CONSUMER JUSTICE IN BANGLADESH: A CRITICAL STUDY OF LAWS & RULES

A Research Work for the degree of ‘Doctor of Philosophy in Law’

Submitted by
Zahangir Alam Khan
Reg. No. 02/2009-2010
Department of Law
University of Dhaka, Bangladesh

Jointly supervised by
Professor Dr. Sumaiya Khair
Department of Law, University of Dhaka
&
Professor Dr. Ridwanul Hoque
Department of Law, University of Dhaka

17 January 2016
Dedication

The late Begum Sufia Ahmed, my mother
Consumer justice is a matter of relative perception, formed and shaped by various socio-economic and legal factors. From this point of view, it may be defined as a branch of social and economic justice. Considering its inherent relation with some aspects of human rights, it is also regarded as as a branch of human rights.

This study tries to critically examine the origin and development of this branch of justice with emphasis on Bangladesh since the pre-historic and ancient periods. The review of this aspect reveals that consumer justice has arrived to the present stage through an invisible process of evolution. In this respect, the factors that have played the important role in its emergence and development is materialism, commodity exchange, value institutions and so on. It has also been influenced by economic and normative prohibitions and restrictions (fairness, competition, perceived value, Caveat Venditor). Presently, the factor that has strongly appeared to be a factor it is public interest due to which it has paved the avenue for judicial intervention, consumer activism, and so on.

This study highlights on the consumer justice system of Bangladesh the main objective is to establish a governance system that will ensure justice for all. As part of this system of Bangladesh, it also provides a small review on the remedies available to a consumer with emphasis on his right of access to justice. So, the way that it undertakes to review this aspect is justice-centric, not rights-centric. So, focus has been given on ‘individuals’ right of protection, maximizing the potential of consumer justice institutions, and above all, creating a vibrant condition for activism in the arena of consumer justice. While reviewing the consumer justice system, it has also been observed that the aspect of consumer justice is run by is run both by statutory and non-statutory laws where both the non-consumer legislations have important role to play. So, this study undertakes a review on the statutory and non-statutory laws, directly or indirectly dealing with consumers’ right of protection.

This study also provides a sectoral review of justice with reference to health and food. While studying from the aspect of remedies and the right of access to justice, it has been observed that the consumers’ right of protection is largely denied by various aspects of denial syndromes among which the most important is the system of executive driven justice. moreover, malfunctioning of the consumer justice institutions, discordance of legislation, absence of proper judicial forums, deficiency of law, failure to recognize consumers’ preferential right of choice to civil or criminal to remedies have contributed much in creating this state of condition. Due to the reasons mentioned above, the consumers are revolving in a vicious circle of redresslessness. In view of this condition, a brief review on these two sectors (health and food) is undertaken in this study.

The cross-jurisdictional review of consumer justice system reveals that many of the consumer issue have been resolved by unconventional methods where the initiative of citizens has played the
pivotal role. A review of this aspect in Bangladesh reveals that the potential of this avenue has not yet been explored. In view of this condition, this study endeavors to explore and maximize the potential of unconventional institutes and laws (Civil society, NGOs, LGIs, Village Courts, Small Cause’s Court and so on) for this cause. In conclusion, considering the balance of convenience and inconvenience in favor of the consumer, this study will help to import a governance system that will ensure justice for all the consumers.
ACKNOWLEDGMENTS

The present study has come to fruition with the assistance and support of many individuals and institutions. I am deeply indebted to Professor Dr. Sumaiya Khair and Dr. Ridwanul Hoque who have taken relentless efforts in analyzing the laws and rules, guiding this study, facilitating the interviews with the resourced personalities, and above all, reviewing and critically analyzing this thesis.

I greatly acknowledge Prof. Dr. M. P. Singh, for his tremendous support in undertaking the cross-jurisdictional in Delhi National Law University, India and discussion with the fellow teachers of the university.

I express my thanks and gratitude to the teachers of the Department of Law, University of Dhaka who, in spite of their preoccupations, have attended the seminars and provided their advices on matters connecting to it.

I express my deep gratitude to Ms. Sultana Nasira Khan, Joint Secretary, Legislative Division of the Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh for her continuous encouragement in this work.

Above all, I also express my deep gratitude to my father Mr. Mohiuddin Ahmed Khan, who happened to be an Advocate of the Supreme Court of Bangladesh and whose continuous blessings and encouragement helped me continue the study for a longer period of time.

Special thanks are due to Kazi Salahuddin and Marufa Salhuddin for their continuous support and efforts they provided in continuing this study. Their support at times of pain and pleasures is really praiseworthy.

I also express my heartfelt thanks to Sumaiya Raihan, Barrister-at-Law, and Emraan Azad, LLM student at the University of Dhaka, for their efforts in editing and reviewing the manuscript of this research work.

Sincere thanks are also due to one of my well-wishers Dr. O. P. M. Sohrabuzzan who helped me a lot in time of pain and pleasure.

Above all, I extend my heartfelt gratitude to my family members for their endless support. My wife Prof. Kazi Khourshed Talat Banu and daughter Samira Yashna Khan had remained as a constant source of hope and inspiration. They have tremendously sacrificed as well as supported me throughout the period of this doctoral research.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>i</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>iii</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>ix</td>
</tr>
<tr>
<td>Table of Statues</td>
<td>xi</td>
</tr>
<tr>
<td>Abbreviations</td>
<td>xiii</td>
</tr>
</tbody>
</table>

## CHAPTER 1: CONSUMER JUSTICE: A WIDER ASPECT

1.1 Introduction
1.2 Objective and rationale
1.3. Scope and focus of study
1.4. Methodology
1.5 Literature review
1.6. Chapter breakdown

## CHAPTER 2: CONCEPTUALIZING CONSUMER JUSTICE

2.1. Fundamental or doctrinal bases of consumer justice
   2.1.1. Materialism
   2.1.2. Economic and Social dynamics
     2.1.2.1. Economic
     2.1.2.2. Social
   2.1.3. Jurisprudential arguments
     2.1.3.1. Universality of the right of protection
     2.1.3.2. Rights and entitlement
   2.2. Competing theories on consumer justice
     2.2.1. Consumer justice as social justice
     2.2.2. Consumer justice as economic justice
     2.2.3. Consumer justice as human rights
   2.3. The concept of consumer Justice

## CHAPTER 3: ORIGIN AND DEVELOPMENT OF CONSUMER JUSTICE

3.1. Pre-history & ancient period
   3.1.1. Emergence of the idea of justice relating to consumer goods
     3.1.1.1 Code of Hammurabi: the primary Code of conduct regulating economic life of people
   3.1.2. Commodity Exchange
   3.1.3. Moral ethical forces/institutions in regulating economic life of people
     3.1.3.1. Ethics and morality
     3.1.3.2. Norms and values
     3.1.4. Religion
   3.2. Medieval period
     3.2.1. Royal sanctions
     3.2.2. Continuance of religious compulsions as measures for enforcement
   3.2.3. Common law principles
     3.2.3. 1. Caveat Emptor
     3.2.3. 2. Strict liability
   3.3. Modern age
     3.3.1. Emergence of the idea of economic market for goods
     3.3.2. Equality in market resources
     3.3.3. Changing aspect of social dynamics
     3.3.4. Pioneering role of courts
     3.3.5. Emergence of domestic statutes
     3.3. 6. International legal regime
3.4. Developments in the Indian Sub-Continent
3.4.1. Ancient period
   3.4.1.1. Kautilya’s Arthashastra
3.4.2. Medieval Age
   3.4.2.1. Price-control system
   3.4.2.2. Adoption of uniform system of weights and measures
3.4.3. Modern period

CHAPTER 4: CONSUMER JUSTICE SYSTEM IN BANGLADESH

4.1. Developments in Bangladesh
   4.1.1. Pre-independence period
      4.1.1.1. Before 1947
      4.1.1.2. From 1947-1971
      4.2.1 The regime of laws on protection of life, supply of essential commodities
      4.2.2. Institutional development
      4.2.3 Enactment and enforcement of consumer law exclusively: The CRP 2009

4.3. Review of legal frame-work governing consumer law
   4.3.1. Goods and services
      4.3.1.1. Banking and financial services
      4.3.1.2. Food
      4.3.1.4. Health and medicine
   4.3.2. Essentiality of Goods and services
      4.3.2.1. The Essential Articles (Price control and anti-Hoarding) Act 1953
      4.3.2.2. The Special Powers Act 1974
      4.3.2.3. Qualitative and quantitative aspect of goods
      4.3.2.4. The Standards of Weights and Measures Ordinance 1982
      4.3.2.5. The Bangladesh Standards and Testing Institution Ordinance 1985
   4.3.3. Monopoly and Restrictive trade practices
   4.3.4. Competition
   4.3.5. Protection of intellectual property with respect to goods and services
      4.3.5.1. False marks or trade description
      4.3.5.2. Anti-trust activity
      4.3.5.2. Environment

4.4. Review of the Consumer Rights Protection Act, 2009
   4.4.1. Major areas of protection: Goods and services
   4.4.2. Major areas constituting the offence of violation: Acts of commission or omission
   4.4.3. Determining person or entities entitled to invoke justice
   4.4.4. Major remedies available under the CRP Act 2009
      4.4.4.1. Criminal
      4.4.4.2. Civil
      4.4.4.3. Administrative

4.5. Judicial and administrative structure for providing justice
   4.5.1. Judicial
      4.5.1.1. Criminal remedies
      4.5.1.2. Institution of cases and its cognizance
      4.5.1.3. Time limit for complaint
      4.5.1.4. Investigation of complaint
      4.5.1.5. Obscurity as to the extent of jurisdiction
      4.5.1.6. Summary trial
      4.5.1.7. Appellate jurisdiction (Criminal justice): Breach in principle/system
   4.5.2. Civil remedies
      4.5.2.1. Cause of action
      4.5.2.2. Jurisdictional aspect
      4.5.2.3. Period of Limitation for institution of suit
4.5.2.4. Compound ability of suits
4.5.2. 5. Civil appellate jurisdiction of court
4.5.2.6. Mode of remedy
4.5.3. Administrative: Directorate of Consumer Protection
4.5.3.1. Directorate of Consumer Protection
4.5.3.2. Committees/councils
4.5.3.3. District Magistrate

CHAPTER 5: CONSUMER REMEDIES AND ACCESS TO JUSTICE

5.1. Remedies available to consumers
5.2. Criminal law remedies
  5.2.1. Remedies regarding essential commodities
  5.2.2. Remedies under special laws
  5.2.3. Remedies for qualitative and quantitative aspect of goods and services
    5.2.3.1. The Standards of Weights and Measures Ordinance 1982 and the Standards Testing Institution Ordinance 1985: a brief review
    5.2.3.2. The Standards Testing Institution Ordinance 1985
5.3. Civil law remedies
  5.3.1. Specific Relief Act 1877
  5.3.2. The Competition Act 2012
  5.3.3. The Sale of Goods Act, 1930
5.4. Tort law remedies
  5.4.1. Liability of Psychiatric harm
  5.4.2. Deficiency
  5.4.3. Duty of care
  5.4.4. Omissions
  5.4.5. Magnitude of harm
  5.4.6. Standards of care
  5.4.7. Likelihood and the relative cost of avoiding the harm
5.5. Constitutional law remedies
5.6. Administrative remedies: Preventive and interventional
5.7. Remedies under other laws
5.8. Access to justice
5.9. Access to justice under other laws
  5.9.1. Criminal
  5.9.2. Civil
    5.9.2.1. The Competition Act 2012
    5.9.2.2. The Trademarks Act 2008
    5.9.2.3. The Bank Companies Act 1991
  5.9.3. Law of Tort
  5.9.4. Constitutional

CHAPTER 6: HEALTH LAWS IN BANGLADESH: JUSTICE FOR CONSUMER?

6.1 Is there a right to health?
  6.1.1. International: Medical ethics as universal legislation
  6.1.2. International covenants
    The Geneva Declaration of Medical Code of Conduct-1942
    6.1.3. The UN Guidelines for the Protection of Consumers 1985
    6.1.4. Perceived values
6.2. Review of health laws
6.3. Product liability in the health sector
  6.3.1. Drugs and Medicine: The Drugs Act 1940 and the Drugs Control Ordinance 1982
    6.3.1.1. Standardization of products
6.3.1.2. Standardization of products Safety: Skills of manufacturing personnel
6.3.1.3. Quality and quantity: Protection through intellectual property legislations
6.3.1.4. Fairness in pricing
6.4. Liability in the health services sector
   6.4.1. Diagnostic and clinical services
   6.4.2. Governance problem in clinical and diagnostic services
   6.4.3. Health education
   6.4.4. Surgical, organ-transplantation and transfusion of blood
      6.4.4.1. Surgery and organ transplantation
      6.4.4.2. Transfusion services
6.5. Remedies vis-à-vis defective health products and negligence/breaches of law by service providers
   6.5.1. Criminal remedies
      6.6.1.1. Product liability
      6.6.1.2. Service liability
   6.5.2. Civil law remedies with respect to product liability
      6.5.2.1. Knowledge
      6.5.2.2. Skill
      6.5.2.3. Normal intelligence
      6.5.2.4. Duty of care
      6.5.2.5. Liability for failure to diagnose diseases
      6.5.2.6. Emergency and Momentary mistake
6.6. Constitution and jurisdiction of courts; summary trial; Penal provisions
   6.6.1. Summary trial
   6.6.2. Public Interest Litigation (PIL) in health
6.7. Other laws affecting health consumers’ rights
6.8. Access to justice
   6.8.1. Investigation and Inquiry of complaints
   6.8.2. Right to sue
   6.8.3. Ambiguity in penal provisions
   6.8.4. Gaps in the phrasal aspect of medicine

Chapter 7: Justice through the Safety of Food

7.1. Conceptualizing food justice
   7.1.1. Food as an issue of Entitlement, development or governance or justice
7.2. Review of laws dealing with food safety and availability
   7.2.1. Safety of food: The Safe Food Act 2013
7.3. Purity and Adulteration; Normal or natural constituent of food; Quality & quantity
7.4. Infringements, patent rights as aspects of quality of food
7.5. Fortification of food
7.6. Factors affecting governance system of food
   7.6.1. Unfairness or restrictive trade practices
   7.6.2. Monopoly and Competition
   7.6.3. Lack of governance
7.7. Remedies available to consumers against breaches of the right to safe food
   7.7.1. Criminal law remedies
   7.7.2. Civil law remedies
   7.7.2.1. Civil remedies under intellectual property laws
   7.7.3. Administrative remedies
   7.7.4. Non-statutory aspects of law: Tort law application
7.8. Remedies under the Safe Food Act 2013
   7.8.1. Does the procedural aspect of law facilitate justice?
   7.8.2. Autonomy of court for justice
   7.8.3. Access to justice under other laws
CHAPTER 8: SOCIAL AND LEGAL ACTIVISM FOR CONSUMER JUSTICE, AND INSTITUTIONAL INNOVATION

8.1. Consumer activism in Bangladesh
   8.1.1. Consumer education
   8.1.2. Campaign and motivation

8.3. Consumer movement
   8.3.1. Civic or social activism

8.4. Legal activism for Consumer Justice
   8.4.1. PIL for consumer rights enforcement
   8.4.2. Suo motu judicial actions

8.5. Maximization of consumer justice institutions’ functions
   8.5.1 Directorate of consumer protection
   8.5.2. Directorate of Health
   8.5.3. Directorate of Drug Administration
   8.5.3. Bangladesh Standards and Testing Institution

8.5.4. Alternative use of potential legal institutions
   8.5.1 Village Courts
   8.5.2. Small Cause Court
   8.5.3. Special Court for Consumers

8.6. Public engagement with the consumer justice system
   8.6.1. Bazaar committees
   8.6.2. Non-Government Organizations (NGOs)
   8.6.3. Parliamentary Standing Committees
   8.6.4. Local Government Institutions (LGIs)

8.7. Central Government initiatives
   8.7.1. Annual Performance Agreement
   8.7.2. Adoption of new modus operandi by community organizations

Chapter 9: CONSUMER JUSTICE – THE WAY FORWARD

Bibliography
## Table of Cases

A. Ali Akand vs. Registrar of Patent, Design and Trademarks, Govt. of Bangladesh and ors, Title Suit No. 1721/1993, In the court of District Judge, Dhaka.

Ain Odhikar Trust vs. Tabani Beverage, Title Suit no 324/1999, The Court of District Judge, Dhaka

American Philatelic Society V. Clairborne 1935, 3 Cal 2d. 689, 698-699


*Barquis V Merchonty Coleection Assn* (1972) 7 Cal 3d 94, 109, 111

BCIC vs. Sattar Match Works 44 DLR (AD) 208


*Brasserie du Picheur SA vs. Federal Republic of Germany* (Case C-46/93)[1996] at [74]

Brown vs. Board of Education (1954) 347 US 483


Dilworth v. Commissioner of Stamps, UK (1899) AC 99,

Donoghue v. Stevenson (1932) AC 562

D.S. *Nakara v. Union of India*, (1983) 1 SCC 330


Francovich vs. Italy, 1993 2 CMLR 66


Gardiner vs. Gray (1815)


J. Radhakrishnan vs. Mrs. A. Basheera, I (2001) CPJ 57 (TN)

Janata Dal v. Harinder Singh and ors AIR 1993 SC 892


Jones vs. Bright, 1928, 5 Bing. 533


K M Zabir vs. Amanullah Chief Metropolitan Court Case no 1097A/1988

Lockett vs. A and M Charles Ltd (1938) 4 All E.R. 170

*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 at SCC p. 342, para 94 (50)

Mohiuddin Farooque vs. Govt. of Bangladesh Writ Petition no- 1783/1994
Peoples Union for Democratic Rights vs. Ministry of Home Affairs AIR (1985), Delhi 268
R vs. Secretary of State for Transport, ex p Factortame Ltd (Case C-48/93)
Randall vs. Newson (1877) 2QBD 102
Roper v. Simmons, 03-633 (decided on 1-3-2005)
State vs. Deputy Commissioner of Satkhira 45 DLR (1993) 643
State vs. Fulu Mia Criminal Misc. 1755/1993
Thornton vs. Shoe Xane Parking Ltd (1971) 2 QB 163
**TABLE OF STATUTES**

1. The Allopathic System (Prevention of Misuse) Ordinance 1962
2. The Bangladesh Standards and Testing Institution Ordinance 1985
3. The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983
4. The Bangladesh Homoeopathic Practitioners Ordinance, 1983
5. The Bank Companies Act 1991, Bangladesh
6. The Code of Criminal Procedure 1898
7. The Code of Criminal Procedure 1898, Bangladesh
8. The Competition Act 2012
10. The Consumer Rights Protection Act 2009, Bangladesh
11. The Drugs Act, 1940
12. The Drugs (Control) Ordinance, 1982
13. The Eye Surgery (Restriction) Ordinance 1960
14. The Epidemic Diseases Act, 1897 (Act III of 1897)
15. The Essential Articles (Price Control, and Anti-hoarding) Act, 1953
16. The Essential Commodities Act, 1956
17. The Foods (Special Court) Act 1956
18. The Food Safety Act 2013
19. The Human Organs Implant (Regulations) Act, 1999
20. The Illegal Advertisement (Regulations) Act, 1952
22. The Medical and Dental Council Act 2010
23. The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982
24. The Merchandise Marks Act 1883
25. The Mobile Courts Act 2009
27. The Patent, Designs and Trademarks Act 1883 (Repealed)
28. The Patent and Designs Act 1911, Bangladesh
29. The Penal Code 1860
30. The Pharmacy Act 1967 (replaced by the Act of 1976)
31. The Public Health (Emergency Measures) Act 1944
32. The Pure Food Ordinance, 1959 (Repealed)
33. The Special Powers Act 1974
34. The Standards of Weights and Measures Ordinance, 1982
35. The Trademarks Act 2008, Bangladesh
36. The Vaccination Act 1880 (Act I of 1880)
37. The Lepers Act, 1898 (Act III of 1898)
38. The Consumer Protection Act 1979, Sri Lanka
39. The Consumer Protection Act 1986, India
40. The Consumer Protection Act 1987, UK
41. The Consumer Protection Act 1999 of Malaysia
42. The Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973)
43. The Geneva Declaration of Medical Code of Conduct-1942
44. The Islamabad Consumers Protection Act 1995, Pakistan
46. The Sale of Goods Act 1893, UK
47. The Australian Consumer Protection and Fair Trading Act 2012
48. The Universal Declaration of Human Rights 1948
49. The UN Guideline for the Protection of Consumers 1985
50. The United Nations Guidelines for Consumers Protection 1985
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>APA</td>
<td>Annual Performance Agreement</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td>BELA</td>
<td>Bangladesh Environment Lawyers’ Association</td>
</tr>
<tr>
<td>BLAST</td>
<td>Bangladesh Legal Aid and Services Trust</td>
</tr>
<tr>
<td>BSTI</td>
<td>Bangladesh Standards and Testing Institution</td>
</tr>
<tr>
<td>CAB</td>
<td>Consumer Association of Bangladesh</td>
</tr>
<tr>
<td>CERS</td>
<td>Consumer Education and Research Center</td>
</tr>
<tr>
<td>CJM</td>
<td>Chief Judicial Magistrate</td>
</tr>
<tr>
<td>CPC</td>
<td>Code of Civil Procedure</td>
</tr>
<tr>
<td>CRP</td>
<td>Consumer Rights Protection</td>
</tr>
<tr>
<td>CrPC</td>
<td>Code of Criminal Procedure</td>
</tr>
<tr>
<td>DDT</td>
<td>Dichlorodiphenyltrichloroethane</td>
</tr>
<tr>
<td>DG</td>
<td>Director General</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Convention on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>INN</td>
<td>International Non-proprietary Names</td>
</tr>
<tr>
<td>GDS</td>
<td>Grievance Redress system</td>
</tr>
<tr>
<td>LGI</td>
<td>Local Government Institutions</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental Organization</td>
</tr>
<tr>
<td>PCB</td>
<td>Polychlorinated biphenyl</td>
</tr>
<tr>
<td>PIL</td>
<td>Public Interest Litigation</td>
</tr>
<tr>
<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
</tr>
<tr>
<td>TIB</td>
<td>Transparency International Bangladesh</td>
</tr>
<tr>
<td>UC</td>
<td>Union Council</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>USA</td>
<td>United Stated of America</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
</tbody>
</table>
Chapter 1

Consumer Justice: A Wider Aspect

1.1 Introduction

Justice is one of the greatest gifts of human civilization and is so ‘consumer justice’ that has a deep root in the soil of human civilization. ‘[L]aws have been used to protect consumers for centuries. These laws have drawn on a variety of legal forms including criminal law, tort, and contract, to achieve their objectives. In addition to those laws that specify consumer protection as their primary concern, numerous other provisions have the effect of protecting the consumers’ (Cartwright, 2012:1).

In view of this condition, justice to consumers has become one of the prime concerns to present day legal thinkers. Ordinarily, the term justice implies a process of redress involving the process of courts. But, in this study, the term ‘justice’ shall imply both the system and law. For the purpose of this study, the term law includes either statutory or non-statutory law, directly or indirectly affecting consumers’ right of protection. The term system shall imply both conventional and unconventional system of redressal measures the focus of which shall be the consumers only.

Issues of justice arise in several different spheres and play a significant role in causing, perpetuating and addressing conflict. Just institutions tend to instill a sense of stability, well-being, and satisfaction among society members, while perceived injustices can lead to dissatisfaction, rebellion, or revolution (Deutsch, 2011). In view of this, it may be held that though the failure of justice in the arena of consumption may not give rise to rebellion, revolution or social instability, it might give rise to dissatisfaction and anarchy in consumption among society members causing thereby a catastrophe to human life, liberty and property. These types of justices have an important bearing on socio-economic, civil and criminal justices both at the national and international level.

Consumer justice has emerged through an invisible process of human relation with property. A matter of protection may remain unrecognized as a matter of violation for millions of years, but it does not cease to exist as a matter of justice for want of formal recognition. This ‘relation’, just mentioned has instilled such an idea in the minds of consumers that has played an important role in the emerging consumer justice. A review of the state of protection of consumers reveals that economic development has given consumers tremendous increases in purchasing power while at the same time prompting changes in the market have significantly weakened their bargaining position. This problem bears particularly heavily on the poor (Caplovitz, 1963). In view of this condition, ‘the consumer needs protection because of the peculiarities of the market in which he transacts’ (Rahman, 2010:1).

A review of the condition of consumers in Bangladesh shall reveal that ‘[t]he majority of people in Bangladesh live in a vicious circle of cheating and deception. …They face the great challenges … of commodity adulteration, cheating in weights and measures, hoarding, artificial price-
hike and so on. The unlimited desire for profiteering having no control brings unbearable sufferings for the consumers and particularly for the people of limited income as they cannot adjust themselves with the great and sudden change in price level. ‘Price hike, adulterated and imitated articles of essential goods flooded the market and no protest and agitation from the innocent and silent consumers is making the situation all the more worse. They blame their luck and accept the sub-human life as natural (Hasan, 1992:25). “Needless to say that in a country like Bangladesh where ‘poverty for the great majority of the people is a grim struggle for survival’ (Jansen, 1978:14), consumer justice has little or no practical appeal to the general people” Actually, ‘[t]he consumers’ in Bangladesh are living in a state of redresslessness (Ahmed, 2010) against which the demand for justice is increasing.\(^1\)

The reasons that are responsible for this problem is that there prevails a state of discordance between legislation and judicial say. The system of consumer justice is mostly executive driven; it does not provide unfettered right of access to justice to the victim. It also does not recognize consumers’ preferential right of selection with respect to the modes of justice- civil or criminal. Along with this, the matter that has worsened this situation is the absence of appropriateness in legislation, the dysfunctional state of redressal forums, the absence of welfarism in legislation, absence of socio-legal activism and to some extent the nascent stage of consumer movements (Halim, 1993) has worsened this situation.

Against this backdrop, since 1990s, Bangladesh is trying to resolve this problem by enacting comprehensive legislations on consumers (Rahman, 2010). In view of this condition, the Consumer Rights Protection Act 2009 was enacted with a view to serve the needs of consumers. It was supported by law subsequent supportive enactments such as the Competition Act 2012. These laws were thought to be capable of checking the evils of unregulated market conditions and thus protecting the consumers from deception, unfairness, and in conclusion ensure justice. This study is undertaken focusing on the aspect of justice only, and not rights.

1.2 Objective and rationale

The objective of this study is providing the ways and means for securing justice, both at the individual and collective level, to identify and analyze the reasons that preclude consumers from seeking justice. So, with a view to protecting the consumers, the present study has undertaken a cross-jurisdictional analysis and examination of factors, legal or social-legal, that has deterred consumers from seeking recourse to justice. Apart from a comparative insight into global developments, this study seeks to explore a legal framework alternative to traditional system of consumer rights in Bangladesh. This study does not endeavor to innovate or develop new legal system/framework as alternative to present legal framework; rather, it seeks to explore the potential of those legal frameworks and legal systems

that are presently available and thereby suggest utilizing these avenues with minor adjustments appropriate for consumer justice. The dysfunctional state of redressal forums, absence of appropriate legislation and so on, have been identified as the major causes that deprive consumers of due legal protection. Moreover, the absence of social-legal activism, and to some extent, the nascent stage of consumer movement has worsened the conditions of consumers (Halim, 1993: 10). In view of this, this study attempts to:

1. identify the procedural or institutional problems that deter people from taking recourse to law for consumer justice;
2. explore the jurisprudential and juridical measures for ensuring access to justice by consumers; and
3. Explore the potentials of alternative legal forums and measures including socio-legal activism in addressing consumer justice.

1.2.1 Rationale

A review of consumer studies reveals that the legislations are designed in such a manner that the people are caught up in a vicious circle of redresslessness (Ahmed, 2010). The reason for such failure lies in the fact that stating some legal provisions in the body of text, these legislations have not adequately addressed the aspect of justice for consumers. In spite of these failures, little or no academic exercise has been undertaken on this issue. A review of available literature shows that these studies are mostly rights-centric, and not justice-centric. As a result of which, the problems of justice remained unaddressed by these studies. In view of this condition, this study, emphasizing on the aspect of justice for consumers, is a time-worthy work in the arena of consumer law.

1.3. Scope and focus of study

‘When trying to define the scope of consumer policy, the greater part of community activity and law making is ultimately aimed at providing the individual citizens, the consumers, with protection and support in various aspects’ (Cranston, 1984: 6-7). The scope of consumer justice is quite vast and it engulfs a broad spectrum of issues relating to protection. It seeks to focus on the regime of legislation, directly dealing with the affairs of consumers. It will also give emphasis on some legal aspects or legislations that do not directly deal with consumers, but, affects consumers’ right of protection, e.g. competition, infringement of intellectual property rights and so on. In some cases, the discussion on these aspects is mostly dependent on conceptual or jurisprudential precepts or framework of justice. So, the jurisprudential aspects influencing this branch of justice shall also be reviewed. From this point of view, the focus of this study shall be given on (a) exploring the ways and means of establishing a governance system and (b) a scheme of redressal for consumer breaches.
As the main objective of this study is ensuring justice for all, so, the purpose of this study is to explore the ways and means for establishing a governance system. For the purpose of this study, the term ‘governance system’ shall imply ‘those processes or mechanisms through which institutions (rule systems) in place in any social system are adapted, […] to the needs and purposes of those who live under them’. Pursuant to this, ‘the function of governance is to monitor and enforce compliance of the rules systems […] as they evolve’ (Stone, 2010: 8-9). In view of this condition, the discussion shall emphasize on creating of some vibrant conditions or mechanisms that encourage people to seek for justice. The term ‘vibrant condition’ implies such a process of judicialization that is ‘dynamic organized by trigger mechanisms and feedback effects’ (Sweet, 2010:8). In this study, the term vibrant condition shall imply the ways and means of assuring the accessibility and availability of justice that would ensure justice for consumers.

In order to establish governance system that would ensure a better access to justice for consumers, this system requires that the legislation should not be viced with the denial syndromes. The term ‘denial syndrome’ implies the factors that hinders or obstructs the right of access to justice. To explain it more clearly, these syndromes include– denial of the right of access to justice, or negation to the preferential right of choice to relief (civil or criminal), or any other form of juridical denial. The reason for linking these processes with justice lies in the fact that the consumer laws of Bangladesh do not provide direct access to justice, in some cases, the relevant legislations do not contain provisions for redressal of breaches, some of them do not provide redressal forums at all. The deficiency of these provisions amounts to denial of justice indirectly. For this purpose of this study, these syndromes shall be studied from institutional and instrumental contexts. For the purpose of this study, the term ‘instrument’ includes mainly the rules system (legislations) providing jurisdiction to courts, regulating the procedures for dispensing justice, providing subject-matters of jurisdiction and the acts of commission or omission giving rise to statutory violations. In view of this, the main focus of this study shall be centering round the syndromes of denial of justice.

It may be mentioned that due to technological advancements, the areas of everyday consumable goods or services are expanding. It includes small goods to large capital goods, domestic appliances to cars, boats, private houses and so on. The services sector covers services starting from traditional to modern technology based product, herbal to nuclear medicine, small surgery to highly skilled health services. In the widening aspect of goods and services, these matters of consumption may be linked with the instrumental and institutional aspect of justice. It may be mentioned that there is no law in Bangladesh that regulate the consumption of these goods and services. These grey areas relating to goods and services shall fall within the scope of this study.

---

2 For example, the Medical and Dental Council Act 2010 of Bangladesh does not specify any court or judicial body by which these complaints may be redressed.
In the above, we have mentioned the features of instrumental denial. For the purpose of this study, the term ‘institutional denial’ implies either there is no institution; if institution, those are not accessible or effective for justice. The role of institutions also includes conventional and unconventional institutions, judicial, quasi-judicial and non-judicial. In this respect, the primary role rests on the judicial or quasi-judicial institutions, such as, courts, tribunals or other bodies’ mandated for consumer justice. The reason for giving importance to the role of courts lies in the fact that ‘the concepts of governance are also relatively related in abstract terms with the process of judicialization (Sweet and Stone, 2010: 8-9) pursuant to which the ‘courts are regarded as pragmatic organs of governance (ibid. Stone). In view of this, the role of judicial and quasi-judicial institutions, especially, the role of courts shall fall within the purview of this study.

It is not only the legislations, but also the institutions that may play a significant role in dispensing justice. For the purpose of this study, the term institutions also includes those non-judicial bodies whose proactive role may help to create a vibrant condition for consumer justice. These institutions include NGOs, LGIs (Local Government Institutions), business organizations, and rights activist groups and so on. These institutions might not have any direct relation with dispensing consumer justice, but they are critical in establishing a governance system that would help realization of justice for consumers. In this connection, it has been observed that as ‘lawmaking is one core function of any system of governance’ (Ibid.) and ‘the legislature has broadened the scope of legal protection against wrongful business practices generally’,3 so, the role of legislature is important for the governance of non-judicial organizations. In view of the discussions mentioned above, the problems of these conventional and unconventional institutions shall be given proper attention where it is required for establishing consumer justice.

In the above, we discussed about the reason for linking the role of non-judicial institutions with the aspect of governance. In this respect, the courts have an important role to play and the ‘courts are regarded as paradigmatic organs of governance (Sweet, 2010: 8-9). The reason for giving importance to courts’ role lies in the fact the ‘[T]he concepts of governance are also relatively related in abstract terms with the process of judicialization (Sweet and Stone, 2010:8-9). In this respect, the role of organizations capable of facilitating measures for consumers’ right to justice is also given utmost importance.

From time immemorial, it has been observed that the businessmen try to conduct their businesses by evading standard principles or measures of standards. In respect of quantity and quality of goods and services, deception and cheating in weights have been a matter of concern for consumer protection. In view of this condition, it was felt necessary to address these quantitative and qualitative aspects of justice through the process of legislation consequent upon which, necessary laws were

3 Barquis v Merchonty Coleection Assn (1972) 7 Cal 3d 94, 109, 111
enacted underlying the basic principles of ‘standards of weights and measures’. Despite these measures, the qualitative aspects of justice remained unchanged largely. From this point of view, the qualitative aspect of consumer justice shall also be reviewed in this study.

Since long, the aspects of consumer justice were confined exclusively with tangible issues, i.e. goods and services. With the passage of time, there emerged some new concepts of business that played important role in establishing a governance system for consumer justice. For example, intellectual property is one of such issues which has no direct relation with consumer justice, but, has an important role to influence consumers’ right of protection indirectly. But, the limitation of these laws is that they do not recognize the influence of these aspects on consumers’ right of protection due to which the purposes of these Acts/Ordinances are kept confined in protecting the owners of these properties, not the consumers. With the passage of time, the influences of these matters on consumers’ economic interest have increased. Similarly, the aspect of competition is a non-consumer issue, but, it has become a new addition in the arena of consumer protection. Pursuant to this recognition, some of the jurisdictions, when enacting legislations for consumer protection, have enacted necessary legislations making room for the aspect of competition. Bangladesh is not away from this trend for which it has enacted the Competition Act 2012. Now the question arises, how far these legislations are capable to cater to the needs of justice? In view of this, while discussing the governance system of consumer justice, the discussion on these aspects shall be undertaken as being within the scope of this study.

In many parts of the world, many of the social and legal issues have been settled though the process of socio-legal activism. These initiatives are mostly taken at the instance of non-consumer entities in which the matter that functions as the basis of Locus Standi is public interest. It is not confined narrowly only within judicial processes, it includes interventions both by social and legal processes. Of course, in the early stage of consumer justice in Bangladesh, many of the initiatives of the people were caught up due to the thematic limitation with regard to locus standi. In this respect, only the personal loss and injury of the plaintiff could import Locus Standi. In view of this, the matter of activism shall also fall within the scope of this study. It may be noted that the global reforms in the affairs of consumer have imported the increasing trends in consumer activism, and other reformatory changes in the neighboring jurisdictions. In view of this condition, this study shall also focus on cross-jurisdictional ideas as well as the global and neighboring laws.

The aspects of fairness in business play a pivotal role in attaining consumer justice. It has important bearing on matters relating to price and competition, safety and security, quality and

---

4 The Bangladesh Standards of Weights and Measures Ordinance 1985, the Drugs (Control) Ordinance 1982, the Private Medical Practice and Laboratories Ordinance 1982, the Competition Act 2012 and so on
5 The Patent Act 1911, the Trademarks Act 2008 and so on.
6 The Competition Act 2012.
7 Ahammad Ali Akand Case.
quantity and standardization of goods and services. Taking this matter into consideration, some of the jurisdictions have tended to incorporate this in their legislation.\textsuperscript{8} This has made the consumer legislation more dynamic to encompass newer areas of consumer justice. In furtherance of this, the aspects of ‘fairness’ fall within the purview of juridical review. In furtherance of this, the purview of this study may be widened to include the juridical review of fairness.

A review of consumer justice in Bangladesh reveals that due to technological advancements, the areas of goods or services are expanding which include everyday consumable goods or small capital goods to large capital goods, home or domestic appliances to cars, boats, private houses etc. The services sector is merchandized in such manners as to cover services starting from traditional to present day technology based services; from herbal medicine to nuclear medicines, small surgery to highly skilled professional health services. In view of this condition, the widening aspects of goods and services influence to address these aspects by legislation.

A review of consumer justice in Bangladesh reveals that emphasis has not been given on restorative system of justice due to which the legislations have always emphasized on the conventional methods of justice; no attention has been given on unconventional systems of justice. It has widely accepted that the traditional methods or rules systems cannot serve the purpose of justice in all the cases. In some cases, it requires the alternative methods to resolve the issue of consumer justice. These methods include redressal forums beyond the regular courts (e.g. small Cause’s court), ombudsman, alternative dispute resolution systems, and so on. In view of this, the focus of this study shall be exploring those systems and method the potential of which has not yet been explored in furtherance of which it will examine the feasibility of these systems in our system of judicial governance.

There are some international documents that do not provide legal provisions for justice, but, imports some aspects that have the capacity to mould, shape and influence the thematic aspect of justice. These documents include international convention, resolutions, and guidelines and so on. Considering its influence on justice, some of the countries have provided formal recognition to the covenants of these documents. In this respect, we may refer to the thematic influence of Universal Declaration of Human Rights 1948 or on some other declarations on national constitution, policy or law. From this point of view, the study of these documents shall fall within the purview of this study.

The limitation of this study is that the regime of justice in Bangladesh is based mainly on statutory legislation. The aspect of consumer justice is dealt with indirectly by much legislation. But, in this short span of discussion, it is not possible to offer discussion on all these laws. It may be noted that the emergence of new goods and services demands for widening the arena of the right of

protection with respect to goods and services. But, due to some limitations, it is difficult to offer discussion on the widening aspects of demand for justice. In view of this, the scope of this study has been kept limited to a few laws and issues only. It may be noted here that this study does not ignore the influence of metaphysical factors of justice. So, it considers the influence of history and religion, societal functionaries on the aspect of justice. From this point of view, it has also considered the influence of some judicial and non-judicial aspects on consumer justice.

1.4. Methodology

This study shall follow the combination of primary and secondary research methods based on a combination of qualitative and theoretical research analyses, with a comparative exercise of global context. As the study concerns about the analysis of laws and rules, so, this study shall not approach the empirical methods of data analysis. So, this study shall adopt the method of evaluation, dissemination, sharing, interviewing and consultation in which the thematic and juridical analysis of laws, interview with informants, resource personnel, case-law review shall be given due emphasis.

For the purpose of this study, primary materials are drawn from statutory legislations, international covenants and relevant constitutional provisions, reported and unreported court decisions, semi-structured societal and moral laws on this subject. For the purpose of analysis of in-depth discussion on practical problems, we have engaged in structured and semi-structured conversations with relevant academics, judges, lawyers, rights activists, media-workers, policy-makers, and enforcement agencies that are directly or indirectly involved in the implementation of consumer related laws.

1.5 Literature review

The purpose of this part of study is to critically analyze to borrow and share ideas with the legal and juristic works that influence the regime of consumer justice. An analysis of the literature relating to consumer justice shows the dearth of sources on the subject. An analysis of the literal works on juridical or judicial matters relating to consumer justice shows that the literal works on consumer justice stands in a meager state in Bangladesh. There are few legal authors who took interest in analyzing the problems of consumers. Yet, findings of those few authors that focused on consumer laws are critical for the present study. So, despite its inherent weaknesses, the recommendation made by them has been taken into consideration for analyzing the problems of consumers.

Consumers in Bangladesh: Helplessness and Redress (1992), is one of the notable works on consumers in Bangladesh. In this study, the helplessness of consumers have been pin-point saying this that the ‘unlimited desire for profiteering having no control brings unbearable sufferings for the consumers and particularly for the people of limited income as they cannot adjust themselves with the great and sudden change in price level’ (Hasan, 1992:25). In this state of condition, the matter that has
been considered as a major factor for consumer protection is consumer education, but, the limitation of this study is that it did not categorize the steps that are effective for consumer justice.

*Social Welfare Legislation in Bangladesh* (1993) is one of the notable studies on Welfare Legislation. It is also an important study on consumer movement. It has pointed that the consumer movement is a complicated social step in the present socio-economic condition of Bangladesh. In this respect, lack of awareness, low rate of literacy, improper education and knowledge regarding consumers’ right of protection has been accused as one of the important impediments for this movement. In view of this condition, it has been thought unworthy to think about consumer justice through the process of consumer movement.

*Consumer Protection Institutions in Sweden: An Overview* by Rahman (1994) is a review of dissemination of knowledge with a view to fit to it to our system. The author highlighted on the institutional measures adopted for protecting the consumers of Sweden. The Notable feature of this study is that it has emphasized both on conventional and unconventional measures of protection. In this respect, it has mentioned the functional procedures of executive and quasi-judicial bodies like the Consumer Ombudsman, National Consumer Board. It also spells out the experience of functioning of special courts in a developed society—Consumers Small Claims Court functioning. The notable feature of this court is that it requires no formal procedure to redress a consumer claim. He claimed that this system has contributed much in the ‘quality of life ’of consumers. So, he emphasizes on legislation setting up proper institutions in the Swedish style. The weakness of this literature is that it did not offer any discussion on the potential of similar type of laws (The Ombudsman Act, 1978) and institutions of Bangladesh (e.g. Small Cause Courts, Village Courts). The matter of fallacy that occurred with this is that it ignored the differences between the socio-legal culture and heritage between Sweden and Bangladesh. As a result of which, it could not explore the potentials of these legislations matching with consumer demand.

Naim Ahmed (1999) made a review from the point of public interest litigation titling ‘Public Interest Litigation—Constitutional Issues and Remedies’. It is a review seen from individuals’ right of protection. In this study, he tried to advocate the ‘Public Interest litigation’ as an inventive step for legal justice. The weakness of this study is that it is confined only within the broader line principles of some political rights, such as, unlawful detention of citizens. It did not offer any discussion on the aspect of justice that may address a wide variety of issues of consumers. From this point of view, this study cannot help the consumers in substantiating his right of justice.

*Ombudsman: A means of Good Governance in Bangladesh* by Md. Ahsan Kabir and Md. Hashibul Alam Prodhan (2007) is a joint review that provides light on German-Swedish context of
citizen rights that helped to emerge the institution of Ombudsman in these two countries. It also points out that this provision of Ombudsman was incorporated in the constitution of Bangladesh in 1972 in furtherance of which the Ombudsmen Act 1980 was enacted. It provides light on those aspects that gave rise to the urgency of upholding the right of protection for a citizen against the executives’ atrocities. The weakness of this literature is that It has failed to mention the efficacy of Ombudsman in protecting the consumers, rather, it has advocated for a system where important executive issues are involved. Despite its weaknesses, the knowledge disseminated in this study may be helpful to re-defining our ideas on consumer justice.

_The Consumer Protection in Bangladesh: Present Status and some Thoughts for the Future_ by Rahman (2010) is another important work on consumer protection. The study was undertaken after the enactment of The Consumer Rights Protection Act 2009 to pin-point the impediments that may deter consumers right of protection, but failed to emphasize on the issue of justice for consumers due to which this issue remains unaddressed.

From the above discussion, it may be presumed that most of the literatures reflected only on the aspect of rights without any analysis of sectors (e.g. food or health) closely connected with the consumers. These weaknesses of these studies bear strong impact on justice to consumers. ‘The Health Services and Consumer Protection’ by Hoque (2010) seems to be the first of these studies that focuses on the review of justice with respect to health. In this study, he tried to settle the question whether the right of health is an inseparable rights of human beings, whether it falls within the purview of entitlement’, how the health legislation provides the right of justice. In analyzing this aspect, he referred to the health policy and the fundamental state policy of the constitution. But, the weakness of this literature is that He tried to resolve the problems of health from juridical, not from justice point of view. It also did not point out how these rights can be translated into justice under the present legal system. Despite its weaknesses, it is the first work that highlighted specifically on the issue of health.

This study also contains the review of some consumer related constitutional cases. These cases provided an insight regarding the protection of consumers. But, unfortunately, we could not add a good number of cases in the basket of consumer justice. Similarly, we do not see any instance of ‘Suo Motu rule’ from the judges due to which consumers feel helpless with regard to consumer protection.

It may be relevant to mention that Bangladesh, India, Sri Lanka possess the same legal culture and heritage. In view of this, legislation and precedents of these countries have a strong referral value.

---

on the justice of neighboring jurisdictions. In view of this, attempts may be made to review the consumer legislations and precedents of neighboring jurisdictions where necessary. In this respect, it may be relevant to mention that that the Consumer Protection Act 1986 of India, The Consumer Protection Act 1979 and precedents of these countries have been tried to analyze when necessary. Above all, as part of review of consumer legislation, emphasis has been given on the Consumer Rights Protection Act 2009, The Competition Act 2012, the Safe Food Act 2013, The Drugs Act 1940, the Drugs (Control) Ordinance 1985, The Standards of Weights and Measures Ordinance 1985 etc. From this point of view, the present review is time-worthy study on consumers. In this study, we have given emphasis on the aspect of justice, not on individuals’ right of protection. Taking these aspects into consideration, we shall also pin-point some new elements that are required for justice to consumer.

1.6. Chapter breakdown

The structure of this study is designed as justice-centric, not rights-centric; it takes the matter of justice as the core of the issue. The structure of this study is divided into seven chapters among which four chapters contain or make a review on of laws directly or indirectly dealing with consumers’ right of protection. Chapter one of this study provides the reason for undertaking this study, its objective and scope, methodology, notable works on consumers issues and in conclusion its nexus with the aspect of justice:

Second chapter of this study – Conceptualization of Consumer Justice is a self explanatory chapter. This study makes a review on the conceptual framework (universal right of protection, rights and entitlement and so on) that has an inherent relation with consumer justice. It highlights on the conceptual framework that provides the jurisprudential basis of this justice. In discussing the conceptual aspects, it will try to explore the thematic aspects that may be helpful for justice to consumers.

Consumer justice is not a divine justice; it is also not an isolated branch of justice that has no relation with aspects of the society. It is greatly influenced by some jurisprudential and non-jurisprudential factors aspects. Chapter three of this study makes a review on factors that have influenced the forming, shaping of consumer justice. In discussing the evolutionary processes, it did not explore at which point of history that consumer justice has emerged in human civilization. But it tried to offer discussion on some legal and economic school of thoughts (materialism, commodity exchange theory) that might have an inherent relation with the affairs of consumers. This chapter has endeavored to highlight on how these schools have influenced the emergence of consumer justice. In this process of discussion, it has highlighted on the origin of consumer justice in Bangladesh.
Unlike common law justice, the aspect of consumer justice is not a matter of discretion, good conscience or other thematic principles of justice. It follows the path of statutory of legislation the main focus of which is justice, not rights. Chapter four of this study makes a juridical review of legislations directly dealing with the affairs of consumer. It offers discussion on the system and procedure for dispensing justice, nature of relief- civil or criminal, the acts of commission or omission that amounts to consumer violation, the structure for implementing the objective of consumer legislation. Chapter five of this study offers discussion on two subjective issues- redressal issues and the right of access to justice. In discussing these issues, it highlights that acts as impediment of justice, deters people from seeking recourse to justice.

As the core focus of this study is justice, so chapter six and seven makes a review on the sectoral analysis of justice. In this connection, it offers discussion on the laws that deals with the most vulnerable sector of goods and services-food and health. This study characterizes these aspects of review as health and food justice respectively. These two chapters shall not depend on the data analysis or specific case-study, but it shall make a thematic and juridical review of justice.

This study holds the view that consumer justice cannot be dependent merely only on the conventional system of justice, i.e. statutory arrangements of justice. In some cases, the unconventional system poses to be more influential than conventional system of justice, i.e. statutory arrangement of justice. In view of this, the matter of activism seems to be more effective than other systems. From this point of view, this study shall emphasize on the review of consumer activism which is undertaken in chapter eight of this study. At the end, this study makes as recommendation for the development of consumer justice.

The study of consumer justice encompasses not only the narrower aspect of justice, i.e. laws and rules; it also encompasses the wider aspect of justice, e.g. fundamental bases of consumer justice, competing theories on justice and so on which are required for the comprehensive study of justice. From this point of view, a study on this aspect titling ‘Conceptualizing Consumer Justice’ is taken in chapter 2 of this study.
Consumer justice refers to the idea of doing justice to a consumer through legal, administrative and social processes. Consumer justice, in the context of Bangladesh, is mostly dependent on discretion, good conscience and sense of justice on the part of the court and other actors such as the regulators, service providers, and the sellers. In Bangladesh, consumer justice is typically dependant on statutes, directly or indirectly dealing with consumer affairs.

Unlike any other branch of justice, it implies not only the right of protection through the process of court, but also through other processes beyond the court. The factors by which consumer justice is influenced include law, religion, and socio-economic conditions and in some cases, international and neighbouring environment. It acts both vertically and horizontally, binding both individuals and the government. In this chapter, to borrow from Sen (1999: ix), we seek to clarify how we can proceed to address questions enhancing consumer justice and removing injustice, “rather than to offer resolutions of questions about the nature of perfect justice”. The fundamental basis of this branch of justice may be found in dome doctrinal bases. These aspects may not be jurisprudential, but they provide the thematic basis of consumer jurisprudence. The fundamental basis of consumer justice is seen from two standpoints – jurisprudential and non-jurisprudential. The jurisprudential basis includes rights and entitlements, fairness and reasoning and so on. The non-jurisprudential factors that constitute the fundamental basis of the concept are dialecticism, materialism, commodity exchange, social and economic dynamics, and so on.

2.1. Fundamental or doctrinal bases of consumer justice

There is no concrete idea regarding the conceptual framework of consumer justice, for which one need to count on some doctrinal approaches – dialecticism and materialism, universal right of protection and so on a brief review of which is given below.

2.1.1. Materialism

The factor that has influenced the origin of consumer justice is materialism\(^1\) which depicts the picture of human relation with property. Marx has characterized it as historical materialism (Jordan, 1967 and Wood, 1981). The moment human beings started to revolve their hopes and aspirations centering around property, there emerged two opposite forces – violation and redress. This interdependence of relation resulted in establishing a contractual relation between the buyer and seller. Marx has characterized this relationship of interdependence between man and property as ‘problem of legality’.\(^2\) The spirit of this relationship also functions in the exchange of consumer

---


\(^2\) Plamenatz, *German Marxism*, Chapter ii, Section i.
products which is the fundamental basis of consumer justice. [T]he property relations of men belong to the sphere of their legal relations: property is the first of all a legal institution’ (Cohen, 1978: 35). ‘To say that the key to understanding historical phenomena, it must be sought in the property relations of men saying that this key lies in the institutions of law’ (Cohen, 1978: 35). Derived from this proposition, Marx’s followers also believed that ‘human relation with property or commodity is the basis of law’ (Edelman, 1979:24). This structure emerged since the pre-historic period and has been carried forward through process of evolution. Actually, until the relationship between man and property’ had emerged, the ideas of consumer justice also did not emerge.

A critical analysis of the concept of materialism reveals that the fundamental basis of consumer justice rests two principles upon which the whole concept of dialecticism rests. These principles include union of opposites and the power of negative which has transformed negativity to positivity, violation into justice. The modern concept of consumer jurisprudence derives its thematic and fundamental basis from this relationship. From the discussion made above, it may be presumed that the concept of consumer justice has an inherent relation with the principles of dialectic materialism.

In the arena of justice, the term ‘union of opposites’ implies relationship of relativity, i.e. relation of opposite equal actions between two opposite forces. In the arena of consumer justice, this relation of opposite equal actions may be seen in ‘violation and redress’ with respect to goods and services. The recognition to this relationship is regarded as the primary basis of consumer justice. The relation between power of negative and consumer justice is that this power has transformed negativity to positivity, from violation to justice. Marx has identified that this power has given rise to many positive reforms in human civilization in support of which he characterizes ‘human or civil society as the clash of social forces’3 that has transcended by the universality of law and state. This power of negative is the inherent spirit of redress; it implies the condition that transforms the breach of law into justice. This power bears on universal principle of justice.

The present day consumer justice system owes its thematic basis to these principles in the sense that it has given rise to some jurisprudential thoughts that are equally functional on consumer jurisprudence. These principles include ‘Caveat Venditor against Caveat emptor, perceived value, fairness and reasoning, implied warranty, strict liability, competition, and so on. These principles have widely been applied in the arena of consumer justice.

From the above discussion, it may be presumed that the matter that has always been influential on consumer justice is materialism which has an indirect relation with dialecticism. This relation between consumer justice and dialecticism is universal which cannot be ignored by any means of law.

3 Hegel based his ideas on power of negative. On this, see Avenri (1972), and Dallmayr (1989).
2.1.2. Economic and Social dynamics

2.1.2.1. Economic

The factor that influences the principles of justice is economic dynamics. It has given rise to the idea of ‘economic market for goods’ upon which the whole system of consumer justice rests. The market place is the only place where commercial relation can be formed. It (market) gives consumers the opportunity to express the needs they feel through demand, enables the producer to gain knowledge of their demand and to deploy the resources needed to meet it…… formalizes the trade relationship between the isolated buyer and the individual seller (Nozick, 1974). It has also been observed that “the idea of ‘market for goods’ has figured in political and economic theory as a device for both defining and achieving certain community-wide goals… as a necessary condition of individual liberty, the condition under which free men and women may exercise individual initiative and choice so that their fates lie in their hands.”

It is not only economic factors, but also the matter of ‘free and equal will’ has also played as an important role in regulating the economic life of people (buyers and sellers). But, it has been observed that “The free and equal owners of commodities who meet in the market are ‘free and equal’ only in the abstract relation of appropriation and alienation. In real life, they are bound by various ties of mutual dependence”. But this problem of market challenges has given rise to the urgency of institutional development. In furtherance this, the measures economic benefit (e.g. refund, replacement, return, compensation and so on) have been taken as a measure for justice and it has given rise to the urgency of enacting laws on this aspect, (e.g. competition). These ideas of economic benefit as well as economic market are greatly dominated by two factors- ‘autonomy and community-wide goals’. It has been observed that “The autonomous will of those engaged in exchange (buyers and seller) is an indispensible pre-condition wherever the categories of value and exchange value come into play.”

From the above discussion, it may be presumed that the economic dynamics have provided the thematic bases for the whole system of consumer justice. From this point of view, it may be presumed that since the period when the civilization started to flourish, the economic dynamics has influenced the idea of justice. In other words, it provides the thematic and juridical bases for justice.

---

4 Ibid.
5 Ronald, Dworkin, What is equality? (1981), 10 Philosophy and Public Affairs 283. Unfortunately, the ‘economic market’ has been characterized as enemy to equality in different ways since that period.
6 Supra note 2, at p. 124.
7 Ibid.
2.1.2.2. Social

As ‘Every aspect of life is guided by the necessity of social benefit (Locke), and the aspect of ‘Justice can never be looked upon as an independent issue of judicial matter; rather it may be connected with the main structure of the society (Locke, 1679), so, the matter that has been considered as one of the dynamics for consumer justice is social benefit. ‘The real source of law is not statute, but activities of society itself’ (Ehrlinch, 1936). This accounts for the acceptance of social dynamics on justice to consumers. While analyzing the inherent relation between social dynamics and consumer justice, it has been observed that ‘In society, there is an inevitable conflict between social interests and each individual’s selfish interests. To reconcile this conflict, the state employs both the method of reward and punishment for enabling economic wants to be satisfied by the method of coercion. When a ‘consumer’s individual interest is defeated by selfish interest of the business community who adopts unfairness and restrictive trade practices, the society itself has the responsibility of settling these acts of violation by its own processes. An analysis from thematic point of view, it reveals that consumer justice is a matter of social contract. It is social in two senses – firstly, they regulate the conduct of members of society; secondly, it derives from human social practices’ (Dworkin). It presupposes eminence of a contract between the individual and the society upon which the whole system of justice rests. The recognition to this dynamics (Social contract) is the bases of consumer justice. ‘Every society has certain basic assumptions upon which it’s ordering rests, though for the most part these may be implicit rather than expressly formulated. Certain of these assumptions may be identified as the jural postulates of the legal system; as embodying its fundamental purposes… that they (values) are not static, but may change as society develops new needs and new tensions.’

The influence of this contract on consumer justice is so wide that it may be regarded as measures of social control and solidarity. The matter that provides justification to such proposition is that ‘[L]aw is the measuring rod of society that produces the principal form of social solidarity’ (Durkheim, 1984:68). To provide the thematic basis behind this proposition, it argues ‘law is a form of social control, to be adequately employed in enabling just claims and desires to be satisfied, must be developed in relation to existing social needs and must not chary of relying upon the social sciences in studying the place of law in society and the means of making it most effective in action (Pound, 1870-1964). From this point of view, consumer justice is considered as one of the measures of social control and solidarity against unfairness prevailing in the market. In the above it has been seen that the influence of social dynamics on consumer justice is so wide that while enacting economic laws, the legislature have repeatedly been seen to enact laws respecting social dynamics, e.g. The Act of Monopolies, 1602. The court of England while declaring monopoly as illegal, they

9 Ibid.
have taken social dynamics in their consideration.\textsuperscript{10} From this point of view, consumer justice may be regarded as part of social justice.

2.1.3. Jurisprudential arguments

The aspect of consumer justice receives its fundamental basis from some jural factors which most includes universality of the rights of protection, principle as to rights and entitlement and so on.

2.1.3.1. Universality of the right of protection

The very basis of consumer justice may be found in the universal right of protection. It refers to those moral legal aspects which cannot be separated from the life of a consumer.

This aspect of protection has been advocated in a various ways and means among which the most important is natural law and natural justice. The justification for integrating consumer justice with aspect may be found in ‘\textit{Fiat justitia, et pereat mundus}.\textsuperscript{11} According to the spirit of this maxim, every person is restrained from invading the rights of others as well as from doing hurt to them for the ‘willeth, peace and preservation of all mankind.’\textsuperscript{12} This concept of protection provides this conviction that ‘Man being born, as has been proved, with a little to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally other man, or number of men in the world, hath a nature, a power not only to preserve his property – that is, his life, liberty and estate, against injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.’\textsuperscript{13} The justification behind providing recognition to this aspect lies in the fact that ‘No political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto punish the offences of all those of the society, there, and there only, is political society where every one of the members hath quitted natural power, resigned it up to the law established by it (Rousseau, 1725). This view represents a concept that imposes a duty upon the state to ensure the right of protection to consumers. The very basis of this right may also be searched in some other factors – humanism, climate, religion, laws and maxims, morals and customs (Montesquieu, 1748: 15). This may be characterized as the passive element within a system conceived as the ceaseless interaction of moral and physical forces (Ibid. Montesquieu: 17). These factors may not be jural, but, the whole of a society is hinged on the functioning of these factors. From this point of view, the universal right of protection may be regarded as the factor providing the fundamental basis of justice to consumers.

\textsuperscript{10} Co. Rep. 84.
\textsuperscript{11} It implies ‘let justice be done, though the world perishes’ and it was preached by the 16\textsuperscript{th} century Roman Emperor Ferdinand I.
\textsuperscript{12} The civil Government, Two Treaties of Government; see Dennis Llloyd, \textit{An Introduction to Jurisprudence}, p. 149).
\textsuperscript{13} Please see Locke’s \textit{Social Contract: Two Treaties of Government}, BK II, Chapter 7.
2.1.3.2. Rights and entitlement

Despite the aspect of universal right of protection, the jurisprudential structure of this branch of justice rests principally on two aspects which include – rights and entitlement.

Apparently, the term ‘rights and entitlement’ seems to mean and include the same sense of the term, but there is a little difference between the two. In this study, the term ‘rights’ is used to mean and include the charter of rights provided only by statutory law and the term ‘entitlement’ is used to mean and include the inseparable right of protection which cannot be curbed, denied, waived or diminished by any means. Those who espouse rights based theory of justice, insist on the pre-eminence of some rights already declared by law. The proponents of this school, (e.g. Dworkin) claim that ‘the whole institution of rights rest on the conviction that the invasion of a relatively important right’ and to oppose it may be regarded as ‘Grave injustice’. They define it as valuable commodity (Wasserstrom, 1964: 628-629) or important moral coinage (Buchanan, 1984: 2(1)). While explaining the influence of rights on justice, it is argued that ‘A world without rights, no matter how full of benevolence and devotion…, would suffer an immense moral impoverishment …. A world with claim of rights is one in which all persons, as actual or potential claimants, are dignified objects of respect (Feinberg, 1963:137).

The rights based theory of justice is based on two competing theories: will or choice theory; and interest or benefit theory. The will theory holds the view that the purpose of law is ‘to grant the widest possible means of self-expression to the individual, the maximum degree of self-assertion’ (Hart, 1955: 175). It is closely related to the idea of moral individualism in which the right-bearer, by virtue of this power waives or enforces the duty in question and extinguishes his choice or discretion (Mill, 1859). This “Individual discretion is the single most feature of the concept of ‘rights’ (Flathman, 1976).

The interest or benefit theory holds the view that ‘Rights are said to be benefits secured for persons by rules regulating relationships (Hacker and Raj, 1977). The particular strength of this theory is that it covers all types of rights as well as liberties; e.g. the so-called economic rights such as health care, education etc which are considered as consumer related issue also. The interest or benefit theory follows the rules of relativism wherein redresses function as the consequence that naturally flows or derives from any action or choice’.

Those who rely on moral ethical forces as its fundamental basis, they advocate ‘entitlement’ as the moral legal basis of justice. Ordinarily, the term ‘entitlement’ implies an individual’s right to

---

15 The interest or benefit theory was found first in the writings of Bentham, who argues not to protect individual assertion but certain interests.
16 Please see ‘Essays on Bentham’ (1982).
17 Dennis Lloyd, An Introduction to Jurisprudence, p. 355.
receive a value or benefit under any law; when a matter is termed as entitlement, it provides guarantee of access to some benefits under any law. In this study, the term ‘entitlement’ is used to mean and include the inseparable right of protection of the consumer the very basis of which is moral righteousness (e.g. ethics, rationality, law, equity, fairness and so on). From this point of view, we may conclude that to oppose the righteousness of entitlement is ‘to oppose the possibility of a community governed by the moral law.

While advocating ‘moral righteousness’ as the basis of entitlement, the proponents of this school argue that ‘the state grows by an ‘invisible process and by morally permissible means’, without anyone’s rights being violated’. The state being ‘a system of diverse communities, organized along different lines and perhaps encouraging different types of characters, and different patterns of abilities and skills best realizes the utopian aspirations of untold dreamers and visionaries’ through the process of justice. These processes of aspirations ‘treats us as persons having individual rights with the dignity that constitutes entitlement … which allows us, (individually or collectively) to choose our life and realize our ends aided by voluntary cooperation of other individuals possessing the same dignity. This aspect of view is regarded as the fundamental basis of entitlement. It is also regarded as the public manifestation of the positive moral law (Aquinas).18 In view of this, any law or agreement divesting oneself of his inherent right of protection is immoral and cannot be supported. The failure to grasp the spirit of this aspect may lead to anarchic situation.

Nozick developed his ‘entitlement theory’ of justice; he characterizes ‘entitlement as a provision made in accordance with legal frameworks of a society (Nozick, 1974). For the purpose of expanding its influence on justice, he claims the right of justice as ‘being associated with a moral or social principle. This views of ‘entitlement’ covers those moral legal principles to which every individual has an inherent right to enforce (e.g. the right of access to justice, right of safety, and security of life, body and property and so on). To develop his entitlement based theory of justice, he emphasizes on acting according to the principle what they are morally required to do.

The justification for integrating the aspect of entitlement with consumer justice may be drawn from this fact that ‘Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property - that is, his life, liberty and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the deserves, even with death itself, in crimes

---

18 For Aquinas, please see Dennis Lloyd, *An Introduction to Jurisprudence*, p. 107.
where the heinousness of the fact, in his opinion, requires it”. It implies that the right of justice cannot be separated from the life of a consumer.

The aspect of ‘Entitlement’ imports an ideal situation in the market where the seller and buyer cooperate with each other. For arguing this aspect of relation between consumer justice and entitlement, we may rest on the idea of economic goods that arises in the rightful claims of ownership. With the passage of time there arise many areas of concern which cannot be resolved within the purview of statutory legislation. Unless these issues are addressed by bringing them under the umbrella of entitlement, it may become difficult to claim it under the regime of statutory law.

‘Entitlement’ does not spell the ‘dos or do not's nor does it outline the ‘modus operandi’ of protection; it simply outlines the areas where the state is to intervene for the ‘goods of society’. This part of manifestation is done by underlying the fundamental principles of state policy in the constitution or by statutory law. Actually, people enjoy their rights more by undefined than defined regime of legislation and the upcoming and issues of justice are addressed by ‘entitlement’. From this point of view, the influence of the aspect of entitlement on individuals’ right to justice cannot be ignored. It is the ‘passive element within a system conceived of as the ceaseless interaction of moral and physical forces’ (Swingewood, 1948:17). Unless these moral obligations are transformed into law, it is difficult to enforce the principles of entitlement as legal compulsions. From this point of view, we may integrate consumer justice with ‘entitlement’ as inseparable covenants of life which cannot be separated by any means of law.

2.2. Competing theories on consumer justice

Consumer justice is not an isolated branch of justice that has no relation with other aspects of human social life. It possesses multidimensional relation with human rights, socio-economic affairs of people. Considering its inherent relation with these aspects it may characterized as social and economic justice as well as part of human rights.

2.2.1. Consumer justice as social justice

The factor that has greatly influenced to characterize this branch of justice as social justice is the welfarist school of jurisprudence. In furtherance of this, some legal thinkers of welfarist view tries to relate it with the welfarist view of justice (Shewell & Kaplov, 2002).

‘Social beings are recognized as increasingly important and it is important for any effective consumer protection policy to address (Cartwright, 2012:2). It may be mentioned that every society formulates some ‘standards of code’ that serves ‘fundamental basis of the society without which no justice can be enforced in society. The society has also formulated some code of conduct for

---

regulating the relation between the buyer and seller. These codes are social in nature and it has a great influence on the system of justice. Consumer justice is based on this invisible process of contract.

In characterizing it as a matter of social justice the factor that has to be taken into consideration is its impact upon society. The offence of adulteration may be individual in nature, but its impacts on society are heavier than individual loss and injury. The reason why it should be related with social justice is the effect of imbalances and failures of market for which the consumer need protection. It has been observed that the system of market ‘gives consumers the opportunity to express the needs they feel through demand,… enables the producer to gain knowledge of this demand and to deploy the resources needed to meet it,…formalizes the trade relationship between the isolated buyer and the individual seller’ (Bourgoingle, 1981:6). But, it cannot provide the guarantee of justice to consumer; the imbalances diminish the opportunities of market. ‘The imbalances and failures that arise in the course of development of an economic system based on the free play of market forces account for the emergence of a deep-seated social movement whose first demand is to establish free and fair market conditions making a real balance between sellers and consumers (Rahman,2010:2-3).

The other point for considering it as a social justice may be the influence of psychological stimulants on society. These aspects influence the life-style or pattern of a consuming society. ‘In a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers need the greatest protection from sharp business practices’.20 Another factor that has the capacity to influence consumer justice is its homogeneity of its influence on society. The offence of adulteration, though, individual in nature, has greatest a costly effects on the life and liberty of people living in the society. Considering the gravity of influence on society, consumer legislations emphasizes on “setting up procedures and structures for defining standards rules that serve to promote the interests of the consumers in the market. It also extends well beyond the mere protection of economic interests of the consumers, to become part of more general social policy on consumer affairs.”21 By recognizing a number of consumer rights and establishing a specific normative framework, it is conducive to achieve the aims of seeking to promote the interests of consumers”22

An analysis of judicial precepts or precedents has also proved its readiness to accept its influence on society. In some of the cases, the courts have been seen to deliver its judgment basing upon its influence on society; e.g. the impact of implied warranty or merchantable quality on society.23 Taking this matter into consideration, the absence of these contracts has taken the breach of implied warranty as ‘fundamental breach of contract’ (Kamarov, 1981:11). From the discussion made

---

22 Ibid., at pp. 23-24.
23 Randall v. Newson (1877) 2 QBD 102.
above, consumer justice may be termed as a branch of social justice and the legislation as social legislation.

2.2.2. Consumer justice as economic justice

The proponents of economic school of justice identify the factor as most influential on this branch of justice is economic aspect of law. They emphasize more on economic than legal precepts and considers efficient allocation of resources as more influential on justice. ‘[T]he economic analysis has come to dominate thinking about law and justice’.24 ‘The economic analysis of law which argues, by contrast, that large areas of law can be explained by seeing them as concerned not so much with matters of justice as with the efficient allocation of resources is highly influential.’(Posner, 1983).25

The proximity of relevance with economic justice may be found in the words of Holmes who point out that ‘all considerations of human beings shall be guided or influenced by the economic consideration or the market conditions’ (1897: 469). Due to the reasons stated above, while the problems of consumer came to the forefront of the play, the nature of protection to consumers started to change. This change helped to recognize the ‘consumer’ as a legal entity.

In the post-World War (II) period of rapid economic growth, when the competitive market was being considered as being one of the important determinant for consumer protection, it encouraged to grow more enterprises for providing benefits to the consumer. But, It was also thought that a strong consumer protection will discourage the producers and ultimately affect the market force by tying the hands of the producers. So, the drawbacks of this system was that it provided less importance to legal that economic aspect of protection. As such, no significant development could be imported in the arena of legal concept governing the consumer-seller relationship in the market. Due to this it was felt necessary to address the matter of economic violation from the legal point of view.

The imbalances and failures that arise in an economic system based on the free play of market forces need to be addressed by establishing free and fair market conditions making for a real balance between suppliers and consumers. In view of this, consumer legislations comprises ‘the body of standards, rules and instruments representing the juridical fruit born by the various efforts that have been made to secure or improve the protection of the consumer on the economic market. By recognizing a number of consumer rights and establishing a specific normative framework, it is conducive to the achievement of aims of the movement seeking to promote the interests of consumers” prominent among which is the aim to establish a balance of power between consumers and their economic partners or, probably more realistically, to define the means whereby the existing imbalance can be reduced.26 In the present context of free market economy, the impact of economic

---

factors cannot be kept confined only within the consumer of a particular area; it has crossed the political and territorial boundary. In view of this, the concept of international warranty has emerged as a growing issue for providing extended protection to consumers.

2.2.3. Consumer justice as human rights

An analogy of the nature and volume of consumer violation reveals that there exists a relation between human rights and consumer justice. The root of justification for so recognizing lies in the documentation of The Universal Declaration of Human Rights, 1948 which enumerates the most important rights of humanity which the state, society is to respect.

Although, this declaration does not give a formal recognition to the inherent relation between consumer justice and human rights, but, it has indirect influence on some fundamental rights that are regarded as the primary basis of the right of access to justice. In furtherance of this, it may be said that UDHR falls within one of such legislation which has greatest influence on consumer justice. Although this declaration defines some rights, but the main thrust is on justice for which it may be regarded as the primary international recognition to ‘consumer justice’. The beauty of UDHR is that it is does not specify the specific areas of legislation, but it recognizes the fundamental principle - rights to justice. This recognition uniformly influences the legislation process the fundamental state policy of the constitution. The ‘Fundamental Principles of State Policy’ of the constitution recognizes human rights as one of the fundamental state policy. Article-11 of the constitution spells out that “The republic shall be a democracy in which fundamental human rights and freedoms and respect for dignity and worth of the human person shall be guaranteed …. at all levels…” Article- 32 of the constitution spells out that ‘No person shall be deprived of life or personal liberty in accordance with law’. An analysis of these provisions signifies that the very basis of consumer justice lies in human rights as stated by the fundamental state policy of the constitution and UDHR-1948. When remedy against any violation is not available at all or not easily accessible, then it becomes the issue of human rights. When absence of remedy against adulteration of medicine or food becomes the cause of death or health hazards to millions of people, then it may becomes the issue of human rights. The use of steroid or hormone in animal feed may apparently be regarded as a consumer rights violation, but when it becomes the cause of death to many children, then it turns into an issue of human rights vis-a-vis an issue of consumer justice. From the discussion made above, the aspect of consumer justice becomes an issue of human rights also.

---

27 Article 11 of Bangladesh Constitution.
2.3. The concept of consumer Justice

Consumer justice is a matter of relative perception formed, shaped and moulded by various jurisprudential and non-jurisprudential factors. These factors include social, legal, economic, human rights and so on. As a matter of conceptualization, by origin, the ‘consumer’ is an economic entity. But, he (consumer) is not only an economic entity, but also a legal entity (Wasserstrom, 1964:628-629) which has been recognized both by domestic and international legislations. In this connection we may refer to the enactments of 1950s\textsuperscript{28} and onwards while referring to domestic legislation. We may also refer to international guidelines, convention and treaties, covenants while referring to international legislations. In this respect reference may be made to Social and Economic Council’s initiative of 1970s, when the UN officially recognized ‘consumer rights’ as a means of socio-economic development. Reference may also be made to the ‘Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Resolution no. 36/63 of 1980) and the UN Guideline of Consumer Protection 1985. Since then, ‘consumer justice’ got its international recognition as a legal and economic entity.

There is no doctrinal proposition regarding the nature of this branch of justice - civil, criminal, tort or administrative. Taking the multi-dimensional influence of this justice on various aspects of life, Bangladesh has considered it primarily as matter of criminal liability and secondarily the civil. The welfarist view of justice considers holds the view that the matter of consumer justice is greatly influenced by welfarism and accordingly, it is characterized as welfare justice and the legislations as welfare legislation. The countries that emphasize on restorative justice have a tendency of considering the consumer violation as a matter of civil liability. In this respect, we may refer to the consumer laws of UK, India.\textsuperscript{29} An analysis of consumer law of UK, India reveals that these countries have characterized the consumer violation as a matter of civil justice and accordingly, they provide remedies of civil nature (e.g. compensation, refund, replacement, return of goods and so on). On the contrary, the countries that consider consumer violation as a matter of retributive justice have a tendency of characterizing them as a matter of criminal justice. The penal provisions of consumer law of these countries are burdened with criminal measures like imprisonment or fine. A review of consumer laws of Bangladesh, Pakistan or Sri Lanka reveals that they consider consumer justice as a matter falling within the purview of criminal justice and the consumer laws of these countries

\textsuperscript{28} For example, the Essential Commodities Act 1957, the Pure Food Ordinance 1959 characterizes the ‘consumer’ as economic entity.

emphasize largely on criminal measures like imprisonment, fine or both.\textsuperscript{30} According to the discussion made above, the matter of consumer justice may be defined as justice of civil, criminal, or administrative nature.

In the above, it has already been mentioned that in forming, shaping and moulding the concept of consumer justice, the divergence of the school of plays the key role. According to the sociological school of thought, it is a measure of social control. In characterizing the concept of this branch of justice, the factor that acts as one of the important factor is public interest. Considering it as a matter of public justice, the regime of consumer laws of Bangladesh provides the right to lodge complaint by non-consumers where the question of public interest is involved. From this point of view, consumer justice may be characterized as public interest justice and the law as public interest law. From this point of view, it is also considered as public interest law where the aspect of ‘public interest’ justice.

Although it deals with a special kind of violations, still, the consumer law is not considered as a special law. Considering its wide scale of influence on beneficiary group or stakeholder, it serves the purpose of all classes of people. So it has been accepted without contention that ‘it is now a matter of no contention that consumer protection is not simply a middle-class issue but a matter of vital importance for the less well-off members of society.’\textsuperscript{31}

The matter of consumer justice may be defined as equitable justice. Considering its influence on consumers’ right of protection, it holds the view that there prevails an implied contract between the buyer and seller as to the quality, quantity, and other issues of fair businesses. These contracts are universal in nature and the whole system of consumer justice revolves upon this principle. This aspect of justice is greatly influenced by some principles which include Caveat Venditor, perceived value, fairness, safety and security of person, right of access to justice, rational legal system, and sovereignty of buyer, right to information, public interest and equitable justice, protection of creative rights, and so on. Actually, these principles constitute the primary basis for consumer justice and they regulate human relation with property. The comparative advantage of providing recognition to these principles is that the scope of justice has been widened to such a level that it cannot be denied on any ground of law. Actually, the principle of Caveat Venditor plays the guiding force on this aspect. It has been observed that the whole system of consumer justice has been revolutionized by \textit{Donoghue v. Stevenson} case.\textsuperscript{32} Since then, the principle of Caveat Venditor has become the principal guiding force justice.

\textsuperscript{30} Sections 37-56 of the Consumer Rights Protection Act, 2009 (Bangladesh), Section 9 of the Islamabad Consumers Protection Act 1995 (Pakistan), Section-28 of The Consumer Protection Act 1979 (Sri Lanka) provides only jail or fine as consequential relief.
\textsuperscript{32} (1932) 2 QBD 532.
Ordinarily, the property related laws consider the aspect of goods and services are the core area of its purview. But, the concept of consumer justice deviates from ordinary view and it imports some pre-conditions without complying which, the goods and services cannot fall within the purview of this justice. So, the matter of goods and services under consumer laws are different from goods and services under other laws. These conditions include that for being considered as goods or services under consumer law, it must be goods and services of consumer nature, not of commercial nature. Due to this reason, some of the capital goods (e.g. electric appliances, generators) although meant for consumers do not fall within the purview of this justice. With the passage of time, a sharp change has occurred in the arena of consumption due to which the arena of consumer goods or services have expanded tremendously. For these reasons, cars, home and electric appliances and so on are transforming from capital goods to everyday consumable goods. Similarly, the aspect of services have changed or diversified from traditional system of medical treatment to nuclear medicines, from small to highly professional health services. For this reason, the wider aspect of goods and services has come under the purview of conceptual framework of consumer justice. In this respect, it is not only the tangible, but also the intangible aspects that have formed part of the concept of this branch of justice. These aspects include intellectual property rights and the offences include offences relating to counterfeit or false marks, deceptive trade descriptions, and anti-trust activity and so on. These matters may not directly fall within consumer violation, but, its role in protecting the consumer from being cheated and deceived cannot be denied. From this point of view, the intangible aspect of justice (e.g. intellectual property rights) shall also form the conceptual framework of consumer justice. But, it has been observed that the regime of laws on this aspect have not changed accordingly.

The concept of consumer justice respects not only the conventional, but, also the unconventional system of justice. These aspects include alternative dispute resolution, ombudsman, and small cause’s dispute resolution systems and so on. So, some of the countries have incorporated these systems in their consumer laws. A good number of consumer disputes in England are being settled by Ombudsman. From this point of view, the functions of unconventional systems or institutions have become part of this.

In constituting the conceptual framework of consumer justice, question may arise whether international legislations, precepts form part of this legislation. The answer to this question is the matter of consumer justice does not follow unilateralism, rather it believes in universalism of justice. From this point of view, it cannot be kept limited only to the regime of domestic law; it extends to the

---

33 Section 483 of the Penal Code 1860: A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trademark.

34 Bangladesh has also enacted the Ombudsman Act, 1980.
premises of international law where it matches with the purpose of justice. In furtherance of this, the European courts have accepted international legislations as integral part of its legislation.\textsuperscript{35}

The factor that influences the conceptual framework of consumer justice is fairness. It signifies some fundamental conditions the existence of which is required for the basic structure of the society.\textsuperscript{36} Fairness functions as the as public perception and confidence upon the system of justice. It provides protection of ‘one’ in opposition to the rights of ‘others’ with whom he transacts. It protects the trusting of people from fraud and deceit.\textsuperscript{37} In defining the conception of fairness, the law is tried to be searched in law found in all creatures. ‘The association of justice with fairness has [thus] been historically and culturally rare and is perhaps chiefly a modern innovation’ (Lorraine (2008). For the reasons mentioned above, it (fairness) functions as the fundamental basis for consumer justice. It is considered as one of the apex issue for a consumer in the market. A study at UCLA in 2008 has shown that ‘fairness, as yet has been proved by psychologists, is an instinct wired in brain of animals. It functions with the same part of brain that responds to food; it shows that brain reacts to fairness as it does to money and chocolate.\textsuperscript{38} In another research conducted at Emory University, Georgia, USA in 2003 involving Capuchin Monkeys demonstrated this sense of fairness as it is found to be instinctual in human behavior.\textsuperscript{39}

The ideas of ‘Fairness’ has also been characterized as contract theory’. These contracts are to govern ‘the assignment of rights and duties and to regulate the distribution of social and economic advantages. … This aspect of social system defines and secures the equal liberties of citizenship and establishes social and economic equality’.\textsuperscript{40} This choice of fairness in economic transaction is the most important choice of human beings that has given rise to this discipline of justice. The recognition to the existence of a contract between the buyer and seller is the core element of fairness. Fairness is not expected only in the judicial processes, it is also expected in the process of legislation. In this respect, we may refer to Edward VI’s legislations on monopoly which was enacted for importing fairness. So, the courts provided necessary directives declaring the attempt of monopoly as ‘engrossing’ (Borrie and Diamond, 1964:241).

From the discussion made above, it may be concluded that consumer justice is not only a matter of law, but also a matter of perception created and influenced by various jurisprudential and non-jurisprudential factors. These factors also influenced the evolution and development of this

\textsuperscript{36} Rawls, John, \textit{A Theory of Justice} (Revised edition, 1999), pp.52-56.
\textsuperscript{37} \textit{American Philatelic Society v. Clairborne} 1935, 3 Cal 2d. 689, 698-699.
\textsuperscript{38} Nature 425, 297-299, 18\textsuperscript{th} September 2003; <http://newsroom.ucla.edu/portal/ucla/brain-reacts-to-as-it-49042>.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., see Rawls, 1999: 52-56.
branch of justice. In view of this, a review on the aspect of evolution of this branch of justice is undertaken below.
CHAPTER 3
ORIGIN AND DEVELOPMENT OF CONSUMER JUSTICE

There is no direct evidence at which point of history consumer justice has merged in human civilization. But, the anthropological study of law reveals that the idea of consumer justice existed in the primitive society also. The people of the pre-historic period or ancient times “had … set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things” (Gluckman, 1955: 229). In this respect, the term ‘other’ is used to mean ‘person’ and things as goods. In view of this, we shall critically analyze the evolutionary process of consumer justice.

It has been widely accepted that there exists an inherent nexus between history and law. ‘[I]f the subject is law, the roads are plain to anthropology,’’ and it is “perfectly proper to regard and study the law simply as a great anthropological document’ (Holmes, 1889:443). The anthropological study of law reveals that the factors that had influenced the forming and shaping of other branch of justice had also been functional on consumer justice equally. Traced with care, a keen study as to the economic life of primitive societies reveals that ‘The idea of consumer protection existed in every social order and judicial mechanism, whether primitive or modern’ (Konoorayar, 2012:155). There existed some measures of justice which provided the idea of consumer justice in primitive society and these ideas took the shape of code of conduct. These codes were applied “through the systematic application of the force of politically organized society’.

Now the question that arises what are the factors that influenced the evolutional process of consumer justice. In this respect, it may be necessary to mention that the matter of justice is not only a matter of history, but also a matter being influenced by both jurisprudential and non-judicial factors. In view of this, it may be presumed that it has emerged not in isolation, but in collaboration with non-jurisprudential school of thoughts. These factors have an indirect influence on the socio-economic life of a consumer due to which it provide the thematic and pragmatic bases to the emergence or development of consumer justice. In this connection, factors that had influenced the emergence of consumer justice include dialectic materialism, commodity exchange and so on.

In view of above discussion, the focus of this study shall not only be the landmark legislations on consumer protection, but the jurisprudential or non-jurisprudential factors that have influenced the forming and shaping of this justice since the time from the pre-historic and ancient period.

3.1. Pre-history & ancient period

3.1.1. Emergence of the idea of justice relating to consumer goods

There is no direct evidence as to the existence of the idea of consumer justice. But, it has been proved that ‘the primitive peoples without formal legal codes, courts, policemen or prisons… had their own legal system-custom, which it is assumed as absolutely rigid; but, complete conformity being enforced
by the overwhelming power of group sentiment. These codes of conduct contained “the elementary principles which they were bound to respect for setting up of a viable society.

‘In all periods of human civilization, societies have displayed a melancholy record of oppression, discrimination, cheating against which natural law served the purpose of protection which may be described as ‘natural necessity’. “These simple facts constitute a core of indisputable truth in the doctrines of natural law”. The anthropological study of different tribes reveals that there existed various systems or codes of conduct the purpose of which was social control. Consumer justice did not emerge as an isolated branch of justice; it has emerged as a response to the challenges found in the commodity exchange; it has emerged as a ‘natural necessity from a ‘semi-sociological point of view’.

In this respect, we may refer to the inscriptions made in the Code of Hammurabi and Kautilya’s ‘Arthashastra’. Max Gluckman found that the clan people “had also law as set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things”.

A critical analysis of these codes also reveal that the matter of justice was regarded as socio-economic issue and all these matters were regulated by the central authority through some ‘legal system’ or set of rules. Malinowski characterizes these codes as “normatively clothed set of abstractions from practice.” The measures inscribed in these codes bear testimony to the evolving and existing of the idea of justice among primitive people. These systems were enforced by a central authority mostly based on ‘reciprocity, systematic incidence, publicity. In this respect, we may refer to Malinowski’s study of the Trobrianders’ society of the Trobriand Island, or Max Gluckman’s study of the Barotse society in Africa which provides the proof of ‘Central authority’ providing the codes, functioning as the courts, and discharging the duties of constables.

From the discussion made above, it may be presumed that if the idea of justice existed for any kind of breaches, the similar idea of consumer justice also evolved and existed among ancient people. For the clarity of understanding, a brief review on one of such code the Code of Hammurabi.

3.1.1.1 Code of Hammurabi: the primary Code of conduct regulating economic life of people

Among the land-mark legislations, the code of Hammurabi is regarded as one of the landmark legislation in this respect. It had emerged and developed in the Mediterranean green-grass of ‘Babylonian civilization’ and was displayed in the conspicuous place of the city of Babylonia. The code comprised some laws in relation to the exchange of goods and a few areas of services, especially with respect to manufacturing of fake-gold ornaments, wrong treatment of a patient, violation of building construction code and so on’. The punishment of such works were engraved on stones and displayed at the conspicuous places of the city or market. The guiding principle that governed this branch of justice was ‘Caveat emptor (let the buyer be informed). Under this code, the buyer had to be
cautious about the purchase of his goods and the seller was not responsible for any defect found after purchase.

3.1.2. Commodity Exchange

In the above discussion, we have come to know that the ‘human relation with property’ is the fundamental principle that provides fundamental basis for consumer justice. But, a new dimension has been added to the idea of consumer justice by the commodity exchange theory of Pashukanis. He holds the view that firstly the commodities are produced and then it is exchanged. All law is directed towards this process between subjects who act as guardians of commodity. Commodity is the cell form of legal relations and “Law arises out of the needs of the commodity form of production”. It holds the view that “law is the result of a specific stage of social development only and law arises out of the needs of ‘commodity form of production… Even the concept of criminal law is connected with the contractual relation with respect to property. The Concept of theft may be been related with the concept of contract”.

In the commodity exchange form of production, property is considered as a core issue of law and the whole body of legal doctrine is based upon the process of commodity exchange and the conflicts related to it. As exchange develops so also the dispute increases and a legal system has to emerge to address these matters of conflict. It holds the view that disputes, conflict of interest that create the legal form, the legal superstructure. The school that provides the jurisprudential basis to this thought is Supporting Pashukanis’s commodity exchange theory, Edelman holds the view that the genius’ of ‘Commodity exchange’ can be applied to all other laws. From historical point of view, ‘commodity exchange’ may be argued as the starting point of consumer justice. The reason for which commodity exchange is considered as the one of the reasons of the emergence of consumer justice is that it imports the idea of an invisible process of contract and contractual relation between the buyer and seller. It considers this aspect of contract as ‘the foundation of all law and law exists for the sole purpose of being utterly spent’.

Apparently, the Commodity exchange theory provides the thematic basis to consumer justice. but, it is subject to some limitations which include that it considers human beings as a mechanical subject guided by rules of abstract or material science; it ignores the humanitarian part law. Despite its inherent limitations, commodity exchange is considered as the science for consumer justice.

3.1.3. Moral ethical forces/institutions in regulating economic life of people

The anthropological study of law further reveals that since the time of human civilization, the factors that have forced the emergence of this branch of justice is moral ethical forces which includes ethics and morality, norms and values, and religion. These forces have influenced the forming and shaping of societal rules to bind people.
3.1.3.1. Ethics and morality

‘Ethics or morality’ is the science of human conduct that influences justice. That the law in action is not a mere system of rules; it involves the use of certain moral principles. That among other factors ‘morality’ may and do concur in the development of a legal rule, and that where there is a possible choice in adjudication, moral or other extra-legal considerations may induce the coming to one decision rather that another. Laws are defined as the positive morality by the general opinion of any class or society of persons (Austin: 134-142). Law is regarded as ‘the only possible public manifestation of the moral law’ (Aquinas). Unless a rule or code possesses its moral ethical forces, it loses its acceptability irrespective of its being legal. What the positivist school insists is that once the rule is laid down or determined, it does not cease to be law until it collides or does not show to be in conflict with morality

Unlike any other branch of justice, ‘morality’ may influence consumer justice in two approaches: (a) the skilled application of morality to legal rules and (b) the exercise of inherent power by judges to reject immoral rules. ‘By the skilled application of these principles to legal rules, the judicial process distills a moral content out of the legal order. Another approach that would go much further and confer upon the legal process is inherent power to reject immoral rules as essentially non-legal. According to the present doctrine, ‘it is a matter of the internal structure of the legal system, which treats immoral rules as inadmissible rather than as being annulled by an external law of nature (Fuller, 1969). A critical analysis on to the evolution of consumer justice may reveal that the way morality influences justice is the way a judge exercises his discretion.

Different studies have shown that consumers react differently to different kinds of ethical issues. ‘Morality or Ethics’ is not a static, it is dynamic which varies relatively within the bounds of time and space (Sen, 1999). There are various ways in which morality or ethics has been tried to be connected with law as a factor to provide the basis for consumer justice. Depending upon the moral or ethical standards and legal cultural heritage of a country, the aspect of justice may vary from jurisdiction to jurisdiction. Consumer ethics in the European region may not be equal with the cultural standard of Asia. Having the same legal cultural heritage, the Consumer Protection Act-1986, in India, it is a matter of civil liability; whereas, it is considered to be a matter of criminal liability in Sri Lanka, Bangladesh.

As the state ‘grows by an invisible process and by morally permissible means, without anyone’s rights being violated, it cannot be seen ‘to oppose the possibility of a community governed by the moral law. For an act to be legal there must have a motive considered good independently of the sense of the virtue of the action’ (Hume, 1740: 542-543). As rights are not gifts from God’ (Dworkin, 1974), “morality arises and can only arise from freedom (Kant, 1724-1804). Morality or
ethics is the emotional construct of human beings, it is guided by reasons. The application of moral principle has been seen in the shift of legal principle from Caveat emptor to Caveat Venditor.

In some studies it has been shown that ‘The consumers evaluate seller’s actions and form ethical judgments. These judgments are a major explanatory variable in consumer store loyalty intentions. This dynamism of morality depends upon the liberty or independence of consumer to think about a particular issue what we call moral independence. Consumer justice respects this independence or liberty of the consumer. Because of this independence, the consumer is at a moral liberty to think that no sale can be executed in manner repugnant to his fundamental rights. In this respect, it may not be wrong to mention that this factor of moral independence had greatly influenced the judges to give a broader line principle of consumer justice by making a paradigm shift from Caveat emptor to Caveat Venditor in Donoghue vs. Stevenson (1932).

One of the most important institutions that function in human beings is reason and institution. ‘Reason and emotion play complementary roles in human reflection. The importance of emotions can be appreciated within the reach of reason’ (Sen, 2009:39). Among the factor of reasons, the moral ethical force that influences conjustice is equitable and good. From the above discussion, it may be presumed that the state of conjustice has emerged from the moral ethical forces. It is the reflection of morality where reason and emotion provides its fundamental basis for enforcement.

3.1.3.2. Norms and values

As a matter concerning human beings, consumer justice had had its origin in the holy land of ‘norms and values’. It is regarded as the first constitution of human civilization. ‘Human laws are not in themselves statements of fact, they are rules or norms, which prescribe a course of conduct, and indicate what, should happen in default (Kelsen517-522). ‘A multiplicity of norms constitutes a unity, a system, an order, when validly can be traced back to its final source in a single norm. This basic norm constitutes the unity in diversity of all the norms which makes up the system. All the individual norms can be derived from the basic norm by an operation of thought, by deduction from universal to particular (Kelsen, 1935:517-522). In the above discussion it has already been described that ‘norms influence justice, the question may arise ‘which of the norms that may be identified as influencing consumer justice? The answer may be the ‘higher authorizing of an act of will directed toward the conduct of others’(Kelsen, 1986).

3.1.4. Religion

In an empirical study, it was found that ‘religiosity is in fact, an important personal characteristic that forms some types of ethical judgments (Vittel and Paolillo, 2003). The influence of religion is not confined only within the spiritual aspects of life; it also imports some moral ethical forces that bind people in the transaction of goods. The recent studies show that religion is an important cultural and
individual variable which has an obvious importance on consumers’ lives. It has influenced the origin and development of consumer justice by forming some ethics to which people may agree. Regarding its influence on the day to day life of people, R.W. Gordon characterizing religion as cluster of belief, expresses his view that “Law like religion and television images, ties in with a lot of other non-legal but similar clusters that convince people that all the many hierarchical relations in which they live and work are natural and necessary’.

The reason why religion was taken as a factor providing the basis for consumer justice is its moral ethical forces, i.e. its capacity to bind people through the process of compulsion. It is difficult to identify the part of civilization religion started to regulate the day to day affairs of consumers, but, it has been observed that with the gradual increase in the demand of goods, the practice of ordinary moral ethical forces, such as, ethics and morality started to decline. At this stage, it was felt necessary to import some rules of compulsion which the religion has performed. From the gradual expansion of this needs and demands, religion appeared as an important instrument for binding the buyers and sellers which we define as consumer justice.

The process by which religion served the purpose of compulsion is the idea of ‘goods of the society’. Considering it as an indispensible system for social existence, Gordon further opines that ‘Law is just one among many such systems of means that people constructed in order to deal with one of the most threatening aspects of social existence; the danger posed by other people, (i.e. adultery, adulteration of goods and so on) whose co-operation is indispensible to us. It binds people against crimes, or torts successfully’. Being convinced by his ideas, we may conclude that in the primitive society, religion played the role of a social system which tied people with a lot of non-legal clusters beliefs. With the emergence of religion, religious sermons and maxims started to function as important source of consumer law. So, since the period of pre-history and ancient times, the aspect of ‘Sin’ and since then, the fear of God and divine punishment has been associated with the economic aspect of life. The proof of the influence religion on consumer justice may be seen by reviewing some of the religions – Dharma Shastra, Holy bible and the Holy Qur’an.

3.1.4.1. Dharma Shastra, Holy bible and the Holy Qur’an

‘In ancient India, all sections of society followed ‘Dharma Shastra’ as the most important holy book. The major portions of law concerning the consumer were also derived from the principles of ‘Dharma Shastra’ (Supakar, 1986:38). A brief review on this is given in the later part of this chapter. In the holy book of Old and New Testament, we find some verses regarding justice and punishment. The major areas of offences covered by it were the illegal homicide, guardianship, offences against God and so on. Old Testament restricts the taking of ‘interest on loan from one’s brother or sister’. But, such provisions do not signify concrete proof of consumer legislation. The New Testament also does not bear any instruction specifying the matters on consumer rights. But, the principle of ‘doing good
to ones neighbor’ contained in both the testaments bears testimony to the recognition of consumer justice. Regarding the principles as to commodity exchange, there are various principles that are enshrined in the holy ‘Quran’. These principles are characterized as Sharia’. After the advent of Islam, some principles of prohibitions were declared in holy Qur’an which is commonly recognized as Sharia law. These principles were capable of deterring people from being engaged in some dilatory tactics with respect to goods. Any sort of falsification or misrepresentation in the trade of goods, involving in usury, cheating in weights and measures was declared illegal by Sharia law. It also imposed ban on hoarding of goods and foods for more than 40 days. It directs to eat and drink halal foods and restricts involving in the sale of Haram food. The result of these religious principles was that the unfair practice in trade was regarded as a sin. The practice of these religious ethics served as an instrument for social control. With the declining of religious bondage, sellers’ behavior also started to transform to a different shape.

3.2. Medieval period

In medieval times, the idea of consumer justice could appear as strong phenomena in the regions of Europe and India. Evidence shows that many of the rules protecting the consumers had its origin in the early middle ages; many of the principles were given in the course of deciding specific disputes (Borrie and Diamond, 1964:9). But, an analysis of these principles reveals that the royal sanctions played the most important part of legislation.

3.2.1. Royal sanctions

Since its inception from the ancient period, the development of the issue of consumer justice did not stop in any stage of human civilization. But, due to the interest and special attention by some of the rulers, the issue of consumer justice got a momentum that helped the emergence of new dimension of developments which include hoarding, unfair and restrictive business practices, price control, control of monopoly, adoption of uniform system of weights and measures. These were seen to appear in many parts of the world including India. The developments in India was dominated by price control system and enforcement of the price control system a brief review of which is given in the later part of this study. The developments in England and other parts of Europe were centered round royal prerogatives and judicial precepts. Regarding this aspect, we may refer to the Statute of Monopoly 1602 by the King of England. This was enacted for regulating the aspect of monopoly. Monopolies had been considered contrary to the law from the time of Magna Carta. It has been observed that most of the laws in England connected with consumers were passed in the 18th and 19th century. India did not witness any such legislation until the British rule in India since 1857. The rules passed or developed during this time are still continuing. Other rules were laid down, not in relation to the facts of a quarrel between living men, but as more as less abstract rules, intended to of general application,
embodied in the Act of Parliament (Bories: 13). Despite its criticism, England witnessed the pioneering role of judges during this period.

As far back as middle ages, both the legislature and courts were anxious to preserve freedom of trade and free competition, were concerned at their growth. In Edwards VI’s reign legislation was passed against price-fixing combinations and against such practices as ‘engrossing’ by which traders bought up large quantities of wares in order to sell them at inflated prices. It is true that monopolistic trading rights were often conferred by the crown, but the powers of the crown were curbed during the seventeenth century. In the case of monopolies, 1602, the court held that the grant by Elizabeth I to an officer of her Household of the sole right to import and make playing cards was illegal as a monopoly. The Statute of Monopolies, 1624, confined the Crown’s prerogative of granting monopolies to first inventions, a principle still applied in the law relating to patents. Accepting a positive responsibility for preserving conditions in which free competition would thrive, the courts of Queen Elizabeth I ruled that all agreements restricting the right of anyone to carry on his trade were completely void. Such agreements, it was seen, might tend to privately-created monopolies. After the demise of medieval period, the consumer justice system witnessed the developments of modern age.

3.2.2. Continuance of religious compulsions as measures for enforcement

A review of ‘Medieval intellectual synthesis’ reveals that ‘justice had been subjected to the rhetorical ploys of the rulers wherein God was seen as the creator of life and God’s presence was seen in the organization (Hobbes,1651). Actually, no other factor could deliver better enforceability than it. So, the medieval period did not witness uniform development of consumer justice either in Europe or India. Although, the principles of religious compulsion had strong bearing on many aspects of life, but, the issue of consumer protection was regarded as a private issue. A critical analysis of the judicial measures taken by the courts in England reveals that there was a clear dominance of the principle of ‘Caveat Emptor’ and the matter of consumer protection was regarded as a private issue during this period. Due to this reason, the Authorities responsible for consumer protection were mostly dysfunctional and it was difficult to convince a judge to dispense justice for the defects of goods. So, it has been seen that religion has not only influenced the spiritual or cosmic ideas and beliefs, but also influenced the economic life of human beings. From this point of view, moral ethical forces also formed part of the conceptual aspect of consumer justice. Despite the dominance of religious principles on human life, the dominance of Caveat Emptor precluded the consumers from many aspects of protection. In the above, we have seen the dominance of religion on consumer protection. But, the scenario of dominance of religious compulsion or caveat emptor started to change with the adoption of the idea of common law principles.
Origin and Development of Consumer Justice

3.2.3. Common law principles

During this time, ‘law was seen as a positive morality dispensed among the civitas (Commonwealth of people, state or society). It was adopted as a guiding principle for judicial governance- there can be no right without a remedy (justice), it was established that ‘the court must not lose sight of its power … its duty is to arrive at a just solution of the problem. In response to this recognition, the courts of England took legal measures against consumer violation which may best be analyzed by the measures taken with respect to strict liability, warranty, Caveat emptor and so on. It is necessary to mention that for a long time the common law principles were dominated by Caveat emptor.

3.2.3.1. Caveat Emptor

It may be a cherished adage of the consuming public that the consumer is always right, but in the eye of law this saying has never been significant. Far greater emphasis has been placed by the courts maxim of ‘Caveat Emptor’- let the buyer beware. “Eminently suited though it was to the prevailing ideas of the 1800s ‘Caveat emptor’ had its origins deep in the Middle Ages” (Borrie: 14). It had its origins deep in the Middle Ages (Borrie: 14). In those far-off days, transactions of sale and even of barter between strangers were few and rare. When trading did take place, it was in markets and fairs where the goods were openly displayed. The cloths could be examined, the farm produce picked up. Because, it was taken for granted in these dealings that the buyer relied on his own judgment- only a fool would rely on the words of a stranger he might see again- the idea of Caveat Emptor reflected the actual practice (Borrie: 15). This did not mean that the buyer never had a remedy if he was the victim of unprincipled salesmanship, but it was not enough to show that the seller boosted that the goods were sound and genuine. The buyer had to take the risk that they were faulty or worthless unless the seller had broken a positive promise-a warranty or was guilty of fraud. Despite its limitations in the medieval periods, we see some developments with respect to consumers. The notable development that was made was the adoption of uniform standards of weights and price control system and so on.

3.2.3.2. Strict liability

During Fourteenth Century, ‘In an age of rugged individualism when judges shrank from imposing obligations on men other than for deliberate acts, when there was not yet the concept of the sanctity of agreements, when damage caused by negligence rarely led to legal liability, the courts in England discovered good reasons for imposing the strict liability and they ‘willingly enforced ‘the common custom of the realm’. Thus we see the emergence of strict liability during this time. In an early case of 1348, the courts compelled the Humber Ferrymen to compensate the owner of cattle which had died due to the overload of the boat. In 1368, the pilgrim whose belongings were missed from his room of an inn in Canterbury was liable to recover compensation from the innkeeper.
The scenario of consumer justice had also been changed due to emergence of industrial revolution in many parts of Europe. In the 16th century, when Europe witnessed industrial revolution, it brought enormous changes not only in the field of science and technology; but also in the ideas of law and economics. Since then, it has been observed that ‘the economic analysis has come to dominate thinking about law and justice’. The factors that provided momentum to this change are the emergence of the idea of ‘market’, i.e. the ‘economic market for goods’. The seventeenth century development of consumer justice witnessed two important developments- measures against monopoly and warranty.

3.3. Modern age

3.3.1. Emergence of the idea of economic market for goods

In the above, we discussed regarding 'equality in market resources' as a factor to influence the emergence of the idea of consumer justice. In this part, we shall undertake a review on the idea of economic market for goods.

For the purpose of this study, the term 'economic market for goods’ implies the legal, and economic structure required for the functioning of a product oriented market. The challenges relating to goods for the consumer and the responses against these challenges is the inner faculty of this idea of economic market for goods. The inner faculty of this challenge relating to goods for consumers helped to emerge the modern concept of consumer justice. It is the economic market for goods that ‘provides consumers the opportunity to express to express the desire or needs they feel through demand, enables the producer to gain knowledge of their demand and to deploy the resources needed to meet it….formalizes the trade relationship between the isolated buyer and the individual seller (Nozick, 1974). “The idea of ‘market for goods” has figured in political and economic theory as a device for both defining and achieving certain community-wide goals... as a necessary condition of individual liberty, the condition under which free men and women may exercise individual initiative and choice so that their fates lie in their hands. From this point of view, it may be presumed that the idea of economic market for goods is the principal determinant that influenced the emergence of modern concept of consumer justice.

The factors that provides support to this aspect of economic market for goods is autonomy and community-wide goals upon which the whole system of consumer justice rests. It has been observed that the autonomous will of those engaged in exchange (i.e. the buyer-seller) is an indispensible pre-condition wherever the categories of value and exchange value come into play. But, the limitations of this market is that the free and equal owners of commodities who meet in the market are free and equal only in the abstract relation of appropriation and alienation. In real life, they are bound by various ties of mutual dependence. This problem has been tried to be resolve by institutional and instrumental development. Regarding the aspect of autonomy, it has been observed that the free
play of market forces account for the emergence of a deep seated social movement whose first demand is for the re-establishment of market conditions making for a real balance between suppliers and consumers. Regarding the aspect of autonomy, it has been observed that the ‘free and equal will’ of equal owners has also played as an important role in providing the idea of community wide goals. It has been observed that there prevail imbalances and failures that arise in the system of economic consumption. Although the market ‘gives consumers the opportunity to express the needs they feel through demand, still, the aspect of free will of consumers are not widely accepted. "The free and equal owners of commodities who meet in the market are ‘free and equal’ only in the abstract relation of appropriation and alienation. In real life, they are bound by various ties of mutual dependence”.

But this problem of market challenges has given rise to the urgency of institutional development of justice. Consequent upon this, the measures of PIL has been refund, replacement, compensation have been taken by common law courts as a measure for community wide benefit or justice. From the above discussion, it may be presumed that since the period when the civilization started to flourish, the economic dynamics has influenced the idea of justice.

3.3.2. Equality in market resources

The term ‘equality in market resources’ is used to mean and include the consumers’ equal right of protection and his unhindered right of access to goods and services. The idea of equality has figured in political and economic theory because of its wide amplitude of scope. The ideas of justice with respect to ‘consumer’ may also be found in Dworkin’s ideas of equality in market resources. He analyzes his idea of equality from a point of totality and thus characterizes the term ‘equality’ as ‘Equality of resources’. He holds the view that when people transacts in a market, he enters the market on equal terms. He holds the consumers’ right of equality in the market resources as sovereign. Unfortunately, ‘[T]he economic market… is the enemy of equality, largely because the forms of economic market systems developed, enforced … encouraged vast inequality in property’.

The idea of ‘equality in market resources’ also imports the idea of private ownership on equal terms. ‘Private ownership ...is not a single, unique relationship between a person and a material resource, but an open-textured relationship many of which must be fixed’ from the point of equality in the economic terms. ‘Equality’ in market forms part of command over private resources for a private individual. Dworkin characterized ‘equality’ as a means of ‘command” over resources and argues that ‘From the standpoint of […] sophisticated economic theory, an individual’s command over […] resources forms part of his private resources. From the above discussion, it may be construed that the urgency of ‘equality’ in the market as ‘a matter of equality in whatever resources are owned privately by individuals’ is the starting point of consumer justice. Dworkin’s ideas of equality in market resources are the guiding force of modern concept of consumer jurisprudence.
3.3.3. Changing aspect of social dynamics

An analysis into morality, norms and values also reveals that since the ancient period it has been observed that the society is the most influential factor that play the pivotal role in forming, shaping and changing the ‘norms’ and values. The variability of norms and values depends on the socio-economic background (cultural standard) of the people of particular region at a particular time. The social norms are built by the slow but constant work of the social leaders, civil society or activism by conscious rights group. This is equally applicable in respect of consumer justice. The principle of ‘Caveat Venditor’ (the seller must be aware of the defects of the goods/services) may be cited as a basic norm which brings unity in diversity. From this point of view, it may be presumed that the emergence Ethics and Morality, norms and values, social culture and heritage concerning the protection of commodity exchange was the reason that has influenced the emergence of consumer justice. These institutions of moral ethical forces had been functional in all the ages since the pre-historic and ancient periods.

Legal studies have shown that ‘One of the most characteristic features of the twentieth century jurisprudence was the development of sociological approaches to law. Legal thoughts have tended to reflect the trends to be found in sociology’ (Cottrell, 1898:171). These approaches social dynamics to law have been defined as ‘social compulsion, social solidarity. The changes that occurred in the social dynamics have greatly influenced consumer justice also. Accordingly, this aspect of ‘changing sociological dynamics’ has been applied to consumer law as a measure for social control. In this connection we may refer to the fact that the factor that has been influential on consumers rights or interest is social interest than individual interest. In furtherance of this, the regime of consumer laws has given rise to its utmost importance on social demand than individual demand and the legislations emphasized on matters that affects the society as a whole. Besides this another important fact that has influenced the modern jurisprudence of consumer justice is equality in market resources. In this respect, it must be borne in mind that the pioneering or proactive role of courts has also facilitated the emergence and development of consumer justice. An analysis of the 19th century consumer development reveals that besides the role of social dynamics on law, the courts in Europe played a pioneering role in protecting the consumers.

3.3.4. Pioneering role of courts

By the beginning of the 19th century, the courts in England moved away from their original position and held that ‘[I]t is the duty of the court in administering the law to lay down rules calculated to prevent fraud, to protect persons who are necessarily ignorant of the qualities of a commodity they purchase, and to furnish the best article that can be supplied…. if a man sells an article he thereby warrants that it is merchantable – that is fit for some purpose. If he sells it for a particular purpose, he thereby warrants that it is fit for that purpose’. Of course, these principles could not strongly influence
judges to adopt these policies. An analysis of these two cases reveals that this was a paradigm shift from ‘Caveat Emptor’ to ‘Caveat Venditor’ which was well-settled in the Donoghue v. Stevenson case. In furtherance of this, the remarkable development of this period (18th Century) was the importation of warranty both in statutory and non-statutory laws. During this period, England and India witnessed the emergence of statutory protection. A review of which may be undertaken with reference to warranty.

3.3.4.1 Warranty

It may be presumed that the idea of warranty or strict liability dates back to 14th century idea of inn-keepers liability. Actually, the idea of Caveat Venditor with respect to goods and services emerged in early seventeenth century. In case of Chandelor v. Lopus, the court shifted from its traditional view regarding warranty and knowledge of the buyer, false description, and strict liability and so on. In this case, it the principle that was provided includes that knowledge of the buyer regarding the defect of goods does not relieve the seller from the liability of warranty unless there is express contract relieving the buyer. It was further held that ‘where there is no opportunity to inspect a commodity, the maxim Caveat Emptor cannot apply (Gardiner v. Gray (1815). ‘If a man sells a good for a purpose, it is impliedly understood that they are fit for that purpose. That if they turn out not to be fit, the buyer must have a remedy (Jones v. Bright 1829). This view of the court was based on the insistence on words of promise which we characterize as warranty.

The discussion made above reveals that since the pre-historic to medieval ages, the article that was regarded as the only area of protection for consumer was ‘consumer goods’ only and the idea of service-trade (except physical labor) as a saleable commodity did not emerge. In the absence of currency, the barter system was regarded as the main system of trade. This was a need-based system of transaction. In spite of the limitations, this control was regulated by some restrictions (code of conduct) approved by the proclamations, customs and so on. The cumulative result of these prohibitions, sanctions or the combination of some set of rules blended with cultural behavior gave rise to modern idea of justice. The modern idea of consumer protection has been transformed into the idea of justice through the process of statutory legislation.

3.3.5. Emergence of domestic statutes

The last stage of consumer development is statutory legislation. this process may be divided into national and international legislation. The process of national or domestic legislation started in the 17th century and it was initiated with the laws on anti-monopoly. In this respect we may refer to the Statute of Monopoly 1602. this process of legislation started in India in the 19th century and it was initiated with the enactment of the Penal Code 1860 a review of which is undertaken in chapter 4 of this study. During this period, many aspects were incorporated under the veil of statutory
laws which had never been thought of ever before, merchantability of goods, implied warranty. The advantages of importing these aspects were that it paved the way for imposing liability upon persons who is remote from the consumer or buyer. In this process, there appeared the conception of competition, intellectual property rights, qualitative and quantitative issues, implied warranty regarding goods and services which were lately incorporated in the subsequent legislation.

After the demise of 18th and 19th century, “[A]t the turn of twentieth century’, it was found that ‘during the time of rapid industrialization and social and political changes, a movement aimed to check the evils of unregulated business enterprises achieved remarkable success. New legislation aimed to protect the workers and consumers and monitoring institutions came up to defend collective rights’. In furtherance of this development, there emerged the regime of state organization (like the US Federal Trade Commission) and legislation simultaneously for consumer justice. In this stage of evolution, the legislature assumed the role of protector of consumers. in furtherance of this, it played a strong role in the national level. The effect of this initiative was that “[T]he legislature broadened the scope of legal protection against wrongful business practices generally and in so doing extended to the entire of public consuming –protection– once afforded only to business competitors. Accordingly, some legal provisions were enacted to protect the consumers under the umbrella of civil and criminal law. Besides the national legislations, the matter that provided support to national legislation was international laws.

3.3. 7. International legal regime

In the Post-World-war (II) period of rapid economic growth, it was thought that the competitive market is the determinant for consumer protection. Assuming it as a measure for providing better protection or benefits to consumer, the issue of ‘justice’ did not appear in international legislations.

During this time, it was encouraged to emerge or grow more business enterprises and was not considered at this stage of economic vibration. The factor that influenced to ignore the aspect of justice was the influence of the idea of perfect competitive market. It was thought that a strong consumer protection will ultimately benefit the market as well as the consumer. Due to this, no significant development was made in the regime arena of legal thoughts regulating the interdependent relation among the manufacturer-supplier and consumer. It was felt necessary to address the matter of consumer protection more from the economic than legal point of view. But, the aspect of competition alone could not yield better benefit to consumers. This failure led to the shift in the ideas of consumer protection. But, the paradigm shift took place when it was found that these measures could not contribute much compared to the widening aspect of consumer violations. In view of this condition, many of the international organizations (UN, EU, ASEAN and so on) recognized the aspect of consumer violation as a growing concern. In result, they provided some conventions, rules, declaration, or guideline which was transformed into laws or it was incorporated in the domestic
legislation, directly or indirectly. In this connection, we may refer to The UN Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and The UN Resolution on Consumer Protection 1985 and so on. These legislations do not directly dispense justice, but it possesses strong influence on consumer justice. After the enactment of these legislations, the idea of consumer justice was set in motion by the domestic legislations of India, Malaysia, and Bangladesh. The reference of these legislations is made in this study where appropriate.

In the above, the discussion was not region specific. Now, we shall undertake a review which is region specific. In view of this, we have given a brief study on the evolution and development of consumer justice in the Indian Subcontinent with special emphasis on Bangladesh.

3.4. Developments in the Indian Sub-Continent

3.4.1. Ancient period

In analyzing the origin and development, legal scholars have observed Bangladesh inherits its inception of consumer justice from the legal culture and heritage of India. Legal scholars have observed that since its inception, the system of consumer protection in India was based upon the ‘human values and ethical practices’ (Prasad, 2000:132). In his study on the Historical Evolution of and Law in India, it has been shown that the welfare of the subjects was their primary concern of the rulers and they showed keen interest in regulating not only the social and religious affairs, but also the economic life of people, establishing many trade restrictions to protect the interests of consumers. In this connection, the first code of conduction or ancient legislation was Kautilya’s Arthashastra. The code of conduct that was followed during Chandra Gupta’s period was also followed in this region of Bengal.

3.4.1.1. Kautilya’s Arthashastra

During the period, ‘Chandra Gupta Mourya’ (323 BC) a renowned economist-‘Kautilya’, gave his treatise on market codes known as Kautilya’s ‘Arthashastra’ which may be considered as the prominent source of legislation regarding the exchange of commodities. Though the primary concern of this legislation is matters of practical administration, commodity exchange occupies a prominent place in ‘Arthashastra’. It describes the role of the state in regulating trade and its duty to prevent crimes against consumers’ due to which good trade practices were prevalent during this period.

During this period, an official as ‘Director of Trade’ performed the primary responsibility of monitoring the market situations and exchange of goods. He was required to be “conversant with the differences in the prices of commodities of high value and low value. He advised to “Avoid even a big profit that would be injurious to the subjects. He did not create a restriction as to time or evil of a glut in the market in the case of commodities constantly in demand.” Every trader was required to take a license to sell; a trader from outside also had to obtain permission. On the return of an article purchased or payment of price thereof, there was fixed rule of time, after which an article could not be returned” or exchanged.
During this period, several measures were taken to maintain official standards of weights and measures. There was system of stamping the weights and measures for every four months. Traders were to pay a stamping fee amounting to one ‘Kakani’ everyday to the superintendent of standardization. The penalty for unstamped weights was twenty seven ‘Panas’ and a quarter. To prevent black markets, goods could not be sold at their place of origin. It had to be brought in the market known as Panya Sala. The traders were prohibited from taking recourse to unfair trade practices (Supakar, 1996:107). The seller had to declare the quality, quantity, and prices of goods which were registered in the books. The Superintendent of commerce fixed the whole-sale prices of goods as they entered the market, fix retail prices to allow a certain margin of profit. Easy access to justice for all was considered of great importance. During Kautilya’s time, the court system was well organized; different set of courts were prevalent in ancient India. The mobile and circuit courts for consumer affairs worked at nights, when necessity arose. They also worked on holidays in urgent matters. Severe punishments were prescribed for different offences, e.g. “for cheating with false cowrie-shells, dice, leather straps, or by sleight of hand, the punishment was cutting-off one hand or a fine.” The above discussion signifies that consumer justice evolved in human civilization of India vis-à-vis its neighbouring parts since ancient periods.

3.4.2. Medieval Age

**Initiative to adopt price-control system and uniform system of weights and measures**

3.4.2.1. Price-control system

During this period, the larger portion of time was ruled by two groups of both Hindu and Muslim rulers- the Sultans and the Moguls which are popularly known as Muslim era in India. During this period, India was divided into many regions known Parganah, Subah and for each region many a regional ruler or governors known as the Subedar, Zaigirdarh were appointed. During this period, the prices were determined by local conditions. As a result of which, a larger portion of consumer justice were framed in accordance of the local custom and usages. During this period, they gave first importance on the rules of fair trade among which fall the purity of food, use of correct standards for weights and measures, imposing strict control on pricing and so on. This aspect of compulsion is still functional in arena of business today.

In this connection, we may cite the example of the Price Control System of Aladdin Khilji by which he tried to introduce justice through regulated price. In furtherance of this, consumer issue ranked a prime position in the governance of subjects. So, in no time, consumer rights lost sight of the attention of the rulers like Aladdin Khilji whose ‘Price Control System’ is still believed to influence the student of consumer justice of today. Under this system, strict controls were established in the market place. In those days, there was an unending supply of grains to the city and grain-carriers sold their goods at prices fixed by the Sultan. There was a mechanism for price-enforcement in the market.
Similarly, shop-keepers were punished for under-weighing their goods. The system was introduced for Delhi and it could not be extended in other areas of the state. Still, it cannot be disagreed that the glimpses of these landmark incidents that originated or implemented in a particular region, influenced the successive developments and these incidents still reserves its usefulness as of today.

In the middle ages, the Sultan of India Aladdin Khilji tried to introduce a system for regulating the exchange of goods through a price-control system. Under this system, strict controls were established in the market place. In those days, there was an unending supply of grains to the city and grain-carriers sold their goods at prices fixed by the Sultan. There was a mechanism for price-enforcement in the market. Similarly, shop-keepers were punished for under-weighing their goods. An analogy of these codes reveals that all these provisions were made for regulating the exchange of commodity.

### 3.4.2.2. Adoption of uniform system of weights and measures

The greatest achievement of this period was the separation of state-craft from religion. For this reason though the community of Hindus and the Muslims were governed by their personal laws in their family affairs, but in the case of business transaction, the state sanction prevailed; the religious sanctions had the ordinary value of ethics, not as a tool for justice. The separation of religion from the state-craft was a paradigm shift in the Indian system of consumer justice. Taking advantage of this shift, During Muslim rule, the greatest development was a large number of units of weights were used in India. During this period, the Mogul Emperor Akbar adopted weighing scale and introduced many units of weights and measures. These standards of weights and measures may be deemed as the landmark incident for the quantitative aspects of justice.

The quantitative aspect of justice had long been a matter of concern in different ages. For this end, attempts have been taken in different ages. The greatest contribution of Aladdin Khilji was the idea of price-control system, another contribution that was made in the quantitative aspect of justice is Akbar’s ‘Uniform system or scales for Weights and Measure’. For the convenience of understanding, the discussion is divided into pre-Akbar period, Akbar Period and the post-Akbar period and the period of British rule in India since 1861. Before the introduction of comprehensive legislation in this country or region, the whole of India were run by an unscientific and fluid system where various local systems of measures and weights were used. During this time, the system of weights and measure varied from region to region, commodity to commodity, and rural to urban areas for which uniformity could not be maintained. The quantitative aspects, were based on two main methods— for weights, seed-based system was introduced. For this end, various seeds, rice, paddy, wheat, berry and Ratty were taken as acceptable stone of weighing scale. The length of arms and width of fingers were accepted as the basis for measuring the length and breadth of commodity like cloth, wood, tin and so on. There were different systems in Bengal, the Presidency of Madras, and Bombay following
different nomenclatures. The volume of liquid goods or commodity was measured by specially
designed Round-shaped tumbler or instrument. These local systems were popular in the whole of
Bangladesh-India- Pakistan before the adoption of the metric system. Akbar realized the need for
uniformity of measuring scale and weighing stones in trade and commerce. He selected the
‘Barleycorn’ weights and ‘Jau’ for width as the uniform measures; but, it could not replace the
practice of different local stone for measures, rather than adding a new item in the prevailing state of
anomaly. When the British entered India, they accepted Barleycorn as a unit ‘grain’ for weighing gold.
They minted coins using wheat berry as the standard. Eventually, British introduced their own system
for weighing; Troy ounce for gold, pound/cwt/ton for commodities, yards/feet/inches. These
initiatives of price control system or uniform system of weights and measures prove that these ideas
were generated by the personal initiative of a particular individual for which it could not bring
enormous change in the horizon of consumer justice.

Traced with care, a keen study into the anthropological study of law reveals that ‘[T]he idea
of consumer protection existed in every social order and judicial mechanism, whether primitive or
modern’ The clan people “had also law as set of rules accepted by all normal members of the society
as defining right and reasonable ways in which persons ought to behave in relation to each other and
to things”. In this respect, the term ‘other’ is used to mean ‘person’ and ‘things’ as ‘goods’. The extent
to which the idea of consumer protection it was emphasized may vary from circumstances’.

The doctrinal review of consumer justice reveals that it has emerged not in isolation, but in
collaboration with other school of thoughts. All these ideas may not be jurisprudential, but it has an
indirect relation with these schools of thoughts that influence the socio-economic life for the
consumer. This nexus of relationship is inherent in nature that influences the emergence of newer
ideas in consumer jurisprudence. The school of thought that provides justification to the existence or
emergence of this branch of justice since the pre-historic and ancient period includes dialecticism,
materialism, commodity exchange, basic human instincts theory and so on. Among these thoughts, the
school that has proximity of relation with consumer justice is commodity exchange, natural response,
or rational choice theory and so on. Considering its influence on consumer jurisprudence Vis-à-vis
justice, a review of this is undertaken below.

3.4.3. Modern period

Laws on goods and services

Before the inception of British rule in India, the laws of this region were not codified; the system of
justice was mostly governed by the religious rules or social customs given by the native rulers. In this
region, ‘justice had been subjected to the rhetorical ploys of the rulers wherein God is seen as the
creator of life and God’s presence was seen in the organization. With the introduction of British rule
in India, the Indian legal system was totally revolutionized and the English legal system was
introduced to administer justice (Galanter, 1977:15). The whole of judicial system transformed from oriental to Anglo-Saxon system; the process of codification of laws dispensing justice was started. During this period, ‘the law itself underwent considerable adaptations. The British institutions and rules were combined with structural features, e.g. a system of separate personal laws and rules e.g. Dharma, and local custom which accorded with indigenous understanding. The borrowed elements underwent more than a century, and a half of pruning in which British localisms and anomalies were discarded and rules were elaborated to deal with new kinds of persons, property and transactions.

To administer justice, ‘they were confronted with the problem of the value suitable to attach in practice to the Indian traditions and customs. Despite these challenges of Indian legal systems, Indian laws were in its outlook had the Indian flavor, but in operation it had the fabric of modern British common law concept with it (Galanter, 1977: 49). Under the prevailing fabric and flavor, the aspect of consumer protection was introduced statutorily in the Indian legal system from which the legal rules and systems swallowed to the newly born independent countries- Pakistan, Sri Lanka, and Bangladesh and so on. Initially, none of these countries went for revolutionary change in the legal rules and systems that they have inherited from British Rule in India until 1947. These laws cannot be looked into as an ordinary piece of rule, they were mostly criminal laws or in the alternative, laws guided by the principles of criminal legislation. Still, they have been regarded as one of the important mile-stones giving rise to the modern concept of consumer justice. The reason why the Criminal law in the field of consumer protection has acquired such significance is that the consumers were less inclined to go to civil court for small claims. It was claimed that ‘the functional value of criminal law in the field of consumer protection is a high one and it has a respectable pedigree’ in the Indian sub-continent. So, after the demise of British rule, the trends of criminalization of legislation continued to exist in countries of this region and it continued to grow with newer legislations on goods and services. The process that these countries adopted was also of criminal justice. The benefit of these legislations was that it did not require the consumer to prove Mens Rea on the part of the seller. Rather, the offences are of strict liability, and not dependent on any particular intention or knowledge’. In view of this condition, the legal culture and heritage of British rule in India could be swallowed to other countries of this region. And it became the common property for these countries. Criminal law in the field of consumer protection has acquired much significance, as consumers are less inclined to go to civil court for small claims. It has been said that ‘the functional value of criminal law in the field of consumer protection is a high one and it has a respectable pedigree’. Another view is that there has been an attempt to look at consumer protection as ‘a public interest issue rather than as a private issue’.

In the above, we discussed the origin and development of consumer justice and the factors that helped the emergence of this aspect of justice since ancient and pre-history period. The study on this topic relates mainly to laws and rules. So, for the purpose of undertaking a critical analysis on the
question as to how far these laws and rules are capable of ensuring justice is necessary. So, a brief
discussion on this aspect titling ‘Consumer Justice System in Bangladesh’ in chapter 4 is undertaken
below.
CHAPTER 4
CONSUMER JUSTICE SYSTEM IN BANGLADESH

4.1. Developments in Bangladesh

Unlike any other branch of justice, a process of innovation and development is taking place in the arena of consumer jurisprudence. With a view to providing justice to consumers various measures have been undertaken. These measures include formulation of new devices and strategies, enactment of subjective or special laws, shift of justice from legal principles to statutory legislation, innovation of various types of measures and remedies (civil, criminal, administrative, constitutional and institutional and so on) which has become part of the consumer justice system of Bangladesh.

A review of the consumer justice system of Bangladesh reveals that it is viced with some deficiencies due to which it has largely failed to provide the guarantee of justice. These aspects of deficiency includes defective framing of legislation, absence of standardization of legal principles in legislation, contradiction or inappropriateness in legal procedure of redressal forums, passive denial of the right of access to justice (negation to consumers’ right of direct access to justice), absence of preferential right of choice to reliefs – civil or criminal, increased trends in the executive driven state of justice, and so on. Moreover, the failure of civil society in taking initiatives for consumer movement (Hasan, 1992: 25), inaction of the rational judicial institutions, absence of welfarism in legislation (Halim, 1993) and so on has worsened the situation. These factors are also considered as the parameters of justice which the consumer laws of Bangladesh have largely failed to address. A critical analysis of these factors reveals that the reason for such failure is not so much due to the socio-economic factors as much as it is due to the failure to incorporate the trends of consumer jurisprudence in its legislation which is required for a vibrant system of justice. In view of this condition, a study focusing on judicial governance and jurisprudential developments have been undertaken below.

4.1.1. Pre-independence period

A critical analysis of the developments in Bangladesh reveals that Bangladesh is the successor of India in many aspects including the legal culture and heritage. So, the systems and measures that existed in the social order and judicial mechanism of India have swallowed to the consumer justice system of Bangladesh since ancient period. An inquiry into the developments of consumer justice system in India reveals that it emerged in an organized form was during the reign of Chandra Gupta

---

1 Max Webber has characterized the law making agencies as rational judicial institutions. Pl see Judges and Justices by John R. Schmidhauser, pp.1-4.
2 For the purpose of this study, the term ‘pre-independence period’ implies the period that ranges from 1860 to 1947.
Mourya and it was derived from Kautilya’s ‘Arthashatra’. Before this, the consumer justice system was totally based on societal and religious rules accepted by all members of the society. Due to the absence of written form of code, the whole of consumer justice was viced with over-criminalization. But, Kautilya’s ‘Arthashatra’ provided rules defining the rights and reasonable ways in which persons ought to behave in relation to each other and to things. although this Code helped to initiate the shifting of consumer justice system from unwritten to written form of justice in India, still, the criticism that is offered to it is that it did not provide any separate legal entity to different nature of justice – civil or criminal; the whole of consumer justice system was dominated by the principles of criminal justice although, some form of civil remedies were available in a few cases. This system continued to exist at the end of Muslim rule in India. But, the paradigm shift in this system occurred with the inception of Anglo-Saxon system of justice in British-India in 1860.

4.1.1. Before 1947

The first stage of development started in 1860 with adoption of Anglo-Saxon system of justice in India. The most important feature of this development was separation of religion from justice and adoption of statutory justice which was formally initiated by the Penal Code 1860. It is the first law on consumer protection for Bangladesh the enactment of which introduced the written form of criminal justice system in Bangladesh. It provided some basic principles which was not in existence ever before. these; it had recognized that the issue of consumer is not a private issue, but a matter of public issue providing various forms of remedies-civil, criminal, and administrative and so on. The system of justice that this Code provided was not executive driven due which the jurisdiction of courts in taking cognizance and dispensing justice was not curbed by any means of conditionality. An individual could lodge his complaints directly to the court simply by complying the relevant provisions of the Code of Criminal Procedure 1898, and this right could be availed without recourse to any executive authority. The context of time in which it was enacted may seem to be fit to cater to the needs of consumers, but, while considering the number of violations in the present context, the basket of remedies offered by this Code does not match with consumer violations occurring in the market. From this point of view, it may be characterized as partial or insufficient legislation.

Another important development that was initiated in the stage of development was the emergence and adoption of the idea of civil justice and it was initiated by the enactment of the Sale of Goods Act 1930. The salient feature of this Act was that the term ‘goods’ implies only the moveable

---

3 Just after the enactment of Penal Code 1860, several other laws were enacted (e.g. The Stage-Carriages Act 1861, the Sarais Act 1867 and so on). Although, the main focuses of these laws were not the consumers, still the provisions of these Acts dealt with the affairs of consumers, directly or indirectly.
goods, but, not goods of any special type.\textsuperscript{4} This Act is applicable both to existing and future goods,\textsuperscript{5} but, not to contingent goods. With regard to dimensions, it recognizes the sellers lien, but, not of consumers at least in a limited sphere.\textsuperscript{6}

The main principle of liability under this Act rested on the principle laid down by the Contract Act, 1872 due to which many of its remedies had resemblance with remedies awardable by the Specific Relief Act, 1877. These remedies include recovery of price of goods,\textsuperscript{7} damages for non-delivery of goods,\textsuperscript{8} specific performance of the contract with or without interest,\textsuperscript{9} rejection of goods for breach of warranty,\textsuperscript{10} or repudiation of contract before due date,\textsuperscript{11} recovery of interest or special damages.\textsuperscript{12} But, the criticism that may be offered to this Act is that in this stage of development, no significant change has been seen to appear in the concept of services as a separate legal entity; rather, there was a tendency of characterizing the aspect of services within the purview of goods. Due to this, some of the matters (e.g. water, gas) that are ordinarily considered as services by other laws are not recognized as services by this Act. Another important limitation of this Act is that it does not provide any special court or administrative measures of special nature. As this Act followed the principle of the law of contract, so, it has failed to provide unfettered right of access to justice; it is curbed by the conditionality of prior contract between the parties (seller and buyer).

Another important development that was initiated in the first stage of development was integration of the quantitative aspect with consumer justice. Since long, the matter that had been considered as a matter of great concern for consumers was cheating in weights and measures. The reason behind this was that the prevalence of unscientific system of weights and measures and lacking uniform standards of weights and measures. In view of this condition, with a view to providing quantitative justice, the Standards of Weights Act 1939 was enacted. This Act was based principally on British standards system; it did not abandon the traditional system of weights and measures that was in force in this region since long. But, it has failed to import the aspect of ‘quality’ as important parameters of justice. From this point of view, the scope of justice under this Act cannot be defined as wide.

Another important development that was initiated in this stage of development was the recognition of health as a separate legal entity. Although, the 19th century legal regime of Bangladesh

\textsuperscript{4} Section 2(11) of the Sale of Goods Act 1930, Section 2(11).
\textsuperscript{5} Ibid., Section 2(2) and (6).
\textsuperscript{6} Ibid., Section 47.
\textsuperscript{7} Ibid., Section 55.
\textsuperscript{8} Ibid., Section 57.
\textsuperscript{9} Ibid., Section 58 and 61.
\textsuperscript{10} Ibid., Section 59.
\textsuperscript{11} Ibid., Section 60.
\textsuperscript{12} Ibid., Section 61.
provides some laws on public health\(^\text{13}\) (e.g. vaccination, epidemic diseases), but, the main stream of legislation on health emerged between 1930s-40s. But, in this stage, the drugs was recognized as an entity different from other consumable goods. In furtherance of this, some laws exclusively on drugs, the Drugs Act 1930, the Drugs Act 1940\(^\text{14}\) were enacted. But, the limitation of this aspect of development was that while enacting on health goods, it ignored or failed to import the concept of ‘services’ in the arena of health due to which most of the laws were centered round only health goods. Despite all the criticisms, it may be said that it had imported the idea of subjective or special legislation in consumer justice.

4.1.1.2. From 1947-1971\(^\text{15}\)

Laws regulating the supply and price of essential commodities

The development for which this part is marked for is the recognition of food as a separate legal entity. In the 1950s, it was found to be seen that the matter of food is attacked by the problem of hoarding, black-markets, unfairness in price of goods. So, it was felt necessary to enact laws on it. It may be noted that the problem was not confined only to food, but, it was appeared to be seen in respect of other goods also. In view of this condition, it was felt necessary to enact comprehensive laws encompassing food and other consumable goods. Accordingly, with a view to addressing the problems of unregulated activities in business, a few laws on this aspect (essential commodity) were enacted.\(^\text{16}\) For the purpose of giving special emphasis on the smooth supply of goods, a few goods were declared as essential commodity a brief discussion of which is given in the later part of this chapter. But, the distinctive feature of this period was its emphasis on food due to which some special laws on food addressing the problem of purity\(^\text{17}\) or smooth supply of food were enacted. These laws provided special courts for the trial of food related offences.\(^\text{18}\)

In the second part of this development, the aspect for which it is marked for includes ‘recognition of services’ as an important vehicle for consumer justice. The background of these Ordinances of 1960s was that it was observed that some of the important medical treatments or major surgeries, especially with eyes were being undertaken by persons having no professional qualification or training. So, with a view to preventing the malpractices, it was necessary to enact laws on the

\(^{13}\) The Epidemic Diseases Act 1897.

\(^{14}\) By enacting these laws, the matter of drugs was brought out of the purview of the Sale of Goods Act 1930.

\(^{15}\) This period may be defined as second stage of consumer development.

\(^{16}\) These legislations include the Anti-Hoarding and Black-markets Act 1948, the Essential Articles (Price Control, and Anti-hoarding) Act, 1953, the Essential Commodities Act 1956, and the Essential Commodities Act 1957. A brief discussion on this aspect (essential commodity) is undertaken in the later part of this chapter.

\(^{17}\) The purpose of the Pure Food Ordinance 1959 was ensuring smooth supply of food which is pure.

\(^{18}\) For example, The Food (Special Courts) Act 196 provides Food Court for the trial of food related offences.
aspect of services. In furtherance of this, the Eye Surgery (Prevention) Ordinance 1960 was enacted and this process of development was carried forward by subsequent laws.19

In the last part of this stage of development, the regime of consumer laws of Bangladesh witnessed the emergence of the aspect of state control over monopolistic and restrictive trade practices. It was initiated in the 1970s with the enactment of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970. This process influenced the subsequent developments of 1970s Bangladesh. Considering these aspects as being injurious to the economic well being, growth and development, stability of Bangladesh (economic and financial), this Ordinance provided provisions against concentration of undue economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices.


4.2.1. The regime of laws on protection of life, supply of essential commodities

The focus of this part of study is protection of life, supply of essential commodities, safety and security of person. The post independence period is marked for tri-dimensional development of consumer protection which includes the aspect of constitutional guarantee to the right to life, social dynamics of law, and public interest. These three aspects helped to emerge multi-dimensional aspect of development with respect to health, food and so. In this respect, the process that was adopted was not confined only with statutory legislation, it also extended to the process of judicialization.

An analysis of the constitution reveals that it does not provide any provision for consumer protection, but, some of its provisions may be applied for this purpose. (Article 102(2)(I)) reveals that any person being aggrieved may approach the High Court of the Supreme Court for directing any person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to or compel him to do what he is required to do.20 The legal effect of this Article is that it can be utilized for activating the person or entities connected with consumer protection (e.g. the Directorate of Consumer Protection) to take necessary measures. This process of consumer development may also be defined as judicialization of consumer protection.

---

19 The enactment of the Allopathic System (Prevention of Misuse) Ordinance 1962, the Bangladesh Medical and Dental Council Act 1980 and so on was the result of these progresses.

20 Similarly, the legal effect of Article 102(2)(II) of the Constitution is such that any act done or proceeding taken by a person performing functions in connection with the affairs of the republic or of a local authority may declared as illegal and of no legal effect. Under this provision, any act of omission or inaction of any governmental body may be declared illegal and without legal authority. In this connection it may be necessary to mention that where it is necessary to prevent the imminent danger or continuous breach of fundamental rights (in relation to safety and security of person), one should not be misunderstood by Article 102(3) of the Constitution which discourages interim order. A brief discussion is made in chapter eight of this study.
The aspect of social dynamics of law was applied just after its independence. The application of this aspect helped to enact special laws on health, food, and so on. The enactment of these laws was not necessitated so much by legal demands as much as it was triggered by changing social dynamics. Basing upon these ideas, Bangladesh witnessed the enactment of some special laws on food, health, the very basis of which was changing social dynamics. The influence of these dynamics on legislation is that it provided penal measure that was different from others. Due to the reasons mentioned above, the post-independence period (1980s) is marked as an age of health and medicine during which several umbrella laws on health were enacted. This period also witnessed the development of laws on weights and measures the enactment of which helped to justice on the quantitative and qualitative aspect of goods and services.

The most important change that was found to be seen in the post-independence period was the inception of public interest as a legal concept. It imported the idea of judicial intervention on matters where justice cannot be dispensed due to the absence of relevant legal provisions. The legal support of this provision is derived from the constitutional provision. But, it was implemented first in the 1990s with the relentless efforts of Judges of the High Court division of Supreme Court. Since then, it has appeared as an important landmark for consumer justice in Bangladesh. In exercise of this concept, the relevant provisions of the constitution (Article 102) were operationalized, the courts imposed ban or restriction the import of goods that was considered to be injurious to health, compelled the executive branch of the state in ensuring the safety and quality of health services (medicine). Despite the criticisms that may be offered to it, this aspect of development is marked as landmark development is due to the appearance of superior courts as important consumer justice institution and application of the concept of public interest as one of the important ground for Locus Standi a brief review of which is given in chapter 8.

4.2.2. Institutional development

The consumer justice system of Bangladesh provides various justice institutions—judicial and non-judicial. Among these institutions, the court of magistrate, special tribunal, special courts and summary courts provide only criminal remedies. The Court of Joint District Judge is the only

\[21\] The Special Powers Act 1974 provided provisions on the offence of adulteration of food and medicine. Similarly, the Drugs (Control) Ordinance 1982 provided provision for the trial of cases by special courts (Drugs Court).

\[22\] For example the Bangladesh Medical and Dental Council Act 1980.

\[23\] The Paracetamol Case, the radioactive milk, the Doctor’s Case). A detailed review on this aspect is undertaken in chapter 8 of this study.

\[24\] Under the Consumer Rights Protection Act 2009.

The post-independence development of judicial institutions also provided special judicial institutions or courts. With respect to non-judicial institutions, the executive or quasi-judicial bodies that emerged in 1940s-1950s continued to exist in the post-independence period; it paved the emergence of some new executive organizations with respect to food and drugs. The Consumer Rights Protection Act 2009 provides for the establishment of the Directorate of Consumer Protection. It is not only the judicial or administrative institutions; the consumer justice system has witnessed the emergence and functioning of some Non-Government Organizations (NGOs) in this aspect.

4.2.3. Enactment and enforcement of consumer law exclusively: The CRP 2009

In the prevailing conditions stated above, the Consumer Rights Protection Act 2009 was enacted. Originally, it was enacted as an ordinance – the Consumer Rights Protection Ordinance 2007. The root of this Act dates back to the 1970s when the Economic and Social Council of the UN firstly recognized the aspect of consumer protection as a means of socio-economic development. In 1977, with a view to formulating guidelines on consumer protection, the UN Secretary-General made a request to governments for a report containing proposals in this connection. After a long process of scrutiny the UN General Assembly adopted the Resolution titling UN Guideline for Consumer Protection 1985 (Resolution no. 39/248) on consumer protection. Consequent upon this, after a long process of scrutiny and examination of 22 years, Bangladesh also enacted the Consumer Protection Ordinance 2007 a brief description of which is given below:-

1. Distributed in seven chapters, 82 numbers of sections of this Act deals with goods and services.
2. Starting from national down to the rural level (Union Parishad), it provides for four committees.
3. With a view to protect the consumer and implementing the provision of the Act, a provision for establishing an umbrella organization (Directorate of Consumer Protection) has been provided.

Section 66 of the Consumer Rights Protection Act 2009.

For example, the Special Tribunal under the Special Powers Act 1974, the Drugs Court under the Drugs (Control) Ordinance 1982, and the Food Court under the Safe Food Act 2013.

For example it includes the advisory bodies, committees under the Drugs Act 1940 and the Drugs (Control) Ordinance 1982. For food, Foods Advisory Committee under the chair of Minister for Local Government under 4A of the Pure Food Ordinance 1959.

For example, Section 18 of the Consumer Rights Protection Act 2009 provides for the Directorate of Consumer Protection. the Competition Act 2012 provides for Competition commission. The Safe Food Act 2013 provides for the establishment of the Directorate of Safe Food under it.
4. The law deals with goods and services. It provides the right of access to justice not only to consumers, but also to non-consumer entities. It recognizes 06 (Six) category of complainants of whom three classes are living persons and the other 03 (three) groups are legal entity.

5. It provides two major measures of enforcement – administrative and judicial; i.e. remedy through judicial and quasi-judicial processes.

6. It provides both criminal (imprisonment and fine) and civil remedies (Compensation, refund replacement, and return).

7. The penal provision of CRP Act 2009 may be divided into four broad groups; matters relating to food and medicine, consumable goods, weights and measures and patent and trademarks.

This law forms the integral part of legal regime of Bangladesh.

4.3. Review of legal frame-work governing consumer law

Regarding the legal framework governing consumer justice, it may be solicited both under statutory and non-statutory regime of laws (e.g. torts). The non-statutory aspect of justice is governed mainly by some legal precepts, such as, Caveat Venditor, implied warranty, perceived value and so on. Besides these principles, there are some case decisions that give rise to landmark principles (e.g. the principle of Caveat Venditor as laid down by the Donoghue vs. Stevenson (1932) case). These decisions may also function as guiding principle for consumer justice. From this point of view, the regime of non-statutory laws, along with legal principles forms part of this framework. Despite its (non-statutory laws) applicability to consumer justice, it has been observed that the matter of consumer justice is run mainly by statutory laws. It is divided into–contextual and conceptual aspects. The term contextual implies subjective legislations (e.g. laws on food, health, goods and services) and the term conceptual implies the thematic aspects (essentiality of commodity or goods, monopoly and restrictive trade practices, competition, qualitative and quantitative aspects of goods, and so on) a brief review of which is undertaken below.

4.3.1. Goods and services

Regarding consumer justice, the main area of legal framework is centered round goods and services. From this point of view, a review of legal framework concerning these two matters is given below.

4.3.1.1. Goods

The aspect of ‘goods and services’ is the prime area of consumer justice. It has been dealt with by many laws in many ways, but, the Consumer Rights Protection Act 2009 appears to be the prime law on it. The term ‘Goods’ under the CRP Act 2009 implies a ‘commercial article of moveable nature
capable of being exchanged by payment in cash or on promises to pay for the price to the seller’. Under the Customs Act 1969 the term ‘Goods’ implies all moveable goods and includes (i) conveyances, (ii) stores and materials (iii) baggage (iv) currency and negotiable instruments and (v) electronic data. Under the Trademarks Act 2008 it implies any “business or anything which is connected with production and agricultural product and it shall also include trees with branches and fruits”. The Competition Act 2012 does not provide any definition of it, but, it provides sanction to the relevant provision of the Sale of Goods Act 1930 as its guiding principle on it.

A critical analysis of the provision of ‘Goods’ under this Act reveals that it has been formulated from narrower point of view where the term ‘goods’ signifies only the daily consumable of small value (e.g. food, medicine and so on); whereas, the modern trends in consumer jurisprudence encompasses the broader aspect of ‘goods’. The term broader aspect of view includes goods of capital nature. Actually, this Act (the CRP Act 2009) has failed to incorporate the principles that match both with the narrower and broader aspects. Due to its failure, the principle as laid down by this Act of 2009 is not followed as the guideline principle for other laws. So, while defining the term goods, these laws (except the CRP Act 2009) provides less emphasis on the aspect of consumer protection due to which these definitions also does not match with the demand of justice as is required for the consumers. An analysis of this Act reveals that it has failed to take the aspect of ‘end user’ into consideration due to which the goods with which the aspect of intellectual property is attached remains out of the purview of the term goods. Due to this, the term ‘services’ under The Trademarks Act 2008 goes into such terms that it does not correlate with the consumer and it has turned into law not for the protection of consumers.

4.3.1.2. Services

The term ‘services’ implies ‘any benefit or any act resulting in promoting the interest or happiness which may be contractual, professional, public, domestic, legal, and statutory and so on’ (Majumder, 2009:9). But, while defining ‘services’, this Act has not taken the thematic aspect of ‘services’ into consideration, rather, it enlists 11 categories of activity as ‘services’. The matter or activity that it brings under the purview of services includes gas, electricity, fuel, health, water-supply and sewerage.
transport, telecommunication, residential hotel, and restaurant, construction (different from building construction). The inherent weakness of so defining is that it does not provide a uniform standard or policy that may serve as the guiding principle for ‘Services’ for other laws that do not provide any definition of the term ‘services’. While defining the term ‘services’, it (the CRP Act 2009) does not take the fundamentals of the spirit of ‘protection to consumer’ due to which it fails to bring the contractual, professional, public, domestic, legal, and statutory and other services under its purview. As a result of which, the idea of integrating public services with consumer services has not yet emerged.

The Consumer Rights Protection Act 2009 is totally silent on this aspect due to which a vast area of services, private or public, remains out of the purview of this Act. For this reason, the services like banking, insurance, educational, municipal and other related services for promoting the interest or happiness does not fall either within the purview of private or public services. So, for the purpose of expanding the regime of protection to consumers, the wider amplitude of services is required to be refurbished (Majumder, 2009: 9). Taking this view into account, The Consumer Protection Act, 1986 (India) defines services from thematic point of view. Section 2(O) of this Act provides that ‘services means and includes any description which is made available to potential users and it includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging, or both, housing construction, entertainment, amusement, or the purveying of news or other information, but does not include the rendering of any other service free of charge or under a contract of personal service’. Malaysia, one of the member of ASEAN has defined the term ‘services’ thematically. A review of legislation of neighboring countries reveals that the Consumer Protection Act, 1979 of Sri Lanka has also failed to adopt the thematic aspect in its legislation. The job of defining the legal aspects or precepts on any subject (goods or services) from thematic point of view is a new trend for consumer jurisprudence. The comparative advantage of applying this aspect in respect of services is that it makes avenue for juridical recognition some of the aspects that are found to be applied by non-statutory laws (tort laws)

36 Section 2(22) of the Consumer Rights Protection Act 2009.
37 The Bank Companies Act 1991 which considered as the principal legislation on banking, does not provide provision for customer services; it does not provide any definition of customer or depositor, consumers. The focus of this Act is confined only with the formation and operation of a bank company.
38 Section 3 of Consumer Protection Act, 1999, Malaysia: “Healthcare services” includes(a) medical, dental, nursing, midwifery, allied health, pharmacy, and ambulance services and any other service provided by a healthcare professional; (b) accommodation for the purpose of any healthcare service; (c) any service for the screening, diagnosis or treatment of persons suffering from, or believed to be suffering from any disease, injury or disability of mind or body; (d) any service for preventive or promotive health purpose; (e) any service by any healthcare para-professional; (f) any service for curing or alleviating any abnormal condition of the human body by the application of any apparatus, equipment, instrument or device or any other medical technology; or (g) any health related services including alternative and traditional medical services.
and it widens the scope of any such aspects (goods or services) where statutory law fails to provide protection. Taking its comparative advantages into consideration, some of the jurisdictions (e.g. India) have incorporated necessary provisions on public and private services in their laws. So, the breach of services that apparently seems to be tortious in nature, are considered as matter falling within the purview of statutory law (The Consumer Protection Act 1986). A review of some of the consumer cases reveal that the courts of India have considered the breach of educational services or unnecessary medical tests or offering procurement of loan from a fake source as violation under the Consumer Protection Act 1986.

The above discussion reveals that although the CRP Act 2009 engulf many aspects of services, but due to its failure to provide a comprehensive view, many of the aspects of ‘Services’ (financial and banking, and so on) remain out of the purview of consumer law. This may be made clear by undertaking a review on any of these services (banking and financial services).

4.3.1.3. Banking and financial services

There is no specific law for regulating consumers’ financial services. The Bangladesh Bank Order, 1972 or the Bank Companies Act 1991 is tried to claim as the laws in this regard. But, a critical analysis of the finance related laws reveal that there is no law for controlling and regulating or dealing with consumers’ credit or banking services. The Bangladesh Bank Order, 1972 which is regarded as the principal law on banking deals only with the operation and management of the central bank, not with other affairs of the consumer. Similarly, the Bank Companies Act, 1991 deals only with the operation and management of privately operated banks, its capitals, constitution of the management board, the privileges of its board members and so on. It does not deal with the rights and privileges of the consumers. Actually, the consumer has no right of protection for any violation under both the laws.

The aspect of deficiency in service has been recognized as one of the aspect of consumer violation by many countries, and it has been seen that the consumers’ (Account-holders) are

---

39 The failure of the college authority was failure to take necessary steps for admission of students in universities. Please see Ajitv. Dr. M.R. Sreedhavan Nair, 1998 (2) CPR 32 (Ker).
40 Misrepresentation by the opposite-party made by an advertisement that students who did not pass in Plus II examination could be successful within two years and could get degree of B.A. Part.III, and was extracting extra money The ground for fixing liability on the defendant was unfairness which is an important issue of the law on tort. Please see D.S. Bhinder v. Amit Rishi, 1(2000) CPJ564 (Punjab).
41 The ground for fixing liability was medical negligence which is an important issue for the law of tort. Please see Consumer Research Information and Education Society v. Durgabhai Deshmukh Hospital, II (1999) CPJ 234 (AP).
42 Trivedi Hasmukhbhai Chelaram Doshiwada v. Jaikishanbhai Bapalal Nirmal, 1992 (1) CPR 312 (313,314) (Gujrat).
compensated properly for deficiency of service. In a case dishonor of cheque,\textsuperscript{43} or loan sanctioned, but failure to disburse money,\textsuperscript{44} or the account holder found the locker for keeping jewellery,\textsuperscript{45} or bank draft lost, duplicate copy of bank-draft not issued\textsuperscript{46} was held to be deficiency in service for which the defendant bank is liable to pay compensation to the client (consumer).

An analysis of banking services of Bangladesh reveals that it is viced with redresslessness. The banks adopt many dilatory tactics for realizing extra money or charges from the account holder against which no remedy is available under the consumer law. Among the dilatory tactics, the method that is frequently applied is ‘Risk Fund’. Apparently, money is realized for adjudging the unrealized debts of persons who has become insolvent, unable to pay for some valid reasons (illness, death). There are many other techniques which are applied for undue realization of money from the borrowers. Actually, being the apex body for ensuring accountability, Bangladesh Bank has failed enforce its supervisory powers.

The discussion on the aspect of goods and services made above is undertaken from consumption point of view. There are some other aspects of ‘protection of life’ that form an important part of consumer jurisprudence. These aspects of goods and services include food, health and medicine. A brief review on the legal framework of these goods and services is undertaken below.

4.3.1.4. Food

Ordinarily, the matter of food falls under the legal framework of goods and the Penal Code 1860 is the first among laws that provided provisions on it. It provides penal measures against the offence of adulteration of food or drink\textsuperscript{47} selling or offering for sale of adulterated or noxious food or drink.\textsuperscript{48} In the 1950s, when the problem was hoarding, black-market, unfairness in pricing, purity, and so on, a few laws were enacted the focus of which was providing food at affordable price. These laws defined the article of food as essential commodity by respective laws.\textsuperscript{49} During the same time, with a view to ensuring purity of food, the Pure Food Ordinance 1959 was enacted. It provided some provisions which were both judicial and administrative in nature simultaneously. As part of administrative measure, it provided provision for constituting a ‘National Advisory Committee’ on the Purity of food under the chair of Minister for Local Government,\textsuperscript{50} appointing food analyst for every municipal

\textsuperscript{43} Nina Arora vs. Sr. Manager, Canara Bank, II (1994) CPJ 109: 194 (3) CPR 485 (NC).
\textsuperscript{44} J. Radhakrishnan vs. Mrs. A. Basheera, I (2001) CPJ 57 (TN); see also Jaysree Nair vs. Halrefathudeen, I (2000) CPJ 166: 2000 (1) CPR 429 (Ker.).
\textsuperscript{47} Section 272 of the Penal Code 1860.
\textsuperscript{48} Ibid., Section 273.
\textsuperscript{49} Please see laws on essential commodity.
\textsuperscript{50} Section 4 of the Pure Food Ordinance 1959.
bodies, providing standards (national standard) for different categories of food. Recently, the main concern with respect to food has been shifted from purity to ‘safety’ in furtherance of which a new law on food – the Safe Food Act 2013 has been enacted. This Act has repealed the Pure Food Ordinance 1959.

Besides these laws, there are some special laws that possess the capacity to ensure the smooth supply of safe food, address the problem of hoarding, black-market and thus ensure protection of life to consumers. One of such laws is the Special Powers Act 1974. The moral ethical force of this law also comes from the concept of protection of life. It considers food and medicine as integral part of protection of life and accordingly, it provides provision against the offence of adulteration of food, drink and medicine. The penalty that it provides include death, imprisonment for life, rigorous imprisonment for a term that may extend to 14 years, and also fine.\(^{51}\) This Act also provides the same punishments for an attempt to commit any of these offences.\(^{52}\) Besides the discussion made above, a review on the legal framework with reference to safety of food and protection of life is undertaken in chapter 7 of this study.

### 4.3.1.5. Health and medicine

The legal framework health may be divided into health goods and services and the laws into no-health and health laws exclusively. At the very outset of statutory justice, the matter of health was dealt with by non-health law – the Penal Code 1860. Since then, it formed the legal framework of health laws for a long time. It provided penal measures against the offence of adulteration of drugs and medical preparations,\(^{53}\) sale of drugs or medical preparation different from the drug or preparation offered or intended for sale.\(^{54}\) With the passage of time, when the matter of health goods and services started to take a complicated shape, the measures provided by this Code lost its necessity and applicability. Excepting the aspect of referral value, this Code ceased to be defined as an important part of the legal framework on health laws of Bangladesh.

After this Code, the law by which the regime of health law (health goods) was revolutionized includes the Drugs Act 1940 and the Drugs (Control) Ordinance 1982. Presently, the whole of activity relating to drugs and medicine revolves upon this. From this point of view, these two laws are considered as the principal law forming part of the legal framework of drug and medicine. But, due to the ambiguity in legislation or contradiction with other laws, it faces the apprehension of legal battle or challenges. According to the main provision of the Drugs (Control) Ordinance, 1982, the matters

---


\(^{52}\) Ibid., Section 25D.

\(^{53}\) Sections 274 and 275 of the Penal Code.

\(^{54}\) Ibid., Section 277.
relating drugs and medicine are triable by the Drugs Court under this Ordinance of 1982. Whereas, apprehension of denial of justice is created by the provision of the principal law on consumer protection which provides that these offences shall be tried only by the Special Tribunal constituted under section 26 of the Special Powers Act 1974. Being a special law, although this Act deals with adulteration of drugs and medicine, but, it cannot be defined as health law in the strict sense of the term. While, this Ordinance provides provision for the trail of drugs related offences by a special court (i.e. drugs court), such insertion of provision curbs the inherent capacity of this law (the Drugs (Control) Ordinance, 1982) and it ceases to exist as a vibrant law forming the legal framework of health law. With a view to providing special emphasis on laws regulating the production and sale of health goods, the regime of health laws of Bangladesh provides some laws on the traditional system of medical treatment (Homeopathic, Ayurvedic, Unani, and Bio-chemic). These laws also form part of the legal framework of health laws of Bangladesh.

Regarding health services, the process of legislation on this aspect started in the 1960s by the enactment of Eye Surgery (Prevention) Ordinance 1960, or the Allopathic System (Prevention of Misuse) Ordinance 1962. But, the initial process of comprehensive legislation on health started with the enactment of the Bangladesh Medical and Dental Council Act 1980. Subsequently, it was reinforced by some other laws. At present, this Act has been re-named as the Bangladesh Medical and Dental Council Act 2010. It is regarded as the principal law on health services. A brief review on these laws is given in chapter six of this study.

Although, the focus of this discussion was contextual, but, it cannot be ignored that with the passage of time, there emerged some aspects that gave rise to the necessity of enacting laws on it. These aspects include essentiality of goods, qualitative and quantitutive aspect of goods and services, monopoly and restrictive trade practices and so on. In view of this, a review on the legal framework of these aspects is given below.

### 4.3.2. Essentiality of Goods and services

With a view to meeting the urgency of smooth supply of goods, especially with food and medicine, the regime of Bangladesh legislation, imported a concept of essential commodity. Basing upon this concept, some of the laws were enacted in the 1950s. These laws include The Essential Articles (Price control and anti-Hoarding) Act 1953, the Control of Essential commodities Act 1956, and the Essential Commodities Act 1957. The process that it adopted for providing remedies were, declaring a

---

55 Section 73 of the Consumer Rights Protection Act, 2009.
56 These laws include the Bangladesh Unani and Ayurvedic Practitioners Ordinance 1983, the Bangladesh Homeopathic Practitioners Ordinance, 1983.
57 For example, the Private Medical Practice and Laboratories Ordinance 1982; the Transfusion of Safe Blood Act 1999.
few goods as essential commodity, enlisting the name of these goods, fixing the price of goods beyond which it cannot be sold or procured, limiting the quantity of goods beyond which it cannot be held or possessed by any person and so on. The system of justice that provided was criminal in nature, not civil. It provided provisions only on goods, not on services. Although, Acts dealt with various kinds of goods, but, the focus of these laws were food and medicine. For the purpose of clarity, a brief review of these laws is given below.

4.3.2.1. The Essential Articles (Price control and anti-Hoarding) Act 1953

The Essential Articles (Price control and anti-Hoarding) Act 1953 is first among these categories of laws. The purpose of this Act is to ‘make provision for the control of supply and distribution of, and trade and commerce in, certain limited number of essential commodities’. The legal structure of this Act provides authority to the government:

(a) to fix the maximum price at which the essential commodity can be sold, or the goods can be procured for sale,
(b) it also provided the authority to the government to fix the quantity of goods that can be held for possessing by a trader,
(c) obtaining trade license for food and essential commodity dealers, compulsory sale of essential goods at such quantity and price as may be determined by the government.

This Act suffers from some deficiencies which is inherent in nature. These deficiencies include the failure in providing the definition of the term ‘essential article or goods’ due to which it requires borrowing legal principles from the provision of other laws. The same problem exists with the penal measures; it has to depend on the penal provision (Section 3 of the Black Market and Anti-Hoarding Act, 1948). The risk of this trend of resorting to the legal provisions of other law is that if the provision of the respective law is repealed or amended, the very basis of the borrowing law becomes inoperative. Moreover, although, it does not restrict or curb the right of access to justice by any conditionality, still, it is viced with some drawbacks for which it cannot ensure justice. Among

58 Section 3 of the Essential Articles (Price control and anti-Hoarding) Act, 1953.
59 Ibid., Section 4.
60 Ibid., Section 5.
61 Ibid., Section 6.
62 Ibid., Section 7.
63 For definition of essential commodity, it seeks resort to Section 3 of the Control of Essential Commodities Act, 1956.
64 For penal measures, it seeks resort to Section 3 of the Anti-Hoarding and Black Market Act, 1948.
these drawbacks, the most important is that being a special nature of law, it does not provide special court for the trial of offences.

In view of this condition, the Control of Essential Commodities Act 1956 was enacted without bringing any fundamental change in the main feature or structure of previous law. This Act without providing a thematic aspect of definition of the term ‘essential commodity’, it has simply provided the definition by providing a list of goods that may be characterized as essential goods. In furtherance of this, it provides for a list of 24 articles which it characterizes as essential commodity. 65

Regarding the control of price as it was in the earlier law, it provides that if it appears necessary to the government or expedient for maintaining, increasing supplies of any essential commodity, securing equitable distribution and availability of it at fair prices, or for regulating, prohibiting, the production, treatment, keeping, storage, movement, transport, supply, distribution, disposal, acquisition, use or consumption, trade and commerce of essential commodity, 66 it may control by fixing the maximum price at which goods may be sold or procured. 67 For controlling the supply of goods and curbing the apprehension of hoarding, it provides provision for trade license, permits, storage, transport, distribution, disposal, use, consumption of such commodity, 68 control the stock or holding of it in possession by any person 69 and order for compulsory sale of any such goods. For the purpose of avoiding the complicacy of proving the alleged charge, it has shifted the burden of proof on the accused. 70 Despite these measures, this Act could not make a landmark success in consumer protection. The reason for its failure lies in the fact that although section 11 of this Act provides for summary trial, but it does not provide any special court. Even the enactment of a special law 71 for the trial of food related offences (i.e. Food Court) could not bring any significant change in the situation. Moreover, the right of access to justice for an individual was curbed by prior conditionality. No court could take cognizance of any offence without report from a public servant under section 21 of Penal Code, 1860. 72

With the passage of time, when the volume and variety of consumption was expanding, it was felt necessary to widen the scope of essential commodity by new enactment. So, with a view to catering to the needs of time, the Essential Commodities Act, 1957 was enacted. This Act did not import any fundamental change in the system or principle of law. It had simply expanded its scope

65 Section 2(a) of the Control of Essential Commodities Act, 1956.
66 Ibid., Section 3(1).
67 Ibid., Section 3(2)(a).
68 Ibid., Section 3(2)(c).
69 Ibid., Section 3(2)(e).
70 Ibid., Section 14.
71 The Food (Special Courts) Act, 1956 was enacted with a view to try the offences relating to food.
72 Section 10 of the Control of Essential Commodities Act, 1956.
simply by expanding the number of essential commodities under it. Other than expanding the number of goods from 24 to 32 or providing provisions for summary trial under section 260 of the Code of Criminal Procedure 1898, this Act did not provide special court for the trial of offence. Moreover, the right of access to justice was not unfettered, rather it was viced with conditionality. In view of this condition, it was felt necessary to enact and enforce laws exclusively for consumers.

4.3.2.2. The Special Powers Act 1974

The Special Powers Act 1974 is a special law. Although the purpose of this Act is only to enforce the goods standing and order in the society, still, some of its provisions may be utilized for providing protection of life to consumers. In this respect, the term ‘protection of life’ is used to mean and include injury to health and death. The laws relating to protection of life may not be found in one umbrella legislation. It is dealt with by various laws including the laws relating to consumer goods. It has also been observed that the aspect of protection of life and the aspect of goods (supply of essential commodity) is dealt with by the same law. In some cases, it assumes the character of special law, e.g. the Special Powers Act 1974.

The purpose of the Special Powers Act 1974 was providing special measures for the prevention of certain prejudicial activities, ensuring the speedy trial and effective punishment of these offences. The main focus of this Act was not consumer protection; still, some of the provisions provided provisions against the adulation of food, drugs and other daily consumables (hair oil, toilet soap, cosmetics). Section 25C of this Act provides penal measures against adulteration of food and drugs. This Act also provides for trial of cases by special tribunal constituted by Sessions Judge, Additional or Assistant Sessions Judge or a person who shall be Metropolitan Magistrate. The trial of offences under this Act may also be conducted by the procedure of summary trial as provided by CrPC, 1898. It provides death, imprisonment for life or rigorous imprisonment for a term of fourteen years including fine.

The criticism that may be offered to this Act is that it makes a difference in the jurisdiction of tribunals. A tribunal constituted by a Sessions Judge, Additional or Assistant Sessions Judge is

---

73 Section 11 of the Essential Commodities Act, 1957.
74 Ibid., Section 10.
75 For example, sections 42 and 43 of the Consumer Rights Protection Act, 2009 provides provisions against injury to human body and health by adulteration of food or adopting a process for manufacturing of goods which is declared illegal by law. Sections 52 and 53 of this Act also provides provisions against death of persons by negligent acts.
76 Section 25C of the Special Powers Act 1974 provides provision both for the supply of essential goods as well as against the apprehension of injury to health and death of persons by the adulteration of food and medicine.
77 Section 26 of the Special Powers Act, 1974.
78 Ibid., Section 27 (4).
empowered to pass capital punishment, whereas, the tribunal constituted by magistrate is not allowed to pass a sentence exceeding seven years of imprisonment and the fine exceeding taka 10,000. The right of access to justice under this Act is not unfettered due to which no court shall take cognizance of an offence without report from a police.

4.3.2.3. Qualitative and quantitative aspect of goods

A review of consumer related laws reveal that it provides laws on the qualitative and quantitative aspect of goods. In furtherance of this, the Standards of Weights and measures Ordinance 1982 and the Bangladesh Standards and Testing Institution Ordinance 1985 were enacted. These laws provided some standards of weighing which includes kilogram for mass, mole for substance, metre for length, second for time, ampere for electric current, Kelvin for thermodynamic temperature, candela for luminous intensity. These provisions have imposed ban and restriction on the use of non-standard i.e. non-metric standards in relation to any goods. With a view to providing uniform standards with respect to mass, mole energy, value, weight, length, volume, structures, materials, dimensions of goods, it provided national standards known as ‘Bangladesh Standards’. A brief review of the legal framework on this aspect is given below.

4.3.2.4. The Standards of Weights and Measures Ordinance 1982

With a view to protecting the consumers from being cheated by the use of traditional standards of weights and measures the Standards of Weights and measures Ordinance 1982 introduces the metric system which is uniform. It provides some base units that may be used in all respect of trade and commerce. The units that it introduces include kilogram for weighing mass, mole for the amount of substance, metre for measuring length, second for time, ampere for electric current, Kelvin for thermodynamic temperature, candela for luminous intensity. These provisions have imposed ban and restriction on the use of non-standard i.e. non-metric standards in relation to any goods. It provides that no person shall manufacture, repair, and sell any commercial weight and measure, any weighing or measuring instrument without obtaining license under this Ordinance. For the purpose of implementing these provisions, this Ordinance provides authority to the officials of BSTI to examine, verify and stamp the units used in trade and commerce. For the purpose of signifying the

---

79 Ibid., Section 28.
80 Ibid., Section 27.
81 Section 4 of the Standards of Weights and Measures Ordinance, 1982.
82 Sections 27 and 29 of the Standards of Weights and Measures Ordinance, 1985.
83 Section 4 of the Standards of Weights and Measures Ordinance, 1982.
84 Sections 27 and 29 of the Standards of Weights and Measures Ordinance, 1985.
85 Ibid., Section 24.
86 Sections 14-17 of the Standards of Weights and Measures Ordinance, 1982.
correctness of the standards, it requires sealing of every scale or standard of weights and measures by BSTI.\footnote{Ibid., Section 27.}

This Ordinance has made some provisions directly affecting the rights of consumers. For protecting the consumers from being cheated by less quantity of goods, it provides that no person shall sell, distribute or deliver for sale a package containing a commodity which is filled less than the specified quantity of such package.\footnote{Section 23(7) of the Standards of Weights and Measures Ordinance, 1985.} In furtherance of this, a person is not is entitled to make, manufacture, pack, sell distribute, deliver, offer, expose for sale any commodity unless it contains a declaration with regard to the identity of the commodity, the net quantity or number of goods, sale price of goods,\footnote{Ibid., Section 23(1).} a conspicuous declaration as to the net quantity or number of commodity contained in the package is necessary.\footnote{Ibid., Section 23(6).} So, where there is reason to believe that there is undue proliferation of weight, measures or number in which any commodity is being packed for sale, distribution, and such undue proliferation impairs the ability of consumer in making a comparative assessment of the prices after considering the net quantity or number of such commodity, the government may direct the manufacturer, packers, sellers to sell, distribute, or deliver such commodity in such standard of quantities or numbers as it may specify.\footnote{Ibid., Section 23(5).} This Ordinance provides penal measures (imprisonment and fine) against the use of non-standard weights and measures,\footnote{Section 32 of the Standards of Weights and Measures Ordinance, 1982.} manufacturing and sale of weight and measure that do not conform to the standards provided by this Ordinance,\footnote{Ibid., Section 33.} manufacturing of weights and measures without permission of the government,\footnote{Ibid., Section 34.} breach of provisions with regard to reference, secondary and working standards.\footnote{Ibid., Section 35.} It also provides penal measures for contravention of this Ordinance.\footnote{Ibid., Section 36-50.}

The limitation of this Ordinance is that it deals only with the aspect of quantity. So, with a view to addressing the qualitative aspect of problem, the Bangladesh Standards and Testing Institution Ordinance 1985 was enacted.

4.3.2.5. The Bangladesh Standards and Testing Institution Ordinance 1985

For ensuring the minimum standard of quality and quantity with respect to goods and services, it (the Bangladesh Standards and Testing Institution Ordinance 1985) provides the standards of goods and services known as National standard’. These standards function as reference value for mass, mole, energy, value, weight, length, volume, structures, materials, dimensions of goods and commodities.
The compliance of these standards in respect of goods is ensured by ‘certification marks’. The use of these marks in respect of goods and services implies the compliance of certain conditions relating to the standards of quality and quantity of goods and services. So, a person desirous using any such mark in relation to any article, process, or design should obtain a license from BSTI. Any person unless provided with any such license, shall use these standard marks, or any colorable imitation of it.

For the purpose of preventing persons from giving a wrong impression with regard to the standards of quality of goods, it prohibits the use of the seal BSTI, or printing the word ‘Bangladesh standards’ or any abbreviation of such expression or any marks deceptively similar to the marks issued or used by BSTI on the package of any goods. It provides provision for the confiscation of articles or any other thing used for committing the offence under this Ordinance. If any article does not conform to the Bangladesh Standards, BSTI may order for the closure of such factory producing such article or goods, the premises where such article are stored, kept or traded.

These two Ordinances provide only criminal remedies, not civil. Any person who contravenes the rules of these Ordinances shall be punishable with imprisonment and fine. Moreover, the system of justice that it provides is executive driven; no court shall take cognizance of any offence except report or complaint from the Institution. These two Ordinances of 1982 provide for summary trial in accordance with the provision of chapter XXII of the Code of Criminal Procedure 1898. No court inferior to that of Metropolitan Magistrate or a Magistrate of the First Class shall be authorized to try such cases.

4.3.3. Monopoly and restrictive trade practices

With respect to monopoly and restrictive trade practices, there are two laws that deal with these aspects – the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 and the Special Powers Act 1974 a brief review of which is given below.

---

97 Section 20 of the Bangladesh Standards and Testing Institution Ordinance, 1985.
98 Ibid., Section 5(a).
99 Ibid., Section 20.
100 Ibid., Section 19.
101 Ibid., Section 21.
102 Ibid., Section 33B.
103 Ibid., Section 33C.
104 Ibid., Section 30-32.
105 Section 52 of the Standards of Weights and Measures Ordinance, 1982 and Section 33 of the Bangladesh Standards and Testing Institution Ordinance, 1985.
107 Section 52 (b) of the Standards of Weights and Measures Ordinance, 1982.
Considering the undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices as being injurious to the economic growth, stability, well-being, and development of the country, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 was enacted. It provides provision for the establishment of an Authority – the Monopoly Control Authority108 the main function of which is administrative or quasi-judicial.109 With a view to curbing the concentration of undue or unreasonable economic and monopoly power, prevent unreasonably restrictive trade practices,110 it provides power of requiring any undertaking or person to discontinue the restrictive trade practices, terminate or modify any agreement relating to it.111 It may require some person or undertakings to divest themselves from the ownership of any stock, shares, assets and other beneficial interests, management and control of such undertakings by converting these enterprises into public limited company, or by requiring them to offer a significant part of the controlling shares to the public.112 With a view to restoring the competitive prices and eliminating restrictions on the entry of competitors in the market, it may also prohibit these persons or undertakings from acquiring any stock, or asset, or merging with other undertakings, or limit the investment of such undertakings.113

The authority has power to inquire into the affairs of any undertakings or individuals,114 and these proceedings have been characterized as judicial proceeding within the meaning of section193 and 228 of the Penal Code, 1860. This Ordinance considers the Monopoly Control Authority as a civil115 and the measures of penalty that it provides are of civil nature. The authority may direct any person or undertaking to pay such sum of money not exceeding one lakh taka as penalty, failing which it may impose a further penalty of taka ten thousand for every day.116

4.3.4. Competition

The matter of competition plays an important role in protecting the rights of consumers. The Competition Act 2012 is considered as the principal law on this aspect. Although, it deals with matters connecting with trade and commerce, but, its influence on consumers’ right of protection

108 Section 8 of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.
109 Ibid., Section.
110 Ibid., Section 3.
111 Ibid., Section 12(1)(c).
112 Ibid., Section 12(1)(a)(i)&(ii).
113 Ibid., Section 12(1)(b).
114 Ibid., Section 15.
115 Ibid., Section 15.
116 Ibid., Section 19.
cannot be ignored by any means of law. The provision of this Act has been made applicable both to goods and services.\textsuperscript{117} So, a brief review of this law is undertaken below.

This Act imposes ban on any anti-competition activity with respect to the production, supply, distribution, storage, acquisition any goods and services.\textsuperscript{118} The term anti-competition activity implies acquisition,\textsuperscript{119} oligopoly,\textsuperscript{120} cartel,\textsuperscript{121} combination,\textsuperscript{122} monopoly,\textsuperscript{123} collusion,\textsuperscript{124} tie in agreement and agreement of exclusive nature,\textsuperscript{125} practice of predatory price,\textsuperscript{126} dumping of goods and so on. The term goods imply only goods under the Sale of Goods Act, 1930 due to which the application of other laws (e.g. the Consumer Rights Protection Act, 2009 or laws on essential goods) cannot be applied.

For the purpose of implementing this Act, it provides provision for the establishment of an executive organ of the state – the Competition Commission.\textsuperscript{127} For the purpose of importing a state of competition, this Act provides for some administrative measures which includes administrative fine, (not exceeding 10\% of the three years turnover or profit which is higher), injunction for restraining any person or body from doing any act apparently seem to be anti-competition in the opinion of the Commission.\textsuperscript{128} This Act also provides for criminal measures. Any person being charged with the breach of any provision under this Act shall be liable to imprisonment for one year.\textsuperscript{129} No court without prior report from the authorized officer shall take cognizance of any offence under this Act.\textsuperscript{130} For the purpose of this Act, the Commission shall be treated as a civil Court under the Code of Civil Procedure, 1908 and section 195 of the Code of Criminal Procedure, 1898.\textsuperscript{131} It may hold inquiry and investigation on any matter connected with competition compel the attendance of any person or enterprise to produce the documents, examine the persons.\textsuperscript{132} This Act is not regarded as a complete law. There are some limitations due to which it cannot be termed as a complete legislation on fairness. These limitations include this Act does not authorize the closure of factory, shop, warehouse suspected of being engaged in the anti-competition activity. From this point of view, it cannot be characterized as an important weapon for consumers.
4.3.5. Protection of intellectual property with respect to goods and services

The matters of intellectual property play an important role in respect of consumers’ right of protection. In this connection it may be mentioned that the Penal Code 1860 is first among the statutory laws that provided provisions regarding the intellectual property rights. With the passage of time, we have observed the sharp rise in the demand of laws on preventing offences with respect to different marks [distinctive business marks, trademarks, patent, designs and so on] used in trade and commerce. In response to this demand, the Merchandise Marks Act, 1889 was enacted with avowed objective of preventing offences regarding this. This process was strengthened by the process of further legislation. The legislations relating to intellectual property were enacted with avowed objectives of protecting the owner (i.e. the inventor, producer, or manufacturer) of this property [rights] with no intent of protecting the consumers. Apparently, the owner of intellectual property seems to be the first victim of infringement, but, a critical analysis of these laws reveals that its effect cannot be kept confined only within the owner; rather it extends to the premises of ultimate user [consumer]. From this point of its influence on consumers’ right of protection, these laws have been considered as integral part of consumer laws. In view of this, a brief discussion on this aspect is undertaken below.

4.3.5.1. False marks or trade description

Among the forms of infringement of the rights of intellectual properties, the matter that affects the consumers’ right of protection directly includes false marks, false certification or trademarks, identical or deceptively similar nature of marks likely to cause confusion or deception or using marks without assignment or transmission. By using these marks, the manufacturers or sellers tries to give a false impression regarding the quality, quantity, the time and place, mode, composition and grade of material or manufacture, the fitness, accuracy, performance, or usefulness of the produce as that of a well-known brand or trademark. In this respect, these offences may not have immediate or direct bearing on the consumer, but, its effect on the consumer as being the ultimate user cannot be ignored. So, the law addressing this aspect forms part of the legal framework.

The regime of consumer law (the Trademarks Act, 1940) provides sanction to phonetic and visual form of deception and provides that no other proof is required. From this point of view, the proof of impression likely to cause effects or confusion in the minds of consumer of ordinary

133 The Patent and Designs Act, 1911; The Copyright Act, 2000; and The Trademarks Act 2008.
134 Section 2(5) of the Trademarks Act, 2008.
135 Ibid., Section 8(c).
136 Ibid., Section 8(b).
137 23 DLR 25.
138 BCIC vs. Sattar Match Works 44 DLR (AD) 208.
prudence forms part of the legal framework of consumer justice.\textsuperscript{139} Despite the use of false marks, the manners by which the infringers deceive the consumers include false trade description. These descriptions are directed towards the ‘standards of quality of goods and services, fitness of purpose, performance, strength, or behavior, time, place at which the goods or services were manufactured, identity of manufacturer, materials or grade compositions. By the use of such descriptions, the infringer tries to give an impression that the produce using such description lead persons to believe that the goods are the manufacture or merchandize of a person which in reality are different from the person whose merchandise or manufacture they really are,\textsuperscript{140} or it contains more quantity of goods or less quantity of hazardous material. These descriptions are likely to cause confusion or misunderstanding in the mind of the consumer.\textsuperscript{141}

4.3.5.2. Anti-trust activity

One of the important measures by which the consumers are frequently deceived is anti-trust activity and the methods those are applied for this end franchise of logo, copying the design of patented goods of a renowned brand. These assignments are made without any transfer of technology connected therewith. Assuming the product as the true copy of the original manufacturer or service provider, the consumer buys such products at a price equal to that of the price of original product. In such cases, the owner of this property rights may not be affected, but, it affects the enjoyment of consumer. This act of deception is characterized is regarded as ‘anti-trust activity’. A critical analysis of intellectual property law reveals that they do not provide any recognition to anti-trust activity as a form of deception or infringement. But, considering the immediate or direct effect on consumers, the law relating to anti-trust activity may be regarded as law forming part of the legal framework of consumer law.

4.3.5.2. Environment

The environment related laws (e.g. The Environment Act 1995) do not deal with the consumer protection, but it provides some measures that may be utilized for the protection of consumers. It has been observed that some of the provisions which are required for the safety of goods are not properly incorporated in the respective law. In such cases, the provision of the environmental laws may help to address these problems. These laws act through two important measures— prevention\textsuperscript{142} and

\textsuperscript{139} 20 DLR 1171.
\textsuperscript{140} Section 2(5) of the Trademarks Act 2008.
\textsuperscript{141} Ibid., Section 2(7).
\textsuperscript{142} Section 4(2)(b) of the Environment Act, 1995.
intervention. Under this Act, the Directorate of environment may provide directions to carry out programs for the quality and standards for drinking water. In this respect, a direction issued under this Act shall include matters relating to closure, prohibition, or regulation of any industry, undertakings, or processes and the concerned person shall be bound to comply with such direction. Where the public safety is likely to be in danger and immediate measures are necessary, it may immediately issue directions necessary to prevent the risk of life of people and environment. It may issue directions regarding the prevention of manufacture, sale of goods or operation or management of such activities considered to be ecologically harmful. The failure to comply these provisions may result in compensation to the injured person, confiscation of materials and equipments employed or used for the manufacture of such goods or violation of the environmental directions. The system that these laws provide for dispensing of justice includes ‘Constituting Special Court on Environment’. To speak about the relevancy of the environment related laws with consumer justice, we may refer to provision relating to the standards of quality of drinking water as provided by the Environment Act 1995.

4.4. Review of the Consumer Rights Protection Act, 2009

4.4.1. Major areas of protection: Goods and services
This issue has already been discussed in the preceding part of this study. So, for the purpose of avoiding ambiguity, a new review on it is not offered here.

4.4.2. Major areas constituting the offence of violation: Acts of commission or omission
To provide jurisdiction to appropriate authorities’ jurisdiction to dispense justice, the acts of violation against which justice may be sought must be determined. The act of violation against which justice may be sought is defined by consumer legislations as anti-consumer activity. Do all the acts of violation constitute anti-consumer activity? This may be settled both from the juridical and thematic point of view with reference to The CRP Act 2009.

The term violation includes not only the act of commission, but also the act of omission. The term omission implies requiring a person, who is doing nothing to take positive action to protect others from harm for which he is not responsible. Where there is prior relationship between the

---

143 Ibid., Section 4(2)(e).
144 Ibid., Section 4 (2)(b) and (h). This Court is empowered to try these cases and award compensation.
145 Ibid., Section 4(3).
146 Ibid., Section 6A.
147 Ibid., Section 15A.
148 Ibid., Section 15B.
149 Section 17 of the Environment Act 1995 provides provision the establishment of a special court in furtherance of which the Environment Courts Act 2010 was enacted.
parties, an omission to act will not constitute actionable negligence (Street, 2006: 36). The term ‘anti-
consumer’ activity imports not only the statutory, but also the no-statutory aspects of violation, i.e.
 omission. A review of the penal provisions of the Consumer Rights Protection Act, 2009 reveals
that it has recognized only the act of commission, not the act of omission. The enumeration of these
pre-determined activities in legislation have been made the basis for justice to the consumers. The
limitation of these penal provisions is that they are incapable of encompassing the wide amplitude of
violations that has emerged with the passage of time. It does not provide sufficient space for applying
discretion by courts. It leaves no room for applying some of the common law principles (e.g. Caveat
emptor, perceived value, implied warranty and so on) where the statutory principle seems inadequate.

In some of the countries, the non-statutory aspects of violation have been well taken as the
basis of justice. For this reason, some of the ASEAN countries have taken these aspects into
consideration and have incorporated these aspects into their statutory legislation; the aspect of implied
safety of goods and services has been incorporated in the Consumer Protection Act 1999, Malaysia.
Consequent upon this, the breach of the implied guarantee as to acceptable quality or fitness for
particular purpose, or acceptable or reasonable price, or reasonable care have seen that The CRP
Act 2009 has failed to incorporate this aspect of omission in it while defining the anti-consumer
activity.

4.4.3. Determining person or entities entitled to invoke justice
The dilemma that attaches to the question of the right of access to justice is ‘the person or entities with
whom the right of access rests? We may analyze this problem from narrower and broader aspect of
view. From the narrower point of view, the right of protection rests firstly rests with the victim, i.e.
the individual-consumer who consumes or avails of any goods or services. From the broader aspect of
view, by operation of law, this right may be extended to the premises of non-consumer. The law
considers this person or entity as passive victim or consumer. He is not required to consume or avail
of any goods or services directly by him.

In providing this right, both the statutory and common law principles are followed. This right
is provided on the basis of specific provision of law or principles under the statutory law; common
law provides this right on the privity of relation among the parties. The countries that have
incorporated the common law principles in their legislation provides an unhindered right of justice
both to the consumer and non-consumer entities. In providing this right, the legislation makes no
difference between the active and passive consumer.

151 Donoghue vs. Stevenson (1927) AC 562.
152 Section 37-56 of the Consumer Rights Protection Act, 2009.
153 Section 19-23 of the Consumer Protection Act, 1999 of Malaysia.
By incorporating the common law principles, the countries like the UK, India have extended the right of protection to non-consumer entities.\(^{154}\) So, for death to a person caused by defects in product, wholly or partly, the dependants of the victim may sue under the consumer legislations of these countries. The rights of protection may also be extended even to unborn persons. When, a defective product causes damage to a baby before birth, the baby may later sue in respect of its disabilities.\(^{155}\) In allowing the right to sue by a third party, it seems that the courts have followed the rules of privity. In an old English case,\(^{156}\) a wife whose husband bought her a restaurant meal was able to claim compensation for her food-poisoning on the basis that her husband acted as her agent.

A review of the Consumer Rights Protection Act, 2009 of Bangladesh reveals that there prevails a state of dilemma in providing this right. On the one hand, it recognizes the rules of privity; conversely, it negates this rule. A review of the Consumer Rights Protection Act 2009 reveal that it has failed recognizes the concept of passive consumer and thus it follows the statutory principle in providing the right. Pursuant to this recognition, on the one hand, it provides this right to sue for consumer violation to (a) the group of consumers having the same interest of a consumer, (b) voluntary organizations being registered for the purpose of consumers, (c) National Consumer Council or any officer authorized by the council or the government, and (d) any retailer or a wholesale businessman.\(^{157}\) On the opposite, in the case of death caused by adulterated food or medicine, it fails to provide the right of suing to the heirs of the victim-consumer. In view of the above discussion, it may be presumed that this Act has failed to resolve the dilemma between ‘rules of privity and statutory rights’ due to which the right of protection provided by this Act has turned to passive denial which needs to be cured.

### 4.4.4. Major remedies available under the CRP Act 2009

This Act provides three categories of remedies – civil, criminal and administrative the fundamental basis of which is anti-consumer activity. The term anti-consumer activity has been defined by this Act and it shall serve as the guiding principle both for these three measures (criminal and civil and administrative).

#### 4.4.4.1. Criminal

The Consumer Rights Protection Act, 2009 provides for criminal remedies against the offence of anti-consumer activity. For this end, it provides a list of activity (Section 37–56) the commission of which shall give rise to anti-consumer activity. The activity that shall constitute such offence includes— non-

---

\(^{154}\) Section 2(1) of The Consumer Protection Act 1987, UK, Section-2(1)(b)(v) of The Consumer Protection Act 1986, India.

\(^{155}\) Section 6(3) of the Consumer Protection Act 1987 (UK).

\(^{156}\) Lockett vs. A and M Charles Ltd (1938) 4 All ER. 170.

\(^{157}\) Section-(2(3) of The Consumer Rights Protection Act 2009.
disclosure of information to which the consumer is entitled, non-compliance of conditions required for its process or which the seller or service provider is bound to comply for the production of any goods or providing services, unfairness in pricing, adulteration of food and medicine, cheating in weights and measures, negligence in rendering services. It provides imprisonment and fine as criminal remedy. It also provides provision for confiscation of the materials equipments used for the commission of an offence under this Act. But, an analysis of the criminal justice system reveals that it lacks dynamism due to which they do not match with consumer demand. For the purpose of clarity, we may examine how far these remedies are available to consumers.

Regarding the charge of failure to disclose the information required for the safety and security of person, this Act does not provide any provision for parallel remedy (e.g. civil remedy). With respect to the offence of failure to comply the conditions required for the process or manufacture of any goods, the CRP Act 2009 does not clearly spell whether the provisions of the Environment Act 1995 shall be applicable in this respect. In this connection, it also does not confer powers on the consumer courts for applying the provisions of the Environment Act 1995 while trying under the provisions of the CRP Act 2009. The provision regarding unfairness in pricing is also not clear. According to the provisions of this Act, the deliberate abstention from disclosing or displaying the price list of goods and services, or sale of goods, medicine, or services exceeding the price-limit fixed by law shall be punishable under this Act. But, the problem arises from this fact that it does not make it clear regarding the remedies where specific law on the price of any goods or service is not available.

An analysis of these remedies reveals that this Act does not incorporate some of the fundamental principles of criminal justice in it. This Act does not spell about the joint or vicarious liability, abetment where the complaint is against the company or any of its staff or agent. It does not clarify the fate of criminal proceeding under this Act where there is proceeding under other law for the same cause. It also does not clarify the extent of limit of penal remedies where these measures under other laws exceed the limit of CRP Act 2009. It also does not provide any clarification

---

158 Section 37 provides that the failure to cause the package of the product, non-disclosure of information regarding the date of manufacture, weights or quantity of date of expiry, maximum price, date of packaging, modes of uses goods and so on shall be punishable with one tear’s imprisonment or fine not exceeding taka fifty thousand or both. Actually, the failure to provide information has been identified as one of the measures of consumer violation.

159 Section 43 of the Consumer Rights Protection Act.

160 Section 38 deals with deliberate abstention from disclosing or displaying the price list of goods and section-39 with services. Sale of goods, medicine, or services exceeding the price-limit fixed by law is dealt with by section-40.

161 Section 41 - Adulteration of goods or medicine; section 42 - mixture of article injurious to human health and life.

162 Sections 46, 47, 48, 49 of the Act.

163 Sections 52-53 of the Act.

regarding the supremacy of this Act over other laws. Actually, unless these gaps are made clear, apprehension of denial or miscarriage with respect to criminal justice shall continue to prevail. So, from the discussion made above, it may be presumed that the provisions of the CRP Act 2009 suffers from ambiguity and insufficiency.

4.4.4.2. Civil

An analysis of the Consumer Rights Protection Act 2009 reveals that the activity that shall entitle the consumer to civil remedy has not been spelled clearly by this Act. The non-disclosure of necessary information, or the failure to cause the proper package of goods, has been made punishable with criminal remedies under section 37 of this Act. But, these activities are capable of being treated as civil liability. failures also possess the capacity to entitle the consumer to as civil liability. These aspect of liability is based on some legal principles – Caveat Venditor, Perceived value, implied warranty and so on. These principles create providence for civil justice for the consumer. Although, the system of civil justice is based on statutory provisions, but, it fails to provide recognition to these principles as the guiding principle for civil justice. In this connection, we may refer to the consumer justice system of England. The court of England have considered these breaches as fundamental breach of contract.\(^{165}\) Considering its urgency for the ends of justice, the European Community legislations have recognized these principles as inherent in nature, due to which one cannot relinquish his liability from these obligations by any pre-determined conditions.\(^{166}\) Some of the countries have incorporated these principles in their laws.\(^{167}\) An analysis of the Consumer Protection Act 2009 reveals that it has failed to grasp the spirit of changing dynamics of consumer jurisprudence and thus incorporate principles that are relevant for it. Actually, this failure of legislation leads to indirect denial of the right of justice.

4.4.4.3. Administrative

The CRP Act 2009 also provides for administrative remedies and primarily, the Directorate of Consumer Protection functions as the principal executing agency for this end. An analysis of these remedies reveals that the remedies that it provides acts in *Rem*, not in *Personem*. For the purpose of preventing the anti-consumer activity, this Act provides power to the Directorate to investigate complaints,\(^{168}\) confiscate or forfeit document, equipment, materials suspected to be used for any act.

\(^{165}\) Thornto n v. Shoe Xane Parking Ltd. (1971) 2 QB. 163.
\(^{167}\) Please see sections 19-23, 32,33,36,39,50, 53 of Consumer Protection Act, 1999 of Malaysia, Section 2 of the Consumer Protection Act, 1986 of India.
\(^{168}\) Section 23.
punishable under this Act,\textsuperscript{169} pass an order of injunction or impose ban on the production, sale of goods likely to be injurious to human health and body, or impose ban on the import of such goods.\textsuperscript{170} order for temporary closure of shop, factory, warehouse or undertakings being used for the production, sale, and storage of such goods.\textsuperscript{171} For the purpose of monitoring and evaluation, this Act empowers the directorate to collect sample of goods or medicine as it deems fit.\textsuperscript{172} An analysis of this Act reveals that it is viced with ambiguity due to which some of the measures cannot be enforced. This Act provides the authority to the Directorate to take the measures with respect to health services or weights and measures;\textsuperscript{173} whereas, the same Act forbids the Directorate from taking any such measures.\textsuperscript{174} This Act also does not provide powers that are required for the proper functioning of the justice system (e.g. power of re-call of goods). From the discussion made above, it may be presumed that the measures that it provides are not sufficient to cater to the needs of justice. A brief description of which is given in the later part of this chapter.

4.5. Judicial and administrative structure for providing justice

4.5.1. Judicial

For the purpose of this study, the term ‘Structure’ shall imply the procedure adopted for providing justice as well as the organizations responsible for discharging it. In this respect, we shall undertake a review of the structure of criminal and civil justice. For the purpose of criminal justice, the term ‘structure’ shall imply the court of magistrate empowered under this Act. For civil remedies, it shall imply the civil court empowered by this Act in this behalf. For administrative remedies, it will imply the principal organization responsible for implementing the provisions of this Act (Directorate of Consumer Protection). For the purpose of clarity of understanding, a brief review of the criminal justice system for consumers is given below.

4.5.1.1. Procedural aspect of criminal remedies

(a) For dispensing criminal justice, the jurisdiction of court is divided into (i) original (ii) appellate and (iii) summary. For this end, the court that functions as the court of original jurisdiction is Metropolitan Magistrate for metropolitan areas and the Court of Judicial magistrate 1\textsuperscript{st} class for areas other than metropolitan areas.\textsuperscript{175}

\begin{itemize}
    \item\textsuperscript{169} Ibid., Section-24.
    \item\textsuperscript{170} Section 29.
    \item\textsuperscript{171} Section-27 of the Consumer Rights Protection Act, 2009.
    \item\textsuperscript{172} Ibid., Sections 30-31.
    \item\textsuperscript{173} Ibid., Section 21.
    \item\textsuperscript{174} Ibid., Sections 72 and 73.
    \item\textsuperscript{175} Section-57 of The CRP Act 2009. It provides that ‘all the offences falling under the penal provisions of this Act shall be triable by a Judicial Magistrate or a Metropolitan Judicial magistrate of the first class.'
\end{itemize}
(b) For the purpose of dispensing justice, this Act confers the cognizance taking power as well as conducting trial upon Courts of Judicial magistrate 1\textsuperscript{st} class for areas other than metropolitan areas and Metropolitan Magistrate for metropolitan areas.\textsuperscript{176}

(c) The consumer or the complainant must lodge his complaint to the authorized officer of the directorate or any executive magistrate authorized by the district magistrate. The time fixed for lodging complaint is 30 days from the date of arising the cause of action.

(d) After receiving the complaint, the authorized officer shall start the process of investigation as to the correctness of the complaint. After investigation, the investigating officer shall submit the report to the court for its cognizance. The time fixed for submitting the report is 90 days from the date of complaint.

(e) After taking cognizance, the court may go for trial of the case. If, for the purpose of correctness of the complaint, it appears that a technical test report is necessary, the magistrate may order for lab-test from the authorized laboratory. The time for submitting the report is 60 days from the date of collecting sample by the lab. The person conducting the lab-test shall submit the report directly to the magistrate, not to the investigating officer.

(f) For the purpose of expeditious trial of cases, this Act also provides for summary trial.\textsuperscript{177}

Now we shall examine whether the criminal justice system may cater to the needs of justice.

\textbf{4.5.1.2. Institution of cases and its cognizance}

The consumer justice system is viced with bureaucratization of justice. According to the provisions of this Act, except the authorized officer of the directorate, no other entities (e.g. police), even the consumer courts have no jurisdiction to receive any complaint directly from the complainant. The complainant is bound to lodge the complaint only to the authorized officer of the directorate. Although the consumer may submit the complaint to the executive magistrate,\textsuperscript{178} the mandatory provision for submitting of complaint only to the authorized officer of the directorate curbs the inherent jurisdiction of the consumer court as well as the police which the criminal justice system provides in the Code of Criminal Procedure, 1898. The system that it provides is that no complaint shall be instituted without report from the authorized officer of the directorate. Similarly, the courts do not have the inherent jurisdiction of receiving complaint directly from the victim. This system of

\textsuperscript{176} Section-57 of The CRP Act 2009. It provides that `all the offences falling under the penal provisions of this Act shall be triable by a Judicial Magistrate or a Metropolitan Judicial magistrate of the first class.

\textsuperscript{177} It has been observed that there is provision and system for trial mobile courts under the Mobile Courts Act 2009 (Item-82 of the Schedule), not from the CRP Act 2009. It is a deviation of the system of criminal justice.

\textsuperscript{178} Section 69 of the Consumer Rights Protection Act, 2009.
depending upon the report of the authorized officer turns the system of justice as executive driven. this matter of curbing the inherent jurisdiction of court in entertaining the is repugnant to the traditional system of criminal justice.

4.5.1.3. Time limit for complaint

The provision of time limit for lodging complaint does not match with the system of criminal justice. It provides that unless the complaint is lodged within 30 days from the date of cause of violation, the complaint shall not be taken into consideration for investigation and other processes. It also does not provide for condonation of delay. So, a complaint how genuine it may be, is bound to stand dissolved due to its being lodged after the stipulated time. Actually, this provision defies the inherent right of justice for the consumer. As a result of which, the victim is precluded from the right of justice as a matter of natural justice and the system mentioned above has impliedly struck to the conventional system of criminal justice of Bangladesh.

4.5.1.4. Investigation of complaint

There prevails a deviation from the established system of investigation for criminal offence. The principle that ‘Investigation shall follow cognizance’ as provided by the Code of Criminal Procedure 1898 has been denied by this Act. This Act characterizes the offence as cognizable, but, follows a system which does not match with cognizable offences. The process of investigation is undertaken before cognizance. Although the consumer may submit the complaint to the executive magistrate, but, this does not mean providing jurisdiction to consumer courts. The consumer court has no inherent jurisdiction to take cognizance of a complaint on its own motion. It is not the merit of the complaint, but the report of the authorized officer that entitles the victim to his right of justice.

There are some other gaps in this Act that may be fatal for justice. This Act leaves no space for engaging other agencies (e.g. police) for the purpose of investigation. This Act does not allow extension of time required for conducting the investigation; it also does not spell about the fate of the complaint against which charge-sheet is not submitted. In such cases, apprehension of denial of justice is created where the investigating officer cannot conclude the investigation within the stipulated time. In such cases, the complaint becomes inoperative.

\(^{179}\) Ibid., Section 60.
\(^{180}\) Sections 154 and 173 of the Code of Criminal Procedure, 1898.
\(^{181}\) Section 71 of the Consumer Rights Protection Act, 2009.
Regarding the test report, the procedure that it provides created apprehension of denial of justice. It provides provision for submitting the report directly to the court without informing the investigating officer. The dilemma of requiring ‘post-charge-sheet technical report’ lies in the fact that if the correctness of the alleged complaint is not proved in the lab-test, this Act does not provide no directives as to the fate of the charge-sheet. Actually, this system has ignored the established system of criminal justice and it may expose the victim to miscarriage of justice. In such cases, the only remedy that is open to victim is Naraji petition. Now we may examine the provision relating to naraji petition.

This Act also fails to conceive that the complainant may not be satisfied with the investigation report (charge-sheet) submitted by the investigating officer of the directorate. It provides no right of objection which is fundamental for justice to a victim-consumer. Any person being aggrieved by report (charge-sheet or any other report) may raise objection to the report under section-173 of The Code of Criminal Procedure 1898. But the consumer legislation has failed to recognize this right for the litigating parties. This omission to provide this right may amount to defiance of the fundamental rights of justice.

4.5.1.5. Obscurity as to the extent of jurisdiction

For being regarded as a cognizable offence, the proof of *Mens Rea* on the part of the seller is not required; it is sufficient that the violation conforms to condition of anti-consumer activity on the very prima facie of it.\(^{182}\) Apparently, it seems from this that the court has jurisdiction of taking cognizance as well as trial over all the offences as mentioned in section 37-56 of the Act. Still, the fact remains that the court cannot take cognizance of all offences mentioned therein. The jurisdiction of the consumer court for trying cases under sections 41, 51 of this Act is barred section 71 of this Act. ‘Unless constituted under section 25C of The Special Powers Act 1974, no court of magistrate or tribunal of criminal jurisdiction, shall take cognizance of an offence of adulteration of medicine, mixing of adulterated ingredients with medicine’.\(^ {183}\) From the above discussion, it may be presumed that the provision relating to cognizance taking power of court collides with each other.

4.5.1.6. Summary trial

The system for criminal justice in Bangladesh is lengthy, time-consuming, encompassing various intricacies for the litigant. In view of this condition, this Act provides provision for the trial of cases by summary procedure as laid down by section 260 of the Code of Criminal Procedure, 1898 without

\(^{182}\) Anti-consumer activity under section 2 (20) of the Consumer Rights Protection Act, 2009.

\(^{183}\) Section 72 of the Consumer Rights Protection Act 2009.
impairing the provision of section 57 of the CRP Act 2009.\(^{184}\) An analysis of this provision reveals that the provision for summary trial is not sufficient; it requires the supportive provision of law which this Act has failed to incorporate. Some of the countries have resolved this problem by curbing the delaying involved in the process of justice; the Consumer Protection Act 1986, India provides for a time-bound system of trial.\(^{185}\) For curbing the dilatory tactics of delay in justice, it provides that no proceeding shall be called in question even on the ground of natural justice.\(^{186}\) Sri Lanka has addressed this problem not by providing any such provision for summary trial; but, by prioritizing the consumer related cases over other businesses of the court.\(^{187}\)

A critical analysis of the provision for summary trial reveals that it is not conducive for justice to consumers of Bangladesh. The term ‘trial by summary procedure’ does not imply trial by mobile courts; still, it is taken to imply ‘trial by mobile courts’ which is incorrect from legal point of view. Due to this misconception, the whole system of consumer justice has become dependent upon trial by mobile courts. Moreover, The trial by mobile courts receives its sanction from the Mobile Courts Act, 2009, not from the CRP Act 2009. This system of resorting or depending on other law places the consumer justice system at stake. If the relevant portion of Mobile Courts Act 2009 is repealed, the system of consumer justice by mobile courts shall be at stake. Moreover, the Mobile Courts Act 2009 provides no access to the consumer; it is convened at the instance of the authorized officer of the Directorate. So, the provision relating to mobile court is not in favor of the spirit of criminal justice.

\subsection*{4.5.1.7. Appellate jurisdiction (Criminal justice): Breach in principle/system}

There prevails discordance in underlying the principle relating to the appellate jurisdiction. Under section-65 of the CRP Act 2009, an appeal may be preferred to the Sessions Judge as a court of appeal against the judgment of the court of magistrate or the court of summary trial. According to the criminal justice system, any judgment pronounced by a court of magistrate (either of conviction or acquittal) is ordinarily appealable to the court of Chief Judicial Magistrate (CJM). But, in respect of consumer cases, it is the Sessions Judge, not to the CJM has been made the court of appeal. Consumer justice requires a vibrant condition that will be jubilant for the consumer justice system of Bangladesh. But, by taking away the jurisdiction of lower courts and devolving it upon the court of

\begin{footnotes}
\item 184 Section 58 of The Consumer Rights Protection Act: ‘In respect of trial under this Act, the courts shall, as far as possible, follow the summary procedure as down in section 260 of the Code of criminal Procedure, 1898 without impairing the provision of section 57 of this Act.
\item 185 Section 12(3) of the Act provides for hearing on maintainability or acceptance of suits, section 13(1) for laboratory test-report and so on.
\item 186 Ibid., Section-13(3).
\item 187 Section-29 of the Consumer Protection Act 1979, Sri Lanka.
\end{footnotes}
higher jurisdiction does not make the justice system jubilant for consumers. Actually, this act of deviation does not bring enormous result for the consumer; rather, it has made a breach to the established system of criminal justice.

4.5.2. Civil remedies

The CRP Act, 2009 provides replacement of defective goods by appropriate goods, refund of money paid for the defective goods or services supplied, and compensation to the plaintiff to compensate as civil remedies.\(^{188}\) This financial compensation may extend to five times of the ascertained loss. Any person aggrieved by any act of the defendant, may institute a suit for civil remedies under this Act. For the purpose of this Act, the competent court includes the court of Joint District Judge.\(^{189}\) The court of magistrate for consumer justice does not possess any jurisdiction of awarding civil remedies.

4.5.2.1. Cause of action

The first problem arises with respect to civil remedy is ambiguity in cause of action or *locus standi*. It is presumed that the principles of anti-consumer activity as described by this Act shall be the guiding principle for this remedy; but, this provision lacks some standard or fundamental principles those are required for civil remedies; even it does not provide any hints about the acts that will constitute the cause of action. It has failed to incorporate the aspect of unfair or restrictive trade practices, defects or deficiency in goods or services and so on. The countries those who have adopted justice of civil nature have incorporated these principles in their laws. But, the Act of 2009 has failed to incorporate these aspects in it.

4.5.2.2. Jurisdictional aspect

This Act provides that the provision of the Code of Civil Procedure 1908 shall be followed in dispensing justice of civil nature. Under section 15 of this Code, the court of first instance shall be the court of lowest grade having the pecuniary jurisdiction. But, this Act has breached this principle by earmarking the Joint District Judge as the competent court. Actually, a good number of complaints with respect to small valued goods could have been resolved by courts having lower pecuniary jurisdiction. But, this provision has curbed the potential of other courts of law for dispensing this justice. In this respect, we may mention that the potential of small cause courts under the Small Causes Courts Act 1877 which has been curbed by bringing all the offences under the Joint District Judge. Actually, this provision functions as indirect defiance to the established system of justice.

\(^{188}\) Section 67 of the Consumer Rights Protection Act, 2009.
\(^{189}\) Ibid., Section 66(2).
4.5.2.3. Period of Limitation for institution of suit

This Act provides a time-frame for the trial of cases starting from lodging of complaints to finality of order, but, it does not provide any such provision for civil remedies. Rather, instead of providing a time-frame, it has failed to introduce a system that is different from the system that involves a lengthy process. The country that provides the civil nature of justice introduces a time-bound system of justice. In this connection, we may refer to the Consumer Protection Act 1986, India. Under Section 12(3) of this Act, at the very outset of any complaint, the District Forum holds a hearing on the maintainability of the suit within 21 days from the date of the complaint. After hearing of the maintainability of the suit, the Forum shall direct the defendant to give reply within 30 days from the date of receipt or such extended period not exceeding 15 days. It also provides 45 days’ time for laboratory report where it is required for the trial of cases. Due to its failure to provide a time-line, the potential of the CRP Act 2009 cannot be maximized.

4.5.2.4. Compound ability of suits

For the purpose of amicable settlement of disputes, the criminal justice system of the CRP Act 2009 provides for compounding of suits even at the stage of trial or appeal. But, it does not provide any such measures for suits of civil nature. Actually, this failure to provide this opportunity amounts to defiance to the policy of uniformity and equality of justice and in conclusion, it the justice system loses its dynamism.

4.5.2.5. Civil appellate jurisdiction of court

The Code of Civil Procedure 1908 which is regarded as the principal legislation for civil appeal; it spells out the orders and judgment that are appealable. But, as regards the CRP Act 2009, it suffers from inadequacy and insufficiency with respect to civil remedies. The forum of appeal also differs depending upon the difference in the nature of appeal (Civil or criminal). In respect of criminal proceeding, the proper court of appeal is the court of Sessions Judge; whereas, for civil proceedings, the court of appeal is the High Court Division. By taking jurisdiction of the same level of court (The Court of District and Sessions Judge) and devolving it upon court of higher jurisdiction does not match with the principle of uniformity; it lacks the justification, either jurisprudential or circumstantial. Actually, it drives the consumer to criminal justice by curbing the scope of justice of civil nature.

---

190 Ibid., Section 13(1)(c).
191 Ibid., Section 60.
192 Section 96-99, 104-108 and Order-XLI of The Code of Criminal Procedure 1908 clearly spells the orders against which appeal shall lie.
4.5.2.6. Modes of Remedies

The civil remedies provided by this Act are limited only to a few schemes, it does not provide for other form of remedies that may be provided under other laws, e.g. the Specific relief Act, 1877. These remedies include –

a) injunction or measures for preventing the defendant from doing any anti-consumer activity, or engaging in unfair and restrictive trade practices

b) withdrawing or cancellation of license, alerting the consumers of the safety, quality, quantity of goods

c) declaration of legality or illegality of any state of affairs or business

d) declaration of right, title or interest of the plaintiff in the goods or goods in question

Attachment of goods, services and the equipments necessitated for the preparation or manufacturing of such goods and services and so on.

The CRP Act 2009 also remains silent about the remedies of Specific performance of contract, express or implied and Purchaser’s right against vendor with imperfect title and so on. The failure of the CRP Act 2009 to provide sanction to these collateral provisions of law curbs the scope of justice for the consumer. But, the CRP Act remains silent on these remedies.

4.5.3. Administrative: Directorate of Consumer Protection

“Institutions can […] be important in facilitating our ability to scrutinize the values and priorities that we consider, especially through opportunities for public discussion (Sen, 2009: xii). While discussing the dispensing of justice, it has been observed that the functioning of the administrative organizations also contributes much in dispensing justice beyond the functioning of judicial bodies. In this respect, we have seen the functioning of two types of organizations – organizations principally responsible for this end and auxiliary organizations. The functioning of the auxiliary organizations may not directly dispense justice, but, it may import important bearing on the providence of justice for consumers. The Directorate of consumer protection acts as the principal organization for this end. Beyond the functions of the Directorate of consumer organizations, there are many other organizations who discharges their duties under separate law and their functioning helps to facilitate consumer

---

194 Section- 42 of The Specific Relief Act, 1877 read with section 18 and 22.
194 Ibid., Section 18.
195 Ibid.,Section-12.
196 Ibid. Section 18.
protection. These organizations may be defined as auxiliary organization a brief review of which is given in this chapter.

4.5.3.1. Directorate of Consumer Protection

The CRP Act 2009 provides provision for the establishment of the Directorate of Consumer Protection197 as the principal executing agency for consumer protection. This organization functions mainly through two processes – centrally by the officials of this organization, the office of District magistracy, and the committees and lastly, through committees or councils constituted under the CRP Act 2009.198 According to the provision of this Act, the powers and functions of this Organization is administrative in nature and it may be undertaken without recourse to any judicial or quasi-judicial bodies. But, main weakness of this organization of is its failure to formulate the strategy of its functioning, identifying the partner organizations with whom it may junction jointly, and so on.

A strategy paper is important for the smooth functioning of the concerned organization and its related bodies. Since the enactment of this law in 2007 (as Ordinance), it took five years to formulate the rules concerning the procedure for investigation of complaints; it has left other procedures relating to awareness campaign, coordination with partner organization, establishment of consumer care centers or any such system for bringing justice at consumers finger tip, provide assistance to civil society for consumer protection, and other related matters.

Another important matter that is conserved as failure of this Organization is its failure in taking initiative for the constitution and establishment consumers courts. It has been observed that many years have passed since 2007, the regular court for consumers has not yet been established nor any court has been assigned with this responsibility. Due to the reasons mentioned above, the potentials of this organization could not be explored or maximized to a satisfactory level; rather, the main stream of its functioning has become dependent on conducting mobile courts by the office of district magistracy.

According to the allocation of business, the ministry of Commerce and the Directorate of Consumer Protection is the principal organization which has pivotal role for consumer affairs. But, the authority of the directorate or some of its powers are curbed by conditionality or legal restrictions. Under section-21(2)(b),(e), (f), (g), (h), (j) of the CRP Act 2009, it may take measures against the act of manufacturing and selling of adulterated medicine. But, under Section-71 and 72 of The CRP Act 2009, the Directorate cannot take any measures by its own motion. Similarly, under section-73 of the same Act, in respect of complaint regarding private health services (including the clinical laboratory

197 Section 18 of the CRP Act 2009.
198 Section 69 of the CRP Act 2009.
services), it has no authority of investigating the complaint except informing the Directorate of Health or to the ministry of health regarding this. Moreover, the measures as provided by this Act are not self-contained. For example, the power of temporary closure; the tenure of temporary closure is not defined by this Act due to which it may lead to arbitrary exercise of the powers and ultimately may face legal challenges from the court. The same situation is applicable to the power of confiscation or forfeiture of documents, equipments, or injunction. Due to the reasons mentioned above, its potential has not been explored and unlike other organizations, it could not emerge as an organization effective for consumer protection.

4.5.3.2. Committees/ councils

In the above, we have given the structure for discharging the executive functions. Beyond this structure, for the purpose of carrying forward these activities, the CRP Act 2009 provides for four-tier structure starting from national to local level (Union Council) as below:

**Committees and councils**

<table>
<thead>
<tr>
<th>Council/committees</th>
<th>Members of committee</th>
<th>Headed by</th>
<th>Committee’s Tenure</th>
<th>Meetings</th>
</tr>
</thead>
<tbody>
<tr>
<td>National council (Section 5)</td>
<td>27 of which 03 will be female.</td>
<td>Minister for Commerce</td>
<td>02 &amp; half years</td>
<td>Once in 02 months, Quorum: minimum 10 members</td>
</tr>
<tr>
<td>District Committee (Section 10)</td>
<td>10 members. No seats for female.</td>
<td>Deputy Commissioner</td>
<td>02 and half years</td>
<td>At least once in a month</td>
</tr>
<tr>
<td>Upazila Committee (Section 13)</td>
<td>Regulated by regulation.</td>
<td>Upazila Nirbahi Officer</td>
<td>Determined by regulation.</td>
<td>No mandatory provision, but determined regulation.</td>
</tr>
<tr>
<td>Union Parishad Committee (Section13)</td>
<td>Committee yet to be formed</td>
<td>Chairman of the UP</td>
<td>Determined by regulations.</td>
<td>No mandatory provision, but determined regulation.</td>
</tr>
</tbody>
</table>

These committees or councils suffer from inherent weakness of inadequacies. Firstly, since the enactment of CRP Ordinance 2007; the National Council have not yet been able to provide operational strategy for the committees working in the District, Upazila and Union level. According to the provision of law, these committees are not accountable to the national or district committees due

---

199 Injunction: Under section-29 of the CRP Act 2009, if the directorate has reason to believe that ‘the manufacture, production, and sale of any product is injurious to human health and body, it may cause to pass an order of injunction, or pass an order banning the import, storing, manufacture, distribution, selling or exposing or offering for sale of such goods.
to which it suffers from functional inertia. The structure of the council or committees is viced with dominance of executive members\(^{200}\) of the administration; the majority of members (out of 29 members) are from the executive. It also suffers from representational parity; out of 29 members, only three representations are reserved for the women (Chairman, National Council for Woman of Bangladesh and two other members). Moreover, the UN Guidelines on Consumer Rights 1985 have provided special emphasis on the protection of consumers living at the rural level. But, this Act of 2009 has made no provision for representation from rural population. This failure goes to the very root of rural justice affecting the consumers living in rural areas. This council also suffers from improper representation; the person whose presence is earnestly required for the functioning of the council is not included. Among the pivots of health administration, the first person responsible for it – DG (Health) is not made a member of this council; whereas, the DG, Drug Administration is included in the council which is a gross irregularity.

It has been observed that the powers of the directorate are curbed by operation of law. In this respect, it has been observed that the measures regarding health as provided by this Act cannot be dealt with by this Directorate; it is dealt with by the Directorate of Health. The matters relating to medicine is dealt with by the Directorate of Drug Administration. The matters relating weights and measures are dealt with by the Bangladesh Standards Testing Institution. Save and except the matters for which no organization is created or empowered by the respective laws, the rest of the consumer affairs shall be dealt with by the Directorate of Consumer Protection. Due to the reasons mentioned above, the functioning of these council or committee is viced with bureaucratization of justice where the importance consumer as the principal object of public justice has been marginalized by operation of law.

4.5.3.3. District Magistrate

In the district level, the functions of the directorate are carried by the District magistrate and the executive magistrates as the principal executing agency on behalf of the Directorate. The District magistrate possesses the powers equal to that of the Directorate\(^{201}\) (power of closure, forfeiture, injunction, under section 21-30 of the CRP Act 2009). Besides the powers mentioned above, the District magistrate has the power of conducting mobile courts under the Mobile Courts Act 2009. For this end, it may also apply the provisions of other laws.\(^{202}\) It can provide control on price for essential commodities, ensuring equitable distribution of essential commodity in different parts of the country, regulate provisions relating to the

\(^{200}\) Under section 5 of the Act, in the national council, out of 22 members, 15 are institutional members. Under section 10 of the Act, in the district level committee out of 10 members, 5 are institutional members.

\(^{201}\) Section 69 of the Consumer Rights Protection Act, 2009.

\(^{202}\) In this respect, we may refer to the Essential Commodities Act 1956, the Special Powers Act 1974, the Safe Food Act 2015 and so on.
production, movement, transport, sale, supply and stocking of goods in different parts of the country. The sanction to the Special Powers Act 1974, provides authority to the district Magistrate in preventing or curbing the apprehension of prejudicial acts likely to be done by any person or entity. The review of consumer laws of Bangladesh reveals that although it has ratified many documents or indentures that may be regarded as international law, but, it does not provide sanction to these documents as forming part of legal framework, e.g. the Universal Declaration of Human Rights 1948. As the EU countries have ratified these documents, the domestic courts of some of the EU countries have been seen to apply the precedent of EU courts, rules or covenants of the union (EU). From this point of view, the international laws also form the part of consumer legislation indirectly. This system of abstention bears on remedies and right of access to justice for consumers. From this point of view, a review on these aspect is undertaken in chapter 5 of this study.
CHAPTER 5

CONSUMER REMEDIES AND ACCESS TO JUSTICE

5.1. Remedies available to consumers

In the preceding chapter, we discussed the legal framework on the consumer justice system of Bangladesh. In this chapter, no discussion could be offered on the aspect of remedies, especially with emphasis on the right of access to justice. In this part, we have undertaken a review on the consumer justice system of Bangladesh wherein the main focus shall be different forms and manners of remedies available to a consumer and the right of access to justice.

The matter of consumer remedies may be divided into criminal, civil, tort, administrative and constitutional. These remedies act both in Ret and Personem according to its nature. Under the consumer justice system of Bangladesh, the criminal remedies acts primarily in Personem, and then in Ret. The remedies of civil nature including the tort remedies act in Personem, not in Ret. The administrative and constitutional remedies act both in Ret and Personem.

The most important point to be noted with remedies is that the system is based on the conventional system of justice [statutory system of justice] due to which it fails to adopt many of the unconventional systems of remedies as well as maximize the functioning of many organizations capable of providing alternative remedies. Due to its failure to keep the avenues of conventional and unconventional system of remedies wide open, the scope of alternative remedies have been curbed or denied to a great extent; the potentials of some unconventional organization and its systems could not be applied extensively.

The matter of food and medicine acquired the prominent position in the legal structure of consumer justice system of Bangladesh due to which the statutory laws incorporated necessary provisions on food and medicine since its very inception. So, the Penal Code 1860 being the first laws on this aspect provided provisions against the offence of adulteration of food, drink and medicine. The laws on other aspect of goods and services emerged with the passage of time.

In analyzing the consumer justice system of Bangladesh, it is necessary to mention that this system of Bangladesh is totally based on domestic laws. Although Bangladesh has ratified many international treaties, conventions, declarations (e.g. the Universal Declaration of Human Rights 1948), but, they do not form part of national legislation like many of the EU countries. In some of the EU countries, the domestic courts are at liberty to apply the precedents of EU courts, rules or covenants of the union (EU). In Bangladesh, it is only the domestic or national law that forms part of the legal framework of consumer justice system, these international laws possesses only the referral

---

1 According to the consumer justice system of Bangladesh, criminal remedies comprises imprisonment and fine.
2 Sections 272 and 273 of the Penal Code, 1860.
3 Ibid., Sections 274 and 275.
value. From this point of view, it forms the weakest part of consumer legislation. In view of this condition, we may undertake a review of these remedies.

An analysis of the criminal justice system of Bangladesh reveals that it is tainted with many vices the first of which includes that it is not based on the principle of restorative justice due to which the right of access to justice is curbed by much conditionality. This right is confined only between the victim and the offender; it does not extend to the premises of successors of the victim due to which the heirs of the victim cannot sue the offender even in the case of death. Moreover, this right of access to justice is not unfettered, rather it is executive-driven due to which the right of justice is largely denied or curbed by operation of law.

The provisions of consumer law do not match with the principles of civil justice. It has recognized only three forms of remedies and a vast area and forms of remedies remains beyond the sphere of consumer law. The provisions of law does not clearly spell the forms and manner the commission of which may give rise to violation of consumer law. The principal law on consumer protection does not recognize or provide the widely practices form of civil remedies, such as, specific performance, injunction and so on. Moreover, the aspect of tort as a form of civil remedy is not taken into consideration. In many jurisdictions, these aspects of tort liability [psychiatric harm to the victim, duty of care towards buyer and so on] have been given recognition by statutory law due to which provisions have been incorporated in the statutory law incorporating the aspects of tort liability. For this reason, it has become easy to provide these remedies to the victims. Under the present structure, the non-statutory law (i.e. law on Tort) also forms an important part of legal structure of Bangladesh. In such cases, the principle that shall function as the guiding principle is the Donoghue vs. Stevenson (1932) case. In furtherance of this, justice may be solicited by applying the principle of Caveat Venditor, implied warranty, perceived value and so on. So, these aspects also form an important part of legal framework of consumer justice in Bangladesh.

Regarding the administrative remedies, it does not clearly spell the ways and means by which these remedies shall be made available to consumers. In this respect, the remedy open to a consumer is the enforcement of fundamental rights which is also viced by skepticism of judges. In view of this condition, with a view to make justice available to consumers, a review of this aspect is undertaken below in which the main focus is given on remedies available to a consumer and the right of access to justice.

5.2. Criminal law remedies

These remedies are provided mainly under the consumer protection act 2009. There are some other laws that also provide this remedy. So, for the purpose of clarity of understanding a comprehensive review of this is undertaken below.
Among these legislations, the Penal Code 1860 is regarded as the first legislation on consumer justice. It has already been mentioned in the preceding chapter that the Penal Code 1860 provides with respect to goods and services. It also provides remedies with respect to intellectual property and weights and measures. Regarding offences relating to food, drink and medicine, it provides that whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months or fine of taka one thousand.\(^4\)

Whoever sells or offers or exposes for sale as food or drink, any article which has been rendered or has become noxious, or is in a state unfit food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months or fine of taka one thousand.\(^5\) Whoever with intention to sell or knowing that it will be sold, sells or exposes for sale, any adulterated medicine or mix with it any ingredients likely to lessen the efficacy of it, shall be punished with imprisonment of either description for a term which may extend to six months or fine of taka one thousand.\(^6\)

Regarding weights and measures, it provides that whoever fraudulently uses any instrument for weighing which he knows to be false shall be punished with imprisonment which may extend to one year or with fine or with both [section 264 of penal code]. Similarly, whoever, fraudulently uses any false weight or false measures of length or capacity or fraudulently uses any weight or measures of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment for one year or fine [section 265 of Penal Code 1860]. Similarly, for being in possession of false weights and measures [section 266] or making or selling of false weights and measures [section 267], the accused may be punished for one year.

5.2.1. Remedies regarding essential commodities

The consumer justice system of Bangladesh provides the remedy of criminal justice [imprisonment and fine] for offences relating to essential commodities. In the preceding chapter, we have seen a list of laws\(^7\) that act as the principal legislation for dealing with this aspect. These laws provided provisions for imprisonment for term that may extend to three years and a fine\(^8\) as criminal remedies against the offence of hoarding, black marketing, cheating and unfairness in prices and so on. In this connection, the drawback of this provision is that it does not spell out the amount that may be inflicted

\(^4\) Ibid., Section 272.  
\(^5\) Ibid., Section 273.  
\(^6\) Ibid., Sections 274, 275, 276.  
\(^7\) These laws include Anti-Hoarding and Black-Market Act 14, the Essential Articles (Price Control and Anti-Hoarding) Act 1953, the Control of Essential commodities Act 1956 and the Essential Commodities Act 1957, the Special power Act 1974 for criminal remedies.  
\(^8\) Section 6 of the Essential Commodities Act, 1957.
as fine upon the offender. From this point, it suffers from juridical insufficiency. In this respect, it may also be mentioned that the remedies mentioned above are applicable only to a few number of goods defined as essential commodity due to which these provisions cannot be applied to a wide variety of goods unless incorporated by law as essential commodity.

Regarding administrative remedies, it provides the remedy by restriction, prohibition, control, and compels inspection and so on. Power to fix prices: The government may from time to time, fix the maximum price at which essential article may be sold by a retailer, wholesaler, or any other person and for this purpose, it may also fix different prices according to the variant feature of the locality. It may also cause the marking of prices (maximum) on the body of any essential article and compel the display of these prices at such conspicuous places of the shop or godown as the government may determine. It shall also specify the date and time from and until which the price shall be effected or remain in force.

The government may impose prohibition on the sale, purchase, delivery or accept the delivery of any essential article at a price exceeding the maximum price fixed by it. No person or trader shall display, sale, or offer for sale of such articles exceeding the prices fixed for it. For the purpose of ensuring the smooth supply, delivery and abundance of essential articles, the government may control of the stock of any such articles in the possession of any family, wholesaler, or retailer. For the purpose of bringing better control and supervision on the stock, sale, delivery of essential articles, the government impose restriction or prohibition on the sale of any such article except under and in accordance with the conditions of a license issued in this behalf.

For the purpose of ensuring the smooth supply of essential articles, the government may cause the compulsory sale of such articles at such quantity and the prices fixed by the government. For the same purpose, the government may take measures against the refusal or withholding of the sale of such articles. For the purpose of ensuring the measures mentioned above, it may cause the inspection, searching of the stock of such articles in the possession of the seller. It may enter upon and inspect the premises, tents, vessels, or vehicles used or believed to be used for the purchase, sale, transfer or storage for sale of any essential article. This Act did not provide any measures of criminal liability under it. But, it provides that any person, who contravenes any of the provisions of this Act, shall be deemed to have committed an offence under section 3 of the Hoarding and Black Market Act 1948, and the provisions of that Act shall apply. The attempt to commit any such offence shall also be

---

9 Section 3 of the Essential Articles (Price Control and Anti-hoarding) Act, 1953.
10 Ibid., Section 4.
11 Ibid., Section 5.
12 Ibid., Section 6.
13 Ibid., Section 7.
14 Ibid., Section 9.
15 Ibid., Section 8.
16 Ibid., Section 13.
equally punishable under this Act.\footnote{Ibid., Section 14.} This type of resorting to the provisions of other laws is subject to apprehension of denial of justice. the risk of such resorting lies in the fact that, if the relevant provision of the said Act or the Act itself is repealed, annulled or amended, any amendment brought in the said Act providing criminal remedy, the very basis of the borrowing law (e.g. Act of 1953) becomes inoperative; even it may stand dissolved. So, this provision amounts to indirect defiance of the right of justice.

The Act of 1956 followed the provisions of the Act of 1953 with few variations. It provides the similar provisions relating to the power or authority, license, stock, sale of essential commodities.\footnote{Section 3 of the Control of Essential Commodities Act 1956.} For the first time of legal regime of Bangladesh, it has imported the aspect of public interest by this Act. Giving utmost emphasis on food and textile, it provided special provision for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority, if unregulated are likely to be detrimental to public interest.\footnote{Ibid., Section 3(2)(f).}

As criminal remedy, it provides that any person contravening any of these provisions shall be liable to imprisonment for a term which may extend to three years or fine or both. The court may also order the forfeiture of such property thereof.\footnote{Ibid., Section 6(1).} If any vessel, conveyance, or animal carrying such articles contravening the provision of this Act shall also be liable to confiscation and forfeiture.\footnote{Ibid., Section 6(2).} Any attempt to commit any of such offences\footnote{Ibid., Section 7.} or providing false statement\footnote{Ibid., Section 9.} shall also be deemed to be an offence committed under this Act and the accused shall be punishable with imprisonment for a term of three years of fine or both. This Act provides for summary trial of offences.\footnote{Ibid., Section 11.}

System: the system that this Act provides is supremacy of legislation. In furtherance of this provision, no order made in exercise of the power conferred by or under this Act shall be called in question in any court.\footnote{Ibid., Section 13(1).} So, any order that purports to be passed or issued by any authority shall be deemed to have been issued or passed by the proper authority within the meaning of the Evidence Act 1872.\footnote{Ibid., Section 13 (2).} It has deviated from the traditional principle of burden of proof. Under the provisions of this Act, the burden of proof rests on the person so accused or charged.\footnote{Ibid., Section 14.}

\footnotetext{17}{Ibid., Section 14.}\footnotetext{18}{Section 3 of the Control of Essential Commodities Act 1956.}\footnotetext{19}{Ibid., Section 3(2)(f).}\footnotetext{20}{Ibid., Section 6(1).}\footnotetext{21}{Ibid., Section 6(2).}\footnotetext{22}{Ibid., Section 7.}\footnotetext{23}{Ibid., Section 9.}\footnotetext{24}{Ibid., Section 11.}\footnotetext{25}{Ibid., Section 13(1).}\footnotetext{26}{Ibid., Section 13 (2).}\footnotetext{27}{Ibid., Section 14.
5.2.2. Remedies under special laws

It provides remedies against the offence of adulteration of food, drink and medicine, or the sale of adulterated food, drink, drugs or cosmetics. Under section 25C of this Act [1974], whoever adulterates any article of food or drink with intention to sell it as food or drink, or sells, or offers or exposes such goods for sale that has become noxious; or adulterates any drug or medical preparation in a manner likely to lessen the efficacy or knowing it as being adulterated sells or offers or exposes for sale shall be punishable with death or with imprisonment for life, or with rigorous imprisonment for a term which may extend to fourteen years, and shall also be liable to fine.

This Act also provides the same punishments for attempt of committing the same offence. It provides that ‘Whoever attempts or conspires or makes preparation to commit or abets any offence punishable under this Act shall be punishable with the punishment provided for the offence.’ The provision of this Act is not confined only within the individuals committing the act of commission (offence), but is extended to offences committed by firms, companies. Any offence, whether committed by person or company, the person engaged in this offence shall be held responsible under this Act.

The criticism that may be offered in respect of this Act is that it has provided emphasis on criminalization of justice which is declining in the present context. It has provided such an amount of penal remedies that is higher than remedies provided by other laws of ordinary nature. It imports a state of disparity or difference in the jurisdiction of tribunals. A tribunal constituted by a magistrate cannot inflict such amount of penal remedies which capable of being inflicted by tribunal constituted by a Sessions Judge, Additional or Assistant Sessions Judge. A tribunal constituted by a Sessions Judge, Additional or Assistant Sessions Judge is empowered to pass capital punishment as provided by this Act; whereas, this power of the tribunal constituted by magistrate is curbed. A magistrate is not allowed to pass a sentence exceeding seven years of imprisonment and the fine exceeding taka 10,000. The right of access to justice under this Act is not given to an individual due to which no court can take cognizance of an offence without report from a police-officer. It has incorporated the principle of ‘due diligence to prevent the commission of the offence’ for fixing the liability of offences committed by companies or firms. It may be compared with the principles of tort law which is very much exceptional in the context of statutory law of Bangladesh. The moral ethical force of this law comes from the state of emergency of the constitution under which the provisions of this Act, if applied diligently, it could serve as the law of emergency in the consumer justice system of Bangladesh for ensuring the smooth supply food, medicine and other essential commodities.

29 Ibid., Section 28.
30 Ibid., Section 27.
Power of Detention or removal of person

Where immediate measures is necessary to prevent the prejudicial act by any person, the person so suspected may be put under detention for such a period as the government thinks fit. This provision may be applied for ensuring the uninterrupted supply of essential goods (food, medicine).\(^{31}\) The government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act it is necessary to do so, make an order –

a. Directing that such person be detained;

b. Directing him to remove himself from Bangladesh in such manner and before such time, and by such route as may be specified in the order.

In this respect, the term prejudicial act includes amongst other, to prejudice the maintenance of supplies and services essential to the community.\(^{32}\)

5.2.3. Remedies for qualitative and quantitative aspect of goods and services

The matter of remedies regarding the breaches of law with respect to qualitative and quantitative aspect of goods and services is dealt with mainly by criminal, not by civil measures. The provisions regarding this aspect are provided principally by three laws – the Penal Code 1860, The Standards of weights and Measures Ordinance, 1982 and The Standards Testing Institution Ordinance 1985. The remedy as to weights and measures has already been mention in the preceding part of this chapter.

5.2.3.1. The Standards of Weights and Measures Ordinance 1982 and the Standards Testing Institution Ordinance 1985: a brief review

This Ordinance of 1982 provides penal measures (imprisonment and fine) against the use of non-standard weights and measures,\(^{33}\) manufacturing and sale of weight and measure that do not conform to the standards provided by this Ordinance,\(^{34}\) manufacturing of weights and measures without permission of the government,\(^{35}\) breach of provisions with regard to reference, secondary and working standards.\(^{36}\) It also provides penal measures for contravention of this Ordinance.\(^{37}\)

The Standards Testing Institution Ordinance 1985

Under section 20(2) of the Ordinance, no person shall use in relation to any article or process, the Standard mark or any colorable imitation thereof unless such article conforms to the Bangladesh

---

\(^{31}\) Ibid., Section 3.
\(^{32}\) Ibid., Section 2(8) (vi).
\(^{33}\) Section 32 of the Standards of Weights and Measures Ordinance 1982.
\(^{34}\) Ibid., Section 33.
\(^{35}\) Ibid., Section 34.
\(^{36}\) Ibid., Section 35.
\(^{37}\) Ibid., Sections 36-50.
standard. Whoever, by contravening this provision, uses in re relation a article or process or in the title of any patent, or in any trade mark or designs, the Standard mark or any colorable imitation thereof, shall be liable to imprisonment for a term that may extend to two years or fine of taka fifty thousand or both.\textsuperscript{38} Under section 21 of the Ordinance of 1985, no person shall, without previous permission of the Institution shall, use any name which so nearly resembles the name of the Institution as to deceive or likely to deceive the public or which contains expressions `Bangladesh Standards or `Bangladesh Standard Specification` or any abbreviation of such expressions and any mark or trademark in relation to any article or process containing the expressions `Bangladesh Standards or `Bangladesh Standard Specification` or any abbreviation of such expressions. Any person contravening this provision shall be liable to imprisonment for a term that may extend to two years or fine of taka fifty thousand..\textsuperscript{39}

Under section 22 of the Ordinance, no registering authority shall register any company or firm or other body of persons which bears any such name or expression or register a trademark or design which bears any name or mark, the registration of which contravenes the aforesaid provision. The company or firm so registering shall be liable to imprisonment for a term that may extend to two years or fine of taka fifty thousand or both.\textsuperscript{40}

A court convicting a person as above may direct the confiscation or forfeiture of any such property used for the purposes mentioned above. If any person contravenes any provision of this ordinance for which no penalty has been suggested shall be liable to imprisonment for a term of four years or fine of taka one lac. Any person who voluntarily obstructs or gives false information shall be liable to imprisonment for a term which may extend to one year or fine of taka fifty thousand.\textsuperscript{41}

The Ordinance of 1982 and 1985 does not provide for civil remedy. The administration of criminal justice is executive driven; no court shall take cognizance of any offence except on complaint made by or under the authority of the government or the Institution.\textsuperscript{42} These two Ordinances of 1982 provide for summary trial in accordance with the provision of chapter XXII of the Code of Criminal Procedure 1898.\textsuperscript{43}

Despite these measures, this Ordinance has failed to address the wide amplitude violations adopted by the sellers for the purpose of evading the obligation regarding the use of standards marks. The measures taken under this Ordinance is executive-driven due to which the implementation of these standards has been made dependent upon the law enforcing agencies. The post-license drive by BSTI is not considered significantly. Whether a licensee is complying with the national standards is

\textsuperscript{38} Section 30 of the Bangladesh Standards Testing Institution Ordinance 1985
\textsuperscript{39} Ibid., Section 30.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid., Section 31B.
\textsuperscript{42} Section 52 of the Standards of Weights and Measures Ordinance 1982 and Section 33 of the Bangladesh Standards and Testing Institution Ordinance 1985.
\textsuperscript{43} Section 52 of the Standards of Weights and Measures Ordinance 1982 and Section 35A of the Bangladesh Standards and Testing Institution Ordinance 1985.
not considered due to which the licensed commodities do not match with the national standards of weights and measures. The administration of justice is executive driven; no court shall take cognizance of any offence except on complaint made by or under the authority of the government or the Institution.\footnote{Section Section 52 of the Standards of Weights and Measures Ordinance 1982 and Section 33 of the Bangladesh Standards and Testing Institution Ordinance 1985.}

5.3. Civil law remedies

5.3.1. Specific Relief Act 1877

The remedies under this Act (the Specific Relief Act 1877) are universal in nature. It provides various forms of remedies which cannot be invoked under other laws. Moreover, the remedies which cannot be invoked under any other law may be sought under the provisions of the Specific Relief Act 1877.

This Act provides for different kinds of relief which may be remedial or protective, e.g. specific performance, variation, rectification, cancellation. It may also provide for preventive, e.g. relief by way of injunction. Where the specific law fails to provide appropriate remedy, the consumer may, based upon the principle of mutuality, invoke specific relief. In this respect, the statutory provision of law and the principle of English law may be followed in awarding the reliefs. Under section -5 of the SR Act 1877, the remedies may be awarded –

a. By taking possession of certain property and delivering it to the claimant

b. By ordering a party to do the very act which he is under an obligation to do,

c. By preventing a person from doing that which he is under an obligation not to do,

d. By determining and declaring the rights of the parties otherwise than by an award of compensation to award civil remedies to an individual consumer, or a group of consumers.

Where remedy under any consumer law is curbed, denied, or restricted, the scope of the Specific Relief Act 1877 is not shut down; a provision may not fit to a case directly, but, its principle may be applied or the relief so invoked may be awarded by exercising the discretionary power of the court in a way that it fits to the particular problem. In this respect, we may refer to the provision of suit for recovery of possession immovable property [Section -8 and 9], but, a consumer sue for recovery of possession of public places of immovable nature [e.g. a newspaper corner], where he proves that he sues not only for himself, but also for consumers at large. The forms and manners of remedy under this Act include recovery of possession, specific performance, and injunction and so on.

Recovery of possession

In exercise of the provisions under this Act, the consumer may sue for recovery of possession of moveable property [section-10]. A person having the possession or control of a particular article of moveable property of which he is not the owner may be compelled specifically to deliver it to the
Specific performance

A consumer may not invoke remedy of recovery of possession of moveable property under the provisions of this Act directly, but there is no bar to apply the principle to a case where appropriate. The court may, in exercise of its discretionary power, may grant relief of recovery of possession of moveable property under section-12 of this Act when the act agreed to be done is in the performance, wholly or in part, of the defendant and when there exists no standard for ascertaining the actual damage caused by non-performance of the contract to be done and when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief or when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done. The breach of contract to transfer moveable property can be adequately relieved by compensation is a matter of presumption.

Some of the reliefs are not incorporated in the laws relating to consumer protection which includes variation of the contract, rectification, rescission for mistake, declaration as to status or right, appointing receivers, or the preventive relief of injunction [temporary, perpetual, or mandatory]. In such a case, the remedies so mentioned may be invoked by a consumer in exercise of the principle with regard to variation of the contract [sec-2], rectification [section 31], rescission for mistake [sec 36], declaration as to status or right [sec 42], appointing receivers [sec 44] or the preventive relief – temporary, perpetual, and mandatory injunction [sec 53, 54 and 55].

5.3.2. The Competition Act 2012

For the purpose of curbing anti-competition activity, the Competition Act 2012 empowers the ‘Competition Commission’ with the authority of a civil court to inflict some financial penalties upon the defaulter and its proceedings are considered as civil proceeding. The civil nature of remedies under this Act includes imposing financial penalties upon the defaulter, taking the measure of

45 PLD 1975 Kar. 598.
46 AIR 1916 Mad. 314.
47 22 Mad. 478 [DB].
48 Bazlur Rahman Bhuiya vs. BSC 34 DLR [AD] [1982] 42.
50 Section-8(6) of Competition Act 2012, Bangladesh
51 Ibid., Section 20 (a), (b), (c), and (d).
52 Ibid., Sections 5 and 7.
53 Ibid., Section 20 (a), (b), (c), and (d).
injunction against the accused,\(^{54}\) ordering some enterprise or person to refrain from engaging in activity or contract likely to impair the market conditions,\(^{55}\) passing order upon the owners of business enterprises to disintegrate their business enterprises for the purpose of reducing their dominant position in the market.\(^{56}\)

The measures of civil nature also includes ‘Banning or imposing restriction on Combination’.\(^{57}\) It also includes extra-territorial measures.\(^{58}\)

### 5.3.3. The Sale of Goods Act, 1930

The whole system of relief under the Sale of Goods Act 1930 is based on the principles laid down by the Specific Relief Act 1877. These remedies include injunction, mandatory provisions of merchantability of goods, implied warranty as to acceptable quality, and so on. The remedy of injunction includes both preventive and mandatory measures, compelling someone to do or refrain from doing any act. Actually the provision of the Specific Relief Act 1930 is transfigured as for protecting both of them.

Subject to the provisions of Chapter II of the Specific Relief Act 1877 (Sec 58), in any suit for breach of contract to deliver specific or ascertained goods, the court may, direct that the contract shall be performed specifically. The decree may be unconditional or upon such terms and conditions as to damages, payment of the price or otherwise, as the court may deem just, and the application of the plaintiff may be made at any time before decree.

Where there is breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject other goods, but he may [a] set up against the seller the breach of warranty in diminution or extinction of the price, or [b] sue the seller for damages for breach of warranty. The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the losses that he has suffered (section 59).

Where the seller repudiates the contract before the date of delivery, the other [buyer] may either treat the contract as subsisting and wait till date of delivery, or he may treat the contract as rescinded and use for damages for the breach (Section -60). Nothing in this Act shall affect the right of the buyer to recover interest or special damages or money paid for as consideration [Section 61].

---

\(^{54}\) Ibid., Sections 17 and 18.
\(^{55}\) Ibid., Section 20(Ka) (A).
\(^{56}\) Ibid., Section-20(Ka) (d).
\(^{57}\) Ibid., Section 21.
\(^{58}\) Ibid., Section 22.

In the preceding chapter, we discussed about the legal framework of this ordinance. An analysis of The Monopolies and Restrictive Trade Practices [Prevention and Control] Ordinance 1970 reveals that it provides some remedies of civil nature which includes fine and compensation. Under section 19 of this Ordinance, the monopoly control Authority may direct any person or undertakings to pay to the government by way of penalty such sum of not exceeding one lakh of taka.\(^{59}\) Any person or undertaking who fails or deliberately abstains from complying any such order of the authority or furnishes false information or makes any statement to the authority which he knows or has reason to believe to be false, and if the breach is a continuing one, shall be liable to fine of ten thousand for every day’s failure.\(^{60}\)

5.4. Tort law remedies

In the above, we discussed on legislations governing the broader principle of statutory justice in which emphasis is given more on statutory rights only, not on un-defined aspects of justice; i.e. torts. The problem of consumer protection in Bangladesh is covered only by statutes; the court cannot go beyond the provisions. The limitations of statutory justice are that there are wide areas of violations which are not defined by statutory law, but justice demands the redresses through the process of law and this demand may be met by non-statutory provisions of justice; i.e. the laws of tort. The law on tort is applicable both in respect of consumer goods and services. This section critically examines how far the matter of consumer justice is addressed by the law of torts. The law on tort acts mainly with respect to product and service liability where the main areas cover a wide variety of remedial justices, such as, damages, compensation, exchange, refund, return and so on. The matters of tort are also covered by the laws, such as, deficiency, duty of care,\(^{61}\) professional negligence, breach of fundamental duty and so on.

Tort is that branch of civil law relating to obligations imposed by operation of law on all natural and artificial persons. It concerns the basic duty that a person owes to another outside a contract or the obligations. It enables the person to pursue a remedy on his own behalf. The breach of a duty is private in nature and does not represent the public damages or societal damages at large. [T]he breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a

---


\(^{60}\) Ibid., Section 19(2).

\(^{61}\) Tortuous liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages'; see Winfield, *Province of the Law of Tort* (1931), p. 92.
representative of society as a whole’ (Birks, 1955: 51). In the following discussion, we may undertake a review on the state of remedial justice under the law of tort.

5.4. 1. Liability of Psychiatric harm

‘Damages cannot be awarded at common law for ordinary grief and sorrow. …The courts have traditionally been cautious about awarding damages for non-physical harm to the person, even if that harm goes well beyond normal distress resulting in some obvious physical symptoms’ (Street, 2006: 67). Judicial recognition of the genuine nature of psychiatric harm led to the abandonment of the nineteenth century attitude that non-physical harm to the person was totally irrecoverable. The courts began to award damages for what was for many years called ‘nervous shock.’ A claimant who became mentally ill because of the shock to his nervous system caused by an accident that either threatened his own safety or involved witnessing exceptionally distressing injuries to others could in certain circumstances recover compensation for psychiatric harm.

The aspect of psychiatric harm is labeled as posttraumatic stress disorder (PTSD) such psychiatric harm follows some from an incident in a number of ways; such as, a claimant who suffers severe physical illness triggered by the terror of accident may succumb to mental illness, a person may be so badly treated following a traumatic event that psychiatric harm ensued or an incident may occur in which the claimant in involved but in which he suffers no bodily injury, only shock and fear that cause psychiatric illness. And lastly, a claimant may not be directly involved in the original accident, and be at no personal risk of physical injury, but nonetheless witness injury to others and suffer psychiatric harm in consequence, e.g. newspapers publish bloody pictures by which the children are affected. The first three categories of affected persons are classified as primary victims and the fourth category is regarded as secondary victim of defendant’s negligence. A person who suffers psychiatric harm as well as physical injury is the part and parcel of this claim for injury. The courts held that although damages for ordinary grief and bereavement remain irrecoverable a secondary victim can never recover damages for psychiatric illness where he establishes the general pre-conditions for such a claim. And that the negligence of the defendant caused or contributed to mental illness. The claimant is capable of recovering illness regardless of the fact that his illness

---

62 For the nineteenth century view see Victorian railways v. Coultas (1888)13 App Cas 222. For an analysis of how the law has always ‘limped behind medicine’; see Sprince, ‘Negligently Inflicted Psychiatric Damage: A Medical Diagnosis and Prognosis’ [1998] Legal Studies 35.
63 C becomes mentally ill as a consequence of an assault upon his nervous systems: see Alcock v. Chief Constable of South Yorkshire [1991] 4 All ER 907.
64 Dulieu v. White & Sons (1901) 2 KB 669.
65 Hambrook v. Stokes Bros. (1925) 1 KB 141.
66 Note the refusal of damages in Hay v. (Bourhill) v. Young (1943) AC 92.
68 Vermen v Bosley (No I) [1997] 1 All ER 577.
70 Alcock v. Chief Constable of Police of Yorkshire.
consisted partly of an abnormal grief reaction.\textsuperscript{71} The consumer law in Bangladesh recognizes the primary or secondary form of psychiatric harm.

The laws relating to consumer justice recognizes only the statutory justice, not the violations which cannot be seen. Due to this reason, it (e.g. CRP Act 2009) recognizes only the tangible violations, such as injury to human body and health. Section- 42 of CRP Act 2009 recognizes only injury to human life and health, Section-52 of this Act recognizes only safety and security of the consumer, and Section 53 of CRP Act 2009 recognizes financial loss and safety and security of person. The preceding sections do not recognize both ‘physical and mental loss’ (psychological harm). In such cases, a consumer seeks for justice through the law of tort. It has been observed, that the psychiatric losses or mental injury may occur from many of the forms, such as, humiliation, loss of reputation, omissions (unintentional loss for lack of duty of care).

5.4.2. Deficiency

“Deficiency” may be best covered by the law of tort. It may impair the rights of a consumer. Some of the countries have recognized this deficiency as a matter causing injury to consumers. Where matters of purchase relate to goods or services, they require the efficient performance of the equipments. In the performance of any act, the deficiency with respect to any ‘product’ has been accepted and addressed by the Consumer Protection Act 1986 of India.\textsuperscript{72} It has been observed that the consumer laws in Bangladesh do not provide any remedy under the statutory law for deficiency of services. The Consumer Rights Protection Act 2009 does not spell about deficiency of services, so; again the way a consumer can seek redress is only under tort law.

5.4.3. Duty of care

Duty of care imposes a reasonable obligation on the service provider or sellers of goods the non-performance of which gives rise to a liability. The advice regarding the use of medicine, the restrictive articles, or alerts regarding the side-effects of a medicine, or the restriction on drinking the IV fluid is a duty imposed on the service provider or the seller of goods. In respect of electrical appliances, the label or alerts printed in red letters or the mark of ‘Fragile’ on the packet of glassware also fall within the definition of duty of care. Some goods are sold or services provided in a manner that does not conform to the rules of duty of care. The rules of duty of care cannot be pre-defined by law, but, the very nature of goods and services will reveal what type of care is required in this connection.

\textsuperscript{71} The courts prepared to make a ecision in the award of damages where C’s grief merges with a recognizable psychiatric disorder; see, e.g. Rahman v. Arearose Ltd. (2001) QB 351. Furthermore, D will only be liable for that part of C’s psychiatric harm that he actually caused: Hatton v. Sutherland (2002) 2 All ER 1.

\textsuperscript{72} Section- 2(1)(g): “Deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service’.
otherwise it will amount to negligence. The tort of negligence requires more than ‘heedless or careless conduct.’\textsuperscript{73} The injured party must establish that the defendant owed him a duty to take reasonable care to protect him and his property from the kind of harm suffered.\textsuperscript{74} Consumer legislation in Bangladesh is silent about this duty of care due to which many of hazards are created with respect to goods and services.

5.4. Omissions

It is not only the acts of commission, but also the omissions that may expose the consumer to a situation of loss and injury. So, the law of tort imposes liability on the seller for omission to ensure justice to consumers. The act of omissions functions as an important form of deviation from the duty of care. Lord Nicholas summed up the distinction between acts and omission declaring it be- ‘… One matter to require a person to take care if he embarks on a course of conduct which may harm others. It is another matter to require a person, who is doing nothing to take positive action to protect others from harm for which he is not responsible.’\textsuperscript{75} Where there is prior, relationship between the parties, an omission to act will not constitute actionable negligence (Street, 2006: 36). The regime of consumer legislations in Bangladesh spells about the acts of commission; but does not recognize the acts of omission with respect to duty of care as a form of consumer right violation. These Acts\textsuperscript{76} do not underline the ground principles of omissions for which penal liabilities may arise. Due to this, it is difficult to address a matter of omission under the provision of these legislations. For example The Private Clinics and Medical Practice Ordinance 1982 provides for some degree of duty of care. These duties are not complied with and no action is taken for omission of duty. So, the only way of seeking remedy is the law of torts.

5.4.5. Magnitude of harm

The review of penal provisions of the consumer related laws reveal that it failed to import the aspect of magnitude of harm as an weapon for rendering justice. Rather, when providing penal provisions as a mechanism for consumer justice, it has incorporated a few penal provisions (jail or fine) based on some pre-determined aspects. But, the penal provisions may not be commensurate with the magnitude of harm. Due to the limitations of statutory law, the courts also cannot go beyond this. But, it is the law of torts which has the potential to assess the magnitude of harm and award justice. For a normally sighted individual, the harm of two-eyed man cannot be equated with the harm of one-eyed man. ‘For the one eyed man, the risk of being struck in his one good eye meant a risk of ‘total blindness’ (Street, 2007). In Paris v. Stepney Borough Council\textsuperscript{77} the House of Lords held that the gravity of

\textsuperscript{73} Lochgelly Iron and Coal Co vs. M’Mullan (1934) AC 1, at 25, per Lord Wright.
\textsuperscript{74} In Caparo Industries plc v. Dickman (1990) 605, at 627
\textsuperscript{75} Stovin. (1996) AC 923
\textsuperscript{76} For example, The CRP Act 2009, The Medical and dental Council Act 2010 and so on.
\textsuperscript{77} (1950) 1 KB 320.
consequences of an accident befalling an already disabled person had to be taken into account in fixing the level of care required of the defendant.\textsuperscript{78} The regime of consumer legislations in Bangladesh that spells loss and injury to consumers does not follow the principle of magnitude of harm. Section-66(3) allows entitlement to compensation for damages only up to the limit of five times of the actual damages, but not in accordance with the magnitude of harm. This magnitude of harm has been limited by the statutory law, which cannot be essentially recovered without recourse to the law of torts.

5.4.6. Standards of care

The review of penal provisions of the consumer related laws reveal that it failed to import the aspect of standard of care as an weapon for justice. Rather, when providing penal provisions as, it has adopted the method of pre-determined redresses based on some priorly defined aspects of violation.

It is not common for the standard of duty of care to be treated as part of the duty; it seems preferable to confine duty to the question of whether the defendant is under an obligation to the claimant and to treat separately the question of the extent of the duty owned. Whether, a defendant has broken a duty of care is a mixed question of fact and law;\textsuperscript{79} but the standard of care required of the defendant is an exclusively legal construct and based on the standard of a hypothetical reasonable person. If the defendant causes loss or injury to the claimant, but is able to show that he acted in a way that a reasonable person would have acted, no liability will attach.\textsuperscript{80} The test by which the liability is settled is the standard of care as seen in Glasgow Corporation v. Muir,\textsuperscript{81} i.e. whether the defendant owed a duty to take reasonable care. It means a test by which the duty of care is to be judged or the measure of the duty of care.\textsuperscript{82} The courts have recourse to a range of considerations in deciding whether the standard has been met or not. The consumer related laws such as, The Bangladesh Standards Testing Institutions Ordinance 1985 deals only with the standards of goods and services, but, not with the standards of duty of care. The laws relating to medicine provides legislations regarding the personnel working for the manufacturers of medicine; e.g. pharmacists. But it does not provide any standards for the health technologists. The laws relating to health services\textsuperscript{83} also reveal that it does not provide the standards for duty of care.

5.4.7. Likelihood and the relative cost of avoiding the harm

A seller of goods or the service provider owes a duty not only for the foreseeable matters; justice requires precaution against unforeseeable events also, i.e. the likelihood of harm. The limitation of the scope of statutory law is that it cannot bring all the foreseeable and unforeseeable issues under its

\textsuperscript{78} Haley v. LEB (1965) AC 778; D’s standard of care was set according to the fact that D ought to have foreseen the possibility of blind persons coming into the vicinity of the hole dug by D in the pavement.

\textsuperscript{79} Barber v. Somerset CC (2004) 1WLR 1089.

\textsuperscript{80} Al-Sam v. Atkins (2005) EWCA Civ 1452.

\textsuperscript{81} (1943) AC 448 at 454.

\textsuperscript{82} Bolton v. Stone (1951) AC 850 at 860.

\textsuperscript{83} The Bangladesh Medical and Dental Council Act 2010.
purview. But, justice demands redress against both aspects of harm. The law of tort imposes a duty of care or precaution against the likelihood of harm. The opponent of likelihood of harm may argue that ‘An ordinary careful man does not take precaution against every foreseeable risk …. life would be almost impossible if he were to attempt to take precautions against every risk’.  

But, Lord Wright in Northwestern Utilities Ltd v. London Guarantee and Accident Co. Ltd. said: The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled’. It is important to appreciate that the test is not one merely of whether the risk in question was foreseeable. Instead, the standard of care is set at a level which is commensurate with the degree of risk. The contemplation of possible risks does not reveal them to be present. Where the risk remains unforeseen, it provides good evidence that the risk involved was sufficiently slight so as not to require the taking of precautions. The amount of caution required tends to increase the likelihood that the defendant’s conduct will cause him harm, and vice versa. In Bolton v. Stone, the care is reasonable care, not an abnormally higher degree of care.

It is relevant to consider how extensive and costly would be the measures necessary to eliminate the risk. In essence there is a balancing cost: the cost of averting a danger measured against the cost of the danger transpiring. The nature of risk and precautions against the likelihood of harm depends upon the nature of goods. In essence there is a balancing of costs: the cost of averting a danger measured against the cost of the danger transpiring. In The Wagon Mound (No 2) the judicial Committee stated in similar vein: ‘A reasonable man would only neglect … a risk [of small magnitude] if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk.’ In this case, the chance of harm was so little that the defendant could not be expected to take additional precautions against such a remote possibility. In another case, the risk was higher for which the defendant was held responsible for breach of duty of care. The nature of risk and precautions against the likelihood of harm depends upon the nature of goods. The passenger carrying buses plying in the cities in Bangladesh involve both risk and absence of precaution as it uses CNG as the main fuel. But, the authorities (e.g. BRTA) are not concerned about the safety and risk of these vehicles. The statutory laws of Bangladesh need to address the principles of likelihood of harm

84 Lord Oaksey in Bolton v. Stone (1951) AC 850 at 863.
85 (1936) AC 108 at 126.
86 Orange v. Chief Constable of Yorkshire (2002) QB 347 (The drunken prisoner committed a suicide, no breach of duty to prevent suicide by placing him in a cell without the kind of Horizontal bar from which he hanged himself).
87 (1951) AC 850 at 860.
88 The American judge, learned Hand, in United States v. Caroll Towing Co 159 F 2d 169 (1947), at 173 expressed the matter in terms of a formula: if the probability be called P, the injury , L; and the burden , B; liability depends upon whether B is less than L multiplied by P, i.e. whether less than PL.
89 (1967) 1 AC 617, at 642.
for the ends of justice. In such cases, among the considerations that may guide dispensing of justice is the principle of relative cost with social utility.

5.5. Constitutional law remedies

Beyond the premises of regular or special laws, the way by which a consumer or a group of consumers or persons [not being consumers] may seek remedy is the way to constitutional remedies under Article 102 of the Constitution. With a view to preventing the breach of a legal duty which some authority or local body is under an obligation to do or refrain from doing, it may be sought in the form of enforcement of fundamental rights. It may be initiated at the instance of a consumer or a group of persons in the form of a public interest litigation (PIL). The legal effect of this provision is so wide that it may be utilized for activating the person or entities connected therewith to take necessary measures. Any act done or proceeding taken by a person performing functions in connection with the affairs of the republic or of a local authority may be declared as illegal and of no legal effect the legal effect under Article 102(2)(II) of the constitution. In this connection it may be necessary to mention that where it is necessary to prevent the imminent danger or continuous breach of fundamental rights (in relation to safety and security of person), one should not be misunderstood by Article 102(3) of the constitution which discourages interim order.

5.6. Administrative remedies: Preventive and interventional

A consumer is entitled not only to civil, criminal and tort remedies; he has an entitlement to administrative remedies also. This remedy acts both in Rem and Personem. The dimension of administrative remedies is so wide that it may take various forms and manners. But, the form that is applied widely includes withholding of license, closure of shops or factories suspected to be engaged in anti-consumer operations and so on.

Under the Consumer Rights Protection Act 2009, the authorized officer of the Directorate of CRP may order the temporary closure of any shop, business organization, factory, or warehouse suspected to manufacture, store, sale of any adulterated food or goods or otherwise to be engaged in any other form of anti-consumer activity. There are other forms of remedies that may be sought administratively.

For the purpose of ensuring the proper quantity and quality of goods and services, correctness of the weighing and measuring instruments has been regarded as one of the important instruments of administrative remedy. Of this nature, for example, is the BSTI’s power to inspect and verify the correctness of the weighing and measuring instruments used in trade or commerce, and to verify the

91 Under section 27 of the CRP Act 2009, the power conferred by this provision may be exercised instantly, without exhausting a long legal procedure of serving notice to the person or body concerned.

92 Sections 11, 13, 16 of the Bangladesh Standards of Weights and Measures Ordinance, 1982.
contents of sealed packages.\textsuperscript{93} For ensuring the proper quality and quantity of goods and services, BSTI may also revoke the license of the manufacturer as a precautionary and remedial measure.\textsuperscript{94}

Enforcement of fair competition has also been regarded as an important remedy. For the purpose of preventing oligopoly, monopoly, collusion, cartel, tie-in-arrangement, refusal to sell essential commodities in the market, the administrative authority (The Competition Commission), may take the administrative and legal measures against the violator under the Competition Act 2012.\textsuperscript{95} Even the 2012 Act provides legal support to investigate and take measures not only within the country, but also outside Bangladesh against persons or bodies suspected to be engaged in anti-competition activity. From the above discussion, it may be concluded that the administrative or institutional remedies fall within the purview of civil remedies.

In the preceding part, we mentioned that the responsibility for taking administrative measures against any consumer violation devolves primarily upon the Directorate of Consumer Protection and the judicial organization exclusively for consumer protection [consumer court]. But, it has been observed that due to the limitation or variation of law, these two organizations cannot function as the principal organization for these matters. There are various organizations that may function as the organization of consumer protection in their respective field. For example, the Directorate of Health for health services, the Directorate of Drug Administration for medicine and so on. The measures regarding health as provided by this Act cannot be dealt with by this Directorate of consumer protection; it is dealt with by the Directorate of Health. In the district level, the functions of the directorate are carried by the District magistrate and the executive magistrates working under them.\textsuperscript{96} Save and except the matters for which no organization is created or empowered by the respective laws, the rest of the consumer affairs shall be dealt with by the Directorate of Consumer Protection.

\section*{5.7. Remedies under other laws}

\textbf{The Environment Act 1995}

The environment related laws (e.g. The Environment Act 1995) do not deal with the consumer protection, but it provides some measures that may be utilized for the protection of consumers. It has been observed that some of the provisions which are required for the safety of goods are not properly

\begin{itemize}
\item[Ibid., section17. This section also provides the power to re-seal the packages where possible.]
\item[Ibid., section 20(8). “The authorized officer may, if he is satisfied that the product made or manufactured in accordance with the model which was approved by him has failed to render the expected performance or to conform to the standards established by or under this Ordinance, revoke the certificate of approval issued by him under sub-section (6).”]
\item[The remedies include investigation of the complaint, taking of evidence, call for records of the suspected person or body for showing cause and caution to the suspected person for preventing from anti-competition activity, instructing or cause to prevent the concerned person from being engaged in anti-competition activity (section-20(a), imposing administrative fine on the person or body suspected to be engaged in anti-competition activity (section-20).]
\item[Section 69 of the Consumer Rights Protection Act, 2009.]
\end{itemize}
incorporated in the respective law. In such cases, the provision of the environmental laws may help to address these problems. These laws act through two important measures—prevention and intervention. Under this Act, the Directorate of environment may provide directions to carry out programs for the quality and standards for drinking water. In this respect, a direction issued under this Act shall include matters relating to closure, prohibition, or regulation of any industry, undertakings, or processes and the concerned person shall be bound to comply with such direction.

Where the public safety is likely to be in danger and immediate measures are necessary, it may immediately issue directions necessary to prevent the risk of life of people and environment. It may issue directions regarding the prevention of manufacture, sale of goods or operation or management of such activities considered to be ecologically harmful. The failure to comply these provisions may result in compensation to the injured person, confiscation of materials and equipments employed or used for the manufacture of such goods or violation of the environmental directions. The system that these laws provide for dispensing of justice includes ‘Constituting Special Court on Environment’.

5.8. Access to justice

The CRP Act 2009

The term ‘Access to justice’ involves a triangular role of three entities- victim, police, and the court. The principle relating to ‘Access to justice’ gives rise to some rights from sovereignty to the victim, autonomy of courts and authority of police. An analysis of the provisions relating to the right of access to justice reveals that the principle relating to this right has been largely denied. In the ordinary cases of criminal nature, the magistrate may take cognizance of any complaint directly from the complainant without any prior charge-sheet from the police. When not filed with the police, in taking cognizance of an offence, the petitioner or complainant is primarily examined by the court under section 190 of the code of Criminal Procedure 1898. Where the court does not take cognizance of case directly, the matter is sent to the subordinate magistrate for holding a judicial inquiry regarding the correctness of the complaint under section 200 of CrPC 1898 depending upon which cognizance is taken.
It is not only the consumer, but also the courts whose sovereign authority to take cognizance of an offence and discharging its duty of dispense justice has been curtailed by the provisions of this Act. Under the provisions of this Act, the court cannot take cognizance of an offence on its own discretion. This provision in limiting the right of taking cognizance has curbed the courts’ inherent right of discretion. The right of access to court for civil remedies has been made conditional. Under section-66(1) of the Act, the plaintiff must prove that a consumer case has been tried and disposed of and the defendant has been found guilty by a competent court of magistrate. The plaintiff should also prove that he has suffered loss and injury, failing which the consumers’ right of access to civil justice is denied by this Act. The above discussion also reveals that the provisions of this legislation is viced with some shortcomings, such as, (a) absence of provision for interim justice or alternative measures for continuing the enjoyment of goods or service temporarily, (b) failure to set minimal conditions of warranty for goods and services with reference to the period of time, quantity and quality of goods and services and (c) necessary provisions for replacement, recall of goods and services.

**Insufficiency of courts**

It has been observed that the number of courts under the Consumer Protection Act 2009 and other laws is very meager. Since its enactment in 1953, a few courts of magistrate were empowered to try with cases under these laws. Similarly, a few courts were empowered with jurisdiction for the trial of cases under the Eye surgery [Prevention and Prevention] Ordinance 1960 and the Allopathic Practices [Control of Abuses] Ordinance 1962 trying the courts on essential commodity under these laws are not in existence. No Special Tribunals for the trial of cases relating to food and medicine and other essential commodity as provided by the Special powers Act 1974 has yet been constituted under. Similarly, the number courts [Drugs Court] constituted under the Drugs [Control] Ordinance 1982 is very few in number. for the trial of drugs related offences, only four courts in four divisional head quarters were set up which is also very meager in number. Since its enactment in 2007, no separate court for the trial of offences under the Consumer Protection Ordinance 2009 has been set up, a few number of regular court of magistrate have been set up simply by empowering it to try these cases in addition to their duty for which it is constituted or assigned for.

**Centralized system of justice**

At the very inception of it, the system that was introduced was centralized system of justice due to which many of the courts have not yet been set up even in the district level. An analysis of the function of drugs court reveals that only four courts have been in four divisional head quarters which does not match with the demand. For a longer period of time, the consumer court under the Consumer Protection Act 2009 was not set up. At the initial stage, on a few number of courts working in the Divisional level strict level and dealing with some special issues were provided with jurisdiction to function as consumer court.
**Absence of strategy for the trial of cases**

No strategy for extending the relief to the consumer has yet been formulated either by the court itself or from the end of lawyers or from the citizen due to which no court show any of its capability to discharge their duties. No sign of experience sharing have been seen among the judges or lawyers due to which the good practices being practiced in the neighboring countries could not be imported and applied.

**No process of setting up consumer Ombudsman**

In the arena of consumer justice, no process has been set up for settlement of disputes by Ombudsman. In many countries, like Sweden, UK, Ombudsman is institution that helped to settle the consumer related disputes outside the court. The Constitution of Bangladesh, contains provision for Ombudsman [Article]. The problem with ombudsman in Bangladesh is that it has never been tried to practice or settle disputes through the institution of ombudsman. In the democratic countries, there are two types of ombudsman – parliamentary and judicial both of whom functions with matters of public concern. But, in Bangladesh, it has never been tried or practiced. In UK, a great majority of consumer disputes, especially the health related issues are settled by ombudsman. From this point, Bangladesh has failed to explore the potential of this institution.

**5.9. Access to justice under other laws**

**5.9.1. Criminal**

As this code (The Penal Code 1860) forms part of the consumer justice system of Bangladesh, so, there is no bar to invoke for the right of access to justice and the courts are at liberty to in taking cognizance of these complaints in exercise of provisions [section 190] of the code of criminal procedure 1898 and dispensing justice with reference to these provisions. No report from any agency is required for lodging complaint to the court.

The Special Powers Act 1974 is a special law and it provides penalty special tribunal for the trial of cases under section 26 of this Act. So, it does not provide any right of direct access to the court for justice against the offence of hoarding or black-marketing, smuggling, adulteration of food and medicine and so on. Section 26 of this Act provides that it is only the Special Tribunal that may take cognizance of the offences. it also provides that no tribunal shall take cognizance of an offence except on a report in writing made by the police officer not below the rank of Sub-Inspector.

The standards of Weights and Measures Ordinance 1982 and The Bangladesh Standards Testing Institution Ordinance 1985 do not provide the right of access to an individual to lodge his

---

107 Ibid., Section 25B.
108 Ibid., Section 25C.
109 Ibid., Section 27(1).
complaint either to the court or to the Institution (BSTI). The right of access is reserved only with the authorized officer of BSTI without whose report the court cannot take cognizance of an offence. The inherent weakness of these two ordinances is that justice has been made ‘executive driven’, an individual has no legal right to seek for justice under these two ordinances as a consumer; he can neither lodge a complaint either to the court or to the Directorate. So, the right of access to justice or to courts has been kept reserved with the authorized officer of BSTI, not with any individual consumer.

5.9.2. Civil

5.9.2.1. The Competition Act 2012

The Competition Act 2012 may have an indirect influence on consumers’ right of protection. But, the main problem of justice to consumer lies in many aspects among which the main is the right of access to justice. Under this Act, the forum of justice may include – the Competition Commission and the court. But, it has introduced a system that is executive driven, a review of the Competition Act 2012 revels that it does not provide the right of direct access to court for justice. No proceeding under this Act may be initiated without an investigation report from the authorized officer of the Commission under this Act. Any proceeding under this Act may be initiated only upon investigation report from the authorized officer of the Commission. Of course, it does not restrict the right of access to administrative remedies.

The laws relating to intellectual property does not provide any remedy directly to the consumer. The remedies are civil in nature and it is provided only to the owner, authorized user of this. But, the Penal Code, 1860 provides provision under which both the consumer and the owner or user of this property may seek criminal remedies against the offender, or infringer. Under section 482 and 483 of the Penal Code 1860, any person using any false marks shall be liable to imprisonment which may extend to two years or with fine or both.

5.9.2.2. The Trademarks Act 2008

The Patent and Designs Act 1911 or The Trademarks Act 2008 (TM Act 2008), do not allow a consumer for suing against the infringer. Section-29 of the Patent and Designs Act 1911 provides the right of access to justice only to a patentee, not to a consumer. Section-83 of the Trademarks Act 2008 allows the right of access to justice for an owner of this right, not to a consumer. The right to sue for a consumer suffers from the point of lack of Locus standi. In a case the plaintiff challenged under

---

111 Section 26(2) of The Competition Act, 2012.
112 Ibid., Section 26(2).
113 Section 29(1) of the Patent and Designs Act 1911 provides that ‘a patentee who may institute a suit in a district Court having jurisdiction to try the suit against any person who makes, sells, or uses the invention without his license, or counterfeits it, or imitates it’.
the Penal Code 1860 for cheating with trademarks. He imported soaps from India and marketed the Indian soaps as Bangladeshi product.\textsuperscript{114} After a legal scrutiny of the case, the court refused to try the case as the plaintiff lacked the right to sue. In this case it was held that the consumer possesses no Locus Standi under the intellectual property laws. The Consumer Rights Protection Act, 2009\textsuperscript{115} also does not consider infringement of intellectual property rights with respect to goods or services as a consumer breach. So, it is clear that the individual has no right of access to justice under the intellectual property legislations. Similarly,

Food and drugs related laws, such as, the Safe Food Act 2013, or the Drugs Act 1940, the Drugs (Control) Ordinance 1982 do not provide the right of access to justice to the consumer. Section-32(1) of The Drugs Act 1940 or section-22© of The Drugs (Control) Ordinance 1982 provide the right of access to justice only to the authorized officer of the government; this right of access has been restricted to an individual consumer under the same provision.

5.9.2.3. The Bank Companies Act 1991

It does not provide the right to complaint with respect to matters concerning the consumer affairs. Actually, a client or the holder of an account has no remedy for breaches of consumer rights under this Act or any other legislation. The aspect of right of access to justice under the statutory aspects of justice reveals that a consumer cannot have the right of access to justice without specific provisions relating to this. But, the non-statutory aspect of justice does not deny, refute, limit or curve this right of access. In this respect, the tort law may be one of the important tools that provide the right of access without any statutory provision providing this right. Similarly, the Customs Act 1969 does not provide any right of access to justice to a private individual consumer who is not a consumer of imported goods.

There are some forms of civil remedies that may be sought under the Specific Relief Act 1877. These remedies include specific performance of contract, injunction and other preventive measures.\textsuperscript{116} The protection of patent rights in the manufacture and sale of goods also forms important part of civil remedies. So, this remedy against infringement or deception may be invoked by way of injunction under the relevant provisions of law on intellectual property.\textsuperscript{117}

5.9.3. Law of Tort

There is no bar on seeking the right of protection under tort laws. In the preceding part of this chapter, we have shown that there is no bar on invoking remedies under the law of tort. Actually, the scope of the law of tort is wide. Where any matter cannot be covered by the ordinary statutory or any special

\textsuperscript{114} Title Suit no. 1721/1993 in the court of District Judge, Dhaka. In this case, Mr. A Ali Akand, an Advocate of Dhaka District Bar Association, initiated a public interest case.

\textsuperscript{115} Sections 37-56 of the Consumer Rights Protection Act, 2009.

\textsuperscript{116} Sections 12, 42 and 52-56 of the Specific Relief Act, 1877.

\textsuperscript{117} The Trademarks Act, 2008; and the Patent and Designs Act, 1940.
law, the victim may, instead of invoking remedies through the process of constitutional provision of fundamental rights, enforce his rights through the law of torts. In many countries, the law of tort has been brought under statutory law. But, in Bangladesh, although some of the aspects have been incorporated in the regular or special laws, but, no statutory law has yet been enacted. As no provision of the constitution or any special or statutory law restricts the victims right of protection under non-statutory law, so, the victim may invoke remedies under the law of tort.

5.9.4. Constitutional

The constitution does not impose any restriction on the right of access to justice. Under Article 102 of the constitution, any person being aggrieved may file a petition for enforcing his fundamental rights under the head of protection of life. In this respect, it may be mentioned that the aspect of ‘protection of life’ could be invoked only by the person being aggrieved directly, it may be invoked by a person or organization on behalf of the community as a whole. These classes of petitions are characterized as public interest litigation [PIL]. A brief review on this aspect is given in chapter 8 of this study.

Although, the inception of this right of protection of life dates back to 1972, but, until the period of 1990s, this concept of public interest was not explored and applied in respect of Writs. But, the relentless efforts of a few conscious citizens and the cooperation of some judges helped to explore this regime of legal right on protection of life under the provision of the constitution in the 1990s. Since then, some interventional measures were undertaken by which efforts could be made to provide protection of life in the consumer justice system of Bangladesh public through interest litigations (PIL). In these petitions, the locus standi or the ground for relief was public interest. Handful though, the courts of Bangladesh have been seen to provide remedies under the auspices of the constitution and the form that is applied for it is public interest litigation (PIL). In these cases, the issues that moved these courts to intervene are right to life, safety and security of person, fundamental human rights and so on. In one of such cases, the petitioner sought remedies both for the enforcement of constitutional rights of the consumers concerned and against breach of legal duty owed by the government to the consumers, individually as well as collectively. Accordingly, the court compelled one of the executive agencies (Directorate of Drug Administration) to take appropriate measures for preventing the adulteration of medicine. In this case, the petitioner, a father of four children sought the remedy by way of filing a PIL with a view to compel the legal duty of the

118 Syed Borhan Kabir v. Secretary, Ministry of Health, Government of Bangladesh, Writ Petition no. 701/1993. In this case, the petitioner, a father of four children sought the remedy by way of filing a PIL with a view to compel the legal duty of the government (the Drugs Administration) of enforcing and monitoring the compliance standards to be performed by the manufacturers of medicine.
government (the Drugs Administration) of enforcing and monitoring the compliance standards to be performed by the manufacturers of medicine.119

From the discussion made above, it reveals that the consumer justice system of Bangladesh is viced with various anomalies among which the most important is that it is executive driven, the remedies are burdened with some pre-conditions, and the right of access is denied by law due to the and are inaccessible to consumers due to which the constitutional guarantee of the right of justice is denied largely by operation of law. This state of condition is very much prevalent in respect of health and food a review of which is undertaken in chapter 6 (Health) and 7(Food) of this study.

119 The criminal case originated from this death has been settled in the court of first instance, after 21 years from the date of its institution. The court has passed the sentence of death to the owner of the company. Please see BELA Newsletter, Vol. 1: 1, at 5, reporting that in 1992, 230 infants died as their kidneys failed due to toxic Paracetamol Syrup manufactured by using toxic but cheaper Di-Ethylene Glycol instead of using Propylene Glycol.
CHAPTER 6  
HEALTH LAWS IN BANGLADESH: JUSTICE FOR CONSUMER?

Since long when it was seen from the point of development, and the matter that has been considered as a matter of challenge for health sector was the constraint of resources. But, a shift has been seen to appear in the 1990s when the matter was seen from the point of legal. Since then, it has become an issue of justice. Consequent upon this, the trend that appeared in the arena of consumer jurisprudence is ‘integrating justice with health’. So, the present day trends in consumer jurisprudence have been re-defined both as an issue of development and justice simultaneously.

The Constitution of Bangladesh has made provisions from the point of development where the right of health has been considered both as a matter of equality and social justice. so it has been observed that the health consumers are staying in a state of redresslessness due to which justice to consumers could emerge as the prime issue, rather, the consumers are continuing to experience newer forms and manners of violations and it has become one of the major business strategies for the service providers (health). Apparently, weaknesses in legislation, common trends of denial in providing the right of access to justice, dysfunctional state of redressal forums, failure to explore alternative measures, absence of accountability measures, and so on have made the situation worse. Due to these reasons, this sector is viced with the trend of ‘higher is the propensity of violations and lower is the scope of redressal measures’. In view of this condition, the legal constraint has become more important than other factors for ensuring protection to consumers. In view of this condition, the question that arises is “Is health an issue of development or justice? The answer to this question may be searched in discussion given below.

6.1. Is there a right to health?

Since long, when the challenges with respect to health were seen from resource perspective, it was a common trend of characterizing the health issue as an issue of development. In this respect, the factor that governed the thinking process was market-oriented ‘resource perspective’. In this connection we may refer to Dworkin’s market oriented idea of justice where he connected the aspect of resource with justice. Being influenced by market oriented thinking, the matter of health is governed by a system that is also applicable to other goods and services of consumer nature. From this point of view, the matter of health has closely been clanged to aspect of development. Of course, Rawls refuses to refuses to give more emphasis on resource perspective and argues health as one of the fundamentals required for the society (Sen, 2009: 260). From this point of view, it may be relevant to consider the issue of health not as an issue of development based on resources, but as an issue of justice. In this

---
1 The term constraints in resources have been used to mean the constraints in financial, technological and infrastructural resources.
2 Article 15(a) of the Constitution.
Health Laws in Bangladesh: Justice for Consumer?

...connection, we may refer to some international legislation on health, e.g. the International Convention on Economic, Social, and Cultural Rights (ICSCR) 1966 where the matter of health was considered as a matter of development and the main emphasis was given on resource allocation. It was provided that the state is bound by this convention to allocate a significant share of resources from its national budget for this purpose (Bryne, 2005). Since then, it has functioned as the guiding principle for many countries. In furtherance of this, the fundamental state policy of the constitution of Bangladesh also considered it as the guiding principle for a longer period of time. It provided that “The state shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties”. The above discussion, reveals that the issue of health is considered as an issue of health. But, the paradigm shift occurred after 1970s when the trend of associating this matter with justice started. This trend emerged in Bangladesh in 1990s when a good number of PILs were decided where the main focus was public interest.

While shifting the traditional idea of health as an issue of development, there merged the idea of associating it with justice. Thus, while analyzing it from the point of justice, it has been observed that ‘health [and food] is not exclusively a branch of natural justice that stem from morality; it is the result of some evolutionary factors’ (Bakshi, 2003: 287). In this process of evolution, health has transformed from the issue of development to justice. With a view to have a better grip on people’s real freedom, Rawls considers the aspect of health as a matter required for the ‘basic institutional structure’ of the society (Sen, 2009: 260). Expressing his pervasive sympathy for the disadvantaged, he also characterizes it as ‘primary goods’ required for a viable society and recommends ‘special correctives for special needs’ for the disabled and handicaps’ (Ibid.).

Referring to this fact of human relation with justice, we may refer to Bangladesh’s 1990s legal development where the issue of health has been considered as a matter of entitlement required for the basic structure of the society. The trend of associating the issue of justice with the aspect of health has been seen in many countries like India, New Zealand. They have characterized it as a constitutional right of protection, and integrated it the matter of justice. This aspect may be considered as an important part of development for consumer jurisprudence, and the courts decided that ‘health’ is not only an issue of development, but, also an issues of justice. Basing upon this, the

---

3 Article 12 of the Convention. This provision of the convention has been ratified by Bangladesh in 1998.
4 Article 18 of the Constitution.
role of courts has also been changed\(^8\) where the issue of health has been considered as inseparable part of human life and the courts pronounced some landmark judgments in some PILs\(^9\) of 1990s. Considering these cases as landmark for the jurisprudential development of Bangladesh, it has been accepted that the matter of health is not only an issue being limited within the bounds of development; but, also an integral part of legal issue.

Despite the aspect of justice, some schools of thought integrate ‘health’ with human rights. In this connection, to resolve the challenges of the arena of its scope, it has been argued that as human rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, … that entitle them to these rights (Rawls, 1993: 60-71),\(^{10}\) it is one of the inseparable parts of human life. The argument that it is provided in favor of this proposition is human’s universal right of ‘life, liberty and the security of person… and to act towards one another in a spirit of brotherhood’.\(^{11}\) While characterizing health from the point of human rights, it has shifted from the narrower perspective of physical crimes limited to torture, killing, confinement, rather, it has been made dynamic to cover a wide variety of non-traditional issues capable of attaching to the life, liberty and security of person (e.g. right to health, education, occupation and so on). In view of this condition, the matter of health has been considered as matter being required for ‘minimum standard of a well-ordered political institution’. In this connection, we may also refer to the Constitution of Bangladesh and other national which has integrated the issue of health with human rights. From this point of view, it may be concluded that the issue of health is not only an issue of development; it is also a matter of justice and human rights. Basing upon this thematic approach, many of the international legislations have emerged to protect consumers’ right of health.

The analysis of international legislations reveal that it is influenced by various legislations among which most important is medical ethics, international covenants, and some value of international character. Now we may examine how international laws help to facilitate justice to health consumers.

### 6.1.1. International: Medical ethics as universal legislation

Since long, the aspect of health has been governed by more of medical ethics than legislation. In its origin, the law that served as the fundamentals of all legislations was medical ethics – ‘Oath of Hippocrates.\(^{12}\) The very basis of this ethics is “Service to humanity, conscience and respect to

---


\(^9\) Supra note 5.

\(^{10}\) Please see Rawls, John ‘On Human Rights’(1993)’ (eds. Stephen Shute and Susan Hurley, Basic Books).

\(^{11}\) Article 1 of the Universal Declaration of Human Rights (UDHR), 1948.

\(^{12}\) “I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and judgment the following oath:
humanity, paying highest respect to human life.” Since then, (5th Century B.C.), based on the principle of ‘Never do harm’, it has become the unwritten constitution for health professionals in the absence of statutory law. Based on this principle, the bioethicists emphasize on four pillars as basic principles of health care – autonomy, justice, beneficence, and non-malficence. In this connection, autonomy implies the decision making power of the patient, justice implies the right of reliefs against violation of the medical ethics, beneficence and non-malficence implies the duty of providing services with care and diligence, the responsibility of disclosing the aftermath of medical treatment. Despite its limitations, this oath is recognized as the guiding principle for service liability for health both in the national and international sphere.

In this connection, it has been observed that many countries (e.g. USA, UK) have been accepting this oath as an important legislation. In 1928, where the rate of administering this oath was 26% by the medical schools of USA, UK, it has roused to 98% in 1993. Currently, 100% of the schools administer this pledge to patients. In view of this condition, in 1997, the British Medical Association, after gathering the common points and examples of ethical codes from all parts of the world, has published the translated copy of the oath on behalf of the World Medical Association. This oath has encouraged many of the medical ethicists to make further development of this code among which most important are the oath of Louis Lasagna, and Louis Weinstein. Besides this,

---

I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death.

That I will preserve the purity of my life and my art. I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by specialists in this art.

All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and never reveal.”

In this respect, beneficence, and non-malficence also implies the confidentiality of the patient or his mode of treatment and keeping information secret with the physician.

“Translation of the Original Hippocratic Oath published in March 1997 goes as under:

1. I recognize the special value of human life;
2. I promise that my medical knowledge will be used to benefit people's health.
3. I will be honest, respectful and compassionate towards patients.
4. I will make every effort to ensure that the rights of all patients are respected.
5. My professional judgement will be exercised as independently as possible and not be influenced by political pressures nor by factors such as the social standing of the patient.
6. I will not provide treatments which are pointless or harmful or which an informed and competent patient refuses.
7. I will ensure patients receive the information and support they want and I will do my best to maintain confidentiality about all patients and so on.
8. The oath of Oath of Louis Lasagna goes as “I swear to fulfill, to the best of my ability and judgment, this covenant-
   1. I will respect the privacy of my patients
   2. I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sounds of mind and body, as well as the infirm.
   3. I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow;

---

Dhaka University Institutional Repository
there are some other legislations that function as legal instrument for the protection of health consumers – the Geneva Declaration of Medical Code of Conduct 1942.

6.1.2. International covenants
The Geneva Declaration of Medical Code of Conduct-1942
Among the international legislation, the oath or declaration that has been accepted by Bangladesh is the Geneva Declaration of Medical Code of Conduct 1942. It functions as one of the international covenants on health service. This code ranks high as the basis of parameters for medical professionals. According to this code, a doctor is expected to maintain the highest order of medical ethics in his profession, be careful and respectful to the patients, pay loyalty and allegiance to the patient, serve to the patient with the attitude of service to humanity, and look the matter of medical service with the attitude of helping people or service to humanity. For bringing uniformity of professional ethics among doctors, the World Medical Association has accepted this Code. There are various parameters by which this right of protection may be measured. One of such parameters includes the individual’s right of access to justice. Apparently this code seems to provide justice to the consumers, but, a critical analysis of this Code reveals that it has ignored the vital factor of recognizing individuals’ right of direct access to justice. In this connection, we may refer to another international document that serves the purpose of product and service liability – the UN Guideline for Consumer Protection 1985.

6.1.3. The UN Guidelines for the Protection of Consumers 1985
This guideline has placed compulsion upon states “[T]o promote awareness of the health-related benefits bearing direct on individuals health and collective effects.” It characterizes these benefits as ‘promotion of sustainable consumption’. With a view to meet the legitimate needs for the promotion and protection of consumers from hazards to health economic interests, availability of effective

---

I will apply, for the benefit of the sick, all measures which are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

17 The Oath by Louis Weinstein spells that “I pledge to myself and all others that I shall strive to be a person of good will, high moral character, and impeccable conduct, I shall always have the highest respect for human life; shall always have as a major focus on promoting a better world for which shall act in the best interest of my patient, and I must expand my thinking and practice from a system of episodic care to one of a preventive approach to the problems of mankind, including the social ills that plague the world.

18 The Geneva Declaration of World Medical Association Adopted in 1948, accepted on 12 October 1949 in London, amended 1966 and 1983 goes as - “I solemnly pledge myself to consecrate my life to the service of humanity; I will practice my profession with conscience and dignity; The health of my patient will be my first consideration; I will respect the secrets which are confided in me, even after the patient has died; I will maintain by all the means, the honor and the noble traditions of the medical profession; I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient; I will maintain the utmost respect for human life from its beginning even under threat.”

19 Ibid., Article 49.

20 Ibid., Articles 1(h), 3(g), 5, 42, 51-55.
Health Laws in Bangladesh: Justice for Consumer?

redress,\textsuperscript{21} and promoting high levels of ethical conduct\textsuperscript{22} and curbing abusive practices in business\textsuperscript{23} and promoting the right of access to just, equitable social developments,\textsuperscript{24} maintaining adequate infrastructure for providing justice on drug and food, and establishing or maintaining the legal and administrative measures for providing redress to consumers, this guideline was formulated. Regarding Product and service liability’, this guideline characterizes health, and pharmaceuticals as priority areas\textsuperscript{25} and urges the govt. to makes provision for the protection of physical safety\textsuperscript{26} and safety standards\textsuperscript{27} in this connection, and enact appropriate legislation with respect to health.\textsuperscript{28}

The guideline holds the view that ‘The government should develop or maintain standards, provisions and appropriate regulatory systems for ensuring the quality and appropriate use of pharmaceuticals through integrated national drug policies which could address, inter alia, procurement, distribution, production, licensing arrangements, registrations systems and the availability of reliable information on pharmaceuticals.\textsuperscript{29} Measures should also be taken, as appropriate, to promote, the use of international non-proprietary Names (INNs) for drugs, drawing on the work done by the World Health Organization (WHO).\textsuperscript{30} In so doing government should take special account of the work and recommendations of the world Health Organization on pharmaceuticals for the relevant products, the use of that organization’s Certification scheme on the quality of pharmaceutical products moving in international commerce and in other international information’s system on pharmaceuticals should be encouraged. The direct impact of this guideline is that it had influenced the aspect of health (Goods and services) to a great extent. These international legislations are based on one fundamental principle – perceived value from which other duty, responsibility and conditionality flows.

6.1.4. Perceived values

In this respect, the principle that acts as the perceived value in respect of health goods and services is continuous mandamus. The main spirit of this principle is that the consumer should be assured of his right of protection and it cannot be curbed or denied on any ground of legal intricacies, or the absence of proper laws. Actually, the main principle of perceived value in the health sector is the rule of fairness. In this respect, while providing protection to consumers, we may seek resort to various

\begin{itemize}
  \item \textsuperscript{21} Ibid., Articles 3(a), (b) & 3 (e).
  \item \textsuperscript{22} Ibid., Article 1(C).
  \item \textsuperscript{23} Ibid., Article 1(d).
  \item \textsuperscript{24} No. 39/248, dated 9\textsuperscript{th} April of 1985 and expanded in 1999.
  \item \textsuperscript{25} Article 28 of the UN Guideline for the Protection of Consumers 1985.
  \item \textsuperscript{26} Ibid., Articles 11-14.
  \item \textsuperscript{27} Ibid., Articles 28-30.
  \item \textsuperscript{28} Ibid. Articles 3(a), 16, 37(a), 49, 56, 57, 61.
  \item \textsuperscript{29} Ibid., Article 61.
  \item \textsuperscript{30} Ibid.
\end{itemize}
national and international laws, principles and covenants. But, the aspect that be given utmost emphasis is such values as the basis to goods and services.

The regime of laws of Bangladesh does not restrict the application of common law principles to health goods and services. The principles those which are applicable to this sector include duty of care, negligence, professional skill and knowledge and so on. The surgical and other related services are based on the principle of *Volenti non fit injuria* a review of which is undertaken in the later part of this chapter.

6.2. Local laws: Fundamental State Policy, Statutory and common law principles

The legal instrument that has been considered as document of utmost importance is state policy. It has direct relation with consumers’ right of protection. Basing upon this policy, the health consumers are protected broadly by national legislations which include National Health Policy, Act of Parliament, Ordinances, and so on. These Acts/ Ordinance are applicable both to health goods and services. It is necessary to here that the non-health legislations also form part of protection to health consumers. In this connection, we may refer to the Control of Essential Commodities Act 1956, the Essential Commodities Act 1957 which contained provision relating to the supply of drugs and medicine, curbing the act of hoarding, ensuring the sale of medicine at a price fixed by government. From this point of view, the principles laid down by these laws also forms part of health law of Bangladesh.

6.3. Review of health laws

The regime of health laws of Bangladesh are broadly divided into statutory and non-statutory. Both the system of medical treatment – traditional and modern is based on these laws. The aspect reliefs may be divided into both civil and criminal. Regarding the product liability, the drugs and medicine, blood, and artificial parts human body (e.g. Kidney and other artificial parts of human body) falls within the purview of product liability as well as forms the major part of the system of medical treatment.

The regime of product justice started with criminal law – the Penal Code 1860. It is the first law that provided remedy relating to drug and medicine. Besides this Code, several other laws were enacted during the same period of time. After the enactment of this Code, the law that is considered as law exclusively dealing with health goods is the Drugs Act 1940. Besides these laws, it is reinforced by some other laws – the Drugs (Control) Ordinance 1982. Presently, the matter of drugs

---

31 The term principle, law or covenant includes the Universal Declaration of Human Rights 1948, the Geneva Declaration of Medical Code of Conduct-1942 or the fundamental state policy of the constitution.
32 Article 15 and 18 of the Constitution.
33 Sections 272- 276 of The Penal Code 1860.
and medicine is regulated principally by the Drugs Act 1940 and the Drugs (Control) Ordinance 1982. Regarding the aspect of drugs, we find some laws those which are non-health in nature, but, they have the capacity to influence the consumers’ right of protection. In this respect, we may refer to the laws on essential commodity.\(^{35}\) The provisions of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970 are so articulated that they may also be applied to health goods – drugs and medicine.\(^{36}\) The Special Powers Act 1974 which is a special law. It provides provision for death or imprisonment for life as penal measures against adulteration, hoarding of medicine. It also provides provision special tribunal for the trial of offences by under this Act.\(^ {37}\) Although, the Pharmacy Ordinance 1976 does not provide provision directly relating to the health consumers, but, provide some provisions which are special in nature. It regulates the skills of persons employed in the manufacture of drugs and medicine.

The system of modern medical treatment in Bangladesh comprises various forms of services which include consultancy and diagnosis, surgery and transplant, education and so on. These services dealt with broadly by The Medical and Dental Council Act 2010. Of course, the Medical Practice and Private Clinics and Laboratories (Regulations) Ordinance 1982 also provides moral and legal support to this Act. This aspect of service liability is also dealt with by some other auxiliary laws.\(^ {38}\) These laws apparently seem to deal with product liability, but, actually it deals with service liability.

The traditional system of medical treatment (Ayurvedic, Unani and Homeopathy and Biochemic system of treatment) has been recognized by health laws of Bangladesh as an important dimension for health justice. It has been observed that these aspects were not dealt with separately at the very inception of statutory justice. It was firstly made part of the regime of laws on modern system of medical treatment.\(^ {39}\) A shift was made by the reformation of health laws of 1980s by which it was recognized as a separate legal entity. In furtherance of this, and the laws on the traditional system of medical treatment – the Unani and Ayurvedic Practitioners Ordinance, 1983 and The Bangladesh Homoeopathic Practitioners Ordinance, 1983 were enacted. The regime of laws of Bangladesh does not impose any bar on the application of non-statutory laws in this respect.

\(^{35}\) For example, the Essential Articles (Price control and Anti-hoarding) Act 1953, the control of Essential Commodities Act 1956, the Essential Commodities Act 1957.

\(^{36}\) In this respect, it may further be mentioned that the laws and principles as applicable to the offence of cheating in weights and measures of goods and services shall not, as far as possible, be applicable to the offences of cheating in weights and measures or standards of medicine under the Standards of Weights and Measures Ordinance 1982 or the Bangladesh Standards Testing Institution Ordinance 1985.


\(^{38}\) For example, the Human Organs Transplant (Regulations) Act 1999, the Blood (Safe Transfusion) Ordinance, 2002.

\(^{39}\) The Drugs Act, 1940 and section 3(1(d) of the Drugs (Control) Ordinance, 1982
6.4. Product liability in the health sector

Drugs and Medicine

6.4.1. The Drugs Act 1940 and the Drugs Control Ordinance 1982

In Bangladesh, the matter of consumer justice with respect to drugs and medicine is tried to be ensured primarily by statutory laws. So, with a view to control and regulate the manufacture, sale, distribution, import and export of drugs’, the Drug Act 1940 and the Drugs (Control) Ordinance 1982 enacted. Despite the potential of all other laws, these two laws serve as the principal law on standardization of drugs. Regarding the statutory laws, it may be mentioned that there are some other auxiliary laws which also deal with the manufacture and sale of medicine.\textsuperscript{40} In this respect, a few international legislations, such as, the UN Guideline on Consumer Protection 1985 is available. They provide guidelines on the aspect of product safety and standardization of products. Some of the countries (e.g. EU Countries) provide recognition to the application of these laws in their courts. Unlike other countries, although, Bangladesh does not allow the application of these laws in the domestic courts, but, it carry the referral value for these matters in contention. From this point of view, its value cannot be ignored. In this respect, it may be noted that there has been some issues that serve as the parameters of justice. These issues include standardization of products, product safety, skills of the persons engaged in the manufacture of health goods, and so on. In view of this, we may undertake a brief review on these aspects relating to drugs and medicine.

6.4.1.1. Standardization of products

For the purpose of ensuring justice to consumers, the Drugs Act 1940 has incorporated some aspects or issues that serve as the parameters of justice. These issues or aspects include standardization of products. It also serves as the parameter of product quality and its safety. These aspects of standardization, product quality and safety is ensured by declaring the misbranded or sub-standard quality of drugs as threat to human life and safety, imposing ban, restriction or prohibition on the manufacture, sale, import of certain drugs. It provides that no person shall manufacture, sale, exhibit for sale or distribute import for sale, stock any medicine which is of not standard quality, sub-standard or misbranded.\textsuperscript{41} In this regard, a medicine shall be deemed to be misbranded if it is an imitation, substitution of a product likely to deceive a another drug, or bears upon its label or container the name of another place or country of which it is not the product; or it is offered or exposed under a name which belongs to another drug; or if, it is offered in a manner that appear to be of greater therapeutic

\textsuperscript{40} The Pharmacy Act 1967 (replaced by the Act of 1976).
\textsuperscript{41} Section 10, 15A, and 18 of the Drugs Act 1940.
value than it really possesses, or it bears any false or misleading statement regarding the manufacturer or producer of the drug which is fictitious.42

For the purpose of ensuring the standards of quality, administering the standardization of product goods, both the Drugs Act, 1940 and the Drug (Control) Ordinance 1982 provide for some administrative set up (committees, councils or bodies) which is similar to the set-up provided by each other.

<table>
<thead>
<tr>
<th>The Drugs Act, 1940</th>
<th>The Licensing Authority43</th>
<th>The Drugs Technical Advisory Board,44 and</th>
<th>The Drugs Consultative Committee,45</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Drugs (Control) Ordinance, 1982</td>
<td>The Drugs Licensing Authority46</td>
<td>The National Drugs Advisory Council,47</td>
<td>Drug Control Committee,48</td>
</tr>
</tbody>
</table>

An analysis of the set up provided by the Drugs Act 1940 reveals that the authority provided to the Drugs Technical Advisory Board is similar to that of The National Drugs Advisory Council under The Drugs (Control) Ordinance, 1982. The function of both these laws is to provide advice to the government on the standards of quality (sec-16), advising on other technical matters to carry out the functions assigned to it. For the purpose of analyzing any drug, it also provides authority to the government to appoint inspectors (sec-20 &21), inspecting the premises and equipments used for the manufacture of drugs and call for the records from persons so engaged (sections 22 and 24), lock and seal any factory, laboratory, shop, building, store house, or godown where any such drug is being manufactured, sold, or exhibited for sale (section 22). It may be mentioned here that although, the committees, council or bodies provided by one of the laws do not collide with the power and function of council or committees under the Drugs (Control) Ordinance 1982, but, the justification for incorporating the same type of administrative set up (committees, councils or boards) in the lately enacted laws under different nomenclature is not made clear.

The enactment of the Ordinance of 1982 is expected to replace the committees/ councils/ bodies constituted under the Drugs Act, 1940. But, the provisions of the Ordinance of 1982 are silent on this aspect; no provision annulling these bodies has been enacted. It was further expected that it (Ordinance of 1982) shall also annul or repeal all previous laws (e.g. the Drugs Act 1940, the Penal Code 1860, the Special Powers Act 1974 and so on) directly or indirectly dealing with this subject.

42 Ibid., Section 17.
43 Ibid., Section 3(bb).
44 Ibid., Section 5.
46 Section 5 of the Drugs (Control) Ordinance, 1982
47 Ibid., Section 24.
48 Ibid., Section 4.
But, the fact remains that it (the Ordinance of 1982) has failed to take this aspect into consideration due to which the apprehension of abuse or misinterpretation under different laws continue to exist. This sort of abstention on the part of the Drugs (Control) Ordinance 1982 creates ambiguity or confusion with respect to standardization of products safety.

6.4.1.2. Standardization of products Safety: Skills of manufacturing personnel

In respect of the manufacture and sale of drugs and medicine, the aspect of professional knowledge and skill of the person engaged in the related business is considered as one of the important requirements for product justice. After the enactment of the Drugs Act 1940, it was observed that the drugs or medicine were being manufactured mostly by technicians having no professional training or degree. For the purpose of regulating or streamlining the production of drugs and medicine, the Pharmacy Act 1967 was enacted which provided that no medicine shall be prepared or manufactured except by persons having degree or training in pharmacy. This Act was replaced by the Pharmacy Ordinance 1976 which also provided the same provision. But, the weakness of this Act was that it provided mainly administrative measures and a few number of civil measures and there was no independent authority (like Drug Administration) to enforce the implementation of this Ordinance due to which it has also failed to ensure the implement the conditions of professional knowledge and skill of the manufacturing personnel. But, the matter was again addressed by the Ordinance of 1982 which endeavored to ensure the standards of quality by imposing prohibitions on the manufacture of medicine by persons engaged in this business. It provides that ‘no person shall manufacture any allopathic drug who shall be a pharmacist having the required educational qualifications from the recognized institutes.’

For standardization of traditional medicine, it also provides condition of appointing a person having a bachelors’ degree or diploma in pharmacy, or the Unani, Ayurvedic or Homeopathic or Bio-chemic system of medicine. It declared the manufacture of medicine by persons not having required educational and professional degree; training or skill in pharmacy shall be illegal and punishable with imprisonment or fine or both. Still, this Ordinance could not come out of the legal weakness that prevailed in the previous laws. Except providing that that “no person shall manufacture any allopathic drug who shall be a pharmacist having the required educational qualifications from the recognized institutes,” or traditional medicine, it provides that these products shall not be manufactured without being supervised by persons having bachelors’ degree or diploma in Unani, Ayurvedic or Homeopathic or Bio-chemic system of medicine or other herbal drugs, the Drugs (Control) Ordinance 1982 has failed to address other issues necessary for standardizations.

---

49 Ibid., Section 13.
50 Ibid., Section 13(1)(b).
51 Section 31 of the Pharmacy Ordinance 1976.
52 Section 13 of The Drugs (Control) Ordinance 1982.
53 Ibid., Section 13(1)(b).
does not incorporate provisions against the offence of infringement of intellectual property rights, manufacture of medicine which is not of standard quality, or is misbranded. Moreover, unlike section-27 and 29 of the Consumer Rights Protection Act 2009, it does not provide any provision for the closure of shops, factories suspected to be engaged in the manufacture, sale of adulterated medicine or forfeiture of the raw materials or equipments intended or suspected to be used for the manufacture of adulterated medicine.

6.4.1.3. Quality and quantity: Protection through intellectual property legislations

The Drugs Act 1940 provides provision regarding the sale, manufacture, import, exhibit for sale of any drugs by infringing the intellectual property rights. It provides that no person shall sale, manufacture, or expose for sale of any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof either the true formula or list of ingredients contained in it in a manner readily intelligible to members of the medical profession.\textsuperscript{54} This Act also provides provision against anti-trust activity of the owner or authorized user of intellectual property rights. It provides that no person also shall not manufacture, sale or expose for sale of any drug which by means of any statement, design, or device accompanying it or by any other means, purports or claims to cure or mitigate any such disease, or ailment, or to have any such other effect as may be prescribed.\textsuperscript{55} The health laws of Bangladesh also provide provision relating to the manufacture of traditional medicine having patented or proprietary rights. The provision of the law provides that no person shall sell in the market any patent or proprietary medicine of the Unani, Ayurvedic, homeopathic or bio-chemic system of medicine unless the true formula of the medicine is displayed on the label or container of the medicine.\textsuperscript{56} For the purpose of monitoring standardization, it also provides provision for the evaluation of any aspect of safety, efficacy and usefulness of the medicine.\textsuperscript{57} It also provides that any medicine which fails to prove its efficacy and usefulness, the committee shall recommend for cancellation of registration of the drugs and the licensing authority shall cancel the license of the drug.\textsuperscript{58} In this respect, it has been observed that this provision of the Ordinance of 1982 emphasizes on the power of the executive than judicial review which includes appeal to the government. The weaknesses of this provision are that it does not provide or encourage the special measure of judicial review due to which the devolution of jurisdiction upon the government than the court of law, the inherent jurisdiction of court has been defied. Being the principal legislation of time, any type of its abstention regarding these aspects shall lead to the

\textsuperscript{54} Section 18(a) (iii) of the Drugs Act 1940.
\textsuperscript{55} Section 18(a) (iv) of the Drugs Act, 1940.
\textsuperscript{56} Section 7 of the Allopathic System (Prevention of Misuse) Ordinance, 1962.
\textsuperscript{57} Section 6(2), 6(3) of the Drugs (Control) Ordinance, 1982.
\textsuperscript{58} Ibid., Section 6.
inapplicability of intellectual property laws on medicine or it will amount to indirect defiance to these aspects required for the safety, standardization, usefulness and efficacy of drugs.

6.4.1.4. Fairness in pricing

The regime of health products (drugs and medicine) is also viced with problem of governance and it happens mainly with the price of medicine. The responsibility of pricing is devolved mainly upon the Drug Administration. But, this aspect is viced with corruption and anomaly due to which the rules of standards relating to drugs is not complied with. Giving a brief account of the kick-backs paid to the officials of Drug Administration, TIB has shown that the drug dealers in collusion with the corrupt officials of Drug Administration performs this act of violation (fixes the price of drugs). The alleged unauthorized payments for DGDA Services are as follows:

<table>
<thead>
<tr>
<th>Services Provided</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration of company/project</td>
<td>0.5 million(m) to 1.0 m.</td>
</tr>
<tr>
<td>License renewal</td>
<td>50,000 to 0.1 m</td>
</tr>
<tr>
<td>Project transfer/shifting</td>
<td>1.0m to 1.5m</td>
</tr>
<tr>
<td>Approval of recipe</td>
<td>4000 to 5,000 (per recipe)</td>
</tr>
<tr>
<td>Registration of drug</td>
<td>0.1m to 0.15m</td>
</tr>
<tr>
<td>Approval of foil, insert, label and pack</td>
<td>7,000 to 9,000</td>
</tr>
<tr>
<td>Approval of literature</td>
<td>4,000 to 5,000</td>
</tr>
<tr>
<td>Price determination</td>
<td>5,000 (per product)</td>
</tr>
<tr>
<td>Sample testing and quality control</td>
<td>6,000 to 7,000 (per product)</td>
</tr>
<tr>
<td>Drug license</td>
<td>10,000 to 15,000</td>
</tr>
<tr>
<td>Renewal of drug license</td>
<td>5000 to 1,000.</td>
</tr>
</tbody>
</table>

So, the authority given by this Act is used for the benefit of consumers, rather it is used for the corrupt practice of the officials of Drug Administration.

6.5. Liability in the health services sector

6.5.1. Diagnostic and clinical services

The important development of 1970s and 1980s in the health sector is the recognition of standardization of services’ as a measure for right of protection. After the enactment of the Act of Eye Surgery (Regulation) Ordinance 1960 and the Allopathic System (Prevention of Misuse) Ordinance 1962, the matter that was identified as a threat to individuals’ right of protection was the absence of standardization in the delivery of medical services (clinical, diagnostic and surgical). This problem originated mainly from professional skill and knowledge of medical professionals’. This was due to

59 Ibid., Section 11.
1970s or early of 1980s gradual transformation of health services from public sector to mixed system of public and private sector.

In furtherance of this, many private clinics and laboratories were established in the private sector. The private sector started to provide clinical and diagnostic services; a good number of patients were also being treated in these clinics. On the reverse, it also gave rise to various forms of violation which include abusive business practices and malpractices by health professionals; absence of minimum number of health professionals, nurses, operation theatres, necessary equipments for providing emergency and other medical services. Regarding the laboratory or diagnostic services, no standards of fees for consultancy services were fixed. So, it was necessary to regulate these clinics and laboratories through the process of licensing. In view of this, the Medical Practice and Private Laboratories and Clinics (Regulations) Ordinance 1982 was enacted. This ordinance introduced the system of these clinics\(^{61}\) by observance of the conditions necessary for its registration\(^{62}\). These objectives were carried forward by the Bangladesh Medical and Dental Council Act 2010. The weakness of these laws was that it did not contain provisions for remedies (compensation or damages) against negligence, loss and injury caused by health professionals or the clinics. In such cases, the victim’s family has no other alternative except criminal proceedings by lodging complaints under section 304A and 337 of the Penal Code, 1860 for mala fide negligence (Shafiq, 2007: 169). Being empowered by law to cancel the licenses, taking other measures of legal remedy,\(^ {63}\) of criminal proceeding for imprisonment or fine,\(^ {64}\) the directorate is not seen to take any such measure against these clinics and laboratories.

6.5.2. Governance problem in clinical and diagnostic services

In the above, we discussed the services in the private sector. But, the largest sector of clinical and diagnostic services is dealt with by the public sector – government hospital and clinics. This sector is attacked by governance problem. It has also been observed that the problems with respect to health originate not only from inadequacies of legislation; rather it originates both from the problem of governance; i.e. health and non-health issues. The non-health issues include corruption. In a seminar on health system of Bangladesh, TIB has shown ‘Corruption’ as an important impediment to the right of health. \(^ {65}\) In this seminar, it has been shown that 30% of the budget in government hospital is wasted due to corruption. In this context of situation, we may seek an alternative way of solution- national legislation. In this aspect, these non-health issues have emerged as the core problem of health justice.

\(^{61}\) Section 8 of the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982.

\(^{62}\) Ibid., Section 9.

\(^{63}\) Ibid., Section 11(2)(b).

\(^{64}\) Ibid., Section 13.

in this respect, it may be necessary to mention that the Constitution integrates health with development, not with justice. From the above discussion it may be presumed that unless the problem of this sector is seen from the point of governance, the gradual extension of infrastructure, increased trend of budgetary support, and above all, the constitutional guarantee of the right of health cannot ensure right of protection and thus cater to the needs of justice.

6.5.3. **Health education**

The medical education is considered as one of the important tools for ‘standardization’ of services as well as protection of health consumers. after the enactment of Penal Code 1860, there appeared multi-dimensional problems with regard to health services among which the most important was the abuse of medical degrees or education. So, with a view to streamlining the matter of health education, the Medical Degrees Act 1916 was enacted. But, with the passage of time, this Act lost its usefulness due to which it was required to enact new laws on this aspect. In furtherance of this, enactment of this Act could not check the abusive practices in the health sector. So, in the 1980s with a view to meet the needs and demands of the time, The Bangladesh Medical and Dental Council Act 1980 was passed which provided provision for ‘establishing a uniform standard of basic and higher qualification in medicine and dentistry and for matters connected thereto’. The main objective of this legislation was to provide the right of protection to individuals through a regularized system of medical education. It provided provisions for regulating the medical profession, establishing a uniform standard of basic and higher qualifications in medical and dental studies. But, this Act could not meet some of the important demands, such as, medical education in the private sector due to which it lost its usefulness. It was replaced by another law – the Bangladesh Medical and Dental Council Act 2010. Approving the medical and dental education both in the private and public sector, this Act provides for a council as the main body for regulating medical education in the public and private institutions and its system are regulated by the council. Unlike the provisions of the Bangladesh Medical and Dental Council Act, 1980, the new law prohibits the imparting of medical education without approval from the government. Any institute offering medical and dental education or diploma in this behalf should be an institute recognized under this Act. Even the trainings offered to health professional should be recognized under this Act. The Council has power to call for the records regarding the curricula, mode of examination (written or oral), training for such degrees; inspect the manner of

---

66 Preamble of the Medical and Dental Council Act 1980.
67 Ibid., Section 2(G).
68 Section 2(1) of the Medical and Dental Council Act 2010.
69 The Medical and Dental Council under sections 2(b) and 3 of the Medical and Dental Council Act 2010.
70 Sections 3 and 4 of the Bangladesh Medical and Dental council Act of 1980 and 2010.
71 Section 25 of the Medical and Dental Council Act 2010.
72 Ibid., Section 25.
conducting education and training, evaluate the standards of education by these institutes.\textsuperscript{73} The institutes violating this provision may be liable under section 25(2) of the Act. There is also provision for withdrawing or cancelling the certificate of recognition of institutes.\textsuperscript{74}

The problem lies with this Act is that it does not provide any measure for assessing the standards of compliance. In health services, individual skills of persons delivering services and capability of service providing agency, are considered as important determinant for assessing standardization. In this respect, the graveness of situation may be analyzed by some measures. It has been shown in a report\textsuperscript{75} that out of 65, 24 medical colleges of do not comply with the conditions for maintaining efficiency of standards; only 10 medical Colleges have teachers required for running the curricula. These medical colleges do not comply with the Teacher: Student ratio (1:10) to conduct the courses. A tendency of appointing junior teachers who do not have sufficient experience for medical education is seen to be prevalent. Furthermore, these colleges do not have appropriate lab, morgue for clinical studies. The requirement of 250 beds against the ratio of 50 students is not complied with. As a result of which the students are not getting opportunity to get hand-on training on clinical subjects. These medical colleges are given approval for commercial purposes where a large portion of the investment is collected from the admission fees of the students. To generate revenue, a good number of students are admitted in these colleges who could not score even 10% marks in the qualifying exam. In the prevalence of this condition, 11 new medical colleges have been approved in the private sector.\textsuperscript{76} The reason for arising of this situation lies in the inappropriateness in legislation. The authority of approving the sanction of recognition to medical colleges is vested with the Ministry of Health, not the Medical and Dental Council which is the highest body of medical professionals, profiteering has become a dominant factor for approval of medical institutes. Due to the reasons mentioned above, the right of protection has been ignored and people are compelled to pay even at the cost of his life.\textsuperscript{77} In view of this condition, the High Court Division of the Supreme Court issued a rule upon the Government for formulating appropriate policy concerning the admission and tuition fees of medical colleges (22\textsuperscript{nd} Dec 2012). But, this instruction has not been complied with.

Due to the weaknesses of this Act, people are cheated in many ways among which one of the important means is imparting unauthorized medical education. In the rural and suburb areas, various organization offer medical training or education without approval of the government; they run their business simply by obtaining a trade license from the local union councils or social welfare

\textsuperscript{73} Ibid., Sections 26(1) and 27.
\textsuperscript{74} Ibid., Section 17.
\textsuperscript{75} Daily Prothom Alo Report Dated 01 October 2013.
\textsuperscript{76} ‘Application for another 11 Medical Colleges Approved’, Prothom Alo Report, 01 October 2013 p. 1.
\textsuperscript{77} ‘Private Medical Colleges: a Factory for manufacturing wrong Physicians (Besorkari medical kolege- Opochakshok Toirir Karkhana’, Prothom Alo Sub-editorial, 02 October 2013 p.10. See also ‘Private Medical Colleges: A commercial concern of tk. 650 Crore’, Daily Prothom Alo, 22\textsuperscript{nd} December, 2012.
Health Laws in Bangladesh: Justice for Consumer?

6.5.4. Surgical, organ-transplantation and transfusion of blood

Surgery and organ transplantation

Among various forms of medical treatment, the services by which patients may be subjected to is surgical and implant services. With the discovery and innovation of new newer forms and manners of services, the surgical and transplant services have expanded a lot. With its expansion, the risk of loss and injury has arisen. Accordingly, the need for addressing the problem of surgical and transplant services by legal measures has also evolved. In this country, the process of legislation with respect to surgical services started in the 1960s. Still, the regime of health laws suffers from the absence or insufficiency of legislation. At the present, two important laws on surgical operation and implant services are in force which include the Eye Surgery (Prevention) Ordinance 1960 and the Human Body (Regulations of Transplant of Organs) Act 1999. In the 1960s, the most alarming part of health services that were that some persons were ‘undertaking surgery, especially with eye, without adequate professional knowledge and skills’. So, with a view to address this problem, the Eye Surgery (Restriction) Ordinance, 1960 was passed. It is also the first law on surgical services in the health sector of Bangladesh. This Ordinance imposed ban on conducting surgery of eye or the practices (medical treatment) of eye by persons having no medical degree or by a person not being a registered medical practitioner. The breach of this provision is made punishable under section 3 and 4 of this Ordinance. The drawback of this law was that it was confined only within a small segment – eye surgery, but, it could not coup with the greater demand of surgical services with respect to other services. Due to this reason, the rest of this service remained unaddressed and it could not emerge as landmark legislation on it. Another emerging sector of health services is the implant of organs in human body. In this connection, this matter is dealt with by the Human Body (Regulations of Transplant of Organs) Act 1999.

This Act is exclusively based on voluntary donation of human organs. This Act recognizes two types of donors– donation by nearest relations or legal heirs and voluntary donation by any other person. So, it forbids the commercial sale of human organs. Under the provisions of this Act, the

78 Sections 22, 25, 28, and 29 of the Medical and Dental Council Act 2010
nearest relations or legal heirs\textsuperscript{79} have been recognized as the preferred donor. This Act sets a prohibition of donation by persons below the age 18 and above 65 years (section-6 of this Act). Taking any benefit or privilege in lieu of donation of organs has been declared strictly prohibited (section 9 of this Act). The donor should be physically and mentally fit (certified by a medical board (section 6(2) © & 7) and it shall not create any obstruction to the safe and good living of the donor.\textsuperscript{80} Any violation of the provisions of this Act is made punishable with 3-7 years jail or fine of TK. 3 lac or with both (Section-10 of the Act). One of the merits of this Act is that it does not restrict the right of access to an individual. According to section10 of this Act, the legal measures under this Act shall follow the provisions of Code of Criminal Procedure 1898.

Despite measures, the system of transplant services is subjected to various risk which start with apprehension of breach in voluntary donation. The majority of these donations do not come from voluntary sources. Another cause of abuse of this law is the concealment of age of the donor, the condition regarding the minimum age and guarantee of safe good living of the donor after donation is not complied with. In the absence of credible birth and death registration system, the date of birth of majority of donors is ascertained by fake birth certificate given by the local union councils. Another, important drawback that affects the aspect of justice for donors is the failure to insert provisions regarding the post-operative care of the donor. This failure of compliance creates threat to the donor and the donee. It has been observed that the reason for failure of justice is poverty. It has been observed that taking advantage of poverty of people; a group of brokers have engaged who are in collecting the donors from amongst the poor section of people.\textsuperscript{81}

Besides the aspect of transplant services, the surgical services in Bangladesh is viced with various anomalies. For undergoing a simple surgery, providing of unusual assurance to encourage the patient may turn to violation of disclosure of necessary information. Regarding the disclosure of information, the House of Lords by a majority of 4-1 gave their decision in the case of Sideway v. Bethlem Royal Hospital\textsuperscript{82} that the test should be whether the doctor conformed to a practice of disclosure sanctioned by reasonable medical option. In rejecting the contention that the standard of care ought to be what the reasonable patient would want to know, rather than what the reasonable doctor was prepared to tell, their Lordships made several references to what they saw as undesirable social consequences of adopting patient-centered standard. These included the fact that patient might irrationally reject necessary treatment, that, in general, lay people would not understand further

\textsuperscript{79} Legal heirs include” the father mother-brother–sister under Section 2(b) and nearest relations is defined as uncles, aunt, and husband-wife under Section 2(c) of the Act.

\textsuperscript{80} Section 3 of the Human Organs Implant (Regulations) Act,1999


\textsuperscript{82} (1985) AC 871
information if they were given it, and their Lordships’ view that most people were in any case content to leave the decision on the risk/benefit analysis to their doctor. But, it has been observed in Bangladesh that the surgical operations are not conducted by complying the condition of disclosure of information; the incumbent is not properly informed of the risk associated with the surgery. Moreover, there is no specific law dealing with the matter of surgical services. Due to the reasons mentioned above, the aspects of justice with respect to surgical services have failed to a great extent.

6.5.5. Transfusion services

There are various types of health product which comes mainly under the purview of services. Blood is one of such products that have been associated services. The collection, preservation and transfusion of blood are dealt with by The Safe Blood (Transfusion) Act, 2002. For the purpose of implementing the rules regarding the transfusion services, a council titling ‘National Council on the Transfusion of Safe Blood’ has been constituted under this Act. A review of law relating to transfusion services (of blood) is undertaken below.

The main source of blood is voluntary donation. Any person between 18 -65 years may donate blood thrice in a year and person who has any chronic disease cannot donate under this Act. A critical analysis of the compliance of this condition reveals that it is still dependent mainly on the sale of blood by some professional donors. It has been observed that the majority of donors are sick, drug addict, carrying the germ of some chronic diseases. The donations of blood by these people are guided by the demand of money. The collection process of blood is not free from vices; the examination of donors as required by this Act is not complied with. A large quantity of these bloods are collected and managed by commercial enterprises. The preservation of the blood by these enterprises is not clinically adequate and proper. Moreover, the persons engaged in transfusion services lack necessary knowledge, training and skill. The safety and dependability of blood so donated cannot be guaranteed.

It has been observed that due to wrong matching of blood, failure to diagnose the correct blood group, the patients had to undergo serious problems. In some cases, these violations are so fatal that it may lead to death of person. In a case, death was caused due to the failure to identify the correct blood group. In another case, the patient was attacked by Hepatitis-B and had suffered for a long-time. The blood legislation does not seem to have addressed these matters. In this respect, the

---

83 Profulla Kumar Sahoo v. (Dr.) B.B Patanaik, II (1993) CPJ 1023: 1993 (1) CTJ 765 (Orissa). In this case, the blood group was tested by the opposite party in his laboratory and the report indicated the blood group “AB” positive. In the second report from another clinic, it showed “B” positive. Since there was controversial report, the correct blood could not be transfused in time due to which the patient expired. Held: Death caused due to deficiency of services.

84 Haresh Kumar v. Sunil Blood Bank, I (1991) CPJ 645 (647,648) (Delhi), India. The plaintiff purchased a unit of blood for his wife from a blood-bank which was contaminated with Hepatitis-B. The health personnel failed to undertake the fundamental jobs to ensure that the blood was contamination free. The complainant suffered Hepatitis-B.
problem is not so much due to insufficiency of law as much as it is due sociological problem. Usually the collection of blood may be effected by the donation of students whose age ranges mainly from 18-25 years. It would be easy to campaign in the educational institutions and in result, it could be made to the main source of blood supply. But, the practical condition is that this avenue has not yet been explored in a large scale due to which the health consumer’s right of protection is at stake. From this point of view, the aspect of justice is defeated.

6.6. Remedies vis-à-vis defective health products and negligence/breaches of law by service providers

6.6.1. Criminal remedies

The regime of remedies for health consumers is broadly divided into criminal, civil and tort remedies. Again these remedies may be sub-divided into product and service liability. An analysis of these remedies reveals that most of the laws dealing with product or service liability provide imprisonment or fine as the main form of criminal remedy. Most of the product related laws do not provide any other remedy like confiscation, cancellation, closure, forfeiture, and so on as measures of criminal remedy. Besides the remedies mentioned above, the service related laws provide revocation, cancellation of approval and so on as important measures of administrative remedy the review of which is given below.

6.6.1.1. Product liability

The main branch of remedy that is available against the aspect of product liability is criminal measures which were initially provided by the Penal Code 1860. It also provided remedies only in respect of goods, not for negligence or breach of law. It provided only criminal remedy (imprisonment for a term of six months or fine of taka one thousand or both) against the offence of adulteration of drug or medical preparation, sale or offer for sale of adulterated drugs as unadulterated, or selling them as a different medical preparation. It provided no other remedies (civil or administrative). Following the path of this Code, the Drugs Act 1940, and the Drugs (Control) Ordinance 1982 also provided imprisonment or fine as criminal remedy. Of course, it provided some measures of administrative justice, e.g. confiscation of adulterated or misbranded drugs. It also takes some proactive measures which could be undertaken by the owner of intellectual rights. So, it considers the false warranty or breach of condition required for the sale of patent or proprietary medicine.

85 Section 274 of the Penal Code 1860.
86 Ibid., Section 275.
87 Ibid., Section 276.
88 Ibid., Sections 14 and 31.
89 Ibid., Section 28.
90 Ibid., Section 35.
remedy against false warranty or breach of condition required for the sale of patent or proprietary medicine as criminal offence. Practically, the Drugs (Control) Ordinance 1982 is considered as the main driving law for now. It provides provision against the offence of manufacture, or sale of certain drugs (adulterated, misbranded, spurious, or imitated) the manufacture or sale of which has been made prohibited or declared illegal, manufacture, stock or sale of sub-standard drugs, unauthorized import of these medicine or its preparation and so on. It is confined mainly within imprisonment five to three years and fine of taka fifty thousand to two lakh taka including the forfeiture of the consignment. But, the limitation of this Act is that it does not provide the breach of intellectual property laws as criminal offence and provide any remedy of administrative nature for these causes.

It has been observed that the non-health laws also provide criminal remedies. The laws on essential commodity contain penal provisions (imprisonment and fine) against the offence of hoarding, illegal or unauthorized stock of drugs and medicine. In addition to the remedy of imprisonment or fine, it also provides remedy of forfeiture of the vessel, conveyance used for contravening the provision of law. The Special Powers Act 1974 provides for sentence of death, imprisonment for life which may extend to 14 years, or and fine. It has also been observed that the consumer laws tries to address some of the problems of health, but, while providing remedies, although it refers to criminal measures. But, it provides that these measures have to be undertaken under other laws of criminal nature which collide with other laws dealing with other aspects of criminal nature.

6.6.1.2. Service liability

In the previous discussion, we have seen that the idea of service liability emerged in the 1960s which was also dominated principally by criminal measures where little or no emphasis or importance was given on civil or administrative remedies. So, it has been observed that The laws of 1960s provided

---

91 Ibid., Section 28.
92 Ibid., Section 35.
93 Section 16 of the Drugs (Control) Ordinance 1982.
94 Ibid., Section 17.
95 Ibid., Section 18.
96 Ibid., Sections 17 and 18.
97 Section 3 of the Anti- hoarding and Black Markets Act 1948, section 6 of the Control of Essential Commodities Act 1956 and section 6 of the Essential Commodities Act 1957.
98 Section 6(2) of the Control of Essential Commodities Act 1956 and section 6(2) of the Essential Commodities Act 1957.
100 The penal provisions of these laws (section 37 -56 of the Consumer Protection Act 2009) do not provide any criminal remedy, rather they impose restriction (Section 72 of the Consumer Protection Act 2009) on taking criminal measures. Under the Consumer Rights Protection Act, 2009, the authority of the Directorate is limited only to discover and report to the Health and Drug Administration to report about the manufacture, sale of adulterated medicine or the materials or ingredients required for such manufacture.
only measures of criminal remedy (imprisonment or fine), no other remedies, such as, revocation of certificates, cancellation of registration as a medical practitioner given emphasis. These remedies continued to exist even in the 1990s. A review of the measures under the laws of 1980s reveals that it provided some measures of administrative nature, but, again it reverted to the trend of criminalization of justice in the 1990s. In this respect, reference may be made to the Implant of Organs in Human Body Act 1999 which provides imprisonment for seven years or fine of taka three lakh or both against the offence of commercial sale of human organs, donation of organs below the age required for it.

An analysis of the laws of 1980s reveals that the main emphasis was given on administrative measures, such as recognition of registrable medical and dental qualifications inspection of examinations, inspection and inquiry about medical and dental education and its examination, prohibition on organizing courses on medical and dental education by unregistered persons or institutions for ensuring quality medical education and health services. It provided the remedy of cancellation of registration as a medical doctor or specialist, revocation of approval of institute imparting medical and dental education without complying the conditions required for its approval. These remedies are still available under the present law– the Bangladesh Medical and Dental Council Act 2010.

The remedies that it provides are mostly administrative in nature. As part of this measure, it provides revocation of ‘sanction of recognition’ of medical colleges or institutes for failure to comply with the conditions required for standards of quality, prohibiting the practice of allopathic system of medical treatment without being registered as a doctor, and striking the name of the convict from the registrar of BMDC as doctor or medical professional, imposing ban on representation by a person as medical doctor, or using false designation, title or degree. Any person being accused of these offences shall be liable to imprisonment for three years or fine of taka one lac. The aspect of standardization has been considered as measures of administrative nature. These measures include

---

101 Section 5 of the the Eye Surgery (Restriction) Ordinance 1960, and section 9 of the The Allopathic System (Prevention of Misuse) Ordinance 1962.
103 Ibid., Section 9 and of the Medical and dental Council Act 1980.
104 Ibid., Section 16.
105 Ibid., Sections 17 and 18.
106 Ibid., Section 31.
107 Sections 17 and 25: revocation of approval of institutes for breach of conditions required for imparting medical and dental education, section 22, 28, 29, and 30 for abusive practice of Allopathic system of treatment without approval, proper training or degree as medical specialist, and section 23: cancellation of registration as a medical doctor.
108 Ibid., Section 17.
109 Ibid., Section 22.
110 Ibid., Section 23.
111 Ibid., Section 28.
112 Ibid., Section 29.
113 Ibid., Sections 28 and 29.

Dhaka University Institutional Repository
preventing false representation as a doctor or specialist, regularizing the medical education, equalizing the aspect of medical degrees and so on. These measures, although administrative in nature, but, it protects the health consumers from being cheated or suffering from loss and injury. In India, Pakistan, the aspect of ‘standardization’ is considered as an important measure against unfairness in health services. In this respect, it may be noted here that a doctor is represented by his medical degrees; it functions as an important tool for providing the services properly. But, due to commercialization of medical education, the standards of these medical degrees also vary from region to region. Taking this aspect into consideration, the BMDC Act 2010 requires equalization of medical degrees. This may be considered as one of the measures of both civil and administrative remedy. For the same purpose, the medical council of India also emphasizes on equalization of medical degrees. In a case, the appellant holding a German Degree of MD, misleadingly tried to represent her degree equal to the degree of MD of India which is regarded as ‘Post-Graduate Specialist’ degree. Actually, this degree of MD was equivalent to that of M.B.B.S of India. The court pronounced its judgment declaring the German degree of MD as equivalent to MBBS of India. There are many other forms of deception, misrepresentation regarding which the health laws have failed to address.

6.6.2. Civil law remedies with respect to product liability [law on torts]

An analysis of the remedies in the health sector reveals that it is dominated principally by the principle of criminalization of justice due to which the remedies that provides are mostly criminal in nature (imprisonment or fine or both; it provides no remedies of civil nature. In view of this condition, person seeking civil remedy has to seek resort to tort laws which is also dependent on medical ethics and principles.

The formal recognition to these principles serves the purpose of statutory legislation in respect of consumer justice. The principle that is earnestly required for dispensing justice is the ‘Principle of Intelligence, Knowledge, and skill’. It serves as the grund norm for medical services. In view of this condition, a brief review on these aspects or principles is undertaken below.

6.6.2.1. Knowledge

One of the components of this aspect is memory and experience. People are deemed to know those things which adults from their experience are expected to know. If, someone elects to take on a particular task, he is expected to have the necessary degree of knowledge to complete the task.

---


115 [With reference to the Principle of duty of care, magnitude of harm, Knowledge, Intelligence, and skill Normal intelligence, Special knowledge aspect, liability for failure to diagnose diseases, emergency and momentary mistake]

competently. In fact, actual knowledge of the circumstances on the part of the defendant will increase the standard of care imposed. In the medical services, a professional is expected to have that knowledge that is required for rendering the services he is assigned for. In this respect, knowledge-in particular or expert knowledge- does not remain static over the years. Scientific and technological advances lead to constant revision of, and improvements in, safety standards. In an action for negligence, the defendant shall be judged in the light of the state of scientific, technological or other expert knowledge which should have been available to him at the time of the alleged breach (Street, 2007:109). The health related legislation does not seem to recognize and address this aspect of knowledge.

The defendant’s actual knowledge of the claimant’s frailties and susceptibilities will affect the required standard of care. Thus the level of care owed to a woman known to be pregnant, to a workman with one-eye, will take account of these conditions so long as the defendant know them. If the defendant neither knows, nor ought to know these circumstances, however, the standard of care will be unaffected by the claimants’ susceptibility. As Lord Sumner explained “… a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations.

6.6.2.2. Skill

Personal skill is an important matter without which a doctor may be accused of negligence. A person’s conduct must conform to the standard of a person of normal intelligence. When a person holds himself out as being capable of attaining standards of skill in relation to the public generally. It is important that if D does not in fact have that skill; if he engages in conduct usually associated with persons having that skill, the standard demanded is that of those who actually do possess that skill. Although the standard of a qualified driver (person or the other) was expected of a learner or probationer/trainee, the point was made that if a uniform standard were not applied, the courts would face insuperable difficulties in assessing the skills and competencies of every individual defendant.

Surgery is an important matter where personal knowledge and skill is very much required; even a doctor who undertakes a surgery without having special knowledge and skill may cause loss of life to a patient. The reason for such requirement lies in the fact that any injury caused by surgical

118 Brooks v. London and North Western Rly Co (1884) 33 WR 167.
119 Hay (or Bournhill) v. Young (1943) AC 92, at 109, per Lord Wright.
120 Paris v. Stepney Borough Council (1951) AC 367.
121 For example , a intern or trainee doctor.
122 Glasgow Corpn v. Taylor (1922) 1 AC 44, at 67
124 Nettleship v. Weston (1971) 2 QB 691.
services may not be repairable. So, in respect of surgical and transplant services, the aspect of surgery is totally based on the principle of ‘Intelligence, knowledge and skill’. So, it is important that the health legislation should give a formal recognition to this.

6.6.2.3. Normal intelligence

The defendants’ action must conform to certain criteria expected of a person of normal intelligence in a given situation. It is of no defense that someone acted ‘to the best of his own judgment’ if his ‘best’ is below that of the reasonable man. A man whose intellect is lower than average is not thereby excused. And likewise, a woman whose intelligence is superior is not liable for falling to use those above-average qualities, unless she has professed to have some special skill or expertise to a reasonable degree. In some cases, among the surgeons, some special knowledge is required in this aspect which a person, being a surgeon cannot ignore. In one case in which the claimant had her ears pierced by a jeweler and subsequently contracted a disease that might have been avoided had the work been done with normal medical skill, the jeweler was required only to show the skill of a jeweler doing such work, not that of a doctor. Where someone has not held him out as having special skill, he is not liable when he shows merely average skill in the circumstances although he does in fact have special skill. Skill just like every other aspect of the standard of care has to be assessed in the light of all the circumstances surrounding the alleged breach of duty, and the degree to which the defendant represents that he holds a particular skill is merely one among several considerations.

The reason for putting emphasis on special skill for a special type of job is that a non-doctor, even a doctor having not that specialized skill cannot shoulder the responsibility of a specialized doctor of a separate discipline. On the other hand, while someone who practices alternative medicine is only liable if he fails to meet the standard appreciable to his art, it will nonetheless be relevant to take into account findings within conventional medicine which reveal dangers associated with aspects of his art.

6.6.2.4. Duty of care

Special knowledge does not relieve someone from proving the duty of care. In Haley v London Electricity Board the House of Lords applied Lord Sumner’s *dictum* when they held that a body conducting operations on a highway should foresee that blind persons would walk along the pavement, and that it owes a duty to take those precautions reasonably necessary to protect them from

\[125\] *Vaughan v. Menlove* (1837) 3 Bing NC 468, at 474, per Tindal CJ.
\[126\] See *Wooldridge v. Summer* (1963) 2 QB 43
\[127\] *Philips v. William Whiteley Ltd.* (1938) 1 All ER 566.
\[128\] *Wooldridge v. Summer* (1962) 2 All ER 978, at 989, per Diplock LJ.
\[130\] (1965) AC 778.
harm. Similarly, in John Stone v. Bloomsbury Health Authority\textsuperscript{131} in which the level of care owed by an employer to junior doctors who were required to work excessive hours in issue, Stuart Smith LJ said:

\textit{[i]t must be remembered that the duty of care is owed to an individual employee and different employees may have a different stamina. If the authority in this case knew or ought to have known that by requiring him to work the hours they did, they exposed him to risk of injury to his health, then they should not have required him to work in excess of the hours that he safely could have done.”}

In assessing the liability of duty of care, the courts must have flexibility, in such cases human frailty must be taken into account.\textsuperscript{132} In such cases, the defendants ability to foresee the acts of third parties (e.g. wrong blood group cross-matching) cannot be taken for fixing the liability of a defendant (e.g. a doctor). If the complainant is injured because the third party has done something that the defendant could not reasonably foresee he would do, the defendant is not liable.\textsuperscript{133} Nor can one excuse oneself by relying on another to do an act unless that reliance was reasonable. \textit{Manchester Corpn. v Mark land}\textsuperscript{134} illustrates the point.\textsuperscript{135}

\textbf{6.6.2.5. Liability for failure to diagnose diseases}

The health legislations as mentioned above does not spell if a doctor fails to diagnose a disease. Failure or to diagnose disease due to negligence is an important impediment that impairs the patient’s right of protection. But, the regime of health legislation of Bangladesh has failed to address properly. The health legislations as mentioned above does not spell if a doctor fails to diagnose a disease. A doctor failing to diagnose a disease cannot excuse himself by showing that he acted to the best of his skill if a reasonable doctor would have diagnosed it.\textsuperscript{136} Nor can a young hospital doctor escape liability simply be pleading that he is inexperienced or overworked. He must still attain the level of competence expected from a person holding the ‘post’ entrusted with his responsibilities. In such cases, one must be careful to ascertain exactly what skill the defendant did hold out to possess.\textsuperscript{137}

It is also important to realize that where a skill person conforms to practices accepted as proper by some responsible members of his profession, he will not be held responsible/liable in negligence merely because other members of his trade or profession would take a different view

\begin{itemize}
\item \textsuperscript{131} [1992] QB 333.
\item \textsuperscript{132} \textit{Eastman v. South West Thames Regional Health Authority} (1991) 2 Med LR 297
\item \textsuperscript{133} \textit{Donaldson v McNiven} [1952] 2 All ER 691.
\item \textsuperscript{134} [1936] AC 360.
\item \textsuperscript{135} The appellants were statutory authority for the supply of water to the borough of Eccles. One of the appellants’ service pipes in a road in Eccles burst. Three days later, the resulting pool of water froze, and a car skidded on the ice knocking down and killing a man. In a negligence action brought by the dependents of the deceased against appellants, it was held to be no defense that the appellants chose to rely on Eccles Corporation to notify them of bursts: they should themselves have taken proper precautions.
\item \textsuperscript{136} \textit{Bolam v. Friern Hospital Management committee} (957) 2 All ER 118
\item \textsuperscript{137} \textit{Wilsher v. Essex Area Health Authority} [1987] QB 730
\end{itemize}
Health Laws in Bangladesh: Justice for Consumer?

(Street, 2007: 110). This principle is most frequently applied in the context of medical negligence where there are often differences in opinion as to the best way to address any given medical problem. In such circumstances, the courts will not choose between rival schools of professional thought.\textsuperscript{138} Nor in other circumstances where two non-negligent courses of action were possible, will the courts hold a defendant liable for failing to take that course which has been revealed, with the benefit of hindsight, to have been the preferable course.\textsuperscript{139} In a case\textsuperscript{140} a premature baby was admitted to a specialist neo-natal unit. An error was made that the medical staff failed to notice that the baby was receiving too much oxygen and the baby became blind. The Court of Appeal held that it would be irrelevant that the doctors were inexperienced, or doing a job which should have been done by a consultant, or just grossly overworked. If a particular doctor was too junior for his ‘post’, then it should be the health authority that was directly liable to the claimant for providing inadequate staffing and resources.\textsuperscript{141} In determining the standard demanded in particular ‘post’, expert evidence of proper practice must be called. Where practice is disputed, however, conformity with a responsible body of opinion within the profession will generally suffice.\textsuperscript{142} In Bolitho v. City and Huckney Health Authority\textsuperscript{143} Lord Browne-Wilkinson stressed that to constitute evidence of proper, non-negligent practice, expert opinion must be shown to be reasonable and responsible: ‘the Court has to be satisfied that the exponents of the bdy of opinion relied on can demonstrate that such opinion has a logical basis’.\textsuperscript{144}

6.6.2.6. Emergency and Momentary mistake

‘Mistake by momentary misjudgment’ places no liability of duty of care on the defendant or it does not allow assessing how skill he was in discharging his work. Where negligence is alleged in the course of playing a sport, that fact that the object of competitive sport is to win and the fact that spectators attend sporting occasions to see competitors exhibit their skill at the game will be relevant. So, in Wooldridge v. Sumner,\textsuperscript{145} Diplock LJ held that where a show-jumper was concentrating his attention and exerting his skill to complete his round of the show-jumping circuit, this must be taken into account in determining whether a momentary misjudgment constituted negligence.\textsuperscript{146} Frequently, a defendant may act in an emergency, with little time for reflective decision-making, in a manner that

\textsuperscript{138} Bolam v. Friern Hospital Management Committee (957) 2 All ER 118
\textsuperscript{139} Bolam v. Friern Hospital Management Committee (957) 2 All ER 118.
\textsuperscript{140} Wilsher v Essex Area Health Authority [1987] QB 730.
\textsuperscript{141} Ibid.
\textsuperscript{142} Supra note 139.
\textsuperscript{144} [1997] 3 WLR 1151, at 1159.
\textsuperscript{145} [1963] 2 QB 43.
\textsuperscript{146} See, in similar vein, Caldwell v. Maguire and Fitzgerald [2002] PIQR P45
falls below the standard of care normally expected of him. In such cases, the defendant’s action must conform to the intelligence and knowledge of a man expected in a situation of emergency.

6.7. Constitution and jurisdiction of courts; summary trial; Penal provisions

The matters relating to health goods and service related matters are dealt with broadly by statutory laws which provide both criminal and civil remedies. The matters relating to health services are dealt with broadly by statutory laws. There are some other laws that may function as auxiliary laws. A brief description of redressal forums (court/tribunal) for product justice is given below:

The Drugs Act 1940 does not provide for any special court or tribunal for the trial of cases under this Act. For the trial of cases under this Act, the regular court of magistrate (not less than a magistrate, 1st class) is competent to try these cases. The Drugs (Control) Ordinance 1982 provides a special court – the Drugs Court constituted by a Sessions Judge. It provides no jurisdiction to ordinary court or magistrate.

It is only the Special Powers Act 1974 that provides provision for Special Tribunal for the trial of cases under this Act. The tribunal is constituted by Sessions Judge, Additional or Assistant Sessions Judge or a person who shall be Metropolitan Magistrate. The Consumer Rights Protection Act 2009 provides no court for the trial of health related offences, but, it provides that the offences relating to drug shall only be tried by this Tribunal constituted under the Special Powers Act 1974. There are some other laws that deal with service liability; but, they do not provide any special court. The offences under these laws have been made triable by the court of magistrate. No restriction as provided in section 32 of the Code of Criminal Procedure 1898 shall be functional on the jurisdiction of such courts in inflicting punishment. Regarding the manufacture of drugs by skill persons, the Pharmacy Ordinance 1976 does not provide for summary trial.

---

149 These laws include the Drugs Act 1940, the Special powers Act 1974 and so on.
150 Section 15 of the Drugs Act 1940.
151 Section 23 (2) of the Drugs (Control) Ordinance 1982.
152 Section 26 of the Special Powers Act 1974 provides for Special Tribunal and section 22(b) of the Drugs (Control) Ordinance 1982 provides for a special court – the Drugs Court.
154 Section 72 of the Consumer Right Protection Act 2009.
155 These laws include the Eye Surgery (Restriction) Ordinance 1960, the Allopathic System (Prevention of Misuse) Ordinance 1962, the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982, the Implant of Organs in Human Body Act 1999 and so on.
156 Section 5 of the Eye Surgery (Restriction) Ordinance 1960, Section 10(2) of the Allopathic System (Prevention of Misuse) Ordinance 1962.
An analysis of the composition and trial of cases by these courts reveal that there prevails a state of ambiguity under different legislations. Regarding the composition and trial of drugs related courts, it has been observed that the Drugs Act, 1940 has not been repealed by The Drugs (Control) Ordinance 1982 or any other law. So, it may be presumed that the drugs related offences are capable of being tried by a magistrate having jurisdiction and under the provisions of the Drugs Act 1940 also. There prevails the dilemma regarding the jurisdiction of courts. The CRP Act 2009\(^{157}\) provides that the offences relating to adulteration of medicine shall be tried by the Special Tribunal under The Special Powers Act 1974. Whereas, the principal law on drugs – The Drugs Control) Ordinance 1982. It provides for special court – the Drugs Court constituted by a Sessions Judge.\(^{158}\) So, question arises as to the competency of and jurisdiction of courts under these laws.

The main dilemma lies in the fact that the law that is considered as the principal law on service related matters – the Bangladesh Medical and Dental Council Act 2010 does not provide any provision for the trial of these cases by any court or forum. It may be relevant to mention that in some countries or regions, the product or service related matters are capable of being dealt with by the relevant international legislations Although Bangladesh is one of the signatories of these treaties, documents or resolutions, but, the legal system of Bangladesh does not allow the applicability of these laws in the national or domestic courts.

6.7.1. Summary trial

Some of the health related laws provide provision for the trial of cases by summary procedure. In this respect we may refer to the Drugs Act 1940,\(^{159}\) the Special Powers Act 1974\(^{160}\) or The Drugs (Control) Ordinance, 1982.\(^{161}\) In this respect, the procedure that shall be followed the procedure laid down by section 262-265 of the Code of Criminal Procedure 1898. It shall be lawful for a magistrate to pass an order of sentence exceeding the limit provided by section 32 of the Code of Criminal Procedure 1898. But, the dilemma of summary trial lies that Section-260 of the Code of Criminal Procedure 1898 has specifically mentioned the class of offences that are capable of being tried by the summary trial, but, the offences under these Acts or Ordinances have not been included in Section-260 of the Code of Criminal Procedure 1898. The offences specified in the schedule are capable of being tried only by special courts, not by courts under section 260 of the Code of Criminal Procedure 1898. The failure of to specify the offences creates apprehension of miscarriage of justice for both the health consumer.

\(^{157}\) Section-72 of the Consumer Rights Protecton Act 2009.
\(^{158}\) Section 23(2) of the Drugs (Control) Ordinance 1982.
\(^{159}\) Ibid., Section 39.
\(^{160}\) Section 27 (4) of the Special Powers Act 1974.
\(^{161}\) Section 23(7) of the Drugs (Control) Ordinance 1982.
6.7.2. Public Interest Litigation (PIL) in health

As the Constitution functions as the main instrument for the right of safety and security of person, its provisions may be employed for this purpose. Any person being aggrieved by a violation may seek the protection of law under Article 102 of the Constitution. It has been observed that the constitution has the capacity to serve as the fundamental basis of health justice where the ordinary legislations do not provide the right of access. This right is available when the subordinate legislations do not allow the right of access to the aggrieved person (Hoque, 2013:7). These remedies may be invoked in the form of individual writ or public interest litigation (PIL). It has been observed that the Indian Supreme Court has delivered various decisions taking the ‘right to life and human respect’ as guiding principle for health justice and accordingly, passed necessary orders for the payment of compensation. Under the present structure of the Constitution, a few cases have been decided on the ground of PIL. In a PIL, the courts imposed ban on the production of adulterated medicine. Apparently, right of access provided by the constitution may seem to be open for all, but in practice the right of protection under the constitution is not open and easy; rather it is viced with several difficulties for which these rights have been made impracticable. This matter has been discussed in chapter 8 of this study on PIL.

The National Health Policy gives emphasized on the right of easy access to public resources such as hospitals, clinics, education and awareness. ‘In the National Health Policy 2008, a sustainable, people oriented and easily available health services in promised by the government; but, a pragmatic ‘action plan’ for future is not explained in the absence of which the expectation for a healthy nation is shaken’(Hoque, 2013:7). In the light of restorative justice, the term ‘action plan’ cannot be confined only within the arena of development initiatives; it may be extended to the assurance of the right of access to justice which is not reflected in the Health Policy or the Constitution.

6.8. Other laws affecting health consumers’ rights

In the field of traditional medicine, the Unani, Ayurvedic and Homoeopathic system of treatment comprises a good share in our health sector. This type of medicine was firstly recognized by the Drugs Act, 1940 (Section 3 (b) (II)] and subsequently by the Drugs (Control) Ordinance, 1982 (Section 3(1) (d). For the purpose of regulating these systems of medical treatment, necessary laws were enacted. The purpose of these laws were regulating all matters connected with imparting

---

162 Dr. Mohiuddin Farooque vs. Secretary of Health, Ministry of Health, Govt. of Bangladesh (1996) 48 DLR 438.
163 West Bengal Farmers Society vs. Ministry of Health, West Bengal [WB (1996)4 SCC 37]. In this case, the patient was a labor victim of an accident who died for want of medical treatment.
164 Supra note 162.
165 The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983 and the Bangladesh Homoeopathic Practitioners Ordinance, 1983.
the education of traditional medicine, recognition of these educational institutes, and registration of practitioners by boards\textsuperscript{166} constituted for this purpose.

Considering the ‘standard efficient system of education’ as one of the best means of justice, these laws incorporated necessary provisions for the recognition of these institutes imparting the education on Unani, Ayurvedic and Homoeopathic system of medicine by a board.\textsuperscript{167} For the purpose of securing the consumers against deception and cheating by the use of fake and colorful imitation of degrees by persons, it imposes ban on conferring, granting or issuing or holding out a degree, diploma or certificate which purports to be identical with or is a colorable imitation of any degree, by person other than these institutes. It further provides that no person shall add to his name, title or description any letters or abbreviations which lead to the belief that he hold a degree or diploma as a doctor.\textsuperscript{168}

A review of the Health Policy 1998 reveals that Government has taken measure to provide health services to the remotest areas of Bangladesh, but, a critical analysis of this policy with reference to the traditional medicine reveals that due to lack of awareness, there prevails a state unhealthy competition of advertisements which is obnoxious, unethical and immoral. These sorts of advertisements are strictly prohibited under the provisions of the Illegal Advertisement (Regulations) Act, 1952. It is also prohibited by some other laws.\textsuperscript{169} But, the government has failed to take any initiative to prevent these activities due to which the consumers are still revolving in a vicious circle of cheating, deception and injustice. Besides these laws, an evaluation of the regime of health laws of Bangladesh reveals that there are various other laws that do not directly deal with health goods or services, but, may influence the consumers’ right of protection indirectly. These laws include the laws on essential commodity,\textsuperscript{170} competition,\textsuperscript{171} import of medicine,\textsuperscript{172} and some other laws.

\textsuperscript{166} The Bangladesh Board of Unani and Ayurvedic System of Medicine and the Bangladesh Board of Homoeopathic System of Medicine. these boards functioned under Section 3 and 4 of The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983 and The Bangladesh Homoeopathic Practitioners Ordinance, 1983 respectively.

\textsuperscript{167} Sections 16, 17 of The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983 and sections 16, 18 of The Bangladesh Homoeopathic Practitioners Ordinance, 1983.

\textsuperscript{168} Please see Sections 17, 18, 21, 23, 24, 25, 26, 31, 32, 33 and 34 of The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983 and Sections 19, 25, 28, 29, 18, 21, 22, 37, 38, 39 of The Bangladesh Homoeopathic Practitioners Ordinance, 1983.

\textsuperscript{169} These advertisements of medicine without prior approval from the licensing authority is prohibited under section 14, and is punishable by fine or jail under section 21 of this of The Drugs (Control) Ordinance, 1982. It is also prohibited under the Illegal Advertisement (Regulations) Act, 1952.

\textsuperscript{170} Control of Essential Goods act 1956, the Essential Commodities Act 1957.

\textsuperscript{171} These laws includes the Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance 1970, and the Competition Act 2012.

\textsuperscript{172} The Customs Act 1969 which regulates or controls the import of medicine and its raw materials does not provide any provision directly applicable to drugs and medicine, but, it provides provision of prohibition\textsuperscript{172} on the import of conveyances, stores and materials which may be applicable to the import of drugs and medicine and the materials required for its manufacture.
6.9. Access to justice

In the preceding part of this chapter, we discussed about the construction and jurisdiction of courts under different laws. Among them, some of the laws provide specific provision on this aspect; some of them remain silent on this aspect. In some cases, it has been observed that the same nature of offences fall both under two different laws and the provision of these laws define them as cognizable and non-cognizable offences. This state of condition creates dilemma relating to cognizance of cases.

An critical analysis of these laws reveal that section 22 of The Drugs (Control) Ordinance 1982, characterizes the cases under this ordinance as non-cognizable, on the other hand, The Drugs Act, 1940 is silent about it (i.e. Cognizability or non-Cognizability of the case) for which apprehension of denial of justice may ensue for the absence of clarity of legislation. So, the offences under these laws shall suffer from failure to identify jurisdiction of courts and accordingly, the apprehension of denial of justice is created.

6.9.1. Investigation and Inquiry of complaints

A state of discordance is found to be seen in the procedures, especially with respect to inquiry and investigation of cases. For the ends of justice, any legislation dealing with violations of criminal liability should clearly define whether the complaint shall be cognizable or non-cognizable one. It must also mention the procedure to be followed for further proceeding of the case after cognizance; otherwise, it may be subjected to serious question of material defect or illegality which may result in miscarriage of justice due to the obscurity or absence of clarity in legislation. The fact of deficiency that lies with health legislations is that some of them do not mention any procedure for concluding the trial. They do not clarify which procedure is to be followed to conclude the trial of the case.

For the clarity of understanding, it may be mentioned that section 23 (6) of the Drugs (Control) Ordinance 1982 declares that ‘in all matters with respect to which no procedure has been prescribed by this ordinance, follow the procedure prescribed by the Code of Criminal Procedure, 1898 (V of 1898), for the trial of summons cases by magistrates’. But, the health other legislations like The Eye Surgery (Restriction) Ordinance 1960, The Allopathic System (Prevention of Misuse) Ordinance 1962, The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982, The Medical and Dental Council Act 2010 (as of 1980) do not lay down any such procedural instructions or principles for the trial of cases. It is also observed both The Medical and Dental Council Act either of 1980 or 2010 do not mention about the forum that may take cognizance of the case for dispensing justice. An analysis of formal institutional mechanism reveals that even a good legislation may be futile if avenue for justice through a rational legal system, i.e. an institutional
forum is not created. From this point of view, these legislations have failed to make avenue for a rational legal system for justice.

6.9.2. Right to sue

A review of these laws reveal that the regime of health laws of Bangladesh is viced with direct or indirect denial of the right of direct access to courts. This right is executive driven where a complaint can be lodged to the court only upon report from the authorized officer of the government in this behalf. It is applicable both to product and service liability. So, the question of individuals’ right of protection has become immaterial under these legislations.

A critical analysis of laws relating to cognizance reveals that some of the laws do not provide the right of direct access to court to the victim or the individual health consumer. It restricts or curbs this right in the form of placing restrictions on the cognizance taking power of courts where it provides that the court shall not take cognizance of offences without prior report in writing from the authorized officer. These laws include section 32 (1) of the Drugs Act 1940, section-10(1) of The Allopathic System (Prevention of Misuse) Ordinance 1962, section 27 of the Special Powers Act 1974, Section 22© of The Drugs (Control) Ordinance 1982, Section-14 of The Medical Practice and Private Laboratories (Regulation) Ordinance, 1982, section 41 of the Homeopathic Practitioners Ordinance 1983, section 36 of the Unani and Ayurvedic Practitioners Ordinance 1983, and the Consumer Protection Act 2009.

The Drugs Act 1940 does not provide any right of protection to an individual. Section 32(1) of this Act provides that ‘No prosecution under this Act shall be instituted except by an inspector. Section-5 of The Eye Surgery (Restriction) Ordinance, 1960 does not provide any restriction in definite terms. Section-10(1) of The Allopathic System (Prevention of Misuse) Ordinance 1962 provides that ‘No prosecution shall be instituted under this ordinance except by an Inspector appointed under the Drugs Act 1940 or by a person especially empowered by the Government in this behalf’. Section-14 of The Medical Practice and Private Laboratories (Regulation) Ordinance, 1982 provides that ‘No court shall take cognizance of an offence under this Ordinance except on a complaint in writing made by the Director General or an officer authorized by him in this behalf. Section 22(c) of The Drugs (Control) Ordinance 1982 is ordinance provides no right of access to justice to a private individual. Section 22© of this Ordinance provides that ‘Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no Drug Court shall take cognizance of an offence punishable under this ordinance except on a report in writing made by the licensing authority or an officer authorized by him in this behalf’. The Medical and Dental Council Act 2010 provided no court of jurisdiction to try the offences under this Act. The absence of redressal forum amounts to denial of the right of access to justice. Under this ordinance, In the above discussion, we

have mentioned the drawbacks of legislation regarding the clinical or diagnostic, consultancy and hospital services. There remains an area of risk where the apprehension of death or injury is high-surgical and transplant services. The denial of the right of access to justice to an individual amounts to the denial of justice. In the above, we have seen the reasons due to which the right of protection is under the apprehension of denial. Despite the reasons mentioned above, there are few reasons due to which the consumers’ right of justice is largely denied which includes absence of standardization in the penal provisions, phrasal aspect of drugs, and absence of governance and so on. A brief description of this aspect is given below.

6.9.3. Ambiguity in penal provisions

There are various aspects associated with drugs and medicine that may function as defiance to the right of justice. In this respect, the matter that is very much prevalent is the penal provisions mentioned above reveal that the provisions relating punishment are not uniform; rather, rather it leaves enough space for dilatory practices. Due to these reasons, there is not standard definition of medicine. In respect of penal measures, the term of imprisonment’ under different laws ranges from 02 to 10 years. A brief description of penal measures for the offence of adulteration of medicine is given below:

- Rigorous imprisonment for period ranging up to a period not exceeding six months or fine not exceeding taka one thousand when under section 274-275 of The Penal Code 1860
- Rigorous imprisonment for period ranging from six month to five years and or fine of taka 500 under section 27, 28, 29, 30 and 37 of the Drugs Act 1940
- Sentence of death or with imprisonment for life, or with rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine under section 25C of the Special Powers Act 1974
- Rigorous imprisonment for period ten years and or fine of taka 2.0Lac under section 16 of the Drugs (Control) Ordinance 1982
- Rigorous imprisonment for period ranging up to three years and fine of Tk. 3.0 Lac under section 41 of the CRP Act 2009

6.9.4. Gaps in the phrasal aspect of medicine

Regarding standardization, the phrasal aspect of medicine of these laws differs from each other. An analysis of the scope and areas of jurisdiction, target groups and the beneficiaries under The Drugs Act 1940 reveals that they differ from each other. The term ‘drug’ under the Drugs Act, 1940 signifies drugs capable of being consumed and used both by human beings and animal; whereas, the medicines the Drugs (Control) Ordinance 1982 is confined within medicines consumed only by human beings. Regarding standardization of the phrasal aspects of drugs, these two laws also differ from each other. The Drugs Act 1940 defines drugs as ‘all medicines for internal or external use, treatment, mitigation,
or prevention of diseases in human beings or animals.\textsuperscript{174} It also provides that the substances mentioned in the ‘Pharmacopoeia, Pharmaceutical Codex or National Formulary’ shall also form part of medicine under the Unani, Ayurvedic, homoeopathic or bio-chemic system of medicine. The Drugs (Control) Ordinance, 1982 defines ‘Drugs’ as ‘substance exclusively used or prepared for the use of human beings. Although, it recognizes the Ayurvedic, Unani and homeopathic or biochemical system of medicine’,\textsuperscript{175} but, it does not include medicines consumed by animals. The most weakness of this is that it does not clearly spell which law shall prevail where confusion arises between them. This abstention on the part of legislation leads to denial of justice to health consumers. Due to the reason mentioned above, the constitutional guarantee of the right of protection has largely been denied.

The review of laws dealing on traditional medicine reveals that it does not provide the right of access to justice to an individual. Under the provisions of these ordinances,\textsuperscript{176} “no court shall take cognizance of any offence except on a complaint in writing made by an officer empowered in this behalf”. If we analyze the consumer justice system for health consumers, it will reveal that the consumer justice system is viced with various pre-conditions and restrictions; it is largely executive driven. The reason for such failure is not so much due to institutional incapacity as much as it is due to the failure of law in recognizing autonomy of courts. Besides this aspect, the system has failed to recognize the functional urgency of executive bodies (Police) who has a long standing of working in this arena. Due to the reasons mentioned above, despite the prevalence of various laws and rules in this field, the regime of health laws could not provide the constitutional guarantee of justice to health consumers. The similar condition is also prevalent in respect of food. A brief review on this aspect is undertaken in chapter 7 of this study.

\textsuperscript{174} Under Section 3 of the Drug Act 1940. 
\textsuperscript{175} Section 3(1) (d) of the Drugs (control) Ordinance 1982.
\textsuperscript{176} Section-36 of The Unani and Ayurvedic Practitioners Ordinance, 1983 or section-41 of The Bangladesh Homoeopathic Practitioners (Ordinance), 1983
Chapter 7
Justice through the Safety of Food

7.1. Conceptualizing food justice

Food is not exclusively a branch of natural justice that stem from morality; it is the result of some evolutionary factors (Bakshi, 2003: 287). It has transformed from goods to justice through the process of evolution. In this connection, the factor that has greatly influenced its transformation is individuals’ right of protection and his entitlement to food as basic needs. Being influenced by these factors, the aspect of justice had been associated with food in many judicial systems.

Associating the idea of justice with food is not a new innovation of modern judicial system. This process started with the time when food emerged as the first preferable goods for exchange. Since then, it is not only the smooth supply of food and its availability at the affordable price, but also ensuring justice with respect to food had been considered as the core business of the sovereign authorities. In pursuance of this, they emphasized both on war and food simultaneously. In this sub-continent, Kautilya’s ‘Arthashastra’ or Aladdin Khilji’s ‘Price Control System’ gives testimony to this.

As of today, this policy is very much in place in the functioning of the government. The fundamental state policy of the constitution\(^2\) considers food as one of the fundamental basic needs as well as a matter of social justice. It places utmost duty upon the state for taking measures for assuring the availability of food to its citizens. In view of this condition, it places its utmost emphasis on enhancing individuals’ financial ability to arrange food and its availability as the core of business of the state. Despite these measures, in the present context, ‘safety’ has appeared as an important threat to consumers’ right of protection. While emphasizing on the aspect of availability of food, the attention on the aspect of justice has been ignored due to which the challenge that the consumers face with respect to food is lower propensity of justice against the greater number of violations. Besides the aspect of safety, an analysis of the laws relating to food reveals that it is viced with the denial of the right of access to justice. The matter of justice with respect to food is viced with bureaucratization of justice.

The reason for such failure may be that position of food has not yet been settled properly. The law of the land including the fundamental state policy of the Constitution considers the aspect of food not from the point of justice and governance, but from commodity point of view where livelihood and nutrition plays as the most important parameters of consumer protection. So, a great variety of issues


\(^{2}\) Article 15(a) of the Constitution of Bangladesh.
with respect to food remains unaddressed. In view of this condition, this study shall also try to pin-point the position of food not with reference to the aspect of safety, but also from the point of entitlement, development or governance as an important parameter of justice.

7.1.1. Food as an issue of Entitlement, development or governance or justice

Food is not merely an issue of livelihood or nutrition; it is something more which includes entitlement, justice and governance. There is no direct intellectual analysis on the question of justice and food. But, a relation between these two may be found in the ‘Commodity Exchange Theory’ where food has been shown as the first of commodities to be exchanged and ultimately, had set the system of consumer justice in motion. In the present context, the aspect of justice with respect to food is searched in entitlement. Amartya Sen tried to establish a correlation between food and justice. Although, he based his ideas on entitlement, but, his idea of justice was different from the ideas of others. He bases his idea on the availability or smooth supply of food as an important parameter of justice. He considers the availability of food and individuals’ ability to avail these basic needs as the basis of justice consequent upon which he characterized the right to food as one of the entitlements for human life. In expounding his ideas, he was greatly influenced by economic considerations (i.e. poverty, employment, production, supply and availability of food) and real life experiences\(^3\) (e.g. the great famine of Bihar in 1943) due to which he ignored the legal aspects of food (i.e. the right of access to justice) to a great extent. He opines that ‘When we find, a regime of famine, it seems natural to protest rather than reason elaborately about justice and injustice. And yet a calamity would be a case of injustice only if it could have been prevented, and particularly if those who could have undertaken preventive action had failed’ (Sen, 2009: 4). In the above, it has been observed that Sen’s idea of justice is guided by more of economic consideration than legal precepts.

But, a different view is found to be seen in the present context of individuals’ right of protection. The ground that has been made basis for such claim is entitlement to justice; i.e. consumers’ inseparable right of protection with reference to the Universal Declaration of Human Rights 1948 and the constitution. Due to this, the aspect of entitlement (i.e. inseparable right of protection of human beings) has been associated with the aspect of food. The thematic basis for integrating food with the idea of entitlement may be found Rawls’s ideas of ‘Primary Goods’ which he characterizes as the fundamental basis of society. The aspect of food has also a relation with Dworkin’s idea of Equality of Resources’ where these matters are considered as the inseparable part of human life. Despite the difference of opinion in the legal thoughts, the aspect of ‘entitlement’ has not been strongly advocated due to which the condition of justice with respect to food remained confined only within the economic than legal precepts. An analysis of the constitution reveals that it

---

\(^3\) In elaborating his ideas, he referred to the Great Bengal Famine of Bihar in 1943. Please see, Sen, Amartya Poverty and Famines (Appendix-D). The issue of famine has also been assessed in Amartya Sen’s entry on ‘Human Disasters’ in The Oxford Text-book of Medicine (Oxford: Oxford University Press, 2008).
also makes provisions for guaranteeing food as a matter of fundamental needs as well as equality and social justice. Due to the reasons mentioned above, the food consumers are not protected properly. In view of this condition, the matter of food is not required to be considered not from the point of point of commodity, but also as a matter of entitlement (i.e. inseparable right of justice) which considers it as an inseparable part of justice.

In the above, we have analyzed the aspect of food from the point of entitlement. It has been observed that for ensuring justice to consumers, it is not only the formal recognition, but, also a proper state of governance is required for ensuring justice. So, this matter may be analyzed from the point of judicial governance. The aspect of judicial governance may be seen from two standpoints - organizational and juridical. While analyzing from juridical point of view, an analysis of the legal regime of Bangladesh reveals that this process of juridical governance with respect to food existed during the time of Kautilya when the matter of violation with respect to food were addressed by law. In the modern age, this process of juridical governance started with the adoption of the Penal Code 1860. It is the first legislation which had considered the violation with respect to food as an important subject-matter of criminal justice. Since from the enactment of Penal Code 1860, the Sale of Goods Act 1930 was enacted the main focus of which was not matters pertaining to food, rather the focus was given on the issues of business. A new dimension in the juridical governance was found to be seen in the 1950s during which a good number of laws with respect to food were enacted. During this period, a parallel thought surmounted the horizon of food - 'standardization'. The aspect of standardization was regarded as synonymous to individuals’ right of protection. The emphasis on this aspect facilitated the enactment of a special legislation - the Pure Food Ordinance, 1959.

An analysis of the aspect of laws with respect to food reveals that it had emphasized on organizational measures as a matter of judicial governance. In furtherance of this, a special law for constituting special courts was enacted. This Act provided for the trial of food related offences by ‘Special Magistrates’. In the 1970s, another important legislation - the Special Powers Act, 1974 was enacted where the aspect of justice was not given proper importance. In the subsequent stages, many other laws were enacted. But, a remarkable development occurred in the 1990s when the courts considered food as an important issue of justice. Considering the issue of food as a matter of protection and justice, the courts awarded remedies when apprehension of safety and security of

---

4 Article 15(a) of the Constitution of Bangladesh.
5 Section 272 of the Penal Code 1860.
6 These laws include the Hoarding and Black Market Act, 1948, the Essential Articles (Price Control, and Anti-Hoarding) Act 1953, the Essential Commodities Act 1956, the Food (Special Courts) Act 1956, the Essential Commodities Act 1957 and so on.
7 The Foods (Special Courts) Act 1956.
person was created.\(^8\) Since then, the matter of food appeared to be a matter of judicial governance, organizational and juridical.

The emphasis on the aspect of judicial governance does not restrict the aspect of food being regarded as an important issue of development. In expounding food as an issue of development, the proponents of based on economics theories. In this connection, they have connected the matter of food with issues pertaining to development (livelihood, nutrition, employment, poverty alleviation, and so on). Being ethicized by the spirit of development, the UN Guidelines for the Protection of Consumers 1985 has emphasized on the aspect of safety as an important determinant for development. It declares that “When formulating national policies and plans with regard to food, government should take into account the need of all consumers for food security and should support and, as far as possible adopt standards from the Food and Agriculture Organizations of the United Nations and the World health Organization Codex Alimentarius or, in their absence, other generally accepted international food safety measures. Government should maintain, develop or improve food safety measures including inter alia, safety criteria, food standards and dietary requirements and effective monitoring, inspection and evaluation mechanisms.\(^9\) The constitution also considers it as a matter of development. The fundamental state policy of the constitution\(^10\) provides that "The state shall regard the raising of the level of nutrition [….] as among its primary duties. It further provides that:

(I) It shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing its citizens –

   (a) The provision of the basic necessities of life, including food.....

In the above, it has been shown that food justice does not signify merely a commodity; it also signifies the multi-dimensional aspect of legal precepts-governance, development and justice simultaneously. This relation of food with other aspects is determined by legal precepts or statutory laws. But, the mere determination of legal position does not signify the challenges of justice that a consumer faces with respect to food. In view of this, it is required to determine whether the food related laws provide the assurance of justice to consumers. The matter may be settled by reviewing the laws dealing with the aspect of safety and availability in relation to food.

**7.2. Review of laws dealing with food safety and availability**

**7.2.1. Safety of food**

The threat to safety and security of person may arise from the breach of safety with respect to food. So, the aspect that has been taken in this study as one of parameters of justice is safety. For the

---

\(^8\) Dr. Mohiuddin Farooque vs. Bangladesh represented by the Secretary, Ministry of Commerce and others 48 DLR (1996) 438. The case was instituted for imposing ban on the import of radioactive milk.

\(^9\) Article 57 of the UN Guideline on Consumer Protection-1985

\(^10\) Article 18 of the constitution.
purpose of this chapter, the term ‘safety’ implies that a food contains the natural constituents or physical constants, chemical and nutritional value at such level and quantity the breach of which may give rise to the apprehension of safety of life and health. So, being the supreme law of the land, the Constitution provides utmost importance on this aspect (safety) as a fundamental responsibility of the state; it provides emphasis on raising the nutritional levels of citizen\textsuperscript{11} as well as safety and security of person as the fundamental state policy of the state.

In pursuance of the spirit of the constitution, a special law on this specific issue has been enacted and the law is Safe Food Act, 2013. There are some auxiliary laws that deal with this aspect directly or possess the capacity to facilitate or influence the aspect of safety for food consumers (e.g. the Consumer Rights Protection Act 2009). The process of legislation with respect to the safety of food started with the inception of statutory laws (the Penal Code 1860). In this process of progression, some special laws on this aspect or with respect to other aspects of food were enacted (e.g. the Pure Food Ordinance 1959). The main emphasis of this Ordinance was standardization of legal principles with respect to food. In this respect, the term standardization implies uniform incorporation of legal principles in the respective law matching with the principles of safety and purity. For this end, it has provided both organizational and judicial measures.

The organizational measure for this end includes constituting of a body – National Food Safety Advisory Council under the Chair of Minister for Local Government.\textsuperscript{12} The principal responsibility of this council was advising the government on matters of purity relating to food, formulating the policies and strategies relating to the standardization and quality control, safety for the consumption of food by human beings.\textsuperscript{13} As part of administrative measures, it also empowered the local government bodies to appoint one or more ‘Public Analysts’ of food for the local areas under it.\textsuperscript{14} This Ordinance provided the right of access to these Analysts to the consumers of food for examining purity and safety of any food.\textsuperscript{15} For the purpose of ensuring safety of food, it has made provisions prohibiting the use of poisonous or dangerous chemicals or ingredients or additives or substances like calcium carbide, formalin, pesticides (DDT, PCBs oil etc), or intoxicated food color or flavoring matter likely to cause injury to human body.\textsuperscript{16} It provided provision for establishing the ‘Pure Food Court’ for the purpose of expeditious trial of these cases.\textsuperscript{17} All these measures were provided for ensuring safety of food. But, these measures have been annulled by repealing this

\textsuperscript{11} Article 15(a) of the Constitution spells that (1): “It shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing its citizens” with reference to the provision of the basic necessities of life, including food.
\textsuperscript{12} Section 4A of the Pure Food Ordinance 1959.
\textsuperscript{13} Ibid., Section 4A (2).
\textsuperscript{14} Ibid., Section 4.
\textsuperscript{15} Ibid., Section 28.
\textsuperscript{16} Ibid., Section 6A.
\textsuperscript{17} Ibid., Section 41.
Ordinance by the Safe Food Act 2015. In view of this condition, we may examine how far the aspect of safety has been addressed by the newly enacted law – the Safe Food Act 2013.

7.2.1.1. The Safe Food Act 2013

The Safe Food Act 2013 is a comprehensive law that deals with all types of processed or unprocessed food goods, the raw materials required for the processing or producing of such foods, capable of being consumed by human beings for the livelihood, nutrition and protection of health. This Act has incorporated some legal principles which were also incorporated by the Pure Food Ordinance, 1959. In this context, the question arises, does this Act really provides protection (safety) to consumers?

The definition of food under this Act does not clearly differentiate between food and goods used as medicinal food due to which dilemma lies whether the consumption of these goods shall be treated as food under this Act. Although, section 3(5) of the Pure Food Ordinance, 1959 excluded medicine from food, but, it also failed to clarify this aspect of food. The Consumer Rights Protection Act, 2009 remained silent on this aspect. Being the comprehensive law targeted to one specific purpose, it has failed to provide clarity of legislation. The apprehension of danger of this failure is that these foods do not strictly adhere to or follow the conditions required for maintaining the normal constituent and value of foods. The safety of food consumers may be affected by the false advertisements. For example, the false advertisement that gives fabricated figure or floral picture regarding the usefulness or benefit of vitamin enriched foods.

Discordance is found to be seen in the legislation. While defining the article of food, this Act does not impose restriction on using the definition provided by the Consumer Rights Protection Act 2009. The term food under this Act implies food consumable by human beings only, whereas, the CRP Act 2009 includes articles capable of being consumed by human beings or animal or birds. Actually, the risk of widening the group of consumers for food (e.g. bird or animal) is that the safety standards applicable to bird or animal shall not be equally applicable to human beings. So, when the question of safety is involved, the provisions of Safe Food Act 2015 collide with the provisions of the CRP Act 2009 (e.g. anti-consumer activity) indirectly.

The Safe Food Act 2013 provides provision regarding ‘Unsafe food’. While defining the term unsafe food, it seeks resort to ‘Good Agricultural Practices, Good Hygienic practices, Hazard Analysis, Residual Control System, food Safety Auditing System’\(^\text{18}\) as measure for safe management of food. These matters are very much related with pre-production processes. From this point of view, it may be presumed that by emphasizing on the practices of these aspects, the Safe Food Act 2015 provides emphasis on pre-production matters, and lesser on post-production matters of food safety. But, the adulteration with food may be caused both in the pre and post-production stages. A critical

\(^\text{18}\) Section 13 of Food Safety Act 2013.
analysis of this provision reveals that the aspect of safety is addressed by this Act is not sufficient to protect the consumers.

With the aspect of safety, there are some other aspects that are also directly associated with it. These aspects include purity, adulteration, and fortification and so on. So, for the purpose of undertaking a comprehensive review, the issue of adulteration has been associated with purity in this part of study. availability of food falls within the purview of administrative function of the state, not legislation. In this connection, The Pure Food Ordinance 1959, and The Restraint of Sale of Non-Iodized Salt Act 1990 deals with the aspect of purity and fortification.

7.3. Purity and Adulteration; Normal or natural constituent of food; Quality & quantity

Among the laws with respect to food and allied articles, the Pure Food Ordinance 1959 is the first law that dealt with the aspect of purity under special nomenclature or banner (purity). Although, injury to health is considered as an important issue, but it has been observed that the focus of the Pure Food Ordinance 1959 is purity. In this respect, purity and safety has been regarded as synonyms to each other. Assuming the urgency of these parameters, the food related laws have incorporated the principles of warranty as a necessary condition for the aspect of safety with respect to food.¹⁹

For the purpose of ensuring purity of food, it provides some rules of prohibition and compulsion which it characterized as ‘Natural constituent, physical constant and normal chemical value’ of food. For this purpose, it provides authority to the government for determining the standards for the normal constituent, chemical values and physical constant of any article of food.²⁰ No article of food shall be sold unless it conforms to these standards specified by government in this behalf.²¹ It also provides prohibition on the manufacture or sell of any article of food which is adulterated, or sell to the prejudice of the purchaser any article which is not of the nature, substance or quality demanded by the purchaser, or any article the has been added with or abstracted from with the article of food in such a way so as to impair normal constituent of the food.²² It has also imposed restriction on using false labels on the container of food,²³ false advertisement²⁴ and so on. For the purpose of ensuring the purity of food, it also provides provision for examining the food by an Analyst of food.²⁵

The constant of ‘natural and normal constituent of food’ is an important parameter that helps to ascertain the purity and organic character of food and the violation of which may give rise to adulteration or deficiency in the quality of food. An act of abstracting or substituting of any of the

¹⁹ Section 45 the CRP Act 2009 and Section 20 of the erstwhile ‘Pure Food Ordinance, 1959 gave recognition to warranties as a measure for ensuring justice. Failure or non-compliance of warranties is made punishable.
²⁰ Section 5 (1) (a) of the Pure Food Ordinance 1959.
²¹ Ibid., Section 7.
²² Ibid., Section 6.
²³ Ibid., Section 18.
²⁴ Ibid., Section 19.
²⁵ Ibid., Section 28.
normal constituents from any article, diminishing of the chemical or nutritive value or quality of articles, and mixing of any poisonous or deleterious ingredients is likely to injuriously affect the strength or quality of food. For naturally grown foods also possess some elements of ‘normal constituent, chemical value and physical constants’ are necessary ingredients by which the safety and purity of food is primarily determined. The existence of these ingredients and presence of the characteristics ultimately goes to the very root of ‘quality and safety of food’ for human consumption. An analysis of the laws dealing with the aspect of safety of food shall reveal that this aspect has not been properly addressed by subsequent laws. But, the Safe Food Act 2013 has failed to consider these aspects; this Act has abrogated the idea of the existence of normal physical constants in food or its physical constant, and chemical or nutritional value’ with respect to food.

It is not only the natural constituents, the problem lies with respect to ‘standards’ which is regarded as a condition precedent to the safety of food. The term ‘standard’ implies the presence of essential constants in food at a certain level. Section 13(2) (b) of The Safe Food Act 2013 provides provision relating to the ‘level of safety’ for food. But, the problem that lies with it is that it devolves the authority to fix this level to BSTI. While upgrading or updating these standards or guidelines relating to safety, BSTI is required to make a request to the Food Safety Authority constituted under the Safe Food Act 2015 and the related agencies. In this respect, it is not the Safe Food Authority, but, the BSTI that functions as the principal organization for determining the standards of safety. According to the spirit of Safe Food Act 2013, fixing or determining the level of food safety is an inherent authority of the Safe Food Authority. The problem of devolving this authority upon BSTI is the problem of administrative control. BSTI functions under the ministry of Industries, whereas, the Safe Food Authority works under the Ministry of Food. The agendas, parameters of standards of these two organizations may not match with each other. By devolving this authority to other body or entity, The Safe Food Act 2015 curbs the inherent authority of the agency created by it. In such cases, it has nothing to do with the difference in standards collide with the standards set by BSTI and other agencies. Due to the reason mentioned above, the mission vision of the ministry of food may fail. In view of this condition, apprehension of deviation from the ‘safety level’ creates indirect denial to the non-compliance of these obligatory compulsions and prohibitions set by different Authorities. So, unless a balance is established, it may collide with the safety clause of the Safe Food Act 2013.

In the above discussion, we have shown how failure to provide due importance to safety level amounts to violation of justice. In this connection, it may be mentioned that it is not only the natural constituents, but also the existence of some qualitative and quantitative aspects (physical constants) that serves the purpose of safety. These aspects are defined as fortification. So, a food, though not adulterated or impure and possessing all the ingredients of natural constituent, may amount to violation of safety if it fails to comply with the standards set by the rules of fortification.
7.4. Infringements, patent rights as aspects of quality of food

In respect of food, the aspect of infringement of intellectual property has been considered by consumer jurisprudence as an impediment to the protection of consumers. It serves as an important instrument for ensuring standardization for purity, safety, and quality of food. In furtherance of this, infringement has become an important threat to safety of food. We have discussed this aspect of infringement in chapter four and five of this study. This aspect of infringement has not yet been addressed by any law relating to food. But, an analysis of the food related laws reveals that the scope of addressing this issue (infringement) is very limited. There is wide opportunity of addressing these issues of consumers under the intellectual property laws.

The comparative disadvantage of seeking remedy under the existing legal system provided by the intellectual property law is that the victim consumer has no right of protection where the owner does not take initiative against such corrupt practices. In respect of anti-trust activity of the owner of intellectual property and the franchiser, the consumer is denied of his right of protection straightly for want of Locus standi. In this connection, it may be mentioned that the aspect of intellectual property rights has been especially addressed by the intellectual property law in respect of textile goods. The matter of patents with respect to medicine has been addressed by the Drugs Act 1940, The Drugs (Control) Ordinance 1982, and the BMDC Act 2010. In view of this condition, it may be argued that unless this matter has been especially taken into account by the intellectual property laws or the food related laws especially, the chance of providing protection to consumers is very meager.

It is not only the natural physical constants or purity of food, the matter of fortification has been considered as an important determinant for consumer protection. It helps to determine the normal chemical value or nutritional value of food. So, any breach of this condition has been regarded by the modern consumer jurisprudence as one of the breach of consumer protection. In view of this, a brief review on fortification is undertaken below.

7.5. Fortification of food

With the passage of time, some new concepts emerged regarding food which is regarded as a measure capable of ensuring individuals’ right of protection. In this process, fortification has developed as an important dimension the compliance of which is required for ensuring safety with respect to food. This aspect is also applicable in respect of naturally grown foods where these foods do not contain the ingredients. But, the regime food laws of Bangladesh, the concept of fortification have not yet been accomplished. The Safe Food Act 2013 has failed to incorporate this aspect in it.

The problem of fortification drew notice of the government in the 1980s the deficit of Iodine in food was identified as one of the sources of Thyroid diseases. So, with a view to fortify the food by Iodine, it was thought to impose restraint on the manufacture or produce of goods that may suffer from deficiency of Iodine. In pursuance of this, the Prevention of Iodine Deficit Diseases Act, 1989
was enacted. It is the first law that imposed compulsion or restraint on the manufacture and sale of salt without being iodized properly.\textsuperscript{26}

Apparently, this Act may be praised for inception of the concept of fortification; but, it lacked some fundamental deficiencies due to which it could not serve as a parent law regarding the fortification of food. The first weakness of this Act is that it was a subjective legislation which confined its scope only within one consumer goods—Salt. It has failed to enact a uniform law capable of being applied to other goods (e.g. edible oil). The problem of fortification is tried to address on the case-to-case basis of problems. In this respect, it may be noted that a good number of children in Bangladesh suffers from various disease among which the most important is ‘infantile blindness’. The fact that has been identified as the cause of this disease is the deficit of Vitamin A&D in food. It has been suggested that the edible oil may be enriched with this Vitamin if it is fortified in the process of production. But, in the present structure of law, this problem of fortification cannot be addressed by applying the provisions of the Prevention of Iodine Deficit Diseases Act, 1989. In view of this condition, for addressing this problem of fortification, attempt has been made to enact a new law under title ‘The Fortification of Edible Oil Act 2013’. From the zero draft of this law, it is appears that the proposed law is also a subjective law, not a uniform law capable of serving as the parent law on fortification including the problem of Vitamin ‘A’. So, it cannot cater to the needs and problems of fortification for other areas of goods. In view of this, it is very much required to enact an umbrella law for addressing the wider issues of fortification. From the above discussion it may be construed unlike other laws on fortification, the Safe Food Act 2013 also failed to take this matter into consideration.

In the above, we have discussed the aspects of quality and quantity, safety and security of food as a measure necessary providing the protection to consumers. It is not only these aspects, but also the aspect of fairness in business that functions as a measure for providing individuals’ right of protection with regard to food.

7.6. Factors affecting governance system of food
7.6.1. Unfairness or restrictive trade practices

In the previous discussion we have seen that the majority of violations originate from unfairness and restrictive trade practices. The aspect of food is not an exception to this trend. It is the first among consumer goods that attracted the requirement of fairness. The term fairness may be explained as that before the purchase of any article, every consumer has his own estimate or value judgment based upon which his decision rests. From this point of view, this value judgment may be characterized as fairness and the whole of food trade has been functioning since long. Basing upon this principle, the Pure Food Ordinance 1959 specified some specific form of unfairness and restrictive trade practices. An analysis of this Ordinance reveals that despite the usual customary forms of unfairness and

\textsuperscript{26} Ibid., Section 2(a) of the Prevention of Iodine Deficit Diseases Act, 1989.
restrictive trade practices, it had incorporated some new aspects of unfairness in it. The aspects that created apprehension of safety and security to food consumers include:

(a) Making any statement which falsely represents that the food/goods are of a particular standard, quality, or quantity, grade composition

(b) Falsely representing that the seller or supplier has a sponsorship, approval or affiliation, performance characteristics, uses and benefits which such goods do not have

(c) Giving false or misleading fact disparaging the goods of others

(d) Making promise of the efficacy of a food-product which is not based on a proper test

(e) Offering gifts or lotteries or prizes with intention not to give such prizes or gifts and so on.

An analysis of the food laws of Bangladesh, especially, the Safe Food Act 2013 reveals that they suffer from deficiency; they have failed to correlate these aspects of fairness and restrictive trade practices in food related laws. Due to this, the consumption of food and the related businesses have been viced largely with unfairness and restrictive trade practices.

Many of the countries have resolved this problem by enacting necessary laws. Observing the impacts of unfairness in business upon the consumer, the aspects of unfairness and restrictive trade practices as is mentioned in the Consumer Protection Act 1986 have also been incorporated in the Food Safety and Standards Act 2006. Similarly, the Australian legislature has enacted a new law incorporating the aspect of fairness – The Consumer Protection and Fair Trading Act 2012. But, The Safe Food Act 2013 failed to recognize these aspects as a major cause of affecting consumers’ right of protection. It does not specifically provide an idea regarding such trade practices in the manufacture and sale of food; it remains silent about warranty, express or implied. The failure or absence of these provisions in the law statutory laws goes to the very root of justice. This Act is confined only within the purview of purity and safety aspects of food. This aspect of unfairness may be reviewed from another point of view- abuse of intellectual property rights by the owner or authorized of this property rights.

7.6.2. Monopoly and Competition

In chapter IV and V of this study, we have seen how monopoly and competition affects consumers’ right of protection. But this aspect of competition has not been incorporated in food related legislations. Although, the issue of monopoly and completion drew attention of the lawmakers since long, but, the process of legislation started in the 1950s with the enactments of a few laws. These laws include the laws include the Anti-Hoarding Act 1948; the Black-Markets Act 1950; the Essential Articles (Price Control, and anti-hoarding) Act, 1953; the Essential Commodities Act 1956; and the Essential Commodities Act 1957 and so on.
the number of beneficiaries, these laws posed to be more of policies than laws on food and other related aspects. So, with a view to import a state of good governance, curbing monopoly and other restrictive trade practices, ensuring a free fair competition, various laws were enacted at intervals. The last resort with respect to these legal measures is the Competition Act 2012. It has been regarded as the principal law on addressing the issue of monopoly and competition.

At this moment, there exists no legislation directly dealing with the competitive aspect with respect to food, but, in the past, there existed some legislation which could be utilized for dealing with the aspect of monopoly and competition. Among these legislations, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 provided for civil measures and the Special Powers Act 1974 provided for criminal measures. Among these legislations, The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 does not directly deal with the competition of food or food related business, but its potential could have been explored for the business relating to food. This ordinance formulated legislation for restricting the monopoly of ownership and thus regulating fair competition in the market. This legislation made provisions that ‘There shall be no undue concentration of economic power, unreasonable monopoly power, or unreasonably restrictive trade practices’. In pursuance of this ordinance, to restrict the control of monopoly over the production and marketing of goods, the legislation made restrictions over undue concentration of economic power, unreasonable monopoly power, unreasonable restrictive trade practices, and other circumstances constituting concentration of economic power by imposing restriction over the owning or possessing the shares or proprietorship of such company, enterprises beyond certain percentage or amount. These forms of restrictive measures, if applied, could bring an indirect impact on the competition of food and food related business. In the preceding chapter, we discussed the drawbacks of these laws due to which it could not be utilized as a weapon against monopoly and anti-competitive state of business. Now we may analyze how far the Competition Act 2012 is effective for combating the problem of monopoly and anti-competition with respect to food.

In the preceding chapters, we have seen that although, the Competition Act 2012 is regarded as the principal law on competition, but, cannot serve the purpose of ordinary consumers, especially with food consumers to a great extent. While dealing with the aspect of goods and services, it deals with specific issues like oligopoly, cartel, combination, monopoly, collusion, predatory

---

30 Ibid., Section 4.
31 Ibid., Section 5.
32 Ibid., Section 6.
33 Ibid., Section 7.
34 Section 2(1) (I) of Competition Act 2012, Bangladesh.
35 Ibid., Section 2(1) (T).
36 Ibid., Section 15.
37 Ibid., Section 2(c).
price,\textsuperscript{41} anti-competition agreement,\textsuperscript{42} abuse of dominant position,\textsuperscript{43} unfair practices in tendering,\textsuperscript{44} and so on. But, it does not specifically deal with matters pertaining to food. So, the anti-competition activity with respect to food cannot be dealt with by this Act. These issues may apparently seem to have no relation with food consumers, but a keen analysis of the impacts of these activities reveal that its influence on food consumers cannot be kept isolated from other aspects of competition. So, the laws dealing with the aspect of competition should take notice of the impacts of monopoly and anti-competition on food consumers. But, this Act has also failed to grasp the impact of monopoly and anti-competition on the issues of governance with respect to food and related materials.

7.6.3. Lack of governance

Associating the aspect of governance with food justice is not a new innovation for our judicial governance. Many of the legal thinkers tried to correlate it with food justice. But, it is not always the legal consideration, but, also the non-legal aspects that dominated this discussion. In pursuance of this, in some cases the economic consideration acted as the main considerations to guide their ideas on governance with respect to food. Amartya Sen, being one of the legal and economic thinkers tried to correlate the issue of governance with food justice. His ideas of food justice were centered round the urgency of smooth supply of food at an affordable price to the consumers; he accuses the failure of the system of distribution for food. His ideas of governance were guided mainly by economic than legal precepts; so, he did not emphasize on other precepts of governance. but, recently, lack of transparency in the governance has largely been advocated as a factor affecting the system of governance largely. In this respect, the issues of lack of transparency and corruption, malfunctioning of the state and non-state actors, monopoly, non-disclosure of required information and so on has largely been associated with the aspect of governance.

A critical analysis of this aspect reveals that in Bangladesh, the matter of governance had been taken into consideration since 1950s in furtherance of which the problem of governance with respect to food had been tried to be resolved from legislation point of view. In this process, the issues on which focus was given includes purity, safety, and availability of food. Due to this, the food related laws were centered round adulteration of food, mixing of injurious contents or ingredients,\textsuperscript{45} hoarding and black-marketing.\textsuperscript{46} The limitations of these laws were that the aspect of governance was not associated with food justice. So, these laws were not capable of combating the problem of corruption with respect to food. But, a recent study on food reveals that unless the other aspects of governance

\textsuperscript{38} Ibid., Section 2(1) (h).
\textsuperscript{39} Ibid., Sections 2(1) (o) and 15(1).
\textsuperscript{40} Ibid., Sections 2(1) (p) and 15(1).
\textsuperscript{41} Ibid., Section 16(2)(a).
\textsuperscript{42} Ibid., Sections 2(1) (g) and 15(3).
\textsuperscript{43} Ibid., Section 16(1).
\textsuperscript{44} Ibid., Section 15(2).
\textsuperscript{45} The Penal Code 1860 and the Pure Food Ordinance 1959.
\textsuperscript{46} Section 25C of the Special Powers Act 1974.
are associated with respect to food, it may impair consumers’ right of protection largely. In this connection, we may refer to a recent study undertaken by TIB which it shows that corruption functions as an impediment to the legal governance with respect to food. It spells out the ways and means of corruption happening in the arena of food, identifies the mode of engagement of persons or agencies in the implementation of food related laws, the rate of corruption for performing specific jobs by these officials, and ultimately impairs the right to safe food. From this study, it has been felt necessary to correlate the aspect of corruption in the governance of food related laws.

In this connection, it has been observed that the government has formulated the ‘National Integrity Strategy’ for importing accountability and transparency in different sectors of consumer including food. For obtaining the objectives of this strategy paper, it has selected two important laws – the Consumer Rights Protection Act 2009 and the Competition Act 2012 as important legal instrument for combating the problem of corruption in the arena of food and other related issues. It has formulated the Grievance Redress system (GDS) as a strategy for ensuring accountability and curbing corruption. But, we have seen in the preceding chapters that the failure to establish proper redressal forums, deficiency in law has made this strategy dysfunctional, especially with respect to food.

This strategy paper has identified some government and non-government organizations as change agent, but it has failed to select the appropriate organizations as the change agent. To prevent adulteration of food, this strategy paper has identified BSTI as the principal organization responsible for this end. But, it has failed to identify the exact organizations (Directorate of Consumer Protection) that is responsible for implementing this objective as the principal agent responsible for this. In this connection, it is necessary to mention that that the Directorate of consumer Protection, the Competition Commission, the Safe Food Authority and the District Magistrate is the change agent which this strategy paper has failed to recognize; it has considered only one organization – BSTI as the principal organization responsible for this. It (BSTI) is not the parent organization for implementing the consumer related laws. Due to the failure to locate the proper organization, this strategy paper could not provide necessary measures against corruption with respect to food.

7.6.4. Non-disclosure of required information

It may be noted that the rules of safety requires clarity or disclosure of information. This requirement of disclosure of information rests on the principle of Caveat Venditor. So, it should be clear, accurate and distinctly clear to disseminate necessary information. The notification of information, restriction or advice regarding the usefulness or consumption of a food for a particular group (women, children, old) signifies safety instruction. The failure to provide this information may amount to non-

---

48 Item no. 12 of the Action plan, p. 14 of the strategy paper.
compliance of the rules of safety. Where a product is not consumable for child under a certain age, the failure to disclose this information was regarded as violation of rules regarding the aspect of safety.\textsuperscript{50} The information that the use of fluoride beyond a certain level is hazardous to children below the age of seven was not disclosed by the company while it was marketing fluoride tooth paste. It was alleged that the failure to disclose the information by the company was unintentional. Even then, the failure to provide the necessary information regarding the normal safety level was held by court as violation of the rules of safety.\textsuperscript{51} An analysis of this aspect reveals that the Safe Food Act 2013 has ignored this aspect.

There are acts of commission or omission with respect to food where the consumers are widely deceived by disclosure of false information. The commonly adopted method of non-disclosure of information is executed by false trade description, labels or advertisement to attract the buyers. The use of false labels or advertisement was made punishable under the Pure Food Ordinance 1959.\textsuperscript{52,53} By repealing of this Ordinance, virtually the rules of safety have also been deleted from food laws.

\textbf{7.6.5. Consumers’ lack of options in seeking consequential relief}

An analysis of the remedies under the Safe Food Act 2013 reveals that that the sovereignty of consumer is curved by its juridical restrictions. Among these two types of remedies, the consumer is not at liberty to select or prefer any of the remedies— civil or criminal. He is driven only to criminal remedies.

The availability of civil remedies has been made dependent on the compliance of some pre-conditions. It does not provide the right of direct access to civil remedies unless it has complied with some pre-conditions. For seeking civil remedy under this Act, it must be proved that the plaintiff has to satisfy that a criminal proceeding against the defendant has been proceeded in which defendant has been proved guilty and has been convicted.\textsuperscript{54} This dependency of cause of action implies the justice is conditional and not free from any encumbrances. Moreover, the civil remedies are confined only to one remedy— compensation; it does not recognize other forms of reliefs (return, refund and

\textsuperscript{51} Ibid.
\textsuperscript{52} Section 18(1) of the Pure Food Ordinance 1959: “No person shall, directly or indirectly and whether by himself or by any other person acting on his behalf, with any article of food sold by him, give to the purchaser a label, whether attached to or printed on the container in which such article is sold or not, which falsely describes that article or is otherwise calculated to mislead as to its nature, substance or quality”.
\textsuperscript{53} Section 19(1) of the Pure Food Ordinance 1959: “No person shall publish or cause to be published, an advertisement which falsely describes any article of food or is otherwise calculated to mislead the public as to its nature, substance or quality”.
\textsuperscript{54} Section 76 of the Safe Food Act 2013
replacement) of goods or services. So, any prior conditions for availing relief amount to indirect denial to the right of safety for consumer.

7.7. Remedies available to consumers against breaches of the right to safe food

In the preceding chapter, we have already undertaken a review on the remedies available under different laws. As those remedies are applicable to goods, so, it is equally applicable in respect of food and related articles. While, discussing on the aspect of food, we discussed the administrative, legal (civil, criminal and tort) remedies under the relevant laws with emphasis of the Consumer Rights Protection Act 2009. But, being the issue-based law, we shall discuss only on remedies available under the Safe Food Act 2013.

7.7.1. Criminal law remedies

The remedy provided under different laws includes imprisonment or fine. For adulteration of food or drink or sale of noxious food or drink, the Penal Code provides the remedy of imprisonment and fine to the offender. The same remedy is also provided against the offence of hoarding and black-market, breach of the price fixed by law for any goods, holding of goods beyond the limit of quality fixed by the respective law. The Special Powers Act also provides remedy against the offence of adulteration, price-hike, hoarding, and black-market, artificial crisis of food. The remedies that it provides include imprisonment or fine or both. For the offence of adulteration of food, drugs and medicine, this Act provided capital punishment (death, or imprisonment for life, or rigorous imprisonment for a term which may extend to 14 years, and shall also be punishable with fine which does not match with other laws in this regard. With regard to financial remedies, it suffers from insufficiency; it does not specify the extent of penalties that may be inflicted.

7.7.2. Civil law remedies

Among the laws, the Consumer Rights Protection Act 2009 is the principal law that provides civil remedy to consumers directly. These remedies include compensation, refund of money, replacement

---

55 Section 67 of the Consumer Rights Protection Act 2009 provides: The civil court shall have jurisdiction to order to the defendant for the following remedies, namely:
- Replacement of defective goods by the appropriate goods
- Refund of money paid for the goods or services the defective goods supplied and give a refund of the price of the goods supplied and
- With a view to compensate the victim, the court may order for compensation as payable to the victim and the amount of compensation may extend not exceeding to five times of the assessed loss and injury of the victim including the cost of suit.
56 Sections 272 and 273 of the Penal Code 1860.
57 Section 3 of the Anti-Hoarding and Black Market Act 1948.
58 Sections 3, 4 of the Essential Articles (Price Control and Anti-Hoarding) Act 1953 and section 3 of the Essential Commodities Act 1957.
59 Ibid., Section-5 of the Essential Articles (Price Control and Anti-Hoarding) Act 1953 and section 3 of the Essential Commodities Act 1957.
61 Ibid.
62 The punishment for these offences are imprisonment for a period not exceeding five years.
or return of goods and services\textsuperscript{63} a brief description of which is given in the preceding chapter. But, it does not provide some other forms of \textit{ad interim} remedies which include the withholding of sale of some goods for a specified period of time, recall of goods which are required for protection to consumers. in this connection, we may refer to laws that serve as the standard law for civil remedies where the specific law is not available. It includes the Specific Relief Act 1877.

Since its inception, the law that has been regarded as the standard legal principle for civil remedies is the Specific Relief Act 1877. It provides different kinds of relief, remedial or preventive. The remedies that are broadly available under this Act includes:

\begin{itemize}
  \item[a.] Specific performance of contract, express or implied\textsuperscript{64}
  \item[b.] Purchaser’s right against vendor with imperfect title\textsuperscript{65}
  \item[c.] Injunction or any other measures for preventing the defendant from doing any anti-consumer activity, or engaging in unfair and restrictive trade practices\textsuperscript{66}
  \item[d.] Withdrawing or cancellation of license, alerting the consumers of the safety, quality, quantity of goods
  \item[e.] Declaration of legality or illegality of any state of affairs or business\textsuperscript{67}
  \item[f.] Declaration of right, title or interest of the plaintiff in the goods or goods in question
  \item[g.] Attachment of goods, services and the equipments necessitated for the preparation or manufacturing of such goods and services and so on.
\end{itemize}

The comparative advantage of this Act is that the doctrine of mutuality which was one of the defenses in English law to an action for specific performance has been deliberately left out from the specific Relief Act 1877 by the legislature\textsuperscript{68} due to which specific performance has become a discretionary matter of the court.\textsuperscript{69} Moreover, it acts both in \textit{Rem} and \textit{Personem}. So, the scope of opportunity under this Act is wider than any other law. So, the court of law has jurisdiction to allow or refuse this relief … even the contract is free from any legal defect\textsuperscript{70} The remedies under the Sale of Goods Act 1930 includes refund of prices,\textsuperscript{71} damages,\textsuperscript{72} specific performance of the contract,\textsuperscript{73} rejection to accept the

\textsuperscript{63} Sections 65-67 of the Consumer Rights Protection Act 2009.
\textsuperscript{64} Section 12 of the Specific Relief Act 1877.
\textsuperscript{65} Ibid., Section 18.
\textsuperscript{66} Sections 52-57 of the Specific Relief Act 1877 read with Order39, Rules 1 and 2 of the Code of Civil Procedure 1908.
\textsuperscript{67} Section 42 of the Specific Relief Act, 1877 read with sections 18 and 22.
\textsuperscript{68} Ibid., Section 18.
\textsuperscript{69} AIR 1929 Sind 63.
\textsuperscript{70} 16 DLR 239.
\textsuperscript{71} Ibid.,16 DLR 239.
\textsuperscript{72} Sections 55(1), 58 of the Sale of Goods Act 1930.
\textsuperscript{73} Ibid., Sections 56 57, and 58.
\textsuperscript{74} Ibid., Section 58.
goods,\textsuperscript{74} repudiation of contract before due date of delivery of goods,\textsuperscript{75} special damages\textsuperscript{76} and so on. The remedies mentioned above may also be awarded in respect of food justice.

In the above, we discussed laws that may deal with consumers directly. Besides this, there are some other laws that also possess the capacity to provide protection to consumers in the absence of any specific law. In this part, we shall discuss the laws on intellectual property rights.

7.7.2.1. Civil remedies under intellectual property laws

Taking advantage of the intellectual property laws, the owners or assignees of this property rights may engage in the act of deception. So, the protection provided by these laws to its owner may emerge as a weapon cheating and deception. This is applicable especially with respect to foods to which this property law is applicable.

The right of intellectual property is a matter of conceptual right generally dealing with the right of its owner. But, the impact of infringement of these rights cannot be kept confined only with the owner of this right, rather, it may extend to the premise of a consumer. In view of this, we may undertake a review whether it affects the aspect of right of safety for food consumers. Among different laws, the laws that have the potential of being applied to food safety the Trademarks Act 2009 and the Patent Act 1911. These legislations do not directly deal with matters relating to food safety, but, some of its provisions may be applied to consumers’ right of protection, especially with food consumers.

An analysis of the Patent Act 1911 reveals that it although infringement of patent right has been regarded as one of the important modes of deception, but, it is not only the act of infringement, but act an authorized by this Act may also give rise to deception. For example, the franchise has been regarded as an authorized form of assignment of patents, may give rise to fraudulent act with the food consumers. We have seen that some of the food products are marketed by transferee of these patents, but, the consumers are largely cheated by the anti-trust activity of the transferor or authorized owner of these patent rights. In this respect, the Patent Act 1911 does not provide any legal remedy against these acts of deception, especially with respect to food.

If we analyze this problem of governance with reference to the Trademarks Act 2009, it will reveal that infringement of trademarks has become one of the ventures of deception in many cases, especially with food. The method that is commonly adopted for this act of deception is the assignment of trademarks. Many of the food products are marketed by the franchisees by assignment of trademarks without observing the conditions necessary for maintaining quality and quantity of these

\textsuperscript{74} Ibid., Section 59.
\textsuperscript{75} Ibid., Section 60.
\textsuperscript{76} The court may award interest in addition to the refund of price or consideration paid for under section 61 of the Sale of Goods Act 1930.
goods. These forms and manners of anti-trust activity is widely applied in respect of food and related articles. The commonly adopted forms of infringement that this Act recognizes include the use of false trade description and false or deceptively similar marks. For the purpose of increasing sale or profit, the manufacturers or sellers use identical or deceptively similar marks in respect to their own products. By using fake marks, the manufacturers or sellers tries to gives an impression in the minds of a consumer that the ‘quality, quantity of the produce, the time and place, mode, composition and grade of material or manufacture, the fitness, accuracy, performance, or usefulness of the produce are comparable to that of a well-known brand or trademarks. It is not only the marks; the other way of deception is using false trade description. It may be used as a tool for infringement and deception upon the consumer. False trade descriptions may take a wide variety of forms, but, the legislation recognizes only a few forms which include:\footnote{Section 2(5) of the Trademarks Act 2008.}

- A trade description which is untrue or misleading in a material respect
- Any alteration of trade description … by way of addition, effacement, or alteration
- Any trade description that denotes (implies) that there contained more quantity of goods or less quantity of hazardous material
- Any marks or arrangement or combination applied in such a manner likely to lead persons to believe that the goods are the manufacture or merchandize of a person other than the person whose merchandise or manufacture they really are”.

These descriptions are likely to cause confusion or misunderstanding in the minds of the consumer regarding the product.\footnote{Ibid., Section 2(7).} Apparently, it may seem that it affects only the owner of this right, but, the effects of such infringement cannot be kept confined or limited only within the owner. So, its effect cannot be confined only within the narrowed scope of legal protection for a businessman; rather, it extends to the premises of consumer as an end user of these products. This effect is not confined only to pecuniary loss, but may cause violation of safety for a consumer. From this point of view, although the manufacturer or producer using any marks is the main focus of The Trademarks Act 2008, it may be used as a weapon for protection of the consumer. As the laws on intellectual property rights emphasizes on protecting only the owner of this property rights, so, the consumers have no right of access to justice under these laws.

7.7.3. Administrative remedies
An analysis of the remedies mentioned above reveals that the civil or criminal remedies are not capable of addressing all types of problems concerning it. Some other forms of remedies, such as, curbing or controlling the centralization of economic power,\footnote{Section 4 of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.} growth of unreasonable monopoly
power, restrictive trade practices\textsuperscript{80} by administrative measures has been considered by the Monopolies and Restrictive Trade Practices (Prevention and control) Ordinance 1970 as being required for the wellbeing, economic growth, development and financial stability. But, this ordinance is not confined to a specific business. So, its provisions are capable of being applied to food related business generally. In furtherance of this, there exists no bar to the passing of executive orders requiring any person or undertaking to divest himself from the management, control of such undertakings or from the ownership of any stock or other beneficial interest in such undertakings, or taking such actions as may be necessary to import competitive prices (of food).\textsuperscript{81} It does not restrict the taking of other administrative measures, such as, (a) requiring any person or undertaking concerned to discontinue or not to repeat any trade practice and terminate or modify any agreement that appears in the opinion of the Monopoly Control Authority as restrictive trade practices,\textsuperscript{82} (b) prescribing the conditions under which they may deal with their businesses.\textsuperscript{83} In exercise of the powers conferred by this Ordinance, the Authority may pass an order of penalty for an amount not exceeding one Lac taka for failing to comply with any such orders. If such failure is a continuous one, the person guilty of such failure shall be liable to pay an amount of Taka ten thousand for every day after the order.\textsuperscript{84}

The remedies under the Standard of Weights and Measures Ordinance 1982 and the Standards Testing Institution Ordinance 1985 criminal justice, but, the majority of its provisions are clothed with administrative fabric. The focus of this Ordinance was on administrative measures. For ensuring the observance of this Ordinance, it provided both precautionary and remedial measure which includes the power to inspect and verify the correctness of weighing and measuring instruments used in trade or commerce,\textsuperscript{85} revoking the license as a. manufacturer of standards of weights and measures.\textsuperscript{86} among the administrative remedies, the principal remedy under the Bangladesh Standards Testing Institution Ordinance 1985 includes the establishment of a regulatory body– Bangladesh Standards Testing Institution (BSTI), adoption of uniform standards (national standards). For ensuring the quality and quantity of goods, it include uniform standardization of mass, mole, materials, ingredients, time, length, weight, volume, dimensions, density, temperature, efficacy, energy, commodity and material, operation and practices with respect to goods.\textsuperscript{87} It provides the mandatory use of some

\textsuperscript{80} Ibid., Section 5.
\textsuperscript{81} Ibid., Section 12.
\textsuperscript{82} Ibid., Section 15.
\textsuperscript{83} Ibid., Section 12.
\textsuperscript{84} Ibid., Section 19.
\textsuperscript{85} Sections 11, 13, 16 of the Bangladesh Standards of Weights and Measures Ordinance, 1982.
\textsuperscript{86} Ibid., Section 20(8). “The authorized officer may, if he is satisfied that the product made or manufactured in accordance with the model which was approved by him has failed to render the expected performance or to conform to the standards established by or under this Ordinance, revoke the certificate of approval issued by him under sub-section (6).”
\textsuperscript{87} Section 4 of the Standards of weights and Measures Ordinance, 1982: The standards include Kilogram for mass, Metre for Length, Second for time, Ampre for electric current, Kelvin for thermo-dynamic temperature, Candela for luminous intensity, Mole for amount of substance.
‘marks, seal abbreviations or description’ the use of which imply conformity of national standards. So, the use of identical or deceptively similar marks or description is prohibited by this law.

The matter of administrative remedies with respect to goods and services under the Consumer Rights Protection Act 2009 includes the temporary closure of any shop, business organization, factory, or warehouse suspected to manufacture, store, sale of any adulterated food or goods or otherwise to be engaged in any other form of anti-consumer activity. There are other forms of remedies that may be sought administratively. As this matter has already been discussed in the preceding chapter; so, no discussion on this aspect is offered in this part of study.

The main agendum of remedies under this Act is administrative control over monopoly and anti-competition activity. With a view to curbing the anti-competition activity, it provides provision for establishing an executive body with powers to impose financial, injunctive, investigative, and declaratory, and mandatory measures against oligopoly, cartel, combination, monopoly, collusion, tie-in-agreement, unfair practice or cheating in tendering, driving the competitors out of market by abuse of dominant position, predatory price, dumping and so on. The administrative remedies also include measures of banning or imposing restriction on Combination. The commission may pass orders upon the enterprises to disintegrate their businesses for the purpose of reducing their dominant position in the market.

The Customs Act 1969 has no direct relation with consumer remedies; still, the provisions of this Act have direct relation with consumer protection. Its capacity is to provide preventive justice at source with respect to imported foods. In exercise of the powers conferred by this Act, it may withhold the clearance of imported goods. Any goods imported in violation of the prohibitive provisions may be detained or confiscated by the customs authority. With a view to curb the flooding of markets with low quality goods, it may take some alternative measures on the import of

---

88 Section 20 of the Bangladesh Standards and Testing Institution Ordinance 1985
89 Ibid.
90 Ibid., Section 21.
91 Under section 27 of the Consumer Rights Protection Act 2009, the power conferred by this provision may be exercised instantly, without exhausting a long legal procedure of serving notice to the person or body concerned.
92 Ibid., Sections 20 (a), (b), (c), and (d).
93 Ibid., Sections 17 and 18.
94 Section 18 of the Competition Act 2012.
95 Ibid., Section 15.
96 Ibid., Section 20(Ka) (A).
97 Ibid., Section 15.
98 Ibid., Section 16(1).
99 Ibid., Section 16(2)(a).
100 Section 21 of the Competition Act 2012.
101 Ibid., Section 20(Ka) (d).
102 Section 17 of the Customs Act, 1969.
these goods. The measures include imposing the countervailing duty,\textsuperscript{103} anti-dumping duty,\textsuperscript{104} safeguard duty and so on.\textsuperscript{105}

As the prime focus of environmental law is ecological balance, so, it does not directly deal with any issue of consumer remedies directly. But, a critical analysis of the Environment Act 1995 reveals that under the provision of this Act, the government may impose ban on the manufacture, sale, storage of any goods or article environmentally found to be injurious to human health.\textsuperscript{106} In exercise of the powers conferred by this Act, the government may “carry out programs for observation of the quality of drinking water and rendering advice or issuing advice to the concerned person to follow the standards of drinking water”.\textsuperscript{107} There is no bar to utilize the power of the Director General for closure, prohibition, or regulation of any industry, undertakings, or processes for ensuring human safety.\textsuperscript{108} It also authorizes the taking of some of the administrative measures, such as, issuance of direction to appropriate authority or person for the prevention, control, and mitigation of environmental pollution,\textsuperscript{109} declaring any product (food goods) as being hazardous to human health or safety, searching any place, examining any equipment, manufacturing or other processes, ingredients, or substances for the control, mitigation, and improvement of environment, collecting information about environmental pollution by any person or industry, and advising..... to avoid such manufacturing processes, commodities and substances likely to cause hazards to human health and safety.\textsuperscript{110} A very keen analysis of this provision reveals that it may be utilized as an important tool for regulating food products.

7.7.4. Non-statutory aspects of law: Tort law application

The legal system of Bangladesh, provide wide amplitude of non-statutory justice through the law on tort. The principles of this law may be applied to food related violations. in this connection, we may refer to the case of \textit{Donoghue vs. Stevenson} (1932) from which other major principles of tort liabilities ensued. So, the statutory law provides no bar to seeking the remedies for breach of duty to impose liability on all natural and artificial persons not only as an individual, but, also as a representative of society.\textsuperscript{111} Basing upon this, principle, remedies may be sought for deficiency, breach of fundamental

\textsuperscript{103} Ibid., Section 18A.
\textsuperscript{104} Ibid., Section 18B.
\textsuperscript{105} Ibid., Section 18E.
\textsuperscript{106} Section 6 of the Environment Act 1995.
\textsuperscript{107} Ibid., Section 4(2)(h).
\textsuperscript{108} Ibid., Section 4(3).
\textsuperscript{109} Ibid., Section 4.
\textsuperscript{110} Ibid., Section 4.
duty, negligence, nervous shock, heedless or careless conduct of the offender, and so on. In Paris v. Stepney Borough Council the House of Lords held that the gravity of consequences of an accident befalling an already disabled person had to be taken into account in fixing the level of care required of the defendant.

7.8. Remedies under the Safe Food Act 2013

In the preceding chapter, we have already undertaken a review on the remedies available under different laws. As those remedies are applicable to goods, so, it is equally applicable in respect of food and related articles. While, discussing on the aspect of food, we discussed the administrative, legal (civil, criminal and tort) remedies under the relevant laws with emphasis of the Consumer Rights Protection Act 2009. But, being the issue-based law, we shall discuss only on remedies available under the Safe Food Act 2013.

7.8.1. Does the procedural aspect of law facilitate justice?

Institution and cognizance of cases

Under the provisions of this Act, matters of food related offences are recognized as offence of criminal nature. In order to conduct the trials of food related offences, this Act provides two modes of trial- ordinary and summary procedure. For the trial of cases, the Safe Food Act 2013 provides provision for constituting a special court – Food Court. Section 65(2) of the Safe Food Act 2013 enumerates that the offences shall be tried summarily in accordance with the provisions of Chapter-XXII (Section 260-265) of the Code of Criminal Procedure, 1898. Now the question, whether the procedures adopted for dispensing justice really facilitate justice or not? This question has been tried to analyze from four standpoints— institution and cognizance of cases, investigation and trial of cases, access to justice, and autonomy of court for justice.

Investigation and trial of cases

This Act provides for a smart system of investigation. The procedure laid down for undertaking an investigation under this Act shall be the procedure of investigation for criminal cases under the Code of criminal Procedure 1898. The time provided by this Act for concluding the investigation is 90 days which may be extended by another 30 days. It also provides for departmental measures against

---

112 Tortuous liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages’ Winfield, Province of the Law of Tort (1931), p. 92.
113 C becomes mentally ill as a consequence of an assault upon his nervous systems: see Alcock v. Chief Constable of South Yorkshire [1991] 4 All ER 907.
114 Lochgelly Iron and Coal Co vs. M’Mullan (1934) AC 1, at 25, per Lord Wright.
115 (1950) 1 KB 320.
116 Haley v. LEB (1965) AC 778; D’s standard of care was set according to the fact that D ought to have foreseen the possibility of blind persons coming into the vicinity of the hole dug by D in the pavement.
117 Section 64 of the Safe Food Act 2013.
118 Ibid., Section 67(2).
119 Ibid., Section 68.
the failure of the investigating officer in concluding the investigation. The advantage of this provision is that the investigating officer cannot avert to the obligation of conducting investigation. It provides that while conducting summary trial under section 262 of the Code of Criminal Procedure 1898, the procedure that shall be followed is sections 241-250 of chapter-XXIX of the Code. Compared with the procedures of investigation of offences under other Acts/Ordinances, the provision of this Act seem to be helpful for facilitating justice.

7.8.2. Access to justice

The provision relating to the right of access to justice seems to be self-contradictory. Sub-section 1 of the Safe Food Act 2013 spells that any purchaser, consumer, receiver or supplier of food may lodge complaint to the authorized officer to the Safe food authority or any officer authorized within 30 days from the date of arising the cause of action. After being satisfied of the correctness of the complaint so made, the authorized officer shall lodge complaint to the Pure Food Court. Sub-section -3 of the same provision provides the right of direct access to the court (Pure Food Court) where the report of the authorized officer has not been made mandatory.\(^{120}\) The problem of difference between sub-section 1 and 3 is that on the one hand it provides this right of access to justice to an individual; on the other hand it curbs or restricts this right. This state of dilemma does not facilitate justice to consumers.

If we analyze the jurisdiction of Pure Food Court in contrast with the powers of Special Tribunal under the Special Powers Act 1974, it will reveal that the provision of the Safe Food Act 2013 collides with the Act of 1974. The Safe food Act 2013 provides that “Notwithstanding anything contained in any other laws for the time being in force, if an offence is punishable by higher penalty as special offence under any other law, there shall be no restriction to try this complaint by this court treating it as a special case under this Act.”\(^{121}\) This provision indirectly restricts or obstructs the jurisdiction of Special tribunal to try the food related offences under the Special Powers Act 1974. But, the lateral amendment, i.e. the amendment of section 25C of the Special Powers Act 1974 has not been made. So, confusion still continues to exist.

7.8.2.1. Autonomy of court for justice

In this connection, if we analyze the Safe Food Act 2013 from the jurisdictional or autonomy point of view, it will reveal that neither the cognizance taking power of the court nor individuals’ independence of the right to lodge complaint has been curved in specific terms. Still, the autonomy of court seems to be curved indirectly by imposing some conditions. In respect of criminal remedies, the requirement of report from the authorized officer acts as a conditionality for the right of access to justice.

\(^{120}\) Ibid., Section 66.
\(^{121}\) Ibid., Section 61.
In respect of civil remedies, this Act provides that the loss and injury caused by the defendant has to be proved for instituting a suit for compensation. This conditionality is not applicable in respect of other remedies of civil nature, e.g. refund of money, return of goods and so on. Actually, precondition of requiring the disposal of cases for one type of remedies makes the remedy inaccessible to consumers. From this point of view, it has breached the principle of rational legal system. Unless required for the ends of justice a rational legal system does not restrict or limit the right of justice for the litigant or jurisdiction of the court. In this Act, this state of affairs acts as denial of the autonomous power of the court which is repugnant to the principle of legal governance.

7.8.3. Access to justice under other laws
An analysis of the regime of criminal remedies under other laws reveal that they are viced with bureaucratization of justice due to which the courts cannot take cognizance of a complaint directly from the consumer without report from the authorized officer as provided by the respective law. It is only the Penal Code 1860 that does not restrict this right of access to justice by specific terms while dealing with offence relating to adulteration of food or drink or sale of noxious food or drink. But, the limitation of this code is that its coverage area is very small in comparison with the present context. Many of the violations suffer from juridical recognition due to which it has become inoperative in the present context or situation.

From the above it has been proved that justice cannot depend only on one single factor- mere articulation of legislation; it requires some other measures. In this condition, socio-legal initiatives from the conscious citizens may serve the purpose of justice. In the past, some initiatives from the end of citizens, proved to be more effective than individuals’ isolated initiative to substantiate one’s own right of protection. Consequent upon these socio-legal initiatives, the government was compelled to impose ban on the import of radioactive milk. From this point of view, it may be construed that justice need also be ensured by socio-legal initiatives which we characterize as consumers’ socio-legal activism. From this point of view, the next discussion is undertaken on the socio-legal activism.

---

122 Sections 272 and 273 of the Penal Code 1860.
In the preceding chapters, we undertook the sectoral analysis of justice in which the main approach was juridical. In the present chapter, we shall discuss the matter of justice from a different approach – activism.

No doctrinal principles have yet been drawn on activism. Arthur Schlesinger, who firstly coined the word activism, has characterized activism as an expression of social commitment of conscious individuals. With respect to legal rights, it inspires judges, lawyers to follow the rule of social movement where the law is silent. So, the main focus of activism shall be the socio-legal approach of justice where the main driving force shall rest on the activist role of judges, rights activists, professional, civil societies.

The justification for applying the principle of activism to consumer justice is that “today various forms and manners of revolution are taking place in the arena of justice; the state is under extreme pressure of providing justice and the court is to innovate set new strategies for the purpose of providing justice to a large number of basic entitlements – human rights, access to justice. Otherwise, the law itself will be bar to access for people who suffers legal wrong or injury due to their poverty or socially or economically disadvantaged position to approach the court for relief against the violation (Bhagwati and Ali, 1982:149).

The justification for applying the principle of activism to consumer justice is the barriers that preclude consumers from seeking justice. Several doctrinal and empirical studies have pointed to the financial, psychological and cultural barriers preventing the ‘traditional– individualist and judicial-model of access to justice and settlement of disputes from being applied satisfactorily to the settlement of disputes arising out of relations between consumers and traders (Bourgoignle, 1982: 22).

In view of this, the matter of consumer justice may be resolved through the process of activism. In this connection, the discussion shall not confine only within traditional individualistic approach of justice, rather, it shall also extend to the premises of non-traditional approaches, i.e. social action initiatives being available beyond the premises of court. This process of combining social initiatives with legal measures is the central idea of consumer activism.

The reason for resorting to sociological approach is its moral ethical support to activism. Society is the breeding ground for emerging and nurturing activism as a matter of public justice. Kmiec (2004:1441-47) sees activism as ‘a constitutional imperative to attain social justice’ which includes one or more of three possible actions: overturning laws as unconstitutional, overturning judicial presents and ruling against a preferred interpretation of the constitution. In this chapter, the matter of activism shall not challenge the interpretation of the constitution as unconstitutional or
overturn any legal interpretation of the judicial presents; rather it shall try to create a vibrant condition for ensuring justice to a vast majority of people living in the society. So, while reviewing consumer activism, it shall emphasize on two aspects-social and legal.

8.1. Consumer activism in Bangladesh

Consumer education, campaign and motivation

It has already been mentioned that while discussing the aspect of consumer activism in Bangladesh, it shall encompass the sociological aspects. As part of this, the matters that will be reviewed in this chapter is civic activism, consumer education and awareness building program, intervention by consumer association or society of professionals, optimizing the role of community organizations, NGOs and so on.

8.1.1. Consumer education

Education can assist consumers in better understanding their economy, influence their expectations concerning the strengths and weaknesses of market economies and promote greater knowledge of the laws that have been enacted to protect their interests. Education can thereby, help to ease some of the dissatisfactions that are bound to exist until the economy is operating efficiently (Rahman, 1995: 21).

Consumer education is a critical part of any private enforcement scheme and it is important in countries like Bangladesh where vast majority of consumers are illiterate. Even the most easily accessible dispute resolution system cannot succeed unless consumers are aware of their rights and know how to pursue them. In view of this, the main areas of education shall be that by protecting the consumer a seller does not lose anything; rather he secures his profit by protecting the consumer. Consumer education is very much necessary both for the consumer and the seller. The main areas of education should be behavior and attitude towards each other. Recognizing the importance of consumer education and awareness building among the people, the consumer law of Bangladesh places a wide variety of responsibilities upon the National Consumer Council. The responsibilities include policy formulation and implementation, educational and publicity programs, awareness building and research on consumer affairs, and developing strategy. In this connection, we may discuss the examples of some other countries.

A Handbook of Consumer Law is a consumer guide prepared by a team of researchers of UK providing an overview of all the major areas of consumer laws of Britain, including prices, safety, food hygiene, misrepresentation, defective goods and services, labeling and so on. It contains a large number of laws and regulation which this book tries to explain from the point of a consumer. It also contains some model letters that may be useful for the consumer to lodge his complaint easily. A lot of useful handy ‘do-it-yourself’ material is given in it. The information incorporated in this book may be of great worth for consumers. ‘To find them and collected and listed anywhere like this would be of much benefit to the consumer movement in various parts. Wider publicity about the existence of
such rules and regulations will help consumers to assert their rights. … [I]f consumers know about their rights and can fight for them on all fronts, this will in turn create better compliance with rules by those who offer goods and services. They can then no longer use the ignorance of the public as a convenient shield for their own schemes of fraud on the consumer (Menski, 2012: 5). The consumers of Bangladesh may be benefited by any such informative guide. The relevant agencies (GO-NGO) may take this initiative and it may transform the non-reactive civil society or people into activist section of the society.

A good initiative may be undertaken by educational institutions. Consumer education in school curricula is mandatory in some nations. Many individuals have little interest in consumer protection issues until they have been victimized by an unfair contract or otherwise injured by an unscrupulous business practice. To counter this tendency many nations have initiated adult consumer education program through the broadcast of television and radio shows, the publication of consumer magazines, and the distribution of short pamphlets, buying guides or even comic books written in easily understood language. In the Ganjam district, Orissa, India the schools have taken steps towards incorporating the matter of consumer rights in the schools curricula. Critical concepts need not be taught as separate subjects but can be incorporated into instruction on economics, ecology, political science, communications, journalism and other subjects. Important messages to convey include the theoretical operation of the market forces, the role of consumer and consumer organization play in policing market behavior, the appropriate mechanisms for obtaining redress for personal and economic injury and the function of advertising and the mass media in market activity. In addition, general instruction in business ethics could provide a moral foundation for tomorrow’s entrepreneurs (Menski, 2012:.5). Effective educational programs outside schools may be more difficult to design and implement. This type of initiatives may be undertaken or sponsored by the National Consumer Council of Bangladesh also.

The education includes not only the consumer, but also the traders, sellers which is supposed to have a bearing on the consumer. As part of this activism, we understand educating the consumers. But, in England, it emphasizes education not only for the consumer, but also for the seller. In this connection we may cite some of the books, though meant for entrepreneurs, but ultimately, the ultimate goal or target is the consumer. This initiative is taken by the largest British Consumer Association. The Association publishes ‘WHICH’- a magazine much concerned with middle-class deliberation, containing test reports about various consumer goods to assess their quality and sustainability. The magazine does not often address itself to issues that would concern the average consumers’. Similarly, other publication of the Association is ‘Starting your Business. It is a well written guide for the new entrepreneurs. The section on ‘Marketing and Selling’ focuses on the compliance of product standards to avoid consumer complaints. Another important publication is the ‘Earning Money at Home’ which provides a list of producers from whom the best raw materials may
be collected. This guidance to entrepreneurs benefits the consumer by curving the consumer complaint and enhancing consumer satisfaction. It is necessary to mention that the guide is not published by any business house, but the Consumer Association of UK.

In this connection, we may alert about the threat of following the foreign examples in consumer activism. It is a matter of great weakness that we have a common trend to cite foreign examples in our education process. In consumer education it is very natural to follow the models of any country or region. But, there is a great threat that the social realities of foreign counterparts and our home-culture are different. It is natural to look to more established models to seek guidance. The use of foreign case-law to support a particular consumer claim has already been found helpful to establish an acceptable code of practice ….. [T]here are limits to the borrowing of foreign concepts in this area. The Indian consumers’ social reality is not that of Britain or the USA, and this is clearly reflected in the nature of the Indian consumer protection movement, which has to tackle many more and different issues than its foreign counterparts in the west (Menski, 2012: 3-5).

In this connection, the advice of Menski will be an important guideline for consumer education in Bangladesh. ‘To remain in tune with indigenous developments, the Consumer movement must concentrate first and foremost on realities in its own terrain’ (ibid: 27). The threat of following these unrealistic promises and experiences may frustrate and embarrass the victim. The experience of Indian consumer law is that Indian laws contain so many unfulfilled and unrealistic promises that the individual citizen is often helpless when faced with injustice of any kind (Ibid: 13). The reason may be that there is a danger, though, that conflicts are created between the very real essential needs of consumer protection in India and some lofty ideals of international standards of ‘rights’ that only exist on paper and in the minds of few specialists’(Ibid: 27). Guidance from other jurisdictions is always welcome, but not the wholesale incorporation of foreign principles without concern for the actual state of domestic law and the consequences of such incorporation. Initiatives to maximize the Institutions may be one of the methods by which activism may be effected. This part of discussion is taken in the later part of this chapter under title ‘Institutional Action initiatives for consumer activism’.

8.1.2. Campaign and motivation

It has been seen that some of the laws have been enacted as a result of long but continuous campaign for the establishment of rights. In this connection, we may cite the name of the Rights of Access to Information Act 2012; Bangladesh is a new dimension of campaign and advocacy program. In the arena of consumer protection, we have seen the enactment of new legislation for the reduction of use of hazardous chemical in food and food related articles as the result of long but continuous campaign of advocacy against the use of formalin and hazardous chemicals in food and food related items. But, we do not see a visibly strong campaign for the enactment of new legislation on other matters of
consumer affairs. Of course, the Consumer Rights Protection Act 2009 may be claimed to be the result of campaign and advocacy program of the consumer activists. But, it cannot be regarded as it claimed for the factor that has been more influential on its enactment was the international initiatives than the campaign of the rights groups. The campaign for consumer protection is very weak in Bangladesh. No campaign or initiative for the enactment of new law has yet been seen.

8.3. Consumer movement

Consumer movement is one of the social action initiatives that may help resolve many of the problems of consumers by its own mechanism. As part of this process, it (consumer movement), emphasizes on two aspects- raising wider issues of rights and taking initiatives to provide instant remedies or protection to consumers. From this point of view, ‘consumer protection movement can only be handled effectively if the consumers organize themselves. This is happening all over the country, mainly in cities so far (Menski, 1985: 3-5).

The aspect of consumer movement is not the same all over the world; it has its own attributes depending upon the cultural and geographical differences among regions. In England, consumer protection is an established concern in a very different way. The conscious groups of consumers are organized under the ‘National Federation of Consumers. This group of consumer rights activists prepared an excellent practical guide to consumer problems titled ‘A Handbook of Consumer Law (1986)’. In this respect, consumer advice is a major focus that has played the golden means of activism (Menski, 1985). The price of the book is considered as one of the important modes of reaching the consumer. So, price was fixed at such a lower price so that it may be easily reachable to consumers’ end. This is also an important piece of information for consumer activists to consider that people believe in instant remedies in activism; otherwise it has to fail. ‘If the public is to gain trust in the consumer protection movement …instant remedies have to be provided. This instant remedy is characterized as ‘terribly difficult, and mostly impossible. In this respect it may be relevant to note that such type of initiative is organized by the civil society which we characterize as ‘Civic activism’.

Now we come to the aspect of Bangladesh context. Consumer movement in Bangladesh stands in a nascent stage. The aspect of consumer issue as a welfare issue and the legislation as welfare legislation has not yet been recognized by the majority of people. The society is more or less unorganized on this issue. The number of NGOs and their activity is so limited that it could not build a social movement on issues concerning the protection of consumers. Moreover, reluctance, indifference, non-responsiveness to new initiatives, over exaggerations of politics on every issue has curbed the scope of consumer movement in Bangladesh.
8.3.1. Civic or social activism

Justice can never be established or made sustainable without sanction from the society. The part of social sanction is obtained by a small group of conscious people in any society known as civil society. People living in the society try to explore alternative forums of justice for working in the society and the first alternative forum is the civil society. It is formed by a small group of some conscious citizens having the capability to address various issues of public interest. Another reason for resting on civil society is the trust and confidence placed upon it; its capacity to shoulder the burden of the society. In such cases, the conscious consumer groups organize themselves in a small group. We may cite some of the civic models of activism for consumer justice in some parts of the world.

In a society comprising with so many disadvantaged class of people, it is not required that the initiative from civil society come from a large group of members. Rather, it may be initiated by an individual socially conscious citizen, professional, and so on. In the absence of participation by a large group of civil society members, the initiative may come from an isolated individual. In a case, an individual took the initiative for stopping the sale of fake goods and in favor of the community as a whole, he invoked for measures to impose ban on the sale of such products by appropriate authorities. This is one of the instances of civic activism taken by an individual undertaken in favor of the society as a whole.

The civic activism rolled by civil society plays the vital role in organizing the consumer movement. But, in Bangladesh, Consumer movement does not seem to rest on a good shape; a vast majority of people are suffering from consumer violations against which initiative from civil society is not seen much. The reason may be that people of Bangladesh have repeatedly made their concern about the consumer problems, but the societal initiative in this aspect is very low. The social leaders who have significant influence over society are not seen to take a proactive role. Their silence bears testimony to their non-responsiveness to a given problem and the tendency of averting the burden of social problems.

8.4. Legal activism for Consumer Justice

8.4.1. PIL for consumer rights enforcement

Legal activism is a wealth of discovery and innovation for modern jurisprudence the objective of which is to provide legal and jurisprudential support to courts for providing effective relief to the whole or a section of the society (Kripal, 1985: 268, 290). The factor that has been advocated as the reason for the activist role of judges is checks and balance between law and justice. Being encouraged by these necessities, the judges in Bangladesh have shown their relentless efforts to play the activist role on matters connected with public interest.

Unlike any other jurisdictions, PILs in Bangladesh emerged in the 1980s and 1990s as a constitutional imperative to attain social justice (Hossain, Malik and Musa, 1997). The courts have
addressed various issues of political rights, unlawful detention, freedom of expression in the form of habeas Corpus, Certiorari, Quo Warranto. But, it has been critically observed that the aspect of legal or judicial activism on consumer matters could not gain considerable importance in the arena of justice. So, despite the great number of violations with respect to health and food, and the peculiarities involved therein, we do not see a good number of PILs or Suo Motu judicial actions in the courts of Bangladesh. In view of this, the discussion on legal activism for consumers is undertaken from these two standpoints- PILs and Suo Motu judicial actions by courts.

‘PIL’ is a form of legal proceeding in which redress is sought in respect of injury to the public in general (Sorabjee, 1994: 49; Hussain, 1993: 72). It is initiated at the instance of an individual or a group of persons. “It helps to give ample opportunity to dispense justice in areas where the law is either insufficient or is totally absent. It (PIL) is essentially a cooperative effort on the part of petitioners, the state or public authority and the court to secure the observance of constitutional or legal rights, benefits, and privileges conferred upon the vulnerable section of the community and to reach social justice to them” (Bhagwati, 1982:1473).

Today various forms and manners of revolution are taking place in the arena of justice; the state is under extreme pressure of providing justice and the court is to innovate set new strategies for the purpose of providing justice to a large number of as the basic entitlement of human rights – access to justice. Otherwise, the law itself will be bar to access for people who suffers legal wrong or injury due to their poverty or socially or economically disadvantaged position to approach the court for relief against the violation (Bhagwati and Ali, 1982: 149). Although, ‘the proper role of the judge in a society is a perennial debate, and ubiquitous in all jurisdictions’ (Cardozo, 1921), It has been well accepted that ‘people legitimately expect that judges will exercise activism judiciously (Jalil, 2006: 14). So, despite the divergent contradictions happening within and outside the premises of court, the duty of judges is to play activist role on a slow but continuous matter of basis. The proactive role of a judge is justified by the moral and legal point of view and his role is seen as an activist as well as an alternate policy maker (Canon, 1983). The Judge may do what he thinks in conformity with his conception of “social justice” by throwing to the winds established principles of law and binding judgments. Despite the moral and legal obligations bestowed upon the courts, it has been observed that the number of PILs on consumer justice is very few. Due to some unrealistic reasons, these initiatives of legal activism for consumer justice, although few in number, have been turned down by courts. The courts have persistently been to be reluctant to recognize these matters as a matter of vital public interest. A brief review may be undertaken below.

In a legal proceeding, a group of law professionals-‘Jubo Ainjibi Forum’ filed a suit in 1988 claiming that the soft drink company Pepsi-Cola had violated the law by restoring to lottery techniques. It is the first PIL on consumer matters in Bangladesh. In another case, the petitioner initiated a public interest case challenging the sale of imported Indian soaps as Bangladeshi goods.
His prayer for directing the governmental agencies to stop selling of such soaps was turned down by the court. In this case, the petitioner, a legal professional was seen to play vital role as a conscious citizen of the society by filing cases in the court of law. In the above two cases, the question that arose was “can an individual file a case on behalf of the community as a whole without being aggrieved personally? The courts were of this opinion that these cases lacked Locus Standi.

Another reason of failure on the part of the court was its failure to grasp the spirit of the principle- continuing mandamus. It imposes a duty of dispensing justice on a continuous basis upon the courts. The role of a judge is to help bridge the gap between the needs of society and the law, ensuring changes with stability and avoiding stability without change (Barak, 2006: 11). It imposes a moral duty upon the judges to address problems of society on a continuous basis. It allows the constant monitoring of controversial socio-economic issues over a considerable period of time. In such cases, steps could have approved by courts al initiated at the instance of an individual or small group of individuals who have no direct interest in the matter of contention (Shourie, 2001: 13-61). The admission of this fact (Continuing Mandamus) in consumer justice is the primary basis of justice which these courts failed to grasp.

Due to the same reasons of failure on the part of the court, the courts again hesitated to interfere on matters of vital public interest in two cases. In one of these cases, the petitioner invoked the interference of court for compelling the government to impose ban on the manufacture of toxic Paracetamol syrup. In this Writ petition it was claimed that due to the use of cheaper chemical ingredients ‘Di-Ethylene Glycol’ instead of using ‘Propylene Glycol’ in the manufacture of Paracetamol syrup, the medicine have become poisonous and about 230 children died in 1992 for kidney failure. This was a public interest litigation initiated by an individual on behalf of the society.

In another case, a conscious section of citizens raised their voices for consumer justice by challenging the illegal strike of medical doctors. In this case, the petitioner challenged the BMA’s (Bangladesh Medical Association) strike. The plea that was sought in this case was right to life. In this case, the petitioner had no direct connection either with the doctors’ association or with the government; still, the court was seen to be convinced to issue a rule calling upon the government and the doctors’ to show cause as to why the strike shall not be declared illegal. Of course, this case was settled outside the court by negotiation with the government and the doctors. In another case, the court imposed ban on the import of radioactive powered milk.

Actually, the reasons for partial failure and success in these cases (the failure in Pepsi-Cola case or Indian Soap case and the success in Paracetamol Case or Doctors’ strike case) may be explained by the changing dynamics of time, not public interest. The Pepsi-Cola cases or Indian Soap cases were filed at such a time when the lawyers, judges, jurists were captured by their traditional idea of Locus Standi. The matter of public interest did not emerge in a shape to convince the lawyers or
judges to consider it as a ground of Locus Standi for the greater interest of the society. But, in the later stage of time, public interest gained a considerable importance in the arena of public justice. Accordingly, the Paracetamol Case or Doctors’ strike case could not be turned down on the ground of Locus Standi. It was consider as a matter of vital public interest and ultimately the court issued Rule Nisi. Since then, consumer justice has been recognized as one of the important areas of public justice. In such cases, the court may treat letters as writ petitions, award compensation or supervise and monitor the enforcement of its orders’ (Ahmed, 1999:51) for the greater interest of the society. But, unfortunately, the trend of success in these two cases could not be carried forward by the conscious section of the society.

8.4.2. Suo motu judicial actions

“The Judges do not have a commission to solve society’s problems” (Roberts, 2005: 26); Still, modern jurisprudence has gifted some new tools to courts that has played important role in establishing justice. One of the important tools of justice is Suo motu judicial actions by courts. Enormous changes have occurred in the arena of public justice through these actions of the court. A great majority of measures have been taken by courts in such situations. In this connection, the power of issuing Suo motu rule has been recognized as one of the proactive judicial actions by courts. In such cases, the court itself assumes the role both of a plaintiff and defendant, prosecutor and a judge for the cause of public interest. It is one of the jurisdictions of higher courts exercised by the urgency of public interest. The very basis of this rule is that the judge is a neutral umpire for which he has an unhindered power of intervention on matters of public interest on its own motion. The judge is not required to be moved by an individual; the court may consider an ordinary piece of news as locus Standi for the case.

A good number of Suo Motu judicial actions are seen to be exercised by the courts of Bangladesh. In such cases, the rules of standing were public interest. One of such remarkable cases was Nazrul Islam’s case which was triggered from an investigative journalism titled “Acquitted from all charges, but in prison for 12 years. In this case Nazrul Islam was held in prison for 12 years without trial. This news drew the notice of the court. The court himself initiated a Suo Motu criminal miscellaneous case and released Nazrul Islam from prison. Another Suo Motu action was Hatem Ali’s case. Hatem Ali, aged about 104 years, was released from prison as a result of Suo Motu Judicial action of the court. It was also triggered from an investigative journalism titled “Who will bring back 14 years of Hatem Ali’s life? Arrested in 1978, he was accused of five criminal cases, but was convicted of none. In this case, Fulu Mia was released after 21 years in prison for the direct interference of the court.

Considering the large number of violations in the arena of consumer goods and services, resulting in the risk of life, liberty, safety and security of person, no sign of interference from the court have not yet been seen. The backlash of Suo Motu judicial actions on such issues may be reluctance
on the part of judges to interfere on matters of consumer goods and services. The reason for such reluctance may be that the courts consider these matters as economic issue limited between two parties. For this reason, it has been observed that the ‘the courts have consistently refrained from interfering with economic decisions (Kirpal, 2002:362). The principle that it seems to have been applied is that “Economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be violative of constitutional or legal limits on power or so abhorrent to reason, the courts would decline to interfere” (Kirpal, 2002: 362).

In opposition to this, it may be said that “the problem of economic issue could not have been so great a problem to defeat the genuine claim of public interest. The judges could exercise their discretionary power to mitigate the gaps and uncertainties that calls for dramatic or sudden changes. Many prominent judges and jurists acknowledged that there were gaps and uncertainties in the law and that judges must sometimes make choices” (Tamanaha, 2010).

In such cases, the courts seem to have adopted the policy of self-restraint or avoidance and the argument that it seems to been put forward is that “The Judges are not a commission to solve society’s problems” (Roberts, 2005: 26). We cannot propagate for ‘Frequent resort to such orders, which the courts have neither the time nor institutional mechanism to enforce to their ultimate conclusion, eventually erodes the credibility of the judicial institution. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper. It is of cardinal importance to the confidence that people have in the court that its orders are implicitly and promptly obeyed and it is, therefore, of cardinal importance that orders that are incapable of obedience and enforcements are not made (Bhachura, 2000: 18).

We cannot agree to the above arguments supporting abstention by courts. Consumer violations have reached to such an extraordinary situation where it is required to take extraordinary measures by judicial actions. “Extraordinary powers must be reserved for extraordinary occasions” (Iyer, 1978: 342). In a case Desai held that “The advancing society converts the moral or ethical code into enforceable legal formulations”. In view of this situation, the courts cannot impose self-restraint on passing such orders as is required for the greater interest of the society.

8.5. Maximization of consumer justice institutions’ functions

In the preceding part, we discussed the legal impediments that preclude consumers from being protected by law. In this part, we shall undertake a review on the impediments that preclude organizations from playing their activist role for justice to consumers. In this connection, the process that has been adopted for proactive role of institutions is maximization of consumer justice institutions. It has been proved that ‘Institutions can also be important in facilitating our ability to scrutinize the values and priorities that we consider, especially through opportunities for public discussion (Sen, 2009: xii). In this respect, we will not review the activity of all the institutions; but a few organizations directly dealing with consumer affairs- The Directorate of consumer Protection,
Health, and Drug administration. These organizations may not directly dispense justice, but, its role may create a vibrant condition for justice to the consumers.

8.5.1. Directorate of consumer protection

In chapter-IV, we have already mentioned that as the principal executing agency responsible for ensuring protection to consumers, the Directorate possesses various kinds of power. But, due to some reasons its role cannot be maximized. For the purpose of maximizing its role, some measures (legal, administrative and social) may be undertaken. It may not directly dispense justice, but, its operational activity has an important bearing on consumers’ right of protection. A brief review on these powers is undertaken below.

The CRP Act 2009 provides various powers to the Directorate for taking measures. But, due to contradictions among the provisions of this Act, the powers are curbed to a great extent. Section-41 and 51 provides penal measures against the adulteration of medicine. At the same time, section-71 and 72 of this Act curbs the authority of the directorate from taking the preventive or interventional measures against it. The health is the largest sector that comprises both product and service liability. But, curbing of the authority of the Directorate amounts to self-contradiction in the provisions of law. This provision may either be repealed or adjudged for allowing the Directorate to lodge complaint directly to the appropriate authority or courts (e.g. Drugs Court) without any conditionality.

Due to the deficiency of legal provisions, the power of taking administrative measures may face legal challenges. Section-23 provides the power of summoning a person by the Directorate to produce documents, equipment, materials suspected to be used for the purpose of any act punishable under this Act. But, it does not mention whether the proceeding taken under this provision shall be treated as legal proceedings and the failure to comply this order shall amount to defiance of the order of the court. It also does not prescribe any measures for its non-compliance. The measures so provided may be obstructed by legal challenges. The powers conferred by section-24 of the Act are under apprehension of legal challenges. Similarly, as the tenure of temporary order of closure of shops, factories as provided by section 27 of the CRP Act 2009 is not specifically determined, it may lead to arbitrary exercise of the powers. So, the measures so taken may face legal challenges due to deficiency of legal provisions. So, necessary amendments may be made or adjustment in the legal provisions of this Act may be brought in for allowing the directorate to take measures free of hindrances or legal challenges.

Under section-29 of the CRP Act 2009, the directorate may cause to pass an order of injunction, or pass an order banning the import, storing, manufacture, distribution, selling or exposing or offering for sale of such goods if it has reason to believe that the manufacture, production, and sale of any product is injurious to human health and body’. The limitation of these powers is that it does not provide the power to declare any goods as contraband or declare the mode of any business or
services as illegal. Moreover, This Act does not provide the power of ‘recall of goods and services’ to this directorate. The fact remains that a large quantity of goods and medicines are imported from abroad. But, the directorate has no authority to take such measures against goods already imported or manufactured. In such cases, the Directorate has to bank on section 15-16 of The Customs Act 1969 which this Directorate is not authorized to apply. So, the in-country power for re-call of goods may be provided to the Directorate by making necessary adjustment between the Customs Act 1969 and the CRP Act 2009.

To discharge duties, the concerned organization and its related bodies should have operational strategy on the basis of which the activity of the organization rests. Since the enactment of the consumer law in 2007, it took six years to constitute the committees at the District, Upazila and Union Parishad level. But, the regular court for the trial of consumers’ violations has not yet been established nor any court is assigned with this responsibility. In view of this condition, the initiative for constituting the consumer courts may be undertaken. Section-30 &31 of this Act empowers the directorate to collect sample of goods or medicine sold, imported, manufactured and taking other measures at it deems fit. But, in such cases, the directorate has no logistic support for such examination. It has been observed that the matter of drugs testing facility in the country is not adequate. So, the capacity of the testing laboratories; initiative for setting up special laboratories may be undertaken.

The weakness of administrative measure is that these powers are given to the directorate, not to an individual consumer. An individual has no right to invoke for these measures except judicial activism. So, measures should be taken to bring the services of the directorate at the finger-tips of the consumer; measures for easy access to the directorate for lodging complaints from the consumers must be invented.

The social measures include the increased engagement of the consumers with the process of Directorate. In this connection, the motivational program, campaign, educating the consumers may be effective for engaging the consumer with this process. Moreover, it requires some innovative ideas to transform the measure effectively preventive by engaging the consumers. Lastly, the organizational set-up and the council or committees should be made functional.

8.5.2. Directorate of Health

The total health sector rests on two wings- goods and services. The term goods implies the drugs and medicine, and the services implies hospital and clinical services. The aspect of human resource including the matter of medical education also falls within the purview of services.

According to the Allocation of Business, the Directorate of Health, hereinafter referred as DG (Health) is the principal executing officer for health sector. But, practically, one of the important segments of health sector-drugs and medicine does not fall within the purview of DG (Health).
According to the Drugs (Control) Ordinance 1982, the matter of medicine falls within the functions belong to the Director General of Drug Administration. Under the provisions of the Bangladesh Medical and Dental Council Act 2010, the Medical Practice and Private Laboratories (Regulation) Ordinance, 1982 and other related laws, DG (Health) is responsible for hospital and clinical, education services inclusive of appointment of human resource required for this sector.

According to the provisions of the CRP Act 2009, the scope of maximizing the role of the Directorate of health is limited. A critical analysis of the constitution of the National Council shall reveal that this council is viced with improper representation. The Director General of Health is the pivot of health administration; his presence is very much required for proper functioning of the health sector. But, he is not included as a member of this council. The DG Health has been made member of the National Consumer Council and this proves to be a gross irregularity or anomaly. This anomaly of jurisdiction is one of the important hindrances to the maximization of the Consumer Justice Organizations. Moreover, the director General is appointed by the ministry of health and he has to account for every of his actions. Some of the functions which are supposed to be performed by the Directorate (e.g. granting permission of medical colleges, allocation of human resources and taking disciplinary actions against them) are controlled by the health ministry. Moreover, for any decision taken by the Directorate, the ministry acts as the appellate authority. For the reasons mentioned above, the role of the directorate cannot be maximized.

8.3.3. Directorate of Drug Administration

In respect of product justice, health sector comprises three important products- drugs and medicine, blood, and artificial parts human body. The directorate of Drug Administration deals only with drugs and medicine. These matters are regulated by The Drugs Act 1940 and The Drugs (Control) Ordinance 1982, The Bangladesh Unani and Ayurvedic Practitioners Ordinance 1983, and The Bangladesh Homoeopathic Practitioners Ordinance 1983. The Drug Administration is the principal organization responsible for regulating the production and sale of traditional and non-traditional medicine. The whole matter of drug administration (granting of license for manufacturing medicine, cancellation of license and other related matters) are regulated by two important committees as follows:

<table>
<thead>
<tr>
<th>The Drugs Act, 1940</th>
<th>The Licensing Authority (Sec- 3(bb).)</th>
<th>The Drugs Technical Advisory Board (Sec-5)</th>
<th>Drugs Consultative Committee.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Drugs (Control) Ordinance, 1982</td>
<td>The Drugs Licensing Authority (Section 5)</td>
<td>National Drugs Advisory Council (Section 24)</td>
<td>The Drug Control Committee (Section 4)</td>
</tr>
</tbody>
</table>

According to the provisions of the Drugs (Control) Ordinance 1982, any decision taken by the directorate can be turned down by the Ministry directly or indirectly. According to section-6A of the
Ordinance, any person aggrieved by the decision of the licensing authority (practically the Directorate), he may prefer appeal to the appellate authority. The Appellate body is not a judicial organ, practically; it is an extension of the administrative branch of the ministry. For this reason, the scope for maximizing the proactive role of the directorate is very limited.

In this connection, it may be mentioned that the related laws do not provide to the directorate the power of re-call of medicine, closure of shop, factory, or premises suspected of being engaged in the manufacture, store and sale of adulterated medicine. Rather, it has been observed that the proactive role of the directorate have been obstructed by some untoward activity (strike of drug dealers) of external forces.

The price has a social and economic effect on the life of people. So, it is one of the potential areas where maximization of the institutional role can bring enormous result for the consumer. Under section 11 of the Drugs (Control) Ordinance, 1982, the directorate may regulate the price of medicine and its raw materials. Under section 19 of this Ordinance, there is provision for jail and fine for selling medicine exceeding the price fixed by the government. But, due to non-health reasons of governance (i.e. absence of moral and legal support from the ministry, political interference, corruption), the directorate cannot intervene in the pricing of medicine, especially with imported and life saving drugs. Practically, the matter of pricing is controlled by the Drug Manufacturers Association and the Drug Dealers Association. It may be noted here that a bulk quantity of lifesaving drugs are imported from outside the country. Under section 16 of the Customs Act 1969, the matter of import of medicine is controlled by the Customs Authority where the directorate has least role to play. For the reasons mentioned above, the scope of maximizing the proactive role of the directorate is very limited.

8.5.3. **Bangladesh Standards and Testing Institution**

Consumer justice may be analyzed from qualitative and quantitative points of view. These two aspects imply the pre-eminence of some conditions, systems or principles with respect to goods and services which the producer or seller is bound to comply. The failure to comply these conditions affects both the consumer and non-consumer (i.e. traders, manufacturers, retailers and so on) equally. These aspects are dealt with by two major laws-the Standards of Weights and Measures Ordinance, 1982 and the Bangladesh Standards and Testing Institution Ordinance, 1985 and the functions of these two laws are implemented by the Bangladesh Standards and Testing Institution (BSTI). Now, the question arises, whether BSTI can play proactive role for protecting the consumers. A review of this is given below.

An analytical review of legislations with respect to the qualitative and quantitative aspects of goods and services reveal that the very inception of this law started with The Penal Code 1860. It is the first law on this subject. But, the inherent weakness of BSTI lies in the fact that for dealing with the qualitative aspects, The Standards Testing Institution Ordinance 1985 has set some uniform
standards known as ‘national standards’ or Bangladesh standards with respect to mass, mole, materials, ingredients, time, length, weight, volume, dimensions, density, temperature, efficacy, energy, commodities and materials, structures, practices, and operations, performance with respect to goods and services. Actually, this code of standards has been set as the main basis of justice with respect to goods and services. It also sets some ‘marks, seal or description’ the use of which shall signify the compliance of these standards. For the purpose of curbing the apprehension of deception with respect to certain goods or services, the use of these marks has been made mandatory and for this purpose, it has also been made mandatory to obtain a license from the BSTI for using such marks or seal. For the purpose of curbing the apprehension of deception with respect to such marks, seals, abbreviations or description, any use of identical or deceptively similar marks or description has been declared prohibited by this Ordinance. Actually, this seal is to imply that ‘the article or process in respect of which the standard mark is used conforms to the national standards.

The representation of the consumer in the process of granting license or post-license monitoring of the compliance of the standards are considered as important measures of administrative justice. These Ordinances make no room for representation of the consumer which the other legislations do. While registering or granting a licence of ‘BSTI Certification Marks or Seal’ or monitoring its compliance, these two Ordinances make no avenue for representation of the consumers due to which these Ordinances.

The inherent weakness of these two ordinances is that it is viced with denial of individuals’ right of justice. So, no court can take cognizance of a complaint without report from the authorized officer. Similarly, an individual also has no right to seek for justice under these two ordinances. As a consumer; neither can he lodge complaint either to the court or to the Directorate.

There prevails the lack of coherence among legislations regarding the standards of goods and services due to which these Ordinances cannot enforce or impose any bindings or obligation of complying of these standards. While clearing any goods, the customs authority is not bound to comply with ‘Bangladesh Standards’ either under The Customs Act 1969 or The Bangladesh Standards and Testing Institution Ordinance 1985 due to which, a good number of imported goods are cleared and marketed without complying the conditions of national standards.

8.5.4. Alternative use of potential legal institutions

8.5.1. Village Courts

Among the local bodies that have legal and social recognition in the rural level is the Village Court under the Village Court Act 2006. This Act provides provision for the settlement of rural disputes at the local level through the process of this court. For providing jurisdiction to this court, this Act contains two schedules describing the subject-matter of complaints that may be tried by this court. The 1st schedule contains 09 categories of offences provided by the Penal Code 1860 and the 2nd
schedule contains 06 categories of civil violations. It may try both civil and criminal cases if the value of the subject-matter does not exceed TK.25, 000 and the number of offenders not exceeding 10. It may pass an order of compensation for an amount of TK 25,000 or an order of fine of Tk. 500; but, no sentence of jail.

The constitution and trial procedure of village courts are different from the ordinary course of regular courts. For the purpose of settling the disputes within the shortest possible time, the court cannot allow any adjournment of hearing for more than 07 days. The fees determined for village court are very low; for criminal cases, Tk.02 and for civil matters Tk.04/-. The court comprises of five members which include two respectable persons of the locality, two elected ward members each of them are selected by two opposite parties in his behalf, and the chairman of the council presides over the court. For ensuring unbiased trial, after every finalization or ending of a trial, the ward members acting as judge of the court (except the chairman) shall change their side from right to left or left to right. That is, one set of the members selected and working by the plaintiff-complainant cannot work as judge for the complainant in the hearing of next case.

The Village court functions by the procedure of negotiation, mediation and conciliation or arbitration. For the purpose of extending an opportunity of easy access to justice as well as avoiding complex system of trial, this Act provides a waiver of following provisions of The Evidence Act 1872, Code of Criminal Procedure, 1898 and The Code of Civil Procedure, 1908 which may delay the process of trial. As such it involves less paper transaction which is conducive to justice. To avoid complexities and providing justice without any cost, it imposes restriction on appointing lawyers in the trial of such cases. The village court encourages unanimous decision and discourages dissenting judgment which opens scope for delay through appeal. Every decision of this court is arrived at by the decision taken by majority of the members and the ratio of decision making is 4:1 or 3:1 or 3:2 by the members present in the trial. If the case is decided by a majority of 4:1, the verdict is regarded as absolute and the right to appeal does not lie with any of the parties.

In this part, we will examine how the potentials of this organization that may be employed for the purpose of rural consumers. A keen observation of the schedule of the Act reveals that considering the value of the goods, this Act does not restrict the scope of playing the role by village courts. But, it requires the corresponding support and sanction from The Consumer Rights Protection Act 2009. But, an analysis of the CRP Act 2009 reveals that this Act recognizes the Union Councils as a unit for establishing consumer rights in the rural level. But, it does not recognize the potential of The Village Court for which it cannot contribute to resolve consumer disputes in the local level through this court. Although, the comparative advantage of the penal provision of the village court is high, but, due to some legal insufficiencies, the potentials of this court cannot be maximized.
8.5.2. Small Cause Court

Under The Small Causes Courts Act 1877, the Small Cause’s courts are established to provide hassle free justice to litigations having small value of the subject-matter of the suit. Now we shall examine the potentials of this court for consumer justice. Under the provisions of The Small Causes Courts Act 1877, the value of the subject-matter of the suit should be Tk. 10,000 or less. The comparative advantage of this provision is that the value of majority of the consumer goods and services falls within this price range. Taking advantage of comparative value of suits, the court may settle a great majority of complaints. According to the provision of this Act, the time-line for settling any case is less than 06 (six) months. This provision may reduce the prolonged delay in the process of trial for an indefinite period.

Under the provisions of the Small Cause Courts Act 1877, the jurisdiction of this court is limited only to declaratory suits involving immoveable properties. The present structure of the Small Cause Courts Act, 1887 does not allow scope for entertaining consumer complaints. A critical analysis of CRP Act 2009 reveals that it does not provide any sanction of recognition to the Small Cause Courts. Considering its comparative advantage, it also does not make any provision for the settlement of such disputes of small value by this court. In this connection, it may be noted that in many countries, the potential of small cause’s court have been explored for the protection of consumers.

In conclusion we may say that the ideas generated from the Village Courts Act 2006 or the Small Cause Courts Act 1887 may be an asset for the legal thinkers of the future. In this connection, that constituting special courts or bringing necessary amendments in the legal regime is not sufficient to bring a qualitative change in the arena of consumer justice. Unless the institutions are made effective by appropriate operational procedures, it may not prove to be dynamic to address the issue of the consumer. It may be noted in this connection that a group of researchers in USA have made a proposal for consumer justice where they have presented a model for settling disputes of small value with relation to consumer complaints (Jeffrey and Barry, 1977: 839). In England, The Voluntary court of Small Valued Goods has resolved may of the problems of consumers. A group of researchers-academics in USA, with a view to provide expeditious justice, with respect to small violations, have modeled a quick redressal system. In conclusion, they have designed a model. The present structure of the Village Courts Act 2006, or the Small Causes Court Act, 1887 does not allow scope for maximizing its role by entertaining consumer complaints; but the comparative advantages and benefits of the these courts may be encouraging for consumer justice.

8.5.3. Special Court for Consumers

The Consumer Rights Protection Act 2009 provides for trial of cases by the courts of magistrate. It does not provide for special courts. As the consumer violations involve some different issues of consumption, so, it is a fit case for constituting special courts for this end. Under the provision of the
Code of Criminal Procedure Criminal 1898 (Act V of 1898) and The Civil Courts Act 1887 (Act no XII of 1887), the right to establish any court in any area and for any purpose is rests with the government. It has been observed that the drugs related issues are tried by special court - Drugs Court constituted under the Drugs (Control) Ordinance 1982. The Essential Commodities Act 1957 as well as the Pure Food Ordinance 1959 also provided for the constitution of special courts. Accordingly, the Foods (Special Court) Act 1956 was enacted for its constitution.

A keen observation regarding the implementation of these laws reveals that the proposed courts had never been constituted. At present, no Food Court is functioning in any part of the country. Moreover, no initiative is taken from the government’s end (i.e. ministry of commerce or Directorate of Consumer Protection) either for constitution or for empowering any regular court of magistrate to deal with consumer cases. In this connection, The Small Causes Court could have been a good option for attaining this purpose.

It may be noted that constitution of courts is not enough; it requires innovation for providing justice to consumers. The Modus Operandi for the maximizing the potentials of these courts may be determined by the body concerned. In this connection, we may mention the example of Ganjam District Consumer Court, Orissa, India. They have adopted some innovative measures by which it has become able to provide a systematic speedy justice to consumers.

The Lawyers Association of Ganjam district of Orissa, India has adopted some measures for the speedy trial of cases due to which it has become an example of innovative model for consumer justice. With a view to provide expeditious justice to consumers, ‘The District Consumer Forum of Ganjam district, Orissa, India’, and a group of socially conscious lawyers has adopted a working procedure for expediting the disposal of cases lying pending with this court (Forum). Under this system, the week-days are fixed for different nature of judicial functions. All the Mondays of the month are fixed for receiving complaints, serving summons, Tuesdays for holding hearing on the maintainability of suits, Wednesdays and Thursdays for deposition of witnesses and hearing, and lastly, the Fridays for passing orders and delivering judgments. This model signifies the model of institutional innovation as well as maximization of organs of the court. A keen observation as to the state of consumer justice in Bangladesh shall reveal that there prevails discordance between the law and justice. In this condition, this model has a good potential for Bangladesh. So, the leading NGOs of Bangladesh (CAB, BELA, and BLAST) who have the experiencing with consumer issues may take initiatives for maximization of consumer justice institutions.
8.6. Public engagement with the consumer justice system

8.6.1. Bazaar committees

‘The market place is the only place where commercial relationships can be formed (Keynes, 1971:85). Consumer activism may be given momentum by engaging the community organizations with the consumer justice system. In the rural areas, the institution that functions more closely to the community people is the Haat or bazaar. As the majority of people in Bangladesh total population lives in the rural areas and the largest scale of rural transactions are undertaken in the Haat or bazaars, so these people cannot avoid the influence of these Haat or Bazaars on their economic life. It functions as one of the important sources of revenue both for the local government as well as the central government. According to the provision of the ….. Act, these Haat or Bazaars are managed by a committee constituted by the members of the shop owners. Under this Act, there is provision for representation from stakeholders (e.g. consumers) in the committee, but a keen observation of this provision reveals that this provision has not been complied with due to which the functions of these committees centered round securing the interest only of the sellers, not of consumers In this connection it may be relevant to note that in the 1980s, these Haat or Bazaars committees helped in the introduction of metric system of weights and measures under the Standards of Weights and Measures Ordinance 1982 or the Standards of Weights and Measures Ordinance, 1985. The implementation of these Ordinances helped to resolve the problem of justice with regard to cheating in weights and measures. It may be necessary to mention that for the management of the market, a system has long been working in the hill districts of Rangamati, Khagrachhari, and Banarban in Bangladesh. Under this system, an official called the ‘Bazaar Chowdhury’ is appointed whose principal responsibility is to oversee deception, adulteration, cheating in weights and take appropriate measures in this connection. This system of Bazaar Chowdhury’ has proved to be an effective system for these areas. But, for the other 61 districts of Bangladesh, we do not see such system or official working for this purpose. If the role of the bazaar committees could have been maximized targeting consumer protection, it could serve the purpose of consumer justice to a great extent.

8.6.2. Non-Government Organizations (NGOs)

Global recognition to the recognition of NGO role in the arena of public justice has brought enormous change in the ideas of activism and system of judicial governance. Some of the NGOs are working with newer idea. The newer branches of ideas that worked mostly in Bangladesh are related creating equality of opportunities against indiscrimination, security for life and livelihood by creating safe employment environment, and so on. But, a keen analysis of the activities of these NGOs reveal that one of the important areas of public justice- the issue of public consumption involving the right to safe food and medicine, and other areas of product justice could not form an important place in their agendum. Due to the reasons mentioned above, the issue of consumer justice has been kept in
abeyance for a longer period of time. A keen analysis of this aspect reveals that in some of the neighboring countries, the NGOs have contributed a lot in this area of public justice.

An Indian NGO- Consumers Forum, Chandigarh which has been working to create consumer awareness in the city since 1981, came under the scanner with the UT Consumer Disputes Redressal Forum accusing the body of tarnishing the image of the original forum and misleading the public. But, these threats may be overcome by relentless efforts of the NGOs. Despite its criticism, some of the NGOs have earned reputation by their overall work. In Tamil Nadu, the NGOs raised their voices against the long pending of consumer related cases in the court of first instance ‘District Forum’. This initiative is taken as an important event of NGO involvement in consumer activism that helped others to raise their voices against the delay of cases. Beyond the measures of judicial method, consumer education is regarded as one of the major efforts that can serve the purpose of activism.

In a very few cases, some of the NGOs of Bangladesh are seen to work with consumer issues which are regarded as important landmark cases in the arena of consumer activism. These cases followed the judicial process in the form of public interest litigation. In this respect, we may refer to the involvement of BELA in the case of ‘imposing ban of radioactive powered milk case or stopping the sale of poisonous Paracetamol case. In these two cases, the process of activism was PIL. The success of these cases motivated an NGO to file another case in the court of District Judge, Dhaka against the Illegal lottery of Coca-Cola. The issue involved in this case may not apparently seem to be a consumer issue, but, a keen observation of these cases reveals that the issues were genuine matters of social interest involving the poor and the down-trodden people of the society. In this connection, it has been observed that the leading consumer NGO of Bangladesh since 1978, CAB’s involvement in consumer issues has not been maximized. In this connection, we may cite the role of some NGOs working in the neighboring jurisdiction-India. CERS – a leading NGO of India are working with consumer issue successfully.

The above discussion shows the less involvement of NGOs in the arena of consumer activism. Although the UN Guideline on the Protection of Consumers 1985 considers the consumer protection as a tool for economic justice, still, its reflection on consumer issues is not seen significantly. The majority of NGOs are working in the arena of Micro-credit, sanitation, women rights and so on. Due to the reasons mentioned above, the role of NGOs could not be seen significantly on issues involving consumer protection. In this connection it may be noted that in some countries, policy exists for public funding to NGOs working with consumer-related issues. On January 01, 2008, an ordinance has been passed in Sweden which provides supporting NGOs (administered by the Swedish Consumer Agency) for working with consumer issue. The NGOs working in Bangladesh may explore this avenue to maximize the role of Bazaar Committees, Village Courts with the help of LGIs.
8.6.3. Parliamentary Standing Committees

In a system of parliamentary democracy, the parliament is the most vibrant organization that may serve the purpose of civic activism. It may show its proactive role in matters where the civic activism is not seen, the public is either reluctant or unaware of the fact or situation. In the reduction of slave-trade, the democratic institutions have played the utmost role. In a proceeding of impeachment, the British parliament has been seen to prosecute one of its citizens with the charge of torturing the women, brutality to innocent people, looting, misappropriation, and corruption. On May 5, 1789, the British Parliament undertook a decision for constituting a parliamentary investigation committee to hold inquiry on the same issue. As a result of the parliamentary committee, the British Government passed necessary laws for taking over the charge of administering India. In continuation of the step mentioned above, the then Government of India passed The Penal Code 1860 which contained some provisions with respect to consumer protection. Its provision regarding consumer protection is regarded as the first step of inception of modern ideas of consumer justice. The British parliament also enacted some other laws on governance.

An observation of the parliamentary proceedings of Bangladesh regarding the Consumer Rights Protection Act 2009 reveals that it has failed to play its proactive role in addressing the issue of consumer protection. It may be noted here that the process of enacting this Act started in 1992 and it could not be finished until 2006. During this period of 14 years, three parliamentary elections were held, but, none of the committees could pass it. Of course, this Act was finally passed in 2007 when there was no parliamentary session in the country.

It may be mentioned that the Parliamentary Standing Committee on the Ministry of Commerce is in place. But, its role in protecting the consumers’ right of protection is not widely seen. There is ample opportunity for it. Under the Parliamentary Rules of Procedure, the parliamentary standing committee has power to summon any person or body, call for the record and recommend the appropriate agencies for taking necessary measures. Its recommendation is treated as equivalent to the decision of the parliament which has the force of law in the parliamentary system of government. From this point of view, if its role could have been maximized by involving the related ministries and the agencies working under it, its role could have been visibly maximized for the protection of consumers. In this connection, it has been observed that the majority of issues of ministry of industries, food, fisheries and livestock, law and justice, local government, environment and so on are related with each other and there is a good working relation among them. So, the potential of this institution could have been explored by innovation.

8.6.4. Local Government Institutions (LGIs)

The UN Guidelines for the Protection of Consumers–1985 recognizes the role of local government institutions in implementing the provisions of this guideline. In the context of Bangladesh, the term
local government includes Union councils, Pourashava, Upazila Parishad, City corporations. The LGI is the largest institution for implementing the programs and development works of the government, it has the capacity to play its role in implementing the no-governmental programs as well. Considering its number and area of local jurisdiction, the government has in exercise of the powers conferred by section 13 of the Consumer Rights Protection Act 2009, devolved the responsibility of consumer protection to all the LGIs.

With reference to its organizational strength as well as legal instruments, there is ample opportunity to transform the activities of these community organizations into an activist organization for protecting the interest both of the consumer and the seller and thus transform it into an activist organization. Alternatively, it possesses the greatest potential for justice in the rural areas. In the context of consumer protection, the utilizations of this network and its organizational potential had not been thought of. Implementing of non-governmental but socially important programs by utilizing its strategically advantageous position over other legal bodies and organizations has not been thought. Pursuant to these limitations in our visionary thinking, we could not bring this into our thought that these organizations have the potentials of establishing justice for the consumer.

A keen observation of the Pure Food Ordinance 1959 (repealed) reveals that the principal responsibility of implementation of this Ordinance was bestowed upon LGIs. Under section 4 of this Ordinance, the Minister for Local Government Ministry was the chairman of the National Pure Food Committee. His engagement in the committee successfully helped to implement many of the provisions of this Ordinance through a period of 2003-2006. For the purpose of ensuring purity of food, section 4 of the Pure Food Ordinance-1959, empowers the respective LGIs (local govt. bodies) to appoint one or more food analyst (Public Analyst) for “better control of the manufacture and sale of food for human consumption of Food within its local area. Considering its multi-dimensional influence on local matters, many of the laws may be transformed to maximize the role of LGIs in protecting the rights of the consumers. The advantage of involving LGI is that it adopts the non-invasive methods of implementation (e.g. campaign, motivation, mediation, arbitration and so on). Under the present administrative structure, the Union council is the first step of local administration. The areas where the enforcement of normal administration cannot reach, The LGIs can function in these areas effectively. From this point of view, there is ample opportunity of maximizing the role of LGIs for protecting the rights of consumers.

8.7. Central Government initiatives

The aspect of consumer protection has been recognized by the central government as one of the vital issues of governance. For the purpose of providing better protection to consumers, curbing the corruption has been selected as one of the strategies in this sector. it has prepared a document titled National Integrity Strategy (NIS). The purpose of NIS is to curb corruption by adopting bureaucratic
or administrative measures. The strategy paper has identified some laws and the related directorates or offices as the change agent. The strategy paper has identifies the implementation of the Consumer Rights Protection Act 2009 and The Bangladesh Standards and Testing Institution Ordinance 1985 as one strategies for curbing corruption in this sector as well as providing better protection to consumers.

This strategy paper has adopted on Grievance Redress system (GDS), but, an analysis of the strategy paper of NIS reveals that has failed to select the appropriate organizations as change-agent which has made this strategy paper dysfunctional to a great extent. It has promised to prevent adulteration of food, and for this purpose, the strategy paper has identified some government and non-government organizations as change agent. But, an analysis of this paper reveals that it has failed to identify the proper organization as the change agent. It has identified BSTI as the principal organization responsible for this purpose. But, the fact remains that the DG, CRP is the principal organizations for this purpose.

In this respect, it may be mentioned that the executive magistrates had long been performing their role in dispensing justice under a series of statutes concerning consumers’ rights. For example, under the Essential Commodities Act 1956, the purpose of the legislation was ensuring fair prices and as such provides control on price for essential commodities, equitable distribution of essential commodity in different areas of Bangladesh, and regulating trade and commerce (production, movement, transport, sale, supply and stocking of goods). But, this document failed to appreciate the potential or promotive role of executive magistrates as the principal change agent in the ground level for combating adulteration of food and medicine. In a study undertaken by TIB, it has been shown that the failure of identification of proper agencies has resulted in failure in bringing positive impacts in curbing corruption in the arena of food.

Similarly, for the purpose of maximizing the role of government organizations, the government has recently adopted a document – Annual Performance Agreement (APA). The strategy that it has adopted is identifying the principal responsibilities of the related ministries and the directorates or offices working under it. Accordingly, enter into an agreement with the related ministries for maximizing its role. With a view to maximize the role of governmental agencies, it has entered into a performance agreement with all ministries in which the ministry of Industries and the ministry of Commerce are included. It has set a system of key performance indicators that will signify their success and failure in attaining these objectives. The process of signing agreement between the controlling ministry and the implementing agencies is going on. So, it is early to comment at this stage. In this connection it may be mentioned that the government’s role as a watchdog has influenced the government to undertake such a measure. It has been observed that in Britain, the state has taken over many important watchdog functions…. Here, greater public accountability of all kinds of services has created a relative security (Menski, 1985:3-5). The Government of India has also adopted such a measure which might have influenced Bangladesh. It has been observed that the
failure to provide SSC certificate in due time resulted in consumer violations liability in India. This system has been successfully been practiced in Singapore known as system of KPI and CPI. But, the limitation of this performance document is that the related agencies have failed to contact with the main stake-holders while preparing the key indicators. It has neither generated nor has it invited any new idea due to which it has become the stereo type copying of the charter of duties. So, due to lack of innovation, the NIS and APA does not possess its capacity to maximize the role of these agencies in protecting the consumers.

8.7.1. Annual Performance Agreement

This is an agreement entered and signed between the bureaucracy and the political entity through a process of documentation. This document has tried to bring the service delivery functions of the bureaucrats under a system where their functions may be quantifiable. This system may ensure justice to consumers by exploring accountability parameters for organizations, reconstituting legal infrastructures, operationalizing community organizations. The matters of consumer complaints have been addressed otherwise by the Singapore authority by setting the accountability parameters for consumer related organization. Unlike any other body or organization of the government, the Consumer Dispute Organization is under a process of scrutiny and analysis for this end. They have set some key performance indicators (KPI) and continuous performance indicators (CPI). These two indicators are very important to weigh the quantitative performance of any organization. The main purpose of KPI or CPI is to evaluate and oversee the performance of these bodies. It is necessary to mention here that KPI gives the indication of overall performance of the organization and CPI gives the picture of individual performance of the persons working with the organization. CPI emphasizes on preventive measures against violation and KPI emphasizes on curative justice.

8.7.2. Adoption of new modus operendi by community organizations

The matter that is encouraging for an urban litigant is that the Small Cause’s Court Act 1877 also follows a process of trial which is also not complex. To avoid the lengthy process of examination or cross-examination of witnesses in a trial, it encourages adopting some simple or informal processes alternate dispute settlement system. It has been observed that most of the cases Small Causes’ Courts’ are settled by negotiation, mediation, arbitration, or compromise between the parties. The legal system of Bangladesh has provision for disposing of small matters through the process of Small Causes Court 1877.

It has been seen that some civic organizations have emerged in many jurisdictions to ensure civil and political rights. In USA, the institution that worked most for reduction of racism is social organization of whom some were legal and some of them were purely social. The legal organizations (such as law firms) provided only the legal aid services and the rest provided other type of services, such as, campaign and advocacy, finance and so on. The measures undertaken by these social
organizations were successful in creating an environment capable of compelling the governmental authorities to take measures against the atrocity of powerful section of the society. In India, we see the emergence and functioning of some social and legal organizations that have contributed much in upholding consumer protection.

In view of the discussion made above, it may be presumed that activism is not a free trailed matter; rather, it is the harmonious composition of various divergent issues which include legal, judicial and administrative factors. Being a part of this system and processes, consumer activism requires the innovation and initiatives from the potentials social, economic and legal institutions. In view of this condition, the consumer justice system is in dire need of activism in which the innovation and initiative of socio-economic and legal institutions will help to import a vibrant condition for justice to consumers.
Chapter 9
Consumer Justice – The Way Forward

Consumer justice is a comprehensive measure of law and system. In this study, it has been observed it is not only a matter of legislation; also a matter of perception derived from the system of justice that it provides for its consumers. It engulfs a wide variety of issues, both tangible and intangible, influencing the consumers’ right of protection, directly or indirectly. So, it encompasses both the thematic and juridical aspect of view simultaneously. It is considered as integral part of human rights, social justice as well as means of social control for which the consumer law is characterized as welfare legislation. Being the part of welfare legislations and human rights, the regime of consumer law could not ensure individuals’ right of protection. The reason for such failure is not so much due to the absence of laws as much as it is due to the failure to incorporate some fundamental issues within its purview. Due to the problem stated above, it is difficult to convince judges, lawyers, or right activists to consider it as a branch of human rights, social and economic justice, and above all, as a means of social control. Due to the problems stated above, it is not considered as entitlement, i.e. inseparable part of human life; the aspect of consumer justice is limited only to statutory rights. The immediate effect of this failure is to provide a system that is conducive to justice.

It has further been observed that the consumer justice system recognizes a system of formal justice. It is agreed that “Formal Justice” guarantees the maximum freedom for the interested parties to represent their formal legal interests. In this respect ‘freedom of interested parties’ implies ‘sovereignty’ of the litigant both in respect of his right of preference in selecting the nature of relief (civil or criminal), forum of justice, i.e. access to formal institutions like Court or Police. But, when we analyze the consumer justice system from the point of ‘Formalism’, it reveals that the consumer related laws’ including the Consumer Rights Protection Act 2009 offers for a system of justice that does not recognize the sovereignty or liberty of litigants or consumers; rather, it offers for a system that is executive driven. For this reason, it refuses to accept individuals’ universal right of access to justice; the victim has no right of direct access to courts. His right of lodging complaints or institution of cases has been made dependent upon the filing of report by the authorized officer of the concerned department of the government. The legislations also do not provide the liberty of preferential choice of justice, civil or criminal. Due to this, the consumer is driven to justice of criminal nature where he loses his right of option or preference in selecting remedies In Bangladesh, the regime of laws provides for a system where the inherent jurisdiction of cognizance taking power of courts is curbed or denied by the law itself.

1 Roth and Claus Wittich, Economy and Society, vol-2, P-812
In this connection if we analyze the matter of autonomy from Max Webber’s conception of ideal legal system, it will reveal the consumer justice system should have a ‘formal and rational’ system with the proper propositions of coercion. To his opinion, a system is ‘rational’ when its procedures and customs are developed based on sovereignty and freedom of litigants. Unless this sovereignty and freedom of litigants associated with autonomy of legal system is established, the formal legal system cannot provide the guarantee of justice. In this study it has been observed that the consumer legislations have introduced a system that is not autonomous. Due to these reasons, the courts also cannot take cognizance of an offence without the prior report of the authorized officer of the respective department. Even the courts do not have the minimal right of ordering for inquiry or investigation of a complaint on its own motion. In some instances, the courts have been debarred from exercising its inherent jurisdiction by specific terms. Actually, this system of justice has placed the matter of consumer justice at the mercy of the executive branch of the government by which the independence of judiciary has been denied indirectly.

It has been observed that the consumer justice system follows a centralized system of justice due to which sufficient number of courts for dealing with the consumer affairs has not yet been constituted. With respect to offences relating to drug and medicine, only one court in Dhaka has been constituted to try the offences under the Drugs (Control) Ordinance, 1982. In respect of other laws, either a few number of courts have been constituted or no court has yet been constituted (e.g. consumer court under the CRP Act 2009). Besides this, a good number of consumer justice institutions capable of providing administrative or quasi-judicial reliefs have not been operationalized. Moreover, some non-traditional forums of justice (e.g. Village Court, Small Cause’s Court) have not been empowered with due jurisdiction by the amendment of law. In this state of condition, mobile courts have been made the main source of justice; the matters of consumer justice have been made dependent on the operation of mobile courts on a regular basis.

Regarding the sectoral analysis of justice, it has been observed that the aspect of health and food stands in a vulnerable position. In comparison with the number of violations, these two sectors are viced with the lower propensity of justice against the higher propensity of consumer violations. It is difficult to find a person who is not a victim of anomalies occurring in these two sectors. These two sectors give rise to various offences against which the chance of redress is very low. Regarding the aspect of health justice, it has been observed that the laws cannot ensure the standards of quality of goods and services. The drugs and medicine do not comply with the standards of quality; the markets

---

2 Guenter Roth and Claus Wittich on ‘Max Webber: Economy and society, an Outline of Interpretative Sociology, Vol-2, pp. 653-658
3 Ibid. Guenter Roth and Claus Wittich on ‘Max Webber: Economy and society, an Outline of Interpretative Sociology, Vol-2, pp. 653-658
are flooded with sub-standard or adulterated medicine. Regarding the system and forum of justice, it follows a centralized system of justice; only one court of drugs is functioning in Dhaka for the trial of offences for the whole of the country. Actually, the total sector of health is also burdened with the problem of defiance of law and denial of justice, directly or indirectly. Regarding the food justice, it does not provide the guarantee of safety to the consumers. The regime of food law provides for a centralized system of justice. Besides this, sufficient number of courts has not been constituted for the trial of offences related with food.

The regime of laws of Bangladesh reveals that the laws with respect to food and medicine suffer from lack of uniformity. An analysis of the penal provisions relating adulteration of drugs is punishable from with rigorous imprisonment from six month to five years and or fine of taka 500 under section 27, 28, 29, 30 and 37 of the Drugs Act 1940; whereas, the same offence is punishable with Rigorous imprisonment for period ten years and or fine of taka 2.0Lac under section 16 of the Drugs (Control) Ordinance 1982.

Regarding the redressal forum, the consumer justice system is viced with centralized system of justice; it does not provide sufficient number of courts at different places of the country. In this respect, it has been observed that only one court has been set up in Dhaka for the trial of offences under the Drugs (Control) Ordinance 1982. Most of laws provide for trial by summary procedure. But, the dilemma of summary trial lies in the fact that the procedure for summary trial is given by section-260 of the Code of Criminal Procedure 1898. This provision specifically provides the offences that are capable of being tried by the summary procedure. But, a critical analysis of these provisions reveal that the list of offences or the respective laws have not been included either in Section-260 of the Code of Criminal Procedure 1898 or in any corresponding provisions of law. The aspect of failure may lead to apprehension of miscarriage of justice for both the parties.

It may also be noted that as the product of drugs and medicine has been included in the list of essential commodities, and as no special prohibition or restriction has been imposed against the applicability of these laws to drugs and medicine, so, apparently, there is no legal barrier on the summary trial of drugs and these offences (relating to drugs and medicine) under the laws relating to essential commodities.4 Now we may discuss the right of access to these forums.

It has also been observed that in view of the condition stated above, the social movement for cause consumer justice has not emerged to a significant size; the civil society or the people could not be sensitized even for the sensitive sector of food and health. For this reason, we have seen a very few number of PIL cases from the citizen’s part. Similarly, the courts could not be sensitized due to which

---

4 The Control of Essential Commodities Act 1956, the Essential Commodities Act 1957, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970.
they are not seen to be proactive to issue Suo Motu rule in some important cases. The educational systems also could not take the matter of awareness building into account. Actually, the regime of consumer justice system has adopted a system that does not match with the principle of restorative or distributive justice. In view of this condition, the system and law for justice needs to be corrected by necessary amendment of law. In view of above discussions, the following measures may be undertaken:

I. The legislations should emphasize on individuals’ right of protection with necessary provision of law. The provisions dealing with consumers’ right of protection should incorporate provisions providing the consumers’ right of direct access to justice (i.e. to courts of law). It should also give the preferential right of choice regarding the justice – civil or criminal.

II. Measures may be taken for the constitution of consumer courts. The process of constitution should also include the constitution of small causes court with emphasis on the potentials of informal system of Village courts for settling disputes of small value or price.

III. The system of centralized system of justice should be changed by establishing a good number of courts in different parts of the country. Necessary amendments of law may be made where it is required for the purpose of implementing this provision.

IV. Considering the value of the products and volume of consumption, necessary amendments may be brought in the provision of law; especially, with respect to the Village Court Act 2006 or the Small Cause Courts Act 1877.

V. The forums of justice and the Modus Operendi for lodging complaint should be changed. It should be relieved from being executive driven; rather it should be victim driven where the right of access to justice shall be easy, cheap, and easily accessible and waived from any conditionality.

VI. Time should be given utmost importance; necessary amendments may be brought in the laws and time for inquiry or investigation, recording of depositions, and delivery of judgment may be fixed.

VII. The autonomy of court should be established in furtherance of which the cognizance taking power should be free and unhindered by any conditionality.

VIII. In respect of food and health justice, individuals’ right of protection should be given utmost emphasis in furtherance of which the authority of lodging complaint should also be devolved upon the individual consumer also. the individual consumer should be provided with the right of access to justice.
IX. Emphasis should be given on the protection of rural consumers. In furtherance of which Measures should be taken for rural justice where the potentials of village court may be explored. For this end, necessary amendments may be brought in the Village Courts Act 2006 and other relevant legislations.

X. As a matter of social action initiatives, awareness on consumer justice may be built by different methods. The method may include consumer education. For this end, the matters of consumer justice may be included in the school curricula. In this respect, the GO and NGOs working in this area should take pragmatic measures.

XI. Emphasis should be given on legal activism for which the potentials of PIL and Suo Motu rule on consumer matters should be explored by the proactive judges.

The recommendations mentioned above may help develop justice to consumers.
BIBLIOGRAPHY

Abel (1973-74) 8 Law and Soc. Rev. 217
Austin *Positive law and Morality*.
Bohannan (1957). *Justice and Judgement among the Tiv*.
Brown, Radcliffe (1933), ‘Primitive Law’, *Encyclopaedia of the Social Sciences*.
Diamond, A.S. *Primitive Law* (2nd Ed.).


Guenter, Roth and Wittich Claus, ‘Max Weber: Economy and Society, an Outline of Interpretative Sociology’, Vol. II.


Leary, Thomas B. Commissioner, Federal Trade Commission (1932). Competition Law and
Consumer Protection Law: Two wings of the same House.
Locke, John, Two Treaties of Government.
MacLellan, The Thoughts of Marx.
Montesquieu (1748). The Spirit of Law.
Pound, Roscoe, Philosophy of Law.
Pound, Roscoe (1923). Interpretation of Legal history.
Plekhanov, The Marxist View.
State.
Rahman, Mizanur (2010). Consumer Protection in Bangladesh: Present Status and some Thoughts for
the Future (Unpublished paper).
Rahman, Mizanur (2009). ‘Consumer Protection in Bangladesh: Present Status and some Thoughts
for the Future The Dhaka University Studies, Dhaka, Bangladesh.
University Studies Part-F, Vol. IV (1).
Renner, K. (1949). ‘The Institutions of Private law and Their Social Functions’, The Economic and
Social Functions of the Legal Institutions.
Schindhauser, John R., Judges and Justices.
Sen, Amartya. *Poverty and Famines*.
Stone, J. *Social Dimensions of Law and Justice*.
Weinreb, *Natural Law and Justice*.
Winfield (1931). *Province of the Law of Tort*.