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The Law of Language and the Language of the Law: A Socio-legal Appraisal of Colonial Legal Language in Bangladesh

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1. Introduction

Generally, the language of the law, i.e. how the law is written, results from historical events and the nature of the legal system of any country.[1] This article deals with the legal language, and critically probes into the colonial linguistic style of legal language in Bangladesh which has considerable impact on not only the legislations, but also their application, their social implications, and the overall public knowledge of the law. As a result, we the people of Bangladesh get laws that we do not understand easily upon reading. This pushes us away from knowing or even talking about laws except superficially. In this context, I will explore what specific factors led to this poor condition of the legal language so that Bangladesh can move towards making laws 'for the people'. The term 'legal language' connotes the language used for legal writing. There are different kinds (genres) of legal writing: for example, (a) academic legal writing as in law journals, (b) juridical legal writing as in court judgments, and (c) legislative legal writing as in, laws, regulations, contracts, and treaties. [2] In this paper, I use the word legal language very consciously: for purposes of this article, legal language (আইনি ভাষা) is the language used for lawmaking and other legal procedures. It does not mean lawful or permissible language (বৈধ ভাষা) and it is not equivalent to language of the law (আইনের ভাষা) which more often refers to a particular piece of law or legislation.

1.1 Legal Language: What Is It?

The use of language is crucial to any legal system because if the law is written in a language that is incomprehensible or obscure and inaccessible to the people for whom it is made, the law becomes detached from the people. People tend to not know the law, and this ignorance of law breeds an unconscious, indifferent body of citizens.

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1 Maja Stanojević, 'Legal English – Changing Perspective' (2017) 9 (1) *Facta Universitatis* 67.
2 See, Vijay K.Bhatia, *Analyzing Genre: Language in Professional Settings* (Routledge 1993) 101.

Therefore, lawmakers should use such language which can preserve the characteristic seriousness and formality of a statute and other legal instruments and at the same time ensure that the language used is easy for citizens, as well as members of the bar and the bench to use and apply.

However, as it happens, the legal language in Bangladesh, and in a good number of other countries, is far from easy to understand. Legal language is a language form of its own, and very often difficult for people from non-legal backgrounds to comprehend not because it is too smart for others but simply because specific training is required to understand the sentence structure and complexity of such language. For example, in case of English language, laws written in English follow a very typical emphasis on style, syntax and terminology; it is often heavy with redundant, lengthy, complex, and unusual sentence structure.[3] The plain English movement was initiated by Mellinkoff, who in his 1963 book 'The Language of the Law'[4] argued for promoting plain English writing style for laws. He analysed that, legal English, i.e. English that is used for legal/law-related writing, was characterized by 'pomposity and wordiness'.[5] From there, the necessity of plain English was further propounded by other scholars and researchers. In the late 1970s, psycholinguists Robert and Charrow proved through several experiments how the typical language structure used in laws, documents and many court procedures were difficult for the common people to comprehend.[6] Following their experiments, some laws in the USA were revised to make it more accessible to the public. For example, the old court instruction in California regarding testimony and evidence stated the definition of evidence as:

> Evidence consists of testimony, writings, material objects or other things presented to the senses and offered to prove whether a fact exists or does not exist.

This was not understandable to many. The later revised instruction, the New Instruction no. 202, started differently:

> Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.[7]

The difference is easily noticeable: whereas the older instruction followed the legal grammar, a rigid structure and complex syntax, the newer instruction took a more conversational narrative and instructive approach. This trend gradually expanded, and

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[3] Sanford Schane, *Language and the Law* (Continuum 2015) 6.

[4] See generally, David Mellinkoff, *The Language of the Law* (Little, Brown & Co. Boston 1963).

[5] Supra note 1 at 68

[6] Robert Charrow and Veda Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79(7) *Columbia Law Review* 1306.

[7] Old California Instruction: BAJI 2.00. BAJI refers to the old Civil instructions of California judiciary, which were later replaced in 2003 by new instruction of Californian Judicial Council <http://www.languageandlaw.org/JURYINST/COMPARE2.HTM accessed 21 October 2020.

by the early 2000s, many English speaking countries revised their drafting policies to make the language of the law simpler.[8] Australia is generally considered to be leading in this regard.[9]

1.2 Legal Language in Bangladesh

Bangladesh, following a ministerial decision, started to simplify the legal language, but this simplification seems to exist more in the mind of the drafters than on paper itself. The problem of legal language in Bangladesh, i.e. the legal Bangla, is twofold: firstly, the continuation of colonial laws, which results in adopting the pattern of colonial terminology, syntax and style in making present day laws, thereby making the language archaic; and secondly, there is noticeable lack of Bangla equivalents of important legal concepts and phrases, so whatever technical terms exist in Bangla, those are very instrumental and difficult for people from non-legal backgrounds as those words are not used in common spoken and written Bangla. The paper will now discuss these two issues.

2. Continuing the Colonial Legal Language

2.1 The Colonial Context

To understand the colonial influence on the Bangladeshi legal system, one must understand its roots and characteristics. Today's laws and legal system are a product of the ancient classical Hindu legal system, the Sultanate and Mughal legal system, the British legal system, and last but not the least, the Pakistani legal system all mixed together.

The colonial agenda of the British East India Company rulers was to transform a private corporate body into a colonial ruling power, with support from the British parliament.[10] The Pre-colonial legal systems of the Indian subcontinent were diverse. The legal system back then was characterized by legal pluralism: the Hindu legal period applied Vedic laws based on the notion of *Dharma*, while the Mughal and the Sultanate period ushered in the Sharia for Muslims and Hindu law for Hindus. Even

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[8] Emma Wagner and Martin Cutts, 'A Movement to Simplify Legal Language Clarity, (2002) 47 *Clarity Journal* 1 <http://www.clarity-international.net/journals/47.pdf> accessed 28 June 2020.

[9] Hilary Penfold, 'When words aren't enough: Graphics and other innovations in legislative drafting', paper presented at Language and the Law Conference, University of Texas at Austin, 2001 <http://svc026.wic020v.server-web.com/plain/docs/words_arent_enough.pdf> accessed 4 February 2019. Also see generally, Peter M. Tiersma, *Legal language* (University of Chicago 2000).

[10] See generally, Willliam Dalrymple, *The Anarchy: How a Corporation Replaced the Mughal Empire, 1756-1803* (Bloomsbury 2016), also see William Dalrymple, 'The East India Company: The original corporate raiders' *The Guardian* (4 March 2015) <https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders> accessed 28 June 2020.

then, the Hindu law varied greatly from region to region. This diversity was unfamiliar to the British colonisers, who were only accustomed to homogenous Common Law. As such, Sir James Stephens concluded that Indian laws were full of caprice, and that a wholesale transplant of English law was necessary to establish rule of law.[11]Lord Macaulay in his address to the Privy Council had admitted that Indian people had no need for a British legal system, but since allowing the Indians their own government would defeat the colonial purpose, the British would give what the British needed: a legal system to keep Indians under control.[12] For the British, the legislation was used as a rule for 'managing social relations'.[13] The colonial rule not only influenced but also significantly *changed* the nature of laws and legal system of Bangladesh,[14]by introducing the codification system through the Law Commissions (emphasis added). The First law Commission in its reports created a new form of writing, where the language was positivistic, because, the colonial law makers could not easily understand the plurality of laws that existed in India.[15] However, upon the wholesale codification, this style of writing persisted, and while legal English has moved on, the legal drafting style in Bangladesh stayed more or less the same. After the independence of Bangladesh, the most significant change in terms of legal language appears to be the shift from English to Bangla in legislative drafting.

Since 1971, the laws of Bangladesh with the aid of the judiciary have gradually developed its own style, but when it comes to the making and application of law, the influence of the diverse past is still very much intact.

2.2 The Codification Project

Being a former British colony, Bangladesh follows the Common Law System. Common law is a legal system which started in England with the Norman Conquest of 1066. In common law, judicial precedents, i.e., judicial decisions made by individual judges play a significant role. The higher court's decisions become obligatory upon other courts to follow for similar disputes in all future cases.

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[11] David Skuy, 'The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 515.

[12] Thomas Babbington Macaulay, 'Speech Delivered in the House of Commons, 10th of July 1833' in *The Project Gutenberg EBook of The Miscellaneous Writings and Speeches of Lord Macaulay*, Vol. 4, 2008 https://www.gutenberg.org/files/2170/2170-h/2170-h.htm#link2H_4_0014 accessed 3 February 2020.

[13] Jon E. Wilson, 'Anxieties of Distance: Codification in early colonial Bengal' in Shruti Kapila (ed.), *An Intellectual History of India* (Cambridge University Press 2010) 15.

[14] The laws of Indian subcontinent were largely custom based before the British introduced the codification of laws. See ibid12-14.

[15] Maurice Eugen Lang, *Codification in the British Empire and America* (Reprint, originally published in 1924, Lawbook Exchange 2005) 78–92.

Interestingly, the British colonial rulers applied the common law to Indians through a civil law manner, i.e. via codification. Codification of laws is alien to the Common Law systems, yet the British believed that uncivilized Indians can only be ruled by clearly laid down written rules.[16] The colonial codification was more of an administrative intervention than a legal intervention. Upon conquering Bengal in 1757, the British faced tremendous difficulties in ruling and dispute settlement due to the diversity of the laws practiced in various regions of the land. Before the British rule, India was subject to long centuries of Hindu and Muslim rule. The Hindu period was deeply influenced by the Vedic religious norms, while the Muslim invasion had introduced the Islamic sharia and values. In more than two centuries this created a syncretic legal system where two streams of law flowed side by side. Both Sanskrit and Farsi were used for laws and treatises. Indeed, in the Sultanate and Mughal courts, there were pundits and legal experts well versed in Sanskrit to commentate and analyze Hindu legal issues along with *Muftis* and *Faqihs* to comment on Sharia interpretations.[17]

In this context, the British after their conquest of Bengal, tried to continue the laws but soon found out it to be challenging for various reasons. The British law makers and executive prior to the *Sepoy Mutiny* in 1857, were basically merchants and employees of the British East India Company who were not trained in law. Therefore, when faced with the diverse legal system that India had, they were confused with the nuances. Thus, they gave the excuse of Benthamian utilitarianism and wanted to unify homogenous laws through codification for making administration of justice and executive activities easier.[18]

Secondly, the British, albeit familiar with Islamic law due to their prior experience in Egypt and Middle East, were total strangers to the Hindu laws. So they audaciously analogized Hindu law with Islamic law.[19] They brought in Sanskrit linguist experts, such as William Jones, and they commented on the Vedas, Smritis and other legal texts. The only problem here was the fact that the Sanskrit they had learnt at Oxford and the Sanskrit in the classical texts, such as the code of Manu, was not the same. Therefore, they translated the legal texts in a decontextualized manner which disregarded the traditional style and then re-translated into English which

[16] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', (2005) 23 (3) Law and History Review 671.
[17] Sheikh Mohammad Ikram, 'Chapter 16' in Ainslie Embree (ed), *Muslim civilization in India* (Columbia University Press 1964); see also, George Claus Rankin, *Background to Indian Law* (Cambridge University Press 1946) 16.
[18] Wilson (n13) 15-16.
[19] John D. Mayne, *A Treatise on Hindu Law and Usage* (Madras 1888) 14-15.

decreased the value and often changed meaning of the original text.[20] The same thing happened with Islamic law. The South Asian Islam had a deep Persian influence and many social customs were different.[21] But the British failed to appreciate the nuance.

The resulting chaos led the British for administrative and judicial advantage to undertake a codification project: a scheme under which they were to unify all laws under one body. Therefore, in 1860, after a lengthy work process, the first Law Commission came up with the Penal Code which compiled all offences and crimes under one statute. Soon other laws: land, property, evidence, etc. ensued. This is when the language of the law became important.

Since these laws were intended to aid the executive more than the 'savage' citizens,[22] they had some common features: these legislative pieces contained many vague words which were open to a wide variety of interpretations, almost all the laws gave the executive bodies and law enforcement officials overstretched discretion in carrying out their duties (and thereby bending the law), good faith clauses that would protect the executive from accountability, and complicated language are some amongst them.

These common features influenced the legal language quite deeply and over time these became intrinsic part of legislative drafting. The features, with their ensuing effects, are discussed below:

(i) Use of Vague Words and outdated/ underdeveloped legal concepts

Vague language of the law is particularly problematic both in colonial law and modern laws. While the law is promulgated by the legislature, it is applied by the executive. Vagueness in legal provisions leads to discretionary interpretation which overstretches the jurisdiction and original intent of the law. A befitting example is Section 54 of the Code of Criminal Procedure 1898which gives the power to the police to arrest any person on the basis of '**mere suspicion**.' The executive abused this provision for too long until in 2003 the Supreme Court of Bangladesh ruled in *BLAST& Others v. Bangladesh & Others*[23] that certain guidelines must be maintained before arrest is carried out.

Another example of executive dominance is the provisions regarding '**false, frivolous and vexatious' suits**.[24] While apparently it seems to be a safeguard against revengeful or inimical allegations (because the police during the colonial rule were

[20] Bernard S. Cohn, *Colonialism and its Forms of Knowledge* (Princeton University Press 2006) 66.
[21] Kolsky (n 16).
[22] Mayne (n 19) 6.
[23] *BLAST & Others v. Bangladesh & Others*, [2003] 55 DLR (HCD).
[24] Code of Criminal Procedure 1898 (Bangladesh), s 250.

famous for collecting false witness and for harassment)[25], it was more of a safeguard for the British subjects in Indian mofussil towns who considered themselves potential victims to false charges by their Indian counterparts.[26]

Another pertinent example in more recent laws is the now repealed Section 57 of the Information Communication and Technology Act 2006 and replaced by Section 28 of the Digital Security Act 2018, where the word '**religious sentiment'** is a vague word (and it is being given a broad interpretation by the executive). The 2018 Act lays down that the term 'religious sentiment' will be interpreted as defined in the Penal Code 1860, whereas the 1860 Act itself contains no definition or explanation of the word.

This drafting pattern of using vague words is a legacy of our colonial past. Because most of the colonial laws were drafted during the Victorian era, these laws commensurate to the erstwhile Victorian values which were alien to Indian society. While the world has moved on, our laws have not, and applying Victorian values through legal provisions create legal complexities as well as miscarriage of justice. A pertinent example is the use of the term rape. The Bangla equivalent for rape is ধর্ষণ, which is also the আইনের ভাষা. However, because the Victorian morale believed that only women could be raped, till today the Bengali equivalent used for sexual violence to males is বলাৎকার which is not the আইনের ভাষা but frequently used by the legal professionals as আইনি/ বৈধ ভাষা. Such conflicting use of terms for similar offences not only denies effective justice to the non-female victims of rape, but also confuses the general people by giving vague and mixed messages about the nature of offences, creating double standards concerning the gravity of violating personal and bodily integrity etc.

Another similar example is the offence of '**bestiality and unnatural activities**'.[27] Homosexuality was never a recognized crime in the Pre-British Indian territory. But the vagueness of these words (unnatural activities) and subsequent application has had considerable social implications: prosecuting rapes happening to men is a legal challenge[28], created homophobia and transphobia, and has been so deeply entrenched that often the legal system fails to recognize the rights of these groups of people clearly.

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[25] N. Krishnaswamy Reddy, *Fourth Report of the National Police Commission* (Government of India Press 1980) 7.
[26] Kolsky (n 16) 667.
[27] Penal Code 1860 (Bangladesh), s 377.
[28] Recently, on 14 January 2021, a writ petition has been filed before the Supreme Court seeking to include the word Persons in the Penal Code definition of Rape so that male, transgender and other gender diverse people may seek relief under sec 375 of the Penal Code 1860.

The vagueness has become a legal culture. This may be evidenced by incidents such as when the Executive declared in 2020 that Transgender people shall be entitled to receive share of property under inheritance rights, the declaration remains vague and never clarifies whether that share would be the son's equivalent or daughter's, thereby perpetuating the legal confusions.[29]

Again, in order to accommodate cultural values of the Indians, the legislators inserted various provisions regarding women, which used words which did not have synonymous words or meaning in local language. One such example is '**outraging the modesty of a woman'** and '***pardanashin woman*'**. It is to be noted that there are no definitions of modesty and *pardanashin*, and it was through various court decisions that relevant literature were later developed. As such, these legal writings introduced a new legal language which, in turn, influenced the legal culture and moulded values in this geographical region for years to come. This is a vital factor, because according to a report[30] by World Health Organization (WHO), laws and policies that make violent behaviour an offence send a message to society that it is not acceptable.[31] Thus when laws or official documents contain gender gender discriminatory words as the আইনের ভাষা, it reduces the seriousness of a sexually violent behavior and sustains the patriarchal notions of misogynistic treatment of women as acceptable. In Bangladesh, we can see how cumulative serious offences like sexual harassment are expressed as eve teasing, 'শ্লীলতাহানি' (*shlilotahni*- violating modesty) etc. The problem with such downplaying terminology becoming আইনের ভাষা is that, while on one hand degrades the seriousness of the offence, and normalizes serious offences like rape in a consequent butterfly effect[32], on the other it stereotypes

[29] AFP, 'Transgenders to gain inheritance rights in Bangladesh' *Dhaka tribune* (Dhaka, 16 November 2020). This declaration by the honourable Prime Minister in a Cabinet Meeting has been welcomes by all quarters, but also garnered attention because it does not clarify how much share the Trans people would be receiving. There is a long-standing debate in trans-rights movement in Bangladesh where the Transwomen sometimes argue they should get the son's share in property.

[30] World Health Organization. *Violence Prevention the Evidence: Changing Cultural and Social Norms that Support Violence* (WHO 2009) 9 <https://www.who.int/violence_injury_prevention/violence/norms.pdf> accessed 25 January 2019.

[31] Taqbir Huda, '*Sexual harassment and the law: Where's the problem?*' *The Daily Star* 27 June 2019. The problematic wording of this colonial law invites sexist biases and unwarranted discussions about a woman's "modesty" which can end up victimising her rather than offering protection. Deepti Misra, *Eve Teasing*, (2017) 40(2) Journal of South Asia Studies. Also, the Justice Verma Commission report acknowledged how colonial use of terminologies sustained patriarchal notions and recommended repealing the sections of IPC containing the term 'modesty'. See, Justice Verma Report, Report of the Committee on Amendments to Criminal Law (2013) p111.

[32] A term coined by Edward Lorenz, butterfly effect denotes the sensitive dependence on initial conditions in which a small change in one state of a deterministic nonlinear system can result in large differences in a later state. See Geoff Boeing, 'Visual Analysis of Nonlinear Dynamical Systems: Chaos, Fractals, Self-Similarity and the Limits of Prediction' (2016) 4(4) *Systems* 37.

women by cementing sexist notions such as awoman's greatest asset is her 'honor/dignity/modesty' (নারীর সম্মানই তাঁর সবচাইতে বড় সম্পদ). This can be considered to be a crucial factor in creating or sustaining social and cultural norms promoting misogyny and patriarchy.

(ii) The Good Faith Clause

The good faith clause is a concept originally found in contract law.[33] However, most penal laws in Bangladesh have the good faith clause which states that if any officer of the State does something in 'good faith' then it will not be an offence even if it violates the law. Point to be noted is that there is no definition anywhere what good faith means, and over the decades it has come to mean 'absence of intention to break the law, acting in honest belief' etc. This has resulted in the executive and the law enforcement agencies enjoying wide indemnity, non-accountability and encouraged practices like police encounter, extra judicial killings and so on. [34] The good faith defence is now widely used by the state officers to make themselves beyond the authority of law.[35] Therefore, this articles submits that although the constitution guarantees that everyone is equal before the law; the good faith rule in practice translates into government officials relying upon and indeed receiving impunity (not least due to the laxity of legislative language). Indeed, even in 2017, the Fire Department of Bangladesh had claimed the benefit of the good faith clause to avoid a claim of negligence,[36] brought against them through a writ petition, the first of its kind in Bangladeshi legal history that claimed exemplary damages for the tort of negligence.[37]

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[33] Harold Dubroff, 'The Implied Covenant of Good Faith in Contract Interpretation and Gap-filling: Reviling a Revered Relic' (2006) 80(2) *St. John's Law Review* 559; Paul MacMahon, 'Good faith and fair dealing as an underenforced legal norm' (2015) 99 (6) Minnesota Law Review 2051.

[34] See Human Rights Watch. '*Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces*' (Human Rights Watch 2009) <https://www.hrw.org/report/2009/05/18/ignoring-executions-and-torture/impunity-bangladeshs-security-forces accessed 17 October 2021. The term good faith appears in the draft land law bill, with regard to which Christine Richardson says: as per section 231 of the draft law, action taken by the DC is not challengeable in the civil court and also any action taken in "good faith" by a public servant cannot be challenged in civil or criminal court under section 232. The term "good faith" is a matter of interpretation and has to be decided on a case to case basis. Therefore, any objection as to an action based on good faith needs to be open to interpretation by the courts. See, 'Proposed *Bangladesh Land Act 2020: what legal experts say*" *Daily Star* (Dhaka, 15 September 2020). The impunity arising from good faith clauses has been duly noted by scholars in other (common law) jurisdictions too. See for example Carolyn A. Yagla, 'The Good Faith Exception to the Exclusionary Rule: The Latest Example of "New Federalism" in the States' (1987) 71 (1) *Marquette Law Review* 166.

[35] ACC chief: Mistake done in good faith is not a crime *Dhaka Tribune* (Dhaka, 18 July 2019).

[36] *CCB Foundation V Government of Bangladesh*, (2017) 5 CLR (HCD) para 32.

[37] ibid.

(iii) Overstretching Sentences and over Reliance on the Executive

In the common law system, statutes i.e. written legislations mostly reconfirm the 'common' i.e. unwritten rules,[38] and are mostly found for special subjects whereas most laws are 'common' i.e. not written. That is why, in common law traditions, written statutes tend to focus on precision and particularity, since they do not need law for everything and are not legislation based. These laws have been nicknamed as "fussy law".[39] On the contrary, non-common law countries i.e. civil law countries are legislation based, and therefore their laws are open and general, known as "fuzzy law".[40]

The laws in Bangladesh suffer from the over stretching generalized provisions, which is different from common law tradition. The reason for this discrepancy again is the colonial legacy, since such overstretching openness gave leeway to the executive for discretionary action. This is seen in 19th century laws as much as very recent laws. For example, in the Tobacco Control Act 2005, smoking is prohibited in public places in Bangladesh. The law describes public place as follows:

> "পাবলিক প্লেস" অর্থ শিক্ষা প্রতিষ্ঠান, সরকারি অফিস, আধা-সরকারি অফিস, স্বায়ত্তশাসিত অফিস ও বেসরকারি অফিস, গ্রন্থাগার, লিফট, আচ্ছাদিত কর্মক্ষেত্র (indoor work place), হাসপাতাল ও ক্লিনিক ভবন, আদালত বভন, বিমানবন্দর ভবন, সমুদ্রবন্দর ভবন, নৌ-বন্দর ভবন, রেলওয়ে স্টেশন ভবন, বাস টার্মিনাল ভবন, প্রেক্ষাগৃহ, প্রদর্শনী কেন্দ্র, থিয়েটার হল, বিপণী ভবন, চতুর্দিকে দেয়াল দ্বারা আবদ্ধ রেস্টুরেন্ট, পাবলিক টয়লেট, শিশুপার্ক, মেলা বা পাবলিক পরিবহনে আরোহণের জন্য যাত্রীদের অপেক্ষার জন্য নির্দিষ্ট সারি, জনসাধারণ কর্তৃক সম্মিলিতভাবে ব্যবহার্য অন্য কোন স্থান অথবা সরকার বা স্থানীয় সরকার প্রতিষ্ঠান কর্তৃক, সাধারণ বা বিশেষ আদেশ দ্বারা, সময় সময় ঘোষিত অন্য যেকোন বা সকল স্থান;][41]

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[38] For example, in *Meister v. Moore*, (1877) 96 U.S. 76, the Michigan apex court ruled that even if a statute may take away a common law right, but there is always a presumption that the legislature has no such intention unless it be plainly expressed.

[39] Lisbeth Campbell, 'Legal Drafting Styles: Fuzzy or Fussy?' (2017) 3(2) *Murdoch University Electronic Journal of Law* <http://classic.austlii.edu.au/au/journals/MurUEJL/1996/17.html> accessed 4 February 2019; see also, David Lidimani, 'Custom in Legislative Drafting: Adopting the FUSSY or FUZZY style?' (2009) 13(1) *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol04/13.shtml.

[40] ibid.

[41] The Smoking and Tobacco Products Usage Act 2005, s 2(f). The unofficial English translation is as follows: (Public Place" means educational institution, Government, semi Government and autonomous office, library, lift, hospital and clinic building, Court building, airport building, seaport building, river-port building, railway station building, bus terminal building, ferry, cinema hall, covered exhibition centre, theatre hall, shopping centre, public toilet, Government administered or private children park and any or all other places as may be declared by the Government, by notification in the Official Gazette).

A comparison with the British Health Act 2006 will make it clear:

Smoke-free premises: (1) Premises are smoke-free if they are open to the public. (2) Premises are smoke-free if they are used as a place of work— (a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or (b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present). They are smoke-free all the time.[42]

The British law gives a precise definition for any ordinary citizen to understand what a smoke free place can be. Of course, as per the common law tradition, when the meaning of the law is contested by different parties, the matter is decided by the courts. But it is to avoid such contests, and to make the law readily comprehensible to non-lawyers that the laws, especially criminal laws, have been simplified in England.[43]

The Bangladeshi statute provides no clear definition for public place, and it opts a style widely found in Bangladeshi laws of referring any future questions and interpretations to government gazette notifications. The text style relies upon the executive to decide and interpret for themselves should the police find people smoking in a place not mentioned in the law as public or not.[44]

Thus, I argue that the language of law, i.e. আইনের ভাষা, takes away the control from the people and put them at the mercy of state mechanism.

3. The Use and Non-use of Bangla in the Laws of Bangladesh

The Bangla Language Implementation Act was promulgated in 1987. This Act was a response is a time ripened demand as well as a historical recognition to the sacrifice by the language martyrs who, in 1952, laid down their lives to achieve the recognition of Bangla as the State language of the then Pakistan.

The reason behind promulgating Bangla as the official language for court procedure was simple and rational: use of English in court activities and legal documents made it difficult for the mass people of Bangladesh to understand the procedure / documents that concerned their rights and interests. However, the Bangla

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[42] The Health Act 2006 (Bangladesh), s 2.

[43] David Ormerod, 'Simplification of the Criminal Law: Kidnapping and Related Offences' (Law Com No 355).

[44] Arpeeta Shams Mizan, 'Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights (2017) 5(1) International Journal of Legislative Drafting and Law Reform 20.

that is used as আইনি ভাষা in the documents and law texts are also difficult, because most of the time they are in 'Sadhu' form, again using complex sentence structure. For example, the Copyright Act 2000 defines copyright as:

> "অনুলিপি" অর্থ বর্ণ, চিত্র, শব্দ বা অন্য কোন মাধ্যম ব্যবহার করিয়া লিখিত, শব্দরেকর্ডিং, চলিত, গ্রাফিক চিত্র বা অন্যকোন বস্তুগত প্রকৃতি বা ডিজিটাল সংকেত আকারে পুনরুতপাদন (স্থিরবাচলমান), দ্বিমাত্রিক, ত্রিমাত্রিক বা পরাবাস্তব নির্বিশেষ।[45]

This section uses many technical and rarely used (Bengali) words, which general readers will not understand by plain reading. This feeds into the popular notion that আইনের ভাষা is too complex for people to understand.

It is the right of every citizen to understand what is happening in the court. Article 33 of the Constitution of Bangladesh guarantees the right to be represented in the court of law, which stems from the right to fair trial under Article 10 of Universal Declaration of Human Rights (UDHR) 1948 and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) 1966. Right to fair trial ensues having the free assistance of an interpreter if he cannot understand or speak the language used in court, and being informed…in a language which he understands of the nature and cause of the charge against him. Moreover, ICCPR promises to *protect all individuals from discrimination on the grounds of language*, (with specific reference to court of law) in Article 26.[46] The European Convention on Human Rights 1950 also protects this linguistic right: as per Article 5.2, reasons for arrest and charges have to be communicated in a language understood by the person; and as per art. 6.3, an interpreter for free must be available in a court, if the person cannot speak or comprehend the court language.

The crux of the matter is that the person concerned can effectively participate in the court proceedings,[47] and that they should not be mere spectators of the performance run by the judges and lawyers in front of them. This means that the concerned party can determine for themselves whether or not they are being correctly represented, whether or not the lawyers and judges are correctly appreciating the issues involved, and so on.

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[45] Copyright Act 2000 (Bangladesh), s 2(1). The unofficial English translation is as follows: (Copy means a reproduction in the form of words, picture, sounds, letters, written form or in the form of sound recordings, cinematograph film, graphic picture or in the material or nonmaterial form, digital code (fixed or moving) or whether in two or three or surrealistic dimensions).

[46] James Brannan (tr), 'ECHR case-law on the right to language assistance in criminal proceedings and the EU response' (2016) (European Legal Interpreters and Translators Association) <https://eulita.eu/wp/wp-content/uploads/files/ECHR%20Language_assistance_case-law_summaries.pdf> accessed January 25, 2019.

[47] ibid; See also, *Özkan v. Turkey*, (2006) ECtHR 12822/02).

The subordinate judiciary in Bangladesh has been for long holding proceedings in Bangla, since 1838, when the Deputy-Governor General of Bengal ordered the substitution of Farsi by Bangla by Act XXIX as the court language in Bengal, Bihar and Odissa. The residents in erstwhile Dacca petitioned against it in favor of Farsi, and later the Sadar Court ruled in favour of using Bangla, Farsi or English as per the convenience of the parties.[48] However, due to the influence of the Mughal legacy on the legal system of Bangladesh, there are in fact many technical words (stemming from Farsi) that are used which are unintelligible to the layman. However, these words have become part of the Bangla court jargons, i.e. আইনি ভাষা, since there are no Bangla equivalents, or the Bangla equivalents are more illegible. To give a few examples:

Gong:	And others
Musabida:	Drafting
Ekuney:	Sum total
Katé:	Division/out of
Shikosti/poyosti:	Alluvion land (land that surfaces from river)/ diluvion (land that is submerged)

On the other hand, there are some other words which have good Bangla synonyms and substitutes, and in the lower judiciary such Bangla words are now being used, albeit seldom:

Sakin:	Address of residence (গ্রাম)
Solenama:	Compromise decree (আপোসনামা)
Mokam:	To/ before the court of (বরাবর/ঘর)
Kaymokami:	Substitution suit (প্রতিস্থাপন মামলা)
Taydad:	Suit valuation (মামলা মূল্য)

[48] Christopher R. King, *One Language, Two Scripts: The Hindi Movement in Nineteenth Century North India* (Oxford University Press 1994) 57-58.

Chani mamla:	Miscellaneous case (বিবিধ মামলা)

Thus, it can be argued that there is ample scope to increase the use of legible Bangla in the subordinate judiciary, which would help the masses to be engaged in court issues in an informed manner.

However, the most noticeable language problem seems to occur at the apex judiciary of Bangladesh, the Supreme Court. The Constitution provides that the State language of the Republic shall be Bangla, which is supplemented by the Bangla Language Promulgation Act 1987 provides that:

> ৩। (১) এই আইন প্রবর্তনের পর বাংলাদেশের সর্বত্র তথা সরকারী অফিস, আদালত, আধা-সরকারী, স্বায়ত্তশাসিত প্রতিষ্ঠান কর্তৃক বিদেশের সাথে যোগাযোগ ব্যতীত অন্যান্য সকল ক্ষেত্রে নথি ও চিঠিপত্র, আইন আদালতের সওয়াল জবাব এবং অন্যান্য আইনানুগত কার্যাবলী অবশ্যই বাংলায় লিখিতে হইবে।[49]

However, the fact remains otherwise. To evaluate the situation, the Law Commission of Bangladesh produced a report in 2011 where it observed how because of legislative lacuna, the 1987 Act cannot be properly implemented: the Legislative organ of the State follows the law and all parliamentary proceedings and legislation are done in Bangla. The lower judiciary also started following it. However, in the case of *Hasmat Ullah vs Azmeri Bibi and others*,[50] the High Court Division ruled that the government did not make any declaration regarding Bangla under Section 137(2) of the Code of Civil Procedure[51] 1908 (CPC), which provides: "The language which, on the commencement of this Code, is the language of any Court subordinate to the High Court Division shall continue to be the language of such subordinate Court until the Government otherwise directs". Since the 1987 Act did not have any non-obstante clause (i.e. a clause which provides that despite whatever is written in any other law, the provisions of the current law shall prevail), sec. 137 of CPC has not been changed by the 1987 Act. Thus, the CPC and the Criminal Procedure Code 1898 (CrPC)[52] are the reasons why Bangla is not widely used in the higher judiciary.

In order to address the situation, a writ petition was filed in 2014 by Eunus Ali

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[49] Unofficial English translation is as follows: (after the promulgation of this Act, except for correspondence with foreign countries, everywhere in Bangladesh, e.g. all government offices, courts, semi-government, autonomous institutions shall for all purposes use Bangla in documents, correspondence, letters, legislation, examination and court proceedings.)

[50] *Hasmat Ullah vs Azmeri Bibi and Others*, (1992) 44 DLR (HCD) para 20.

[51] Code of Civil Procedure 1908 (Bangladesh), s 137(1).

[52] Section 558 of the Code of Criminal Procedure 1898 (Bangladesh) states: The Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by it.

Akond, an Advocate of the Supreme Court, seeking directives to implement the 1987 Act. The bench of Justice Quazi Reza-Ul Hoque and Justice ABM Altaf Hossain ordered the authorities concerned to inform the court without delay on the compliance of the order, and issued a Rule to take measures for implementing and ensuring the use of Bangla language everywhere, including signboards, banners, electronic media advertisements, nameplates, and vehicle number plates, within 15 May 2014.[53]

Despite this encouraging judicial intervention, it is doubtful how much progress can be made. A major obstacle in this regard would be the serious lack of Bangla legal terminology. Due to heavy influence of English and Farsi as the court language in the past, Bangla was rarely used as a medium of legal scholarship. Even in present days not many authentic and authoritative law books are written in Bangla. The result is technical terms, legal maxims, basic concepts etc. do not have any Bangla translation or in some cases, Bangla original words.

It is pertinent to mention here that some scholars have cautioned against forced intervention which may hamper the smooth operation of court proceedings. [54] That would be to greater detriment of the people in comparison to continued use of English for the time being. Eminent scholars and linguists Anisuzzaman and Bhattacharya in different occasions opined that for an effective transitioning, there needs to be more research and publication to develop a rich reservoir of legal resources so that Bangla can be effectively used for legal practice.[55]

This has farfetched impact, covering not only the court going people but others. The law students of Bangladesh are one of the worst victims. The students have to read foreign text books, read the judgments in English, and hone their legal skills in English. This, firstly, fails to prepare them for practice; secondly, this keeps them detached from the ground realities of Bangladeshi courts. Thirdly, this creates a vicious cycle of using English and not developing Bangla legal language, preventing

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[53] Nahid Ferdousi,'How far the use of 'Bangla' in the Court of Bangladesh? *The Daily Star* (Dhaka, 25 February 2017; see also, 'HC rules on use of Bangla everywhere' *Dhaka Tribune* (Dhaka, 17 February 2014).

[54] Shishir Bhattacharya, বাংলা ভাষার প্রকৃত সমস্যা ও পেশাদারী সমাধান (আদর্শ প্রকাশনী ২০১৬); শিশির ভট্টাচার্য্য, ভাষা কমিশন ও বাংলা প্রচলন আইন কেন অপরিহার্য? (*Bdnews24.com*, 1 march 2018); মিজানুর রহমান খান, 'উচ্চ আদালতে বাংলা ভাষা: প্রয়োজনীয়তা ও সীমাবদ্ধতা' প্রথম আলো (ঢাকা, ১৬ এপ্রিল ২০১৭).

[55] শিশির ভট্টাচার্য্য, 'বাংলা ভাষাকেন্দ্রিক রাজনীতি ও কূটনীতি' প্রথম আলো (ঢাকা, ৮ মার্চ ২০২০); মহিউদ্দিন ফারুক, 'আইন আছে, প্রয়োগ নেই' প্রথম আলো (ঢাকা, ২১ ফেব্রুয়ারি ২০১৪).

potential scholars from writing and publishing in Bangla for the fear of not being read and of being considered a second-rate scholar. Last but not the least, this sustains the colonial mentality of being English oriented,[56] as we can see how people tend to hold foreign trained 'Barristers' in higher esteem than the Bangladesh trained 'Advocates.'[57]

4. Conclusion

Language is expression, language is power. Therefore, the language of the legal instruments which make us free citizens of a country need to be so that we can use them to the best of our abilities, and to the best of their potentials. When language obscures law or when the law is inaccessible to citizens because of language, the citizens become disempowered. The colonial legacy is still shadowing the public life of Bangladesh, as is the universal after effect of colonialism. What nonetheless stands out in Bangladesh is that the linguistic effect of colonialism is not so starkly noticed in many other areas of the world. The linguistic issues affect our rights, access to justice, cultural and legal values, and overall attitude towards public life. The State must appreciate the value of linguistic rights for the citizens, and only then can the law become the power for the people.

[56] Mitra Sharafi talks about how barristers as a profession had the colonial attitude of aiding the despotic rulers and were in the initial stage restricted to privileged elite classes in most of the Bristish colonies, not just India. Mitra Sharafi, *A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire*, (2007) 32(4) *Law & Social Inquiry*1059-1094.

[57] There are instances where law students and lawyers themselves acknowledge the prejudicial perception prevalent in favor of barristers. See Nabil Ahsan, '*Barrister: To be or not to be!*' *The Daily Star* (Dhaka, 1 March 2016); Chowdhury Tanbir Ahamed Siddique, '*Discriminatory Perception: Advocate Vs Barrister*' *The Daily Observer* (Dhaka, 21 April 2016); Saquib Rahman, '*Barristers' in Bangladesh: Why do they stand out?*' *The Daly Sun* (Dhaka, 26 October 2017).