

LAW OPINION

# The crucial need for sentencing guidelines



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The criminal justice system of our country is primarily regulated by the Code of Criminal Procedure 1898 (CrPC). From initiation of a case i.e., lodging of the First Information Report to the conclusion of the trial, the judges must comply with the provisions of this code. The Penal Code 1860, on the other hand, defines certain acts as criminal offences and prescribes punishment for them. Generally, the Penal Code only prescribes maximum punishment and in some rare cases, the minimum punishment for offences, and consequently the judges and magistrates enjoy wide discretionary powers in sentencing the convict individuals. Such unguided discretion often leads to inconsistent approaches in awarding punishment.

In our country, the court is generally not under an obligation to explain the rationale behind choosing a certain sentence. As a result, arbitrariness prevails in both the tiers of the judiciary- the subordinate and the higher judiciary. In *Md. Karamot Ali alias Rafique Alias Rafiqul Islam v The State* (2009) can be a glaring example of such unguided sentencing powers. In this case, the trial court sentenced the accused to seven years of imprisonment under section 25B(2) of the Special Powers Act 1974, which

was the highest punishment prescribed by the relevant section. The High Court Division (HCD) reduced the term of the sentence to one year, which is the lowest punishment.

Another reason for inconsistency in sentencing is that our criminal court administration does not admit the scope of hearing both parties on the quantum of sentence. After hearing both the prosecution and defence on points of the accused's involvement in the crime, the court itself decides what punishment should be proportionate to the crime. The provisions of sentencing hearings were once made part of the CrPC through the Law Reform Ordinance 1978. Unfortunately, the progressive sections of 250K(2) and 265K(2) incorporating sentencing

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hearings were repealed by the Code of Criminal Procedure (Second Amendment) Ordinance 1982 and 1983 respectively for reasons best known to the legislature. However, India has the provision of sentencing hearing in section 235(2) of the Indian CrPC 1973 which mandates that the court hear the accused on the question of sentence after conviction is decided on.

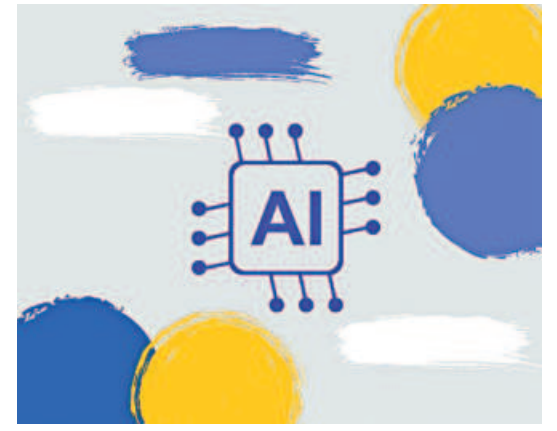
Though the Penal Code and the CrPC were drafted by the British and were highly influenced by the then British legal system, today's United Kingdom is not confined to the age when the judges were vested with such wide discretionary powers. They have come

up with sentencing guidelines to meet the demands of time. The sentencing council was established by the Coroners and Justice Act 2009 to prepare guidelines for the courts in England and Wales. Judges and magistrates must follow the guidelines issued by the sentencing council unless the court is satisfied that it would be contrary to the interests of justice to do so. In the USA, the United States Sentencing Commission is empowered to draft guidelines for the federal courts. However, the *United States v Booker* (2005) case made the guidelines only advisory. In Canada, though there are no extensive guidelines, section 718 of the Criminal Code 1985 enumerates the objectives of imposing punishment.

The need for well-reasoned sentencing guidelines in our jurisdiction has continuously been urged by the bar, bench, as well as academia. In the case *Rokia Begum v The State* (2015), His Lordship Justice Muhammad Imman Ali acknowledged that sentencing is arbitrary in most cases and observed, "there being no sentencing guidelines, the tendency is for trial judges to award the highest possible sentence provided by the law". In another landmark case *Ataur Mridha v The State* (2021), His Lordship Justice Hasan Foez Siddique observed, "certain guidelines and policies need to be introduced by the legislature for bringing fairness and consistency while awarding sentences in criminal cases." Scholars have also emphasised on the significance of guided sentencing in their writings. Professor Mahburur Rahman in his book "Criminal Sentencing in Bangladesh" shows the importance of guidelines on sentencing by going through various case laws in which the court had imposed punishments without assigning any plausible reasons.

It is high time the legislature took the initiative to introduce sentencing guidelines in Bangladesh to ensure that the criminal courts all over the country take a consistent approach in awarding punishment to the convicts.

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LAW THOUGHT

## Legal analytics and the legal profession

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Like any other business, the legal industry also adopts technological advancement like legal analytics which includes modern tech tools e.g Artificial Intelligence (AI), machine learning, natural language processing, pattern matching technology etc. to facilitate the process of getting justice. Albeit historically, law and technology barely collaborated with each other. It is either because of the incomputable nature of law or lack of in-depth research to make technology compatible with the needs of legal services. The trend changed especially during the time of COVID-19 when intervention of technology in judicial processes got wider acceptance all over the planet.

Legal analytics consists of many different approaches, for example, some AI systems attempt to predict the outcomes of a lawsuit, identify the trend of judgments of a particular judge, analyse evidence, mine data from large chunks of documents, etc. A legal analytics device is also competent to take advisory roles by gathering evidence or estimating recidivism rates based on readily available statistics that save both time and labour.

Law chambers deploy legal analytics tools in their daily functions such as legislation and case law analysis, case management, automated contract review, pleadings, and contract drafting to add greater value for their clients. Apart from these, there are some access to justice tools, which support even non-lawyers in engaging with legal processes. For basic legal needs, access to legal services might come in the form of smartphones or other devices that can provide consumers with a catalogue of their legal rights and obligations.

The installation of legal analytics tools in the legal industry presents several significant challenges concerning the legal profession. Among them, whether AI-run robots are going

LAW CONFERENCE

# South Asian turn in comparative constitutional law?

On 23-24 February 2024, the Supreme Court of Bangladesh organised an international conference on the South Asian Constitutional Courts in the twenty-first century: Lessons from Bangladesh and India. The inauguration ceremony of the first of its kind two-day conference was graced by Mr. Mohammed Shahabuddin, the Hon'ble President of the People's Republic of Bangladesh as chief guest and was chaired by the Hon'ble Chief Justice of Bangladesh, Mr. Justice Obaidul Hassan.

The welcome remarks were delivered by Mr. Justice Borhanuddin, Hon'ble Judge, Appellate Division, Supreme Court of Bangladesh. Other dignitaries, along with the Hon'ble Chief Justice of India, Dr. Justice Dhananjaya Y Chandrachud, were Mr. Anisul Huq, Hon'ble Minister of Law, Justice and Parliamentary Affairs, Mr. Abu Mohammad Amin Uddin, Attorney General for Bangladesh, Mr. Md. Momtazuddin Fakir, President of the Supreme Court Bar Association.

The words of the Hon'ble Chief Justice of Bangladesh were indicative of his perception of the constitutional tapestry in South Asia (on the global map of constitutionalism) as a distinct yet common experience with different context-specific nuances. His words also emphasised the growing prominence of South Asian voices within the global constitutional discourse. The inaugural discussions, among others, highlighted the ideals of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, and his contributions, to the making of the Bangladesh Constitution.

will' came to undergird the basic fabric of the Bangladesh Constitution. The discussion on India focused on assessing the nature of rights as perceived by the Constitution drafters. The discussants in the first panel were Mr. Probir Neogi, Senior Advocate, Supreme Court of Bangladesh, and Professor Dr. Mizanur Rahman, former chairman, National Human Rights Commission, Bangladesh.

Panel II, with Mr. Justice Dipankar Datta, Hon'ble Judge, Supreme Court of India and Justice Naima Haider, Hon'ble Judge, High Court Division, Supreme Court of Bangladesh as the panellists and Mr. Justice Hasan Foez Siddique, Hon'ble former Chief Justice of Bangladesh as the moderator,



reflected on the role of judiciary in upholding constitutionalism. In particular, it emphasised the role of the judiciaries of Bangladesh and India in shaping electoral and administrative jurisprudence and ensuring good governance in the two countries. The discussants in this panel were Barrister Mustafizur Rahman, Senior Advocate, Supreme Court of Bangladesh and Professor Dr. Rumana Islam, member, Bangladesh Securities and Exchange Commission.

In the third panel, Mr. Justice Sheikh Hassan Arif, Hon'ble judge of the High Court Division, Supreme Court of Bangladesh and Mr. Justice Soumen Sen, Hon'ble Judge, Calcutta

High Court, presented their papers on regional convergences and divergences in South Asian constitutional jurisprudence. The session was moderated by Mr. Justice Md. Ashfaul Islam, Hon'ble Judge, Appellate Division, Supreme Court of Bangladesh. The panellists primarily deliberated on the significant convergences that have taken place so far (e.g., with respect to the jurisprudence on public interest litigation, judicial review of laws as well as constitutional amendments). The discussion also highlighted the counterbalancing of convergences by waves of divergences, confirming the empirical studies of Tom Ginsburg and others that there is no systematic pattern of constitutional convergences. The discussants for panel III were Barrister Tanjibul Alam, Senior Advocate, Supreme Court of Bangladesh and Professor Dr. Biswajit Chanda, Member, University Grants Commission, Bangladesh.

The fourth panel had Mr. Justice Md. Shahinur Islam, Chairman, International Crimes Tribunal-I and Mr. Justice Arijit Banerjee, Hon'ble Judge of the Calcutta High Court as panellists and Mr. Justice Md. Abu Zafor Siddique, Hon'ble Judge of the Appellate Division, Supreme Court of Bangladesh, as moderator. This session focused on the judiciary's engagement with specific rights which involve competing interests of different stakeholders and require the courts to find a delicate equilibrium. The panel also explored the intersection of constitutional law and international crimes. The discussants for this panel were Mr. Ahsanul Karim, Senior Advocate, Supreme Court of Bangladesh and Professor Dr. SM Masum Billah, Department of Law, Jagannath University.

In addition to the fascinating panel discussions on both historically relevant as well as contemporary constitutional issues, in the event's valedictory session, the Chief Justice of India delivered his keynote speech on Postcolonial Constitutional Development in South Asia. Echoing the Chief Justice of Bangladesh, Dr. Chandrachud emphasised the common yet distinct experience within South Asia's evolving post-colonial constitutional landscape.

Another significant feature of his keynote, relevant even beyond South

Asia, is the implied recognition of the syncretic nature of the post-colonial Constitutions and their impact on constitutionalism. Most post-colonial Constitutions, with transformative agendas, envision the State both as empowered/active (to bring about the socio-economic reforms) and as limited/restrained (to not curtail individual rights or liberties). Such juxtaposition of positive and negative constitutionalism, entails striking a fine balance between active governance and cautious statecraft. Failure to strike such a balance, Mark A. Graber observes, may set the premise for constitutional crises within a democratic polity. The Chief Justice of India opined that both Bangladesh and India, albeit with few rough patches, but with transformative constitutional agendas, have been successful in this regard.

In the valedictory session of the conference, welcome remarks were delivered by Mr. Justice M Enayetur Rahim, Hon'ble Judge, Appellate Division, Supreme Court of Bangladesh. As the chief guest of the valedictory session, Hon'ble Prime Minister of Bangladesh, Sheikh Hasina observed that such an initiative was indeed timely. Among others, she also discussed the constitutional changes introduced in article 7 (through introducing articles 7A and 7B), in order to prevent extra-constitutional regimes from subverting the Constitution.

In their concluding remarks, both the Chief Justices of Bangladesh and India expressed their ambitious intentions to take the South Asian constitutional discourse forward through regional dialogues and engagements. Indeed, the conference engaged two major constitutional Courts in the South Asian region in conversation. Interestingly, the thoughtful conversation was not limited to judges only; academics, practitioners and jurists added new dimensions to the same. As such, it would perhaps not be an exaggeration to borrow from Philip Dann's postulation on the Global South, and comment that the conference was a nascent step, marking rather a 'South Asian turn' in comparative constitutional law.

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