

Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights

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Abstract

The Paper is an in-depth study of the practices prevalent in Bangladesh regarding law making and people's perception as to legal sanctions resulting from such laws bearing colonial resemblance. The critical analysis focuses on the relation between how the common people perceive law in their public life and its impact in the long run upon the realization of human rights in a developing country. In doing so, the Paper draws upon historical discourse on colonial codification, scrutinizes the existing colonial drafting patterns followed by the law makers in independent Bangladesh, and argues that colonial drafting patterns impede the development of legal consciousness in public life. The Paper also analyses the Bangladeshi attitudes towards compliance as well as non-compliance with law especially focusing on the popular tendency of widespread indifference towards legal sanctions. Taking the Law of Torts, which is highly underdeveloped in Bangladesh, as an example, the Paper shows how lack of legal consciousness breeds impunity leading to a culture of disrespect to human rights.

Introduction:

Ensuring and protecting human rights is a challenge. But for a developing country, with a strong presence of a weak rule of law, the challenge is even bigger. Poor rule of law can be sustained by a general disregard for the laws and regulations by citizens (and often by the law enforcement mechanism). But that leads to the question of how does this attitude begin? One plausible indicator may lie in the relationship of law, legal system and society. When the legal system is wrought with dysfunctional laws unable to accomplish their purpose, people start disregarding that law. This non-functionality creates a cycle of rights abuse caused by and resulting in weak rule of law. The paper discusses how such a cycle is currently operating in Bangladesh.

In this context, the paper hypothesizes that the dysfunctional laws in Bangladesh are a result of its colonial drafting and law-making process. Colonial drafting pattern creates laws with colonial traits which cater to the executive, cannot ensure accountability and creates a social attitude of

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This is not an empirical study. It is a critical analysis of the existing legal norms from a interpretative and descriptive perspective. The observations and statements made in this Paper about the Drafting Wing, the Drafters and the Drafting process are not those of the author, but have been derived from the interviews with Executive officials on the condition of anonymity.

defying and evading law. The end result is the absence of legal consciousness in the Bangladeshi society.

The paper tests this hypothesis from a three-dimensional socio-legal approach: how the colonial drafting breeds ineffective laws suffering from complex textual language, how these complex laws prevent lay-people from learning about their laws and their rights, and finally, how the executive bureaucracy along with legislative disability has created a standstill situation.

The key arguments of the paper are that: *-firstly*, the incoherent replacement of community based native laws by the colonial laws disrupted the legal practices and changed people's idea of law in the Indo-Pak-Bangla subcontinent; *-secondly*, by continuously following the colonial laws and colonial drafting styles without appreciating the historical, cultural and social differences of independent Bangladesh from colonial Subcontinent, Bangladesh is frustrating the purpose of the law and promoting the executive interest much like the colonial era; and *finally*, the lack of pro-people law reinforces the colonial idea of law being a government instead of a protection, which negates people's belief in rule of law. In this way, the lack of legal consciousness actually prevents the people as well as the power structure from flourishing their understanding of law and appreciating its necessity.

In proving the arguments, I will use various examples of torts laws and laws on civil liberties in Bangladesh. I choose these two fields because unlike other fields of law where breaches and remedies are generally defined by statutes, remedies under torts and civil liberties require fundamental rights consciousness as a citizen.

1. Colonial laws: Defining the Subcontinental Experience

Global history shows a pattern of subjugating ethnic or native laws to firmly establish colonial laws in practice since the late eighteenth century.¹ In most cases the European colonial powers adopted a strategy of 'superimposing' state laws i.e. putting laws promulgated by the colonial powers over other pre-existing sources.² This subjugation of the local or native laws was facilitated by the prevalence of the colonial mindset in both the colonisers and the colonized people. Most of the pre-colonial laws in India had been customary, hence the colonial rulers

¹ Lauren Benton, *Law and Colonial Cultures* (CUP, 2002) 6

² Ibid 127

considered India having no legal system altogether.³ They often considered the native people uncivilized and uncultured, and consequently declined to continue the native legal processes and courts. Many colonized local people tried to upgrade their social positions by associating with the colonisers in multifarious levels, including but not limited to, welcoming the colonial laws.⁴

The colonial laws were a part of the civilizing mission undertaken by the European powers in Africa and elsewhere.⁵ According to Luigi Nuzzo,

‘The birth of colonial law proper occurred in tandem with...the problem of establishing law governing relations with peoples of another religion or peoples considered to be on a lower level of civilization had assumed a central role in the international law debates of the West’.⁶

The legal experts of Europe treated the colonial laws as part of the formation process of ‘colonial consciousness’ to psychologically manipulate the colonized people to participate in the European expansionist projects.⁷ Colonial consciousness fosters a mindset where people learn to deny ‘the presence of morality’ in their native culture and prefer Western culture as superior.⁸

The colonial laws in the Indian subcontinent during the British rule followed the similar pattern and effect. This touched both the substantive and procedural spheres of the hitherto practiced Muslim and Hindu law: not only definitions of crimes changed, for example, but so did the rules of evidence.

1.1. The Colonial Legacy of the Subcontinent:

The Colonial legacy started with the Law Commission Report produced under the supervision of Lord Macaulay and Sir Henry Maine.⁹ Maine’s theory, now famously termed “from status to contract”, drew predominantly from the Roman society, and also both influenced and was influenced by the progression of the 19th century Indian society.¹⁰

³ W.H. Rattigan, ‘Customary Law in India’(1884-85) 10 L. MAG. & L. Rev. 1,3-4

⁴ cf Benton (n1) 127

⁵ Luigi Nuzzo, ‘Colonial Law’, European History Online (2011) < <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/luigi-nuzzo-colonial-law>> accessed on 19 June 2017

⁶ ibid

⁷ ibid

⁸ S.N. Balagangadhara, *Colonialism and Colonial Consciousness* (OUP 2012)

⁹ Rachel Sturman, *The Government of Social Life In Colonial India: Liberalism, Religious Law, And Women’s Rights* (CUP 2012) 20,112.

¹⁰ Eleanor Newbigin, *The Hindu Family and The Emergence of Modern India: Law, Citizenship and Community* (CUP 2013) 38.

Personal laws in the subcontinent were not uniform throughout the country. in case of Hindu law, customary practices differed regionally and from family to family.¹¹ With the position of the *pandits* (Hindu law experts) declining, customs were pushed to the behind,¹² and using their knowledge of Islamic Law the English judges relied primarily on textual sources like commentaries that were translations and interpretations of the key religious texts as the basis of Hindu religious tradition.¹³ The only problem was that Hindu law was not religious text based like the Quranic law in Islam, and key texts differed from region to region. ¹⁴ Due to the difficulty of defining what custom means, and with increased burden of proving custom as superseding written texts, ¹⁵ customs ceased to be the resulting commentaries as the exclusive source for judicial decisions did not reflect the original diversity Indian laws had.

Some East India Company rulers, such as Hastings and Macaulay, maintained that India already possessed a well-functioning system with established institutions and rules. ¹⁶ The first Governor General of Bengal Warren Hastings promulgated for native laws in cases of issues concerning personal law such as marriage, separation, inheritance, maintenance, etc.¹⁷ But the original aim of the colonial government was "to give good government to a people to whom we cannot give a free government,"¹⁸ To ensure that along with administrative control the people would recognize the English jurisdiction to solve their problems, the Crown's rule was established in India following the *Sepoy Mutiny* in 1857, and colonial subjugation formally started. This gradually paved way for codification of laws (totally foreign to Common Law system) and develop a court structure, providing a 'comprehensive ideology through which to rule'.¹⁹ According to Jon E.

¹¹ cf Sturman (n9), 20.

¹² James Henry Nelson, *Indian Usage and Judge-Made Law in Madras* (K. Paul, Trench, & Company 1887) 191-204; also see Marc Galanter, 'The Displacement of Traditional Law in Modern India', (1968) 24(4) J. SOC. ISS. 65, 73.

¹³ J.D.M. Derrett, *Essays in Classical and Modern Hindu Law* (Brill, 1976) 16, cited in Charitha Shashiraj, 'The Hindu Joint Family: A Study in The Era of Classical Legal Thought', (LLM Long Paper, Harvard Law School 2015).

¹⁴ cf Sturman (n9) 616.

¹⁵ cf Derrett (n13) 7; See, *Collector of Madura v. Mootoo Ramalinga* [1868] 12 MIA 397.

¹⁶ Bernard S. Cohn, *Colonialism and its Forms of Knowledge* (PUP 1996) 58-59

¹⁷ Eric Stokes, *The English Utilitarians and India* (OUP1990) 3.

¹⁸ Lord Macaulay, Speech Delivered in the House of Commons on the 10th of July 1833, *The Miscellaneous Writings and Speeches of Lord Macaulay* (Longmans, Green & Co., 1889)

¹⁹ Barry Wright, 'Macaulay, the India Penal Code and Labour in the British Empire' (University of Queensland Conference, March 2012) < <https://ssl.law.uq.edu.au/calendar-of-events-files/law-research-seminar-series.pdf> > last accessed on 10 December 2016

Wilson, the codification of laws in India was a ‘by-product of practical processes of British administration’ rather than utilitarianism.²⁰

1.2. Codification: The First Blow of Colonisation over the Legal System:

Codification has often been used as an imperial tool.²¹ The rulers successfully portrayed and made the Indians believe in their savageness, as differentiated from the civilized English people and their Common Law. It is ironic to note that even till today international law considers as a source the general principles of law of ‘civilised nations’.²²

The problem of this whole sale codification of laws became apparent as early as the first decades on the 20th century. In 1911, the colonial court in *Kamini v. Promotho*²³ mentioned that the codification was ‘not the panacea...Codes "cannot regulate the time to come, so as to make express provision against all inconveniences, which are infinite in number."²⁴ The colonial drafting and legislating neglected the subtleties necessary to appreciate the nuances of a case.

The *Codification In British India* by Bijay Kisor Acharyya also mentions the ‘Imperial Aspect’ of the codification. The codification on one hand had unified the application of law in different parts of British India (for example, the Indian Penal Code [IPC 1860] was adopted and exercised even in some of the British colonies where the full rights of citizenship of British Indians were questionable)²⁵; on the other hand it ensured that British Indian laws followed the *international standard* (emphasis added) found in civilized laws of the world, for example the Copyright Act 1911 which was influenced by the Berne Convention 1886.²⁶

What the colonial Indians failed to understand was that this civilization process was a sham, for their British counterparts declined to treat the Indian Codes as equal to the common law as practiced in England. The IPC 1860 was dismissed by many English lawyers as ‘suitable only for

²⁰ Jon E. Wilson, ‘Anxieties of Distance: Codification in Early Colonial Bengal’, (2007) 4(1) Mod. In.His. 20, see, Shubhasree Ghosh, ‘The Nineteenth Century Colonial Ideology and The Codification of Criminal Law in India’, <http://theinclusive.org/nineteenth-century-colonial-ideology-and-the-codification-of-criminal-law-in-india-intrusion-with-caution> last accessed on 20 June 2017

²¹ Elizabeth Kolsky, ‘Codification and the Rule of Colonial Difference: Criminal Procedure in British India’, (2005) 23(3) L.His.R. 632

²² See, Statute of the International Court of Justice, 1945, sec. 38

²³ *Kamini v. Promotho* [1911] 13 C. L/. J. 609

²⁴ *ibid*

²⁵ Bijay Kisor Acharyya, ‘Preface’, in *Codification in British India* (S. K. Banerji & Sons, Calcutta, 1914), <https://archive.org/stream/codificationinbr00achaiala/codificationinbr00achaiala_djvu.txt>, last accessed December 10, 2016

²⁶ *ibid*

backward overseas colonies... for magistrates with limited capabilities', and objected to use those laws for themselves.²⁷

2. Continuity of colonial laws: A case for Administrative Convenience?

Continuity of legal system, or Legal continuity, is a doctrine that says that law and the relationships established thereby continue to be enforceable despite other significant changes, such as complete change of a government system, creation of a new state etc.²⁸ Legal continuity is one of the many aspects of a legal system and its identity.²⁹ This often seeks to answer the question whether two apparently different legal system belonging to separate times and context are actually part of a single continuous legal system.³⁰ This is necessary because while the legal system of a state can define and describe its laws (e.g. in a Common law system a court decision has the force of law),³¹ the laws of the State can also define and describe its legal system as upholding the notions and principles of social phenomena,³² (e.g. in Bangladesh prominent pieces of law are seen to contain good faith clauses³³ as a mark of administrative dependence). After the independence of Bangladesh followed partial legal continuity with the adoption of new constitution alongside the Bangladesh (Adaptation of Existing Laws) Order, 1972.³⁴

Because of legal continuity, if the drafters and legislators fail to appreciate justice and punishment as perceived by the society, the laws become ineffective. The legislators can easily change or create law, but unless the law connects to the popular sentiment it will have little effect.³⁵ It is a well-accepted proposition that mere importation of a legal rule or a statutory code

²⁷ cf Wright (n20). Also See, Wing-Cheong Chan, Barry Wright, Stanley Yeo, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate Pub. Ltd., 2013) 32

²⁸ Jiří Havel, 'Legal Continuity', in Zbynek Baladrán and Vit Havránek (eds.) *Atlas of Transformation* (JRP-Ringier, 2011), available at <<http://monumenttotransformation.org/atlas-of-transformation/html/1/legal-continuity/legal-continuity-jiri-havel.html>>, last accessed December 10, 2016

²⁹ Joseph Raz, 'The Identity of Legal Systems' (1971) 59(3) Cal. L. Rev. 797

³⁰ *ibid* at 798

³¹ *ibid*

³² *ibid*

³³ Good faith Clauses are clauses that state no act or omission otherwise an offence if done in good faith by an executive or law enforcement officer would any longer be an offence. This clause is found in all criminal legislations in Bangladesh.

³⁴ The Bangladesh (Adaptation Of Existing Laws) Order, 1972, (President's Order No. 48 Of 1972). The Preamble ordained for continuing all laws which were in force on the eve of independence of Bangladesh (25th March, 1971) in the territory of Bangladesh subject to such consequential changes as may be necessary.

³⁵ *ibid* at 20

without proper adaptation to local conditions is susceptible to failure.³⁶ This proposition explains the problem Bangladesh faces.

When Bangladesh promulgates a law with symbolic penalty, like in Tobacco Control Act 2005 (smoking in public places give a maximum 300 BDT equivalent to 4 USD approx. fine), it fails.³⁷

The issue is that this legislation focuses on the *notion* of punishment instead of the *form*. In a country where people do not appreciate the spirit of law this punishment carries little value, and even the members of the legislation were doubtful about the efficacy of such a penal provision.³⁸

This proves how laws distant from popular feeling become dysfunctional.

3. Colonial laws and Legal Consciousness: How subjugation of people impacts human rights

Legal consciousness means how people understand and perceive law. S. E. Merry in *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* propounds:

“[t]he ways people understand and use law I term their legal consciousness. Consciousness... is the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world.”³⁹

According to Professor Susan Silbey, legal consciousness is a type of social practice which both reflects as well as forms social structures.⁴⁰ It usually refers to micro level social action, specifically the ways in which individuals interpret and mobilise legal meanings and signs.⁴¹ Every nation (i.e. every group of people) holds distinct perspectives of legal consciousness, which plays a significant role in the comprehension and practice of rule of law:

“[legal consciousness] refer to what people do as well as say about law. These... once institutionalized, become part of the material and discursive systems that

³⁶ Umakanth Varottil, ‘The Evolution Of Corporate Law In Post-Colonial India: From Transplant To Autochthony’, (2015) NUS Working Paper Series 2015/001, 5, available at <http://law.nus.edu.sg/wps/pdfs/001_2015_Umakanth_Varottil.pdf>, last accessed December 10, 2016

³⁷ Smoking and Tobacco Control Act 2005, sec.4 (2)

³⁸ See, Summary Proceedings of the *Roundtable on "Tobacco Control Law & Smoke-free Environment"* organized by the Daily Star and PROGGA on April 30, 2015. In the roundtable, **Abul Kalam Md. Ahasanul Hoque Chowdhury, Honourable Member of Parliament, Rangpur-2** opined that: They could issue a revenue stamp of Tk. 300, for example, with a receipt to those breaking the anti-smoking law in public spaces. However, it would not be easy to seek the help of law enforcement agencies to implement this fine on smokers. Instead, the law will be exploited. <<http://www.thedailystar.net/round-tables/tobacco-control-law-smoke-free-environment-79791>>

³⁹ S. E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago University Press 1990) 5

⁴⁰ Susan Silbey, ‘Legal Consciousness’, in Peter Cane and Joanne Conaghan (eds.) *New Oxford Companion to Law* (OUP 2008), available at < http://web.mit.edu/ssilbey/www/pdf/Legal_consciousness.pdf> last accessed December 10, 2016

⁴¹ Susan S. Silbey, ‘Legal Culture and Legal Consciousness’, in N. J. Smelser and P. B. Baltes (eds.) *International Encyclopedia of Social And Behavioural Sciences* (Elsevier, 2001) 8623, 8626

limit and constrain future meaning-making. Consciousness is not an individual trait nor solely ideational.”⁴²

Legal consciousness concerns the historical background, the legal process, the concerned institutions and the cognitive constructs produced by the bar and the bench.⁴³ It is related to law making, because the legal culture enjoyed by the people breeds ‘living law’ (law that constitutes the foundation of the legal order of the society) which does not always conform to the ‘rule of law’ propounded by the domestic legal system.⁴⁴ This results in discrepancies between how laws are implemented by the government and how they are followed and observed by people in daily life.

Silbey probes deeper and differentiates legal culture from legal consciousness: legal culture exists at the macro level and refers to a group’s understanding of the legal system; but legal consciousness can operate on an individual level by his/her interaction with the legal system.⁴⁵ Therefore, laws are more likely to be effective if they are *in demand*. Transplanted colonial laws fail to meet this demand, and become ineffective.⁴⁶ Colonial laws superimposed foreign ideas but the legal culture of Bangladesh originated from customs and religious dictums. Thus, transplanting colonial laws today fail to cause an effective change in public behavior and as a result we see Bangladesh having numerous laws but little or no rule of law.⁴⁷

3.1. Legal consciousness and its impact on asserting citizen’s rights: the poor condition of torts law in Bangladesh

The basis of the law of torts is *culpa* or fault, ergo in order to avoid committing tortious injury or ensuring individual rights requires a conscious civic mind which respects the sense of obligation and duty as much as right. Poorly developed legal consciousness thus prevents such rights from being exercised. A fitting case of developed legal consciousness helping to assert rights is medical strike and medical negligence. In Bangladesh, doctors frequently go on strike for various demands. This has serious implications for *right to health*: as all doctors of a given hospital or

⁴² *ibid*

⁴³ Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006) 11

⁴⁴ Amalia Nilsson, ‘Legal Culture and E-government in Sweden and Japan’ (Master’s thesis in Sociology of Law, Lund University 2013) 10. Also See generally, Eugene Ehrlich, *Fundamental Principles of The Sociology of Law*, (Transaction Publishers 2002) available at <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3920406&fileId=3920407>> last accessed December 10, 2016

⁴⁵ cf. Silbey (n.41) 8623-8624. 164-168

⁴⁷ See, F. K. Savigny, *Of The Vocation of Our Age For Legislation And Jurisprudence*, (The Lawbook Exchange, Ltd., 1831)

clinic go on strike, patients suffer for want of treatment, have to transfer, many dying in the process.⁴⁸ In England, doctors' strikes are uncommon but not unheard of, the most recent one having taken place in April 2016.⁴⁹ However, the strikes in England are regulated by shifting of duties where emergencies are never shut off, and some doctors keep serving while others put on strike. It was established as early as 1901 that going on strikes will be permissible only if uninterrupted service is ensured in the case of [*Taff Vale Railway Co v Amalgamated Society of Railway Servants*](#)⁵⁰.

In case of medical negligence, few cases are reported and prosecuted in Bangladesh.⁵¹ the UK has well-developed jurisprudence and precedents on medical negligence, India has reported cases where Courts ordered the hospitals or doctors to pay compensation for injuries to patients.⁵² But Bangladesh never addressed such issues. In fact, Bangladesh has no specific law to address torts claims except as money suits (which people avoid on grounds of huge expenses), and as such individual rights which could be upheld through tortious claims and civil injuries are left unprotected.

On the basis of this proposition, I submit that the condition and development of law of torts in a given State can show the amount or degree of legal consciousness prevalent in the people's mind. However, since colonial laws intended to subjugate, colonial laws focus predominantly on citizen's duty and not right. Therefore, colonial laws contribute towards preserving a subservient society.

4. Colonial Drafting as an Executive Weapon Creating Dominance:

⁴⁸ Chittagong Bureau, 'Patients Suffer As Doctors in Chittagong Private Hospitals Continue Strike', *bdnews24.com* (Chittagong, 22 January 2016) <<http://bdnews24.com/Bangladesh/2016/01/22/patients-suffer-as-doctors-in-chittagong-private-hospitals-continue-strike>> accessed on January 6, 2017, also see, Staff Correspondent, 'Doctors continue strike at DMCH, *bdnews24.com* (Dhaka, 12 May 2014)

<<http://bdnews24.com/Bangladesh/2014/05/12/doctors-continue-strike-at-dmch>> accessed on January 6, 2017

⁴⁹ Nick Trigg, 'Junior doctors dispute: Fourth strike hits NHS in England', *British Broadcasting Corporation*, (London 16 March 2016), Asa Bennet, 'Junior Doctors Strike: Why Are They Taking Action And How Will It Affect You?', *The Telegraph* (London 6 April 2016) <<http://www.telegraph.co.uk/news/2016/03/16/how-much-are-junior-doctors-paid-and-why-are-they-threatenin-g-to/>> accessed on January 6, 2017

⁵⁰ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] UKHL 1 [1901] AC 426

⁵¹ Two such cases are *BLAST and Sayed Saifuddin Kamal v. Bangladesh* [2016] Writ Petition No. 1509/2016, Doctor's Strike Case (*Dr. Mohiuddin Farooque vs. Bangladesh & others* [1999] Writ Petition No. 1783 /1999. Also, In 2012, High Court of Bangladesh summoned a number of doctors for alleged negligence in treatment at Labaid Cardiac Hospital causing the death of Dhaka University teacher Dr. Mridul Kanti Chakrobarty in 2011. The Hospital was fined 5 million BDT.see, *Shyikh Mahdi,' Medical Negligence vs. Violence on Doctors: Alarming trend on the rise in Bangladesh',The Future Law Initiative* < <https://futrlaw.org/medical-negligence-vs-violence-doctors-alarming-trend-rise-bangladesh/>> last accessed 12 December 2016

⁵² See, *Indian Medical Association v V.P. Shantha and Others* [1995] AIR 550 [1995] 5 SCC (6) 651, *Spring Meadows Hospital & another v Harjol Ahluwalia through K.S. Ahluwalia & Another* [1998] 4 SCC 39

Partha Chatterjee in his book *The Nation and Its Fragments* argues that the colonizer and the colonized share an essentialized difference which justified colonial authoritarianism.⁵³ The dual standard of codified laws promoted the interest of the executive as an aspect of colonisation.

An example can be the Criminal Tribes Act of 1871. This law promulgated that law would simply treat certain Indians as born criminals because of their tribal origin. The Act proposed that certain tribes were ‘addicted’ to the ‘systematic commission of non-bailable offences’,⁵⁴ and the decision as to whether a tribe in fact possesses such criminal propensities was to be taken solely by the Local Government Officer appointed by the colonial Government.⁵⁵ Moreover, any direction by that officer was to be a conclusive proof.⁵⁶ The Act listed more than 60 tribal groups as ‘habitual criminals’ and required their adult males to register with the police.⁵⁷

Therefore the problem in modern Bangladesh lies not only in drafting, but in failing to realize that the colonial drafting had a different agenda unsuitable for an independent state. Colonial laws aimed to subjugate and manipulate, and by copying from those laws Bangladesh is subjugating the people as well.

4.1. Colonial Impact in Drafting: The Bangladesh Case

The paper will now illustrate how the colonial legacy is continued in the once colonized Bangladesh and India, as opposed to how the colonizer United Kingdom has developed their own legal system. I will take three legislations from the three countries sharing a common subject matter (tobacco control) and compare the drafting style. I chose the tobacco control laws because these are fairly recently legislated laws: the Bangladeshi law was promulgated in 2005,⁵⁸ the Indian law in 2003,⁵⁹ and the British law in 2006⁶⁰.

I will do the comparative analysis on a specific substantive provision: the section defining the ‘public place’ where smoking is prohibited. The Bangladeshi and Indian laws⁶¹ merely enlist some places, and the British law⁴¹ gives a definitive guideline of places qualifying as public.

⁵³ See, Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (PUP 1993)

⁵⁴ Criminal Tribes Act 1871, part I, sec. 2

⁵⁵ *ibid*

⁵⁶ Criminal Tribes Act 1871, part I, sec.7

⁵⁷ Criminal Tribes Act 1871, part I, sec. 3-8

⁵⁸ Smoking And Tobacco Products Usage (Control) Act 2005

⁵⁹ The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003

⁶⁰ The Health Act 2006

⁶¹ Sec. 2(f) of the Bangladeshi law provides: “Public Place” means educational institution, Government, semi Government and autonomous office, library, lift, hospital and clinic building, Court building, airport building,

The difference in the drafting language is noticeable. The Bangladeshi legislation takes a positivistic approach and puts in tight letter law what kind of establishment comes under the definition of public place. The statute provides no simple definition of public place. In order not to make the list exhaustive, it opts a style, widely found in Bangladeshi laws, of referring any future questions and interpretations to government gazette notifications. The language also makes it incumbent upon the Executive to decide and interpret for themselves should the police find people smoking in a place not mentioned in the law. Such interpretations generally require applying the doctrine of *ejusdem generis*.^{41A} The practical problem is the wide possibility of Bangladeshi executive officers, often without a law background or training, not knowing the doctrine.

The Indian statute is a bit less positivistic by providing a practical definition (any place to which the public have access, whether as of right or not) which could serve as a guiding principle if question arises about a given place's suitability as public or not. It also gives clear-cut examples, enabling any executive officer to make analogical deduction.

The UK statute, however, gives the best example on this field: a very succinct definition of public places, and clearly illustrates how many variants of open to public place can be found in the United Kingdom, and also how to decide should a given place possess mixed/fluid characteristics.

Comparative analysis between the 'once colonised' and the 'once colonising' countries shows that, the colonised countries still tend to defer the deciding powers to the government and executive, whereas the UK defers it to the places themselves to decide for themselves whether

seaport building, river-port building, railway station building, bus terminal building, ferry, cinema hall, covered exhibition centre, theatre hall, shopping centre, public toilet, Government administered or private children park and any or all other places as may be declared by the Government, by notification in the Official Gazette".

Sec. 3(l) of the Indian law provides: "Public Place" means any place to which the public have access, whether as of right or not, and includes auditorium, hospital buildings, railway waiting rooms, amusement centers, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances, and the like which are visited by general public but does not include any open space".

Sec. 2 of the British law provides: "Smoke-free premises: (1) Premises are smoke-free if they are open to the public. But unless the premises also fall within subsection (2), they are smoke-free only when open to the public. (2)

Premises are smoke-free if they are used as a place of work— (a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or (b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present). They are smoke-free all the time. (3) If only part of the premises is open to the public or (as the case may be) used as a place of work mentioned in subsection (2), the premises are smoke-free only to that extent.

(7) Premises are "open to the public" if the public or a section of the public has access to them, whether by invitation or not, and whether on payment or not. (8) "Work", in subsection (2), includes voluntary work".

they qualify as smoke free places or not. The focus in the UK legislation is on the ‘circumstance’ and not on positive exemplified designations. This legislative approach is utilitarian, liberal and people friendly, which empowers the subjects of the law. The people can understand the law for themselves and conform to it on their own accord. The only area where the authority preserves its power for further regulation or interpretation is areas exempt from being smoke free areas.⁶² Another difference is that the south Asian legislations preserve authority’s power in an inclusive manner (what can be further included as public place) whereas the UK law only gives that power for exemption purposes.

Another noticeable characteristic is the ‘copy-paste’ job. A simple reading of the Bangladeshi Act shows that it closely, in fact from all substantial aspects (i.e. skeleton, language pattern, definition of offences, list of prohibited acts etc.), follows its Indian predecessor.⁶³ Even the resemblance of the compensation amount is also striking: the Indian Act imposes a fine up to Rs. 200 for smoking in public place, while the Bangladeshi law opted for 300 BDT.⁶⁴

One explanation by the Drafting Wing is that firstly the tobacco control acts are implementing mechanisms for the WHO Framework Convention on Tobacco Control 2005⁶⁵, which both countries are party to.⁶⁶ Hence the implementing laws had to incorporate certain provisions as required by the WHO Framework. Secondly, a big argument is the similarity of socio-economic conditions shared by the two States, for law cannot be devoid of reality. This reality however does not change the fact that Bangladeshi drafters are quite heavily influenced by India.

5. How Colonial Drafting Survived in Bangladesh: Styles, Influences and results:

Drafting styles of every country are grounded in distinctive political, cultural and institutional factors.⁶⁷ Drafting is a process of habit and not design,⁶⁸ and therefore I argue that legal drafting process is a technical and procedural aspect of the colonial past.

⁶² Smoking and Tobacco Products Usage Act, 2005, sec. 3 (1), 4(1)

⁶³ For example, compare Sec. 5 (1) (b) of Bangladeshi Act with Sec. 5 (2)(b) of the Indian: *No person shall - sell or cause to be sold any film or videotape or any other thing containing advertisement of tobacco products*, 5 1(d) of the Bangladeshi Act with 5(2)(c)

⁶⁴ The amount of penalty was increased from 50 BDT to 300 BDT by sec. 4 of the Smoking and Tobacco Products Usage (Control) (Amendment) Act, 2013.

⁶⁵ The WHO Framework was adopted by the 56th World Health Assembly in May 2003, opened for signature until 29 June 2004. The Framework entered into force in 2005 as Article 36 of the Framework provided its entry into force upon 90 days after accession, ratification, acceptance or approval by a fortieth State.

⁶⁶ Bangladesh signed the Framework on 16 June 2003, and India on 10 September 2003. For details, see, United Nations Treaty Collections, Chapter IX, Health, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en>

⁶⁷ Lisbeth Campbell, ‘Legal Drafting Styles: Fuzzy or Fussy?’ (1996) 3(2) Mur. Uni. Elec. J.L.

Most drafting offices in the English-speaking world inherited the traditional style of legislative language used in the United Kingdom in the 19th century. Not only were drafters trained in this style, but they were influenced by the language of existing statutes.⁶⁹ Thus modern drafting in some jurisdictions still shows the strong influence of the traditional style. It is very difficult for drafters to shake off the bad habits gained from constantly studying and amending laws expressed in the traditional style, and many traditional expressions are still being used when there are simpler forms available.⁷⁰ The real challenge begins when the passed bill is implemented in the society, and the contradictions due to colonial drafting patterns unsuitable to modern Bangladesh gradually surface. The most striking aspects are as follows:

- Multiple Laws on same issue and the Resulting Conflict between Colonial and Post-Independence Laws: :

It can be argued that since independence Bangladesh has developed its own legal culture, with various supreme court rulings on constitutional, international law, child rights, criminal law and human rights issues.⁷¹ Therefore, when the British and Pakistani laws in force require revision and amendment to keep up with changing times and social needs, such amendments often involve inserting these new legal culture and concepts.

Mixing old concepts with new one's results in coexistence of incoherent colonial and modern legal patterns in a single textual body. For example, the Penal Code 1860 declares having sexual intercourse with a wife below 13 years as rape (sec.375), but the Suppression of Violence Against Women and Children Act 2002 lifts the age to 14(sec.9), whereas the latest Child Marriage Restraint Act 2017 sets the age bar to 18(sec.2). The most problematic part here, I

⁶⁸ Peter Butt and Richard Castle, *Modern Legal Drafting* (CUP, 2006) 7

⁶⁹ Ian Turnbull QC, 'Plain Language and Drafting in General Principles' (First Parliamentary Counsel, Canberra, 2002)

⁷⁰ *ibid* at 4

⁷¹ For example, *Anwar Hossain Chy v. Bangladesh* [1989] BLD (Spl) 1 where the constitutional doctrine of basic structure was enumerated for the Bangladesh Constitution, *HM Ershad v Bangladesh* [2001] 7 BLC[2002] where the relationship between Bangladesh's national law and Public International Law was enumerated, *Syeda Shamsunnahar v Md.Khorshed Anwar Khan* [2005] 10 MLR where the 'Best Interest of Child' doctrine was upheld by overruling the Muslim law custody rule of favoring fathers to mothers for a child over 7 years, *BLAST and another v. Bangladesh and others ('Shukur Ali' Case)* [2010] Writ Petition No.8283/2005 where mandatory death penalty was declared void, *BLAST and Others v Bangladesh and Others ('Rubel Killing Case' or 'Guidelines on Arrest and Remand Case')* [2003] 55DLR(HCD)363 where arrest on grounds of suspicion was declared unconstitutional, *Aberchai Mog and others v Joint District Judge, Khagrachari and others* [2010] 19 BLC (HCD) (2014) 358, *Bangladesh Legal Aid and Services Trust and Others v Bangladesh and Others ('Fatwa' Case)* Writ Petition No. 5863 of 2009 with Writ Petition No.754 of 2010 and Writ Petition No.4275 of 2010 where issuing punishments on the basis of sharia by village religious leaders was declared unconstitutional and void.

submit, is that amongst all this chaos the vital issue of *marital rape is totally lost* (emphasis added). Another fit example is the conflicting laws on immigration, migration and trafficking. The Foreigners Act 1946 is the principal law dealing with the control of entry and presence of foreign nationals in Bangladesh, and it provides for immediate arrest of any alien present in Bangladesh without lawful papers (sec.3). However, this law fails to make distinction between illegal immigrants and asylum seekers who, in order to flee the persecution, failed to bring proper documents with them.⁷² This results in arresting the undocumented Rohingya refugees⁷³. The Executive Orders which granted the 1990s refugees were never updated to include the later influxes,⁷⁴ and therefore are in conflict with the colonial 1946 Act.

Adding to this dilemma comes the Trafficking Act 2012 which clearly prohibits arresting such victims of human trafficking who are illegal aliens (sec.33) but it conflicts with the 1946 Act which was not amended to incorporate this new law.

Then there is Section 3 of the Muslim Family Laws ordinance 1961 which by amendments made in 1974 mention the Arbitration Act 1940 will not be applicable for the purposes of this law. It has no further mentions that the 1940 law has been repealed and replaced by the Arbitration Act of 2001, creating reasonable room for question whether the 2001 law supersedes the 1961 law.

Such incoherence happens when the drafters are not sufficiently skilled in legal knowledge, linguistics, and drafting techniques. The Drafting Wing basically follows Thornton's Book.⁷⁵ But the more modern approaches are not taken. This has a serious implications in civil cases, where due to the contradictory legislative text lawyers often forward lengthy, frivolous and vexatious arguments to prolong the case lengthy at the expenses of the plaintiff, often a poor person in Bangladesh.⁷⁶

- Overriding Clause:

This is the second most major issue.

⁷² See, Arpeeta S. Mizan, *Analysing the Legislative Gaps in Detention Scheme of the Foreigners in Bangladesh: The Released Prisoners* (National Human Rights Commission 2014)

⁷³ The Rohingyas are a persecuted minority group from Myanmar who have been continuously fleeing to Bangladesh. However, due to government policy, after 1995 no Rohingya has been officially recognised as asylum seeker, making them all undocumented and illegal aliens.

⁷⁴ Julfikar Ali Manik, 'Refugees' long stay to stretch even further', *The Daily Star*(Cox's Bazar 8 July 2012) <<http://www.thedailystar.net/news-detail-241208>>

⁷⁵ G.C. Thornton, *Legislative Drafting* (Bloomsbury) 1996

⁷⁶ Telephone interview with Kawser Ahmed, Advocate, Supreme Court of Bangladesh (Dhaka, 27 February 2016)

Numerous laws in Bangladesh contain the overriding clause which reads as: “Notwithstanding anything contained in any other law for the time being in force...”. The overriding clause is a colonial legacy which continued into the Bangladeshi legal system as a matter of strategic convenience and resources weakness: often while drafting a law, the drafters or the legal research team in the Drafting Wing do not have the time, means or mechanisms to do an extensive background study. This habit makes the laws complicated. Many other once colonized countries have moved away from this style, for example, Australia.⁷⁷ The Drafting Wing is a small body of about 40 officers.⁷⁸ One body that could be of assistance is the Law Commission, responsible for reviewing laws and recommending amendments. However, the Commission is a small body whose recommendations, having no binding force, are often ignored.⁷⁹ The drafters often cannot afford time or resources to read and scrutiny all the existing laws sharing the subject matter of the drafting bill, which would lead to multiplicity of conflicting provisions. The overriding clause therefore works as a safeguard against such conflict (because according to general rules of interpretation, a statute later in time will prevail over a statute earlier in time: *lex posterior derogate legi priori*). An example can be the multiple laws on age of majority and children rights. The Penal Code 1860, the Majority Act 1874, the Contract Act 1872, the Labor Act 2006 and finally the Children’s Act 2013- all of these laws have different provisions setting different ages for minors. Until the 2013 Act, the child’s age varied before the court according to the law under which they were convicted. Another fine example is the Anti Trafficking Act 2012 which in its overriding clause provides not to withstanding any other law, but adds that if there are any other law in force containing better standards for victim protection then that law should be applied *despite inconsistencies* with the Anti Trafficking Act (emphasis added). Such incoherent provisions are potent to confuse the judiciary and executive to decide which other law could be better to override the 2012 Act, the only law to try trafficking cases.

- Multiple drafts for a single law:

⁷⁷ The Parliamentary Council of Australia in a 2002 paper proposes avoiding the expression ‘Notwithstanding anything to the contrary contained in the XYZ Act’ by simply saying ‘Despite the XYZ Act’; See, 2002

⁷⁸ *ibid*

⁷⁹ Editorial, ‘Law Commission is Comatose’ *The Daily Star* (Dhaka 7 June 2009)
<<http://www.thedailystar.net/news-detail-91464>> accessed 28 July 2017

Sometimes a single piece of legislation is a result of a multiple drafts before it is finalized. One example can be the suppression and Prevention of the Trafficking in Humans Act 2012. This Act was originally drafted thrice: in 2001, 2009 and finally in 2012.⁸⁰ Keeping a balance among the various drafts is a challenge especially when the drafts are prepared by different people ensuing different writing and grammatical patterns. Moreover, a number of ‘outside authorities’⁸¹ such as the UN organisations are involved in this type of drafting. When the legislation in question is a pre requisite for a string aid or donation, the foreign factor becomes more evident and dominant: delegates as donor agents make suggestions demand specific points in a law etc. In such cases the drafting wing does not enjoy enough freedom and discretion and are obliged to operate within a set periphery. These drafts are prepared in English for the comprehension of the donors. But once translated/ transliterated in Bangla before being presented to cabinet as per the Bengali Language Implementation Act 1987⁸², the text becomes substandard, containing appalling transliteration, and changing the textual meaning. An anecdotal reference can show the point here: once ‘death sentence’ was literally translated as ‘*mora* (dead) *bakko*(sentence)’ instead of *mrityu danda*, the proper Bengali terminology.⁸³

- Explaining the Indian Influence:

The Indian influence, apart from the similarity of socio-economic-cultural context, lack of originality and the vigile judicial activism of India, is explained by the argument that nothing comes out of nothing, and that to start drafting on laws on topics which are being legislated for the first time in Bangladesh, the drafters need a sample to follow and take guidance from. However, it is not that every new law is followed from the examples of other countries. An example is the Renewable Energy Policy (*Tekshoi Jalani Niti*) of 2008.⁸⁴

- Good faith clauses:

⁸⁰Interview with Executive Official from the Ministry of Law, Justice and Parliamentary Affairs (Dhaka, 3 March 2016) The Executive spoke on grounds of anonymity.

⁸¹ As referred by the officials in the Drafting Wing

⁸² Bangla Bhasha Procholon Ain 1987

⁸³ cf Executive Official (n.80)

⁸⁴ Adopted by Ministry of Power, Energy and Mineral Resources Power Division

This is another colonial concept widely prevalent in Bangladeshi legislations.⁸⁵ The Law ministry from 2010-2011 onwards have been trying to avoid incorporating the principle of good faith in the laws, because good faith clause prevents transparency by prohibiting accountability of the executive. However, the use still persists, and we can see the good faith clause being incorporated in laws as recent as those passed in 2015, e.g. the Nuclear Power Plant Act 2015⁸⁶. This persistence is mainly due to the insistence by the Executive.⁸⁷

A good chunk of the executive still maintains the view that in prevalent socio-legal context of Bangladesh, the executive needs enough safeguard to function effectively.

The situation can be understood from the vetting process of the Bangladesh Economic Zones (Amendment) Act-2015, finally passed in June 2015⁸⁸. From January till April 2015, a bill for amendment of an act had been vetted in the cabinet. The drafting wing had not inserted the good faith clause in the original bill. But after the vetting by the concerned ministry and the cabinet, the representatives of the stake holders strongly demanded the insertion of good faith clause.⁸⁹

This is an example of how the conflict of interest between the executive and legislative costs efficacious legislative drafting. The bureaucracy as prevalent can be compared to uphold many colonial practices, including detachment from common public. Whereas the legislative is trying to make the offices open and easily accessible (for example, inter alia, through the promulgation of the Right to Information Act 2009), the executive is yet to welcome it.

- Vague and over-arching words and reliance on executive:

Most Bangladeshi laws have provisions extending immense discretionary power to the executive by means of vague terms and provisions. One commonly found provision is

⁸⁵ cf n.33

⁸⁶ Section 28 of the Act provides: *Any act done in good faith before or at the commencement of this Act regarding the nuclear power plant construction and operation by the government, the chairman, managing director, project director, another director, consultant, advisor, officer or employee cannot be addressed in any civil or criminal case or no other legal action can be taken.* Act no. 19 of 2015

⁸⁷ cf Executive Official (n.80)

⁸⁸ Staff correspondent, 'Bangladesh's Cabinet Okays Draft of 5 Deals To Be Signed With India During Modi's Visit', *The Daily Star*(Dhaka, 2 June 2015)<<http://www.thedailystar.net/backpage/cabinet-okays-draft-deals-india-91099>> accessed on March 10, 2016

⁸⁹ cf Executive Official (n.80)

“...as may be declared by the Government, by notification in the Official Gazette...”, which works as a safety-catch for future questions that may rise while applying the law. Another example is the frequent use of the phrase ‘Appropriate Authority’, which reads: “appropriate authority means any authority or organization, established or formed under any law or any instrument having the force of law”. For example, This type of provisions put too much authority on the Executive *because* it makes the legislative provisions vague. The executive, while acknowledging the colonial legacy, still upholds the necessity of such provision on the basis of flexibility. When a law introduces a new system or concept to the society, it requires flexibility.⁹⁰ Therefore, many acts of Parliament provide for further interpretation or exercise of power through future gazette notification by proper authority. This ensures enough flexibility to handle unforeseeable circumstances. This is often considered to be an innocent clause in the law by the drafting department.⁹¹

Another reason behind this over reliance and a bit too much discretion vested in the executive is strategic. The law makers in Bangladesh while promulgating laws need to consider the risk of backfiring: too much rigidity in the law i.e. strict rules for punishment might make the law impractical in the socio economic context of Bangladesh and thus frustrate the purpose. The Tobacco Control Act is a case to note on this point. The socio economic and cultural context of Bangladesh is pro-smoking.⁹² tobacco, *hukka*⁹³, *bidi*, feature prominently as a cultural lifestyle choice, often depicting the elites of the classical Bengali social strata. Cigarette has continued as a modern version of this legacy. If we add the illiteracy factor in this equation, we can get a pretty clear picture that banning smoking is a mammoth task for Bangladesh. In this scenario, the Tobacco Control Act is

⁹⁰ Flexibility in social systems and institutions is a factors which is often affected by new legal concepts. For example, while courts are expected to ensure the proper application of the already fixed law, courts also need to be flexible so that by interpreting those laws in new manners they can actually uphold the rights enshrined in those laws. See, Jonas Ebbesson and Ellen Hey, ‘Introduction: Where in Law is Social-Ecological Resilience?’ (Contributions from Law for Social-Ecological Resilience Symposium Stockholm, Sweden, 2010)

<<http://www.ecologyandsociety.org/vol18/iss3/art25/>> accessed on April 3, 2016

⁹¹ Interview with Asad Nur, Senior Assistant Secretary, Legislative and Parliamentary Affairs Division Ministry of Law, Government of Bangladesh (3 march 2016)

⁹² Kaneta Choudhury, S.M.A. Hanifi, Abbas Bhuiya and Shehrin Shaila Mahmood, ‘Sociodemographic Characteristics of Tobacco Consumers in a Rural Area of Bangladesh’ (2007) 25(4) J. Hlth.Pop.& Nut. 456–464

⁹³ A single or multi-stemmed instrument for smoking tobacco whose smoke is passed through a water basin before inhalation. See, Edward Balfour, *The Cyclopaedia of India and of Jordan and Eastern and Southern Asia*, (v.2, Bernard Quaritch, (1885)

actually introducing a significant change. The common people are suddenly through this law *discovering* (emphasis added) that a social pastime such as smoking while chatting with friends and family in a field is not only reproachable, but there are pecuniary penalty! This, for a society consisting of 78.58%⁹⁴ adult literacy rate, is hard to grasp. Research shows that 20% cigarette retailers think selling cigarettes is ethical for them, mostly because it ensures their family's survival.⁹⁵ Moreover, due to the low rate of literacy people do not understand or even realise the negative sides of smoking,⁹⁶ which according to psychological research on legal consciousness affects their decision making as regards credibility of law and obeying it. I discuss it in detail in coming sections.

By introducing a minimal punishment of 300 BDT the State is first of all instilling the knowledge and acceptance in the public mind that smoking in public places is a public health concern and not a breach of personal liberty. So the amount is not of essence, rather the idea that I have to pay fine how-ever-much nominal is the aim. This realization can make the law a success, and that success is a benchmark⁹⁷ of rule of law. If Bangladesh chose a Developed country strategy such as the United Kingdom where smoking in public places can cause compensation amounting to a rigorous amount, then most of the smokers, who are the middle class and lower middle class people, would remain beyond the application of law simply because they just could not pay the large amount. If that failure to payment led to civil imprisonment, then the Act itself would stand the chance of being braved as bad law, hence ineffective, and hence failing the rule of law altogether. According to the drafters, the law could not be pro-rich.

This is actually questionable whether the Anti -Tobacco Act is actually pro-poor. I argue that pro-poor law does not making a farce out of a social issue which can be eliminated

⁹⁴ Industry and Labour Wing, Bangladesh Bureau of Statistics , 'Report on The Bangladesh Literacy Survey', (Ministry of Planning June 2010)
<<http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/LatestReports/Bangladesh%20Literacy%20Surver%202010f.pdf>> accessed on April 3, 2016

⁹⁵ Md. Tarikul Islam, ' Ethics Pops up, Economy Constrains: Ethical Dilemma of Tobacco Retailers in Selling Cigarette to Minors', (2012) 4(2) Eur. J. Bus.& Man. 3,
<<http://www.iiste.org/Journals/index.php/EJBM/article/viewFile/1030/950>> accessed on April 4, 2016

⁹⁶ibid

⁹⁷ Benchmarks are predetermined values for indicators that can be based on normative or empirical considerations. In Human Rights Law, benchmarks help identify the attributes of a right. Through the process of selecting and developing suitable indicators indicate whether the implementation of the right has brought any clear, concrete and tangible result. See, Office of the High Commissioner of Human Rights, *Human Rights Indicators: A Guide to Measurement* (United Nations Human Rights 2012)
<http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed on April 4, 2016

by law and create a better rule of law culture. This is not only a civil rights issue, this is also a matter of public nuisance, and this shows why the law of torts is of no significance in Bangladesh.

The language of the smoke free places must also be read in this socio-economic context. The UK Tobacco Control Act and Health Act are for a literate and educated audience, unlike Bangladesh and India. However, from an ambiguity perspective, I argue that the Indian legislation does fare better than the Bangladeshi drafting due to its structured definition which addresses any future questions in a foreseeable pattern, thus ensuring substantive due process of law⁹⁸. This as such again points towards the linguistic weakness of the Drafting Wing of the Law Ministry.

- Executive tendency to preserve status quo:

Since independence, Bangladesh has developed a pro-bureaucratic culture. Again an aftermath of colonial influence, the executive approaches with many laws of colonial pattern can be allegedly attributed the Executive's preference for maintaining status quo. I have already argued how the Executive of Bangladesh is still more colonial in attitude than the judiciary and the legislative. As such, many laws dealing with socio-economic issues are drafted in a way to absolve the executive of its duty with minimal effort so that State can reduce its share of the burden. A very timely example can be the debates preceding the Child Marriage Prevention Act 2017 which provides an exception clause allowing child marriage with parents' consent in extra ordinary circumstances.⁹⁹ One of the reason's by the ministry of women and children's welfare was that lowering the marriageable age for girls to 16 will ensure better safety for the girls especially in the rural areas.¹⁰⁰ In case of sexual abuse (at times as serious as rape and childbirth resulting

⁹⁸ Substantive due process of law means that the law must not be unreasonable and arbitrary, a statute not serving any legitimate governmental purpose thus violates substantive due process. See, *Slaughterhouse Cases* [1873], 83 US 36, *West Coast Hotel v. Parrish* [1937] 300 US 379 and *Griswold v. Connecticut* [1965] 381 U.S. 479

⁹⁹ Child Marriage Restriction Act 2017, sec.19. Also see, Rohini Alamgir and Afrose Jahan Chaity, 'Child Marriage Restriction Act 2017 to Practise No Restraint, *Dhaka Tribune* (Dhaka 28 February 2017) < <http://www.dhakatribune.com/bangladesh/law-rights/2017/02/28/child-marriage-restriction-act/>>, accessed on 5 April, 2016, *Raffat Binte Rashid*, 'Legal Marriageable Age For Girls Still Under Review, *Unicef Bangladesh Media Center* (Dhaka 17 December 2015) <http://www.unicef.org/Bangladesh/media_9756.htm> accessed on 5 April 2016

¹⁰⁰ According to Meher Afrose Chumki, State minister for women and child affairs, 'There are certain countries where even 14 years is allowed to get married. To avoid any illicit relations or living together, we will consider (changing) the law.' See, Nita Bhalla, 'Girls at risk as Bangladesh mulls lowering age of marriage, says HRW',

from the rape), majority people are still of the opinion that the victim if married to the offender will be socially absolved and reinstated. How atrocious the argument might sound is not the issue here. If the age of majority for marriage is 18, then it poses legal bar to such easy solution and the State has to take the responsibility of maintaining the child/victim (under the auspices of *Nari O Shishu Nirjaton Domon Ain 2002*¹⁰¹) posing a challenge for the State to execute its law. Moreover, laws like *Nari O Shishu Nirjaton Domon Ain* which often contain anti-victim provisions are reflections of this state attitude. The 2002 Act provides that the child born of rape will receive maintenance from the income or the property of the rapist, which means the victim is being forced the law to maintain contact with her offender should she be adamant about realizing her right to compensation and payment.¹⁰² This is a huge psychological pressure for the survivor victim which can be considered as a double victimization. But the State could not show the consideration because the other option would mean maintaining the survivors out of State fund, increasing the financial burden of the State.

- The ministerial Decisions:

The colonial language of the colonial laws is very latent and striking. The language is instructive, positive and when it comes to reserving power to the executive, unfailingly vague and ambiguous. In independent Bangladesh, the legislative templates of the colonial era had been followed until quite recently. Until 2000, the laws which were drafted by the Drafting Wing followed a particular pattern: long sentences, tough and complicated narrative, hard to comprehend vocabulary etc.

After 2000, as part of Ministry Decision to make the laws more user friendly (i.e. people friendly), simplification of language is being emphasizes more than before. An example of this trend can be the Suppression and Prevention of the Domestic Violence Act 2010 which can be deemed as one of the most progressive laws.¹⁰³

- Laws on special issues:

Reuters (Dhaka, 13 October 2013) <<http://www.reuters.com/article/us-foundation-Bangladesh-childmarriage-idUSKCN0I212E20141013>> accessed on 7 April, 2016

¹⁰¹ *Nari O Shishu Nirjaton Domon Ain 2000*

¹⁰² *Nari O Shishu Nirjaton Domon Ain*, 2000 sec.13

¹⁰³ cf Nur (n.91)

Laws on technical issues such as the Trademarks Act, 2009 and the Copyright Act of 2000 have texts too difficult to understand underlying substantive and procedural issues.

the drafters in the ministry often lack knowledge and a good understanding of the theoretical and substantive concepts. As a consequence, the legislators read and heavily borrow from the legislatures of the neighboring countries. For example, the Suppression of the Domestic Violence Act 2010, one of the most progressive Acts in Bangladesh incorporating the principles of restraint order for accused,¹⁰⁴ preserving the victim's right to reside in his/her residence by way of residence orders,¹⁰⁵ community service as a punishment before awarding imprisonment etc., was drafted following the Domestic Violence Law of Srilanka¹⁰⁶. This act was originally commissioned to consultants for drafting, but the draft was not deemed satisfactory by the cabinet and then the Drafting wing redrafted the bill from the Srilankan one.

Thirdly, lack of expertise by the drafters causes these drafts to be done by consultants. While expertise in specific drafting is not commonly found even in other countries (e.g. Australia or the UK), The Government of Bangladesh neither offers any basic training. Also Consultants are very limited and not easily found in Bangladesh. As such, the consultants or drafters while drafting law on international or special issues simply follow the mandates given by the UNO and other international organisations. In most of the cases the English text is borrowed from other countries. Therefore, when translated (often through transliteration) into Bangla, the law takes a hideous form and language. This becomes difficult both for academics and the common people to understand.

6. After the Drafting: The impacts on public life:

- Gaining public opinion to abide by the law:

The common man's non-compliance with law, as past researches show, is not something unusual.¹⁰⁷ A key indicator of an effective Executive is the ability to bring public behavior into

¹⁰⁴ Prevention of Domestic Violence Act, 2005 sec. 4 (Srilanka), Suppression of the Domestic Violence Act 2010, sec.13 (Bangladesh)

¹⁰⁵ Prevention of Domestic Violence Act, 2005 sec. 5,11(Srilanka), Suppression of the Domestic Violence Act 2010, sec.15 (Bangladesh)

¹⁰⁶ Prevention of Domestic Violence Act, 2005

¹⁰⁷ See, T.R. Tyler and Y.J. Huo, *Trust in The Law: Encouraging Public Cooperation with The Police and The Courts*, (V.5, Russel Sage Foundation on Trust, New York 2002) 3. Also see, Sonja E. Forward, 'What Motivates Drivers to Disobey Traffic Regulations and How Can We Change This Behaviour?' (16th Road Safety on Four Continents Conference Beijing, China 15-17 May 2013) < <https://www.diva-portal.org/smash/get/diva2:759176/FULLTEXT01.pdf>> accessed on 16 April, 2016

line with the directives of law and legal officers, including law enforcement agencies.¹⁰⁸ The Executive and the law enforcement agency's ability to implement rule of law is dependent on people's compliance. However, such compliance is not to be 'taken for granted'.¹⁰⁹ Tyler & Huo refer to a study showing noncompliance to be usual in people's dealings with police. The researchers further observed:

“Although deference to legal authorities is the norm, disobedience occurs with sufficient frequency that skill in handling the rebellious, the disgruntled, and the hard to manage- or those potentially so- has become the street officer's performance litmus test.”¹¹⁰

A possible way out suggested by Tyler is encouraging the people to realise that the law enforcing authorities exercise the authority duly and that the motives for such exercise are trustworthy.¹¹¹ Establishing people's belief in fair authorities will reciprocate a popular trust that laws are made for addressing problems and facilitate in creating the rule of law culture where people will start respecting law.¹¹²

- Gap between Public's Perception and Executive's Goal in processing the Law:

Asuccessful communication makes the audience dissatisfied with their own views and convinces them that their own attitudes need to get as better as the communicator/information giver.¹¹³ This means, for a law to become effective, the merits of law abiding behaviour must be continuously portrayed to the people. When the authority fails to do so, people may get contradictory idea i.e. that violating the law does not have so harsh consequences as laid down in the laws, they tend to quickly lose forget the law and the legal system loses its standing.¹¹⁴

- Bangladeshi Laws lacking the traits of Effective Message:

A most noticeable feature of the colonial legacy is the complicated text of the laws. Below I will take a few factors important in drafting and analyse how they contribute towards colonial drafting.¹¹⁵ Research shows that to be effective and consequently get people's notice, a message needs seven traits: **Attractive:** it must be appealing to the audience; **Clear:** easy to understand;

¹⁰⁸ cf Tyler and Huo (n.108)

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid* at 7

¹¹² *ibid* at 16

¹¹³ Kenneth G. DeBono, 'Investigating the Social-Adjustive and Value-Expressive Functions of Attitudes: Implications for Persuasion Processes' (1987) 52 J. Pers.& Soc.Psy. 279-287

¹¹⁴ *ibid*

¹¹⁵ cf Executive Official (n.80)

Consistent: used repeatedly; **Credible:** believed by the audience; **Persuasive:** able to generate change; **Relevant:** it needs to focus on an actual problem; and **Trustworthy:** the alternative presented should be possible to achieve.¹¹⁶ Moreover if the message needs to be effective, the presenter of the message also needs to be credible and trustworthy, which can hardly be claimed for a country like Bangladesh suffering from decades of bad governance.¹¹⁷

The laws of Bangladesh lack most of these traits. If these traits are applied to the earlier mentioned Tobacco control Act, the following shortcomings may be noticed: first, research shows law alone cannot stop mass smoking,¹¹⁸ so Bangladesh fails to satisfy the ‘attractive message’ criteria. Second, other factors which sustain smoking in Bangladesh (well-established supply chain, lack of awareness, high unemployment rate, young generation’s attraction to the tobacco products etc.) are not considered.; so the law becomes ‘unpersuasive and irrelevant’. Also, historically tobacco producers take the advantage of the gray areas of laws and do their business quite strongly, depriving the retailers of benefits.¹¹⁹ It demotivates the stakeholders like retailers to Trust on law! The final result: nobody believes law can be a solution.

- Lack of expertise:

Lack of experts on specific issues addressed by drafted bills creates complications in inter-departmental communications regarding the purpose and application of the bills. This vacuum is felt more than before after the separation of executive from the judiciary in 2007 by the *Masdar Hossain Case*.¹²⁰ Prior to the separation, many judicial officers well aware of legal principles,

¹¹⁶ ‘The Message’, in (Delhomme et al. eds.) *Manual for Designing, Implementing, and Evaluating Road Safety Communication Campaigns* (Belgian Road Safety Institute, Brussels 2009)
<https://www.researchgate.net/profile/Forward_Sonja/publication/281801452_Manual_for_Designing_Implementing_and_Evaluating_Road_Safety_Communication_Campaigns/links/561cfe0a08aef097132b136a/Manual-for-Designing-Implementing-and-Evaluating-Road-Safety-Communication-Campaigns.pdf> accessed on July 27, 2016. Also see, Michael Siegel and Lynne Doner, *Marketing Public Health: Strategies to Promote Social Change* (Gaithersburg, Aspen Publishers 1998)

¹¹⁷ cf Tyler and Huo (n.108) 6

¹¹⁸ Md. Tarikul Islam, ‘Ethics Pops up, Economy Constrains: Ethical Dilemma of Tobacco Retailers in Selling Cigarette to Minors (2012) 4(2) Eur. J. Bus. & Man. 1
<<http://www.iiste.org/Journals/index.php/EJBM/article/viewFile/1030/950>> accessed on 20 April 2016

¹¹⁹ *ibid* at 4

¹²⁰ Secretary, Ministry of Finance v Masdar Hossain [1999] 52 DLR AD 82 [1999]. The Masdar Hossain Case upheld the well-known principle of separation of judiciary. The Appellate Division in the judgment held that “judicial service is fundamentally and structurally distinct and separate service from the civil executive and administrative services of the Republic... that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services. (para 76)”. See Bangladesh Supreme Court Bar Association, <http://www.Bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php>

and would work in the legal cells of the ministries. This practice has now stopped. Now there is no consistent implementation of hard-to-understand laws by the Executive and the Judiciary.

7. Negative Impact upon the Rule of Law:

When the people continuously witness that their disobedience to law is bringing little punishment, or that even serious crimes like murder, sexual and gender-based violence etc. are getting unpunished due to bureaucratic/procedural complexities, they “start believing in their own vulnerability” and ultimately lose respect for law.¹²¹ Thus the culture of impunity takes a firm root. So, even progressive laws, especially those upholding civil rights, to be violated in such a largescale that the executive can do nothing.

The situation can be portrayed in the Bangladesh context by the Control of Graffiti and Poster Pasting Act of 2012.¹²² This law was first prepared by the Election Commission as a draft ordinance to penalise the writing of slogans and pasting of posters on walls in any election campaign.¹²³ The law stipulates proper procedure and designated spaces for posterizing, and imposes a penalty of minimum 5000 BDT to maximum 10,000 BDT.¹²⁴ However, till date the law remains basically unused and unimplemented, and most cases of illegal posterizing are still dealt as criminal cases under the Penal Code 1860.¹²⁵

- **Creating and Sustaining the Vicious Cycle:**

Since laws are dysfunctional, the Police are also reluctant in ensuring implementation. Policies to boost police performance have often gone awry. An interesting example happened when the Dhaka Traffic Division decided measuring performance by the number of tickets issued by every officer, which led to unhealthy competition of handing out tickets to drivers for minor faults and false issues, and a major road deadlock due to police’s preoccupation with filing charges than

¹²¹ cf Tyler and Huo (n.108) at 7

¹²² Deyal Likhon O Poster Lagano (Niyontron) Ain, 2012

¹²³ Ain O Salish Kendra, ‘Right to Freedom of Expression’ in *Human Rights in Bangladesh 2008* <http://www.askbd.org/hr_report2008/8_Expression_final.pdf>

¹²⁴ Deyal Likhon O Poster Lagano (Niyontron) Ain, 2012 sec.6

¹²⁵ For example, a defamation case was filed against MP Latif for distorting Bangabandhu Sheikh Mujibur Rahman’s image in posters, Daily Star editor was sued for publishing a poster propagating *Hizbut Tahrir*’s (an Islamist militant group) plans to topple government etc. see, Online Report, ‘MP Latif sued for distorting Bangabandhu’s portrait’, *The Daily Star* (4 February 2016) <<http://www.thedailystar.net/politics/al-mp-latif-sued-distorting-bangabandhus-portrait-212518>>, Mintu Chowdhury, ‘Bangabandhu’s image ‘distorted’ on Chittagong Awami League MP MA Latif’s billboards’, *Bdnews24.com* (Chittagong, 3 February 2016) <<http://bdnews24.com/Bangladesh/2016/02/03/bangabandhu-s-image-distorted-on-chittagong-awami-league-mp-ma-latif-s-billboards>>; **Editorial, ‘Press Must Be Free to Report the News’**, *Dhaka Tribune* (Dhaka, 18 February 2015) <<http://www.dhakatribune.com/editorial/2015/feb/18/press-must-be-free-report-news>>

controlling traffic.¹²⁶ This in turn skyrocketed people's distrust on police and law, creating a vicious cycle; also common in other branches of law.

Conclusion:

Good governance and rule of law are indicators and prerequisites for a functioning democracy. Bangladesh started its journey as an independent democratic State with the specific pledge to uphold and respect the human rights and human dignity of its citizens. The grey area between the theoretical and practical aspects of law making and implementing has created a stalemate in the present Bangladeshi society where both the society and the governance system is suffering. As the discussion above shows, this is attributable to not only the poor quality of law making but also on how State thinks about and treats its people. To make progress beyond the booming economic sector, Bangladesh needs to focus on the challenges I have discussed in this Paper, and must draw positive examples from other developing States facing similar challenges. With carefully planned maneuvering, this vicious cycle can be broken in time to build up a legal system where the law and people complete each other.

¹²⁶ Rafsan Jani, Traffic sergeants compete to hand out cases', *Dhaka Tribune* (Dhaka 7 August 2017) < <http://www.dhakatribune.com/bangladesh/dhaka/2017/08/07/dhakas-traffic-sergeants-compete-hand-cases/>> last accessed 9 august 2017