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The Future of the Trust from an International Perspective

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Introduction

Traditionally non Anglo-Saxon jurisdictions thought that trusts[2] were only relevant in the Common Law world[3]. However, the ever increasing number of cases, statutes and textbooks reveal this to

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[2] For the benefit of non-Common lawyers, the trust mechanism has legal title in the hands of the trustee. Legal title gives the trustee the ability to use the property as required, but this power is constrained through mandatory trustee duties set out in the trust instrument, statute and case law. This restriction of power upon the trustee enables the beneficiary to have rights in equity. These rights fall into two categories. First, they ensure that the trustee fulfils their duties. Secondly, they include the ability for the beneficiary to have an ultimate right to absolute ownership in the trust property.

[3] See e.g. Pierre Lepaulle, *'Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international'* (Paris, 1932), p.113: *"Thus from settlement of the greatest of wars down to the simplest inheritance on death, from the most audacious Wall Street scheme down to the protection of grandchildren, the trust can see marching before it the motley procession of the whole of human endeavour: dreams of peace, commercial*

be both anachronistic and inaccurate[1]. The flexibility of the trust mechanism and the increasing use of trusts in commercial scenarios[2] inevitably led to interest in the trust concept to a wider audience. Upon a closer look at trusts law, it would seem apparent that the trust might not be so different from concepts already in existence in non-Common Law countries. This interest and similarities has led to an increasing desire for these jurisdictions to either state that a domestic concept is essentially the same as a trust,or accept the trust as a concept into their legal systems. The aim of this article therefore is to consider the extent to which it is possible for non-Common Law jurisdictions to recognise the trust concept in their law and for their concepts to be recognised as trusts[3]. The conclusion is that it is possible to create an 'International Trust' recognised in multiple jurisdictions. However, this will require willingness on the part of the foreign jurisdiction to fully accept the concepts that make the trust mechanism so useful.

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imperialism, attempts to strangle competition or to reach paradise, hatred or philanthropy, love of one's family or the desire to strip it of everything after one's death, all those in the procession being dressed either in robes or in rags, and either crowned in a halo or walking with a grin. The trust is the guardian angel of the Anglo-Saxon, accompanying him everywhere, impassively, from the cradle to the grave."

[1]In the last 15 years a number of textbooks specialising in International Trusts law have been written. See e.g. Hayton (Ed.), *Extending the Boundaries of Trusts and Similar Ring Fenced Funds* (Kluwer, 2002); Panico, *International Trust Laws* (Oxford University Press, 2010); Hayton (Ed.), *The International Trust* (3rd Ed) (Jordans, 2011). These texts contain a large number of trusts statutory developments. As an example of trust law cases spanning both common law and civil law jurisdictions, see e.g. the UK Supreme Court judgment in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

2 This increasing use of trusts for commercial purposes led Lord Browne-Wilkinson to comment in*Target Holdings Limited v Redferns (a firm*) [1996] AC 421 at 432:*"in my judgment it is in any event wrong to lift wholesale the detailed rules developed in the context of traditional trusts and then seek to apply them to trusts of quite a different kind. In the modern world the trust has become a valuable device in commercial and financial dealings"*. However, the idea of separate rules as a basis for finding trustee liability has not been followed and other parts of Lord Browne-Wilkinson's judgment have been doubted in the Supreme Court judgment of *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 and by academic commentary such as Carn, *'Clarifying the law for breach of commercial trusts: AIB Group (UK) plc v Mark Redler & Co Solicitors'*, Tru L I 2014 28(4) 226-236. For this reason it is submitted that separate trust law principles applying to specific types of trust only exists to the limited extent where statute has specifically modified the general rules. See e.g. the Pensions Acts 1993, 2004 and 2014, and the Charities Acts 2006 and 2011.

[3] Article 11 of the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition states that signatories to the Convention must recognise trusts that meet the requirements set out in Chapter II of the Convention. However, whilst Chapter II gives guidance on a settlor being able to select the place of administration of the trust and place of the trustee, the nature of trusteeship and the precise extent of the duties of the trustee are vague. Furthermore, there is no mention of beneficiaries and what rights they can obtain under a trust. See also fn.8 *infra*.

When considering issues of recognition of a concept in a foreign legal system it must be borne in mind that law is a social construct, very much a product of the society and the history of the state in which it operates[1]. Notions of ownership and obligation differ between states. Distinct families of legal systems exist in different parts of the world. There is the potential, even within the same legal family, for significant divergence in rules and remedies[2]. Therefore when considering the possibility of an 'International Trust' three main questions arise: 1) whether trusts can be fitted into civil law notions of contract; 2) whether trusts can be categorised as legal persons; and 3) whether concepts in other legal systems, such as Islamic law, can be seen as sufficiently similar to be recognised as trusts in England and Wales[3].

Civil Law: Trusts as Contracts?

To a non-lawyer it can come as a surprise to know that there is divergence in opinion about how property is owned. This distinction can be seen when, for example, comparing Common Law and civil law systems. The Common Law sees ownership as a claim to title. Therefore, as traditionally understood, Common Law ownership of assets through an estate is asserting a comparatively superior right to the property compared to another party with, in theory at least, the ultimate right

[1] See e.g. Wendell Holmes, *The Common Law* (Boston, 1881), Lecture 1: *"The life of the law has not been logic: it has been experience"*. The impact of what has happened in the history of a society creates norms that impact upon the legal structure of that society. For example, *quaere* whether the law of trusts would even exist were it not for the restriction on creation of writs in the Provisions of Oxford 1258 that ultimately led to the Court of Chancery, as well as the Statute of Uses Act 1535 that led to the rise of the trust.

[2] An example in Common Law systems for trusts law is the question of the extent to which purpose trusts can be recognised. In England and Wales, pure purpose trusts can only be recognised in the limited exceptions stipulated by *In Re Endacott* [1959] EWCA Civ 5 together with a valid perpetuity period under section 18 Perpetuities Act 2009. However, other jurisdictions such as the Cayman Islands have specific trust schemes that can be for private purposes and require no perpetuity period. For further detail see Doyle and Carn, Hayton (Ed.) *The International Trust* (3rd Ed) (Jordans, 2011), Ch 5, Purpose Trusts.

[3] Under the Recognition of Trusts Act 1987, which brought the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition a Trust into English law, foreign trusts have to be recognised unless they are manifestly incompatible with public policy under Article 18. See also fn.5 *supra*.

to property being held by the Crown[1]. This notion of competing claims allows the concept of splitting different rights in the same piece of property between multiple parties to exist[2]. Thus the nature of the competing and interlinking property rights[3] between trustee and beneficiary fits easily intoproperty ownership under Common Law. This method of ownership also allows for legal title in a piece of property to be kept separate from other assets a person owns. This flexibility allows trust property to be ring-fenced away from a trustee's personal assets and thus protect it in the event of the trustee becoming bankrupt.

In comparison,the civil law notion of ownership, much shaped by the impact of the First French Empire under Napoleon I, is more absolute in nature[4]. Civil law systems use the concept of patrimony[5] to define the proprietary rights of an individual. Patrimony is the entirety of a person's property. As a general rule a person can only have one patrimony[6], which extends to property a person may acquire in the future as well as present assets[7].

[1]*Parker v British Airways Board* [1982] 1 QB 1004. This also explains why, when there is nobody with a claim to property, it will go *bona vacantia* to the Crown. In the context of trusts law, see e.g. *Hanchett-Stamford v AG* [2008] EWHC 330 (Ch).

[2] This also allows for legal title to be co-owned by multiple parties. A discussion of co-ownership of legal title is beyond the remit of this article but the two methods in which legal title can be co-owned in England and Wales are either through a joint tenancy or a tenancy in common.

[3] See fn. 1 *supra*.

[4] For example, Article 544 of the French code civil states ownership as being *"La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlement"*(*"Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law"*).

[5]See e.g.Friedrich Carl von Savigny, *System of the Modern Roman Law*, (William Holloway trans., Hyperion Press, 1979) (1867), 275-276.

[6]See e.g. Aubry et Rau, *Droit civil français*,(5th Ed, 1917), §§ 573-583.

[7] This should be compared to Common Law ownership, where the issue of who has the superior claim to property is only considered from the moment the competing claim has said to arise. Claim to Common Law ownership can thus be seen as more akin to a 'snapshot' of what rights a party has at the moment of breach, and whether those rights still exist at the moment of judgment. See e.g. the lowest intermediate balance rule for tracing in *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 at 68-69: *"You must, for the purpose of tracing, which was the process adopted in In re Hallett's Estate, put your finger on some definite fund which either remains in its original state or can be found in another shape."*

This more absolute notion of ownership does not allow title to be split between parties. Whilstthere can be burdens placed upon ownership, such as usufruct[1], these are generally seen as creating personal rights[2]. Admittedly there are some proprietary exceptions to this idea of absolute ownership, the so-called *numerus clausus*[3]. However, these exceptions are fiercely restricted to scenarios which are deemed by civil law systems to be absolutely necessary[4]. Such an absolute nature of ownership means the idea of split property rights and duties that are required for the trust mechanism to function do not fit within the traditional civil law rules.

Meanwhile, whilst property rights are more restrictive, the civil law notion of contract law is much broader[5]. There is no need for consideration in a contract, so there can be contracts for gifts of property[6]. Rights for third parties to contracts were also traditionally more sophisticated than in

[1] A neutral definition of usufruct is a limited use splitting of rights in property between *usus*, the right to enjoy a thing directly without altering it, and *fructus*, the right to derive profit from a thing. An example can be land used for farming, where the *usus* will be enjoyment of the land and the *fructus* will be the ability to take the profit from selling crops grown on the land.

[2]See e.g. Article 578 French code civil: *"L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance"* (*"Usufruct is the right of enjoying things of which the property is in another, in the same manner as the proprietor himself, but on condition of preserving them substantially"*). The lack of ability to change the quality of the property itself and duty to maintain the property reveals something less than a property right as the property cannot be freely used or reduced in value. Whilst at a first glance it appears similar an equitable life interest under a trust, the fundamental difference is that a life tenant and remainderman have the ability to collapse the trust by use of *Saunders v Vautier*(1841) 4 Beav 115 rights and take the property as absolute owners. This is not possible under a usufruct.

[3]In comparison English law is more relaxed. In *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, Lord Wilberforce defined the requirements for a proprietary right in rather general terms at 1247: *'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'*. New categories of proprietary rights are thus, at least theoretically, easier to add into English law than into civil law systems.

[4]See e.g. B. Akkermans, *The Principle of Numerus Clausus in European Property Law*, Antwerpen/Oxford/Portland: Intersentia, 2008.

[5] See e.g. B Nicholas, *The French Law of Contract*,(Oxford University Press, 1992).

[6]Articles 1108to 1133 of the French code civil cover the rules for formation of a contract. At Article 1108 the following essential requirements are required for a valid contract: *"Quatre conditions sont essentielles pour la validité d'une convention:Le consentement de la partie qui s'oblige; Sa capacité de contracter;Un objet certain qui forme la matière de l'engagement;Une cause licite dans l'obligation."* (*"Four conditions are essential to the validity of a contract: "The*

English law. When considering these concept in the context of trusts law, some academics have noted that trust law in the beginning was about personal rights[1] rather than proprietary rights. Others, developing this idea, have argued the origin of trusts granting personal rights to beneficiaries is an indicator that the origins of a trust came from Roman Law principles[2], akin to how the rules for modern civil law jurisdictions have developed. If both of these points are accepted, then there is a possible argument that it is acceptable to allow a version of a trust which is based purely upon civil law notions of contract law. Under such an idea the settlor contracts with a fiduciary to gratuitously transfer property to the fiduciary with third party rights being given to a class of people who will be the beneficiaries.

At a first glance this alternative is convincing. Some states like Luxembourg, developing law from the Roman concept of *fiducia*[3], created such an arrangement, which they called the *fiducie*[4]. However, there are two fundamental problems with just transforming trusts into contracts. First, the rights under contract law are not proprietary in nature[5]. Even when a contract is specifically enforceable, the idea is not to give rights in the property to the claimant but instead to force a party to do what they have contracted to do; the focus is on the performance by the party rather than the

consent of the party who binds himself; His capacity to contract; A defined object which forms the subject matter of the obligation; A licit cause in the obligation").

[1] See e.g. Matthews, *From Obligation to Property and Back Again?*, Hayton (Ed), *Extending the Boundaries of Trusts and Similar Ring Fenced Funds* (Kluwer, 2002).

[2] See e.g. Johnstone, *Roman Law of Trusts*, (Oxford University Press, 1988); M Lupoi, *Trusts: A Comparative Study*, (CUP, 2000).

[3] This was used by Roman citizens as a type of pact or agreement, used commonly as security for repayment of a loan. It involved the entrusted person as a full owner of property, but having the obligation in described circumstances to restore the property to the transferor. Contrast this with the rights under a *Quistclose* trust as described by Lord Millett in *Twinsectra v Yardley* [2002] UKHL 12.

[4] Law of 27 July 2003.

[5] Whilst a constructive trust can exist in English law for the transfer of equitable title to specifically enforceable property, as shown in *Neville v Wilson* [1997] Ch 144 and *Jerome v Kelly* [2004] UKHL 25, it is submitted that the focus on both of these cases was to use the constructive trust to avoid statutory requirements under section 53(1)(c) Law of Property Act 1925 and sections 47 and 58 Capital Gains Tax Act 1979 respectively. It is further submitted that the principles from these cases cannot apply in a jurisdiction that has refused to accept simultaneous legal and equitable title to a piece of property and as such the rights of third parties under a *fiducie*can only be personal in nature. Note also the *Abstaktionsprinzip* in German Civil Law, which separates the duty for performance under an agreement from ownership rights in property.

transfer of the subject matter of the contract. Under this model the beneficiaries thus only have rights to make the fiduciary do what he has promised to do with the settlor. Admittedly there is the counter-argument that this is not problematic under English law. In *Re Denley's Will Trusts*[1] a trust was found where the beneficiaries did not have a right to the property beyond using it as a sports ground for 21 years. However, it must also be noted*Re Denley's* typetrusts are not universally supported as good trust law[2]. Secondly, if a trust is transformed into a contract thenthe assets received by the fiduciary are not distinct from the fiduciary's personal assets. If the fiduciary were to go bankrupt the beneficiaries would rank as unsecured creditors[3], just like any other ordinary party to a contract.

A more sophisticated response as a consequence of these problems came from the French equivalent of *fiducie* that was created in 2007[4]. Under this modified model, the property was kept separate, in what is described as a *patrimoine affectée*, from the person entrusted to act having a *deposit* (or possession) of segregated assets. Furthermore, as the *patrimoine affectée* is considered a fund, the original assets can be replaced with new assets over time. This would appear to be a step towards asset protecting the rights of the beneficiaries in a manner similar to that under a trust. Further suggestion of the beneficiaries having more rights is the proscribing of *fiducie* for abstract purposes, thus potentially overcoming any beneficiary principles issues. However, this alone is insufficient to make a fiducie a trust. As Waters notes[5]:

> *"segregation in itself does not confer in rem or in personam rights on the fiduciary, on the beneficiary, or on any third party creditor."*

[1] [1968] 3 WLR 457.

[2]Indeed the only case to have followed *Re Denley's* is *Grender v Dresden*[2009] EWHC 214. However, this case can be argued as an example of where the courts have bent strict trust principles to enable a quasi-charitable trust to succeed when it would otherwise fail. Other examples where this has occurred include *McPhail v Doulton* [1971] AC 424 and *T Choithram International SA v Pagarani* [2001] 2 All ER 492.

[3] See e.g. comments by B Vischer, *the Fiduciary in Continental Europe*, Trusts and Trustees, (1999) 5 (7): 13.

[4]*loi* de fevrier 19, 2007.

[5] Waters, D, Hayton (Ed.)*, The International Trust* (3rd Ed) (Jordans, 2011), 17.69.

It is therefore doubtful whether the French *fiducie*is truly a ring-fenced fund in the nature of a trust as traditionally understood solely on the basis of a party under a contract receiving separated assets alone, without any corresponding property rights being given to another person. Indeed, it is submitted that the fundamental aspect of the trust as traditionally understood is the rights-duty relationship between trustee and beneficiary once the settlor has created the trust. On this basis,*fiducie* can never be recognised as trusts when, in all forms of *fiducie*, the relationship is not ultimately between settlor and beneficiary, but settlor and fiduciary instead.

A second issue the French *fiducie* attempted to resolve was the fact that, if these agreements between settlor and fiduciary are personal, the *fiducie* must come to an end if the fiduciary dies or becomes mentally incapacitated. French jurisprudence suggests that the role of fiduciary is an office rather than a personal obligation. The courts could, as Matthews suggests[1], theoretically replace a wrongdoing fiduciary with another person. This does not appear to be set in stone however and, as noted above, beneficiaries to a *fiducie* certainly donot have any *Saunders v Vautier*[2]rights over *fiducie* assets.

Upon considering these two issues:of the need for the relationship to be between trustee and beneficiary,and for the beneficiary to have proprietary rights in the trust property, all forms of *fiducie* pose further problems. To create a *fiducie* you will need a separate trustee from the settlor as you cannot contract with yourself in any legal jurisdiction. Self-declarations of trust are thus impossible to replicate with a *fiducie*. Furthermore,if the existence of the *fiducie* depends upon there being an agreement between the settlor and fiduciary for the *fiducie* to come into existence, the *fiducie* can fail if the fiduciary refuses to take on the role. With a trust in comparison, the trust

[1] Paul Matthews, *The French Fiducie: And Now for Something Completely Different*,(2007) 21 Tru L I 17.
[2] (1841) 4 Beav 115.

will not fail for want of a trustee even if the trustee disclaims the role[1]. Fundamentally, the trust concept therefore does not depend upon a bilateral agreement but instead is created unilaterally by the settlor.

Further differences can also be found upon comparing the standard of conduct expected for a *fiducie* fiduciary to that of fiduciary duties for trustees. Traditionally, the civil law notion of fiduciary was somebody in whom confidence was placed and who could be relied upon, more akin to a duty of goodfaith[2]. The substantial body of rules governing how fiduciaries act in the common law world simply donot apply, with the result that the standard of conduct expected is lower in civil law[3].

The restrictions of*fiducie* not being able to grant proprietary rights to beneficiaries, as well as the lesser standards of performance expected in *fiducie* compared to Common Law fiduciary

[1] If the court cannot find a willing trustee then the Public Trustee has the ability to control a trust under section 2 of the Public Trustee Act 1906.

[2]See e.g. §242 of the German Bürgerliches Gesetzbuch, which codifies the requirement of performance in good faith in German Civil Law.§242 specifically requires parties to take customary practice into consideration when performing in good faith. Whilst this concept can be seen as a method of protecting against opportunism by a stronger party, the remedy is personal in nature and only applies to circumstances that can be foreseeable if adequate precautions are taken. In comparison, cases such as *Boardman v Phipps* [1967] 2 AC 46 show that there appears to be no remoteness test for fiduciaries under English law, although there is admittedly a remoteness test to limit the duration for which fiduciary profits are disgorged in Australian law in *Warman International v Dwyer* [1995] HCA 18. Furthermore, following *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [46], any profit made in breach of fiduciary duty is always subject to theproprietary remedy of a constructive trust in favour of the principal.The notion of good faith by the fiduciary being a defence has also been explicitly rejected in *Regal (Hastings) Ltd* v *Gulliver* [1967] 2 AC 134 at 144–5.

[3]In additional to authorities cited at fn. 35*supra*, the strict prophylactic nature of fiduciary duties under English law can also be seen in the very low causation test required to connect the fiduciary breach to the profit made. Whilst Arden LJ in *Murad v Al-Saraj* held at [62] that *"no fiduciary is liable for all the profits* [she] *ever made from any source"*, the test is stated in *CMS Dolphin v Simonet* [2001] EWHC Ch 415 as being merely that the breach is one cause of the gain. The more stringent 'but for' test was explicitly rejected for fiduciary breach in *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, where Roskill J held at 453*"the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant."* See also Mitchell, *Causation, Remoteness and Fiduciary Gains*, (2006) 17 KCLJ 325 at 332.

duties,lead to a*fiducie* concept that is less flexible than the trust. The restrictions make itunclear whether the discretionary trust, where the rights of some beneficiaries are defeasible by the fiduciary electing to transfer property to only some members of the class, can ever be suitably replicated by a *fiducie* in which the third party contractual rights of beneficiaries would be by necessity fixed by the terms of the contract. Furthermore, if the discretionary trust is unlikely to fit into the *fiducie* model, then the concept of adding a personal power, where parties who have no automatic rights to even be considered to receive property, but if exercised would defeat rights of discretionary beneficiaries, would certainly be impossible to use in a *fiducie.*

These numerous issues reveal the *fiducie* is not a suitable substitute for a trust, no matter how sophisticated the contract rules are in the jurisdiction. The lack of direct rather than third party relationship between fiduciary and beneficiary, coupled with a lack of proprietary rights for the beneficiary and lesser standard of conduct expected of the fiduciary, ultimately create a legal device that is neither as stringent nor as flexible. Rather greater success has been shown by civil law jurisdictions that have attempted to accept the trust as a new type of property-holding regime. An example that is frequently highlighted is the use of trusts in Italy, which has adopted the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition. However the Italian interpretation of trusts, the *trust interno*, is itself subject to criticism. In an attempt to try and fit the trust concept into every possible jurisdiction, the Hague Convention definition of a trust in Article 2 of the Convention is vague[1], to the extent that it would appear to allow for trusts for

[1]Article 2 of the Hague Trusts Convention defines a trust as follows: *"For the purposes of this Convention, the term "trust" refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics - a) the assets constitute a separate fund and are not a part of the trustee's own estate; b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the*

abstract purposes.To ensure that this vague definition did not offend the rules of an individual jurisdiction, Article 18 allows for a signatory to not recognise a trust that is 'manifestly incompatible with public policy'. As many Italian trusts appear to be for abstract purposes, without even an enforcer as required for offshore trusts such as Cayman STAR[1], it is likely that any Italian trusts without beneficiaries and perpetuity periods are likely to encounter difficulties in recognition by the English courts[2].

It is submitted that the only civil jurisdictions that have a concept that would be recognised are those that have completely assimilated the trust concept, such as Monaco[3]. Many states have refused to do thisdue to a fear that trusts with property rights could be used to defeat forced heirship rules that exist in their legal systems[4]. Many civil law states are therefore at a difficult impasse, where the only way to bring the trust law concept properly into a civil law jurisdiction is to use statute to create a new exception to absolute ownership, but with the difficulty of states not wanting to have to make significant changes to their tax laws if the concept is incorporated into a state's legal system. As it currently stands however, attempts to fudge the issue by modifying existing principles in civil law jurisdictions have not created a legal conceptsufficiently similar that can properly be recognised as a trust.

Civil Law: Trusts as a Legal Person?

Another issue is the possibility of the English trust being given its own legal personality, something akin to the modern legally personified corporation. One way that this may be effected is by

*existence of a trust."*For further discussion see e.g. Lupoi, *The Shapeless Trust*, Trusts and Trustees, (1995) 1 (3): 15-18.

[1] For current rules on Cayman STAR (Special Trusts (Alternative Regime) see Part VIII of the Cayman Trusts Law (2009 Revision).

[2] See fn. 7 *supra*.

[3] *loi* no214 of 1936, as modified by *loi* no 1216 of 1999.

[4] This is not a general issue in English law as there is a wide degree of freedom of testation, subject tolimited statutory modification under the Inheritance (Provision for Family and Dependants) Act 1975.

reference to a commercial model from the continent, known as the Anstalt, which is particular to Liechtenstein[1].

While a trust is always recognisable from its constituent elements, the corporation grew from the 17th Century concept of shared co-entrepreneur assets being held in trust and dedicated to the enterprise in question. In onshore jurisdictions this is still the typical set-up with a clear distinction being upheld between a personified holding vehicle (the corporation) and a trust[2]*. While it seems more logical that the motive for setting up the trust in the first place would dominate, as the corporation steered the vessel along the course of best financial growth and prosperity, this has not been the case. One reason may be that if one displaced the beneficiaries of a trust with the motive behind the trust then one would stray into the tenuous realm of purpose trusts over which strict rules of perpetuity apply*[3]*. The distinction that is reserved onshore between corporation and trust is not accidental; both complement one another very well. On the one hand the corporation has the ability to fulfil purposes of any kind whatsoever and to hold various classes of shares depending upon its individual outcomes. In many ways these powers replicate the wide range of beneficial interests normally associated with the trust but without the complications of such issues like the beneficiary principle. On the other hand, shares in the corporation may be controlled using the trust vehicle, setting out the administration of family shareholdings under the traditional aegis of trustee obligations and enforceable equitable interests.*

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[1] For an interesting examination of the nature of an Anstalt with respect to a common law jurisdiction, see the United States Internal Revenue Service memorandum number AM2009-012. Section 301.7701-4(a) of the Procedure and Administration Regulations provides that the Internal Revenue Code prescribes the classification of various organisations for federal tax purposes.Section 301.7701-4(a) of the regulations provides that, in general, the term "trust" as used in the Code refers to an arrangement created by will or by an *inter vivos* declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules provided in chancery or probate courts. In this case, the IRS decided that an Anstalt was not a trust for taxation purposes.

[2] Patten LJ discusses this somewhat simplistically in *JSC BTA Bank v Kythreotis & Others* [2010] EWCA Civ 1436 at [26]. He indicates that the assets of an individual includes those held under a Liechtenstein Anstalt 'when the defendant retains beneficial ownership or effective control of the asset.'

[3] See e.g. Roxburgh J's discussion *In Re Astor's Settlement Trusts. v Astor v Scholfield and Others*[1952] Ch 534; *In Re Endacott* [1960] Ch 232; *Re Denley's Trust Deed* [1969] 1 Ch. 373; *Hanchett-Stamford v Attorney General*[2008] EWHC 330. Sections 5 and 18 of the Perpetuities and Accumulations Act 2009 may also be examined with respect to this issue.

While it has been argued that the legal personification of the trust may lead to greater flexibility with respect to investment, perpetuity, and property holding, this seems somewhat unnecessary and complicated. The last thing that many trusts academics and practitioners would like to see in England and Wales is the domestic equivalent of the Liechtenstein Anstalt, an entity unknown outside Liechtenstein and perhaps with good cause. It is a distinct legal person with a specified internal organization, entered in the Commercial Registry; it is only at this point that it will gain its legal personality. The *Anstalt* holds rights and property that are personal to it and is generally not a public company.

An *Anstalt* may have members and capital divided into parts in one case or no members and undivided capital in another. For the most part, the *Anstalt* is a privately organised undertaking with its own legal personality and founded with a stated amount of capital.

The purpose of the *Anstalt* are set forth by the Founder in the articles of incorporation and can be stated as desired, provided that the same are not immoral or illegal in application. The purpose may be of a commercial or non-profitable nature, but if the purpose permits the *Anstalt* to engage in commercial activities it must keep proper records of its transactions and also submit accurate financial statements on an annual basis[1].

One very real issue with this somewhat peculiar vehicle is that it seems to be all things to all people. It is something of a chimaera, a synthesis of a trust and a corporation; in another light it appears as a hydra with multiple co-existing heads. On the one hand it may be treated as a trust with objects associated with the traditional Anglo-Saxon construct and yet on the other it is its own legal person. If on the one hand its objects can hold the *Anstalt* to account as a traditional beneficiary might a trustee, this would seemirreconcilable with the notion that the corporation also administers property for business purposes as if it was the outright owner with its own specific legal personality.There is no one to hold this trustee/absolute title holder to account.It would seem better to retain the current distinction between legal personalities, such as corporations and the trust. There seems no particular need to compromise the flexibility of the trust, subject to precedent

[1] See Timothy D Scrantom and Romasa Butt, *Common Law and Tax Recognition of the Anstalt and Foundation,* Trusts & Trustees (1999) 5 (2): 27-30.

and case law, by imposing clear statutory limitations and regulations upon it as would be required should it acquire legal personality. By retaining the latter with respect to corporations and the former with respect to trusts there would be the best of both.

There is also the problem of encouraging the use of the *Anstalt* as a method of avoiding taxation, turning England & Wales into an onshore version of an offshore tax haven[1]. For, if one may appear to be a beneficiary of an *Anstalt* with respect to enforcement powers, but the *Anstalt* itself is the owner of its own funds, then the beneficiary would be allowed to escape tax liability. This makes little sense and has little to recommend it. It is most likely, therefore, that in England and Wales this distinction will be retained in at least the foreseeable future.

Other Legal Systems: *Waqf*

At the same time as civil law systems have attempted to assimilate the trust concept, there are suggestions that other legal systems already have equivalents of trusts. The most common of these concepts is*waqf* under Islamic law. *Waqf* literally means "detention" and is a legal entity agreed to exist by all four Islamic schools of thought; the Maliki, Hanafi, Hanbali and Schafii schools. As a discussion of *waqf* for every school of thought and jurisdiction is beyond the remit of this article, the law on *waqf* in Bangladesh will be highlighted as an example. Under the Waqfs Ordinance, 1962 (East Pakistan Ordinance No 1 of 1962), a *waqf* is when a *waqif* gives an asset[2] to a *mutawalli* to manage the *waqf* and fulfil its aims. Fundamentally, the *mutawalli* does not own the property; he is only a "manager" with duties similar to good faith rather than fiduciary duties. The *waqf*

[1] Alastair Hudson has written about this issue in: A Hudson, *Understanding Equity & TrustsThird Edition* (2008) Oxford, at 179-181. See also *Baker (Inspector of Taxes) v Archer-Shee* [1927] AC 844with respect to tax implications for a beneficiary under a trust despite the trustees being a company with full power of investment over the trust fund.

[2] Whilst this is traditionally land section 2(10) of the Waqfs Ordinance, 1962 includes both movable and immovable property.

property is either seen as ownerless[1] or owned by God[2].When this property is transferred, the capital is tied up in the *waqf* and cannot be replaced[3]. The *mutawalli* can use money[4] and income to fulfil *waqf* aims, with the general aim of preserving the *waqf* capital.If the *mutawalli* wants to use capital, then he can apply to the administrator for permission[5], but this at the discretion of the Administrator. Waqfs are overseen by an Administrator[6] whose function is similar to the enforcer for certain offshore trusts.[7]

Lupoi argues that the definition of a trust in the 1985 Hague Trusts Convention is so shapeless that *waqf* can be seen as trusts[8]. However it is submitted that there are similar problems as to those discussed for *fiducie* above. Whilst *waqf* and trusts are used for similar purposes, they are

[1] This is a particular issue for English law as the doctrine of estate does not allow for the concept of ownerless property. Indeed the *bona vacantia* rule was created so that property would always have an ultimate owner, even if it has to revert to the Crown. This is also an issue for civil law jurisdictions where the state or local authority has the right to claim the property after a certain period of time, such as 30 years in France. Whilst in Bangladesh section 12 of The Abandoned Property (Control, Management and Disposal) Order, 1972 (President's Order No 16 of 1972) states that abandoned property of a waqf can be vested in the Government, the Government of Bangladesh only retains ownership pending the appointment of fresh *mutawallis*.

[2] Property owned by God creates a particular issue for Western legal systems due to the lack of ability to join God as a party to litigation in the courts. See e.g. in Nebraska, USA the attempt by Senator Chambers to sue God in 2007, which was stuck out at a preliminary stage due to a lack of address for serving God as defendant. Similar argument shave been for dismissing claims against Satan, see e.g. *United States ex rel. Gerald Mayo v. Satan and His Staff*,54 F.R.D. 282 (1971).

[3] Section 2(10) of the Waqfs Ordinance, 1962 states that waqf means the permanent dedication of property.

[4] Section 59 of the Waqfs Ordinance, 1962.

[5] Section 56 of the Waqfs Ordinance, 1962.

[6] Section 7 of the Waqfs Ordinance, 1962.

[7] Section 27 of the Waqfs Ordinance, 1962 specifies the powers and functions of the administrator: *"Subject to the provisions of this Ordinance and the rules made thereunder the powers and functions of the Administrator shall include- (a) investigating and determining the nature and extent of waqfs and waqf properties, and calling, from time to time, for accounts, returns and information from mutawallis; (b) ensuring that the waqf properties and income arising therefrom are applied to the objects, and for the purposes and for the benefit of any class of persons for which such waqfs were created or intended; (c) giving directions for the proper administration of waqfs; (d) managing himself, or through the officers and servants employed under this Ordinance or persons authorised by him, any waqf of which he may take or retain charge under this Ordinance and doing all such acts as may be necessary for the proper control, administration and management of any such property; (e) fixing the remuneration of a mutawalli, where there is no provision for such remuneration in the waqf deed; (f) investing any money received as compensation for the acquisition of waqf properties under any law for the time being in force, by himself or by issuing directions for proper investment by the mutawalli; and (g) generally doing all such acts as may be necessary for the due control, maintenance and administration of waqfs."*

[8] See fn. 37*supra*.

fundamentally different in concept. The most fundamental distinction between a *waqf* and a traditional trust is that *waqf* are meant to last for ever, whilst trusts, at least in England and Wales, are meant to follow the rules against perpetuities[1].Furthermore, under a *waqf*, since the *mutawalli* does not own the property, there is no title transfer as required under Article 2 of the 1985 Hague Trusts Convention to be classified as a trust. Whilst it might be argued that it is so close that it should be recognised, the stronger counter-argument is that the convention has already made concessions to being recognised in as many states as possible by having such a loose definition of the trust. By not meeting these criteria, *waqf* cannot be recognised as trusts. The appointment of an administrator might be similar to some offshore trusts jurisdictions but whether these would be recognised in English law is debateable[2].

Furthermore, the lack of a perpetuity period and legal title owner of the property means, as well as a lack of fiduciary duties for the *mutawalli*[3] means that *waqf* would be seen as contrary to public policy under English law by virtue of Article 18 of the Hague Convention and as such not recognised in England and Wales as trusts. It is submitted that as long as the Islamic schools of thought do not see the trust as being contrary to *fiqh*, or Islamic jurisprudence, sharia law has the ability to adapt in a more flexible way than many civil law jurisdictions. Furthermore, so long as the fundamental tenets of trust law are accepted, then it is possible to add further restrictions for

[1] See fn. 7 *supra*. A detailed criticism of the rules against Perpetuities has been made by Gallanis, *"The Rule Against Perpetuities and the Law Commission's Flawed Philosophy"*, 59 *Cambridge Law Journal* 284 (July, 2000)in which his conclusion is that the economic and social policy justifications for the rules against perpetuities in England and Wales do not stand up to scrutiny. Although perpetuity period for the rule against remoteness of vesting was modified by the Perpetuities and Accumulations Act 2009, a comparison to perpetuity periods in other major trusts jurisdictions reveals that this is still far more conservative than average. Although it is unlikely that any major development beyond the 2009 Act will happen soon, it is submitted that Gallanis' criticisms are valid and consequently there is room for further development for perpetuities in English law.

[2]See e.g. Matthews, *From Obligation to Property and Back Again?*, Hayton (Ed), *Extending the Boundaries of Trusts and Similar Ring Fenced Funds* (Kluwer, 2002). In essence Matthews' argument is that, since the enforcer is not meant to have any rights in the property, by deduction the enforcer rights must be personal in nature. These personal rights are not a sufficient counterbalance to ensure that the trustee duties are properly fulfilled. Therefore the same problems of ensuring that there is somebody to whom the court can decree performance of the trustee duties remains and the purpose trust will be seen as contrary to public policy under Article 18 of the 1985 Hague Trusts Convention.

[3] See fn. 35 and fn. 36*supra*.

how a trust could be used so that it is consistent with Islamic legal principles. As such it is submitted that, if acceptable, a wholesale adoption of trust law principles would be a more advantageous method of using trusts in sharia law.

Conclusion

Considering the flexibility and array of uses for the trust concept, it would be surprising if other legal systems did not have something similar to the trust. Yet it cannot be forgotten thatthe trust as a property holding device was created due to the particular way in which property rights can be held under English law and the historical developments of case law and legal concepts specific to England and Wales. Other jurisdictions have attempted through a variety of means to incorporate the trust into their domestic law. However, the consistent result has been that incorporation of a trust will only be successful if the jurisdiction has been willing to accept the connected standards of duties placed upon trustees, the derivative rights granted to beneficiaries, and the standards expected in how the trust is administered. Many jurisdictions have been unwilling to do this for a variety of reasons. Unless other jurisdictions can overcome these issues and find means of accepting the trust concept with all of its related rights and duties, the alternatives to trusts will remain an unsatisfactory compromise and the concept of an ‘International Trust’ will remain out of reach.

Pervading Modernism, Shrivelling Procedural Obsolesecnce: Commending a case for Digitalised Court System

The slumberous attempts at digitising the judicial system since the 1990s is an inferential extension of the franchise aimed at facilitating simplification, modernisation and systematic progression in the legal arena. This, as many court administrators, lawyers and judges around the world foresaw, has ground-breaking potentials to trailblaze constructive characteristics on the procedural aspects of a litigation, mostly by means of positive exploitation of the progressive technological advancements of the 21st century.

In simple terms, the concept of 'electronic' Court is a proposed means by which pending and ongoing cases can be dealt with more efficiently by conscientiously utilising information and communication technologies (ICT). Quite unsurprisingly, the idea in itself is neither unrealistic nor fiercely demanding, but rather an organic and incremental accession of the ICT into the judicial system, its proliferation firmly moored in both theroitical and practical pragmatism. Initially being implemented in an ad hoc basis, the idea gained practical momentum in light of overwhelming benefits that it yielded and the potential it afforded; Singapore, for instance, inspired by its success, installed litigation-management and support technology in their courtrooms with great success.[1]

A well-constituted e-Court system would have lustrous prospects of allowing organised dispensation of justice at a cost-effective, expeditious and transparent manner, ensuring unbiased, independent and impartial legal uprightness in a highly efficient and user-friendly manner, under a general comparative standard of conventional court process. Possibly the most significant barr to access to justice in modern legal system, globally, is the rapid accumulation of cases with slow disposal rate, which has resulted in unimaginable backlog and procedural stagnancy.

The concept has the added advantage of round-the-clock accessibility, downgrading of the adversarial nature of the court system to a more inquisitorial one, and the shunning of the almost

[1] https://www.iacajournal.org/index.php/ijca/article/viewFile/132/118

defunct and crippling culture of employing expensive lawyers in tailored suits and long hours of legal meetings and court proceedings. It has the unrealised budding of convenience and transparency. It is essentially redundant to the practice of physically carrying and transfering of files and evidences to and fro the courtrooms and the corporeal presence of the accused and the witnesses, since the facility of digitalised data storage and video conference would render it a lavish state of affair. This will effectively displace the unholy reliance from paper-based evidence that has historically caused unnecessary delays when lost or misplaced, and would prevent physical tampering and environmental degradation of the evidences. The application of the system would further elevate the likelihood of a more systematic, widespread and stringent praxis of ADR.

It is worth noting that the author intends this disquisition to portray a picturesque print of the concept as a viable alternative to the tedious and coventional court processes and further all possible avenues to unburden it; the idea in itself has potentially infinite prospect for other forms of utilisation, which includes systematic employment of the platform on a purely advisory basis by an individual seeking a third party independent opinion for, for instance, disputed will, divorce settlement, or even family quarrels and personal diemmas, and bring them as an authoritative and highly persuasive premise to the negotiation table, without having to cut through all the red tape of the normally lengthy litigation process.

The International Criminal Court in The Hague is often cited as the best example of electronic court. Regulation of the Court 26 explains:

> The Court shall establish a reliable, secure, efficient electronic system which supports its daily judicial and operational management and its proceedings.

The ICC e-Court Software Suite is formulated to manage transcript, evidence, associated materials, audio and video broadcast, its systematic integration with external resources, and provide a "public" broadcast, with the assistance of advanced in-house technology with the intention to make it available not only to the parties involved but to those interested outside the court, ensuring consistent exchange of information.[2] But it should be noted that ICC is neither the first

[2] http://www.aija.org.au/Law&Tech%2008/Papers/Keddie%20&%20Flores%20PPT.pdf

international court nor the only one with such advanced technological support. By 1997, it was estimated that there were as many as 50 high-technology courtrooms in the world.[3]

In the United Kingdom, the abstract of e-Courts have materialised and gained momentum in multifarious forms in the recent years, with a digital concept court operating in Birmingham Magistrates' Court [4] and electronic filing of bundles being piloted by the UK Supreme Court and the Judicial Committee of the Privy Council[5]. While much of the initiatives are yet to take effect in full swing, significant progress and feasible proposals furthering the cause have been made.

Damian Green, former Minister of State for Police and Criminal Justice, proposed in 2013 a number of measures, under the coalition government, for a radical overhaul of the traditional system by 2016 and sweeping digitisation of it, against an investment of £160 million. The services would include, *inter ali*, full WiFi connectivity in the majority of 500 courts, setting up of Digital Evdience Screen, rolling out the digital case file to replace the current paper ones, accessibility of information between all the stakeholders, special measures for vulnerable and intimidated witnesses, online case progress reports and updates, and giving evidence and testimonies by secured video channels. This mass digitisation and simplification of justice systems will ensure that scarce police resources are used providently and help create a lean, modern and responsive system, thereby avoiding expensive, time consuming and risky transfers of thousands (approximately 13, 500 a year) offenders from prison to court, thereby cumulatively saving millions of officer hours a year and creating a more accessible and transparent justice system.[6]

Although such supersonic level of advancement is yet to materialise, positive progression is not undocumented. Certain online portals, such as www.ecourt.co.uk, offers "competent afforadble, secure, transparent and speedy justice" for those availing its service. The process is fairly simple. While it reduces the cost of lawyers and judges acting as intermediary and arbitrtor, the process cannot be said to be wholly inexpensive if seen from an expansive view.

[3] Damian Schofield and Stephen Mason, Using Graphical Technology to Present Evidence, from Electronic Evidence, Steven Mason (editor) 3rd Edition, LexisNexis 2012
[4] https://quarterly.blog.gov.uk/2013/10/22/the-digital-court/
[5] https://www.supremecourt.uk/procedures/electronic-bundle-guidelines.html
[6] https://www.gov.uk/government/news/damian-green-digital-courtrooms-to-be-rolled-out-nationally

These service providers are merely providing legal opinion based on logic and a sense of fair play, against a sum that may vary from £25 to £10,000, with an option to appeal. As far as the legality of the verdict reached is concerned, it is merely pursuasive if the parties agree to it. It may fall under the law of contract if the parties commit their assent in writing. It has no precedental significance, the establishment having no authority to sanction legal redress nor the power to subpoena. One may be correct to find such arrangement as a fanciful alternative to consulting a lawyer in a conventional manner. While one may be just to treat it as an invaluable and innovative, but ancillary, addition, it is not incorporation of e-Court system in its purest form, since it is not an alternative to the traditional court system.

In the UK every year the courts and Crown Prosecution Service (CPS) use roughly 160 million sheets of paper, whilst in Australia if one is to stack every paper document held in the storage facilities of Australia's Federal Circuit Court and Family Court they would stand staggering 24 kilometres high - its maintainance costing the National Treasury about $1 million annually[7]. Nevertheless, both the Australian courts have implemented internet-connected cameras, used for about 250 hours a month, and facilities of portal with live chat feature used by an average of 200 people a day. Though extremely sluggish, the initiative was taken back in the 1990s, evident from the abolishment of the ‘original document rule’ through the enactment of the Evidence Act 1995. The ultimate aim is to diminish the traditional form of archiving so that the days of trolleys full of papers coming into the courtrooms are brought to an end. [8]

From a convenient system of word search, highlighting and bookmarking to having a reliable electronic access to legal research materials, the electronic nature of the system would necessarily make the process more efficient, cost effective and time saving for the judges, requiring less time to be spent in chambers conducting paper-based research. It is not sufficient for judgments and other court materials to be available online for reference purposes only. The internet should be

[7] http://www.smh.com.au/digital-life/digital-life-news/australian-courts-1-million-a-year-paper-problem-20141125-11thmm.html

[8] http://www.smh.com.au/digital-life/digital-life-news/australian-courts-1-million-a-year-paper-problem-20141125-11thmm.html

positively exploited at all stages of the court proceeding, from filing the originating or appellate proceeding, to final determination.

In 1993 in the United States, an innovative project was set up at the William and Mary Law School in Virginia, called the Courtroom 21 Project – later changed to the Center for Legal and Court Technology –with the goal "to improve the world's legal systems through the appropriate use of technology." Initiatives such as this began to appear elsewhere in the world, often a joint collaboration between theoretically oriented academics and practically oriented court system officials.[9]

Professor Bing, in Greenleaf, Mowbray and Lewis' Australasian Computerised Legal Information Handbook quite correctly stated:

> "… the lawyer is like a treasure hunter in the wilderness of legal sources ... (being) dependent upon some sort of navigation instruments and treasure maps. The most efficient retrieval tool available is the computerized legal information services***. A lawyer not familiar with such tools may not be considered illiterate today, but he certainly will be severely handicapped tomorrow.***"

It applies for lawyers as much as the judges, court administrators and litigants. Full digitisation would require even the most inadept person to acquire the basic computing skills before approaching the digital court's vicinity. Notwithstanding, a significant determinant factor is the issue of funding such intricate system to computerisation, since it competes with important purposes like public safety, education, child welfare, mental health, and medical care. It is important for the assessors to carefully analyse cost against benefit and ensure that the benefit outweighs the cost. The mere convenience of improved court system does not take the battle for pounds and dollars very far unless the State is shown to have been losing money from such inconvenience. To warrant funding in a democratic state, court technology must be able to further improve our ability to impact the lives and communities it serves. To that end, the concept of 'digital' court is worth every penny afforded because of its towering potentials.

[9] See: http://law.wm.edu/academics/intellectuallife/researchcenters/clct/

Nevertheless, credible concerns about security of information and the channel of communication have been voiced, since there exists general mistrust of the internet and the perception that the sensitive information being stored may be sabotaged or misused by its sacred guardians. This can be averted by ensuring a duplicate copy of a Court's database, strict regulatory enactments, technicians, regulatory watchdogs, and ensuring advanced cyber defence system. It must be always ready to be used and a breach in security would incapacitate the entire structure for indeterminate duration of time. This justifies hardcopy of every evidence and document, for documentation and safety purpose. The question remains: would it really reduce the costs that it averred it would?

Adoption and systematic adaptation of the scheme is not an immoderate extravagance, as many conservative minds would reiterate, but rather a necessity, a promise, and a constitutional right of the populace. The Constitution of the People's Republic of Bangladesh is fairly amenable and even though there is no unambiguous expression in any of the Articles suggestive of digitisation of the judicial processes, several Articles rationalises it. End, after all, often justifies the mean.

Article 27 of the Constitution, for instance, intends the citizens to be equal before the law and entitles them to an equal protection of the law. Article 18 affirms that the State shall endeavour to ensure equality of opportunity to all citizens. The monstrous degree of case backlog in Bangladesh prevents one from affording his right under the said Articles and the concept under consideration would give the judiciary the requisite innovation it needs to create leeway for one to rightfully enjoy the fruits of his rights.

Further, Article 14 states that it shall be the fundamental responsibility of the state to emancipate backward sectors of the society from all forms of exploitations. Article 35(3) ensures a speedy and fair trial. The Constitution has professed to recognise such concepts as 'equality before the law', 'equal protection of the law', 'rule of law', amongst others. In light of these discussions, it would be correct to observe that digitisation, perhaps something similar to Damian Green's proposition, would in essence uphold the virtues of the Constitution and will help the legal system realise the cornerstone of omnipresent justice.

However, mere digitisation will not suffice. In Bangladesh, and most of its neighbouring countries, the practice of the concept would be embraced with perplexity and willful defiance. Even in the

West, there is less enthusiasm, perhaps even scepticism, towards the modernisation and a favourism towards the conventional practice with pen and paper amongst certain breed of judges.[10] The Delhi High Court, for instance, has six paperless e-courts while the The High Court of Karnataka has established two more. The problem with the system, in Ram Mohan Reddy's[11] words,

> "Can we think of e-courts if advocates are not ready to adopt cause list provided in electronic form and object to the stopping of supply of cause list in printed form?"[12]

This is, to many experienced advocates of law, not surprising since such apprehensive attitude persists amid senior lawyers, the judges, court adimistrators, and even the forerunners amongst them. Besides training and educating these diversified selection of stakeholders, it is pivotal for the government to clearly depict the relevant political objective and expected outcome as well as positively involve both the Bench and the Bar in the process. Adaption is more important than adoption.

The politically unassailable agenda of the Bangladesh's incumbent government persisting from 2008, *Vision 2021*, defends technological emancipation and a solemnised vow to create 'Digitial Bangladesh' before the country turns 50. Though any significant development on that front is yet to be substantiated, a rabbit can easily be conjured from a hat. A failure to ensure such digitisation would be an embarrassing failure, from all the three fronts: defeating a wailing cry for necessity, a political pledge and, more importantly, the constitutional right.

The world has entered an era of fast-paced digitisation, rampant human profusion, globalisation, multiplying debts, scarcity of resources, increasing legal, social and moral dilemma and impasse, and an uncontrollably high inflation of material demand. The judicial system, incidentally, is at the epicenter of the circus. To use quilt and pachment in an era of computer and internet is nothing

[10] http://www.smh.com.au/digital-life/digital-life-news/australian-courts-1-million-a-year-paper-problem-20141125-11thmm.html

[11] Judge of the High Court of Karnataka and Chairman of the Court Computerisation Committee

[12] http://www.thehindu.com/todays-paper/tp-national/can-we-think-of-ecourts-if-lawyers-arent-ready-for-even-ecause-list/article4586980.ece

short of absolute hilarity, wilful ignorance and an insult to one's intellect. Technology has creeped into every sphere of one's life, including the judicial system.

The author is not suggesting any form of revolutionary refurbishment of all the courtrooms around the world: practicality may dictate the traditional arrangement to prevail over the modern digitalised one or perhaps the cost will outweigh benefits – the possibilities are limitless and to draw one single conclusion would be thoroughly ill-advised. Necessary strategic planning must be done. But more importantly, customary hollow words should diligently be repleted with some positive actions and, of course, good many boxes of algorithms.[13]

[13] The author referred to computer and other devices that runs using algorithm.

ENFORCED DISAPPEARANCE: AN UNDEFINED CRIME IN BANGLADESH

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Abstract: Enforced disappearance is regarded as State sponsored heinous crime which emerged recently in Bangladesh. Political opposition is the main target of forced disappearance; however, civilians are also victim of this offence. Most of the incidents are unsolved and law enforcing agencies repeatedly denied their involvement with this. UN has adopted an International Convention for the Protection of All Persons from Enforced Disappearance in 2006 to abolish the offence from the planet. According to this convention state parties are obliged to take necessary actions to stop this offence. Some other international conventions also treated it as crime against humanity. However, no criminal laws of Bangladesh have yet recognized forced disappearance as offence albeit now it is a reality in Bangladesh. Nevertheless, right to life is one of the key fundamental rights guaranteed under Bangladesh constitution which is violated by continuous

occurring of this crime. It has huge impact on victim's family as well as on the society of Bangladesh. Bangladesh needs to be a state party of the International Convention for the Protection of All Persons from Enforced Disappearance immediately and needs to legislate a new law to prevent any sort of state sponsored crime to stop further consequences. Otherwise, present illegal practice of forced disappearance will bring massive consequences for the whole nation.

Key Words: Enforced Disappearance, Human Rights, Constitution, Bangladesh, Fair Trial, Fundamental Rights, Violation, Crime.

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I Introduction

In last couple of years, the occurrences of abduction, kidnap, enforced disappearance, killing etc. have increased immensely in Bangladesh. Among them the seven murders case at Narayanganj in

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2014 had created most reaction among the citizens which exposed the cruelty and inhumanity of the incident as well as aware the country massively about the gravity of these offences. Apart from this, in recent years there are huge numbers of allegations regarding kidnap, abduction, forced disappearance, extortion and finally killing by unidentified perpetrators.

Most of the incidents are still unsolved and a very few people are rescued successfully by the law enforcers. However, in most of the abduction cases family members, relatives and friends of the victim triggered their assertion towards law enforcement agencies and specifically they have suspected and alleged that people wearing civil dress introduce them as member of Rapid Action Battalion (RAB) or Detective Branch (DB) or from other law enforcing agencies are arresting and forcefully bringing the victim with them.

But when victim's family or media are asking the law enforcers, they repeatedly denied the matter and told that they even do not know anything about it or they did not conducted any such operation. Till now, none of the offenders have brought to trial. Moreover, the incidents are neither properly investigated nor any actions has been taken with proper liabilities to prevent such events. Hence it is not impractical at all that the criminals took the opportunity and gained their desire by the name of law enforcement agency.

II Definition of Enforced Disappearance in International Law

Enforced disappearance is a relatively new addition to state crime.[1] **Enforced disappearances persist in many countries all over the world, having been a continuing feature of the second half of the twentieth century since they were committed on a gross scale in Nazi-occupied Europe.**[2] After the expansion of this offence in December 2006, the UN has adopted the International Convention for the Protection of All Persons from Enforced Disappearance.[3] The Convention entered into force on 23 December, 2010. To date, 90 states have become signatories,

[1] "*Enforced Disappearance: A Violation of Humanitarian Law and Human Rights*," International Committee of the Red Cross, 27June 2006. <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/human-rights-councilstatement-270606.
[2] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, P. 379 (2005).
[3] The text was adopted on 20 December 2006 (A/RES/61/177), and was opened for signature on 6 February, 2007.

and 30 have ratified the Convention.[4] Among those states that are a party, 12 have recognized the competence of the Committee of Enforced Disappearances (CED) to receive and consider communications both by individuals alleging that their rights under the Convention have been violated as well as communications by states claiming that another state party is not fulfilling its obligations under the Convention. Very few states have implemented the Convention into national law. The convention aims to prevent enforced disappearances taking place, uncover the truth when they do occur, punish the perpetrators and provide reparations to the victims and their families.

The Convention delivers a definition of the crime of enforced disappearance and necessary state action in order to both prevent the occurrence of the crime and to allow for the investigation and prosecution of the culprits. As per the language of Article 2 of the mentioned Convention an enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Hence the International Convention for the Protection of All Persons from Enforced Disappearance identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;
- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

Article 1(2) also furnishes, in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. In addition to this, under Article 4 each State party

[4] The countries that have ratified the Convention to this date are: Albania, Argentina, Armenia, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Cuba, Ecuador, France, Gabon, Germany, Honduras, Iraq, Japan, Kazakhstan, Mali, Mexico, Montenegro, Netherlands, Nigeria, Panama, Paraguay, Senegal, Serbia, Spain, Tunisia, Uruguay & Zambia.

has an obligation to take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Moreover, the aforementioned Convention added in Article 6(1) (a) & (b) that any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; and a superior who: knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance and he/she shall be liable for the commission of that offence.

Enforced disappearance is a cumulative violation of human rights.[5] This is because it may inflict a wide range of human rights violations, including violation of:

- The right to life: as the person may be killed or his or her fate may be unknown;[6]
- The right to security and dignity of a person;
- The right to be free from arbitrary detention;[7]
- The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;[8]
- The right to humane conditions of detention;[9]
- The right to legal personality;[10]
- The right to fair trial;[11]
- The right to free movement;[12]
- The right to family life;

[5] Steven R. Ratner, Jason S. Abrams & James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Pp. 128-29 (3d ed. 2009).
[6] Guaranteed as fundamental right under Article 32 of the Constitution of the People's Republic of Bangladesh.
[7] Guaranteed as fundamental right under Article 33 of the Constitution of the People's Republic of Bangladesh.
[8] Guaranteed as fundamental right under Article 35 of the Constitution of the People's Republic of Bangladesh.
[9] Guaranteed as fundamental right under Article 33 of the Constitution of the People's Republic of Bangladesh.
[10] Guaranteed as fundamental right under Article 31 of the Constitution of the People's Republic of Bangladesh.
[11] Guaranteed as fundamental right under Article 35 of the Constitution of the People's Republic of Bangladesh.
[12] Guaranteed as fundamental right under Article 36 of the Constitution of the People's Republic of Bangladesh.

All of the above rights are guaranteed as fundamental rights whether directly or indirectly and enforceable by the court under the scheme of the Constitution of the People's Republic of Bangladesh.[13]

Apart from this, the Rome Statute of the International Criminal Court, the Committee of the Red Cross Rules of Customary International Humanitarian Law, the Inter-American Convention on the Forced Disappearance of Persons prohibits the act and obliges the State parties to define forced disappearance of persons as a crime in their national law and to impose a appropriate punishment commensurate with its gravity.

Rome Statute of the International Criminal Court particularly treats forced disappearance as crime against humanity in Article 7 as "*For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
(i) Enforced disappearance of persons."[14]

Additionally, Inter-American Convention on the Forced Disappearance of Persons affirmed the obligation of State parties in this regard in Article 1 as "*The States Parties to this Convention undertake: a) Not to practice, permit or tolerate the forced disappearance of persons, even in the states of emergency or suspension of individuals guarantees.*"

Hence to prevent this kind of offence Bangladesh should become a state party to the International Convention for the Protection of All Persons from Enforced Disappearance and must needs to legislate a new law urgently to stop the crime effectively.

III Importance of the International Convention for the Protection of All Persons from Enforced Disappearance

[13] Mahmudul Islam, "*Constitutional Law of Bangladesh*," 2nd ed., Mullick Brothers, 2010, Dhaka.

[14] Herman Von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in the International Criminal Court: The Making of the Rome Statute*, Pp. 79 & 102 (Roy S. Lee ed., 1999).

Unlike other human rights violations, enforced disappearances were not prohibited by a universal legally binding instrument before the Convention come into force in 2010.[15] Before that only the Rome Statute of the International Criminal Court[16] provided for prosecution and award of reparation to victims in cases where enforced disappearance amounted to crimes against humanity.[17]

The crime of enforced disappearances was also prohibited prior to 2010 by the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance, the 1996 Inter-American Convention on Forced Disappearance of Persons Rights and customary international humanitarian law. However, this previously existing framework exhibited both serious gaps and ambiguities, and has proven to be insufficient as a protection mechanism. The Convention, despite its own flaws, corrects some of the existing gaps in the legal framework.

- Firstly, the Convention makes enforced disappearance crime under international law and recalls the right of every person not to be subject to it, even under exceptional circumstances, such as the state of war or a threat of war, internal political instability or any other public emergency.
- Secondly, it is an important treaty because it obliges states to implement it into national law. Therefore, ensuring that impunity shall not prevail for enforced disappearance.
- Thirdly, it guarantees the rights of victims or their relatives to have access to justice and full and effective reparation.
- Fourthly, the Convention sets up the Committee on Enforced Disappearances – which begins its work in November 2011.

Prior to this, the only mechanism specialized to deal specifically with enforced disappearances was the UN Working Group on Enforced on Involuntary Disappearances.[18] This body has received and examined reports of disappearances submitted by relatives of disappeared

[15] Antonio Cassese, *International Criminal Law*, P. 80 (2003).
[16] Came into force in 2002
[17] Theodor Meron, *The Humanization of Humanitarian Law*, Pp. 94 & 239 (2000).
[18] Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*, Pp. 13 & 531 (1982).

persons or human rights organizations acting on their behalf since its establishment in 1980. This important global rapid response mechanism for requesting states to carry out investigations into cases in which the Working Group believes an enforced disappearance has taken place and monitoring state compliance with the Declaration on the Protection of all Persons from Enforced Disappearance continues to exist.

The Committee on Enforced Disappearance (CED) will similarly receive requests for urgent action from relatives of the disappeared, their legal representatives or others, which it can transmit to the state party concerned with a request to clarify the fate and whereabouts of the disappeared person. Also it will be able to consider individual complaints by persons who claim to be a victim of a violation of the provisions of the Convention, although only after states parties have recognized the Committee's competence to do so. The Committee is also empowered to perform other functions to monitor implementation and state parties' compliance with their obligations under the 2010 Convention

IV Forced Disappearance under the Criminal Laws of Bangladesh

In any law of Bangladesh there is no recognition of enforced disappearance. It is not only undefined in any penal law but also not treated as an offence in any way. It is a new form of crime in this country and launched last couple of years past. But there are provisions regarding kidnap & abduction in the Penal Code, 1860.[19] According to section 362 of the Penal Code, 1860 a person is said to commit the offence of abduction when he by force compels or by any deceitful means induces any other person to go from one place to another.

On the opposite side, section 359 enumerates kidnapping is of two kinds i.e kidnapping from Bangladesh and kidnapping from lawful guardianship. Whoever conveys any person beyond the limits of Bangladesh without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Bangladesh. On the contrary,

[19] Alhaj Zahirul Huq, "*Penal Code,"* 5th ed., 2010, Anupam Gyan Bhander, 2010, Dhaka.

whoever takes or entices any minor or any person of unsound mind, out of the keeping of the lawful guardian without such guardian's consent is said to kidnap such person.

As per the provision of the Penal Code a person whoever kidnaps any person from Bangladesh or from any legal guardian shall be punished with detention of either description for a term which may extend to seven years and shall also be liable to fine. Further, section 364[20] prescribed the punishment for kidnapping or abduction where the intention is to murder up to imprisonment for life or rigorous imprisonment for a term, which may extend to ten years and fine also. After analyzing these two we can say that **kidnapping and abduction have the following features:**

- Kidnapping is committed in respect of minors under sixteen years in case of a male and under eighteen years in case of a female, or a person of unsound mind. Abduction can be committed in respect of a person of any age.

- In the event of kidnapping, a minor is usually taken away, forcefully or not, without the consent of legal guardian but force, compulsion or deceit are basic elements of abduction.

- Consent of the victim in case of kidnapping is immaterial where in case of abduction absence of voluntary consent is of vital importance.

- Kidnapping moves the victim away from the custody of legal guardian and being so it is a substantive offence but abduction is an auxiliary offence.

Apart from this, if a person kidnaps or abducts any child under the age of ten, in order that such child may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person, shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years, and shall not be less than seven years.[21] Additionally, if a person kidnaps or abducts any woman with intent that she may be compelled to marry any person

[20] The Penal Code, 1860 (Bangladesh).
[21] Ss. 6, 7 & 12 of the Prevention of Oppression against Women and Children Act, 2000 (Bangladesh).

against her will, or in order that she may be forced or seduced to illicit intercourse shall be punished with death or transportation for life or with rigorous imprisonment of either description for a term which may extend to twenty years but not less than ten years, and shall also be liable to fine.[22]

The punishment for murder after abduction is death penalty or imprisonment for life as stipulated in section 302 of the Penal Code, 1860. In addition to this, if kidnapping or abduction is committed with an intention to wrongful confinement, the offender shall be punished with custody of either description for a term, which may extend to seven years and shall also be liable to fine.

Enforced disappearance is a crime under international law for which states are obliged to hold perpetrators responsible through criminal investigation and prosecution. Moreover, it amounts to a crime against humanity when it is committed as part of a widespread or systematic attack on a civilian population. Forced disappearance is a particularly cruel human rights violation; a violation of the person who has disappeared and a violation of those who love him/her.[23] The disappeared person is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights and at the mercy of their captors while every person has the right to life, liberty and security of person.

V Effect of forced disappearance on the societies and individuals

An enforced disappearance of an individual has a tremendous effect on the lives of his or her loved ones and their communities.[24] Families are often emotionally unable to find closure and come in terms with the disappearance of their loved ones. Many suffer from severe psychological distress, sometimes resulting in physical illness as well. Children are not immune from such anguish; disappearance of a parent, sibling, or other members of the family often adversely affects their educational performance and social behaviour.

Furthermore, families frequently face enormous economic consequences, especially when the victim was the principal bread-winner of the family. Even if this was not the case, many

[22] S. 5 of the Prevention of Oppression against Women and Children Act, 2000 (Bangladesh).
[23] William Winthrop, *Military Law and Precedents*, P. 812 (2d ed. 1920).
[24] Egon Schwelb, *Crimes Against Humanity*, pp. 178, 179-80 (1946).

families find themselves in dire economic straits during the course of their search for the victim. The societal and cultural isolation faced by the families frequently go undocumented. For example, while widows in certain cultures have a well-established support system within communities, wives of disappeared victims are at times left in limbo.[25]

Often, people who have disappeared are never released and their fate remains unknown. Their families and friends may never find out what has happened to them. But the person has not just vanished. Someone, somewhere, knows what has happened to them. Someone is responsible but all too often the offenders are never brought to justice. However, the sufferer and his/her family have right to get fair justice and to reparation.[26] They also have the right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

VI Violation of National and International Laws

This incident indicates the serious scenario of falling rule of law in Bangladesh. The Republic is bound to ensure security and safety of life and property of every citizen. Furthermore, it has responsibility to ensure citizens fundamental rights guaranteed by the Constitution.[27] But, by detaining any person without any due process of law, Govt. has grossly violated his fundamental rights. The Constitution of People's Republic of Bangladesh says that: *to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law*.[28]

[25] UN War Crimes Comm'n, Law Reports of Trials of War Criminals, P. 113 (1949).
[26] Beth Van Schaack, Crimen sine Lege, *Judicial Lawmaking at the Intersection of Law and Morals*, Pp. 97 & 119 (2008).
[27] Enumerated in Part III of the Constitution of the People's Republic of Bangladesh.
[28] Art. 31 of the Constitution of the People's Republic of Bangladesh.

On the other hand, another Article of the Constitution incorporates: *no person shall be deprived of life or personal liberty saves in accordance with law*.[29] In reality, this has not been implemented and this most fundamental right is being repetitively violated with complete impunity. The Govt. violated these two Articles of the Constitution of Bangladesh by depriving it's citizen from enjoying the protection of law and to be treated in accordance with law that are announced in our sacred Constitution as inalienable right of every detenu.[30] The law enforcing agencies detained at the time of illegal arrest without any warrant of arrest from any court of law. Even they didn't inform the ground(s) for arrest, didn't produce him before the nearest Magistrate Court till now and didn't get chance to consult with any lawyer which is the clear violation of the Constitution.[31]

The Universal Declaration of Human Rights, 1948 prohibits Govt. from arbitrary arresting with its clear cut text as it includes: *"no one shall be subjected to arbitrary arrest, detention or exile."*[32] Each and every forced disappearance violated universal human right to be safe from illegal arrest.[33] Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR),[34] that prohibits the grave violations of rights highlighted above. According to Article 6 and 2 of the ICCPR, Bangladesh respectively has the obligations to ensure the right to life of its people and to ensure prompt and effective reparation where violations occur.

It is also obliged to bring legislation into conformity with the ICCPR. Under the obligation of ICCPR,[35] the Bangladesh government must ensure a fair and public trial for anyone charged with a criminal offense, and such a trial must take place "without undue delay." ICCPR also requires

[29] Art. 32 of the Constitution of the People's Republic of Bangladesh.
[30] Art. 31 of the Constitution of the People's Republic of Bangladesh.
[31] Art. 33 of the Constitution of the People's Republic of Bangladesh. The said Article says: (1) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
[32] Art. 9 of the Universal Declaration of Human Rights, 1948.
[33] H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, P. 58 (1944).
[34] On 6 September 2000.
[35] Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

Bangladesh to protect freedom of expression.[36] Bangladesh is a state party to the Convention Against Torture (CAT) and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under CAT, the Bangladesh government must ensure that any person who alleges he has been subject to torture has the right "to complain to and to have his case promptly and impartially examined by competent authorities."

VII Recommendations to Stop Forced Disappearance

The government of Bangladesh should ensure a fair and independent investigation into all the cases of disappeared citizens. The government also needs to make clear to its security forces that the era of torture with impunity is over. Any criminal offence should be tried through the criminal justice system; it must not be punished by security forces outside of the due process of law. In the serious human rights violation case, Govt. should take positive step very soon. Every victim should be produce before the Court immediately by the concerned law enforcing agency within whose custody he is detained.

International community must consider the issues of human rights violation and the disappearances in political arena while making any decision about their relation with Bangladesh. Donor agencies should ensure that no person is kidnapped or tortured due only to his political identity, and that all people get equal protection of law from the state. Bangladesh must be urged to halt the growing phenomenon of enforced disappearances and show its commitment to do so by ratifying the International Convention for the Protection of All Persons from Enforced Disappearance without delay and producing and implementing in full domestic legislation in line with the provisions of this instrument.

States must commit themselves to ending the practice of enforced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Furthermore, states must tackle the issue of impunity and ensure that the perpetrators are brought to justice.

[36] Art. 19 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

Bangladesh should ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Moreover, Bangladesh should accept the competence of the Committee on Enforced Disappearances to receive complaints from individuals and state parties under Articles 31 and 32 of the Convention. In addition, it should implement the Convention into national law into line with international law and standards.

Adoption of a long-term and comprehensive plan can prevent and eliminate enforced disappearance, which involves establishment of effective training programs of law enforcement and other personnel. Civil society actors can take specific actions to support their calls urging governments to ratify the Convention. Civil society may participate in the drafting and commenting of national implementing legislation. Civil society members can provide information in relation to the Committee's (CED) review of state reports and its other functions under the Convention, submit urgent requests for action to clarify the fate and whereabouts of a disappeared person, or submit individual communications on behalf of an individual who claims to be a victim of a violation of the Convention's provisions by a state party. Women and women's organizations should be particularly encouraged to do so to ensure that gender issues are taken into account and that the process of preparing implementing law is inclusive. Also, in many countries, it is men who are most often subject to disappearance, and it is their women family members who spearhead efforts to obtain justice for their loved ones.

VIII Conclusion

State must commit to conclude the practice of forced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Bangladesh should ratify the convention and incorporate the offence in domestic law immediately. Also the State should take effective legislation, administrative, judicial or other measures for the taxpayers to prevent and provide protection against unacknowledged or involuntary and forced disappearances. Further, states must undertake the issue of impunity and ensure that the criminals are brought to justice.

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A Critical Analysis of the Article 70 of the Constitution of the People's Republic of Bangladesh

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A Critical Analysis of the Article 70 of the Constitution of the People's Republic of Bangladesh

Abstract

Article 70 of the Constitution of the People's Republic of Bangladesh sets forth the paradoxical provision in the Constitution. If anybody goes through the Article 70 of the Constitution, simply then he will find the true reality of that. There are many provisions in the Constitution declaring democracy, rule of law, human rights, fundamental rights, etc. The Constitution also declares the freedom of thought & conscience and of speech ostentatiously. The preamble of the Constitution affirms country's various aspirations, yearnings, expectations, ends or ambitions pompously. It is also mentioned in the Constitution that this Constitution has been undertaken as the solemn expression of the will of the people. And more courageously the Constitution asserts that "all powers in the Republic belong to the people". It is such a statement or promise or measure that can defeat any strong corps belonged to any great king like Napoleon. This is more powerful than any missile or atom bomb if it is observed truly. But all are seemed to be mere statement and of bogus for the presence of anti-defection law in the Constitution as provided by Article 70. This article attempts to analyze critically the role of Article 70 and put several suggestions on its applications.

1. Introduction

Article 70 of the Constitution of the People's Republic of Bangladesh introduces the anti-defection law in the name of stable & effective government which gives rise to serious criticism and curiosity among the legal thinkers, academics, law professors, general citizens and beyond. The term 'political defection' which is otherwise called 'floor crossing' or 'side swapping' is defined as an action unique to Westminster style parliaments where a Government or Opposition member of parliament refuses to vote with his or her own party in a particular division and crosses the floor of the parliamentary chamber.[1]

However, it should not be forgotten that in the name of stable government the whole spirit of responsible & democratic government & rule of law couldn't be negated. But such has been the outcome of Article 70 of the Constitution of the People's Republic of Bangladesh. What we now, therefore, have to do is to find a compromise process whereby floor crossing can be prevented and the spirit of responsible Parliamentary government can also be sustained. The existing provisions of Article 70 are quite destructive to the spirit of Parliamentary democracy, rule of law etc. An effort has been made here to evaluate Article 70 with its role & put several recommendations in this regard.

2. History behind the insertion of Anti-Defection Law in the Constitution of the People's Republic of Bangladesh

There is a historical background behind the introduction of Article 70 in the original Constitution of 1972 and the amendments thereof up to the Fifteenth amendment in 2011. It is the result of bitter experience of more than two decades of the then Pakistan politics. Unfettered political defection and wide spread floor crossing became a matter of concern for all. The past experience of the Parliamentary system in Pakistan, both at center and in the states, showed that members

[1] Australian Parliamentary Library (2005) *"Crossing the floor in the Federal Parliament 1950-August 2004,"* Research Note: Information, analysis and advice for the Parliament (October 10), no. 11; accessed in http://aceproject.org/ero-en/topics/parties-and candidates/Research%20Note%20Australia.pdf

once elected tended to cross the floor for their selfish ends rendering the Parliamentary system unworkable on many occasions. They would defy party decisions and ignore party commitments made to the electorate resulting in splitting of parties and destroying of party cohesion. This encourages factionalism and ultimately disrupted the stability of the government and smooth functioning of the entire system. The fall of Parliamentary government in Pakistan was mainly caused by political defection.[2] Realizing this, the framers of the Bangladesh Constitution wanted to ensure stability and continuity of government and also to ensure discipline among the members of the political parties with a view to removing corruption and instability from national politics.

It is pertinent to mention that the reasons for the addition of the Tenth Schedule of the Constitution of India where the anti defection law was inserted were explained by the Statement of Objects and Reasons of the Fifty-second Amendment (1985) to the Constitution in the following words:

"The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance."[3]

3. The Anti-defection Provisions in the Constitution of People's Republic of Bangladesh

3. (1) Laws relating to anti defection before 15th Amendment of the Constitution

Article 70 of the Original Constitution of 1972 incorporated the following provisions against defection:

[2] Halim, Md. Abdul, *Constitution, constitutional law and practice*, Published by Md. Yosuf Ali Khan, Green Road, Dhaka, 2006, edn. 3rd, p. 183

[3] Narayan, Jenna, *'Defect-Shun': Understanding Schedule X to the Constitution of India'* Indian Law Journal 2007, *accessed in* http://www.indialawjournal.com/volume3/issue_1/article_by_jenna.html

"A person elected as a Member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party".[4]

*** The Constitution (Fourth Amendment) Act, 1975** added the following explanation with the previous provision:

*** Explanation:** If a member of Parliament-
(a) *being present in Parliament abstains from voting, or*
(b) *absents himself from any sitting of Parliament, ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party."*

T**he Constitution (Twelfth Amendment) Act, 1991** has added the following new two provisions [Article 70 (2), 70 (3)] keeping the previous provisions in Article 70 (1):

Article 70 (2)

If, at any time any question as to the leadership of the Parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it in writing by a person claiming the leadership of the majority of the members of the party in Parliament convene a meeting of all members of Parliament of that party in accordance with the rules of Procedures of Parliament and determine its Parliamentary leadership by the votes of the majority through division and if, in the matter of voting in Parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the Parliament.

Article 70 (3)

[4] Bangladesh. 1972. Article 70 of the Constitution of People's Republic of Bangladesh

If a person, after being elected a Member of Parliament as an independent candidate, joins any political party, he shall, for the purpose of this article, be deemed to have been elected as a nominee of that Party.[5]

3. (2) Laws relating to anti defection after the 15th Amendment of the Constitution

The15th Amendment [6] of the Constitution of the People's Republic of Bangladesh made several changes in the Constitution regarding different issues including the anti defection law. The bill replaced Article 70 as per the Constitution of 1972, saying that –

"A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he – (a) resigns from that party ; or (b) votes in Parliament against that party ; but shall not thereby be disqualified for subsequent election as a member of Parliament".[7]

Thus, this new amendment creates nothing new to the Article 70 but only reinstates the provisions of Article 70 of the original Constitution of 1972 and it repeals the changes brought about by the Constitution (Fourth Amendment) Act, 1975 and the Constitution (Twelfth Amendment) Act, 1991.

4. Criticism against Article 70 of the Constitution

(1) Article 70 of the Constitution outrages the spirit democracy, fundamental human rights and many high ideals declared and cherished in the preamble and many other Articles like Article 7 (1), 11 etc.

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[5] Bangladesh. 1991. The Constitution (Twelfth Amendment) Act, (Act No. XXVIII of 1991, Section 5)
Note: (Article 70 of the original Constitution was substituted by section 5 of the Constitution (Twelfth Amendment) Act, 1991 (Act No. XXVIII of 1991)

[6] Bangladesh. 2011. The Constitution (Fifteenth Amendment) Act, (Act XIV of 2011, Section 5)

[7] Bangladesh. 2011. The Constitution (Fifteenth Amendment) Act, (Act XIV of 2011, Section 5)
Note: Article 70 was substituted for the former article 70 by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011, Section 25

Democracy denotes a system of government by all the people of a country usually through the representative whom they elect i.e. simply speaking one must have to have the right to raise his own hands for own interest. But this right has been curtailed drastically by Article 70 of the Constitution. And where there is no democracy there may not have any other rights that are declared by the Constitution or any other law.[8]

(2) Article 70 contradicts the notion of freedom of thought and conscience and of speech etc as ensured by Article 39 of the Constitution. In order to clarify the above mentioned statement we may read Article 39 of the Constitution. Article 39 says:

"Freedom of thought and conscience is guaranteed".

The right of every citizen to freedom of speech and expression; and

Freedom of the press, are guaranteed."

But Article 70 of the Constitution has grossly violated those provisions. Since the incapability of voting against one's own party means the lack of freedom of thought, conscience and of speech. Actually, freedom of thought and conscience is essential to the development of human personality and every person should be free in his thought and conscience. Besides this, freedom of speech is essential for the development and functioning of democracy. Without freedom of speech there cannot be any democracy.[9]

(3) Article 70 is a great hindrance to the rule of law

Article 70 of the Constitution causes a gross violation to the rule of law. According to A.V. Dicey, the concept of 'rule of law' includes three things- (i) absence of arbitrary power, (ii) equality before law and (iii) individual liberty.[10] But for the existence of article 70 of the constitution all these high ideals have become ineffective. On the other hand, rule of law as distinguished from the rule of man or party, means the rule of that law which is passed in a democratically elected Parliament

[8] Ahmed, Moudud, *Era of Sheikh Mujibur Rahman*, Dhaka: UPL, 1983, edn. 2nd, p. 108

[9] Farid Ahmed v. West Pakistan, PLD1965 Lah. 135

[10] Islam, Mahmudul, *Constitutional Law of Bangladesh,* Mullick Brothers, Dhaka, Bangladesh, 2003, edn. 2nd, (Reprint with Supplement), p. 58

after adequate discussion and deliberation. When there is the scope of adequate deliberation and discussion over a bill, it creates an environment to remove undemocratic provisions from it. But, because of Article 70, the members of the ruling party can make no dissenting opinion. And as every bill, however undemocratic it may be, gets quickly passed or approved. The government always with a view to avoiding debate makes law by ordinances and later gets them approved under the sweeping power of Article 70. For this widespread misuse of ordinance making power by passing the Parliament it is sometimes typically said that Bangladesh Parliament does not legislate but legitimates as the Parliament legitimates more ordinances than legislate. An observance of the following table will show the reality of the aforesaid statement.

Table 1: Statistics of Laws and Ordinances passed by the Parliament

Parliament	Total Law passed	Number of Bills passed which have been initiated from ordinances	Total Ordinance promulgated between two sessions
1st	154	90	94
2nd	65	15	295
3rd	39	14	323
4th	142	89	92
5th	173	70	102
6th	1	0	19
7th	190	20	21
8th	122	5	5

[11]

(4) Article 70 undermines the spirit of responsible government and leads to elective dictatorship in the country

[11] Halim, Md. Abdul, *Constitution, Constitutional Law and Practice*, op.cit, pp. 260-263

The convention of ministerial responsibility plays a fundamental role in the relationship between the Executive and Parliament. For the doctrine of responsible government under the law to be observed, it is essential that government would be both accountable to Parliament and to the electorate, and that the activities and functions of the government would be conducted in a manner sufficiently open, subject to the requirements of the national interest, to inspire the public confidence.[12]

However, it is a matter of great regret that there is no provision for individual responsibility of ministers in the Constitution of the People's Republic of Bangladesh. No mechanism is provided either in the Constitution or in the parliamentary procedure whereby a motion of censure can be moved in Parliament. A minister can be questioned and criticized in the House but cannot be forced to resign by passing a vote of censure. As a result, a minister can easily engage himself into departmental corruption. Of course, Article 55 of the Bangladesh Constitution provides for personal responsibility to the effect- *"The cabinet shall be collectively responsible to the parliament."*[13]

But ironically enough this provision for collective responsibility has become a soundless vessel because of Article 70 of the Constitution. Under Article 70, no member of the majority party has right to vote against the party and as a result, the cabinet is always sure that it will never be defeated on the floor by motion of no confidence. So, under the Constitutional arrangement the cabinet cannot be made responsible to Parliament. The Constitution of the People's Republic of Bangladesh, therefore, provides for parliamentary form of government but not a responsible government; it is rather a prime ministerial dictatorship**.**

5. The Law Relating to Anti-Defection in some Other Countries

[12] (Barnett, Hilaire, *"Constitutional and Administrative Law"*, Routledge Publisher, London, England, September 17, 2011, edn. 9th, p. 401

[13] Article 55 (3) of the Constitution of the People's Republic of Bangladesh

Anti-defection law is not only practiced in Bangladesh but also in many other countries like India, Nepal, Kenya, South Africa, etc. In order to justify our laws relating anti-defection it would be relevant to analyze the provisions of anti-defection law of some other countries of the world.

India

The Anti-defection law was introduced by 52nd Amendment to the Constitution of India in 1985, which added the Tenth Schedule to the Indian Constitution. The main intent of anti-defection provisions under the Tenth Schedule of the Constitution of India is as follows:

* Disqualification

a. If a member of a house belonging to a political party:

- Voluntarily gives up the membership of his political party, or

b. If an independent candidate joins a political party after the election.

- Votes, or does not vote in the legislature, contrary to the directions of his political party.

However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.

c. If a nominated member joins a party six months after he becomes a member of the legislature.

* Power to Disqualify

a. The Chairman or the Speaker of the House takes the decision to disqualify a member.

b. If Power to a complaint is received with respect to the defection of the Chairman or Speaker, a member of the House elected by that House shall take the decision.

* Exception

<u>Merger</u>

A person shall not be disqualified if his original political party merges with another, and: He and other members of the old political party become members of the new political party, or

This exception shall operate only if not less than two-thirds of the members of party in the House has agreed to the merger.[14]

He and other members do not accept the merger and opt to function as a separate group.

Nepal

The seat of a Member of Parliament shall become vacant in the following circumstances:

a) If he/she resigns in writing,

b) If he/she does not possess the qualifications referred to in Article 46,

c) If the party concerned of which he/she was represented provides notification that he/she is no more in the party,

d) If the tenure of the Legislature-Parliament expires, or

e) If he/she dies.[15]

Belize

(1) Every member of the House of Representatives shall vacate his seat in the House at the next dissolution of the National Assembly after his election.

(2) A member of the House of Representatives shall also vacate his seat in the House—

(e) If, having been a candidate of a political party and elected to the House of Representatives as a candidate of that political party, he resigns from that political party or crosses the floor.[16]

Namibia

(1) Members of the National Assembly shall vacate their seats:

(b) If the political party which nominated them to sit in the National Assembly informs the

[14] Article 102 (2) and 191 (2) of the Constitution of India
[15] Article 48 of the Constitution of Nepal
[16] Article 59 of the Constitution of Belize

Speaker those members are no longer members of such political party. [17]

Seychelles

(1) A person ceases to be a member of the National Assembly and the seat occupied by that person in the Assembly shall become vacant—

(h) if, in the case of a proportionally elected member—

(i) The political party which nominated the person as member nominates another person as member in place of the first-mentioned person and notifies the Speaker in writing of the new nomination;

(ii) The person ceases to be a member of the political party of which that person was a member at the time of the election.[18]

Sierra Leone

(1) A Member of Parliament shall vacate his seat in Parliament—

(k) If he ceases to be a member of the political party of which he was a member at the time of his election to Parliament and he so informs the Speaker, or the Speaker is so informed by the Leader of that political party.[19]

Zimbabwe

(1) Subject to the provisions of this section, the seat of a Member of Parliament shall become vacant only-

(e) if, being a member referred to in section 38 (1) (a) and having ceased to be a member of the political party of which he was a member at the date of his election to Parliament, the political party concerned, by written notice to the Speaker, declares that he has ceased to represent its interests in parliament.[20]

Kenya:

(1) The office of a Member of Parliament becomes vacant—

[17] Article 48 of The Constitution of The Republic of Namibia
[18] Article 81 of the Constitution of the Republic of Seychelles
[19] Article 77 of the Constitution of the Republic of Sierra Leone
[20] Article 41 of the Constitution of Zimbabwe

(*e*) if, having been elected to Parliament—

(i) as a member of a political party, the member resigns from that party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2).[21]

Singapore:

(2) The seat of a Member of Parliament shall become vacant—

(b) if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election.[22]

South Africa:

3. A person loses membership of the National Assembly if that person

c. ceases to be a member of the party that nominated that person as a member of the Assembly.[23]

4. Table 2: Experience of Defection and Laws on Defection

Country	**Experience of Defection**	**Law on defection**
Bangladesh	Yes	Yes
India	Yes	Yes
Nepal	Yes	Yes
Kenya	Yes	Yes
Singapore	Yes	Yes
South Africa	Yes	Yes
Australia	Yes	No
Canada	Yes	No
France	Yes	No

[21] Article 103 of the Constitution of Kenya
[22] Article 46 Constitution of The Republic of Singapore
[23] Article 47 Constitution of the Republic of South Africa

Germany	Yes	No
Malaysia	Yes	No
United Kingdom	Yes	No

[24]

5. Table 3: Nations with Anti-Defection Laws

Type of Democracy	**Number of Nations**	**Those with Floor-crossing Laws**	**Nations with Floor-crossing Laws**
Older Democracies	36	5 (14%)	India, Israel, Portugal, Trinidad and Tobago.
Newer Democracies	54	13 (24%)	Belize, Bulgaria, Ghana, Guyana, Hungary, Lesotho, Mexico, Namibia, Romania, Samoa, Senegal, Suriname and Ukraine.
Semi-Democracies	58	19 (33%)	Armenia, Bangladesh, Fiji, Gabon, Kenya, Macedonia, Malawi, Nepal, Mozambique, Niger, Nigeria, Papua New Guinea, Seychelles, Sierra

[24] Rohit, Politics of Defection, Published at the PRS Blog (The official blog site of PRS Legislative Research) accessed in http://www.prsindia.org/theprsblog/tag/defection/

			Leone, Singapore, Sri Lanka, Tanzania, Uganda and Zambia.
Non Democratic	45	4 (9%)	Congo (Democratic Republic) Pakistan, Thailand and Zimbabwe.
TOTAL	**193**	**41**	

[25]

Thus the above shown two tables reveal that anti-defection laws are rare in established democracies but common in nascent democracies, where anti-defection laws are often defended as temporary measures to consolidate a chaotic party system. However, many nations enshrine anti-defection provisions in their constitutions, which are not depositories for temporary legislation.

6. **Suggestions or Recommendations:**

As stated earlier, anti-defection law has been inserted in our Constitution in the name of stability of the government. However, this view point is not supportable as there are many nations in the world who have experience of defections but they did not insert anti-defection law into their respective Constitutions nevertheless their governmental systems never face the instability. However, we would like to put the following suggestions as to the anti-defection law as mentioned in Article 70 of the Constitution of the People's Republic of Bangladesh.

1. The cessation of membership from a political party should not lead to the loss of a member's seat. As we strongly believe that the interest of common citizens must not be outweigh by the

[25] Janda, Kenneth, *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments;* This paper was prepared for delivery at the 2009 World Congress of the International Political Science Association held in Santiago, Chile July 12-16, 2009, accessed in http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf.

interest of a political party. We would suggest the politicians to consider the public interest in place of their own as they frequently pronounced after the liberation war of 1971, 'the state shall prevail over person and party and not vice versa'.

2. The expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a potential threat to the independence of members. Thus anti-defection measures should be viewed with caution; if necessary in some jurisdictions to deal with corrupt practices. [26]

3. The politicians must have certain commitments to the nation which they exaggeratedly declare here and there in their lifetimes. They can insert specific provisions into their manifesto of the party as to the anti-defection in the following effect:

Voting against the party for personal gain will be treated as a moral turpitude and a grave misconduct against the party and the nation at large and one cannot have the membership of a party who has crossed the floor in any Parliament.

4. The election commission may also promulgate that a party cannot have the registration which provide its membership among the defectors. Of course, the defectors may create a new party and then get the registration of the election commission.

5. There are many nations in the world like Australia, Canada, France, Germany, United Kingdom, and Malaysia [27] who have the better experience of political defection but they do not feel of inserting anti-defection law in their respective constitutions in order to show their commitment to democracy, rule of law and after all to the public interest. On the other hand, we have done the ill job fearing of political instability. And if there is no alternative to that then we should apply the provision relating to anti-defection restrictedly.

[26] Latimer House Guidelines for the Common Wealth,19 June 1998, Preserving the Independence of Parliamentarians, accessed in http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF94AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf

[27] Rohit, Politics of Defection, op.cit, p. 4.

The application of anti-defection law should be restricted to a vote of no confidence or confidence motion only. Hence, a proviso may be inserted by an amendment to Article 70 to the following effect:

'Provided that, the provision of this Article shall be applied only when the government faces a motion of no confidence or confidence.[28]

In the end, we can say that all political parties and other concerned personalities should be united to change or make null and void the anti-defection provisions from the Constitution for the sake of fruitful Parliamentary democracy.

7. Conclusion:

It is contended that 'anti-defection law' was introduced in the Constitution to combat 'the evil of political defections'. But it is not the only solution of the problem because in the name of stable government the freedom of MPs cannot be ignored. Actually, Parliamentary democracy should be allowed to grow in its natural way. The success of Parliamentary democracy depends on democracy and discipline within the parties. It is difficult to maintain democracy at the governmental level if there is no democracy within the party unit and democracy within the party is a matter of gradual development; it cannot be made by force of law. It is for the disciplined party system that no government with a majority has been over thrown in the House of Commons since 1895. A political instance like voting against the party or being absent in the House with a view to defeating the government for selfish end can never be found in developed countries. There is no need to pass motion of censure, no confidence motion or cut motion in a well-developed Parliamentary polity. Whenever any such possibility appears in the House, the cabinet or respective minister willingly resigns. Here lies the true political sprit and culture of responsible government. Anti-defection law cannot sustain it. So from the broader point of view, we need greatly democracy and discipline within the parties, the political spirit of responsible government among the party leaders and MPs.

[28] Halim, Md. Abdul, *Constitution, Constitutional Law and Practice*, op.cit, p. 90

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[2] Halim, Md. Abdul, *Constitution, constitutional law and practice*, Published by Md. Yosuf Ali Khan, Green Road, Dhaka, 2006, edn. 3rd, p. 183

[3] Narayan, Jenna, *'Defect-Shun': Understanding Schedule X to the Constitution of India'* Indian Law Journal 2007, accessed in *http://www.indialawjournal.com/volume3/issue_1/article_by_jenna.html*

[4] Bangladesh. 1972. Article 70 of the *Constitution of People's Republic of Bangladesh*

[5] Bangladesh. 1991. *The Constitution (Twelfth Amendment) Act, (Act No. XXVIII of 1991, Section 5)*
Note: (Article 70 of the original Constitution was substituted by section 5 of the Constitution (Twelfth Amendment) Act, 1991 (Act No. XXVIII of 1991)

[6] Bangladesh. 2011. The Constitution (Fifteenth Amendment) Act, (Act XIV of 2011, Section 5)

[7] Bangladesh. 2011. *The Constitution (Fifteenth Amendment) Act, (Act XIV of 2011, Section 5)*
Note: Article 70 was substituted for the former article 70 by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011, Section 25

[8] Ahmed, Moudud, *Era of Sheikh Mujibur Rahman*, Dhaka: UPL, 1983, edn. 2nd, p. 108

[9] *Farid Ahmed v. West Pakistan*, PLD1965 Lah. 135

[10] Islam, Mahmudul, *Constitutional Law of Bangladesh,* Mullick Brothers, Dhaka, Bangladesh, 2003, edn. 2nd, (Reprint with Supplement), p. 58

[11] Halim, Md. Abdul, *Constitution, Constitutional Law and Practice*, op.cit, pp. 260-263

[12](Barnett, Hilaire, *"Constitutional and Administrative Law"*, Routledge Publisher, London, England, September 17, 2011, edn. 9th, p. 401

[13] Article 55 (3) of the *Constitution of the People's Republic of Bangladesh*

[14] Article 102 (2) and 191 (2) of the *Constitution of India*

[15] Article 48 of the *Constitution of Nepal*

[16] Article 59 of the *Constitution of Belize*

[17] Article 48 of the *Constitution of the Republic of Namibia*

[18] Article 81 of the *Constitution of the Republic of Seychelles*

[19]Article 77 of the *Constitution of the Republic of Sierra Leone*

[20] Article 41 of the *Constitution of Zimbabwe*

[21]Article 103 of the *Constitution of Kenya*

[22] Article 46 *Constitution of the Republic Of Singapore*

[23]Article 47 Constitution of the Republic of South Africa

[24] Rohit, *Politics of Defection*, Published at the PRS Blog (The official blog site of PRS Legislative Research) accessed in *http://www.prsindia.org/theprsblog/tag/defection/*

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[26] 'Latimer House Guidelines for the Common Wealth', 19 June 1998; *Preserving the Independence of Parliamentarians*, accessed in – *http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0AEF94AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf*

[27] Rohit, Politics of Defection, op.cit, p. 4.

[28] Halim, Md. Abdul, *Constitution, Constitutional Law and Practice*, op.cit, p. 90

Scope of Review in respect of the Trials of International Crimes: The Perspective of International Crimes (Tribunals) Act, 1973

Quazi Omar Foysal*

Sonali Rani Upadhaya**

1. Introduction:

The emergence of International Criminal Law since the establishment of International Military Tribunal at Nuremburg (also known as IMT, Nuremburg) after World War II[137] has been seen between the line of impunity of the miscreants and the arbitrary punishment of the same. In spite enormous criticism of this Tribunal, its success has outweighed its earlier contentions.[138] The establishment of International Criminal Tribunal for Former Yugoslavia, International Criminal Tribunal for Rwanda and ultimately International Criminal Court bear their legacy from IMT, Nuremburg. Now, the trials of international crimes are no longer confined to international level, rather national prosecutions are also momentum.[139] Bangladesh, also witnessed a voluminous international crimes against its own people during its war of independence in 1971.[140] The initial steps to try the crimes were the establishment of Collaborators Special Tribunal pursuant to Collaborators (Special Tribunal) Order[141] and the enactment of International Crimes (Tribunals) Act, 1973[142]. Notwithstanding its criticism, it is working with great efficiency. This Act of 1973 and its corresponding Rules of Procedure, 2009 has little contention about its substantive part. But, with respect to procedural part, this law had arisen a great hue and cry as regards the scope of Review. This has been well settled by the Review of Judgment of Abdul Quader Mollah Vs Chief

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[137] M N Shaw, International Law, 6th Edn, Cambridge University Press, New York, 2006, p. 400.
[138] M C Bassiouni, Crimes Against Humanity : Historical Evolution and Contemporary Application, 1st Edn, Cambridge University Press, New York, 2011, p. 112
[139] Ibid, p. 649
[140] A Jones, Genocide: A Comprehensive Introduction, 1st Edn, Rutledge, New York, 2006, p. 227
[141] President Order No. 8 of 1972; this Order was repealed by Ordinance No. LXIII of 1975
[142] Act No. XIX of 1973

Prosecutor, International Crimes Tribunal, Dhaka[143] and later on by Muhammad Kamaruzzaman V The Government of Bangladesh represented by the Chief Prosecutor, International Crimes Tribunal, Dhaka[144]. In this article, the author is going to elucidate the scope of Review in the contemporary international criminal justice system and law of criminal procedure of Bangladesh. In the fine, the author will explore the scope of Review in the International Crimes (Tribunals) Act, 1973 and Rule of Procedure of 2009.

3. Scope of Review in Contemporary International Criminal Law:

Neither Nuremburg Tribunal nor Tokyo Tribunal was vested with the power of review. So did Control Council Law 10. The power of review was first appeared in the Statute of International Criminal Tribunal for Former Yugoslavia. It was empowered the review the indictment given by it.[145] In Article 19, it has enumerated:

> The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed. [146]

In respect of the proceedings, the Statute enumerated that the fact or facts which was not known or discovered during the Pre-Trial or Appeal stage and which has decisive role in the indictments, then it may be reviewed by the same judge.[147] Its contemporary institution, International Criminal Tribunal for Rwanda had the same provisions regarding the scope and procedure of Review.[148] Statute of the Special Court for Sierra Leone, 2000 does not contain any provision of Review. So does Extraordinary Chamber in the Court of Cambodia or Extraordinary African Chambers (of Senegal).

[143] Criminal Review 17-18 of 2013
[144] Criminal Review Petition No. 8 of 2015
[145] Article 13(2)(b)(ii), Statute of the International Criminal Tribunal for Former Yugoslavia, 1993
[146] Ibid, Article 19(1)
[147] Ibid, Article 26
[148] Article 12(2)(b)(ii); Article 18(1) & Article 25 of the Statute of the International Criminal Tribunal for Rwanda, 1994

The Rome Statute of International Criminal Court rather rules out about revision of a conviction or sentence.[149] Revision involves intervention at the appellate level that does not call into question findings of the Trial Chamber. It is based on the discovery of new evidence, the discovery that decisive evidence at trial was false, forged or falsified, or a realization that a judge of the Trial Chamber participating in the trial was guilty of serious misconduct or breach of duty sufficient to justify removal from the bench.[150] When it grants review, the Trial Chamber may reconvene the original Trial Chamber, constitute a new Trial Chamber or dispose of the matter itself.[151] But in respect of domestic trial, no tribunal or court established especially for the purpose of trying the international crimes have been endowed the power of review.

3. Scope of Review under General Laws in Bangladesh:

Under the laws of criminal procedure, no courts lower than Appellate Division of the Bangladesh Supreme Court enjoys the power to review its judgment or order. The power of review is exercised in two ways- by changing the decision of cases by reviewing the judgment originally delivered in that case and by overruling a principal of law enunciated in a previous case.[152] This power has been enumerate in Article 105 of the Constitution which is as follows:

> The Appellate Division of Supreme Court has the power subject to the provisions of any Act of Parliament and of any rules made by it to review any judgment pronounced or order made by it.

This was further enumerated in the Supreme Court of Bangladesh (Appellate Division) Rule, 1988[153] which is as follows:

[149] Article 84, Rome Statute of International Criminal Court, 1998
[150] Ibid
[151] W A Schabas, An Introduction of International Criminal Court, 2nd Edn, Cambridge University Press, New Work, 2004, p. 159
[152] M Islam, Constitutional Law of Bangladesh, 3rd Edn, Mullick Brothers, Dhaka, 2012, p. 896
[153] Part IV, Order XXVI, Rule1, Supreme Court of Bangladesh (Appellate Division) Rule, 1988

> Subject to the law and the practice of the court, the court may, either of its own motion or on the application of a party to a Proceeding, review its judgment or order in the criminal procedure on the grounds of an error apparent on the face of the record.

The review application must be filed in the Registry within thirty days[154] after the pronouncement of the judgment, or order which sought to be reviewed. After filing the review application it must be notified to the opposite party and endorse a copy of that notice to the Registry.[155] Every application of review must be accompanied by a certified copy of that judgment or copy.[156] When the application for review is made on the ground of discovery of fresh evidence certified copies of the document shall be annexed to the application, together with an affidavit setting forth the circumstances under which the discovery us made.[157] The application shall be signed by a Senior Advocate of the Bangladesh Supreme Court and the application shall specify the points for review.[158] It will also annex a certificate stating the consistency and reasonableness of reviews. This certificate is in the form of reasoned opinion.[159] As far as practicable, the application for review shall be posted before the Bench that delivered the judgment order sought to be reviewed.[160] In case of review, the grounds are important. In Md. Amir Khan V Controller, Estate Duty[161], Cornelius CJ held that "If there be found material irregularity an yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not required, The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings injustice." But it cannot be utilized for re-hearing of the matter.[162] It is also held in another case that a call for review cannot be made unless the decision is a question of great public interest.[163] In AHM Mustain Billah V Bangladesh[164] it was held that "Review would lie if

[154]Ibid, Rule 2
[155]Ibid
[156]Ibid, Rule 3
[157]Ibid
[158]Ibid, Rule 5
[159]Ibid
[160] Ibid, Rule 7
[161](1962) ,14 DLR (SC) 276
[162]Zobaida Nahar v. Khairunessa (1998) 3 BLC (AD) 170
[163]Manoj Kumar v. Bangladesh (2002) 7 BLC (AD) 42
[164](2005) 57 DLR (AD) 41

there is any error on the face of the record and/or the attention of the court was not drawn to any particular Statutory Provision of law resulting in an error in the judgment.[165] It was further held in Ekushey Television Ltd. Vs Dr. Chowdhury Muhmood Hasan[166] that "For review, an error must be such as in apparent on the face of the record and is so obvious that keeping in record will be legally wrong.[167] Now, a question appears regarding statutory limitations delimiting the review power. This point will be discussed in the next point of the article.

4. Scope of Review Regarding the cases of International Crimes (Tribunals) Act, 1973:

The maintainability of the Review of the cases given under International Crimes (Tribunals) Act, 1973 was amply debated before the passing of Abdul Quader Mollah Vs Chief Prosecutor, International Crimes Tribunal, Dhaka.[168] It was said from the Government side that as International Crimes (Tribunal) Act, 1973 is a special enactment and it enjoys especial privileges under Article 47A (2), it cannot invoke its review jurisdiction provided by the Constitution itself.[169][170] On the other hand, the Defense reiterated that the power of Bangladesh Supreme Court being unequivocal and as there is no specific mention of its blockage, the review can be enjoyed in accordance with the Supreme Court of Bangladesh (Appellate Division) Rule, 1988. These were amply debated before the Appellate Division of Bangladesh Supreme Court in the case of Quader Mollah. Even though the Defense did not succeed in the case, the judgment declared that it may be said that the power of this Division as the appellate forum to review its judgment has not been ousted either directly or indirectly by Article 47A (2).[171] It said further that it may be said that the power of this

[165] Ibid
[166](2003) 55 DLR (AD)
[167]Ibid
[168] Supra 7
[169] Ibid, p. 7-8
[170] Ibid, p. 15
[171] Ibid, p. 8

Division as the appellate forum to review its judgment has not been ousted either directly or indirectly by Article 47A(2).[172] I held that:

> In appropriate cases, this Division on the doctrine of *ex-debito justitiae* may pass any order by correcting mistakes in the judgment but inherent powers of this Division may be invoked only when there does not exist any other provision in that behalf. However, in presence of specific provisions, it cannot invoke its inherent powers under Article 104.[173]

Subsequently it upheld that:

> He has further submitted that apart from Article 104, this Division can invoke its inherent powers to review its judgment on the principle of justice, equity and good conscience.[174]

It further held that:

> …If a party is affected by an order or judgment of the court, in the absence of specific provision for review, the court has inherent power to review its order or judgment. This Division can exercise inherent power as well. It is now established that inherent powers of the court can be exercised by a court of law at any stage of the proceedings.[175]

In the next case Muhammad Kamaruzzaman V The Government of Bangladesh represented by the Chief Prosecutor, International Crimes Tribunal, Dhaka[176], Sinha CJ stated that:

> We observed that a review of judgment is a serious step and the Courts are reluctant to invoke their power except where a glaring omission or patent mistake or grave error

[172] Ibid, p. 10
[173] Ibid, p. 18
[174] Ibid, p. 15
[175] Ibid
[176] Supra 8

> have crept in earlier by judicial fallibility. Power of review is not an inherent power…where the error is so apparent and patent that review is necessary to avoid miscarriage of justice.[177]

In relation to the status of the review, these two judgments reiterated that the review cannot be equated with the appeal. Therefore, in review the full case will not be heard.[178] But it can change the merit of the judgment.[179] It held that where the error is so apparent and patent that review is necessary to avoid miscarriage of justice.[180] The bench in the case of Abdul Quader Mollah resolved the time limit of the filing of the application of review. It held that an aggrieved party can file a review petition against any order of the Tribunal within fifteen days as per Rules framed by it even though normal time is thirty days.[181] Most important of all, these two judgments have clarified the mists around the trials of international crimes in International Crimes Tribunal, Bangladesh

5. Conclusion:

The trial of international crimes is very critical as it not related only with justice but also with reconciliation.[182] In these circumstances, the Defences are said to have more rights than usual for avoiding any unexpected situations and plea of injustice. The right to review is one of those steps in ensuring the justice in cases of international crimes in spite of constitutional clog up. Though no decision was changed by the process of Review, the parties can at least avail one more step to fight for its right to have justice. These judgments can be considered from another perspective. It has cleared the status of the power of Appellate Division in cases of special legislations by enlarging the statutory limit of International Crimes (Tribunal) Act, 1973. The scope inherent power of the Supreme Court of Bangladesh relating to special cases was firmly established in these

[177] Ibid, p. 14
[178] Ibid, p. 12
[179] Ibid, p. 13
[180] Ibid
[181] Supra 32, p. 21
[182] N Roht-Arriaza & J Mariecurrena, Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice, Cambridge University Press, New York, 2006, p. 1-8

judgments. It has also cleared the temporal limit of the review which has changed the limit provided in the Rule of 1988. Moreover, it has also clarified the distinctions between the appeal and review. It has confirmed that a party to litigation is not entitled to seek a review of judgment merely for the purpose of rehearing or a fresh decision of the case. Thus, it has prevented review from transforming into an instrument of delay. In international arena, these judgments can contribute to the development the domestic procedural criminal law relating to the trials of international crimes.

Approach of the UK courts towards enforcement of foreign arbitral awards under the New York Convention: Has the position changed after ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan?***

Ahmed Farzad

Winning arbitration is of little value unless the compensatory award is realized. In the instance of non-compliance on behalf of the debtor, the judgement creditor may call upon the aid of enforcement regime in the place of enforcement. This endeavour benefits greatly from the New York Convention ('Convention') of 1958. The Convention with more than 140[1] signatories including the 27 EC Members, still remains the most popular and effective tool for enforcement of foreign arbitral awards. UK courts have always adopted restrictive interpretations of the Convention refusal grounds, showing a favourable approach towards enforcing foreign arbitral awards. However, When the Court of Appeal handed out judgment in ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan***[2] the arbitral community was surprised by the English court's findings. When, on appeal, the Supreme Court (UKSC) upheld the judgment, the issue gained greater relevance as it was till then one of the only three instances in which an English court had refused enforcement of an arbitral award under the Convention[3]. It raised the question whether Dallah marked the beginning of an 'interventionist' approach of UK courts towards enforcement foreign arbitral awards.

This essay will critically evaluate the refusal grounds of a New York Convention award afforded in s.103 of the Arbitration Act 1996 with reference to case laws, reflecting disposition of Courts' towards enforcement, and then discuss whether ***Dallah*** marks a change in the approach.

The Convention is now transposed by Part III (s.100-s.104) of the Arbitration Act 1996. The scope of the Convention has been defined by Article I, the primary rule being that it applies to the recognition and enforcement of arbitral awards made outside the United Kingdom. The 1996 Act treats the seat of the arbitration as being the place where the award is made.[4] Under the Arbitration Act 1996, a New York Convention Award is binding on the parties as between whom it was made, and may be enforced with the leave of the Court in the same manner, and with the same effect, as if it had been a judgment or order of the local Court.[5] An application to enforce a foreign arbitration award is made pursuant to sections 101 to 103 of the Act, in the form of an Arbitration Claim complying with Part 62 of the *Civil Procedure Rules. A party seeking recognition or enforcement must produce the duly authenticated original award or certified copy of the original arbitration agreement; and if required, certified translations.*[6]

[1] As stated in www.newyorkconvention.org
[2] [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763
[3] **Jacopo Crivellaro, '**Conflicting contrasts in Dallah v Government of Pakistan**'** (2011) 17 COLUM. J. EUR. L. F. 51 http://www.cjel.net/online/17_2-crivellaro/
[4] Arbitration Act, 1996, s 100(2)(a)
[5] Arbitration Act, s 101(1), (2) and (3)
[6] Arbitration Act, s 102

However, a party against whom enforcement is being sought may rely on the substantive and exhaustive exceptions defined in Articles V and VI of Convention, which has been reflected in s.103 of the Arbitration Act 1996.[7]

Broadly, these grounds relate to the inadequate scope of arbitration agreement, procedural deficiencies in the arbitration proceedings, the invalidity of the award in the country of origin and inadequate jurisdiction, the public policy of the state concerned and the non-arbitrability of the subject matter.

By s.103(2)(a), Court may refuse an award if respondent establishes that a party was under some incapacity under the law applicable to him. Usually it will be the incapacity of the party opposing the enforcement but that will not always be the case. The law of incoprporation of a corporate party may, for example prevent a party from entering into an arbitration agreement.[8] However

[7] The Act provides:
"103 Refusal of recognition or enforcement:
(1)Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
(2)Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
(a)that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
(b)that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
(c)that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
(d)that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
(e)that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
(f)that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
(3)Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
(4)An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
(5)Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.
It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security
Available at http://www.legislation.gov.uk/ukpga/1996/23/section/103

[8] David J Sutton, John Kendall, Judith Gill, *Russell on Arbitration*, (21st Edition, Sweet and Maxwell, 1997), pg 404, para 8-014

this is not fanciful as such incapacity of the corporate entity would bedevil international arbitration. As has been reflected in ***Dallah***[9], Court is likely to consider the other factors including legislation of that state and other applicable laws while interpreting s. 103(2)(a),[10] making it very difficult to resist enforcement relying on s. 103(2)(a) solely.

S.103(2)(c) enable the court to refuse recognition of an award where the respondent establishes that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. This ground was considered in ***Kanoria and others v Guinness***[11]***,*** wherby enforcement was refused owing to the fact that the respondent was unable to present his case, undergoing major operations for cancer. The case is distinguished from ***Minmetals V Ferco Steel***[12]***,*** where the award was enforced and respondent's application rejected on grounds that the respondent had failed to avail the scope provided to him to present his case.

By s.103(2)(d), the Court may refuse enforcement if the award deals with a matter that falls outside the scope of the parties' agreement to arbitrate. However the scope of invoking this ground has been limited by the judgement in ***Premium Nafta Products Limited & Ors v. Fili Shipping Company Limited & Ors (sub. nom. Fiona Trust & Holding Corporation v. Privalov)***[13] where the court drew a distinction between disputes arising "out of", as opposed to "in relation to", a contract. As per Lord Hoffman, the courts will now entertain only issues arising out of the contract, limiting the application of s.103(2)(d).[14]

However, severable decisions on matters submitted to arbitration may be recognized and enforced as per s. 103(4).

Relying on Art V(1)(d) and s. 103(2)(e), the Court may refuse enforcement if the respondent can show that the arbitral tribunal was constituted contrary to the parties' agreement or, in the absence of agreement, the law of the place of arbitration. The Court should only refer to law of the seat when the arbitration agreement is silent. It should not question the validity of the agreed terms, but only treat them as valid. Moreover, Articles V(1)(e) and VI of NYC offers the party derivative protection in other contracting states, adjuvant to the challenge in the country of origin.

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[9] [2008] EWHC 1901 (Comm)

[10] Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2008] All ER (D) 32 (Aug); page-2, para 3

[11] [2006] EWCA Civ 222

[12] [1999] 1 All ER (Comm) 315

[13] [2007] UKHL 40; [2008] 1 Lloyd's L.R. 254.

[14] [2007] UKHL 40; [2008] 1 Lloyd's L.R. 254.[Hoffman LJ at para 13]

By s.103(2)(f), the Court may refuse recognition where the respondent establishes that the award has not yet become binding on the parties, or that it has been set aside or suspended by a competent authority. However the fact that there are pending petitions in the home jurisdiction to set aside an award does not mean that the award is binding. The issue is one for the UK court to decide whether it is in a position to recognize and enforce the award, and not by deciding whether the home court would consider it binding.[15] This has been reflected in ***Dowans Holding SA v Tanzania Electric Supply Co Ltd***.[16] Courts further enhanced support towards enforcement in ***IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation***[17] wherby the court was of the view that the mere fact that a challenge has been made to the validity of an award in the home, supervisory court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid. [18]

This provision is aided by Art VI and s. 103(5) of the Arbitration Act 1996, which apply where the application for setting aside or suspension has been to the competent authority. In such case the court may on the application of the claimant order the respondent to give security. Where such adjournment is granted, the court may also allow partial enforcement in respect of an indisputable amount due as seen in ***IPCO*** where the CA noted that:

"the purpose of the Convention is the effective and speedy enforcement of international arbitration awards; the importance of uniformity in the interpretation of international conventions; there is nothing in the Convention or AA 1996 which expressly prevents the partial enforcement of an award; the word "award" under AA 1996, s 103(2) which provides that a court may refuse to enforce should be construed as an "award or part of the award"; and partial enforcement of an award may occur provided that "the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award"[19]

This decision has been welcomed in the Arbitration community as it reflects English courts attitude towards speed and effective enforcement of awards.[20]

Reported decisions show that, owing to the limited scope of success of a foreign challenge, that is being used to seek adjournment, security awarded may be potentially great. In ***IPCO***, Gross J ordered security of $50 million and immediate payment of an undisputed amount of $13 million as a condition for granting an adjournment. In ***Dowans*** court ordered a security of $5,000,000.

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[15] *Halsbury's Statutes* (Vol 11(2) (2010 Reissue), Title: courts, Judgments and Legal Services

[16] [2011] EWHC 1957 (Comm), [2012] 1 All ER (Comm) 820, [2011] 2 Lloyd's Rep 475.

[17] [2008] EWCA Civ 1157, [2009] 1 All ER (Comm) 611, [2009] 1 Lloyd's Rep 89

[18] *Halsbury's Statutes* (Vol 11(2) (2010 Reissue), Title: courts, Judgments and Legal Services)

[19] Janna Purdie, "Partial enforcement of New York Convention awards" New Law Journal, 31 October 2008, 158 NLJ 1522

[20] Steven Friel, "The autonomy of Arbitration" New Law Journal, December 2008 , 158 NLJ 17165

There is also a general ground for refusing recognition or enforcement under s. 103(3) in cases where the matter is a subject not capable of resolution through arbitration, or were it would be contrary to public policy to recognize or enforce the award. This is considered from the perspective of fundamental principles of English public policy. However in the leading case ***Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd***[21] the courts did not review whether the contract was illegal, and enforced the award on the basis of arbitrators' decision. The court aligning with ***Soleimany V Soleimany*** :

"Enforcement does not involve the English Court in giving approval or endorsement to intended and actual breaches by the parties of [foreign] law. What are approved and endorsed are the arbitration agreement and the award" [22]

Ergo, the CA in the same case[23] refused to enforce the award on grounds that it contravened public policy as smuggling of carpets was illegal in Iran and enforcing such an award would tarnish the reputation of English Courts.

Westacre remains the modern authority being applied in ***R V V***[24] and ***Omnium de Traitement V Hilmarton Ltd***[25] where it was held that enforcement should be allowed even if the contract was contrary to the public policy in the place of performance[26]***.***

These cases show a pre-disposition of the English courts towards the enforcement of foreign arbitral awards as viewed by Coleman J in ***IPCO***.[27] However, a question of potential change in the approach was raised in ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan***[28] where the UKSC was for the first time faced with an interpretation of s.103(2)

The validity of the arbitration agreement is fundamental to arbitration. S.103(2)(b) provides for refusal of enforcement if the respondent establishes that arbitration was not valid under the law to which the parties subject it to or, failing any indication thereon, under the law of the seat of arbitration. This ground also includes situations where a respondent claims not to have been a party to the arbitration agreement[29], and the possible discretion provided in 103(2) has been considered while applying this ground.

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[21] [2000] Q.B. 288; [1999] 3 W.L.R. 811; [1999] 3 All E.R. 864; [1999] 1 All E.R. (Comm) 865; [1999] 2 Lloyd's Rep. 65

[22] Unreported decision of Judge Langan Q.C on March 21, 1997 at 16

[23] Soleimany V Soleimany [1999] Q.B. 785; [1998] 3 W.L.R. 811; [1999] 3 All E.R. 847

[24] [2008] EWHC 1531 (Comm); [2009] 1 Lloyd's Rep. 97

[25] [1999] 2 All E.R. (Comm) 146; Lloyd's Rep. 222

[26] Harris, Bruce; Planterose, Rowan; Tecks, Jonathan, *The Arbitration Act 1996: A commentary (*2007, 4th ed); pg 433

[27] Harris, Bruce; Planterose, Rowan; Tecks, Jonathan, *The Arbitration Act 1996: A commentary (*2007, 4th ed); pg 435

[28] [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763

[29] [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763 [77]

It does not seem that the ground 'may' gives open discretion to the court, introduced only to cater to the possibility when despite existence of one of the grounds listed in 103(2), the right to rely on has been lost by for example an estoppel or another agreement[30], Mr. Nigel Teare QC in ***Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another***[31] quoting Mance LJ in ***Dardana Ltd v Yukos Oil Co (No.1)***[32] [33]. In ***Svenska*** enforcement was being sought against the Lithuanian Government. The Court recognized that it was a case where estoppel could apply and appropriate for the court to apply the discretion under s. 103(2), but since it has not been decided conclusively under the Danish law whether Lithuanian Government. was a party to the contract, cancelled the application[34]. The court refused to analyse whether Lithunian Government was a party to the arbitration agreement under Danish law pursuant to s.103(2)(b) reflecting a strong support towards enforcement. In ***Dallah,*** UKSC again considered the discretion provided in 103(2) to determine on an application by Pakistan Government to resist enforcement of an award by the ICC[35]. In doing so the Court went as far as to look whether the Pakistan Government was a party to the original arbitration agreement under the French Law – a matter already decided conclusively by the ICC. The court decided it was not bound by the decision of ICC.[36] ***Dallah's*** fallback argument that the word 'may' in (2) gave the court discretion to enforce the award, was rejected, with Lord Mance stating that:

"Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word 'may' enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue."[37]

This was a leap from the ***Svenska*** decision. The Court in Svenska did not go into the evaluating whether Lithunian Government is going to be considered a party to the arbitration agreement. Thus no evidence of interviewing Danish law experts as to what would be the findings under Danish law was considered by the courts. To the contrary, the Court in ***Dallah*** called for the opinion of French law experts.

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[30] [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763 [67]
Dardana Ltd v Yukos Oil Co. [2002] EWCA Civ 543, [2002] 1 All E.R. (Comm) 819 [Mance LJ paras 8 and 18]
[31] [2005] EWHC 9 (Comm); [2005] 1 All E.R. (Comm) 515; [2005] 1 Lloyd's Rep. 515;
[32] [2002] EWCA Civ 543, [2002] 1 All E.R. (Comm) 819
[33] Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another [2005] EWHC 9 (Comm); [2005] 1 All E.R. (Comm) 515; [2005] 1 Lloyd's Rep. 515; para 9 and 19
[34] Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another; [2005] All ER (D) 15 (Jan); page 1, para 2 & 3
[35] International Commercial Court
[36][2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763 [Mance LJ at para 31 & Collins LJ at para 104]
Available at: http://www.newlawjournal.co.uk/nlj/content/arbitration%E2%80%94award%E2%80%94enforcement
[37] [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763 [Mance LJ]
Available at: http://www.newlawjournal.co.uk/nlj/content/arbitration%E2%80%94award%E2%80%94enforcement

Moreover, the claimants in ***Dallah*** argued that The Pakistan Government failed to challenge the award in the arbitral tribunal and thus should not be able to resist enforcement later. However, the Court held that the Pakistan Government. was not required to challenge the decision. **Dallah** has been followed by ***Excalibur Ventures LLC v Texas Keystone Inc.***[38] where courts again took the view that they had jurisdiction to decide whether itself to resolve the issue as to whether an arbitration agreement existed and granted an injunction restraining further prosecution of arbitration proceedings against the applicants .

This raised a question whether the UK courts were adopting an 'interventionist' approach towards such awards. However, there is nothing 'anti-arbitration' in this. It is submitted that an arbitration friendly court will respect the parties' choice to arbitrate the dispute and not resolve through national courts and limit its examination of substantive merits of the dispute to a minimum. But in ***Dallah*** the very question before the national court was whether the parties actually intended to arbitrate their dispute, requiring full intervention of the courts. It would not be helpful to international arbitration if an award was enforced where the parties had never agreed on arbitration[39]. Their lordships was of the view that the discretion that courts adopted in interpreting s.103(2) was within the scope of Article V of the Convention. The refusal was necessary to maintain the fundamental structural integrity of the arbitration proceedings and ***Dallah*** did not, as it appears, signify a shift in the pro-arbitration approach towards enforcement of foreign awards.[40] It would serve no purpose to allow enforcement of awards against parties who never agreed to arbitrate.

According to Jacopo Crivellaro whether the Supreme Court's ruling has marked the beginning of a more interventionist era in the traditionally pro-enforcement regime of English arbitrations can only be determined by the judicial and legislative reactions to the decision. For example whether the courts will extend such discretion in interpreting grounds like public policy and other refusal grounds under s.103(2) to refuse enforcement. But as of now ***Dallah*** confirms and reflects strongly the English courts' support towards the international arbitral process.

[38] [2011] EWHC 1624 (Comm); [2012] 1 All E.R. (Comm) 933; [2011] 2 Lloyd's Rep. 289; [2011] 2 C.L.C. 338; 138 Con. L.R. 132; [2011] Arb. L.R. 27; (2011) 108(28) L.S.G. 19

[39] [2009] EWCA Civ 755, [2009] All ER (D) 199 (Jul) [87]
LJ Rix: "There could hardly be more fundamental defect than an award against someone who was never party to the relevant contract or agreement to arbitrate."

[40] Jacob Grierson and Dr. Mireille Taok ; "Dallah: Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d'Appel" (2011) 28 J. Int. Arb. 3 pg 415; para B
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An analysis of the law on eyewitness identification evidence in England and Wales

Introduction

Eyewitness testimonies are indeed 'the most problematic form of identification evidence'[1] because they have a common tendency to cause miscarriages of justice. English law has tried to reduce the possibility of such miscarriages by placing certain safeguards. These safeguards, available both in pre-trial and at trial, appear quite strong from the outset. Their effectiveness in practice, however, can be questioned. This essay will put these safeguards under the microscope and analyze them critically to come to a reasoned conclusion as to their effectiveness in practice.

But first let us start with an overview of the problem.

The Problem

The problem with eyewitness testimony lies in assessing its correct value.[2] Juries tend to assign a lot of weight to such evidence[3] but as Lord Devlin pointed out, 'the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken'.[4] This sometimes leads to grave miscarriages of justice. The recent case of Sam Hallam can be cited as an example here.[5]

Hallam was convicted of murder and sentenced to life imprisonment in 2005. The only evidence against him was the eyewitness testimony of two witnesses. From the very beginning, he had always maintained his innocence. Finally, following a referral by the Criminal Cases Review Commission (CCRC), his conviction was overturned by the Court of Appeal in 2012. The court

[1] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 260.
[2] P Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HMSO, 1976) 8.1.
[3] John A Andrews and Michael Hirst, *Andrews &Hirst on Criminal Evidence* (4th edn, Jordan Publishing Limited 2001) 269.
[4] P Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HMSO, 1976) 8.1.
[5] *R v Hallam* [2012] EWCA Crim 1158. See also: Jon Robins, 'Sam Hallam: The Failures That Led to Conviction' (Criminal Law & Justice Weekly 2012) <http://www.criminallawandjustice.co.uk/features/Sam-Hallam-Failures-Led-Conviction> accessed 1 December 14.

held that the eyewitness testimonies against him were unreliable and should have been excluded by the trial judge. Hallam had spent 7 years of his life in prison for a crime he had never committed.

Hallam's story perfectly illustrates the severity of the problem that misidentification causes today. It is for this reason that the Criminal Law Revision Committee in 1972 regarded mistaken identification as 'the greatest cause of actual or possible wrongful convictions.'[6] The problem, however, is not peculiar to the UK alone; but suffered globally. In the US, for example, 321 wrongful convictions were overturned through DNA testing, out of which 72% were caused by mistaken identification evidence.[7]

So what is the cause of this problem of misidentification? Misidentification is caused by a multitude of factors[8], both internal and external.[9] The internal factors relate to the innate fallibility of the human perception.[10] For example, psychological research tells us that our memory does not work like a video recorder, as generally assumed. It rather works like a series of photographs compiled together. As time passes, some of these photographs fade away. Our brain, however, hates to accept its limits and fills in those 'gaps' with information that we know from elsewhere. This process is called 'confabulation'.[11] Other internal factors include weapon focus,[12] the witness' stress level[13] and any biases that the witness may have, e.g. cross-race or own-race identification

[6] *The Eleventh Report of the Criminal Law Revision Committee,* Cmnd 4991 (1972) 196.
[7] The Innocence Project, 'Eyewitness Misidentification' (The Innocence Project 2014) <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> accessed 1 December 14
[8] Only an outline of the relevant factors can be provided here. For fuller analysis, see: J. Don Read, 'Features of Eyewitness Testimony Evidence Implicated in Wrongful Convictions' (2006) 31 Manitoba Law Journal 523;M Stone, 'Criminal Trials: The Reliability of Evidence – Part 1' (2009) 173 Criminal Law and Justice Weekly 532; M Stone, 'Criminal Trials: The Reliability of Evidence – Part 2' (2009) 173 Criminal Law and Justice Weekly 551.
[9] Mark R Kebbell and Graham F Wagstaff, Face Value? Evaluating the Accuracy of Eyewitness Information (Police Research Series Paper 102) (1999).
[10] Stephen Seabroke and John Sprack, *Criminal Evidence & Procedure: The essential framework* (2nd edn, Blackstone Press Limited 1996) 93.
[11] Helen Phillips, 'Confabulation', *New Scientist* (Cover story, 7 October 2006) 32-36.
[12] E Loftus, G Loftus and J Messo, 'Some Facts About "Weapon Focus"' (1987) 11 *Law and Human Behavior* 55.
[13] Brian L Cutler and Steven D Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press 1995).

bias.[14] External factors include duration of observation,[15] lighting,[16] time lapse between the event and the identification procedure,[17] and contamination by interaction with other people.[18]

Commentators have used various taxonomies to categorize these factors into sensible groups.[19] For current purposes, the simplest categorization to use would be that of Wells'.[20] He divides the factors into 'estimator variables' (which cannot be controlled but only be estimated) and 'system variables' (which can and should be controlled).[21]

To minimize the problem of misidentification, the criminal justice system must address both of these variables. This can be done by controlling the system variables and being aware of the effects of the estimator variables. The criminal justice system of England and Wales, like many others, have tried to address both of these variables, and have made legal efforts to reduce them. These efforts will be considered below.

Legal efforts made: the safeguards

The legal safeguards in England and Wales are two-fold. The first of these is Code D of the Police Codes of Practice.[22] It regulates the way in which eyewitness evidences are obtained using pre-trial identification procedures. The second safeguard was provided by the courts through issuance of judicial guidelines in *Turnbull*[23] as to the treatment and evaluation of such evidences in court during trial. We will discuss each of these safeguards in turn.

[14] R Bothwell, J Brigham and R Malpass, 'Cross-Racial Identification' (1989) 15 *Personality and Social Psychology Bulletin* 19.
[15] J Don Read, 'Features of Eyewitness Testimony Evidence Implicated in Wrongful Convictions' (2006) 31 Manitoba Law Journal 523.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 102.
[20] G Wells, 'Applied Eyewitness Research: System Variables and Estimator Variables' (1978) 36 *Journal of Personality and Social Psychology* 1546.
[21] Ibid.
[22] It was promulgated under ss 66 and 67 of the Police and Criminal Evidence Act 1984.
[23] *R v Turnbull* [1977] QB 224 (Lord Widgery).

Code D

Code D provides detailed guidelines on pre-trial identification procedures. It requires an identification procedure to be held when the suspect disputes identity and a witness has purported to have identified a suspect prior to any formal identification procedure.[24] An identification procedure should also be held where a witness expresses an ability to identify the suspect but have not been given that opportunity to do so.[25] There is, however, no need for a formal procedure, if it is not practicable or would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence.[26]

The Code provides four identification procedures that *may* be used to obtain identification evidence.[27] According to it, the procedures were designed to 'test the witness's ability to identify the person they saw on a previous occasion; and provide safeguards against mistaken identification'.[28] The procedures are summarized below.[29]

Where a suspect is known and available, the police should generally arrange a video identification procedure, which involves showing the witness moving images of the suspect and of (at least) eight[30] other fillers who resemble him.[31] An identification parade, in which the witness sees the suspect in a line of fillers,[32] may also be conducted if it is more suitable to do so.[33]A group identification procedure, in which the suspect is viewed by the witness in an informal group of persons, may be used where it is considered practicable to arrange and more suitable than either of the first two procedures.[34]

[24] Code D, para 3.12.
[25] Ibid.
[26] Ibid.
[27]John A Andrews and Michael Hirst, *Andrews &Hirst on Criminal Evidence* (4thedn, Jordan Publishing Limited 2001) 275.
[28] Code D, para 1.
[29] Further guidance is provided in the Annexes A-E of Code D.
[30] Code D, Annex A, para 2; Code D, Annex B, para 9.
[31] Code D, para 3.5.
[32]Ibid., para 3.7.
[33]Ibid., para 3.14.
[34]Ibid., para 3.9.

When the suspect is known but not co-operating, a confrontation may be arranged between the suspect and the witness, putting them face-to-face. This does not require the suspect's consent but should only be done where all other options are impracticable.[35] In any case, force cannot be used to make a suspect reveal his face.[36]

When there is no known suspect, 'a witness may be taken to a particular neighbourhood or place to see whether they can identify the person they saw on a previous occasion'.[37] This is normally known as a street identification procedure.

Breach of Code D *may* result in the identification evidence being excluded if, in the judgment of the court, its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.[38]

The Turnbull guidelines

The treatment of visual identification evidence in the trial phase depends upon its quality.[39]

If the quality is good, the identification evidence should be left to the jury to be assessed with a *Turnbull* direction.[40]When the case against a defendant depends wholly or substantially on the correctness of visual identification(s) which are alleged to be mistaken, *Turnbull* requires the judge to warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.[41] Moreover, it requires him to instruct the jury as to the reasons behind the warning and refer to the possibility that a mistaken witness may be a convincing one and that a number of identifying witnesses may all be equally mistaken.[42]

[35]Ibid., para 3.23.
[36] Ibid.
[37]Ibid., para 3.3.
[38] Police and Criminal Evidence Act 1984, s 78(1).
[39]*R v Turnbull* [1977] QB 224.
[40] Ibid.
[41] Ibid.
[42] Ibid.

If, however, the quality is poor, the case should be withdrawn from the jury and an acquittal directed unless there are other evidences which supports the correctness of the identification.[43]

Evaluation of the safeguards

Code D

Code D does a good job in accounting for much of the contemporary psychological research on identification evidence.[44] It seeks to minimize the system variables to prevent misidentification. However, gaps still remain and misidentifications keep on occurring as evident by Hallam's case.[45] Three of these gaps will be discussed below.

The first of these gaps refer to street identifications. Code D allows for street identification where the identity of the suspect is unknown.[46] The problem is that such a procedure is inherently suggestive.[47] When the witness sees a person surrounded by police officers, it subconsciously obliges him to pick that person as the offender.[48] This suggestive procedure causes a serious risk of misidentification and Code D inadequate in preventing it.[49]

To redress this, the House of Lords provided that the duty to conduct a formal identification remains even after a street identification.[50] The assumption was that a formal procedure following a street identification will provide the witness an opportunity to step back from his original

[43] Ibid.
[44]Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 101.
[45]*R v Hallam* [2012] EWCA Crim 1158. See also: Jon Robins, 'Sam Hallam: The Failures That Led to Conviction' (Criminal Law & Justice Weekly 2012) <http://www.criminallawandjustice.co.uk/features/Sam-Hallam-Failures-Led-Conviction> accessed 1 December 14.
[46] Code D, para 3.2
[47]Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 106.
[48]D Wolchover and A Heaton-Armstrong, 'Ending the Farce of Staged Street Identifications' [2004] 3 Archbold News 5, 6.
[49]Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 107.
[50]*R v Forbes* [2001] 1 AC 473.

decision, and that identification of a suspect in a second procedure is not an inevitable outcome.[51] However empirical research by Roberts *et al* suggests that witnesses are more likely to select the same person in a video identification when they have had the chance to pick him in a street identification.[52] They suggest that this double identification exposes suspects to the risk that a jury will treat the two procedures as independent events and attach weight to the second identification, which it does not deserve.[53]

According to Code D formal identification is only required when you have a known suspect,[54] i.e. a suspect on whom the police have reasonable grounds for suspicion.[55] The police argue that in street identification cases they do not have enough grounds for arrest, and thus they cannot carry out a formal identification procedure.[56] As mentioned earlier, this causes a serious problem, which even a subsequent formal identification cannot solve. Wolchover and Heaton-Armstrong, however, suggest a radical solution.[57] They argue that the fact that a suspect has been stopped and detained close to the scene of an offence who matches the description provided by a witness, will often constitute grounds for reasonable suspicion.[58] In these cases, they suggest, the suspect should be arrested and a formal identification procedure carried out instead of an informal street identification.[59] This radical solution seeks to protect the suspects against long-term suffering and possible punishment by causing them short-term inconvenience.[60] The suitability of this proposal, however, will not be dealt here but left to the reader to decide.

The second problem that requires some consideration is regarding the formal video identification procedure. Psychological research suggests that a simultaneous method of identification forces the

[51] Ibid.
[52]Andrew Roberts, Josh P. Davis, Tim Valentine & Amina Memon, 'Should we be concerned about street identifications?' (2014) Criminal Law Review Issue 9, 633.
[53]Ibid., 654.
[54] Code D, para 3.2.
[55] Code D, para 3.4.
[56]D Wolchover and A Heaton-Armstrong, 'Ending the Farce of Staged Street Identifications' [2004] 3 Archbold News 5, 6.
[57]Ibid.
[58] Ibid.
[59] Ibid.
[60]Andrew Roberts, 'Pre-trial defence rights and the fair use of eyewitness identification procedures' (2008) 71 Modern Law Review 331, 357.

witness to make a relative judgment and increases the chance of an innocent being chosen.[61] Instead, it suggests that a sequential method be adopted, in which the suspect and fillers will be shown to the witness in sequence and the procedure will be stopped once an identification has been made.[62] This process prevents the witness from making a relative judgment and prevents misidentification.[63] Video identification, the procedure of choice in England and Wales, does allow for a sequential view of moving images of the suspect and fillers, but allows the witness to see all the images at least twice before making a choice.[64] As Roberts argues this effectively has the same consequence of a simultaneous method, because the witness is still capable of making a relative judgment.[65]

The third and probably the most serious problem of Code D lies in its enforceability. Breaches of Code D provisions merely constitute a factor to be taken into consideration when deciding on admissibility of identification evidence.[66] If the breach is serious enough to cause unfairness in the proceeding, the judge may very well exclude the identification evidence.[67] However he does not have to.[68] In fact, even where the breach is substantial, the courts are often reluctant to exclude identification evidence, in the absence of bad faith on the part of the police.[69] On the contrary, recent trend of the courts suggest that a warning to the jury may well be adequate rather than an exclusion of evidence.[70] This is dangerous, because trial judges may quickly seize this opportunity to jump on the 'warning bandwagon' instead of excluding unreliable identification evidences even where an exclusion is more appropriate.[71]

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[61] Nancy Steblay, Jennifer Dysart, Solomon Fulero, R C L Lindsay, "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta Analytic Comparison" (2001) 25 Law and Human Behavior 459.
[62] Ibid.
[63] Ibid.
[64] Code D, Annex A, para 11.
[65] Andrew Roberts, *'Eyewitness Identification Evidence: Procedural Developments and the Ends of Adjudicative Accuracy'*, [2009] International Commentary on Evidence, Volume 6, Issue 2, Article 3, Page 13.
[66] Police and Criminal Evidence Act 1984, s 67(11).
[67] Ibid., s 78.
[68] *R v Popat* [1998] 2 Cr App R 208.
[69] *R v Williams* [2003] EWCA Crim 3200.
[70] See: *R v Forbes* [2001] 1 AC 473 and *R v Nunes* [2001] EWCA Crim 2283.
[71] Commentary by D J Birch on *R v Khan* [1997] Crim LR 584, 586.

Furthermore, appellate courts rarely interfere with a trial judge's decision to admit identification evidence where the police have breached the Code.[72] In *Forbes* the Court of Appeal explicitly stated that the s 78 discretion should not be exercised as a means of disciplining the police for failing to hold a formal procedure.[73] However, as Roberts rightly protests, if the discretion is not exercised for this purpose, there is no effective sanction attached to a breach.[74] After all, the strength of any regulatory provision lies in the conditions surrounding its applicability, acceptance and performance.[75] In other words its strength comes from the sanctions that attach to any violation of it.[76] If the police starts to think that the courts usually allow identification evidence regardless of breach of the Code provisions, Roberts suggests that the option of non-compliance with the code will become more attractive to them. After all, why should they spend the time and effort to comply with the Code if it does not have any adverse consequence?[77] This effectively paves the way for undermining the regulatory regime.

Many of the other common law jurisdictions have adopted a more vigorous approach to the admissibility of identification evidence resulting from significant breaches of pre-trial procedural requirements.[78] New Zealand, for example, requires compulsory exclusion of identification evidence if a formal procedure is not followed by the police in obtaining visual identification evidence of a suspect and there was no good reason for not doing so unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have

[72] Andrew Roberts, 'Eyewitness Identification Evidence: Procedural Developments and the Ends of Adjudicative Accuracy' [2009] 6 International Commentary on Evidence Issue 2, Article 3, Page 28.
[73] *R v Forbes* [2001] 1 AC 473.
[74] Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 109.
[75] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press: Oxford, 1991) 122-34.
[76] Andrew Roberts, 'The problem of mistaken identification: some observations on process' (2004) International Journal of Evidence and Proof 100, 109.
[77] Ibid.
[78] Andrew Roberts, 'Eyewitness Identification Evidence: Procedural Developments and the Ends of Adjudicative Accuracy' [2009] 6 International Commentary on Evidence Issue 2, Article 3, Page 28.

produced a reliable identification.[79]Choo suggests that such a vigorous approach may be suitable for England and Wales to improve the protection provided by Code D.[80]

Turnbull

Turning to *Turnbull*, let us consider first what it requires us to do when the evidence of identification is of poor quality. In such a case, *Turnbull* provides that the judge should direct an acquittal unless there are other supporting evidences.[81] What it does not provide, however, is a set of criteria to judge the quality of the identification evidence, apart from the extreme example of a 'fleeting glance'.[82] There are numerous shades of grey between a fleeting glance and a good, clear observation which are really difficult to assess[83] but as a Canadian judge rightly notes, *Turnbull* offers 'no workable criteria for determining when conditions are so difficult that an eyewitness's testimony should not be relied on'.[84]

Where the quality of evidence is good, *Turnbull* requires the judge to warn the jury against the special need for caution when convicting solely on eyewitness identification evidence. When directing the jury, Lord Widgery suggested that the jury should be left to consider the following:

1. visibility and lighting conditions at the material time;
2. distance between the eyewitness and the perpetrator;
3. duration of observation by the eyewitness;
4. whether the observation was impeded;
5. whether the perpetrator was known to the eyewitness;
6. duration between the observation and the reporting of the incident to the police;
7. reasons why the eyewitness recalls that the perpetrator was at the scene;

[79] Evidence Act 2006 (NZ), s 45(2).
[80]Andrew L-T Coo, *Evidence* (3rdedn, Oxford University Press 2012) 169.
[81]*R v Turnbull* [1977] QB 224.
[82] Michael Bromby, 'An examination of criminal jury directions in relation to eyewitness identification in commonwealth jurisdictions' (2007) 36 Common Law World Review 303, 307.
[83] Ibid.
[84]*Mezzo v R* (1986) 30 DLR (4th) 161, (Wilson J).

8. differences between the description of the perpetrator and the actual appearance of the suspect.

Although the list was not meant to be exhaustive,[85]Bromby, having reviewed a number of cases, notes that judges tend to use these eight factors religiously and do not take account of the other relevant factors in such cases.[86] Based on this observation, Bromby suggests that in the light of recent psychological research these factors are of limited scope and does not offer a satisfactory protection.[87]

Nevertheless, even with this limitation, the *Turnbull* direction seeks to inform the jury about the inherent factors related to such evidences (estimator variables) which makes them so unreliable. This attempts to tip the balance ever so slightly away from the weight given to such evidences by juries.

However, as Choo suggests, 'the entire approach is premised on the assumption that juries will actually comprehend and take cognizance of the warnings administered by trial judges'.[88] In fact, research conducted in the US on similar jury instructions suggests little evidence of increased jury sensitivity.[89] After all, 'a 10-minute lecture on identification evidence does not make a juror an expert in assessing its probative value'.[90]

Therefore, it appears that empirical research do not support the claims that judicial warnings provide effective protection against the risk of wrongful conviction.[91] In reality, they do little to displace the faith that juries routinely place on eyewitness identification evidence.[92]

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[85]*R v Keane* (1977) 65 Cr App Rep 247.
[86] Michael Bromby, 'An examination of criminal jury directions in relation to eyewitness identification in commonwealth jurisdictions' (2007) 36 Common Law World Review 303, 307.
[87] Ibid.
[88]Andrew L-T Coo, *Evidence* (3rdedn, Oxford University Press 2012) 159.
[89] Brian L Cutler and Steven D Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press 1995) 263.
[90] Editorial, 'Identifying Problems with Identification' (2004) 28 Criminal Law Journal 69, 69.
[91] G Ramirez, D Zemba, R Geiselman, 'Judges' Cautionary Instructions on Eyewitness Testimony' (1996) 14 American Journal of Forensic Psychology31, 33.
[92] Andrew Roberts, 'Expert evidence on the reliability of eyewitness identification – some observations on the justifications for exclusion: Gage v HM Advocate' (2012) 16 International Journal of Evidence and Proof 93.

In such circumstances, one would reasonably expect the *Turnbull* guidelines to be strictly adhered to by the courts to at least provide the minimum protection it has to offer. However, the Crown Court Study suggests otherwise. It found that there was 'fairly important' or 'very important' identification evidence in close to about 25 per cent of contested cases, out of which, *Turnbull* directions were given in just over 50 per cent of those cases.[93]

This low compliance rate may be attributed to the non-obligatory nature of the *Turnbull* direction. Although a failure to follow the guidelines may well result in the conviction being quashed on appeal (if the verdict was unsafe),[94] it is not always the case.[95] As Lord Devlin recommended,[96] putting the direction in a statutory footing will hopefully ensure compliance and strengthen the limited protection it offers.

This begs the question what else can be done to effectively educate the jury regarding these estimator variables. Some commentators[97] suggest that expert evidence should be allowed to explain the weakness of identification evidence to juries. This proposal certainly has its merits, but the Scottish appellate courts have recently rejected this optionholding that Scottish law has enough safeguards already in place (for instance the jury direction) for the jurors to identify these weakness themselves.[98]However, as argued earlier, the effectiveness of jury directions and the current safeguards are questionable. The English and Welsh courts, however, did not yet have the opportunity to consider this issue.[99]

Conclusion

[93] M Zander and P Henderson, *The Royal Commission on Criminal Justice: Crown Court Study* (1993) 92-3.
[94] J C Smith, *Criminal Evidence* (Sweet & Maxwell 1995) 203.
[95] *R v Forbes* [2001] 1 AC 473.
[96] P Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HMSO, 1976) 4.52.
[97] Andrew Roberts, 'Expert evidence on the reliability of eyewitness identification – some observations on the justifications for exclusion: Gage v HM Advocate' (2012) 16 International Journal of Evidence and Proof 93.
[98] *Gage v HM Advocate* [2011] HCAJC 40. See also: J Don Read, 'Features of Eyewitness Testimony Evidence Implicated in Wrongful Convictions' (2006) 31 Manitoba Law Journal 523.
[99] Andrew Roberts, 'Expert evidence on the reliability of eyewitness identification – some observations on the justifications for exclusion: Gage v HM Advocate' (2012) 16 International Journal of Evidence and Proof 93.

Having a bird's eye view of the problem, the legal efforts made in England and Wales to solve them, and a critical analysis of those efforts, it appears that the legal safeguards are not very effective at solving the serious problem that eyewitness identification evidence causes. Nevertheless, it must be acknowledged, that they do provide at least 'some' protection. It is suggested that these legal safeguards can easily attain their optimum level, if their enforceability is improved. Moreover, new safeguards, such as admission of expert evidence to explain the reliability of identification evidence, may be introduced. Some lessons can be learnt from other jurisdictions in this regard.

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Professor Dr. Borhan Uddin Khan

Shahzeb Mahmood

As I patiently waited for Professor Dr. Borhan Uddin Khan in his spacious office in the early hours of a torrid monsoon morning, he entered his room with a flurry of activities. He wordlessly beckoned me to join him at his table as he quickly exchanged words with his deputies and made a few phone calls. Pleasantries were exchanged and we started an hour long conversation.

Dr. Borhan Uddin Khan was born in 31st August, 1962 in Jessore in the erstwhile East Pakistan. Having completed his primary and secondary education from Jhenaidah Cadet College in 1980, he enrolled himself under the University of Dhaka as an undergraduate student at the Department of Law. However, choosing this line of education was not without its share of pickle; as a student of eighth grade, he was faced with the inescapable dilemma: the choice between science and humanities. A major hurdle then the impasse was intermitted by congenial advice from his parents to take science.

He then circumspectly weighed his options and rationalised that the legal profession would offer him across-the-board options: from opting the conventional route of being a legal practitioner to a distinguished position in the judiciary or an academic appointment, the possibilities were virtually limitless. He braved his decision despite strong words of caution from his parents, particularly his father – who was a legal practitioner, and graduated from the University of Dhaka in 1984. He subsequently pursued Master's the following year.

Dr. Khan silently reminisced how his appointment at Dhaka University was inadvertent. He was an articled pupil under Barrister Rafique-ul Huq since 1986, the year he acquired his practitioner's license. His initial plans were to adhere to the conventional legal practice and further his academic progression. Accordingly, on 14th December, 1988 he applied for the Commonwealth Scholarship; the same month he was advised by the then Dean to apply for the lectureship position and appear before the Selection Committee.

The Selection Committee was composed of Professor Emajuddin Ahamed, Professor K. M. A Qamruddin, late Dr. Muhammad Zahir, and the former Minister of Law, Justice and Parliamentary Affairs, Barrister Shafique Ahmed, amongst others. Dr. Khan by then had a few publications to his credit: an article authored by him was published in the prestigious Bangladesh Journal of Law, an annual publication of BILIA; whilst pursuing his LL.M at the University of Dhaka, he published a book on Criminology that was subsequently used as university reference book. His position was fairly enhanced.

The members of the Committee did not ask detailed questions but was rather sorting out how he could join as a lecturer and leave for higher education unburdened. Dr. Zahir clarified his intentions, "you join and then you leave for your education… we just want you to teach here." On 5th March, 1989, Dr. Khan officially joined the prestigious University. The following month he left for the United Kingdom, with the Commonwealth Scholarship, to pursue LL.M and PhD with full pay for four years.

Dr. Khan bethinks how he considered leaving his teaching position on multiple occasions but felt morally obligated to serve for a few years. His professional immersion was captivating enough for him to outlive his sense of obligation as his service to the great institution marked 26th year in March 2015. Nevertheless, he still aspires to practice in the courts one day.

Between 1989 and 1997, Dr. Khan went through marked academic transformation. After having completed his LL.M in Public International Law at London School of Economics and Political Science, he switched to SOAS for his PhD. His doctorate thesis was on "The Impact of International Labour Standards on Freedom of Association in Bangladesh", which was characteristically built on, *inter alia*, international law, international labour law, constitutional law, labour law and international organisation. Just after having completed his PhD, he received the British Council Fellowship in the latter half of 1992, the United Nations Fellowship of International Law in 1996 and the Fellowship of Hague Academy of International Law in 1997.

Being regarded as the pioneer of International Humanitarian Law (IHL) in Bangladesh, Dr. Khan elucidated the basics of this branch of law. It is, he explained, distinct from human rights law;

while the latter stems from the current regimes of United Nations and strives to defend the fundamental rights of every person (during peace time), IHL has sprouted from Geneva Conventions and confines itself solely to war-time quantums: protection of armed forces in the sea, protection of armed forces on the air, protection of prisoners of wars and the protection of civilians, supplemented by a few additional protection under protocols.

The primary objective of any warfare is to surmount the enemy state by disabling enemy combatants. Hence IHL seeks to govern the rules of engagement between disputed nations, drawing a line between combatants and civilians, affixing the requirement that wounded and captured enemy combatants be treated humanely, with the aim to minimise supererogatory human casualties.

However, there have been highly disputatious debates with regards to whether there can be a war between a state and an unidentifiable non-state entity, he remarked. Former President G.W. Bush's 'War on Terror' is an interesting example. It can neither be classified as an 'international armed conflict', since such conflicts must characteristically take place between recognised states, nor can it be regarded as a 'non-international armed conflict', since the 'war' was not between a state and a recognised non-state armed group (as prescribed by International Criminal Tribunal for the former Yugoslavia). The entire operation was concentrated upon the law enforcement of a country rather than the complex regime of IHL. If there was an incident of bombing, conventional wisdom dictates that it is the domain of the Home Ministry, he noted.

IHL, being a branch of international law, does not have any direct bearing on the legal system of any particular country. Nevertheless, it must necessarily be endorsed; its contravention entails severe political repercussion and far-reaching diplomatic impact, and may attract criminal prosecution by the International Criminal Court at The Hague, as exemplified in cases of Bosnia-Herzegovina and Rwanda.

Dr. Khan noted, quite crucially, that International Humanitarian Law has little relevance as far as refugees, stateless persons and migrants are concerned, even though they are often the resultant

eventualities of humanitarian crisis. While the common concern is humanity, the laws and conventions are premised on fundamental differences.

He further explicated: the **1951 Refugee Convention** and **1967 Protocol**, built on Article 14 of the 1948 Universal Declaration of Human Rights, sets out the rights of individuals who are granted asylum and the corresponding responsibilities of the nation that has granted the asylum. The **1954 Convention on the Status of Stateless Persons** and the **1961 Convention on the Reduction of Statelessness** are key legal instruments in the protection of stateless persons around the world and in the prevention and reduction of statelessness. On the flip side, the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**, entered into force in July 2003, aims to protect migrant workers and their families from exploitation and the violation of their human rights.

Of his many contributions in the legal arena, Dr. Borhan Uddin Khan has made his mark through his personal involvement in the codification of the Bangladesh Code. He briefly reiterated its formative history. The Bangladesh Code has its provenance in the *Unrepealed Central Acts, wherein all central laws of the erstwhile British India were comprehensively catalogued. Its regional counterpart, the Bengal Code, was bequeathed in 1947 and the East Pakistan Code dawned. It was distinct from the West Pakistan Code, he noted, which is rooted in the Unrepealed Central Acts of India. After 1971 Independence,* Section 3 of Bangladesh Laws Revision and Declarations Act 1973 authorised the Law Ministry to codify all laws and print them under the banner of Bangladesh Code. The process of codification was duly commenced and by 2005 the Ministry could only print 11 volumes, codifying laws till 1938.

After having completed his PhD in 1995, Dr. Khan noticed that he mentioned an oft-cited law in his doctorate thesis that has been repealed, and quite astonishingly no one was aware of the development in that area of law. He realised that there was no comprehensive database for the lawyers to consult on this matter. He thus started his own research and published a four volume **Encyclopedic Compendium of the Laws of Bangladesh** in 2002, through Bangladesh Legal Aid Services Trust (BLAST), that acted as the complete database of all the laws in Bangladesh and had

been catalogued in alphabetical order, year and subject-wise, separately listing all the repealed laws and list of amendments.

Dr. Khan strikes a note on how a personal initiative, wrought only a few rooms away from where we were, had then turned into a big government project. In 2003, a law reform project began at the Ministry and Dr. Khan was employed as a consultant. He was delegated the task of preparing a comprehensive paper on the legal institutions of Bangladesh. At the Ministry he raised the issue of not having an up-to-the-minute Bangladesh Code. The Ministry officials, in their private capacity, relegated the task of codifying laws from 1939 to 1947 to Dr. Khan. The consultancy arrangement had an expectancy of 6 months and he delivered the work within the timeframe. Soon after, the Ministry went for an international bidding, where he took part and subsequently got selected. By 2007 he completed the tiresome process of codification.

As we neared the end of our conversation, he reflected his thoughts on such state of affairs as blasphemy, terrorism, defamation and the protection of human rights under the Constitution of People's Republic of Bangladesh.

Blasphemy and terrorism, including those that are state-sponsored, are grounded on the apriorism of noncompliance with legal regime and has its roots in disunited political, religious, social, moral, ideological or psychological perceptions. The conflict lies in the interpretation and lack of tolerance, and the solution in the establishment of compliance regime. To that end, principles affording constitutional protection are fairly well-structured, especially those concerning the elemental rights.

Bangladesh has well-marked provisions safeguarding the fundamental rights of its citizens, largely in line with international conventions, and the courts have interpreted them progressively. However the devil lies in its implementation. Under the Constitution of the People's Republic of Bangladesh, the said rights have been divided into two parts: Part II, listing the legal, social and cultural rights; and Part III, charting civil and political rights. Dr. Khan observes how the overburdened courts, often laced with flavours of politicisation, fail to implement the provisions unobstructed.

He also noted how certain areas of law are underdeveloped due to judicial reticence. For instance, the regime on defamation has been encompassed in the Penal Code; nevertheless, the very nature of the law is fact-sensitive and subjective, and therefore would require the courts to arbitrate on the facts of each case by way of conscious application of the relevant legislation and thereby develop precedents, no matter how the Parliament spells out the law. The primitive culture of backward politics and politicisation of institutions has failed in the positive utilisation of the law.

Dr. Borhan Uddin Khan was amongst the Founder Members of Asian Society of International Law (ASIL) and is currently serving in the capacity of its Vice President and the President of its Bangladesh chapter, since November 2013. He is also the serving as an Adviser at the Department of Law, Eastern University, since 2003 and has been a Professor at the Department of Law, Dhaka University, for over 26 years. Since the 1st January, 2015 he is the Chairman of the Department of Law, Dhaka University, previously having served in the capacity of the Dean of the Faculty of Law. He is also a former Senate Member of Dhaka University and serves in the Editorial Board of Asian Journal of International Law, amongst a few others.