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## Understanding Medical Negligence under the Legal Regimes in Bangladesh: Gaps and Way Forward

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### Abstract:

*Right to health and medical services are the basic constitutional rights in Bangladesh which are closely related to the right to life of a person. But the scenario of medical negligence in Bangladesh is rampant which leads to violation of not only constitutional rights to health and medical services, but also other statutory rights of the people. Though there are couples of conventional legal forums in Bangladesh to address the right to medical services and to regulate medical professions, the legal avenue is undeniably suffering a vibrant vacuum of a comprehensive legislation on medical negligence issue which would specifically address and prosecute the offence. Even, the prevalent legal frameworks are unequivocally inadequate to provide effective remedies in case of medical negligence claims. Therefore, to a large extent, the cases of medical negligence are gone unaddressed without efficacious legal remedies due to absence of a specific law on this issue, shortcomings of the existing laws, alongside the discrepancy between law and practice. Though it is positive sign that the apex court of Bangladesh, time to time, is upholding directives to prevent medical negligence and asking the concerned authority to bring reformation in the laws, the concerned authority is hardly found to comply the judicial directives. Thus, this study is intended to critically assess the effectiveness of the prevalent national and international legal frameworks with a view to confronting medical negligence in Bangladesh. In this regard, the underpinning thrust of this paper is to analyze the rampant gaps and discrepancy under the existing legal frameworks of Bangladesh. In addition to, this study will critically seek the role of the Bangladesh judiciary in prosecuting the medical negligence cases and awarding judicial remedies for it. Finally, this paper will suggest for introducing a comprehensive legislation on this specific issue as well as the paper will strongly advocate for bringing reformation in the prevalent legal frameworks of Bangladesh which will help to effectively address and prosecute medical negligence cases in Bangladesh.*

**Keywords:** Medical Negligence, Medical Jurisprudence, Breach of Duty, Right to Health, Judicial Activism, Health Court and Tribunals

### 1. Introduction

Medical profession standing with high ideal moralities, principles and strong legal, professional and ethical commitments is one of the finest noble professions in the world. But, the present amidst hospito-patho-culture of Bangladesh roughly leads to arise an actionable legal issue referred as 'medical negligence' associated with promptitude violations of the bundle of human rights and constitutional rights including right to health and medical service which falls in the corpus of violation of right to life.<sup>1</sup> Besides, medical negligence also leads to frequent violation of the statutory rights of the people to get health and medical services with highest standard of care and skills from the medical professionals or service providers under the legal avenues of Bangladesh. It is also driving with a cloudless mourning truth that medical negligence demises the true routes of that righteous profession (Billah, 2013) as well as undermines faith and confidence of the people on medical profession. Even in the most of cases, the pathetic scenario of this overwhelming rates of medical negligence in Bangladesh is left unchecked without any efficacious legal remedies because of absence of a specific legislation on this issue, flexibility of the regimes of tort laws, shortcomings of the prevalent laws and less judicial activism of the courts (Reza, 2016) and sometimes, these impliedly denotes that money and capital runs faster than 'right to life' (Billah, 2013).

Hence, this study will aim to demonstrate the diverse dimension of medical negligence in Bangladesh and to analyze the essential ingredients required to prove medical negligence. As well, the significant part of this paper is also to critically demonstrate that the prevalent legal frameworks in Bangladesh are not sufficient and efficient to address medical negligence and this study also urges for a comprehensive legislation on medical negligence to address the present multi-corpus nature of medical negligence with efficacious legal remedies. In addition to, this article strives to highlight how the

<sup>1</sup> Right to health and medical care has been recognized as a constitutional right under Article 15(a) of the Constitution of Bangladesh in the sketch of Fundamental Principles of State Policy (FPSP) which is not judicially enforceable stated in Article 8(2) of the Constitution. But the constitutional court of Bangladesh set a judicial precedent through many judgements that right to health and medical care falls in the corpus of fundamental right to life of a person and these are also demonstrated in this study. See Dr. Mohiuddin Farooque V. Government of Bangladesh, 48 DLR (1996) (HCD) 438

Bangladesh judiciary is setting judicial precedents to address the offence and awarding legal remedies. Finally, the article will demonstrate the significant gaps and challenges in prosecuting the medical negligence under the existing legal frameworks of Bangladesh. Thus, this study will describe the ways forward to bring reformation in the existing legal frameworks and also to justify for introducing a specific legislation on this issue in order to properly address and confront medical negligence in Bangladesh.

## 2. Conceptualizing Medical Negligence

To understand the diverse magnitude of medical negligence, it is important to know the meaning and corpus of negligence. This part aims to analyze the meaning of negligence, medical negligence and its elements. As well, this part will demonstrate the nature and numerous dimensions of medical negligence in order to understand that the picture of medical negligence is really frustrating and most of the times, goes addressed.

### 2.1. Medical Negligence

Generally, negligence means a heedless or careless conduct without reference to any duty to take care. In other words, negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do (Rashidullah V. State ; Heaven case , 1883; Blyth Case, 1856). Whereas sections 304A and 336 of the Penal Code, 1860 defines negligence as an act which is "rash or negligent as to endanger human life or the personal safety of others". But this section has not entrenched any standard of an act which will endanger human life or the personal safety of others. While Medical negligence generally refers to an act or omission by a doctor, physician, dentist, nurse, medical assistant, pharmacist or any other medical service provider in breach of requisite duty of care and accepted standard of medical practices to the patient (Das, 2013, p.13). Here, the standard of care depends on the professional skill, knowledge, diligence and responsibility that reasonably expected from them belonging to their particular class of medical profession (Bangia 1969, p. 263). Any person, including doctors, nurses, or specialists, who assumes any part of the responsibility for a patient's medical care can be held liable for medical negligence.

### 2.2. Elements to Establish Medical Negligence

To assume and establish medical negligence against the patient, the following four elements must be proved by the claimant plaintiff (Philips India Ltd. Vs. KunjuPunnu, 1974):

#### 2.2.1. Duty to Care

The first element to establish medical negligence against the defendant, the plaintiff has to prove that the defendant owes the plaintiff a 'duty to care'. Whereas it is imperative requirement to establish professional nexus between the patient and the doctor to prove 'duty to care' on part of the alleged defendant. Generally, a medical practitioner owes the patients a duty to care in deciding whether to undertake the case, in deciding what treatment to give, in deciding administration of the treatment (Dr. L.B. Joshi V. Dr. T.B. Godbole, 1969). Hence, breach of such 'duty to care' arises medical negligence against the alleged defendant including doctors, nurses, service providers etc. In practically, such a duty to care is essentially assumed whenever a physician or doctor or concerned person or authority undertakes the care of a patient (Bal, 2009).

#### 2.2.2. Breach of Duty

Breach of duty is one of the fundamental imperatives to establish a medical negligence case which implies deviation to meet a standard of care which is required in a particular situation. In case of medical service, failure to take standard of care is occasioned by failure to exercise a reasonable degree of skill and knowledge on this concerned field which other similarly qualified professionals would provide with same care, diligence and knowledge. Standard of care in medical services also involves to consider the magnitude of risks which could have been foreseen and avoided by a reasonable and prudent man. For example, when a doctor agrees to attend a patient, he is always under an obligation to take care of a patient as long as it requires attention (Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr., 1969) as well as patients should also be instructed regarding the adverse reactions and to stop the drug in case of reaction (A.S. Mittal v. State of U.P., 1989).

#### 2.2.3. Proximate Chain of Causation between Act of Negligence and Damage

To establish a successful medical negligence claim, the plaintiff has to prove that he has suffered damage as a direct result of the defendant's negligent care. That means, there must have been the closest chain between the defendant's act of negligence and damage suffered by the defendant. The nature of damage may be physical either to person or property, mental or financial but it must be caused by breach of duty and must be come within the foreseeable area of risk created by breach of duty (Das, 2013, p. 17). For example, if a doctor leaves a sponge inside a patient and that sponge causes an infection or other medical injuries that simply arises a medical negligence claim. But if a doctor undertakes a patient who is later died of arsenic poisoning even after taking all precautions by the concerned doctor does not constitute medical negligence claim (Barnett v. Chesea & Kensington Hospital Management Committee, 1969).

Burden of proof regarding negligence issue goes on the shoulder of the complainant and if he fails to produce material evidence in the court that shows no loss or injury was caused thereby by the medical professional then no legal remedy will be available and the claim shall be dismissed (Sidhraj Dhadda Case, 1994).

### 2.3. Present Dimension of Medical Negligence in Bangladesh

There are different sketches of medical negligence seen in medical science. Some of the more common categories of medical negligence are as follows: misdiagnosis, delayed diagnosis, surgical error, unnecessary surgery, failure to monitor anesthetic performance, wrong site surgery, childbirth trauma, mistreatment of difficult birth, negligent long-term treatment etc. (Karim, Goni& Murad, 2013, p. 426).

However, recently couples of examples occurred in Bangladesh just speak out the dangerous extension and dimension of medical negligence in the country such as, on 22th September, 2016, a premature new born baby named Galiba Hayat, declared 'dead' by a doctor, was found alive immediately before she was being buried in Faridpur on the same day (Sourav, 2016 ; Mridha, 2016). On March 30, 2020, a pregnant woman was died at Faridpur Medical College Hospital as she was reportedly not given oxygen support (Pregnant Woman Dies, 2020). Notably it was also reported that death of a college student was caused during unsafe abortion in Chittagong city where it was alleged that the abortion was performed by a cleaner and nurses who did not have any academic certificate (Four Arrested over Death, 2020). The serious extension of medical negligence incidents has been much more apparent during Covid-19 pandemic. Whereas it is experienced that most of hospitals authority are being reluctant to admit patients disregarding the nature of infection of diseases. while a junior consultant in gynecology and a resident physician refused to treat COVID-19 patients, at Kuwait Bangladesh Friendship Government Hospital, a 200-bed hospital in Dhaka that was specifically prepared "exclusively for treatment of patients with coronavirus infection after the outbreak" of COVID-19 (Bangladesh Suspends Six Doctors, 2021). Apart from these, there are several serious instances of medical negligence incidents were caused to the immediate death of the patients during COVID,19 which are rampant still now.

### 3. Analyzing Medical Negligence under the Legal Frameworks: Bangladesh Perspective

Though the medical negligence directly falls within the regimes of torts law, still the route of bringing prosecution for it has been excavated in different pieces of international and national legislations in Bangladesh. This chapter strives as follows to examine how far the national and international legal frameworks regarding medical negligence are exhaustive and effective to protect and promote health rights of citizens as well as to punish for medical negligence offence in Bangladesh.

#### 3.1. International Legal Frameworks

While Bangladesh is a state party to the international legal instruments including Universal Declaration of Human Rights (UDHR),1948, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979; Convention on the Rights of the Child (CRC), 1989 which mandate the state to ensure right to health and medical care. Under these international legal instruments, Bangladesh has both moral and legal obligation, to fulfill its commitment to protect and promote health rights of the citizens, which obviously includes an easy access to medical and health care facilities, right to have appropriate and adequate treatment and thus, inferring the right to have an effective remedy in case of violations of those rights (Das, 2013, p. 9). These clauses under the above mentioned international legal instruments necessarily implies that a state party has an obligation to ensure health care and medical service without causing any medical negligence. However, the provisions of the international legal instruments relating to right to health and medical services are mentioned below: While Article 25 of the Universal Declaration of Human Rights (UDHR),1948 states:

*"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services"*

Whereas Article 12 of the ICESCR prescribes the role of the state parties to progressively ensure full realization of the right to health and medical care. ICESCR also lays down the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include the provision for the reduction of infant mortality and for the healthy development of the child, the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Article 12(2) of the ICESCR, 1966).

Article 12 of the CEDAW requires the States Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. While Article 14(2) enshrines that States Parties shall take all appropriate measures to ensure to have access to adequate health care facilities, including information, counselling and services in family planning for women in rural areas. Again, the constitution of world health organization, 1946 clearly proclaims that enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition (Preamble of the Constitution of the World Health Organization, 1946).

Moreover, Convention on the Rights of Children (CRC), 1989 is one of the core international legal human rights instruments which has mandated to ensure right to basic health and medical care for children. While Article 24(1) of the CRC stipulates that State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. This article also confers obligation on states parties to ensure that no child is deprived of his or her right of access to such health care services (Article 24(1) of Convention on the Rights of Children, 1989). Again, Article 25 lays down that States Parties shall recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her

physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Notably, it is significantly found in the study that there is no single universal international legal instrument which has unequivocally incorporated provisions for addressing medical negligence and providing remedies for it. But at the same time, it would not be incorrect to assume that right to health and medical services incorporated in the above-mentioned international instruments may include a person's right to get health and medical service without being caused by medical negligence on the part of the state's actors. However, since Bangladesh has ratified all of these international instruments which casts an obligation to fulfill its promises under the treaties. These common obligations on part of Bangladesh as a state party includes adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the instrument (Articles 2(1)(c) & 4 of the Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Child Rights Convention of 1989, Limburg Principles on the Implementation of the International Covenant on the Economic, Social and Cultural Rights, 1966) and taking of appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that are against the spirit of the matter of the instrument (The Convention on the Elimination of Discrimination against Women (1979), Art. 2(f) ; Karim, 2010, p. 344). This in compliance with standards with these international legal instruments, it is essential for Bangladesh as a state party to review the domestic laws, policies and practices and if necessary, to adopt appropriate measures for necessary changes in the law, policy and practice relating to health care and medical services.

### 3.2. National Legal Frameworks of Bangladesh

There are couples of constitutional provisions, national legislations and policies which have been enacted to address the issues and offences relating to medical negligence, as well as, to regulate medical negligence prosecution in Bangladesh. This national legal regime includes the Constitution of Bangladesh, the Penal Code, 1860, The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, the code of Medical Ethics, 1991, the Consumer Rights Protection Act, 2009, the Medical and Dental Council Act, 2010, the National Health Policy, 2011 and etc. This chapter will attempt to examine how far these national legal regimes regarding regulating medical negligence prosecution are comprehensive to prosecute and efficient to provide remedies for medical negligence offence in Bangladesh.

#### 3.2.1. Constitutional Remedy under the Constitution of Bangladesh

The Constitution of Bangladesh does not expressly recognize right to health and medical care as fundamental right but recognizes as part of Fundamental Principles of State Policy (FPSP) which is not judicially enforceable (Article 8(2)). But the constitutional remedies for protection of life and health can be found under its preamble and Articles 15 and 18 as FPSPs read with Articles, 31, 32, 44 as Fundamental Rights (FRs) by filing writ petition under article 102.

While the Constitution of Bangladesh has embodied that

*'It shall be a fundamental responsibility of the state to attain, through a 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 to its citizens- (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care (Article 15).'*

Where Article 18 enshrines, *"The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties ..."* Notably, these articles 15 and 18 have been enshrined in the supreme law of Bangladesh as FPSP which is not judicially enforceable under its article 8(2). Although the Constitution does not expressly recognize right to health and medical care as fundamental right, it is evident from the constitutional provisions as mentioned above, that the framers of the Constitution intended for progressive realization of such rights and the constitutional sanction in favour of right to health and medical care can further be inferred from Article 32 of the Constitution that guarantees right to life as a fundamental right which is judicially enforceable (Das, 2013).

In meanwhile, the apex court of Bangladesh asserted in couples of public interest litigation cases including *Dr. Mohiuddin Farooque Vs. Bangladesh and others* that the right to life includes right to protection of health and normal longevity as well as livelihood<sup>2</sup>, health and appropriate medical care (Hoque, 2006: 405). It was also held in the landmark case of *Professor Nurul Islam V. Bangladesh*<sup>3</sup> that the state is obliged to improve public health as it falls under the right to life under Article 32 of the constitution. As well, the High Court Division held in *Saleemullah V. Bangladesh*<sup>4</sup> that the state is bound to protect the health and longevity of the people free from threats of manmade hazards. Again, Article 27 provides for equality before law and 28, for non-discrimination as well as Article 40 entitles a right to profession, occupation, trade or business which are also relevant in dealing with medical negligence case to establish accountability for the alleged professionals and to provide for adequate remedy or redress of grievances relating to medical negligence (Das, 2013).

Hence, it can be concluded that the concerned authority has a constitutional obligation to protect and ensure right to health and medical care through preventing medical negligence since right to life as fundamental right includes right to health and medical care for the patients. But this constitutional remedy through filing Public Interest Litigation has some limitations because it is difficult to establish how far a medical negligence case violates right to life as well as this remedy is really costly, time consuming and basically unfamiliar to the general public in Bangladesh (Sultana, 2019).

<sup>2</sup> 48 DLR, (1996) HCD 438, see also: *Ain o Salish Kendra Vs. Government of Bangladesh*; 19 BLD, (1999) HCD 489 where right to life has been construed in a wider sense to include right to livelihood which includes right to health, see also *Olga Tellis V. Bombay Municipal Corporation*, AIR 1986 SC 180

<sup>3</sup> 52 DLR 413

<sup>4</sup> (2003) 55 DLR 1

### 3.2.2. Criminal Liability under the Penal Code, 1860

Even, depending on the nature and culpability of the alleged act, medical negligence can also come within the purview of general penal law. A person can be incurred for criminal liability for medical negligence under couples of the sections of the Penal Code, 1860 including under sections 269 and 270 relating to likely to spread infection of diseases dangerous to a patient's life, under S. 304A for causing death to a patient by negligence, under S. 312 to 316 for causing miscarriage, injuries to unborn children and exposure infants as well as for allegation of cheating under sections 415 to 418 of the Penal Code, 1860 (Ranchhoddas, Keshavlal, & Chandrachud, 1997). Unfortunately, the penalties given under the penal code, 1860 for these medical negligence offences are much more insufficient and inadequate in proportion to the loss incurred to the victims. While it is found that the maximum punishment for most of these alleged offences is up to ten years imprisonment (exception in case of causing miscarriage without woman's consent under section 313)<sup>5</sup> even if death caused by negligent act of the alleged professionals<sup>6</sup> and minimum punishment is imprisonment for six months in case of negligent act likely to spread infection disease dangerous to life under section 269.

But eventually, section 88 and 92 of the penal code, 1860 absolves the offenders by giving one kind of immunity which narrows down the scope of criminal action against the concerned professionals. While section 88 and 92 of the penal code are based on doctrine of good faith and benefit which suggests if any medical practitioner or any person in service does any act for the benefit of the patients which causes injury to the person would not be considered as an offence. But absence of a specific standard to prove good faith (how far the act undertaken by the concerned medical practitioner would be beneficial to the patients) often leads the difficulties to prove a medical negligence case.

### 3.2.3. Civil Remedies under the Contract Act, 1872 and the Specific Relief Act, 1877

Medical negligence on the part of concerned person or authority in service is also backed by civil remedies in Bangladesh under the Contract Act, 1872 and the Specific Relief Act, 1877. Where an aggrieved person can legally claim compensation for damage caused due to the negligent act of the alleged person or authority under these laws, if there is a contract between the patient and the medical professionals or concerned authorities. Section 73 of the Contract Act, 1872 enunciates provision for compensation for the loss or damage caused by breach of contract. Moreover, the Specific Relief Act, 1877 also prescribes temporary and permanent injunctions under sections 53 and 54 of the said Act in case of breach of contract caused by the alleged professionals due to their negligent acts. But one of the limitations of the provision is that such compensation enunciated in the Contract Act, 1872 is not to be given for any remote and indirect loss sustained by reason of such breach of contract (Section 73). Another backdrop is often seen in most of the cases that there is no tradition of making contract between the patients and medical professionals or service providers which leads a realistic difficulty to establish a professional nexus between them. Nevertheless, the trends of signing a document of consent by patients before any surgery or operation absolves the alleged professionals from civil and criminal liabilities. Because if the patient dies in the Operation Theater (OT) due to negligence on the part of the medical practitioners, it becomes quite difficult to prove the civil or criminal negligence against the responsible person (Sulatana, 2019, p. 81).

### 3.2.4. Remedies under Other Relevant National Legislations and Policies

In addition to the above discussed national legal frameworks, there are also many other strong national legal instruments in Bangladesh which are enacted with a view to dealing the medical negligence and malpractices. These legal instruments significantly include Medical and Dental Council Act (MDCA), 2010, Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, the Code of Medical Ethics, 1991 and Consumer Rights Protection Act, 2009. But there is no single exhaustive legislation and policy which was found to specifically address the issue of medical negligence.

While Medical and Dental Council Act (MDCA), 2010 is one of the core legal tools to regulate medical professions which was enacted to provide for the constitution of a Medical and Dental Council, for regulating registration of medical practitioners and dentists (Preamble of the Act, 2010). The said act prescribes to constitute a Medical and Dental Council named as BMDC (mentioned in this study) which is authorized to remove the name of any registered medical practitioner or dentist from the Registration on account of professional misconduct (sec. 28). While section 25 of the said Act also enshrines punishment of Penalty for fraudulent representation or registration by any medical practitioner or dentist.<sup>7</sup> But the act is not exhaustive itself regarding dealing with medical negligence case as the said act does not define misconduct and medical negligence. Again, section 32 of the said act provides indemnity to the council or committee formed under this law in case of an act or failure which to be done in good faith. But the said act does not provide any criteria to establish good faith doctrine. It is also found that the power of BMDC is limited and the rate of investigation and undertaken action is few. It is also worthy to suggest that enactment of provision for establishment a tribunal to adjudicate the complaints against the medical practitioners would enhance effectiveness of the Act.

In addition to these laws, the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982 also deals medical negligence with remedial measures. This Act was enacted to regulate medical practice and functioning of private clinics and laboratories enshrined in the preamble of the said Act. The Act has incorporated provisions for

<sup>5</sup>Section 313 of the Penal Code, 1860 suggests that Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>6</sup>Section 314 of the Penal Code, 1860 prescribes punishment up to 10 years imprisonment in case of causing death of a woman with intent to cause the miscarriage. But if it is done without the consent of woman, then the punishment would be up to imprisonment for life.

<sup>7</sup>Section 25 of the Act lays down punishment of fine which may extend to Taka two thousand, or with imprisonment for a term which may extend to one year, or with both in case of fraudulent representation or registration by any medical practitioner or dentist.

prohibiting a registered medical practitioner in service of the Republic to carry on private medical practice during office hours (Section 4), determining and displaying charges and fees in private clinics (section 3,7), requiring license to establish private clinic (section 8,9,10). While section 11 of the Act enshrines that if any chamber, clinic or laboratory is found to have contravened any provision of the Ordinance, the Director General may recommend to the Government to debar the medical practitioner from carrying on private practice; or in case of clinic, may cancel the license; or in case of laboratory, may recommend to the Government to close down the laboratory. Moreover, section 13 has enunciated penalty of imprisonment for six months, or with fine which may extend to five thousand Taka, or ordering to forfeiture of all or any of the movable property in the clinic.

But there are some backdrops in the law as the law debars the victims of medical negligence to get redress from the court of law as section 14 lays down 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 on his behalf. Even, this Act does not prescribe any rights of the victimized patients including compensation clause in case of loss caused due to medical malpractice committed by the concerned professionals. Again, it becomes very difficult to implement the provisions of the ordinance due to continuous threat of strikes from doctors. In 2017, the Ministry of Health and Family Welfare suspended the four intern-doctors from the Shaheed Zia medical College Bogra on recommendation of a probe investigating alleged assaults, which resulted in intern doctors countrywide going on strike until the penalty was revoked (Countrywide Intern Doctors, 2017).

Bangladesh Medical and Dental Council has adopted the Code of Medical Ethics, 1991 which strives to set up guidelines and standards to be followed by the medical professionals.<sup>8</sup> This code has introduced penalty of the suspension or removal of the name of a Medical or Dental Practitioner from the Register for gross negligence as misconduct of his professional duties to his patient (Section 5(a) of the Code of Medical Ethics, 1991). The code is not exhaustive as it has not addressed standard of care that a doctor owes to patient. This code has just set some normative guidelines which are hardly found to be enforced by BMDC. Again, the code has only addressed some guidelines to be followed by the medical practitioners but has not described the rights of the patients. Moreover, there is no strong monitoring mechanism to check how far the medical professionals or authority complies the code.

The Consumer Rights Protection Act, 2009 also provides a legal forum of remedies for the victim patients in case of medical negligence. While if the concerned doctors or hospitals do not provide promised service in lieu of payment, the offender will be punished with imprisonment for a term not exceeding one year or with fine not exceeding 50,000 taka or both under section 45 of the Consumer Rights Protection Act, 2009. Medical service providers can also be prosecuted if there is negligence or intentional act or omission leading to endangering life and security of the patients under sections 52 and 53 of the Act. Section 66 of the act also provides for civil remedy for compensation, independently of any criminal case and under section 67, the civil courts are empowered to award compensation up to the sum equal to five times of the actual damage caused by the medical professionals due to such negligence. But the act does not completely address the issue of medical negligence at all. While section 2 (22) clearly provides that service means transport, telecommunication, water supply, drainage, fuel, gas, electricity, construction, residential hotel and restaurant and health services, which is made available to its users in exchange of price but does not include the services rendered in free of cost. Thus, the act does not provide remedies to the patients against the negligent acts of the professionals or authority of service in the Republic. The law only covers the rights of a consumer whose rights are infringed upon by purchasing medicine or medical goods; however, the complaint filing process by the consumer under this Act is very complex in nature (Ahmed, 2018; Akter, 2015). As an aggrieved person needs to take approval from the Director General in case of filing a complainant against the alleged authority on ground violation of consumer rights under the said act. Besides, the National Health Policy, 2011, the Vaccination Act, 1880, the Drugs Act, 1940, the Eye Surgery (Restriction) Ordinance, 1960, the Pharmacy Ordinance, 1976 are also wide legal forums to deal the issues of medical negligence with remedial measures.

#### 4. Judicial Activism for Preventing Medical Negligence in Bangladesh: A Critical Overview

The supreme constitutional court of the Republic of Bangladesh has entertained couples of Public Interest Litigation (PIL) cases regarding medical negligence cases where the court upheld that medical negligence is a criminal offence and it violates the constitutional right of people to get standard health services and medical care as well as violates the professional duties enshrined in the statutes (Moneruzzaman, 2020). While in the '*Doctor's Strike Case*'<sup>9</sup> the petitioner challenged the continuance strikes called upon by the govt. doctors, here the constitutional court observed this strike led to professional medical negligence and also upheld that these sorts of strikes bring results into failure to perform their statutory and constitutional duties to ensure health services and medical care to the general public. The court also emphasized that the willful absence of the doctors (BCS Health Cadre) cause a direct threat to 'right to health and life' of the general public (Dr. Mohiuddin Farooque V. Bangladesh & others, 1999).

Again, in the land mark case of *Medical Negligence-Private Clinics Case*<sup>10</sup>, while the petitioner impugned the failure of concerned authorities to perform their respective functions and legal duties to ensure proper monitoring of the private clinics under the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982. On admission, the Court issued a *Rule Nisi* upon the Government on 29.01.2006 to show cause as to why their failure to ensure compliance with the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982 in particular, Sections 8, 9, and 11 should not be declared illegal and without lawful authority as violation of fundamental rights under Articles 27, 31,

<sup>8</sup> The Code remains in force as per savings clause (Section 38(3)(a) of the Act of 2010.

<sup>9</sup> Dr. Mohiuddin Farooque V. Bangladesh & others, writ petition no, 1783 of 1999

<sup>10</sup> Ain o Salish Kendra Vs. Secretary, Ministry of Health and Family Welfare & Others, Writ Petition No. 624 of 2006.

32 of the Constitution and as to why they should not be directed to discharge their legal duties to ensure compliance with the Ordinance by taking appropriate steps (ASK Case,2006)<sup>11</sup>

Moreover, the Apex Court also upheld judicial pronouncement to clog on the rampant strikes by the intern doctors in different hospitals which leads denial of medical treatment to the already admitted, under-treatment and even to the emergency patients. On many occasions, such strikes led to death of patients.<sup>12</sup> Therefore, the Supreme Court of Bangladesh by observing the patients issued *Rule Nisi* in the case of '*Intern Doctors' Strike Case*'<sup>13</sup> on 30.05.2010, calling upon the respondents to show cause as to why their failure to take any action and to investigate the allegations of strikes called by the intern doctors in different hospitals across the country resulting in death of patients and deprivation of citizens from access to emergency health care should not be declared illegal, without lawful authority and unconstitutional; being in violation of the fundamental right to life including the right to health.<sup>14</sup>

Notably, a landmark decision was upheld by the High Court Division (HCD) of Bangladesh in a written petition of *Human Rights and Peace for Bangladesh vs. Ministry of Health & Others* that the denial of treatment by government and private hospitals or clinics resulting in the death of the patient would constitute a criminal offence (Moneruzzaman, 2020).<sup>15</sup> The HCD also issued 11 directives owing to rampant mismanagement of treatment in private hospitals during the rapid spread of COVID-19 in the decision including asking the Ministry of Health and Family Welfare (MOHFW) and Directorate General of Health Services (DGHS) to prepare a monitoring cell to ensure that private hospitals were duly providing treatment to all COVID and Non-COVID patients, to prevent private hospitals or clinics from imposing excessive bills for treating COVID 19 patients, asking the commerce ministry and Consumers Association of Bangladesh to fix the prices of oxygen cylinders, etc. (Moneruzzaman, 2020).

In addition to these, the judgment of awarding monetary compensation in case of medical negligence offence was upheld in October, 2018, while the HCD awarded compensation worth taka 1 million to each of the 17 victims who lost their eyesight following cataract surgeries at the Impact Masudul Hoque Memorial Community Health Centre, Chuadanga (Mashraf, 2019). This judgment has set a landmark judicial precedent in awarding compensation in case of tortious liability of medical negligence in Bangladesh.

Moreover, in case of *BLAST V. Secretary of the Ministry of Health & Family Welfare and Others*<sup>16</sup> in 2019, the HCD ordered the concerned authorities to formulate guidelines to prevent unnecessary Caesarian sections. The court ultimately issued a rule asking the authorities concerned to explain within four weeks as to why their failure should not be declared illegal. Furthermore, the HCD ordered them to come up with guidelines to prevent these unnecessary C-sections and submit that to the court within the next six months.

Notably, the landmark decision regarding ensuring emergency medical treatment for road accident victims and legal protection for those offering assistance to such injured victims was come in light in the case of *BLAST V. Ministry of Health & Others*<sup>17</sup> where the HCD asked the Ministry of Health to formulate and circulate guidelines on these issues to the hospitals via gazette notification and also asked the respondents why their failure to ensure emergency treatment should not be declared violative of fundamental rights guaranteed under the constitution. Notably, in 2020, the HCD issued a contempt of court rule against the Health Secretary and Director General (DG) of the Directorate General of Health Services (DGHS) in the Contempt Petition (H) 209/2020 asking why action should not be taken against them for their failure to comply with this order.

However, in the case of *Delwara Begum V. Dr. Md. Surman Ali*,<sup>18</sup> the High Court Division ordered the Chief Metropolitan Magistrate, Chittagong to proceed with the case against the accused after the trial court discharged him in a case of medical negligence. The HCD also noted in its decision that the trial court had discharged him without applying judicial mind to the materials on record.

Finally, there are other cases relating to medical negligence but the notable precedents have been mentioned in the study. At same time, it is found that the judicial development establishing medical negligence with providing remedies are really few. However, these landmark judicial activism's role played by the supreme court of Bangladesh conveys a judicial sanction to the medical professionals and concerned authority to prevent medical negligence offence leading to rampant violation of the rights of the victims. But in the most of the cases, it is seen that the government is unwilling to formulate and implement the directives given by the Supreme Court regarding preventing medical negligence. But the judicial activism role of the Supreme Court regarding upholding the guidelines and directives to prevent medical negligence is also a positive sign but it is also expected that the government and other related stakeholders will formulate and implement all of the directives upheld by the Supreme Court of Bangladesh.

<sup>11</sup>The matter is still pending before the HCD.

Available at [http://ww3.supremecourt.gov.bd/web/case\\_history/case\\_history.php?div\\_id=2&case\\_id=219345](http://ww3.supremecourt.gov.bd/web/case_history/case_history.php?div_id=2&case_id=219345)

see also ASK's Report (2013)

<sup>12</sup> For instance, in 2008, a three-day long strike of intern doctors at MAG Osmani Medical College Hospital, Sylhet resulted in death of total 34 patients (Sangbad, 08.04.2008 and 09.04.2008). This is only one instance among many other similar incidents of strike or agitation of intern doctors and consequent death of patients. See Ain o Salish Kendra (ASK), 'Report on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective', (March-April 2013), p.59

<sup>13</sup>Ain o Salish Kendra Vs. Bangladesh and others, Writ Petition No. 4319 of 2010

<sup>14</sup> The last hearing of this writ petition was held in 24.10.2011 and the matter is still pending.

See [http://ww3.supremecourt.gov.bd/web/case\\_history/case\\_history.php?div\\_id=2&case\\_id=296384](http://ww3.supremecourt.gov.bd/web/case_history/case_history.php?div_id=2&case_id=296384)

<sup>15</sup> The directive was upheld on 15<sup>th</sup> June, 2020 by the Virtual bench of HCD consisting of Justice M. Enayetur Rahman. See also M Moneruzzaman, 'Denial of Treatment Resulting in Death a Crime: HC', New Age, Bangladesh, June 15, 2020, last accessed on 13<sup>th</sup> February, 2021.

Also available at <https://www.newagebd.net/article/108474/denial-of-treatment-resulting-in-death-a-crime-hc>

<sup>16</sup>Writ petition No. 7117 of 2019

<sup>17</sup>70 DLR (2018) 833

<sup>18</sup>70 DLR (2018) 766

## 5. Challenges and Gaps in the Prevalent Legal Regimes of Bangladesh

Despite having different ambits of national legislations and policies dealing with medical negligence in Bangladesh, the matter of medical negligence issue is swimming in the grey area in the legal regimes due to absence of codified law on this issue and different gaps of laws. The prevalent gaps and lacunas of the existing legal frameworks in Bangladesh dealing with medical negligence are stated below:

### 5.1. Absence of a Comprehensive Legislation

Though there are numerous laws and policies dealing with medical negligence in Bangladesh, there is no specific codified enacted law in Bangladesh which would define and determine the legal nature of medical negligence, standard of care and diligence. Even it is hard to find any comprehensive law on this issue which can exclusively determine the extents of liability of the alleged person(s) in case of medical negligence offences. It is also seen that the victims have to file several litigations since the forum of remedies for medical negligence are scattered which also causes multiplicity of suits and creates procedural complexities.<sup>19</sup>

### 5.2. Gaps and Anomalies in the Prevalent Legal Remedies

Despite having a number of constitutional provisions and national legislations, the vibrant presence of numerous inconsistencies and gaps in these laws leads a failure to provide proper remedies in the cases of medical negligence. For Example, constitutional remedy provided in the constitution of Bangladesh sometimes is challenging to prove and time consuming to get. As enforceability of right to health as FPSP is still now a matter of debate and resource limitation in case of enforcement of this right is also a common justification to avoid enforcement of this right. Again, it becomes difficult to establish that right to health falls in the corpus of right to life. As well, filing Public Interest Litigation (PIL) is still unknown to the majority of the people in Bangladesh and sometimes, the procedure is time consuming and complex in nature. Again, in case of criminal remedies, the relevant legislations are insufficient and contradictory itself. For instance, though criminal action can be brought under several provisions of the Penal Code, 1860 as discussed in the study, but other sections (section 80 and 88) of same law expressly leave an undefined and unshaped area of private defenses for doctors accused of criminal liability. Such gaps and anomalies are also seen in case of laws providing civil remedies while the civil court provides compensation and other remedies to the victims only in case of breach of contract between the patient and alleged professionals. Thus, the pre-existence of contract between the parties is a *sine qua non* for claiming civil remedies which is rarely found in Bangladesh (Akter, 2013).<sup>20</sup> Further, the rate of filing civil suit in case of medical negligence case are frustrating due to complexities of procedural laws, expensive litigation costs, lengthy court proceedings and inefficiency of the court administration that mostly remained this remedy as an unexplored avenue in seeking remedy for medical negligence (Das, 2013).

Again, under international human rights instruments, Bangladesh has a legal responsibility to fulfill, protect and promote right to health for the citizens. Thus, it is also a human right of the citizen to get right to health services free from medical negligence. But the insufficiency of laws and gaps in laws dealing with medical negligence cases in Bangladesh simply imprints state's failure to fulfill core obligation of ensure right to health under these international human rights instruments.

### 5.3. Lack of Expertise Skill and Knowledge of Judicial Officers in Deciding Case

There is an unparalleled debate arising who will decide the issues of negligence as the judicial officers are trained to handle only traditional civil and criminal issues where medical negligence cases are of special in nature that needs to be determined with additional expertise knowledge and skill. Again, if the doctors are empowered to determine the extent of liability for negligence, it will clearly go against the 'principle of biasness'. Here, a striking balance between the expert's opinion and that of the court may solve the conundrum (Billah, 2013).

### 5.4. Dilemma to Establish Medical Negligence Case

Burden of proof regarding negligence issue goes on the shoulder of the complainant and the failure by the complainant to establish the allegation of medical negligence against medical professionals results no legal remedy and dismissal of the claim (Sidhraj Dhadha Case, 1994). But it is a simple tragic tale with upright truth that it becomes extremely hard to establish medical negligence by the complainants due to the technicality of medical issues, extreme reluctance of the doctors or hospital authorities to produce material documents of the patients, declination of doctors to provide information against their colleagues and lack of the knowledge of judges and lawyers on medical science (Akter, 2013).

### 5.5. Absence of Effective Monitoring Bodies

The legal avenues of Bangladesh do not provide any strong monitoring body which will check and monitor the medical practices and prevent medical negligence and absence of strong monitoring body is also responsible for increasing medical negligence in Bangladesh (Sultana, 2019, p. 86). While the Bangladesh Medical and Dental Council Act, 2010 provides BMDC authority to regulate the medical practices subject to some limitations. In case of professional misconduct

<sup>19</sup>For instance, taking criminal action against the alleged doctors under the Penal Code, 1860 does not ascertain the compensation to the victims but it only ensures the punishment for the accused. While to ascertain compensation for the loss caused by the alleged professionals, the victim has to choose other forum of remedy as to file a civil suit which simply leads to multiplicity of suits. Thus, such sort of problem is only happened due to vacuum of an exhaustive and codified law on medical negligence issues.

<sup>20</sup> Again, generally to file a suit in a court needs a large scale of money along with higher fees which is not affordable by the poor litigant in Bangladesh. That's why victim often does not seek assistance from legal procedure.



or negligence, under section 28, the BMDC has power to take disciplinary actions only against registered practitioners but it has no authority to take actions against the unregistered medical practitioners. Even the rate of taking action against the medical practitioner in case of misconduct is really low. In most of the case, the authority escapes from its responsibility either by warning or mere criticisms (Sourav, 2017). Moreover, the Director General of Health is empowered to monitor the medical practices of the private clinics or laboratories which is also hardly found to be monitored.

#### 5.6. Non-Compliance with Judicial Directives

Time to time, the judiciary of Bangladesh either upholds fundamental directives or asks the concerned authority to formulate relevant guidelines in terms of ensuring easy access to medical services and preventing medical negligence. But surprisingly, it is seen that the concerned authority is found in most of the cases to be reluctant either in implementing the directive upheld by the court or formulating the guidelines.<sup>21</sup> In the same way, the directives upheld by the apex court are rarely found to be formulated as a shape of act by the legislature body in Bangladesh. If the directives of the court are to be properly enacted and implemented by the implementing body, the rate of medical negligence would be expected to be much less in Bangladesh.

#### 5.7. Lack of Multi-Stakeholders Dialogue in Making Medical Laws or Policies

The most significant portions of shortcoming in our legal avenues dealing with medical negligence are found due to absence of dialogue with multi-stakeholders who are practicing and dealing with medical practices as well as taking medical services. Before enacting any law or formulating any policy, most of the cases, experts' opinion, consultation and guidelines given by the multi-stakeholders including practicing medical professionals, BMDC, medical association and victims are not taken into consideration. Even sometimes, the directives upheld by the court of law are rarely found in formulating new policy or enacting law. Since, the dimension and corpus of medical negligence in special and technical in nature, in this case, the expert opinions and multi-stakeholders dialogue with all relevant authorities will help to make an effective and exhaustive law on this field.

Moreover, the flexibility of torts law, gaps and lacunas of the prevailing laws, lack of strong case precedents and jurisprudence on medical negligence issue simply imprints a cloud of uncertainty in dealing such sort of overwhelming malpractice and that should urgently be dispelled by enactment of codified legislations and judicial activism.

### 6. Confronting Medical Negligence: WayForward

Therefore, it can never be denied that medical negligence is one of the significant problems in Bangladesh that causes frequent violation of constitutional and statutory rights which urgently need to be addressed with effective redress. Lack of an exhaustive law on medical negligence, gaps and lacunas in existing laws, weak monitoring system, difficulties in proving medical negligence case, incompetency of judges, lawyers and other stakeholders dealing with the case, etc. analyzed in the study are mainly responsible for medical negligence offence in Bangladesh. Thus, the durable ways forward for properly addressing and confronting medical negligence offence in Bangladesh are given as follows:

- To address and prevent medical negligence in Bangladesh, a specific and exhaustive legal code on medical negligence should be enacted. As the prevalent legal avenues of Bangladesh are not sufficient and effective to address and confront it. Therefore, enactment of a codified and specific law with incorporation of provisions defining medical negligence, demarcating its nature and corpus as well as setting up a standard to determine the liability of a person in case of medical negligence puts an indispensable urge to properly address. Enactment of such legislation should also provide adequate and practicable remedies to the victims including penal punishment and compensation. In this case, the instance of the redress provided in the UK for medical negligence can be taken into consideration includes an offer of compensation, explanation, apology and report of action to prevent similar occurrences (Section 3 of the NHS Redress Act, 2006).

Again, the new medical negligence law should also incorporate provisions with specific inclusion of the patient's rights and responsibilities of the medical professionals in case of medical negligence occurrences. Moreover, Bangladesh Law Commission suggested to form a committee consisting of doctors, experts and citizen representatives in order to enact a comprehensive separate code on medical negligence with efficacious legal remedies (Bangladesh Law Commission, 2013, p. 8). In addition to these, to ensure effective prosecution of medical negligence cases in Bangladesh, the existing scattered laws should be revisited, gaps and lacunas of these laws should be analyzed and there should be brought necessary reformation to these laws through a policy advocacy with the concerned stakeholders including medical professionals, the victims, Bangladesh Medical Association (BMA), BMDC, Bangladesh Law Commission, Ministry of Health and other related non-government stakeholders.

- Besides, the existing complaint mechanisms and monitoring bodies under the legal avenues should be revised to make the mechanisms more effective and easier in order to provide easy access to the remedies to the victims in case of medical negligence case. For instance, to file a criminal litigation in case of violation of rights under the Consumer Rights Protection Act, 2009, the cumbersome provision of taking approval from the Director General needs to be revised.<sup>22</sup> And there should be a public complaint box under the BMDC while the BMDC will enquire the complaint submitted in the box

<sup>21</sup>In *BLAST V. Secretary of the Ministry of Health & Family Welfare and Others*, (writ petition no. 7117 of 2019), the Supreme Court of Bangladesh in 2019 asked the Ministry of Health and other authority to formulate guidelines to prevent unnecessary C-sections and to submit it within 6 months which has not been still come into light.

<sup>22</sup>Section 60 of the Consumer Rights Protection Act, 2009 lays down that no complaint relating to violation of consumer rights under this Act shall be accepted if it is not lodged to the Director General within 30 days of accrual of the cause of action.

and take disciplinary actions against the alleged professionals or authority if the complaint is proved. In this case, the BMDC is reasonably expected to act in compliance with 'rule against biasness' as the rate of taking actions against their own colleagues in case of such negligence incidents are very few. Furthermore, provision of debarring legal proceeding against an act of the BMDC or any committee constituted under the BMDC Act, 2010 which is done under good faith, should also be revisited and the circumstances signifying the acts under the good faith should specifically be demarcated in the amended law.

The power of BMDC under the Bangladesh Medical and Dental Council Act should be enhanced and it should be empowered to provide compensation to the victims in case of medical negligence in addition to take the said disciplinary actions under the act. Again, under the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, a strong monitoring body should also be formed to frequently monitor the private clinics, hospitals or laboratories whether they are found to have complied with the provisions of the Act.

- As the number of incidents of medical negligence are increasing day by day in Bangladesh and the traditional courts are not too much expert and sufficient in dealing with these cases as being technical nature of the case, therefore, setting up a specialized tribunal namely 'Health Tribunal' or empowering any criminal court as 'Health Court'<sup>23</sup> in each district can be an effective mechanism to prosecute the medical negligence case. And, this court or tribunal should be characterized by trained adjudicators, expert prosecutors, independent expert witnesses, predictable damage awards (Akter, 2013, p. 77). As well, there should have a distinct investigation body under the court or tribunal consisting of medical experts and members of law enforcing agency which will closely and independently investigate the medical negligence complaint filed and submit the report before the said court or tribunal.

Besides, there should have an alternative dispute resolution mechanism under the court such as inserted in the Code of Civil Procedure, 1908 while the complaint lodged before the court is to firstly approach to the 'Medical Dispute Resolution Body' which will take attempts to resolve the case with taking reports and expert opinions submitted by the investigation body discussed here and if the resolution body fails to resolve, then the matter should be forwarded to the specialized court or tribunal. If this is happened, it will minimize the overburden of the cases and ensure practicable remedies within the shortest possible of time.

- Moreover, since the proof of medical negligence is often seen to become more difficult due to technicality of its nature as well as reluctance of the concerned doctors or authority to provide relevant documents. Therefore, amendments should be made in the Medical and Dental Council Act 1980 inserting the provision imposing duty on the physicians to maintain and preserve medical records and make them available to the patients or his relatives when requested (Akter, 2013).

- The Apex Court of Bangladesh can play a horizontal role through its judicial precedent by ruling against the alleged medical authority to prevent medical negligence as well as awarding compensation in case of medical negligence case. Though it is positive sign to get the judicial precedents on these issues as discussed in the study, the sketch of failure of concerned authority to formulate and implement guidelines in preventing medical negligence signifies to some extent state's failure to ensure constitutional right to health and medical services. Thus, it is expected that the judiciary of Bangladesh would be much more positive in awarding monetary compensation to the victims in medical negligence occurrences and the administrative authority would show its responsibilities through formulating and implementing guidelines and directive upheld by the apex court of Bangladesh. Again, the apex court is expected to play a significant role to apply and develop tort laws in ensuring constitutional and statutory right to health and to prevent medical negligence in Bangladesh.

Finally, to prevent medical negligence in Bangladesh, awareness programs on the duties and responsibilities of medical professionals and providers, medical ethics should be enhanced more. In enacting or reforming laws, medical and professional ethics should be given highest priority and these should be preserved and upheld by all of the concerned professionals dealing with medical services. Lastly, the recommendations of Bangladesh Law Commission regarding enacting laws on medical negligence should also be taken into consideration.

## 7. Conclusion

The relationship between patients and doctors are the generous, unique and privileged nexus standing on mutual trust, faith and confidence, where it is reasonably expected that doctors will treat their patients as friends but not their consumers of the medical negligence offence (Loewy, 1994, p. 52). Besides, the medical professionals or service providers have legal obligation to render medical services with exercising their highest diligence and care under the international and national legal frameworks in Bangladesh which have been shown in the paper. But it is also found in this study that the prevalent legal frameworks are inadequate and inefficient to properly address and effectively prosecute the technical and extended dimension of medical negligence in Bangladesh. As neither the present legal avenues are exhaustive nor free from loopholes and anomalies to properly prosecute the case with effective legal remedies which has also been demonstrated in the paper. In that case, enactment of a codified and specific law on medical negligence offence through revising of the existing scattering laws and policies can open a horizontal legal tool to properly address that offence with efficacious legal remedies. Before enacting new legislation, policy advocacy with the concerned multi stakeholders should be given priority. In addition to these, the directives upheld by the supreme court of Bangladesh in terms of confronting

<sup>23</sup> The concept of 'Health Court' has been launched in U.S.A in early 1990s by Judge Goodman's and now it is estimated that more than 150 health courts are being expanded in the U.S.A. In UK, it was launched in 2009 in response to review of people responsible for criminal justice system. See Health court - Wikipedia, the free encyclopedia, Available At [www.google.com/en.wikipedia.org/wiki/Health\\_court](http://www.google.com/en.wikipedia.org/wiki/Health_court) Accessed on 24th February 2021

medical negligence in Bangladesh should also be taken into consideration in case of both bringing reformation in the existing laws and making new legislation. The complainant mechanisms should be brought into reformation and these must be seen to be strong and active. Again, Bangladesh Medical and Dental Council should be much more vigilant and active. Besides, establishing a 'Health Tribunal' or empowering any criminal court as 'Health Court' in each district and a separate investigating body consisting of medical experts under this court or tribunal may be an efficient mechanism to prosecute the medical negligence. It is also expected that the court of Bangladesh will be much more positive in application of tort laws and strong development of inclusive case precedents. Furthermore, ethical medical jurisprudence should be developed much more and expected to be practiced and preserved by the medical professionals. Therefore, it is also remarked that the concerned authority will take into consideration of these issues in making or reforming laws not only to effectively redress the offence but also to preserve faiths, confidences and trusts of the people on the medical profession.

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