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Note from the Editor

The year 2021 is significant for a number of reasons: to begin with, Bangladesh steps into its 50th year of independence; the country observes the 100th birth anniversary of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman; the University of Dhaka celebrates 100 years of serving as the heart of academic excellence in higher education in the country; the Faculty of Law of the University of Dhaka also turns 100, a proud institution that has had the privilege of hosting many of the country's sterling personalities---scholars, statesmen, scientists, jurists, lawyers, academics, human rights activists, policy makers, lawmakers, economists, diplomats, media personalities artists and development practitioners. This journal celebrates these noteworthy milestones as Bangladesh graduates to LDC status, which, in itself, speaks volumes about the sacrifice and hard work of the people of this country, who, despite the challenges and setbacks at different junctures of its political history and economic development, never looked back since its independence in 1971.

The theme of the journal-"*Equality, Justice and Inclusive Societies for Sustainable Development: Past, Present and the Future*" was chosen for its potential to offer authors with a broad lens for expounding their thoughts and critical analysis. The fact that Bangladesh is a signatory to the Sustainable Development Goals (SDGs) supplements the need to study the various parameters of law and look at how they contribute to the achievement of the relevant Goals. 'Sustainable development', a widely-used expression these days, has been defined by the United Nations as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (UN, *Our Common Future*, also known as the Brundtland Report, October 1987). While not necessarily definitive in the strict sense of the term, this definition is flexible enough to straddle various social, economic, cultural and legal aspects of development and the associated agendas that impinge on the daily lives of people across the globe.

It has long been established that law is an indispensable tool to ensure equality and justice. Although democratisation and the rule of law have been widely acknowledged as a major driving force for pro-poor development, poor people in relatively new democracies continue to experience powerlessness in diverse ways. While economists and development experts have tended to view this powerlessness as essentially stemming from the lack of economic opportunities, there is an increasing belief that people's powerlessness also derives from the state's failure to provide adequate protection to its citizens, particularly when they are poor and/or marginalised and are unable to reach the judicial and legal process for vindication of their rights. The relationship between States and their citizens has increasingly become subject of contentious debates within legal and governance paradigms. Citizens' encounters with the State are quite often limited to matters of law and order, basic service delivery and

economic development and that too, only when State action and/or inaction compromise citizens' rights and entitlements. Although people's perception of the State and understanding of governance are mediated by a wide array of socio-political, economic and cultural factors, they generally envision the State as a defender of law and order and a provider of resources and essential services. This perception unfortunately falters when people experience inefficiency and non-responsiveness of State institutions, compounded by an increasing concentration of political and economic power in the hands of an elite few, which in effect divests people, particularly when they are poor and disadvantaged, of the opportunity and power to claim rights, entitlements and to enjoy essential services.

It is now widely recognised that the lack of a reliable and expeditious justice system not only adversely impinges on the exercise of citizen's fundamental rights under the law and Constitution, but also retards growth and development when the poor are unable to protect their assets and livelihoods. Accordingly, issues of rule of law, due process of law, judicial independence, equality and non-discrimination have, in the past few years, transcended the confines of lawyers and courts and have become the focus of development discourse. Corruption, nepotism, and the lack of transparency and accountability among State actors are some of the recognised factors that have eroded legal and governance standards, structures, and institutions. The practice of back-door lobbying by influential and resourceful individuals essentially weakens regulatory and accounting controls over activities of public officials. While public officials indeed have a strong influence on policy making, direct acts of omission or commission like, suspended or undelivered services and rent seeking, demonstrate their lack of concern and commitment towards public good.

There is no denying that the Rule of Law lies at the very core of sustainable development in the sense that it places every person equally before the law, holds all accountable for wrongful omissions and/or commissions and paves the way for a just and egalitarian society. The Rule of Law reinforces and upholds human rights and fundamental freedoms, without which legal discourses cannot possibly advance far. Seen from a development perspective, the concept of the Rule of Law pervades the broader notions of justice, which are usually used to denote integrity, neutrality, objectivity, fulfillment of rights, and the pursuit of good governance. Sadly, the situation on the ground worldwide demonstrates an erosion in the Rule of Law manifest in inequality, discrimination, deprivation, exclusion, violence, conflicts, corruption, arbitrariness in governance—all that contribute to denial of rights and justice, which are integral aspects of sustainable development. It is time we paused to reflect on and reconsider the inherent challenges that confront us in achieving inclusivity, equality and justice at the desired level. An informed dialogue on human rights and democratic governance would indeed go a long way in creating the much needed level playing field for actors at different tiers in a given society.

Clearly, the study of law is simply not about knowing the laws and their application, court procedures and processes, but much, much more. Indeed, law or legal scholarship touches human life in ways that we often cannot even conceive, much less understand. Treating law as the business of only lawyers and judges and of course, legal academics

and law students at the preparatory phase, does not do justice (pun not intended!) to its true role, which in fact, contributes varyingly to business, politics, administration, governance, trade, economics, environment, and international relations—a whole gamut of human interfaces and experiences. Recognising the versatility of law, this journal, though an outcome of an initiative undertaken by the Faculty of Law to commemorate 100 years of the University of Dhaka and the Faculty of Law, has by no means restricted contributions from the legal fraternity alone but has strived to showcase the scholarly work of others outside of the legal arena. It brings together scholars who are noted for their contribution in their respective fields nationally, regionally and internationally. We have the pleasure of presenting here the reflections of academics and practitioners from Bangladesh, Australia, United Kingdom, Malaysia, Singapore and India.

The journal offers a kaleidoscope of erudite contemplations which are extensive enough to tease and satiate the appetite of an inquisitive reader in search of diversity in terms of thoughts and ideas that shape legal discourses. I draw on the authors' papers here, sometimes verbatim, to take you on a brief journey through the various deliberations that have been presented here for a clear understanding of the scope of this publication.

Several authors have written on constitutional matters, an area that has always occupied centre stage in legal studies. ***Shahdeen Malik*** revisits a series of constitutional amendments in Bangladesh and demonstrates how Bangladeshi law-makers have brought in these amendments from a "law as a command of the sovereign" perspective. Stemming from an Austinian viewpoint, this approach essentially emphasised on the 'command' interpretation of the law when legislating constitutional amendments, often to the detriment of the citizens. Malik argues that this practice not only jeopardises the rights of citizens, but also creates a substantial disconnect between law and morality in Bangladeshi laws; consequently, citizens tend to abide by laws more out of fear of sanctions, rather than moral considerations. The thought provoking analysis of this disjunction culminates with a suggestion to rely on "natural law" to better understand people's apparent reluctance to take legal obligations seriously.

Ridwanul Hoque describes how, despite the recognition of fundamental rights by the Constitution of Bangladesh and endorsement of the same by the higher judiciary in some cases, there is no evidence of the enforcement of fundamental rights against private actors. While the Court has generally demonstrated flexibility in allowing writs against public authorities under Article 102(2) of the Constitution in 'non-fundamental rights' matters and also implicating private entities within the ambit of the same constitutional provision, there is a tendency to adhere to vertical application of the fundamental rights. Hoque argues that this stance contradicts the intent of the original text of the Constitution and derogates from the public law standard of rights adjudication. This also circumscribes the wider principle of constitutionalism that obliges private persons and corporations to comply with constitutional rights. The author draws on the jurisprudence of horizontality of constitutional rights from India and Sri Lanka to substantiate his arguments.

Mohammad Shahabuddin takes us on a journey through the Indian Constituent Assembly Debates between 1946 and 1950 to help us acquire a critical understanding of the minority rights discourse that prevailed at the time. While conceding that the 'ideological function of the postcolonial state vis-à-vis minorities is almost universal and by no means unique to India', the author dwells on how the ideology of the postcolonial state actually legitimises and reinforces marginalisation on the pretext of 'national unity, territorial integrity, and liberal egalitarian principles of equality and non-discrimination'.

Reiterating the significance of governance reforms in statecraft targeting administrative performance, service delivery, ethics and integrity and the welfare of citizens, ***Habib Zafarullah*** takes us through the entire gamut of governance reforms that have taken place in Bangladesh since its independence. The author revisits the conceptual factors relevant to governance and examines and evaluates the various ramifications of the challenges and achievements in the reform process and how Bangladesh has aspired and innovated to address them. The author concludes by emphasing that irrespective of the governance approaches and models, 'building inclusive, effective, accountable and ethical institutions should be the definitive consideration for societal well-being and development', not to mention 'a truly representative parliament elected freely and fairly' for 'neutralising executive dominance' and 'maintaining a sound governance regimen in the country' , with civil society playing the role of a watchdog and external donors focusing on contextual needs.

Jon S.T. Quah ponders whether minimising corruption in Bangladesh is an impossible dream. Recalling how Bangladesh consistently ranked as the most corrupt country on Transparency International's celebrated Corruption Perception Index (CPI) from 2001-2005, with only marginal improvements in subsequent years, the author attributes the failure to effectively contain corruption to weak political will of successive governments in addressing the root causes of corruption and the constraints resulting from unfavourable policy contexts. He concludes that corruption in Bangladesh can only be minimised if the incumbent government demonstrates a strong political commitment to reduce corruption and to enhance the Anti-Corruption Commission's effectiveness by providing it with the necessary legal powers, autonomy and resources to execute its mandate objectively and without bias.

Werner Menksi uses, what he terms as the 'pluri-legal kite model of law', to argue why, despite all odds, the dream of a 'Golden Bangladesh' may yet be a strong reality. His key argument is that, if all major stakeholders recognise the potential of development initiatives that allow plurality in all aspects of life and accordingly work together for a sustainable future, no government and political or politicised opinion of whatever orientation can realistically resist their drive. Indeed, the necessity of plurality-consciousness has become even more imperative in view of the grave impact of the COVID-19 pandemic in 2020/2021 on the socio-economic well-being of Bangladesh. The author highlights the role of lawyers in protecting the public interest of the nation state of Bangladesh as an independent, modern Muslim majority secular entity that has to find its own path.

The governance of The Covid-19 pandemic that shook the world since its advent in early 2020 presents new governance and legal challenges. ***Amita Singh's*** deliberations supplement emerging directions in scholarly debates and academic research on disaster law as she underscores how the Covid-19 pandemic has reinforced inherent societal inequities and injustices, thereby leading to erosion of human rights, civil liberties and labour laws. Critiquing the knee-jerk legal and executive measures introduced by governments of both developed and developing countries to contain the situation, she showcases how some of these measures have proved to be counter-productive evidenced by an escalation in social ostracisation based on race, caste, religion and class. These developments not only indicate deficiencies in governance but also a lack of proper understanding of biological emergencies and disaster management. Singh calls for collective action through research, information flow, informed legal frameworks and regional collaboration so that disasters such as the Covid-19 pandemic are better managed.

Alluding to the damage caused to by reckless disregard for health guidelines prescribed by the World Health Organisation (WHO) to restrict the spread of the Coronavirus**,** ***Jamila Chowdhury*** draws on the principles of mens rea to demonstrate how this could well amount to a public health offence as opposed to a mere public nuisance or negligence. Indeed, the dynamic nature of offences offers countries with a choice to penalise 'free riders' for their role in spreading highly contagious and life threatening virus, like the Coronavirus. The author highlights how some countries have enacted new laws or amended existing ones to address the offence of 'free riding' and recommends that stringent punishments should be in place to deter these wayward incidents.

A number of authors chose to look at the expansion of international law into new and emerging areas of common concern. ***Nazrul Islam*** dwells on the growing focus of international law on environmental obligations which are associated with the management and utilisation of transboundary watercourses. He analyses the progress made in this context, including the entry into force in 2014 of the 1997 United Nations (UN) Watercourse Convention, the global opening in 2016 of the 1992 United Nations Economic Commission for Europe (UNECE) Convention and their use and reflection in contemporary state practice and international judicial decisions. Comparing state practice of the above-mentioned global norms in the South Asia region, with particular reference to the 1996 Ganges Water Agreement, Islam suggests ways for developing a more efficient and sustainable regime for the benefit of the people of this region.

Shawkat Alam refers to the principle of intra-generational equity in sustainable development and showcases how asymmetry in access to and use of resources between the North and the South compromises the equitable application of this principle in international agreements, which in turn, impedes the achievement of sustainable development in the strict sense of the term. Reiterating that the 'principle of common but differentiated responsibilities (CBDR) places differential responsibilities upon States to address both environmental and socio-economic inequities according to the resources the States have and the pressures their societies place on their environment', he assesses the practical invocation of the CBDR principle by appraising two key

sustainable development mechanisms, namely, climate change adaptation finance and technology transfers. Alam contends that the implementation of CBDR through these two mechanisms are suffering largely due to a lack of commitment from developed countries.

Muhammad Ekramul Haque challenges the normative international human rights law discourse that relegates economic, social and cultural (ESC) rights to a lesser footing than the more celebrated civil and political (CP) rights, as ESC rights were historically not deemed to be judicially enforceable. However, subsequent developments in international law witnessed a paradigm shift, which has significantly narrowed the traditional gap between CP and ESC rights. Haque describes how, with ESC rights increasingly gaining prominence, the very foundation for justifiability and enforceability of these rights at the international and regional levels has become stronger. He also highlights the status of judicial enforceability of ESC rights in Bangladesh in line with recent developments of international human rights law.

That economic development is key to a sustainable future has been established by two authors in their contributions. While underpinning the significance of foreign direct investment (FDI) induced sustainable development in reducing poverty and inequality in developing countries, ***Rafiqul Islam*** critiques the global policy framework within which FDIs operate, for protecting corporate interests. He argues that demands for increased liberalisation and a 'blankly incentivised FDI policy' do not necessarily ensure development; rather, it is essential for liberalisation and the regulation of FDIs to co-exist in harmony if the competing interests of investors and host countries are to be balanced out. In other words, if host countries are to be 'FDI protection-friendly', 'FDI must be development-friendly' and promote liberalisation for investors and regulation for sustainable development in the interests of both stakeholders. Islam concludes by recommending a liberal, yet development-focused regulatory and policy approach for developing countries for achieving the goal of sustainable development.

Enamul Haque examines the Competition Act, which was passed by the Bangladesh government in 2012 in an attempt to ensure fair play, equity and justice for both consumers and producers in the market. This law has also been instrumental in establishing the Bangladesh Competition Commission in 2014. Recognising that competition in the market is essentially an economic concept which is normally viewed through the lens of economics, Haque critically analyses various provisions of the law from both an economic and legal perspective to better understand and interpret anti-competitive behavior in the market. He also offers ways forward in which competition law could be implemented without prejudice. This paper indeed paves the way for further legal scholarship in a relatively under-researched area.

Advances in technology and increased use of artificial intelligence necessitate that security controls are in place to prevent unauthorised access to sensitive information. ***Md. Ershadul Karim*** looks at the legal framework for cybersecurity in Bangladesh. While technological advancement, open internet and the use of computerised devices and applications indeed offer numerous advantages to users, this transition is not without problems, as evidenced by a rise in cyber-crimes. Easy accessibility to

technology and inadequacies in existing legal provisions, principles, and norms create scope for such crimes. The author believes that in the absence of binding international legal instruments in this context, the development of a cybersecurity culture in domestic jurisdictions, public awareness, cooperation, and mutual legal assistance, would potentially assist policymakers and relevant stakeholders to address the complexities in cyberspace regulation.

Law primarily functions to prevent undesirable behavior, provide relief to persons for harm caused to them by others, impose liability on those responsible for causing the harm and deter others from committing the same. Tort law is one such branch of law that has the scope of holding people accountable for the harm they cause by making them pay for it. ***Naima Haider*** underpins the significance of the application of tort law principles by the courts, which is not very common in Bangladesh, although tortious liability is recognised as a common law concept. Drawing on prominent case laws of the Appellate Division and the High Court Division of the Supreme Court of Bangladesh, she evaluates the attitude and role of the higher judiciary in helping to develop laws that accommodate tortious liability within the framework of the legal system of the country. Examining various concepts and doctrines which have evolved from these case laws from both academic and practical perspectives, the author suggests ways in which laws of tortious liability could be substantially developed by way of judicial activism based on forward-looking decisions of the Supreme Court.

I believe that the sum total of the contributions in this volume would go a long way to enhance our knowledge and understanding of law and rights and their implications for sustainable development. The reflections showcased in this journal demonstrate how law, in all its manifestations, contribute to sustainable living—locally, regionally and internationally—in normal times and during crises. I hope the readers find this volume interesting and useful.

Sumaiya Khair, Ph.D.
Editor
Centennial Special Issue 2021
Dhaka University Law Journal
&
Professor
Department of Law, University of Dhaka.