*, London, REDRESS, 2004, at pp. 15-16. The doctrine of the ‘fruit of the poisonous tree’ is defined as “... the rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the “fruit”) was tainted by the illegality (the “poisonous tree”) [...]” *Black’s Law Dictionary* (Garner, Bryan A. edited), West Group, 1996, p. 271.

<sup>76</sup> In *Zillur Rahman v. The State* (2001) 6 MLR (HCD) 99, the HCD held that s. 27 of the Evidence Act has to be interpreted in favour of the accused.

<sup>77</sup> (2003) 23 BLD (HCD) 389.

<sup>78</sup> *Ibid.*, at pp. 401-2.

defending the victim's liberty. To take even a successful instance of this genre, the High Court Division in *Md. Shahanewas v. Govt. of Bangladesh* (1998),<sup>79</sup> involving the arrest and subsequent incarceration of a wrong person whose name was identical to that of the real accused, found "sheer negligence" on the part of the concerned police officer in discharging his public duty,<sup>80</sup> but hardly relied on constitutional guarantees and safeguards except to the effect of reiterating its constitutional jurisdiction in such a case.<sup>81</sup>

A limitation of these two progressive and commendable decisions is that the Court's reasoning provides inadequate illumination on their legal basis, as the Court did not resort to the Constitution. Evidently, these decisions have been a good instance of protecting the victim petitioners' rights to life, liberty, security and privacy. The Court would, therefore, certainly have done better by highlighting the value of these constitutional rights and associated public duties.

#### **Victims' right to a fair trial**

It must, however, be recognised that the sensitive exposition of the Constitution in criminal trials has not been totally absent, although such kind of activism has remained confined to certain judges rather than becoming a general trend. In *Shamsuddin Ahmed v. State* (2000),<sup>82</sup> for example, the offence under s. 295A of the Penal Code, 1860 (the offence of maliciously insulting the religious beliefs) was interpreted in light of Art. 39(1) of the Constitution, i.e., the right to freedom of thought and conscience. Most notable of cases in this category are those concerning rape and other violations against women where the security of victims was a matter of court's conscientious concern.

The right to fair trial involves consideration of a popular triangulation entailing the interests of the victim, the accused and society,<sup>83</sup> an aspect which achieved due emphasis in certain HCD decisions. In *Al Amin & Others v. The State* (1999),<sup>84</sup> for example, the HCD considered rape a deplorable violation of one's right to life and stressed the duty of the court

<sup>79</sup> (1998) 18 BLD (HCD) 337.

<sup>80</sup> *Ibid.*, at pp. 339-40.

<sup>81</sup> Ordering the release of the innocent prisoner, the Court awarded a "compensatory" costs of taka 20,000 against the police officer.

<sup>82</sup> (2000) 52 DLR (HCD) 497.

<sup>83</sup> Morrison, W.J. *et al.*, *Common Law Reasoning and Institutions*, London, University of London Press, 2006, at p. 186.

<sup>84</sup> *Al Amin & Others v. The State* (1999) 19 BLD (HCD) 307, *per* Badrul Huq J.

and the state to do justice to both victims and society by ensuring adequate punishments to the accused.<sup>85</sup> Justice-consciousness of the Al Amin Court was also evident in its suggestion for reducing the evidential threshold in rape cases in consideration of the relevant social factors, i.e., for considering the rape-victims' sole testimony sufficient for conviction in some cases.<sup>86</sup> Similarly, by invoking the constitutional rights to equality before law and the equal protection of law, and the right to life and liberty, the HCD in *Tayazuddin & Another v. The State*<sup>87</sup> emphasised the victim's right to fair trial and held that protection of rights of the victim is a constitutional requirement<sup>88</sup>

### **B. The use of the Constitution in challenging certain penal laws**

A contemporary legislative trend in Bangladesh is to enact harsh penal laws providing for severe and often disproportionate punishments to suppress offences or to combat the rate of crimes. Ironically, these laws have often seriously undermined the constitutional principle of justice and the due process of law. These new 'harsh' criminal laws along with some other colonial and pre-Independence statutes, constitutionality of which is doubtful, tend to create serious human rights implications for those accused under these laws. In this subsection I analyse how the Constitution of Bangladesh has been invoked to challenge the legality or vires of certain penal laws. Although some laws analysed here have either already lapsed or been repealed, an examination of their constitution-compatibility provides an important insight to the nature of criminal law making and to their constitutional impacts.

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<sup>85</sup> Ibid., at pp. 317-9. For similar remarks see also *Shibu Pada Acharjee v. State* (2004) 56 DLR (HCD) 285.

<sup>86</sup> *Al Amin*, *ibid.*, at p. 317.

<sup>87</sup> (2001) 21 BLD (HCD) 503.

<sup>88</sup> The appreciation of the HCD's stance vis-à-vis victims' rights needs a caveat when it comes to the question of sending victims to 'safe custody' (the *situs* of which has, until recently, been the prison), a practice which the HCD in *Rokeya Kabir v. Bangladesh* (2000) 52 DLR (HCD) 234, 239 refused to declare violative of Arts. 32 and 33 of the Constitution. This decision needs reversing as 'safe custody' often occasions a serious violation of victims' constitutional right to life and liberty as well of their human dignity. The recent legal coverage of 'safe custody' (s. 31 of the Suppression of Violence against Women and Children Act, 2000; s. 28 of the Suppression of Acid Crimes Act, 2002) cannot cure its constitutional infirmity for the reason just mentioned.

**The Special Powers Act, 1974 (SPA)**<sup>89</sup>

The SPA, 1974 has so far been the most infamous piece of legislation in Bangladesh, telling upon the liberty and human security of the people. A two-way knife, this law provided for the administrative detention of anyone virtually for an indefinite period in anticipation of his engaging in certain vaguely defined prejudicial activity,<sup>90</sup> and criminalised certain actions, providing for severe punishments and special tribunals for trial. While the constitutionality of its provisions for harsh punishments for ordinary offences such as hoarding and for trial by special tribunals has not been questioned in trials, the Act's exclusion of superior courts' oversight over special tribunals was challenged in *Sahar Ali v A. R. Chowdhury* (1980).<sup>91</sup> S. 30 of the SPA barred "any court" from revising any order or judgment of special tribunals established under this Act, with the effect, inter alia, that death sentences passed by these tribunals became ousted from the High Court Division's automatic power to determine the legality or otherwise of any capital punishment (s. 376, CrPC). This not only deprived the accused person of having an access to an independent higher court, it also seriously impinged on his right not to be deprived of life except in accordance with law.

These constitutional rights escaped adjudication in *Sahar Ali*, but in a bold assertion of its judicial authority, the HCD held that its constitutional supervisory or review power could not be ousted by an ordinary law. Following prolonged passivity on this important issue, sometimes marked by a complete failure to discharge the constitutional role,<sup>92</sup> the HCD in *Sahar Ali* finally made an intense review of the above ouster clause and held it unconstitutional for, among other things, placing the tribunals "outside the purview and pale of the Supreme Court". Following this welcome decision, s. 30 of the SPA was amended providing for appeals to

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<sup>89</sup> This section has drawn on my unpublished doctoral thesis: Hoque, R., *Judicial Activism as a Golden Mean: A Critical Study of Evolving Activist Jurisprudence with Particular Reference to Bangladesh*, London, SOAS, 2007.

<sup>90</sup> See ss. 3 and 2 of the SPA, 1974, an analysis of which falls beyond the proper scope of this article.

<sup>91</sup> (1980) 32 DLR (HCD) 142.

<sup>92</sup> In *Salimuddin v. State* (1976) 28 DLR (HCD) 187, 188, for example, the HCD found its supervisory power "completely ousted". But see *Yousuf Sheik v. Appellate Tribunal* (1977) 29 DLR (AD) 371, in which the Appellate Division interfered with convictions passed by a 'Tribunal' in order to prevent gross injustice. For a good analysis see Malik, S., "Bangladesh", in Harding, A. and J. Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey*, Dordrecht & London, Martinus Nijhoff, 1993, pp. 41-58.

the HCD from decisions of a special tribunal and for the confirmation by the HCD of death sentences passed by such a tribunal.<sup>93</sup>

Mention should be made here of a jurisdictional bar in s. 34 of the SPA, precluding “any Court” from questioning any “order made”, or “proceedings taken” under the Act. In addition to detention orders, even unlawful convictions by a special tribunal were perhaps sought to be made immune from judicial review. Although it did not categorically invalidate this privative clause, the HCD in a series of cases, prominently in *Humayun Kabir v. The State* (1976), held this legal clogging ineffective in the face of its constitutional review power.<sup>94</sup> Resultantly, judicial constitutional remedy against unlawful convictions by special tribunals remained continually available.

#### **The Public Safety (Special Provision) Act, 2000 (Jono Nirapotta Ain, 2000)**

The Public Safety (Special Provision) Act, 2000 (hereafter the PSA) contained certain provisions which are at stark conflict with the accused’s right to be fairly treated and other constitutional rights. For example, s. 16(2) provided for compulsory denial of bail to the accused until the period of investigation ends, while s. 18(b) provided for the recording of summary evidence and s. 24(1) barred challenges of any action or order by a special court otherwise than through an appeal. The dangers which such a harsh law might pose to higher constitutional values of a nation such as the rule of law and human dignity is well captured in the following observation by Malik:

Such draconian laws, invariably, take away a number of procedural safeguards, including bail. Legislative denial of bail raises the troubling question about a crucial aspect of criminal jurisprudence, namely, the presumption of innocence [...]. Mandatory denial of bail of an accused who may not be convicted in the subsequent trial, is tantamount to imprisonment of an innocent person.<sup>95</sup>

Another danger for the fairness of a trial comes from section 14(3) of the PSA which provides for the admissibility of testimony of a witness recorded outside of the court as evidence if such a witness dies or can not be present during trial. On this Malik comments:

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<sup>93</sup> See the Ordinance No. XXXIII of 1985, s. 2.

<sup>94</sup> (1976) 28 DLR (HCD) 259, 262.

<sup>95</sup> Malik, S., “Laws of Bangladesh”, in Chowdhury, A. M. and F. Alam (eds.), *Bangladesh on the Threshold of the Twenty-first Century*, Dhaka, Asiatic Society of Bangladesh, 2002, pp. 433-80, at p. 446.

Acceptance of such testimony without cross examination jeopardises another foundational pillar of the criminal justice system. [...] By taking away this tested mechanism [i.e., cross-examination] of eliciting truth from a witness, the Act has seriously undermined fairness of the criminal justice system. If one is inclined to think that such testimony would hasten and ensure fair trial, one perhaps is not at all aware of the dangers looming.<sup>96</sup>

In this background, the constitutionality of the PSA was challenged in *Afzalul Abedin and Others v. Government of Bangladesh and Others* (2003)<sup>97</sup> that culminated in a split decision by the HCD in which one judge declared the PSA unconstitutional while the other struck down only certain of its provisions.<sup>98</sup> A two-pronged attack was made vis-à-vis the constitutionality of the Act: (i) that, although it was not a ‘money bill’, the PSA was passed in Parliament as a money bill,<sup>99</sup> which being a fraud on the Constitution renders the Act so passed unconstitutional, and (ii) that, by interfering with principles of criminal justice, the PSA has violated fundamental rights provisions of the Constitution and hence void. To remain within the scope of this essay, we shall confine the rest of the discussion to the second prong of the objection.

It was argued by Counsels that the PSA denied due process by permitting the selective law enforcement or selective prosecution, by providing for the scope of prosecuting the same offence under two different statutes.<sup>100</sup> Terming the PSA as a ‘charter of arbitrariness’, Counsel Dr. Kamal Hossain, in particular, argued that the legal right of bail has a constitutional coverage and the denial of bail under s. 16 of the PSA is, therefore, tantamount to a violation of Art. 33 (2) of the Constitution, which virtually empowers the magistrate to determine custody of an arrestee.<sup>101</sup> Moreover, it was further argued, the Criminal Procedure Code through its ss. 60 and 340 incorporated two fundamental principles of criminal justice, namely the rights of the accused to be promptly produced before a magistrate and to be defended by a counsel, which imply the accused’s right to be freed on bail through the judicial process pending the

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<sup>96</sup> Ibid.

<sup>97</sup> (2003) 8 BLC (HCD) 601.

<sup>98</sup> The decision of the Division Bench being split, the litigation was referred by the Chief Justice to a third judge for disposal pending whose decision Parliament repealed the PSA in 2002.

<sup>99</sup> By analysing Art. 81 of the Constitution, Aziz J discussed the issue in detail.

<sup>100</sup> (2003) 8 BLC (HCD) 601, 632, at ¶ 85.

<sup>101</sup> Ibid., at p. 621, ¶64.

trial, to which s. 497 of the Criminal P.C. gives effect. The purpose of incorporating these principles of the CrPC into the wider spectrum of Art. 33 of the Constitution is to limit Parliament's power to abrogate them.<sup>102</sup> The PSA, it was argued, exceeded this limit by being vague, unreasonable, arbitrary, and lacking in guidelines and objective standards for the purpose of its enforcement, and also by breaching the substantive due process requirement under Art. 31 of the Constitution.<sup>103</sup>

Accepting these arguments, Aziz J adjudged the PSA as unconstitutional for breaching basic constitutional principles of criminal justice and interfering with the independence of concerned courts. Although his Lordship did not say so in clear words, the ratio decidendi of Aziz J's decision seemed to be that the PSA created for the accused a substantial risk of unfair trial in courts lacking independence. This can be deduced from his unambiguous pronouncement that the legislative denial of bail is not only a breach of Art. 33(2) but also of Arts. 100 and 116A of the Constitution, which respectively invests the HCD with original, appellate and other jurisdiction, and provides for the independence of judges/magistrates of all tiers. As he succinctly observed, "under section 16 of the PSA the Magistrate has been transferred into a lame, deaf, and dumb duck,"<sup>104</sup> while s. 24(1) deprived the HCD of its supervisory powers over subordinate criminal courts concerning cases under the PSA.<sup>105</sup> The learned judge found these measures as tantamount to an infringement of a series of Constitutional provisions including Art. 26(2) that delimits Parliament's power to legislate in violation of fundamental rights.

The other judge, Huda J, however, supported harsh laws like the PSA in consideration of the Bangladeshi context of ever increasing crimes,<sup>106</sup> but disapproved of certain harsh provisions concerning the denial of bail (s. 16) and the recording of summary evidence [s. 18(b)], largely on the ground that the HCD's judicial power is interfered with by these

<sup>102</sup> Arguments made by counsels in *Afzalul Abedin*, *ibid.*, at pp. 621-2, by referring to the Indian legislative history of, and reasons behind enacting Art. 22 of the Indian Constitution.

<sup>103</sup> *Ibid.*, at p. 622, ¶65. In *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111, it was held that Art. 31 of the Constitution is analogous to the so called American due process clause.

<sup>104</sup> In *Afzalul Abedin*, above note 97, at p. 643, at ¶123.

<sup>105</sup> For these powers see ss. 562A, 439, and 526 of the Cr.P.C.

<sup>106</sup> *Afzalul Abedin*, above note 97, at p. 669. However, Aziz J commented that harsh law is a not a solution to ever increasing rate of crimes. *Ibid.*, at p. 648, ¶134.



provisions.<sup>107</sup> Finally, Huda J struck down only ss. 6(1), (2), and 18(b) of the PSA instead of the whole Act. It hardly escapes one's notice that that his Lordship was extremely reticent about the PSA's impact on fundamental rights, but rather remained anxiously and overly concerned with the principle of presumption of constitutional validity of any impugned law.

### **The Suppression of Violence against Women and Children (Special Provisions) Act, 1995**

Apart from providing for harsh punishments, the now repealed Women and Children (Special Provisions) Act, 1995 (hereafter the Act of 1995)<sup>108</sup> provided for denial of bails until the completion of investigation. Curiously, the unjustness or the Constitution-incompatibility of this Act never became an issue for judicial scrutiny either independently or as a collateral question in any trial until a minor boy received the death sentence.

In *BLAST v. Bangladesh* (2005),<sup>109</sup> which is pending till date, s. 6(2) of the 1995 Act providing for the mandatory death penalty for the offence of 'rape and murder' committed by 'any person' was challenged on the ground that capital punishment for children is unconstitutional for breaching Arts. 7, 26, 31, 32, and 35 of the Constitution. Interestingly, this judicial review has been sought following the Appellate Division's refusal of an appeal by one Sukur Ali, a juvenile death-penalty recipient, against his conviction imposed by the concerned special tribunal and subsequently confirmed by the High Court Division in *State v. Sukur Ali* (2004).<sup>110</sup> While we shall probably have to await the HCD's decision in *BLAST v. Bangladesh* (2005) for some more time, it would be interesting to see how the court deals with the perplexing and disturbing issue of imposing death sentence on a minor.

*Sukur Ali* is a case that unfolds how the Constitution has had a marginal impact on certain areas of injustice prevalent in substantive criminal law. *Sukur Ali* was charged with the offence of raping and murdering a seven-

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<sup>107</sup> Huda J refused to consider the right of bail as having a constitutional cover ("bail is not a constitutional right"), but was of the opinion that the PSA's denial of bail negates the constitutional principle of judicial independence. *Ibid.*, at p. 671, ¶267.

<sup>108</sup> Officially titled as the *Nari O Shisho Nirjaton (Bishesh Bidhan) Ain, 1995* (Act XVIII of 1995). The Act was repealed in 2000, but the pending and concluded trials were saved.

<sup>109</sup> WP No. 8283/2005.

<sup>110</sup> (2004) 9 BLC (HCD) 238.

year-old girl, and was arrested when he was aged 14. After a trial conducted in company with adult offenders, which itself is a gross contravention of the country's Children Act, 1974 that provides for separate trial for juveniles (s. 6), Ali was sentenced to death in July 2001. The imposition of death penalty on Ali was confirmed by the HCD on 25 February 2004,<sup>111</sup> and was finally upheld by the Appellate Division, the country's apex court, in May 2005.

In the HCD the principal question of contestation was whether Ali's trial by a special tribunal rather than by a juvenile court exclusively meant for juvenile offenders entailed an illegality making the trial unfair and warranting setting aside of the conviction. The HCD took a rather positivistic approach to statutory laws, without having any recourse to the Constitution. In its view, the overriding clause (s. 3) of the Suppression of Violence against Women and Children (Special Provisions) Act, 1995 makes any other law, including the Children Act, inapplicable to offences under this special law. The Court also argued that since the Act of 1995 provides for only the death penalty for the offence of rape and murder and makes "any person" liable to be punished for this offence, it had no discretion to consider the accused's minority and to commute his death sentence. Given the space-constraint, I avoid a detailed analysis of these views of the Court, but it needs to be emphasised that the view that the special law of 1995 had overridden the Children Act, 1974, another special law of a sui generis kind, is open to serious doubt. It is also doubtful whether by the term 'any person' the legislature intended to include children within its ambit, particularly when it comes to the question of awarding mandatory capital sentence. The absence of such an intention can be presumed, *inter alia*, from Bangladesh's ratification of the Convention of the Rights of the Child (CRC), which prohibits the death penalty for children [art. 37(a)]. Interestingly, however, the Sukur Ali Court recorded their "pangs and agony" while confirming Ali's death penalty and observed that this is a fit case to attract the President's clemency,<sup>112</sup> thereby impliedly recognising the unjustness of the Act of 1995 and, to say more directly, of the death penalty for the juveniles. One might thus wonder whether a sensitive employment of the constitutional principles and rights and of Bangladesh's obligation under the CRC would not have helped the Court to avoid this 'hard' decision.

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, at p. 250, respectively at ¶40 & ¶41.

There were a series of early encouraging decisions with a direct import for Sukur Ali, as in these cases trials by special courts of youthful offenders under certain special laws were overturned. Particularly in *BLAST & Another v. Bangladesh & Others* (2002),<sup>113</sup> a judicial review petition, the counsel argued that trial and the conviction of a minor by a special tribunal under the 1995 Act was violative of the Children Act, 1974 and the defendant's fundamental right guaranteed in Art. 35 of the Constitution. Although it was extremely reticent on the question of the constitutional right invoked, the HCD accepted these arguments, and, in view of the minority of the accused and other factors such as his non-voluntary confessional statement, invalidated the conviction by a non-juvenile court.<sup>114</sup> The Sukur Ali Court, however, distinguished this case and refused to follow its dictum, reasoning that in *BLAST v. Bangladesh*, unlike in Sukur Ali, there was no corroborative evidence to support the charge against the minor. This line of reasoning by the Sukur Ali Court is hardly convincing, because, in the *BLAST*'s case the two grounds, the minor's trial in a non-juvenile court and the reliance on non-corroborated evidence, were apparently independent.<sup>115</sup>

The above thus leads one to conclude that if the Act of 1995 epitomises a failure of the legislature to comply with constitutional rights and international human rights obligations, the case of Sukur Ali, at both HCD and AD levels, shows a serious failure on part of the judiciary to uphold human rights in criminal law adjudication, or to constitutionalise substantive criminal law. Much appreciably, however, in the most recent case of the State v. Md. Roushan Mondal @ Hashem (2007)<sup>116</sup> in which a youth offender was convicted with the death penalty by a non-juvenile special tribunal, the HCD disapproved of the Sukur Ali dictum and compensated its jurisprudential deficiency by holding that a youth offender's right of trial in a juvenile court is a special right of "universal application" which, having a constitutional coverage under Art. 28(4), remains untainted by any special law like the

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<sup>113</sup> (2002) 22 BLD (HCD) 206.

<sup>114</sup> *Ibid.*, at p. 210, ¶9. Here, the HCD (at p. 210) categorically declared that a confession made by a child is of no legal effect, particularly when his statement was procured through coercion exerted or inducement offered by the police.

<sup>115</sup> See, e.g., *Md. Shamim v. State* (1999) 19 BLD (HCD) 542; *Bakhtiar Hossain v. State* (1995) 47 DLR (HCD) 542; *Monir Hossain v. State* (2001) 53 DLR (HCD) 411; *Anarul Isman alias Md. Anurul Islam v. State* (2003) 23 BLD (HCD) 46.

<sup>116</sup> (2007) 4 LG (HCD) 12. (LG= Law Guardian).

Suppression of Violence against Women and Children Act, 2000.<sup>117</sup> Promisingly, the Court's reasoning was informed of the spirit of the Constitution and of standard procedural safeguards under international human rights standards.

### **The Suppression of Violence against Women and Children Act, 2000**<sup>118</sup>

Following the repeal of the 1995 Act, the Suppression of Violence against Women and Children Act, 2000 (hereafter the '2000 Act') was enacted with almost similar provisions, but dropping the provision for mandatory death penalty for the combined offence of 'rape and murder'. Still a harsh fiat, this 2000 Act provided for its overriding effect (s. 3) and for the trial of youthful offenders along with adults [s. 20(7)]. This means that the repeated judicial endorsements of a child's right to be tried in a juvenile court have now been made nugatory. In an application for judicial review (WP No. 3356 of 2006), the constitutionality of these two provisions [ss. 3 & 20(7)]<sup>119</sup> has been challenged, *inter alia*, on the ground that they breached Art. 28(4) of the Constitution which requires special treatment of children. It thus remains to be seen how the Court is going to interpret the children's right to a fair trial.

### **The Law and Order Disruption Crimes (Speedy Trial) Act, 2002 (the Speedy Trial Act)**<sup>120</sup>

The Law and Order Disruption Crimes (Speedy Trial) Act, 2002 (hereafter the STA) is just another example of the tendency of over-criminalisation of acts. Like the above-mentioned statutes, the STA too seriously impinges on the accused's right to a fair and just trial, for example, by providing for summary and exceedingly speedy trial.<sup>121</sup> The constitutionality of the STA was challenged in 2002, and the Court issued a rule nisi on 23 June 2002 asking the government to explain why this Act being "inherently prone to arbitrary and discriminatory

<sup>117</sup> *Ibid.*, *per* Imman Ali J, at p. 30, ¶ 67.

<sup>118</sup> Act No. VIII of 2000. Amended in 2003 (see the Suppression of Violence against Women and Children (Amendment) Act, 2003), this Act has been in force since 14 February 2000.

<sup>119</sup> This provided that when a child is accused of an offence under this law the provisions of the Children Act, 1974 shall have to be applied "as far as it is practicable".

<sup>120</sup> This Act (No. XI of 2002) was initially enacted for a 2 years' term. Following a recent extension of its term of validity (see the Act No. VIII of 2006, s. 2) the Act will now lapse on 9 April 2008.

<sup>121</sup> See respectively s. 13 and s. 10.

application” should not be declared unconstitutional.<sup>122</sup> This constitutional challenge still remains pending.

Nevertheless, it is worth analysing the STA’s constitutionality which is open to serious doubt on the question of the fundamental rights-compatibility. However, given that the Constitution provides for the right of the accused to have a speedy trial of his charge, the question is how the Act has been in conflict with the constitutional principles of fairness and justice. Writing in 2004, Islam and Solaiman have argued that the Act has compromised with the accused’s right to have sufficient time to prepare his defences by providing for a 7 day timeframe for the police to complete the investigation and a 30 day timeframe running from the date of submission of police report for the Court to complete the trial.<sup>123</sup> In a common law adversarial system of trial, these authors argued, the parties must be effectively represented by legal counsels which necessitates that the accused has a proper defence which is virtually impossible to ensure within this rigid timeframe and with the serious inadequacy of infrastructural and resource facilities. As we know, despite the Legal Aid Act, 2000 an effective legal aid regime for the people accused of crimes is also absent in Bangladesh. Therefore, the argument that the STA is inconsistent with constitutional safeguards thus appears logical. There is a growing recognition elsewhere that “a defendant may waive the statutory right to a speedy trial”<sup>124</sup> in the interest of justice. From the context of Bangladesh, it seems therefore that the better way of providing for a constitutionally sustainable scheme for speedy trial is to straddle a middle course between an overly speedy trial, which may prove counterproductive for justice, and an unreasonably tardy trial which would yield injustice.

### **The Speedy Trial Tribunal Act, 2002 (Act No. 28 of 2002) (Droto Bichar Tribunal Ain)**

The Speedy Trial Tribunal Act, 2002 (hereafter ‘STTA’) provides for speedy trial of certain prescribed offences and empowers the government to transfer pending cases from ordinary courts to speedy trial tribunals for disposal. In *Mohibur Rahman Manik and Others v. Bangladesh and Others* (2003),<sup>125</sup>

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<sup>122</sup> See Islam, M. R. and S. M. Solaiman, “The New Speedy Trial Law to Maintain Law and Order in Bangladesh: Its Constitutional and Human Rights Implications”, 46:1 (2004) *Journal of the Indian Law Institute*, pp. 79-98, at p. 84. See also *The Daily Star*, Dhaka, 24 June 2002.

<sup>123</sup> Islam and Solaiman, *ibid.*, at p. 87.

<sup>124</sup> *State v. Southard* 261 Kan 744, 933, 2d 70, 1997 (USA).

<sup>125</sup> (2003) 55 DLR (HCD) 637.

involving the STTA's constitutionality, the High Court Division reasoned that the Act only reduced the time limit within which a trial has to be concluded but left other conditions relating to the criminal trial untainted. It argued that the Act contained no stringent provision concerning, for example, the accused's right of bail, but rather was a result of the state's response to its constitutional duty to ensure the accused's right to a speedy trial.<sup>126</sup> The Court also argued that since the basic criminal process to be followed by speedy trial courts remains unaltered, the assailed Act did not breach the constitutional rule of equality. Based on this line of reasoning, the Court finally confirmed the STTA's constitutionality. One might well wonder whether the Court's analyses have not been overshadowed by its leaning towards legal positivism, a tilt that becomes apparent in the following words of the Court:

“The learned Advocate for the petitioners could not show any provision of the [Act] which has in any way curtailed the rights of the petitioners to get fair trial”.<sup>127</sup>

The Court did not enter an elaborate doctrinal and jurisprudential discourse to assess how fair the ‘fair trial’ under the STTA was. The Court inadequately addressed the issue of constitution-compatibility of the government's unguided power under ss. 5 and 6 of the STTA to transfer criminal cases from ordinary courts to speedy trial tribunals. The question of constitutionality of this executive power was the central issue before the HCD in *Abdul Kader Mirza and Another v. Bangladesh* (2004)<sup>128</sup> in which the Court adjudged the STTA as constitutional holding that the beneficial part of this law (i.e., the speedy trial) can be used in favour of the accused. Yet the Court's reasoning was hardly based on constitutional provisions invoked by petitioners' counsel, nor did it illuminate the constitutional impact of this law.

#### **IV. Factors responsible for a minimalist approach to the utility of the Constitution in criminal processes**

The above shows that the majesty of the Constitution, which the country's legal system adopted not long after its independence, has not been adequately explored in criminal trials. Referring back to the comparative discussion in part II above that reveals almost a dramatic influence of the Bills of Rights on the criminal justice systems of the countries studied, one might wonder why is it that the Constitution of

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<sup>126</sup> *Ibid.*, at p. 640, ¶19.

<sup>127</sup> *Ibid.*, at p. 640, ¶17.

<sup>128</sup> (2004) 56 DLR (HCD) 31.

Bangladesh has had only a marginal impact, if at all, on her criminal law. As it has been clearly shown above, the constitutional safeguards and rights concerning a detainee or an accused, enshrined in Arts. 33 & 35, have not been invoked in criminal trials or other proceedings like unlawful searches as vigorously as ought to have been.

It is pity that there is almost a total absence of the reliance by the defence as well as criminal courts on fundamental principles of justice that embrace the ideas of rule of law, equality, human dignity, and judicial independence. Take, for example, the case of administration of criminal justice in lower courts by magistrates who are none but the members of the administration and hence arguably non-independent. One might well ask whether this has not occasioned a continuing breach of the accused's right to an "independent and impartial court" guaranteed in Art. 35(3) of the Constitution. No court has ever addressed the issue whether in view of this fundamental right "executive officers can at all perform purely judicial functions".<sup>129</sup> By contrast, these high moral constitutional grounds have often illuminated judicial reasoning in jurisdictions compared in this essay, particularly in South Africa. Surprisingly, lower criminal courts in Bangladesh, which have the primary responsibility of trying offences, appear to be oblivious of the Constitution while making deliberations and arguments, and giving their underlying reasoning. This is evident in many judicial mistakes that have become unfolded in the course of this essay.<sup>130</sup>

It can further be claimed that constitutional attacks on ever increasing 'harsh' statutes are few and far between. In whatever challenges against such laws have been made, the Courts have been either very quick in reading the law from a positivistic perspective or delaying the disposal of those challenges. Regrettably, for example, a constitutional challenge to the Joint Drive Indemnity Act, 2003, indemnifying the security forces for the killings and atrocities during the controversial anti-terrorism 'joint-drive' (16 Oct 2002 to 9 Jan 2003), has been long pending before the Court.<sup>131</sup> Moreover, judges

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<sup>129</sup> The phrase is of Kamal J in *Secretary, Ministry of Finance v. Md. Masdar Hossain & Others* (2000) 52 DLR (AD) 82, at p. 102. Justice Kamal was aware of this issue, but deferred its determination to the future.

<sup>130</sup> It is interesting to note a contrary, negative appellate judicial attitude. A retired judge of the Supreme Court has told me in private that the superior courts readily disapprove of lower courts citing or referring to the Constitution, seemingly out of a conviction that dealing with the Constitution is a prerogative of the Supreme Court alone.

<sup>131</sup> See *The Daily Star*, Dhaka, 13 April 2003. Also pending are challenges (i) to a law constituting a new law-enforcing force branded RAB (Rapid Action Battalion) in whose custody or so-called 'cross fire' many people have already died, (ii) to s. 86

faced with constitutional challenges to harsh laws often tend to prioritise the rule of presumption of validity of statutes over the accused's concern about fairness of his trial and the enjoyment of his fundamental rights.

How does one explain the limited or restrictive use of the Constitution in criminal law adjudication? What factors are responsible for a minimalist or 'last resort' approach to the utility of the Constitution in criminal processes as noted above? It seems that it is legal positivism or legal formalism that is largely responsible for this scenario, in which the Bangladeshi judges, lawyers, and academics are trained and which they like to inculcate in their respective area. Despite the Constitution's and the premier procedural Code's emphasis on a due process scheme of criminal justice, Bangladeshi penal laws and criminal practices and judicial interpretations of them often focus on 'crime control' or 'effective law enforcement', aiming at achieving a high rate of convictions. This excessive focus by the criminal justice system on the deterrence goal often ignores and trivialises the rights of the accused. Positivist lawmaking and law-administration in the field of criminal law have indeed facilitated an exclusionary approach to those charged with committing crimes. This kind of legal thinking which lacks adequate rationales and moral underpinnings has a legacy in the colonial lawmaking which arguably aimed at increasing imperial economic interests rather than justice for the natives.<sup>132</sup> In an excellent work, Malik argues that, in legislating for crimes and punishments for Bengal the colonial masters set out to transfuse into laws their perceptions of corrupt and untruthful natives.<sup>133</sup>

Thus, the dominant approach to criminal law in Bangladesh has often been the approach of legal positivists who nourish a 'black letter law' tradition. In such a tradition, the fact that criminals as human beings are fully entitled to the enjoyment of human dignity and other rights often gets lost sight of in the enactment and construction of 'the law'. One cannot agree more with Malik:

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read with s. 100 of the Dhaka Metropolitan Police Ordinance, 1976, providing scope for arbitrary arrest (*BLAST & Others v. Bangladesh*, WP No.. 2191/2004), and (iii) to s. 124A of the Penal Code, 1860, providing for the offence of sedition.

<sup>132</sup> See Benton, L. A., *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Cambridge, Cambridge University Press, 2002, at pp. 127-66.

<sup>133</sup> Malik, S., *The Transformation of Colonial Perceptions into Legal Norms: Legislating for Crime and Punishment in Bengal, 1790s to 1820s*, London, SOAS, 1994. (Unpublished PhD thesis).



Our understanding of law is the understanding derived from the Penal Code, Criminal Procedure Code, the Contract Act and so forth, i.e., manifestation of positivism in law. [...] India offered the fertile ground for positivism's experiment and the 'success' of this experiment has shaped our understanding of law – law as a product of the law-giver. Implicit in this understanding is the “command” theory of law. [...] When you accept law as the command of the sovereign, the need to scrutinise the broader issues such as why people obey law, or why law is authoritatively binding, or what is the purpose of the law and whether it is suited for the particular purpose, decimates. Instead, the focus of analysis is invariably on the technical aspects of law, its internal cohesion, use of language, citing of judgements in support of a view, and so forth.<sup>134</sup>

It appears, therefore, that apart from the distorted criminal laws of colonial origin as well as the ‘control’-focused post-Independence criminal laws that are often fraught with over-criminalisation, lawyers’ and judges’ uncritical tilt towards legal formalism, i.e., their trained fidelity to posited law, is worth blaming for inadequate presence of the Constitution in the country's criminal law and practices. The cases analysed here are well indicative of this diagnosis. To remind oneself one can be referred to the case of *Hiru Miah* (above) in which the HCD refused to extend the benefits of s. 35A of Cr.P.C. (the reduction of the period of pre-conviction custody from the sentence imposed) to those tried under special laws. Also notable is a case involving an allegation of unlawful and secret detention and torture of the victim in which the Appellate Division overturned the HCD's decision in WP No. 1268 of 2002 calling the police to submit the case diary to the Court.<sup>135</sup> This rigid decision reflects nothing but the spilling over impact of legal positivism on the concerned Court.

#### **IV. Conclusions: Emphasising the value of the Constitution in criminal law**

I do not wish to end this essay on a totally negative note, but one must ask whether the existing criminal law and practice in Bangladesh truly conform to constitutional principles of justice, rule of law, and dignity. As seen above, many provisions of the law and certain practices might not overcome this query. The subject matter of this article represents a complex area which has garnered too little attention from legal scholars. The present author has simply made an attempt to sensitise all actors of the criminal justice system about the

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<sup>134</sup> Malik, above note 95, at pp. 455-56.

<sup>135</sup> *Bangladesh v. Dr. Shamima Sultana Rita*, Civ. P. No. 485 of 2002 (Appellate Division).

importance of relying on the Constitution as the most important source of guidance and ‘command’, if one is allowed to say in this term.

The foregoing discussion reveals that the criminal law and the Constitution nexus in Bangladesh stands on a loose footing and that the fundamental rights of the accused and the safeguards the Constitution accords to him have not yet become a central focus of the country’s criminal law. Conducting and defending criminal cases in Bangladesh are found to be largely of traditional mould, predicated upon an excessive reliance on posited laws, application and interpretations of which have remained often uninformed by the Constitution. This is, however, not to undermine in particular the judges’ contributions, including those made through their self-initiated (*suo motu*) interventions,<sup>136</sup> towards removing illegality from, and constitutionalising the country’s criminal justice system. There is, however, nothing to be overly complacent. The instances of injustices and unfairness caused to the accused and victims due to the violation of basic tenets of the Constitution are not few. This article has detected legal positivism as a potential factor behind this scenario.

Essentially, this article argues that in order to achieve better justice for the accused, there is a need to craft a constitutional criminal law, taking into consideration both the spirit and letters of the Constitution. Antagonists might say that, by loosening the enforcement of criminal laws the proposed constitution-based approach to the penalisation of crimes will entail a risk of letting the criminal off the hook. But the benefits of administering the criminal law in accordance with the norms and values of the Constitution far outweigh the evils that might ensue from a straightforwardly positivistic application of criminal law. In a free and democratic society based on the rule of law and other fundamental principles of justice, the need for the criminal law and all its actors to conform to constitutional principles and mandates is an unending need.

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<sup>136</sup> See e.g., the well-known decision in *State v. Deputy Commissioner, Satkhira* (1993) 45 DLR (HCD) 643. On *suo motu* judicial interventions see Hoque, R., “*Suo Motu* Jurisdiction as a Tool of Activist Judging: A Survey of Relevant Issues and Constructing a Sensible Defence”, VIII (2003) *Chittagong University Journal of Law*, pp. 1-31.

