CRIMINAL SENTENCING IN BANGLADESH: FROM COLONIAL LEGACIES TO MODERNITY (BRILL NIJHOFF: LEIDEN 2017)

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In his last and longest dialogue, the *Laws*, Plato "reaffirms his preference for rational self-control and also emphasizes the necessity of [positive] law in any actual state."[1] This position of Plato was reflected in his argument for crafting a balance between the discretion of the court and the rule-based regulation of judicial process: "something must be left to the discretion of the courts, but not everything; there are things which the law must itself regulate."[2] To him, why such balance is necessary lies in the argument that individual differences in fact and harms committed are too great for detailed legislative prescription of the sanctions. So far as this problem of imposing sanctions is concerned, the need for the judicial discretion as a precondition to building the Platonic balance is thus not easy to question.

Yet it is not difficult to find whether the use of [judicial] discretion in connection with the task of imposing sanctions itself "remains part of the problem rather than part of the solution." This is closely the point around which Dr. Muhammad Mahbubur Rahman has offered a theoretical sentencing scholarship in his book, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity* (published by Brill Nijhoff: Leiden in 2017). Within the breadth of seven interrelated chapters (as contained in around 250 pages),[3] this book speaks of a scholarly maneuver of exploring criminal sentencing in Bangladesh the major task of which appears to be grounded on identifying the problems in the existing system that favors discretion in sentencing. In situating the operational limit of the discretion-based sentencing, this book calls for rethinking the traditional judiciary-centric understanding of criminal sanctions in Bangladesh and beyond.

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[1] Hall, Jerome, 31 (2) (1956) "Plato's Legal Philosophy", *Indiana Law Journal*, at p. 190.

[2] Plato, *Laws* (translated into English as *The Laws of Plato* by A.E. Taylor) London: Dent & Sons, 1934 at 876a).

[3] In total the book contains more than 450 pages including the part that encloses a relatively longer bibliography.

The central theme of the book is however built upon a crucial point: it argues for 'regulated discretion' in sentencing without compromising the need of contextual balance. The progression of such argument is evident in the first chapter of the book in which the author defines the framework of his study to fit into a perspective that allows locality-colored and culture–specific understanding of sentencing policies. In so doing, the chapter identifies the limitations manifested in and arising out of contemporary sentencing scholarship by calling it "predominantly western in origin […] and analysis".[4] In this way, it purposefully chooses a plurality-focused definition of sentencing policies that includes the use of coercive authority of the state in employing 'extra judicial' penal tactic as a component of a wider understanding of sentencing policies of Bangladesh.[5]

Within the framework so defined, chapter 2 of the book is therefore deigned to re-conceptualize the wide array of sentencing debates with a view to arguing for the need of contextual balancing between conflicting norms and principles relating to criminal sentencing. In this chapter, the author makes an attempt to demonstrate how variance in sentencing practice among different jurisdictions can be construed as a logical consequence of variance in the extent of state's power to criminalize an act in general, and the 'consequent difference' in policy choice regarding justification and quantum of punishment in particular.[6] To put it another way, in refuting the overriding trend of most theories that search for an absolute answer, the chapter is designed to look into how the choice of different forms of punishment attributes the development of and changes in the institution of punishment to the interaction of competing social forces or the contradictions in power-relations within a particular society. This position of the author is further reinforced when he argues at the end of this chapter that

> […] the dominant trend in criminological literature is to search for an absolute answer based on a logical finality. But the issues when analyzed from different paradigms, indicate to us the paradox of sticking to any fixed just decision. This relates to "aporias" as indicated by Derrida, which us that the search for justice remains a never-ending task of revisiting of issues, and at the same time this never-ending endeavor is bound to be obstructed to some extent by laws, since legal decision can hardly wait for infinite knowledge to reach justice.[7]

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4 Rahman, Muhammad Mahbubur, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity*, (Brill Nijhoff: Leiden, 2017) at p. 8.

5 See, *ibid* at p. 223.

6 See, *ibid* at p. 11.

7 *ibid* at 68.

The real kernel of this chapter thus lies in its acceptance of "incurable relativity" in criminal sentencing as reflected in its suggestion that "both legislative prescription and judicial imposition of sentences should remain in place *as comparative and supplementary process* requiring appropriate and contextual balancing […] within constantly changing contexts".[8] At this point, it might be important to ask how such uncompromising stand of the author for contextual balancing is reconciled with his tendency to favor "rule-based rather than discretion-based" criminal justice in the context of Bangladesh. Chapter 3 along with chapter 4 of the book thus gives us a "curious indication" of whether the author has counter-balanced his position regarding contextual rationality. It seems that the issues explored in chapter 2 in defense of contextualization are qualified in the subsequent chapters so far as they are used to portray the historically located contradictions in the culture of criminal sentencing as developed in Bangladesh over times.

Chapter 3 presents the background of sentencing policies of Bangladesh from the pre-colonial to the colonial and post-colonial era, which is crucial in forming the foundation of the societal and historically contingent conditions of sentencing. Chapter 4 is designed to locate the historical legacy as depicted in the preceding chapter into the present-day legal framework of Bangladesh by commenting that "the conventional dividing points between colonial and post-colonial eras as well as pre-independent and post-independent eras do not inform us of any significant departure marking qualitative departure."[9] The chapter demonstrates in contrary the growing tendency towards heightening the hegemonic role of state in independent Bangladesh where punishment is "perceived more as a right than as an obligation to deliver justice." In assessing the ramifications of this tendency, this chapter also shows how the use of such power to punish is extensively influenced in Bangladesh by its volatile socio-economic and political culture.

In it in this way that author fits his argument for contextual rationality into the explanations as to why traditional understandings of sentencing are too narrow to give a way of responding to the real problems of law and order in Bangladesh. Chapter 5 along with the case study as contained in chapter 6 of the book further clarify the position of the author where he interrogates the relevant laws and sentencing jurisprudence of the court to ascertain the extent to which approaches of the legislature and judiciary are sensitive to the need of contextual rationality. Under these chapters, the author identifies the absence of legislative fixed prioritization as a problem that leads towards inconsistent sentencing practices in Bangladesh. By referring to both the legislative and

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8 *ibid* at p. 12.

9 *ibid* at p. 225.