LAW VISION

Improving higher education in Bangladesh: A case for collaboration with Australia

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Australia and Bangladesh have concluded the Trade and Investment Framework Agreement (TIFA) on 15 September 2021 to boost their trade and investment partnership. This agreement includes 'skill development and education services' as one of the listed high priority areas of bilateral cooperation (s 3). Bangladesh has become one of the fastest growing economies in South Asia and plans to be a middle-income country by 2030 and developed country by 2041. This vision warrants a mission of developing its human resources, an engine of growth capable of achieving this goal and identifying and addressing the challenges of sustainable development from now on to 2041 and beyond.

Higher education in Bangladesh is at crossroads, often failing to meet growing demand for quality educated and skilled workforces in the economy. It encounters the shortage of infrastructure, lack of enough qualified teachers, dearth of facilities, dominant government regulation, and paucity of sufficient research works by the academic community (WB tertiary education review 2019). The government policy of widening higher education has mushroomed public and private universities with less focus on their quality of education. The existing universities have performed poorly in recent International University Rankings (Times Higher Education World University Rankings 2022). Given such lacklustre performances, Bangladesh is set to face serious shortage of educated, skilled, and knowledge-based workforce, a human capital with high efficiency and productivity. This deficiency is recognised in its National Education Policy 2010 with a shift of emphasis on improving the quality of performance. The World Bank partnership report for Bangladesh 2016-20 emphasises on building human and social capital.With its far-reaching economic goal of continuing development, Bangladesh will soon not only need to improve its higher education but also become a major importer of higher education services.

Trade in higher education is dominated by developed countries including Australia. Although the UK, US, and Canada are engaged in the Asia-Pacific region, Australia, with its sufficient exportable surplus higher education services, enjoys comparative advantage and the predominant flows of Asia-Pacific students studying in Australia. This advantage in human skills and qualities, together with its proximity and suitable climate, have positioned Australia to enjoy the most competitive edge as one of the major exporters of higher education services to Bangladesh. Australia is already engaged in bilateral trade in other sectors with Bangladesh, which is the 30th largest trading partner. Australia imports textiles, clothing, leather goods and footwear from, and exports agricultural and dairy products, minerals, metals, and industrial raw materials to, Bangladesh. The advent of TIFA is a turning point, providing a framework for harnessing their trading complementarities and synergies to promote and deepen their bilateral economic cooperation and integration through trade and investment of mutual interest. The fast-rising urbanised middle-class young population of Bangladesh has a strong appetite and zeal for higher education, which should attract Australian exporters and investors to export higher education services to Bangladesh. Australia is well suited for investing in higher education services by establishing branches of higher education institutions in Bangladesh where Australia has already an established brand name record. Engaging in higher education in Bangladesh may serve an alternative pathway for Australian tertiary institutions' student recruitments, an insurance against embargo on Australia-bound Chinese students as a part of China's trade restrictive measures amid challenging bilateral tensions, and the changing geo-economic and geo-strategic landscape in Asia surrounding the South China Sea and Taiwan.

Trade in education services is an important component in Australia's trade in services, which reflects the core objectives of its National Strategy for International Education 2015 and Market Development Roadmap 2025. Students from Bangladesh have long been drawn to study in Australian high-ranking universities, English-speaking environment, employment opportunity, and comfortable lifestyle. This trend of Bangladeshi students studying in Australia as consumers of Australian education services has increased in recent years. TIFA can open prospects for further structured and augmented bilateral trade in higher education services.The National Education Policy of Bangladesh 2010 recognises higher education as a driver of economic and social development and creator of responsible citizens to address ever growing social inequality. Its Strategic Plan for Higher Education 2018-2030 reiterates the government's resolve to improve higher education to be of international standard. Its Perspective Plan 2021-2041 seeks to harness the demographic dividend by creating a knowledge-based economy propelled by a well-educated and trained labour force.

Bangladesh had protected its higher education sector from foreign entry and competition in its higher education sector under the Private University Act 2010. However, in response to mounting pressures on cost efficiency and high productivity in its developmental pursuit, Bangladesh has introduced limited deregulation and privatisation of this sector by restructuring and reforming in its higher education market. It has now diversified its higher education sector and allows the establishment of foreign university branch campuses or study centres under the 'Foreign University, Its Branches or Study Centres Operating Rule' of 31 May 2014. Under this Rule, foreign universities directly or through their local representatives, joint venture initiatives with any local university or investors may be allowed to establish and operate branches or study centres in Bangladesh subject to the approval of the higher education regulatory body – the University Grants Commission (UGC). The 2014 Rule has created domestic import options and foreign export interests on a bilateral and case-by-case basis. This liberalisation is likely to attract foreign higher education services providers and related foreign investment. Several British universities have expressed their willingness to establish offshore campuses in Bangladesh (*Daily Star*, 6 March 2021). Australian universities should seize the opportunity by providing in-house higher education services in Bangladesh.

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The Foreign Private Investment Act (No. XI) 1980 of Bangladesh legally protects foreign investment against arbitrary nationalisation and expropriation (s 7), and guarantees most favoured nation treatment, non-discriminatory national treatment between foreign and local investment (ss 4, 6), and repatriation of proceeds from sales of shares and profit (s 8). Foreign exchange, remittance, and profit repatriation may not require approval from the Bangladesh Bank, but are subject to government approval, limitations and to be done through authorised Dealers. The 2014 Rule requires an income and value added tax payment letter from the Registrar of Joint Stock Companies under the Company Act 1994 (s 7).

Australian education services providers, universities, and other tertiary institutions can play a complementary role under TIFA in providing higher education services in Bangladesh either independently or through joint venture and partnership initiatives in collaboration with any local university or investors, to establish and operate local branch campuses and teaching facilities, twinning arrangements, subsidiaries, or franchises in Bangladesh under the 2014 Rule. Such an arrangement would alleviate physical and financial resource constraints, which will be an incentive for many local students to opt for Australian standard higher education in Bangladesh. Importing quality higher education services from Australia will improve local human resources with international standard of skill and expertise in Bangladesh. This will significantly reduce the current massive outflow of Bangladeshi students going abroad for quality education and educational exodus for employment in foreign countries, thus arresting 'brain drain' to contribute to its gross national products.

Branching out Australian university campuses in low-cost Bangladesh would minimise operational costs and promote internal competitiveness among higher education institutions.The availability of cost-effective Australian standard higher education and research may attract foreign students from neighbouring countries of Asia, Africa, and the Middle East in higher education institutions in Bangladesh, affording an external source of revenue for these institutions and internationalising their prestige and reputation.The global visibility of high-quality attributes of higher education institutions are critical for attracting good students and staff - academic, administrative, and support alike. This human capital-building venture would make Bangladesh self-reliant with leverage in bilateral and multilateral negotiations in international relations. The benefit of such development will also tickle-down to secondary and primary levels of education.

The TIFA Joint Working Group may be assigned the task of initiating bilateral policy dialogue for a collaborative andmutually beneficial plan of trade in higher education services. Both countries must show that they are partners in building domestic education capabilities rather than a threat to each other's local providers. Should economic integration in higher education service eventuate, it would to be a rewarding experience for both parties because of their partnership, complementarities, and synergies in several sectors identified in TIFA.

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LAW LETTER

ADR IN THE CRIMINAL JUSTICE SYSTEM

Alternative Dispute Resolution (ADR) is a well-established procedure in the civil adjudication system, but it has not been widely introduced in the criminal justice system. Inadequate number of judges, absence of witnesses, etc. are making the criminal justice system more complex and causing delay in trial. As such, it is the high time to introduce ADR mechanism in the criminal justice system to avoid any kind of complexity or delay in trial.

Section 345 of the Code of Criminal Procedure, 1898 refers to the compoundable offences. Now-a-days, minor offences are compoundable by the consent of the parties. Consent of court is not necessary in compounding as offence if the parties are being agreed to do so amicably. However, compromise is not really possible in the grievous offences such as murder. Simultaneously, pity offences can be settled by compromising of the parties where the natural justice should be ensured, and the process needs to be guided by the legal activities.

ADR is now a popular option for the people at large to settle their disputes as it is time-efficient, cost-effective and allows parties to avoid procedural complexity. Compounding is possible at any stage of the trial, and in many cases, compounding is possible before pronouncing the judgment. In the case of *Md. Joynal and others* v *Rustom Ali and others* (1984) 36 DLR (AD) 240, the Supreme Court of Bangladesh highly appreciated the compromise which is the basic form of ADR.

Indeed, to promote the ADR necessary steps should be taken by enlarging the scopes of section 345 of the Code of Criminal Procedure, 1898. Offences under section 385 of the Penal Code, 1860 are also considerable to be compromised by using the ADR mechanism and it can only be possible when necessary amendments in laws are introduced. Many lawyers and legal professionals are not well familiarised with the process of ADR. To make them aware, several training centers should be established at the earliest time possible.

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LAW OPINION

Living under the agony of death

Mohammad Shishir Manir

In our legal system, the death sentence is awarded to those who commit the most heinous crimes. When a decision of a death sentence by a trial court is sent to the High Court Division (HCD) for confirmation, it takes years before it is heard and disposed of. The HCD may or may not uphold such a death sentence and the decision of the HCD may be challenged in the Appellate Division of the Supreme Court which takes further time to conclude.

A prisoner on death row, as a last resort, may apply for the Presidential prerogative of mercy under Article 49 of the Constitution. Therefore, with the acceptance or rejection of the mercy petition from the President, a proceeding of a death sentence comes to finality. From the date of passing the death sentence till the conclusion of the appeal process in the Supreme Court, a death row convict, on average, has to stay in a condemned cell for around a decade. What is it like to wait to be executed!

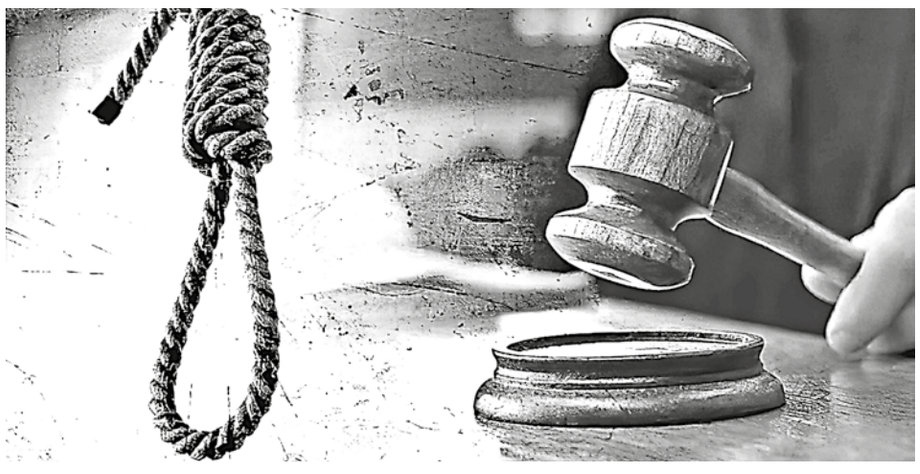
In 2018, Obaid Ali died in a condemned cell after spending 13 long years as a death-row convict. He died on the day he was scheduled to be released after he was declared innocent by the apex court. He was alleged and convicted for killing two police constables in 2006. Thanks to the prolonged delay, he could not have the luck to enjoy the free air.

As of August 2021, a total of 782 death reference cases were pending before the High Court for hearing. The trials of these cases concluded six to sixteen years ago but the convicts remained in condemned cells during this time. There are also instances where prisoners languished in condemned cells for as long as 20 years waiting for their appeals to be heard by the High Court Division. The prisoners spend this delayed time with the torment of death in 10 feet by 6 feet sized cells.

Prisoners' rights are often overlooked in the criminal justice system of Bangladesh. Prolonged delay in execution of a death sentence has a dehumanising effect. It has a legal implication of depriving a person of his life in an unjust, unfair and unreasonable way to infringe fundamental rights guaranteed by the Constitution. It creates adverse physical conditions and psychological stress on the death row convicts. Studies have found that the delay in disposing of death reference cases leaves the condemned prisoners in trauma resulting in losing their mental stability, tendency to make them suicidal, etc. The torments of death row prisoners remain unspoken since most of them come from the most deprived part of the society as found by a study conducted by the University of Dhaka.

In the case of *Re Medley* (1890) the Supreme Court of United States considered four weeks between sentencing and execution to be a long delay and results in "horrible feelings" and "immense mental anxiety amounting to a great increase in the offender's punishment."

In the landmark case of *Pratt and Morgan* (1993), the Judicial Committee of the Privy Council ruled that executing prisoners



after they had already spent more than five years on death row was "inhumane and degrading," amounting to unconstitutional double punishment. Such prisoners, the court held, must have their death sentences commuted to life in prison. This jurisprudence may have a great implication in our criminal justice system since our prisoners spend a long time waiting to be executed.

According to the statistics provided by the Department of Prisons of Bangladesh, 1,987 prisoners are languishing in condemned cells as of 19 September 2021. Immediately after the trial court verdict, convicts are placed in condemned cells according to section 30 of the Prisons Act, 1894. The Act states that a prisoner 'under sentence of death' shall be 'confined in a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard'. The phrase 'under sentence of death' is come under scrutiny since the prisoners are put into the condemned cell immediately after the trial court verdict and before there is finality regarding their fate by the apex court.

Similar prisons law operates in India. In *Sunil Batra* v *Delhi Administration and Others* (1978), the Indian Supreme Court held that Section 30 of the Prisons Act does not cover a prisoner on a death row so long as his petition for mercy to the President has not been disposed of. To be under sentence of death means to be under a finally executable death sentence. This view is confirmed by successive judgements.

The same court in *Union of India* v *Dharam Pal* (2019) held "The prisoner can be said to be under the sentence of death only when the sentence has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure... Till then the person who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of section 30, sub-section (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-section (2) of section 30, reducing the period of such confinement to a short duration."

The inordinate delay in disposing of a death reference case to its finality indeed amounts to double punishment violating fundamental human rights guaranteed under our Constitution. In countries with better standards of human rights, the delay itself is being considered as a mitigating factor for commuting capital punishment. The sensitive process of taking one's life, be it lawful, must be dealt with utmost care. Any defect in that lawful process adversely affects the right to life and renders the whole process questionable. We must make sure that the letter of the law is not misconstrued, and the fundamental human rights of every single person are weighed justly against the literal interpretation of a statutory provision. Considering the sensitivity of death sentences, necessary steps must be taken to dispose of the cases rapidly to reach finality without undue delay.

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