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Towards a Comprehensive Legal Aid System in Bangladesh: The Need for Early Access to Legal Aid in Criminal Proceedings

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Abstract The government-funded legal aid system in Bangladesh has been undergoing development. Bangladesh has guaranteed the right to legal assistance in different laws and particularly in the Legal Aid Services Act (LASA) with specific and greater detail. Moreover, it acceded to the International Covenant on Civil and Political Rights (ICCPR) in 2000. In this context, the purpose of this article is to examine the current practice of the country with respect to the granting of early access to legal aid in criminal proceedings in light of international human rights standards. The article indicates that the prevailing problem of arbitrary arrest and pre-trial detention of those who are living in poverty is a matter of grave concern in Bangladesh. The author, therefore, recommends a mechanism to ensure early access to legal aid in the government-operated legal aid framework, as a fundamental aspect of a comprehensive system, for the protection of the interests of those who have been arrested or detained prior to being interviewed and formally charged of a criminal offence.

Keywords Legal aid · Criminal justice · Police station · Arrested · Suspected

Introduction

There exists a founding contradiction in the legal system, in that the law promises to administer fair judgments in disputes between parties who are not equal in respects of money, power and status (Maru 2010). Even when equal access to courts is guaranteed, an affluent or strong party has the privilege to improve its chances (Maru 2010). Legal aid is considered a "classic corrective" to this fundamental disagreement that aims to boost the weaker party's interest

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(Maru 2010). According to the United Nations Special Rapporteur on the Independence of Judges and Lawyers (Knaul, A/HRC/23/43, 15 March 2013), legal aid contributes to the elimination of obstacles and barriers which impair or restrict access to justice by providing assistance to those who would not otherwise have been able to afford legal representation and access to the court system (Knaul, A/HRC/23/43, 15 March 2013, para. 27). In particular, the right to legal aid is construed as both a right and an essential guarantee for the effective exercise of other human rights including the right to an effective remedy, the right to liberty and security of the person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial (Knaul, A/HRC/23/43, 15 March Knaul 2013, para. 28). The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly Resolution 67/187, 20 December 2012), the first international instrument exclusively dealing with legal aid (Willems 2014), states that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It provides a foundation for other fundamental rights, including the right to a fair trial, and is an important safeguard that ensures fundamental fairness and public trust in the criminal justice process (General Assembly Resolution 67/187, 20 December 2012, para. 1).

It is noted that the obligation to provide legal aid is widely acknowledged in criminal matters since these involve the coercive power of the State (Manning 2009). In criminal cases, the State making an accusation serves as an initial invasion of liberty (Young and Wall 1996). Legal aid is essential to protect the right of a person from the deprivation of his liberty (Manning 2009; Mossman 1993) and to secure justice (Young and Wall 1996). However, in criminal proceedings, the stage when legal aid is guaranteed is critical. Particularly the early stages of the criminal justice process involving the first hours or days of police custody or detention are crucial for the arrested[1] or detained persons (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014). Their ability to protect their rights effectively, the length of their detention or the time when they are produced before a court and as a whole their right to a fair trial is dependent on the early stages of the proceedings (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014). Furthermore, suspects[2] and accused persons are more likely to suffer from the risk of torture or other forms of degrading treatment and unlawful detention during this period (Birk et al. 2011). Thus, the fairness and efficiency of the criminal justice system is dependent on the early stages of criminal proceedings.

In Bangladesh, Article 27 of the Constitution embodies the principle of equality before the law.[3] The Constitution also ensures the right to a fair trial. Yet the need for legal aid for the

[1] The terms "arrest" and "detained" are defined in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution A/RES/43/173 (9 December 1988). "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority; and "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence. Same definitions have been adopted in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (para. 10).

[2] The term 'suspected' is not defined specifically, but the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems states that the right to legal aid of suspects arises before questioning, when they become aware that they are the subject of investigation, and when they are under threat of abuse and intimidation, e.g. in custodial settings (The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (footnote 10, para. 10).

[3] Bangladesh first adopted an ad hoc Constitution under the Proclamation of Independence Order of 10 April 1971 which was replaced by the Provisional Constitution of Bangladesh Order 1972. The present Constitution was adopted by the Constituent Assembly on 4 November 1972 and it came into force on 16 December 1972.

poor and marginalised has magnified over the years (Khair 2008). State intervention in the area of legal aid was established with the enactment of the Legal Aid Services Act (Aingoto Sohayota Prodan Ain, Act No. VI of 2000, hereinafter LASA) in 2000. Furthermore, Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR) in the same year.[4] In this context, the present paper examines the current practice of Bangladesh with respect to the granting of early access to legal aid in criminal proceedings in light of international human rights standards. The author, therefore, first looks at the international human rights normative framework regarding the issue. While analysing those international standards that take into account recognised good practices, the paper uses examples from the European Court of Human Rights and the Supreme Court of the United States. After discussing international human rights standards on the right to early access to a lawyer, the author addresses the current laws and practices of Bangladesh and finally makes recommendations. It should be noted that non-governmental organisations (NGOs) are working consistently to supplement the government legal aid framework in Bangladesh (Ameen 2004; Chowdhury and Malik 2002).[5] This paper, however, focuses on the legal aid system operated by the government.

Early Access to Legal Aid in Criminal Proceedings Under the International Human Rights Normative Framework

The ICCPR protects the right to justice and a fair trial based on the idea of equality and its Article 14 requires the State Parties to ensure that in the determination of any criminal charge, everyone shall have an effective remedy by an independent, impartial and lawfully established court or tribunal. Paragraph 3(d) of the same Article particularly guarantees the right to have legal assistance assigned to an accused person whenever the interests of justice so require, and without payment by them in such cases where they do not have sufficient means to pay for it. The Human Rights Committee (HRC)[6] has, therefore, opined that "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way" (HRC, General Comment 32, para. 10).

Along with the ICCPR, there are other United Nations (UN) instruments or soft laws that require States to ensure the right to legal aid. These instruments, as discussed below, consist of the UN General Assembly resolutions and standards of behaviour. While the State Parties to the ICCPR are legally bound to ensure the right to legal aid, soft laws are not considered to have a binding force (United Nations Charter,[7] Articles 10–14; Shelton 2008). However, this does not mean that they have no relevance. The General Assembly resolutions have considerable authority because they are issued by the only forum that is composed of all the UN Member States (Willems 2014; Higgins 1994). Since the General Assembly is not a legislative body, the relevance of its resolutions lies in its authority, especially when they are of a

[4] The ICCPR was adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Bangladesh acceded to the ICCPR on 6 September 2000. This information is available at http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en. Accessed 19 November 2014.

[5] Some of these NGOs are Bangladesh Legal Aid and Services Trust (BLAST), Ain o Shalish Kendra (ASK), Bangladesh Women Lawyers' Association (BNWLA) and Bangladesh Rural Advancement Committee (BRAC).

[6] The HRC monitors the implementation of the ICCPR by its State Parties.

[7] The Charter of the United Nations was signed on 26 June 1945 in San Francisco and came into force on 24 October 1945.

declaratory or law making nature (Willems 2014). The resolutions set standards for States and contribute to the process of law development (Chinkin 2013). According to Higgins, the process of law development occurs not only by the passing of binding instruments, but "legal consequences can also flow from acts which are not, in the formal sense, 'binding'" (Higgins 1994). Often the General Assembly resolutions are the precursor to treaty negotiations and able to trigger State practice which can ultimately lead to the formation of customary international law (Shelton 2008). For instance, the foundational document of international human rights law, the Universal Declaration of Human Rights (UDHR)[8] was adopted in the form of a General Assembly resolution. The UDHR was followed by the ICCPR and the International Covenant on Economic, Social and Cultural Rights[9] that are binding on the State Parties. Other soft laws are significant as well. They bring an issue of concern onto the international agenda (Chinkin 2013) and, therefore, have a large impact on the development of the law. They can fill in the gaps in existing treaties by way of interpretation (Shelton 2008). Soft laws also provide guidance or models for domestic laws that are able to assist policy makers to realise rights at the national level (Chinkin 2013).

Among the above-mentioned soft laws, the first one is the Standard Minimum Rules for the Treatment of Prisoners [adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957, and 2076 (LXII) of 13 May 1977, Rule 93]. It imposes an obligation on States to allow the untried prisoner to apply for free legal aid where such aid is available for his defense. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, 9 December 1988) further makes governments responsible to allow a detained person the right to defend themself or to be assisted by counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment if they do not have sufficient means to pay (General Assembly Resolution 43/173, 9 December 1988, Principle 17, para. 2). In addition, the Basic Principles on the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990) through its Preamble and Articles 2, 3 and 6 obligates States to protect human rights, ensure equal access to lawyers and provide sufficient funding for legal services to the poor. These principles clearly direct the governments to ensure efficient procedures and responsive mechanisms for effective and equal access to lawyers for all persons within their territory and subject to their jurisdiction without distinction of any kind and, therefore, to make provision of sufficient funding and other resources for legal services to the poor and other disadvantaged persons (Basic Principles on the Role of Lawyers, Articles 2 and 3). The more recent development in the area of legal aid is the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly Resolution 67/187, 20 December 2012, hereinafter the Principles and Guidelines) which indicates a benchmark for access to justice (Willems 2014). The Principles and Guidelines is drawn from international standards, namely the UDHR and the ICCPR, and recognised good practices and provides a useful framework to guide States on the principles on which a legal aid system in criminal justice should be based (the Principles and Guidelines, para. 6). It makes

[8] The UDHR was proclaimed by the United Nations General Assembly on 10 December 1948, General Assembly resolution 217A (III).

[9] The Covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

States responsible to guarantee the right to legal aid in their legal systems at the highest possible level including the Constitution (the Principles and Guidelines, Principle 1) and accordingly to undertake efforts and measures in order to strengthen access to legal aid in criminal justice system (the Principles and Guidelines, Principle 2).

The UN documents are considered as the most authoritative and comprehensive in their respective fields (Wilson 2010). Particularly the Principles and Guidelines is of considerable significance due to its exclusivity on legal aid. However, the Principles and Guidelines lacks teeth and cannot automatically generate improvements in national legal aid systems. Yet this does not mean that the instrument has no significance. Its value lies in the fact that this instrument is adopted by the General Assembly consisting of all the UN Member States (Willems 2014). The Principles and Guidelines acknowledges the global need for improvement in the legal aid sector. Moreover, it is based on international standards and recognised practices which gives it a realistic and practical character in order to establish an accessible and effective legal aid system (Willems 2014).

The international human rights instruments, as noted above, obligate States to provide legal aid in criminal proceedings. However, upon perusal of the international instruments, the stage at which the right to legal assistance is guaranteed in criminal proceedings becomes a critical issue because in practice this right does not often begin at the first questioning (Willems 2014). This can have serious repercussions on the outcome of a case, and a lawyer might not be able to rectify this at a later point when incriminating statements have already been made without a lawyer's presence (Willems 2014). Moreover, the prospects for a fair trial depend on the early stages of a criminal justice process since investigative acts are done for the purpose of collecting evidence during this period. In pursuance with Article 14 paragraph 3(b) of the ICCPR, every person under criminal charge has the right to have "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." This implies that the right to legal assistance and to communicate with the lawyer applies for a person accused of a criminal charge from the preparation to all stages of the proceedings. The HRC has accordingly established that failure to allow access to a lawyer during the initial period of detention and during any interrogation constitutes violation of rights under Article 14, paragraphs 3(b) and (d) of the ICCPR on various occasions.

In assessing the HRC's views with respect to access to a lawyer during the initial period of the proceedings, it is important to first give a brief account of the legal effects of such views. As noted earlier, the HRC is entrusted with the responsibility of monitoring the implementation of the ICCPR by its State Parties. Furthermore, the First Optional Protocol[10] to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by State Parties to the Protocol. The hearing of individual communications has a clear legal character as the Committee is required to determine whether an individual's rights are violated or not in a specific case (Mechlem 2009). However, the final decisions on merits of the complaint procedures are not legally binding (Chinkin 2013; Rodley 2013). Yet the monitoring role of the HRC indicates that the views of the Committee cannot be easily disregarded (Chinkin 2013). In its General Comment 33, the HRC stated that despite their non-binding nature, the views of the Committee "exhibit some important characteristics of a judicial decision" (HRC, General Comment 33, para.11). Moreover, the views of the Committee provide an authoritative interpretation of the ICCPR by a body entrusted by State

[10] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 9.

Parties (HRC, General Comment 33, para. 13), and the principle of good faith to treaty obligations requires States cooperate with the Committee as well as inform it of action they have taken to implement its views (HRC, General Comment 33, para. 15; Chinkin 2013). Thus, the HRC develops jurisprudence on the interpretation and implementation of the ICCPR by its individual complaint procedures. In addition, the opinions of the Committee are useful for decision makers and are used as supporting evidence of current human rights law (Chinkin 2013). The view of the International Court of Justice (ICJ) is relevant in this context. The ICJ has stated that the opinion of the HRC—"an independent body established specifically to supervise the application of that treaty"—should be given "great weight" [*Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010, para. 66].

In the case of *Gridin v. Russian Federation* (adopted on 20 July 2000, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997), Gridin claimed before the HRC that he did not have a lawyer available to him for the first 5 days after he was arrested but the State party argued that he was represented in accordance with the law. The State party did not, however, refute the claim that Gridin requested a lawyer soon after his detention and that his request was ignored. Also, the State party did not refute that Gridin was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation. The HRC, therefore, decided that denying access to legal counsel after the request and interrogating during that time constituted a violation of rights under Article 14, paragraph 3(b) (*Gridin v. Russian Federation*, adopted on 20 July 2000, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997, para. 8.5).[11] In another instance in 2011, the Committee found that the right of the complainant's brother to a lawyer had been violated as he was denied access to a lawyer of his choice in pre-trial detention for 13 days (*Toshev v. Tajikistan*, adopted on 30 March 2011, Communication No. 1499/2006, U.N. Doc. CCPR/C/101/D/1499/2006). During this period of time, both the investigative acts and the interrogation were conducted (*Toshev v. Tajikistan*, adopted on 30 March 2011, Communication No. 1499/2006, U.N. Doc. CCPR/C/101/D/1499/2006, para. 6.7). The HRC, therefore, noted that the violation of the brother's right to a lawyer had occurred because the brother was denied access to a lawyer during police questioning in the course of pre-trial detention.

There are other bodies of standards that also allow early access to legal aid, for instance, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment allows a detained person the right to legal assistance and imposes an obligation on State authorities to inform them of such a right promptly after arrest (General Assembly Resolution 43/173, 9 December 1988, Principle 17). The Basic Principles on the Role of Lawyers also declares that the right to counsel extends to all stages of criminal proceedings, including interrogations, presumably even before the formal arrest (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, Principle 1). As a result, all persons who are arrested, detained or charged with a criminal offence must be informed of their right to have legal assistance upon arrest so that they can exercise that right (Basic Principles on the Role of the Lawyers, Principle 5). More recently, the Principles and Guidelines has construed the term "legal aid" to include legal advice, assistance and representation not only for the victims but also for the arrested,

[11] See also, views of the Human Rights Committee in *Carranza Alegre v. Peru*, adopted on 28 October 2005, Communication No. 1126/2002, U.N. Doc. CCPR/C/85/D/1126/2002.

prosecuted and detained persons in the criminal justice process (General Assembly Resolution 67/187, 20 December 2012, Introduction, para. 8). Principle 7 of the Principles and Guidelines guarantees that legal aid is provided "promptly [and] at all stages of the criminal justice process." In particular, the Principles and Guidelines stipulates that States shall provide legal aid to persons who are in police stations, detention centers or courts immediately while their eligibility is being determined (the Principles and Guidelines, Principle 3, Guidelines 3 and 4). Put simply, the Principles and Guidelines imposes responsibility on States to provide an arrested, detained, suspected and accused person with the means to contact a legal aid provider (lawyer) at the time of deprivation of their liberty and that any interview by the police or other authorities does not commence until the legal aid provider arrives and has the opportunity to provide advice and assistance to them. As such, the Principles and Guidelines requires States to introduce measures so that the accused is promptly informed of such an entitlement and can get legal assistance (the Principles and Guidelines, Principle 8, Guidelines 2 and 3).

In 2014, the United Nations Office on Drugs and Crime and the United Nations Development Programme jointly published a handbook entitled *Early Access to Legal Aid in Criminal Justice Processes*: *A Handbook for Policymakers and Practitioners* (hereinafter the Handbook) with a view to ensuring early access to legal aid at the national level. The Handbook is intended to provide practical guidelines to policy makers and practitioners under the international standards set by the Principles and Guidelines.[12] Based on different State practices, the Handbook discusses the organisation and models for the delivery of early access to legal aid. In addition, it discusses the role and responsibilities of various stakeholders including the legal aid providers, police, prosecutors and judges while providing early access to legal aid (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014).

As mentioned earlier, the Principles and Guidelines is drawn from recognised good practices. Therefore, some examples of practices might be useful in analysing the international standards concerning early access to legal aid. The European Court of Human Rights (ECtHR) addressed the question of when the right to legal assistance arises in the landmark *Salduz v. Turkey* case (*Salduz v. Turkey*, App. No. 36391/02, 27 November 2008). The Court reiterated that the right to counsel provided for in Article 6, paragraph 3 of the European Convention on Human Rights (ECHR) as one element of the concept of a fair trial set forth in Article 6, paragraph 1 and emphasised that, in regard to criminal proceedings, even if the primary purpose of Article 6 of the ECHR is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not mean that the Article is not applicable to pre-trial proceedings (*Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para. 50). Moreover, early access to legal aid provides the suspect, who usually does not have expertise in substantive and procedural law, as well as full awareness of his or her rights (Trechsel 2009), with technical skills to exercise his or her rights in the criminal proceedings (Ginter and Soo 2012) and, thus ensures the principle of equality of arms between the investigating or prosecuting authorities and the accused (*Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para. 53). The ECtHR accordingly ruled that for the right to a fair trial to remain "sufficiently 'practical and effective',…as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police" (*Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para. 55).

[12] The Handbook is available at http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf. Accessed 27 June 2014.

The ECtHR's interpretation of Article 6, paragraph 3 of the ECHR concerning early access to legal aid has also been followed in several judgements.[13] In 2010, some contracting parties to the ECHR, such as Belgium, France and Scotland, have introduced a right to early access to legal aid as a result of the *Salduz* decision (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014). In the United States (U.S.), the right to lawyers' assistance in pre-trial proceedings derives from the Fifth[14] and the Sixth Amendment[15] of the Constitution (Ginter and Soo 2012). In 1966, the U.S. Supreme Court in the famous case of *Miranda v. Arizona* [384 U.S. 436 (1966)] established that a suspect arrested by police has the right to have counsel present during custodial interrogation and, as such, must be informed of his or her right to a lawyer before the commencement of any police questioning [*Miranda v. Arizona*, 384 U.S. 436 (1966), p. 471]. The Court held that the prosecution may not use statements arising from the questioning initiated by authorities after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective for securing the Fifth Amendment privilege against self-incrimination [*Miranda v. Arizona*, 384 U.S. 436 (1966), pp. 444–491]. Thus, the *Miranda* case indicates that if a person is held in custody and not yet convicted, the right to counsel is fundamental for the protection of the privilege against self-incrimination; counsel's assistance is able to guarantee that people would not make self-incriminating statements involuntarily (Ginter and Soo 2012; Grewell 2005).

In accordance with the Principles and Guidelines, the authorities cannot derogate from the right to consult a lawyer at the investigative stage, but a person can be interviewed in the absence of a lawyer if there are compelling circumstances (the Principles and Guidelines, Guideline 3). However, the police and judicial authorities must not arbitrarily restrict the right of access to a lawyer, particularly in police stations (the Principles and Guidelines, Guideline 4). The Principles and Guidelines has not defined what constitutes a compelling circumstance, but it takes into account the law of many jurisdictions and the jurisprudence of both national and international courts (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014). The ECtHR has held that limits on the right of access to a lawyer during the investigative stage are permissible only if, in the particular circumstances of a case, there are compelling reasons for doing so. Still it has to be guaranteed that these restrictions do not unduly prejudice the suspect's right to a fair trial (*Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para. 55). The ECtHR has also not defined "compelling reasons", but the European Union directive on the right of access to a lawyer (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013) provides that the right of access to a lawyer may be temporarily derogated only when, in light of the particular circumstances of a case, it is justified by (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or (b) a need for immediate action by the investigating authorities to prevent substantial jeopardy to criminal proceedings (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, Article 3, para. 6). However, such derogation must satisfy that it is proportionate and does not go beyond what is necessary, strictly limited in time, is not based exclusively

[13] For instance, *Aba v. Turkey* (Apps. nos. 7638/02 and 24146/04, 3 March 2009); *Böke and Kandemir v. Turkey* (App. nos. 71912/01, 26968/02 and 36397/03, 10 March 2009).

[14] The fifth amendment of the U.S. Constitution states that no person shall be compelled to be a witness against himself in any criminal case.

[15] According to the Sixth amendment, the accused shall enjoy the right to have the assistance of counsel for his defence in all criminal prosecutions.

on the type or seriousness of the alleged offence and does not prejudice the overall fairness of the proceedings (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, Article 8, para. 1). In the U.S., the Supreme Court has held that the police need not give the *Miranda* warnings when doing so would pose a threat to public safety, for instance, when the suspect's silence might prevent police from discovering a dangerous weapon [*New York v. Quarles*, 467 U.S. 649 (1984), pp. 655–657]. The Handbook on the implementation of the Principles and Guidelines states that if the law of a particular country provides for derogation from the right to legal aid, such derogation is required to be clearly and narrowly defined (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014).

The suspect or accused person can also waive his right to early access to legal aid (the Principles and Guidelines, Guideline 3) and such a waiver must be done on the basis of informed and voluntary consent (the Principles and Guidelines, Guideline 3). Therefore, suspects and accused persons are to be informed of the implications of waiving this right in a clear and plain manner (the Principles and Guidelines, Guideline 3). States must also have a mechanism for verifying the voluntary nature of the person's consent (the Principles and Guidelines, Guideline 3). The *Miranda* decision of the U.S. Supreme Court imposed a "heavy burden" on the prosecutor to establish that the suspect waived his or her right knowingly and intelligently, but according to the subsequent case law, such a waiver is implied from the fact that the suspect proceeded to answer questions (Weisselberg 2008). The ECtHR, however, has held that a waiver has to be voluntary, knowing and intelligent, and, before a suspect can be said to have implicitly waived his or her right to legal assistance, it must be shown that he or she could reasonably have foreseen what the consequences would be (*Pishchalnikov v. Russia*, App. No. 7025/04, 24 September 2009, para. 77).

Existing Laws for Legal Aid in Criminal Proceedings in Bangladesh

As a ratifying country, the Bangladeshi government has an obligation to provide legal aid as contained in the ICCPR. On the domestic level, the obligation is contained in some related laws and particularly in the LASA. The Code of Criminal Procedure (Cr.PC), 1898 (Act No. V of 1898) and Legal Remembrancer's Manual (LR Manual), 1960 provide provisions applicable to criminal proceedings. According to Section 340(1) of the Cr.PC, any person accused of an offence before a criminal court has the right to be defended by a lawyer. However, this right becomes a mere wording for the person living in poverty unless they are allowed legal aid. It has been, thus, observed by the High Court Division[16] in *State v. Abdul Gazi and Others* [33 DLR (1981) 79] that Section 340 of the Cr.PC confers on every accused person a right to be defended by a lawyer of his choice when he is brought before a criminal court. Denial of such right renders the trial as one that has been done not according to law and requires a fresh trial. This is because it contradicts the principle that justice must not only be done but must manifestly be seen to be done. As far as the LR Manual is concerned, it is particular for death penalty matters and categorically allows legal aid to the unrepresented accused irrespective of economic class, poor or otherwise (LR Manual, Chapter VII, Section 3).

[16] Article 94(1) of the Constitution of Bangladesh says, "There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division".

It should be noted that organised State intervention towards legal aid is a fairly recent development in Bangladesh (Khair 2008; Muralidhar 2004). The first initiative was taken in 1994 when the government by a resolution established a National Legal Aid Committee chaired by the Minister of Law, Justice and Parliamentary Affairs. The resolution also asked for the District Committees that are chaired by the District and Sessions Judges. The government granted an amount to be distributed through the District and Sessions Judge of each district depending on the size of respective districts (Chowdhury and Malik 2002). However, the resolution was repealed by a resolution in 1997 (S.R.O .No. 74-Law/1997). Finally in the year 2000, the LASA was enacted to put legal aid activities on a firm footing after a series of consultations by the government with the leaders of legal aid movements, representatives of NGOs and members of the Law Commission and bar associations. This Act came into effect on 28 April 2000 (S. R. O. No. 119/Law/2000). The LASA is applicable to both civil and criminal matters. However, death penalty matters that are covered by the LR Manual fall outside its scope. The government adopted Legal Aid Services Policies in 2001 (S. R. O. No. 130-Law/2001) to determine in specific terms the eligibility of legal aid recipients under Section 7(a) of the Act. In 2014, the Policies were amended to update the list of eligible recipients (S. R. O. No. 194-Law/2014). As a result, the Policies are called Legal Aid Services Policies, 2014. The government has also adopted the Legal Aid Services Regulation (S. R. O. No. 131-Law/2001) to deal with the process of legal aid applications, the nomination of legal aid lawyers and panel lawyers' fees and so on.

An Overview of Early Access to Legal Aid for the Arrested or Suspected in Bangladesh

Article 33 of the Constitution of Bangladesh provides safeguards regarding arrest and detention as a fundamental right of its citizens. The Article stipulates that the arrested person shall not be detained without being informed, as soon as may be, of the grounds for his or her arrest (Constitution of Bangladesh, Article 33, sub-article 1). They shall also be allowed to consult and be defended by a lawyer of their choice (Constitution of Bangladesh, Article 33, sub-article 1). Following this, those who are arrested and detained in custody have to be produced before the nearest Magistrate within a period of 24 hours of arrest (Constitution of Bangladesh, Article 33, sub-article 2). The relevant provisions of the Cr.PC also conform to the Constitutional standard. For instance, Section 60 of the Cr.PC states that a police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions relating to bail, take or send the arrested person before a judicial Magistrate or the officer-in-charge of a police station. Section 61 has also restricted the time period for detaining any person to 24 hours, unless a judicial Magistrate issues a special order to extend the duration of the detention under Section 167. When the 24 hours of detention coupled with the additional time necessary to bring an accused before a Magistrate and the 15 days additional detention allowed by Section 167 expire, one of two options is allowed—an accused must either be released by the police upon security or the accused must be forwarded to a Magistrate who is empowered to take cognizance of the offence upon a police report.

However, though the Constitution prohibits arbitrary arrest and detention, the Cr.PC through Section 54 allows the police to arrest merely on suspicion of criminal activity without an order from a Magistrate or a warrant. The Dhaka Metropolitan Police Ordinance, 1976 (Ordinance No. III of 1976, Section 86) authorises the detention of persons on similar grounds

of suspicion. This power of arrest is not quite absolute; it requires the existence of any one or more of the grounds precisely enumerated in the sections (Rafiqul and Solaiman 2003). Yet the law enforcement authorities frequently abuse such provisions. According to the report of a human rights organisation Ain O Salish Kendra (ASK) and media, the authorities made more than 2,000 routine arrests on a daily basis in 2010 (Shahabuddin 2013). The reasons behind the majority of arrests are public secrets; the police randomly arrest innocent civilians on the basis of suspicion and without any warrant either for bribes (Shahabuddin 2013; Rafiqul and Solaiman 2003) or for a political purpose (Rafiqul and Solaiman 2003; COI Service, Home Office, the United Kingdom 2013). The arrestees who cannot manage to pay bribes for a hurried release are put in remand under Section 167 of the Cr.PC (Rafiqul and Solaiman 2003). The purpose of remand is to extract evidence or a confession (Rafiqul and Solaiman 2003; Ahsan 2013), but in practice, the arrestees in remand become subject to severe torture and other inhuman treatment even resulting in death (Rafiqul and Solaiman 2003). Article 35(5) of the Constitution prohibits torture, cruel, inhuman or degrading punishment or treatment. The Constitution also prohibits any compulsion on a detainee to make a confession or to be a witness against himself (Constitution of Bangladesh, Article 35, sub-article 4). The provisions of the Cr.PC are relevant in this context. Section 163 of the Cr.PC has provided safeguards against involuntary confessions made by a detainee under threat or coercion. In addition, the detainees are allowed to deny the statements or confessions given to the police during remand, as well as to make fresh statement to the Magistrate (Cr.PC, Section 164). Before recording any confession of the person in remand, the Magistrate is required to explain to such a person that he is not bound to make any confession and that his confession, if voluntarily given, may be used as evidence against him (Cr.PC, Section 164). The Magistrate is also required to make a note to that effect at the foot of the record that the information was communicated to the person concerned. However, the practice of remand under Section 167 of the Cr.PC defeats the spirit of Article 35(4) of the Constitution and Sections 163 and 164 of the Code due to the use of torture and inhuman treatment (Rafiqul and Solaiman 2003). Police often threaten the accused in remand prior to producing him before the Magistrates and warn that he will be placed in further remand if he denies the confession or informs the Magistrate about torture or ill treatment, and the next round of remand will offer more severe mistreatment (Rafiqul and Solaiman 2003; Siddiqui and Hosen 2013). With a view to avoiding torture or inhuman treatment, many victims sign confessional statements prepared by the police either knowingly or without completely realizing the consequences of their actions (Rafiqul and Solaiman 2003; Siddiqui and Hosen 2013). The conclusion can be drawn that police remand in Bangladesh is tantamount to violent torture, degrading treatment and punishment (Rafiqul and Solaiman 2003). This frustrates the objective of the legal provisions in dealing with the cases of suspicious arrest without warrant that cause custodial deaths and injuries to many innocent citizens (Rafiqul and Solaiman 2003).

In the case of *BLAST* (*Bangladesh Legal Aid and Services Trust*) *v. Bangladesh* [55 DLR (HCD) (2003) 363], the High Court Division observed that many innocent people have become subject to harassment due to the abuse of the law and, therefore, the legislators should examine the procedures that are used for the purpose of interrogation in police custody. The Court has also made detailed recommendations for the amendments to the relevant sections of the Cr.PC, the Penal Code, 1860 and the Evidence Act, 1872. Furthermore, the Court gave several directions that are required to be followed strictly by the concerned authorities in order to prevent arbitrary arrest, detention and torture. However, the government has not implemented the directions yet (Faruque 2013; Siddiqui and Hosen 2013).

There are other special criminal laws which are also used as a means of arbitrary arrest, detention and torture (Faruque 2013). The most debated one is the Special Powers Act, 1974 (Act No. XIV of 1974) under which the government or a District Magistrate may, within the limits of Articles 33(4) and (5) of the Constitution, order to detain a person for 30 days to prevent the commission of an act which the administration considers detrimental to the interests of the State (Act No. XIV of 1974, Section 3), and in case of such detention, the safeguards provided in Articles 33(1) and (2) of the Constitution do not apply (Constitution of Bangladesh, Article 33, sub-article 3). In most cases, it happens that people who are arrested under Section 54 of the Cr.PC are later charged and then detained under the Special Powers Act (Faruque 2013). It was revealed in a survey conducted by the human rights organisation Odhikar of Bangladesh that between July 2000 and December 2001, a large majority of people arrested under suspicion are from very poor economic backgrounds (The Daily Star 2001). Therefore, one can find that the problem of arbitrary arrest causes the violations of human rights mostly for the poor in the context of Bangladesh.

Along with arbitrary arrest, the poor also suffer from excessive and lengthy pre-trial detention (Atkinson-Sheppard and Pfannmüller 2011). In Bangladesh, arbitrary and lengthy pre-trial detention is considered a serious problem (Shahabuddin 2013). Poor detainees are ignorant about their legal rights and do not have access to legal assistance (Atkinson-Sheppard and Pfannmüller 2011). Moreover, they lack adequate financial resources to bail themselves out (Siddiqi 2003). In some cases, the duration of pre-trial detention equals or even exceeds the sentence for the alleged crime (COI Service, Home Office, the United Kingdom 2013). In January 2004, the High Court Division ordered the government of Bangladesh to publish the number of people who had been in prison for more than a year awaiting trial. The government accordingly submitted a list to the High Court Division that included 16 people who had been in prison without trial for more than 11 years, 10 for over 10 years, 29 for more than 9 years, 51 for more than 8 years, 111 for more than 7 years, 238 for more than 6 years, 502 for more than 5 years, 917 for more than 4 years, 1,592 for more than 3 years and 3,673 for more than 2 years (United States Department of State 2005). On 3 August 2004, a high court bench ordered the government to release over 7,400 detainees on bail who had been in prison awaiting trial for more than 360 days (Home Office Science and Research Group, the United Kingdom, 2005).

The situation has not yet improved and recent estimates from the International Centre for Prison Studies reveal that the total prison population of Bangladesh including pre-trial detainees and remand prisoners amounts to 65,662 (International Centre for Prison Studies, Bangladesh 2014).[17] This indicates that Bangladesh is one of the countries with the highest number of pre-trial detainees in the world (Open Society Justice Initiative 2014).[18] Moreover, pre-trial detainees and remand prisoners made up about 69 % (in March 2014) of the Bangladeshi prison population (International Centre for Prison Studies and Bangladesh 2014). In other words, approximately two thirds of the prison population is pre-trial detainees and, therefore, two out of three people are behind the bars without even having been convicted. This figure is comparatively more alarming in a global context because worldwide one out of three people is under pre-trial detention (Open Society Justice Initiative 2014). Excessive numbers of pre-trial detainees causes the Bangladeshi prisons to be extremely overcrowded on the one hand (COI Service, Home Office, the United

[17] The figure was obtained from the national prison administration as of 31 March 2014.

[18] The countries that have the highest number of pre-trial detainees include Libya, Bolivia, Democratic Republic of Congo, Liberia, Congo (Brazzaville), Benin, Paraguay, Haiti, Central African Republic, Yemen, Nigeria, Bangladesh, Republic of Guinea, India, Pakistan, Togo, Venezuela, Panama, Uruguay and Chad.

Kingdom 2013) and increases the backlog of cases on the other.[19] Moreover, this is a dire waste of human potential and it causes substantial cost to the government, taxpayers, families and communities (Open Society Justice Initiative 2014).

The above expositions of arbitrary arrest and prolonged pre-trial detention demonstrate the need of adequate immediate legal advice and assistance to the arrested and suspected persons in Bangladesh in order to protect their right to liberty. However, the examination of provisions of the LASA and the related Rules makes it clear that there is no specific provision to grant legal advice or any other form of legal assistance to arrested or suspected when they are brought to police stations or during their interrogation by the authorities. According to the Legal Aid Services Policies of 2014, people who are financially insolvent are eligible for legal aid in Bangladesh and such insolvency is determined by the annual average income limit of the applicants.[20] However, there are some specific categories of people who become automatically entitled to legal aid under the LASA, for instance, women and children who are victims of human trafficking, women and children who are burned using acid by miscreants, homeless or vagrants, physically or mentally handicapped people, poor widows, women deserted by their husband and destitute women. The Legal Aid Services Policies state that people who are found unable to establish their right or to defend themselves in a court of law due to financial crisis, people who have been detained without trial and are incapable of defending themselves due to financial crisis, people who are considered by the court as poor or helpless, people who are recommended by the jail authority as financially helpless or poor and any other person who is considered by the Legal Aid Board from time to time due to financial crisis or any other socio-economic reasons or disaster can get legal aid in Bangladesh. From these criteria, three specific situations can be identified that talk about the stages when a person is entitled to legal aid in criminal proceedings. Firstly, when a person is placed before the court but they are unable to defend themself due to financial crisis and the court considers them eligible for legal aid. This indicates that the process of legal aid starts when a person is placed before the court only; they are not granted any legal advice or assistance while they are under arrest or being interrogated by the concerned authorities. In the second case, the government grants legal aid to those who are awaiting trial but they are not able to defend themselves due to their financial inability. In other words, a person becomes eligible for legal aid for the trial proceeding if they do not have sufficient financial means and they are not granted any kind of legal aid while they were in the police station or during their interrogation. Finally, a person is granted legal aid when the jail authority recommends them as financially helpless or poor. This clearly means that the person has been detained in the jail without any legal assistance and becomes entitled to legal aid only for the proceedings before the court on the recommendation of the jail authority. All these cases, thus, show that legal aid is granted for the proceedings before the court only; the concerned person is not granted any kind of legal assistance at the early stage of criminal proceedings. This can be explained from another perspective too. As mentioned earlier, the Legal Aid Services Regulation provides a payment structure for the services of legal aid

[19] Report states that a huge backlog of around 2.3 million cases is pending before the courts across the country including the Appellate Division and High Court Division of the Supreme Court (Sarkar 2013).

[20] According to the Legal Services Policies, 2014, the financial eligibility yardstick for the legal aid applicants is below 150,000 Bangladeshi taka (approximately USD 1,935) if the matter lies before the Supreme Court and the limit is below 100,000 taka (approximately USD 1,290) for the matters before other Courts. The limit is different for freedom fighters (150,000 taka) and labourers (100,000 taka) for matters before any Court. To note, freedom fighters belong to a guerrilla force which fought against the Pakistan Army during the Bangladesh War of Independence in 1971 (http://www.genocidebangladesh.org/?page_id=24).

lawyers at different stages of both civil and criminal proceedings. While mentioning about the fees for criminal proceedings (Legal Aid Services Regulation, clause 6), the Regulation does not include the payment structure for the services that might be useful at the early stages of criminal proceedings. In particular, the Regulation does not have the structure of fees for the services provided to those who are arrested and brought to the police stations or during the period while they are interrogated by the concerned authorities. Therefore, the LASA, the Legal Aid Services Policies and Regulation are silent about early access to legal aid and the current system grants legal aid only before the court proceedings and not at the police stations or during the interrogation of the arrested or detained person by the authorities while their statements are obtained or accusations are made.

The development of international human rights norms and jurisprudence pursuant to the ICCPR and other UN instruments, as described above, is a benchmark for States to develop their national legal aid systems. International human rights standards, particularly the Principles and Guidelines, require States to provide early access to legal aid to those who are arrested, detained, suspected of or charged with a criminal offence in order to protect and promote their rights as part of a functioning and comprehensive legal aid system. This is because legal aid in police stations and consequently during the interrogation by the authorities is fundamental to protect the interests of the poor and disadvantaged groups who often do not have adequate access to information and adequate awareness of their rights and entitlements (United Nations Office on Drugs and Crime, United Nations Development Programme, with Open Society Justice Initiative 2014). Early access to counsel also protects the detainee against torture, ill-treatment, coerced confessions and other abuses (HRC, General Comment No. 20, para. 11). In addition, it can contribute to reducing prison overcrowding of any given country. Finally, it instills gradual recognition and trust in criminal proceedings (European Criminal Bar Association, Year unknown) and eventually increases efficiency of the justice system (Carmona, A/67/278, 9 August 2012, para. 67). It is noted that the ECtHR and the Supreme Court of the U.S. have established the right to early access to legal aid. The ECtHR has ruled that the right to access to a lawyer is to be guaranteed from the first interrogation of a suspect by the police. The U.S. Supreme Court has also established that a suspect arrested by police has the right to have counsel present during custodial interrogation. In Bangladesh, the random arrests by the police for bribery or political reasons means many economically weak parties suffer from unlawful deprivation of their right to liberty. They also suffer from violent torture and degrading treatment in the police remand. Moreover, the detainees who are poor languish in excessive pre-trial detention. Therefore, given the scope of international human rights obligations and established recognised practices, the inclusion of arrested and suspected persons as legal aid recipients in the Legal Aid Services Policies of Bangladesh is crucial. The government of Bangladesh should respect international human rights standards and adopt the mechanisms that will provide early access to legal aid and ensure fairness and efficiency in the criminal justice system.

The right of early access to legal aid embraces the concepts of derogation from and waiver of such a right. The Principles and Guidelines does not allow derogation from the right to access to a lawyer during the investigative stage of criminal proceedings except in the existence of compelling situations where a person may be interviewed without the presence of a lawyer. The Principles and Guidelines prohibits the police and judicial authorities to arbitrarily restrict the right of access to a lawyer, particularly in police stations (the Principles and Guidelines, Guideline 4). The ECtHR has established that limits on the right of access to a lawyer during the investigative stage are permissible if there are compelling situations. Yet the ECtHR requires that such restrictions cannot unduly prejudice the suspect's right to a fair trial. The U.S.

Supreme Court has allowed derogation in the case of public safety. As regards the waiver of such a right, the Principles and Guidelines states that the waiver of the right to early access to a lawyer is allowed if it is done on the basis of informed and voluntary consent and the accused persons must be clearly informed of the implications of such a waiver. The U.S. Supreme Court has allowed the waiver of the right when the suspect or the accused waives his or her right knowingly and intelligently and proceeds to answer questions. On the other hand, the ECtHR requires that a waiver has to be not only voluntary, knowing and intelligent, and it must also be shown that the suspect could reasonably have foreseen what the consequences would be if he or she waives the right to legal assistance. The government of Bangladesh should respect the standard set by the Principles and Guidelines with respect to the right to early access to a lawyer coupled with the concepts of derogation from and waiver of such a right. In addition, the recognised practices of the ECtHR and the U.S. Supreme Court could be useful in this regard.

Conclusion

Early access to legal aid protects arrested, suspected or detained persons from unlawful pre-trial detention and improves the efficiency and fairness of the criminal justice system. It also provides an important safeguard against torture and other forms of ill-treatment. The current development of international human rights norms, therefore, calls on States to provide early access to legal aid in criminal proceedings. This paper recommends that the government-operated legal aid system of Bangladesh should adopt a mechanism in order to ensure early access to legal aid in police stations and then in custody prior to being formally charged with a criminal offence as essential component of a comprehensive system. As a result, the LASA and the ancillary policies need necessary amendment; for instance, specific reference should be made to arrested or suspected persons as legal aid recipients and guidelines should be given about the operation of this system. Also, arrangements should be made to do widespread publicity of the programme including what the programme consists of, how to access such service and other relevant information so that the general people have a clear understanding of the programme. The government should ensure early access to legal assistance as part of an effective and functional legal aid system in the country. The Handbook on the implementation of the Principles and Guidelines is a useful source that can guide the government of Bangladesh to put its international obligation into effect.

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