State Practice of Asian Countries in International Law

Bangladesh

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ENVIRONMENTAL LAW – GREEN CLIMATE FUND

Bilateral Agreement

On 8 March 2018, the Government of the People's Republic of Bangladesh and KfW, Development Bank acting on behalf of the German Federal Government signed a Financing Agreement for the implementation of a Climate Resilient Infrastructure Mainstreaming (CRIM) project. The total cost of the project is 82,75 million USD out of which 40 million USD has been given from the Green Climate Fund (GCF) as a grant to – construct and renovate cyclone shelters and critical access roads to protect lives in the rural coastal areas of Bangladesh; develop urban infrastructure and protect vulnerable city dwellers from climate risks; and establish a national “Center of Excellence for Climate Resilience Infrastructure” to inform and guide infrastructure development throughout the country. The Green Climate Fund (GCF) is a new multilateral, multi-billion-dollar fund which was established by 194 countries as Parties to the UN Framework Convention on Climate Change (UNFCCC) at the Conference of Parties (COP) in 2010. GCF aims to promote the shift towards low-emission and climate-resilient development pathways. The CRIM project is the first project which has been approved by the GCF for Bangladesh.

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HUMAN RIGHTS – WOMEN'S RIGHTS, VIOLENCE AGAINST WOMEN, DECLARATION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, CEDAW, DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN, UDHR, ICCPR, CRC

Dowry Prohibition Act 2018

Bangladesh witnessed a rise in dowry related violence since its independence from Pakistan in 1971, which assumed alarming proportions in subsequent years. Scores of women and young girls (primarily child brides) faced mental and/or physical torture by their husbands and/or in-laws, some resulting in death or suicide. The first anti-dowry law, titled Dowry Prohibition Act, was passed in 1980 in an attempt to curb the rising incidents of domestic violence against women and young girls on the pre-text of non-payment of dowry. In 2018, the Bangladesh Parliament repealed the 1980 law and passed the Dowry Prohibition Act 2018. While provisions of the earlier law and its subsequent amendments have been given due consideration while drafting the new Act, the new law is said to have been framed to respond to evolving concerns and needs of the day.

Section 2(b) of the Act defines dowry as any direct or indirect demand for money or any other wealth or consent thereto, as precondition to marriage made by one party to the marriage to the other at the time of marriage or before marriage or during the continuation of the marriage as a stipulation to continue the marriage. The definition of dowry in this section excludes dower provided as per Muslim personal laws and gifts from relatives, friends, and well-wishers given to any party to the marriage.

The Act criminalizes the act of demanding dowry and prescribes a maximum of 5 years and a minimum of one year's imprisonment or a fine of maximum BDT 50,000 or both (section 3). The Act prescribes the same penalty for any party to marriage who gives or receives dowry or who facilitates the giving or receiving of dowry or who enters into an agreement to facilitate the same (section 4). Section 5 of the Act regards any agreement related to the giving or receiving dowry as void. The Act of 2018 adds a new provision by way of section 6 that penalizes any person who files or induces another to file a false complaint or case with intent to victimize any person, with a maximum of five year's imprisonment or BDT 50,000 fine or both. Section 7 considers an offence committed under this Act as cognizable and non-bailable but open to out of court settlement.

Critics of the new Act flag several discrepancies. To begin with, the exclusion of gifts from the definition of dowry in section 2(b) creates scope for misrepresenting dowry as gifts, leading to potential misuse of the provision. The Act equally penalizes the act of demanding and payment of dowry but ignores the extenuating circumstances which compel a party to concede to the demand. This will discourage parties who are compelled to pay from reporting the offence, namely, the wives and their families. Out of court settlements primarily pertain to petty crimes; dowry demands predominantly involve physical and mental torture on the wife and by making it a compoundable offence, the law trivializes the impact of the offence. This will also provide the accused and/or his family with an opportunity to force the complainant and/or her family to settle out of court.

**HUMAN RIGHTS – UDHR – RIGHTS OF PERSONS WITH
DISABILITIES – CONVENTION ON THE RIGHTS OF PEOPLE
WITH DISABILITIES (CRPD) – ICCPR – UNGA RESOLUTION
46/119 (17 DECEMBER 1991)**

A new law on mental health was adopted by the Bangladesh Parliament by repealing the earlier Lunacy Act of 1912. The new Act has provisions that aim to ensure the overall well-being including the care, dignity, right to property and rehabilitation of people having mental health problems. It did away with terms such as, “lunatics” and “temporary patients”, defined *inter alia*, “mental health” and the criterion for “non-protesting” patient and distinguished between “mental illness” and “mental disorder” (section 2, definitions). The Government has been entrusted with the responsibility of implementing all activities including the expansion, development, regulation and coordination of mental health related issues (section 4).

The law speaks of establishing a Mental Health Review and Monitoring Committee in every district which will include, among others, government representatives and mental health professionals, amongst whom at least one member shall be a woman (section 5). Any guardian or relative, who is dissatisfied with the treatment of a patient with mental health issues, may seek redress from this Committee (section 5[1]). Appeal lies with the government in case the applicant is aggrieved by the decision of the Committee (section 5[4]). All matters relating to the role and functions of this Committee shall be determined by the Rules that would be drafted to help implement this Act (section 5[5]). Section 6 states that people with mental health

problems shall be ensured rights to their health, property, dignity, education and other rights, as appropriate (section 6[1]); all matters pertaining to the rights of these people shall be regulated by the Rules to be drafted (6[2]).

The Act empowers the government to establish hospitals, or medical college hospitals or separate units/departments in district hospitals for the treatment of mental health patients as long as separate arrangements are in place to treat mental health patients who are drug addicts, under-trial or convicted prisoners and minors (section 7 [1]). Private hospitals for treating mental health patients can also be set up after obtaining a license from the government to this end (section 8). The government has the authority to enter and inspect any mental hospital and inspect and seize any register, sample, equipment, or documents related to mental health treatment of patients as deemed appropriate and necessary; however, in case of registers or documents that pertain to the illness of the patient, approval of the patient or his/her guardian must be obtained before seizure or public disclosure (section 9). In the case of private mental hospitals, the government has the authority to suspend their licenses and close their operations in the public interest, if there is evidence that treatment of patients is not up to the required standard or if the violation of any of the conditions of the licence is such that it would be inappropriate to ask the hospital to show cause (section 9 [b]). Where private hospitals are closed, respective hospital authorities are required to ensure the speedy transfer of under-treatment patients to other hospitals (section 9[c]). Anyone running a mental hospital without a proper licence shall be punishable with a fine of Taka 0.5 million and a further Taka 2 million taka for repeat offences (section 10 [1]). Any practitioner working in any unlicensed mental hospital shall be liable to a fine of taka 100,000 (section 10[3]).

The Act has extensive provisions for the admission of mental health patients for treatment, whether voluntary, involuntary or non-protesting; when admitting minors, the consent of the guardian or relative is mandatory (section 11[1]). Admission of voluntary patients is quite straightforward – the designated medical officer will examine the patient within 24 hours of the application and record the findings in a prescribed form (section 12[2]). A voluntary patient who has been admitted may express unwillingness to receive treatment or request for release at any point of time; however, the medical officer may, if s/he deems it fit to categorize the patient as an involuntary patient, reject the request (section 12[3]). That there can be a change in the admission status or that the request for release can be rejected shall be communicated to the patient (section 12[4]). The rationale for admission of patients and the duration of stay in the hospital shall be re-considered every 15 days and in case of minors, every 7 days (section 12[125]).

As for non-protesting patients, they may be admitted with the consent of the guardian or relative (section 13[1]). All other processes relating to change in the admission status, release, review of the rationale for admission and duration of stay, and the right to be informed of the same shall be the same as that applicable in case of voluntary patients (section 13 [2,3,4]).

Before admitting an involuntary patient, several factors will have to be considered: the designated medical officer or a mental health specialist or the Mental Health Review and Monitoring Committee shall take into account the nature and degree of the illness, incidents of violence and tendency thereto, unwillingness to take medication, predisposition to suicide, etc., and the fact that non-admission of the patient shall pose imminent threat to his/her health and safety and that of the public (section 14[4]). Subject to these various considerations and based on the consent or application of the guardian or relative of the patient or the on-duty police officer of the concerned jurisdiction or the designated medical officer, steps for admitting the patient shall be undertaken (section 14[1]). The duration of such admission shall vary according to, inter alia, the recommendation of the designated medical officer, assessment of the Mental Health Review and Monitoring Committee, and the importance of the treatment (section 14[2]). A relative, parent or friend can initiate an application for involuntary admission. This is followed by an assessment by a medical officer within 24 hours. A medical officer can authorize emergency admission for up to 72 hours. An assessment by a psychiatrist is required for ongoing involuntary admission. This status is reviewed every 28 days. The maximum duration of admission is 180 days; the Mental Health Review and Monitoring Committee can extend the duration of stay, if necessary.

Patients who are accused of a crime shall be admitted for treatment based on the order of a Magistrate (section 15). Patients devoid of an address or guardian or relatives shall be admitted for treatment by the representative of the local government authority of a given locality (section 17). If any person suffering from mental health problems is considered to be dangerous, s/he shall be taken into police custody and referred to the nearest mental hospital (section 17[2]). The Act directs the rehabilitation of mental health patients by social welfare systems or rehabilitation centers (sections 19–20).

A guardian or relative of a person afflicted by mental health problems may move the court for determination of his/mental status; the court shall order a designated medical officer to determine the mental status of the concerned individual and submit a report (section 20[1–2]). The medical officer may seek attendance of the person for examination by way of a notification; where the concerned person is a woman who practices religious and/or cultural dictates that require seclusion from the public, she may be examined in any convenient place in the court premises (section 20[3])). Upon submission of the report,

the court shall make an order on the mental status of the person and his/her capacity to hold and manage property (section 20[4]).

The Act specifically emphasizes on salient issues pertaining to guardianship of persons afflicted by mental health problems (section 22). When, after admission into a hospital, a mental health patient is found to be incapable of managing his/her property due to mental illness or any other reason, the designated medical officer will inform his/her guardian or relative about the potential damage to property that his/her incapacity is likely to cause. If the guardian or relative is unwilling to take any steps in this regard, the designated medical officer shall request the court to appoint a Manager to look after the said property. If the court is convinced that the patient is incapable of managing his/her property and that his/her parents are not alive, it shall appoint a Manager for a period of three years. On assuming responsibility, the Manager shall prepare and submit to the court an inventory of all moveable and immoveable property of the patient. Thereafter, the Manager shall, on behalf of the patient, undertake the receipt, regulation and management of property, business, partnership and necessary legal actions in this regard; however, the Manager is prohibited from transferring, by way of sale, mortgage, gift, exchange, rent or lease beyond 5 years any of the patient's immoveable property without the permission of the court. Within 3 months of the completion of each financial year, the Manager is required to submit to the court reports on the status of the property in his custody, money received and all expenditures related to the care and treatment of the patient. The guardian or relative of the patient is entitled to seek information from the Manager and in the event of his death from his legal representative, regarding all transactions, expenditure, etc. related to the patient's property; they may also move the court to obtain financial records of the same. With the exception of the costs required for the care and treatment of the patient and management of his/her property, the Manager shall deposit all money to the government treasury; this shall be returned to the patient when it is evident that s/he has recovered fully.

The Act criminalizes the issuance of false certificates regarding the mental status of a patient by mental health practitioners and makes it punishable with a fine not exceeding Taka 3,00,000 or one year's rigorous imprisonment or with both (section 23[1]). If a guardian of a mental health patient or a manager appointed to look after his/her property fails to discharge his/her duties in terms of care and treatment of the patient or management of the property or fails to comply with directive/s of the court in this regard, s/he shall be liable to a fine not exceeding Taka 5,00,000 or rigorous imprisonment of three years or with both (section 23[2]). Anyone contravening any provision of this law or any rules thereto, or any government order or directive or assisting, abetting

or instigating any such contravention shall be liable to a fine not exceeding 1,00,000 or six month's imprisonment or with both (section 23[3]). Offences under this Act are non-cognizable, compoundable and bailable (section 24[2]).

HUMAN RIGHTS – CYBER SECURITY – UDHR – ICCPR – FREEDOM OF EXPRESSION

Digital Security Act 2018

Bangladesh enacted the Digital Security Act in September 2018. The purpose of the law, as stated in its preamble, is to “ensure National Digital Security and enact laws regarding Digital Crime Identification, Prevention, Suppression, Trial and other related matters”. The Act prescribes measures to deal with defamation, the hurting of religious sentiments, the causing of deterioration of law and order, and the instigation of violence against any person or organization by publishing or transmitting any material on any website or in electronic media. More importantly, this law has extra-territorial application manifest in section 4 which provides that if any person commits any offence within the meaning of this Act from outside of Bangladesh, s/he would be liable to punishment as though the offence was committed in Bangladesh.

The law speaks of establishing a Digital Security Agency with appropriate manpower the terms of reference of which will be prescribed by the government. The role and functions of this Agency shall be formulated in the Rules that will be drafted for implementing the Act (sections 5–7). The law also proposes the creation of a National Digital Security Council to be headed by the Prime Minister (section 12). Primarily an advisory and policy making body, the Council will ensure proper implementation of the Act.

The Act lays down preventive measures in terms of power to remove or block some data-information, having in place an Emergency Response Team, developing a digital forensic lab and ensuring the quality of the lab. The law grants law enforcement authorities wide-ranging powers to remove or block online information (via the Digital Security Agency) that harms the unity of the nation, economic activities, security, defense, religious values or public order or spreads or incites communal hostility and hatred (section 8). The Bangladesh Telecommunications and Regulatory Authority (BTRC) will remove or block the item accordingly. Comprising of digital security experts and if necessary, members of the law enforcement agencies, the Emergency Response Team Working will work round the clock to guard against potential cyber/digital attacks and to take remedial measures, as and when necessary,

either by themselves or by drawing on international expertise (section 9). The digital forensic lab will provide forensic support to the implementation of the Act (section 10); to this end, it will be fully equipped with trained personnel, relevant infrastructure, equipment and instruments in order to maintain a high technical standard (section 11).

The Act has an extensive list of crimes and accompanying punishments (sections 17–36). They include: illegal entrance in Critical Information Infrastructure (section 17); illegal entrance into computers, digital devices, computer systems (section 18); damage to computers, computer systems (section 19); offenses relating to computer source code change (section 20); propaganda or campaign against the liberation war, recognition of the liberation war, the Father of the Nation, the national anthem or national flag (section 21); digital or electronic forgery (section 22); digital or electronic fraud (section 23); identity fraud (section 24); publishing and sending offensive, false or fear-inducing data-information (section 25); collecting and using identity information without permission (section 26); cyber-terrorism (section 27); publication and broadcast of such information on any website or in any electronic form that hampers religious sentiments or values (section 28); publication and broadcast of defamatory information (section 29); e-transactions without legal authority (section 30); deteriorating law and order (section 31); breaching Government secrets (section 32); illegal transfer and saving of data-information (section 33); hacking related offence (34); aiding in the commission of offences under this Act (section 35); offence committed by Company (section 36).

Among these various provisions, the most disputed and debated are the following:

Section 21

Anyone spreading “propaganda and campaign against liberation war of Bangladesh or spirit of the liberation war or Father of the Nation” using digital devices or instigating such acts, will be punishable with a maximum of fourteen years’ imprisonment or a fine of up to Taka 10 million or with both. S/he will be given a life sentence or a fine of Taka 30 million or with both for committing the offence for the second time or recurrently.

Section 25

A person may face up to three years in prison or Taka 0.3 million in fine or with both if s/he is found to have deliberately publishing information on the website or in electronic form that is “aggressive or frightening” or

which can make someone disgruntled; knowingly publish or broadcast false and distorted (fully or partially) information to annoy or humiliate someone; knowingly publish or broadcast false and distorted (fully or partially) information to tarnish the image of the state or to spread rumours. A person will face up to five years in jail or Taka 1 million fine or with both for committing the offence for the second time or recurrently.

Section 28

A person may face up to seven years in jail or Taka 1 million in fine or with both if s/he is found to have deliberately published or broadcast something on the website or in electronic form or get it done to hurt religious sentiments and values. A person will face up to ten years in jail or Taka 2 million in fine or with both for committing the offence for the second time or recurrently.

Section 29

A person may face a maximum of three years in jail or Taka 0.5 million in fine or with both if s/he commits an offence stipulated in section 499 of the Penal Code (defamation) through website or in electronic form. S/he will be punishable with a maximum of five years in jail or a fine of Taka 1 million or with both for committing the offence for the second time or recurrently.

Section 31

This section penalizes the posting of information that “creates animosity, hatred, or antipathy among the various classes and communities” or creates instability or disorder or disturbs or is about to disturb the law and order situation with a maximum of ten years of imprisonment or a fine of Taka 0.5 million or with both. If any person commits the crime for the second time or recurrently, s/he will be punished with imprisonment for a term not exceeding ten years or with a fine not exceeding Taka 1 million or with both.

Section 32

A person may face imprisonment for a maximum of fourteen years or a fine of Taka 2.5 million or with both for gathering, sending, or preserving classified information of any government using a computer or other

digital device. If s/he commits the offence for the second time or recurrently, s/he will be punished with life imprisonment or with fine not exceeding Taka 10 million or with both.

The passage of this law was met with wide criticism from the media and civil society. Termed as draconian and arbitrary, the law was viewed as going beyond its defined scope and venturing into areas that may potentially impede the freedom of expression and freedom of the media. A law that penalizes the expression of opinions about historical facts are incompatible with a country's obligations to respect freedom of opinion and expression. Without sufficiently distinguishing between genuine cyber-crimes and the nature and practice of independent journalism, the law introduces provisions that can easily be used and abused to curb press freedom. Besides, the vagueness in the language poses threats to the freedom of expression as it leaves too much room for interpretation, which can be misused. Indeed, the vagueness, combined with the potentially harsh penalty, increases the likelihood of self-censorship. The Act has also been criticized for giving the police unrestricted powers of search, seizure, and an arrest without warrant, with virtual impunity.

**HUMAN RIGHTS – ADMINISTRATIVE FAIRNESS – EQUALITY
BEFORE LAW – EQUAL PROTECTION – NON-DISCRIMINATION**

Dr. A.Y.M. Akramul Hoque Versus Government of the People's Republic of Bangladesh 12 SCOB [2019] High Court Division (Special Original Jurisdiction), Writ Petition No.1852 of 2014, Judgment Delivered on 04 November 2018.

The case of the petitioner, as set out in the Writ Petition, in short, is as follows: The petitioner having qualified in the Bangladesh Civil Service (BCS) Examination of 1982 was recommended by the Public Service Commission (PSC) for appointment to the Administration Cadre and accordingly he joined the Administration Cadre as Assistant Commissioner on 14.12.1983 following which he served in various capacities under the government and was ultimately promoted to the post of Joint Secretary on 05.03.2005. As Joint Secretary to the Government of Bangladesh, he served as Director, Bangladesh Jute Mills Corporation from 15.05.2005 to 15.03.2006 and as Director General, Bureau of Statistics from 30.03.2006 to 15.10.2009. However, he was made an Officer on Special Duty (OSD) under the then Ministry of Establishment (now Ministry of Public Administration) on 16.10.2009 and since then he has been an OSD

thereunder. It may be noted here that while historically the OSD position merited honour and respect, in recent times, this is increasingly being used as a means of penalizing government officers who do not toe the partisan line of the ruling party.

A combined gradation list of the officers of the Administration Cadre of various batches of 1982 was updated on 27.01.2014 by the government. The name of the petitioner appears in serial no. 79 in that combined gradation list. A total of 28 officers who were below the petitioner in the gradation list were promoted to the post of Additional Secretary by superseding him vide a notification issued by the Ministry of Public Administration on 27.01.2009. On 07.09.2009, the Ministry of Public Administration issued another notification thereby promoting another 46 officers of the Administration Cadre to the post of Additional Secretary by superseding the petitioner. Subsequently, on 10.10.2011 the concerned Ministry issued yet another notification whereby 27 officers were promoted to the post of Additional Secretary by superseding the petitioner. Several other notifications followed pursuant to which more officers were promoted to the post of Additional Secretary by superseding the petitioner bringing the total to 302, all of whom were below the petitioner in the gradation list, and who were promoted to the higher post of Additional Secretary bypassing the petitioner without any justifiable reason. At later dates and via various notifications, a total of 21 officers, who were below the petitioner in the combined gradation list, were promoted to the post of Secretary bypassing the petitioner.

The Court issued a Rule Nisi calling upon the respondents to show cause as why the different notifications issued by the government whereby officers were promoted by superseding the petitioner and so far as they relate to the exclusion of the name of the petitioner therefrom, should not be declared to be without lawful authority and of no legal effect and why a direction should not be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011 and to pay him all attending benefits and/or such other or further order or orders passed as to this Court may seem fit and proper.

The legal instrument for regulation of the appointment of the civil servants by promotion to the ranks of Deputy Secretary, Joint Secretary, Additional Secretary and Secretary respectively is hereinafter referred to as the Promotion Rules of 2002. Rule 4(1) of the Promotion Rules of 2002 provides merit, efficiency and seniority as the basis of promotion. Rule 4(2) provides that in case of promotion to the rank of Additional Secretary or Secretary, the importance and nature of assignments discharged by a concerned officer in his total

service tenure and his personal reputation and other relevant matters will also be considered. Rule 5 prescribes the procedure for promotion. As per Rule 5(4), the Superior Selection Board (SSB – respondent no. 2 in this case) will make necessary recommendations for promotion which are required to be approved by the Prime Minister.

The court observed that the petitioner had the requisite qualifications as enumerated in the 1st Schedule to the Promotion Rules of 2002 for appointment by promotion to the rank of Additional Secretary on 27.01.2009, when a good number of officers, who were below the petitioner in the gradation list, were promoted to the post of Additional Secretaries. As per the 2nd Schedule to the Promotion Rules of 2002, an officer shall be evaluated based on 100 marks for promotion. The court observed that on 27.01.2009, when other officers who were below the petitioner in the gradation list were considered for promotion, the petitioner, despite being otherwise eligible for promotion and having presumably obtained the qualifying marks, was not promoted to the post of Additional Secretary. The court believed that the additional considerations as contemplated by Rule 4(2) of the Promotion Rules of 2002 were not only redundant but also vague, because these are already covered by the ACRS of concerned officers. The provisions of Rule 4(2) have been constantly used by the authority to pick and choose at will candidates for higher ranks in the Civil Service of Bangladesh. Hence, Rule 4(2) of the Promotion Rules of 2002 was discriminatory. The court held that repeated supersessions of the petitioner by junior officers to the post of Additional Secretary and thereafter to the post of Secretary to the Government of Bangladesh were arbitrary and vitiated by malice in law. The repeated supersessions of the petitioner also violated Article 29(1) of the Constitution of Bangladesh. Against this backdrop, the Rule was liable to be made absolute.

The government contested the Rule by filing an Affidavit-in-Opposition stating that the petitioner was not found eligible for promotion to the post of Additional Secretary and as such, he was not recommended by the SSB. Denying the petitioner's claim that he had the requisite qualifications for promotion, the government contended that Rule 4(2) of the Promotion Rules of 2002 was not vague, redundant or discriminatory as it requires consideration of the nature and importance of the duties performed by an officer concerned throughout his service career and is equally applicable to all incumbents. The officers below the petitioner were found eligible and accordingly they were recommended for promotion by the SSB. The government argued that seniority was not the only basis from promotion – merit and efficiency are equally important, qualities that the petitioner lacked. Therefore, the supersessions of the petitioner were not vitiated by malice in law. No right of the petitioner

was curtailed or infringed nor was he deprived of his legal entitlement. Besides, the petitioner being now retired, there is not scope for promotion to a higher position.

In response to the government's Affidavit-in-Opposition, the court held that the government's argument that the petitioner was not eligible for promotion in the light of Rule 4(2) of the Promotion Rules of 2002, was not tenable given that no specific reason was assigned by the SSB for the supersession of the petitioner. It was evidently clear that the SSB did not objectively assess the worth, efficiency, drive, zeal to work and integrity of the petitioner, particularly when the contents of his ACRs from 1984 to 2013 speak volumes about his spotless, untainted and unblemished service record. What was interesting was that the petitioner scored about 95% marks on an average between 2000 to 2009.

Since he was made an OSD in the Ministry of Public Administration from 2010 to 2013, the petitioner did not incur any liability for the absence of his ACRs for that period (2010 to 2013). Acknowledging that the petitioner's ACRs during his entire service career were excellent and given that no specific reason was assigned for his repeated supersessions, the court held that the SSB did not act fairly in evaluating the suitability of the petitioner for promotion to the post of Additional Secretary to the Government. In this context, the court alluded to decisions in *Re Infant H(K)* ([1967] 1 All E.R. 226, *Council of Civil Service Union Vs Minister for the Civil Service* [1984] 3 All E.R. 935, and *Swadeshi Cotton Mill Vs India*, AIR 1981 SC 818 which maintained that administrative authorities must act fairly and that this rule must not be compromised save in very exceptional circumstances where compulsive necessity so demands.

Drawing on relevant case law from various jurisdictions (*Ram Chandra ... Vs ... Secretary to the Government of W. B.*, AIR 1964 Cal 265; *Punjab ... Vs ... Khanna*, AIR 2001 SC 343; *Shearer ... Vs ... Shield*, [1914] AC 808; *Associated Provincial Picture ... Vs ... Wednesbury Corporation* [1948] 1 KB 223; *State of A.P. and others ... Vs ... Goverdhanlal Pitti*, (2003) 4 SCC 739; *Regional Manager ... Vs ... Pawan Kumar Dubey*, AIR 1976 SC 1766; *Venkataraman ... Vs ... India*, AIR 1979 SC 49; *Maneka Gandhi ... Vs ... India*, AIR 1978 SC 597; *Romana Shetty ... Vs ... International Airport Authority*, AIR 1979 SC 1628; *Ajay Hashia ... Vs ... Khalid Mujib*, AIR 1981 SC 487; *D.S. Nakara ... Vs ... India*, AIR 1983 SC 130; *A.L. Kalra ... Vs ... P and E Corporation of India*, AIR 1984 SC 1361 et al.) and legal authorities (Dicey; Rotundy; Sir Ivor Jennings), the court stressed that mala fides or bad faith vitiates everything and a mala fide act is a nullity. In the present case, mala fides applied as the aggrieved party was able to establish that the authority making the impugned supersessions did not apply its mind at all to the matters in question. This is evidenced by the incomprehensible manner in which the SSB brushed aside the spotless, untainted and unblemished

service record of the petitioner throughout his career without furnishing any plausible reason whatsoever. Equally astounding was the SSB's failure to take into consideration the petitioner's ACRs which ought to have been the most dominant and persuasive factors determining his eligibility for the promotion post. However shockingly enough, those evaluations were completely disregarded by the SSB – it was a case of total non-application of the mind. That the SSB had an ulterior motive and that some extraneous factors were definitely taken into account by the SSB were evidently clear from the facts and circumstances of the case. Indeed, the repeated supersessions of the petitioner were classic examples of bad faith or *mala fides*. The reason for supersession as mentioned in the Affidavit-in-Opposition, appear *prima facie*, cryptic, vague, unspecific and nebulous and as such, the court believed that the impugned supersessions of the petitioner were arbitrary and unreasonable.

The doctrine of acting fairly requires that the SSB ought to have examined the matter of promotion of the petitioner objectively before arriving at a decision. Disappointingly, however, the SSB did not do so and the court was compelled to conclude that the petitioner was superseded several times in the “colourable exercise of power” and with a purpose for which he became a victim of *ex-facie* arbitrariness, unreasonableness and bad faith. It was on record that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the Ministry of Public Administration for reconsideration of his case for promotion; instead of responding thereto, the petitioner was made an OSD in the Ministry of Public Administration on 16.10.2009 – this was malice in law – pure and simple.

On the issue of equality before law and equal protection of law, the court stressed that while no employee has any right to claim promotion on the basis of seniority alone, where the promotion post is to be filled up on a seniority-cum-suitability basis as per service rules, the guarantee of Articles 27 and 29(1) of the Bangladesh Constitution require that an employee fulfilling the qualifications for promotion should be duly considered for promotion. Thus, if the junior employee is promoted without considering the case of a senior employee who fulfills the qualification for promotion, the guarantee of equality of opportunity is violated.

Considering the views of different distinguished Judges and scholars on the meaning of the phrase “equality before law and equal protection of law”, the court observed that “equality before law” is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term “equal protection of law” is used to mean that all

persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same.

The Court maintained that the petitioner and others who were in the combined gradation list of officers were a class by themselves. There was no 'intelligible differentia' or 'permissible criteria' between them; as such, the petitioner should not have been discriminated against as regards his promotion.

Having due regard to the discussions and the facts and circumstances of the case, the Rule was made absolute in part. The respondents were directed to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. He would be deemed to have gone on Post Retirement Leave (PRL) as a Secretary to the Government of Bangladesh on 28.02.2014. Consequentially, he would be entitled to all pensionary benefits of a Secretary to the Government of Bangladesh in view of the then prevalent National Pay Scale of 2009.

HUMAN RIGHTS – ADMINISTRATIVE FAIRNESS – PRINCIPLES OF NATURAL JUSTICE – DUE PROCESS OF LAW

**Md. Shamsujjaman and Others – Versus – Bangladesh, Represented
by the Secretary, Ministry of Education, Ramna, Dhaka and Others,
13 SCOB [2020] High Court Division (Special Original Jurisdiction),
Writ Petition No. 3691 of 2014, Judgement Delivered on 14.11.2018**

Relevant facts of the case are that petitioners, the petitioners, being 10 in number, studying in different departments at the Shahjalal University of Science and Technology, Sylhet challenged the order of their expulsion issued by the University on account of an incident that took place on 13.12.2013. On that day, a human chain was formed by the teachers and students of the University condemning the heinous attack on a monument of the University. Some miscreants attacked the teachers and students who formed the human chain, causing injury to some of them. The said incident was published in both national and local dailies. Following the incident, an Inquiry Committee was formed to look into the matter. On 26.12.2013, the Inquiry Committee issued letters only to petitioner nos. 1 and 2, asking them to appear before the Committee on 30.12.2013. The petitioners refrained from appearing before the Committee. The Committee submitted its report to the Proctor, who was

the Member Secretary of the Committee, recommending action against certain students of the University, including the petitioners. Pursuant to the report and recommendation of the Committee, the University authority issued show cause letters, all dated 02.02.2014, upon the petitioners, asking them to respond within 15 days of receiving the said notice, which they did.

On 27.02.2014, at its 183rd Meeting, the Syndicate of the University took a decision approving the temporary suspension order of the petitioners. However, on the very same day, the Syndicate also passed an order of expulsion of the petitioners. Accordingly, pursuant to the decision of the Syndicate, the impugned letters dated 16.03.2014 were issued to all the petitioners, communicating thereby the orders of their expulsion from the University.

The petitioners filed applications before the Vice-Chancellor of the University praying for cancellation of the suspension order. There was no response to the application. The petitioners then issued a Notice Demanding Justice requesting the concerned respondents to cancel the expulsion order. Again, no steps were taken in response to the notice. Being constrained, the petitioners moved the Court and obtained the instant Rule.

After hearing both sides, the court conceded that while the image and sanctity of the University cannot be allowed to be vandalized and perpetrators of such action must be dealt with sternly, even if they were students of the University, in so doing, the University authorities must follow the principles of natural justice and conduct the proceeding in accordance with the law and only in accordance with the law. The court believed that a plain reading of the show cause notice reveals various deficiencies; for example, the show cause merely stated that an incident took place in which some teachers and students came under attack and some motorcycles and bicycles were burnt, without going into relevant details in terms of, for example, the exact place and time of the occurrence, the identities of the teachers and students who were allegedly injured, the extent and nature of the injuries sustained by them, the number of motorcycles and bicycles that were alleged to have been damaged, and so on. In the absence of such relevant information, the court regarded the show cause notice as being based on vague, unspecific and indefinite allegations. Given that the show cause notice was the first step in the entire process that would culminate in the expulsion of the petitioners and that it stated therein that an Inquiry Committee conducted the inquiry and submitted a report, no such report was either annexed with the show cause notice itself or served upon the petitioners, thereby preventing them from giving a proper reply to the allegations brought against them.

On perusal of the impugned order of the University Syndicate dated 16.03.2014, it was apparent to the court, the authority issued the expulsion order

in a very mechanical manner, without affording the petitioners an opportunity of being individually heard. In essence, the petitioners were condemned unheard, which by itself is a gross violation of the principle of natural justice, not to mention the non-observance of the due process of law. The University, more particularly the Syndicate, being in a position of "loco parentis", is obliged not only to observe the well-established principle of natural justice, but also to act in accordance with law. The court observed that, in the instant case, not only did the University authority fail to observe the due process of law, but the impugned orders of expulsion were passed in gross violation of the principles of natural justice. The Syndicate, being the highest administrative body of the University, was also acting as a quasi-judicial body and as such, it was, imperative that it complied with principles of natural justice and acted in the due process.

Drawing on judicial decisions from Indian and domestic jurisdictions, the court elaborated that the concept "administrative fairness" requires that an authority, while taking a decision which affects a person's right prejudicially, must act fairly and in accordance with the law. Unfortunately, the University/Syndicate in the present case failed to comply with the principles of natural justice resulting in arbitrariness, which in turn, vitiated the impugned order. Therefore, the court held that the impugned order of expulsion of the petitioners was made without lawful authority and was of no legal effect and made the Rule absolute.