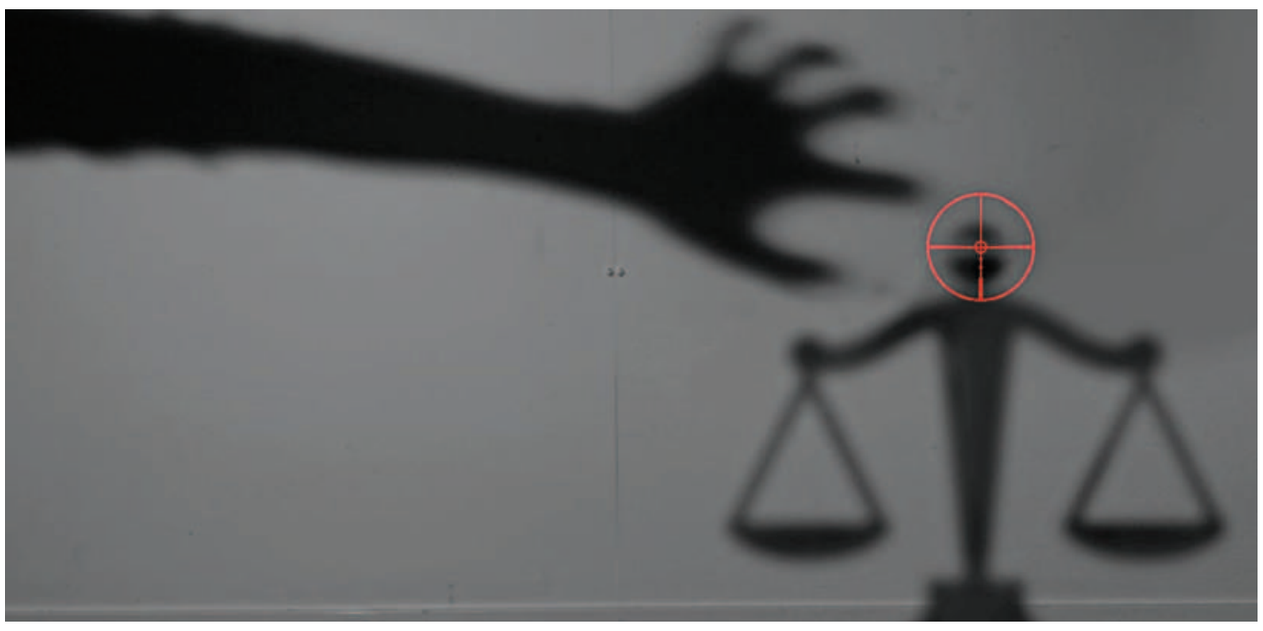
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

ADVOCATING FOR LAW REFORM

The necessity of enacting witness protection law

Professor K. Shamsuddin Mahmood

IN the administration of justice system, be that criminal or civil, complainants as well as their witnesses perform a very decisive and significant role, since to a great extent dispensation of justice profoundly relies on evidences put forward by them. However, witnesses are often vulnerable to threats, intimidation, coercion, duress, harassment, etc. by the offenders or their accomplices that prevent them from testifying before the investigating officers (in the stage of investigation) or from giving evidences before the Court or Tribunal during trial, thereby occasioning the probability of miscarriage of justice. Thus, to secure ends of justice, both victim's testimony and evidences gathered



from the witnesses are imperative elements in establishing any guilt or civil claim and also a congenial social atmosphere, which is a condition precedent, to relieve them from fear and pressure in support of administration of justice in the society at large. Hence, it has now-a-days become rudimentary for any State to ensure adequate protection to victims as well as witnesses so that cogent evidences in trials before the Court become available to avoid miscarriage of justice.

Unfortunately, Bangladesh and India still do not have any independent law for this above odious situation, except our other colonial neighbour, Pakistan [where Witness Protection, Security and Benefit Act, 2017 was enacted (except for Province of Sindh and Baluchistan having their own separate laws)]. However, India, does have a Witness Protection Scheme, 2018 which has been prepared with inputs and suggestions gathered from open sources, police personnel, judges and civil society that ultimately being finalised by the National Legal Services Authority (NALSA) and got approval of the Supreme Court of India by the landmark judgment in *Mahender Chawla and others* v *Union of India and others* (2018 SSC OnLine SC 2679) that initiated a step forward towards the above concern.

In this context it is noteworthy to mention, a three member Committee of the Bangladesh Law Commission headed by Lordship Mr. Justice Mostafa Kamal as Chair has in fact, recommended for a new law to enact towards protection of victims and witnesses along with their rights and privileges as early as 2006 (Bangladesh Law Commission Report No. 74) and also a Bill on the subject for the Parliament was drafted for consideration and enactment as a new law. However, statistics of the Law Commission reveals that a second report (being no. 108) was also submitted in 2011, but alas, the same has not been enacted.

Internationally in some countries witness protection is based on legislation, while in others it has evolved naturally as part of police activities. The Federal Witness Security Programme (WITSEC) which began in 1971 in USA (mandated under the Organised Crime Control Act of 1970 which subsequently amended in the Comprehensive Crime Control Act, 1984), probably the oldest such initiative in the world and widely acclaimed as an exceptional as well as valued tool for the USA to fight back criminal conspirators and such groups engaged with organised crime. Under the programme, victims, witnesses along with families would get new identities having proper documentation, accommodation, facilities and allowances towards basic living expenses or medical care.

European scenario in the matter is to some extent, different and varied, as in Germany, Italy, Czech Republic and Lithuania protection of witness are controlled by specific legislation, although this is not so in others (i.e. Austria, Denmark, Finland, Greece, Ireland, France, Luxemburg, Spain and the Netherlands). While in Austria, Slovakia and the UK, witness protection is embedded and managed within the Police Administration, in others (e.g. the Netherlands), the Executive or Judiciary of the country operates the programme. However, in Italy and Belgium, the Witness Protection Programmes are looked after and implemented by multi-disciplinary bodies (comprising of the Central Commission, made with the Under-Secretary of State of the Interior Ministry, two Judges/ Prosecutors and group of Experts having knowledge of organised crime along with the Commission on Witness Protection).

Earlier though, EU Millennium Strategy of 2000 outlined planned EU actions in this regard and proposed to develop and prepare an instrument in the form of an EU Model Agreement for protection of witnesses to operate across all EU member States by taking into account the experiences of Europol and use of bilateral understanding between member States. But with utter surprise and dismay, the EU Commission in 2007, after assessing the feasibility study of an EU Legislation for protection of witness concluded that time is yet not ripen and further studies are required to be carried out to identify an acceptable way forward. Afterwards, in the year 2009 the above fact was confirmed in a parliamentary deliberation that the EU Commission did not intend to legislate (in the aforesaid matter) as contemplated earlier.

To conclude, above being a precise world scenario of existing endeavours on the issues of protecting and preserving testimony of victims and witnesses, now time has come for us to decide as to whether Bangladesh should hang its decisions 'in limbo' like the EU countries or embark upon the Bangladesh Law Commission's recommendation and act as the USA did and thus, move forward for a new enactment.

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COURT CORRIDOR

HCD RULES ON PRENATAL SEX DETERMINATION

ON February 3, 2020, the High Court Division of the Supreme Court of Bangladesh issued a rule asking the government to explain as to why they should not be directed to prohibit the gender detection of unborn babies, in order to ensure protection of the unborn and pregnant mothers. In the rule, the court also asked respondents to show cause why their failure to frame a guideline to prevent gender detection of unborn babies should not be declared illegal. Secretaries to the ministries of health, women and children affairs and social welfare affairs, directorate generals of health services, family planning, department of women affairs and national institute of population research and training have been made respondents to the rule.

In the rule, the petitioner lawyer also sought explanation from respondents on why they should not be ordered to maintain a database of diagnosis report of unborn babies conducted by registered hospitals, diagnosis centres and other entities.

It is entirely a cultural reality that in certain parts of the world, the desired child is a male child. Gender discernment facilitates 'sex-selective abortion' or female foeticide in many cases when the gender of the unborn happens to be not of the liking of the parents-to-be. Additionally, in many cases, not bearing a male child is considered as the woman's failure (unscientifically so) and the same paves way for different forms of domestic violence and torture against women. Therefore, prenatal gender determination is found by many as violative of right to life of the unborn and also that of the woman. Allowability of this practice is violative of the principles of equality and non-discrimination as well. It will not be out of place to note that in 1994, India enacted the Pre-Conception and Pre-Natal Diagnostic Techniques Act which banned prenatal sex determination.

It is yet to see how the rule unfolds and how the State responds to the petition.

FROM LAW DESK.

LAW EVENT

DU wins the Bangladesh round of Jessup 2020

THE fourth Bangladesh national rounds of the Philip C. Jessup International Law Moot Court Competition took place from February 6-8, 2020, at the University of Asia Pacific (UAP). 24 Law Schools from across the country took part in this national qualifying round of Jessup, the largest and most renowned moot court competition for law students across the globe. Jessup Bangladesh, in association with the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) United States (US) Department of Justice (DoJ); International Law Students Association (ILSA); University of Asia Pacific (UAP); Old Bailey Chambers and UQEEL organised the Bangladesh national qualifying rounds of Jessup for the fourth successive year.

The inaugural ceremony and the exchange of memorials took place on February 6, while the preliminary and the knockout rounds took place on February 7 and 8 respectively. The team from University of Dhaka (DU) consisting of Rifat Zabeen Khan, Tahseen Lubaba and Jalal Uddin Ahmed won the championship, while the team from University of Chittagong (CU) consisting of Syed Fazlul Mahdi, Arafat Ibnul Bashar and Badhan Ghosh were adjudged as the runner-up. University of Asia Pacific bagged the 3rd place, while East West University (EWU) clinched the 4th place in the competition. As a result, DU, CU, and UAP have all qualified to participate at the international rounds of Jessup in April at Washington D.C., USA.

The grand finale of the competition was adjudicated by Justice Mirza Hussain Haider, Judge, Appellate Division, Supreme Court of Bangladesh; Justice Zubayer Rahman Chowdhury, Judge, High Court Division, Supreme Court of Bangladesh; and Barrister M Amir-ul Islam, veteran lawyer, Supreme Court of Bangladesh. They also graced the closing ceremony as the distinguished guests. Professor Dr. Jamilur Reza Chowdhury, Vice-Chancellor, UAP; Ms. Lesley Benn, Executive Director, ILSA; Mr. Eric Opanga, Resident Legal Advisor, OPDAT, US DoJ etc. were also present at the closing ceremony.

The judges of the grand finale lauded the performance of the mooters in the final and wished them good luck for the upcoming international rounds. They also stressed the importance of organising such mooting competition to develop the research and oratory skills of our law students, which would help them to become better legal practitioners in the future.

Apart from the championship and runner-up trophies, prizes in the other categories were also handed out in the closing ceremony. Rifat Zabeen Khan from DU won the best mooter award, while the team from CU won the best memorial award. The best new team award went to Khulna University while Premier University, Chittagong clinched the Spirit of the Jessup award.

Earlier on February 6, the competition was inaugurated by Mr. CM Shafi Sami, Chairman, Board of Trustees, UAP. Also present during the inaugural ceremony were Mr. Md. Asaduzzaman, Head, Department of Law & Human Rights, UAP; Mr. Eric Opanga, Resident Legal Advisor, OPDAT, US DoJ; Ms. Lesley Benn, Executive Director, ILSA; Mr. Qayum Reza Chowdhury, Former Chairman, Board of Trustees, UAP; Mr. Nuran Chowdhury, National Coordinator, ILSA Chapters, Bangladesh; and Advocate ASM Sayem Ali Pathan, National Administrator, Jessup Bangladesh.

Jessup is considered as the world cup of moot court competitions, assembling law students from over 100 nations in its international rounds. Bangladesh first took part in the international rounds of Jessup in 2017. Ever since it has been regularly competing in the international rounds. This year too, the red and green flag will make its way to Washington D.C. at the 61st edition of Jessup, courtesy to the teams from DU, CU, and UAP.

THE EVENT COVERED BY ALI MASHRAF, STUDENT OF LAW, UNIVERSITY OF DHAKA.

RIGHTS ADVOCACY

Social and cultural barriers in accessing civil justice system

Sekander Zulker Nayeen

GOAl 16 of the SDGs pledges 'ensuring access to justice for all' irrespective of their race, sex, colour, language, religion, wealth, etc. In Bangladesh, the poverty ridden people, women and vulnerable people are not getting easy access to civil justice system because of some social and cultural barriers. In a UN report on extreme poverty and human rights, some social and cultural barriers were summarised. Persons living in poverty often decide against bringing a case to court because of those barriers, thereby precluding them from accessing to justice system. In this write-up, hence, I tend to explain some of those barriers synthesising with my professional experiences.

The first obstacle is the fear of reprisal from more powerful actors of their community. An imbalanced position of the poor people in comparison with the muscle man of the society makes the former reluctant to approach any justice system. This one is a long traditional and also social obstacle in this country. Perhaps this was the cause for what the character *Upen* waived his right to appeal against the decree obtained by the landlord on the basis of false loan-defaulting case in '*dui bigha jomi*' of Rabindranath Tagore.

The second one is mistrust of the justice system which is also related with the first one. People of the society acquire this mistrust observing for long-time the outcomes of justice institutions. If the outcomes contradict with their perceptions of justice, they lost the trust upon the court. Although it is difficult to define which outcomes of judicial decision would be considered just outcomes, from the viewpoint of cultural belief it can be termed just one if it conforms with the maxim 'justice should not only be done, but should manifestly and undoubtedly be seen to done'. In other word, the people of the society and the individual litigant would realise that justice has been done. Such realisation denotes the people's prediction of judicial outcome which is popularly known as predictability of court's decision. It means the possibility to predict *ex ante* how the law will be applied by the court *ex post*.

The third obstacle is for women irrespective of their economic solvency. In Bangladesh, there are strong social and cultural norms that women should not claim their proprietary rights before the court and even at the time of family settlement. In our society, there is a concept of 'good sister' and 'bad sister'. The sister who leaves her inheritable proprietary right to brother is applauded as good one. Last week, while I was presiding over the court, a brother-plaintiff was deposing that he is the only successor of his parents. I scrutinised the documents and discovered that he has three sisters. When I asked him, 'why did not you implead your sisters as plaintiffs of this suit?' The lawyer replied that the sisters are so good and affectionate to their brother that they waived their rights in this particular property. Although goal 5 of the SDGs and inheritance law ensures women's right to economic resources, ownership and control over land and other forms of property, etc., women's cultural perception of losing the label of 'good sister' or 'good woman' refrain them from seeking their lawful rights before any court.

The fourth one is the socio-economic subordination. For example, in some societies, poor women may be unable to approach justice system without the assistance of a male relative, while in very hierarchical societies those who are economically dependent on other groups are unlikely to pursue justice claims against them. Once one man told me, he used to reside with his elder brother's family after the death of their parents. He now resides separate, but yet he could not ask his elder to have their ancestral property partitioned. He even cannot pursue a lawsuit for partition because all the related documents of their property are under the custody of his elder brother and he does not have sufficient means to collect copies of those documents from different government offices.

The fifth one is lack of awareness and access to information. Persons living in poverty are often deprived from the opportunity to acquire the tools, social capital and basic legal knowledge necessary to engage with the justice system. They are unaware of the existence and contents of their legal rights and entitlements, of the State's obligations and duties towards them, and of how to secure the assistance they need. To conclude, all these social and cultural barriers make the poor, women and vulnerable people incapable for accessing the justice system.

THE WRITER IS JOINT DISTRICT JUDGE AND VOLUNTEER OF *SDG LAB*.