



Review Article

Pragmatism for Biomedical Laws of Bangladesh

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<https://doi.org/10.62865/bjbio.v14i3.75>

Abstract: Pragmatism is a school of moral philosophy, and of contemporary in origin, comparing to the other schools of moral philosophy. It evaluates the action based on the practical applicability and relevance. Pragmatism can, therefore, be useful to make a law that govern the society contemporary and relevant for the constantly changing world. Biomedical laws in particular are needed to correspond to the changing standards and good practices in tandem with their advancements. This paper will assess from a pragmatic point of view, the efficacy of the biomedical laws of Bangladesh.

Keywords: Pragmatism, biomedical laws, philosophy, bioethics, Bangladesh.

Introduction: According to William James, what pragmatism considers “probable truth” is contingent upon any particular approach or theoretical notion fitting in with each aspect of life and not being wholly to create a grim melee of contesting ideas, hence, pragmatism is open to new “solutions and conveniences” to solve a problem to achieve the most desired result¹. Richard Posner stated that, “the basic problem is that pragmatism is more a tradition, attitude, and outlook than a body of doctrine; it has affinities rather than extension”². It is our contention that it does not necessarily mean that it will adhere to any one particular

concept, rather will focus on the multitude of aspects presented by everyday life and adopt a case-by-case approach. This type of approach has also been called pluralism³. Pragmatism conditionally places the utility, efficacy, and acceptability of any theory, belief, or construct on its ability to adapt to or apply to the real world⁴. In other words, pragmatism focuses on the practicality of a theory in terms of it being functional in practice. The concern of pragmatism thereby encapsulates the connection between theory and reality. Pragmatism can also be used to assess the utility of laws. In the biomedical sector,

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laws are crucial to formalize healthcare and biomedical research standards and establish a mechanism for the progressive development of such standards⁵. Biomedical laws, thus, are crucially required to share a linkage with the real world to ensure that the standards set forth are reflective of real-world practices. For example, the Mental Health Act 2018 of Bangladesh (to be discussed later in this paper) in comparison with the Mental Health Care Act 2017 of India⁶ does not contain any provisions concerning the “privacy of patient data” and “measures for making a complaint” concerning shortcomings in the mental healthcare services. Another appropriate example would be the Safe Blood Transfusion Act 2002⁷ “erroneously” stating the *ideal temperature for maintenance of blood cold chain higher than the established standard*. This paper, through the lens of pragmatism, will focus on the biomedical laws of Bangladesh and assess their practicality.

Methodology: This research paper was developed at the Department of Law, University of Dhaka by a team of legal scholars with a background in bioethics and biolaw. The research for this paper was conducted during the period of 2022-2023, from the start of the work to the final submission of the manuscript for publication. Google Scholar, HeinOnline, BDLaws (Laws of Bangladesh) were the preferred search engines and websites consulted. Pragmatism, biomedical laws, philosophy, bioethics, and Bangladesh were the possible keywords for retrieval of the literature. This paper, from a “pragmatic point of view”, evaluates the efficacy of the biomedical laws of Bangladesh. The conclusion and assessment of the laws of Bangladesh from a pragmatic point of view, are the strengths of this paper.

The Law and Pragmatism: William James, presenting pragmatism as a “mediating philosophy” said it is a “method for settling metaphysical disputes that might otherwise be interminable”⁸. He further defined pragmatism as a fact-supremacy discipline where facts form the core of pragmatism and are “the seat of authority”⁸.

However, Charles Sanders Peirce identified pragmatism as the principle that gives primacy to practicality. According to Peirce, pragmatism takes into consideration a “theoretical judgment” conditional upon or only when such judgment is capable of enforcing “a corresponding practical maxim”. In other words, the theoretical judgments’ practical applicability rather than its theoretical implications, is the focus of pragmatism⁹. Peirce further states that the ambit of pragmatism encompasses adapting our general knowledge which in turn will influence our morals resulting in our morals being attuned to practicality⁹.

The law in its nature is “vague” and requires “contextualisation” in a given case. Legal provisions can not be formulated to describe any specific anecdotal evidence because the very nature of the *legal language is expansive and ambiguous to allow future incidents to be accommodated*. Assumed instances can be included as “illustrations” but that can not be the core provisions of the Act. The legal provisions of an Act are *interpreted to fit into a particular circumstance*. For example, though there was no specific law on violation of COVID-19 containment rules mandated by the Government, the Penal Code 1860 could still be applied. The lead author of this paper Dr. Arif Jamil witnessed that the Mobile Court had fined Awake Coffee, Bashundhara, Dhaka, Bangladesh, under Section 269 of the Penal Code 1860¹⁰ for remaining open in violation of COVID-19 containment measures. The “general” character of the law is intended to encompass and interpret unforeseen circumstances; because technological development allows humans, i.e., the agents of the society, to behave in an uncontrolled manner by circumventing the specific provision of a law. Therefore, the law can not be “specific” but it can be intelligently formulated, i.e., drafted, to serve any particular purpose.

Therefore, the job of the legislator is to find the right framework embodied in proper expression that captures the technological progress and keeps the society engaged, relevant, and functional. We contend that to maintain order and right balance while

reflecting some of its (society's) expectations by accommodating the minority (religious, ethnic, cultural, and sexual), the legal texts have to be holistic, pragmatic, fluid, and philosophically sound.

Nevertheless, the law can be appropriate and relevant for the moving affairs of life and hence, required to maintain order among the agents of the society. However, law can be redundant, if the application withers with the dying technology and “forgotten behavior of the past” of the agents of the society. The law can be poorly drafted without philosophical justification or driven by a poor understanding of the literature. Law can also be repressive aimed to control, manipulate, or oppress any target group of society. A balanced piece of legislation must take into account its justification (justify the ramifications) i.e., fairness and equity, utility (benefits), and rationale (logic) for it (Figure 1). John Dewey¹¹ posited that reality is always in a state of fluidity and that an ideal loses its value if it is isolated from the actual. Similarly, the law and the standard that it establishes can neither be secluded from nor ignorant of the changing “realities”.

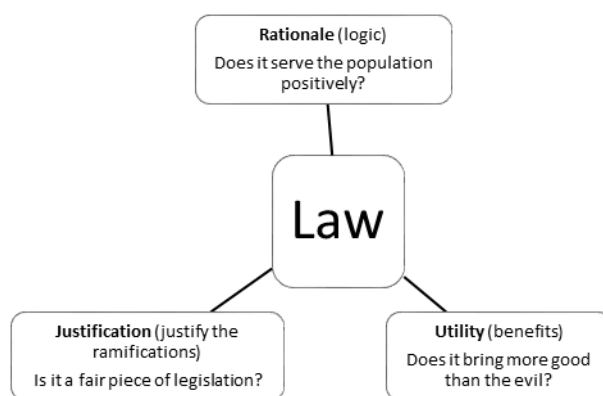


Figure 1: A balanced piece of Legislation

However, the actual distinction between the “legal” and “moral” is a practical one. The judge and jury go as far into the motives and inner workings of criminals as the knowledge of psychology will allow. The history of judicial proceedings may show that the standard of judgment experienced changes continually. The relation of “law and equity” is a good illustration here. Law is the aggregation of several centuries of accumulated text. The

“exercise of discretion” and “conscientious judicial response” find their justification in equity. But after a while, what was equity becomes law, and this is but a continual narrowing of the distance between “legal” (enacted law) and “moral” (support stemming from the equity). Hence, the “moral” is a complete insight into the act of man; the “legal” is not. Therefore, the law is the formulation of the insight of the previous period¹¹.

From Figure 1, it is important to include in the discussion that the purpose of the law and equity is the same: doing justice. While the term “equity” can be a tool of wrong application (e.g., instead of claiming “gender equality”, advocating for “gender equity”), the law can also be misinterpreted. The legal system of Bangladesh is adversarial and the provisions of law allow both the parties to contest arguments in their favour. The linguistic fluidity and ambiguity of the law allow parties to manipulate and interpret the language in their favour to fit their narratives. However, the “equity and discretionary power” allows the Court to find a balance or draw logical conclusions to make a judgment that is deemed “right” on the one hand and believed to “serve the ends of justice” on the other hand. Furthermore, the schools of “moral philosophy” works as a justification for the “attitude” of the legal provisions and Pragmatism is one of the most contemporary, useful, and fluid schools of moral philosophy that can allow the law to be customised to serve justice in evolving new reality.

Richard Posner in an attempt to clarify the concept of pragmatism, similar to William James, posits that at the heart of pragmatism, lies “action”² based on “facts and consequences”² rather than “conceptualisms, generalities”² or flowery talks. Posner acknowledged William James’s efforts at defining pragmatism while noting the complexities surrounding the very definition of the idea of pragmatism². He further clarifies that the pragmatic outlook focuses on the “experimental method of inquiry”², that supports the culture of “trial and error”² involved in scientific experimentations to reach the best probable outcome.

Law and Bioethics: Bioethics as a driving force for biomedical legislation for a population should be built on multiple foundations. Among them, one important foundation is the philosophical justification for the enactment of a particular law¹². The law can be enacted subsequent to the occurrence of the incident (narrow and can be targeted, hence, carries the possibility to be repressive) and it also can be enacted while experiencing certain patterns considering future possibilities (wide and the future incidents are unknown). The latter case requires the law to be flexible and accommodative in language that allows further interpretation. An ideal piece of legislation has to be wide enough to allow the words to be interpreted in a future context so that the piece of the Act does not become irrelevant with time. Pragmatism may allow the words to play with the unforeseen context. Pragmatism is one of the many philosophical schools that is very useful in biomedical legislation.

Pragmatism for Biomedical Laws of Bangladesh: How Pragmatic are the Laws of Bangladesh? This part of the writing analyses the biomedical legislations of Bangladesh and tests their practical utility.

The Bangladesh Homeopathic Practitioners Ordinance, 1983: A registered practitioner is required to abide by the Code of Ethics for practitioners framed by the Bangladesh Homoeopathic Board and approved by the Government¹³. However, the Bangladesh Homeopathic Board failed to provide any such code of ethics on their website¹⁴ though they have the Code of Ethics.

Moreover, the Ordinance says no medical practitioner shall sell, stock, or prescribe any medicine or drug that is not included in the Homoeopathic Pharmacopoeia¹³.

It indicates that the measures were taken based on the apprehension that otherwise unproven therapies may cause abuse to the patient population. It is a holistic approach, in other words pragmatic, but in a few cases, it was seen that the apprehension of fake medicine and non-trained and inexperienced professionals making wrong diagnoses and wrong treatment is also a major concern for

many patients¹⁵. As the regulatory affairs (the legal framework on “patient care” is developing in recent times¹⁶), may not effectively address all the cases, the issue of “wrong treatment and grievances of the patients”, “professional malpractice or mishandling of professional capacity”, “violation of treatment protocols” and “negligence” remain a concern in general, for the healthcare. However, one important question here is: who goes to a homeopath? We believe, two types of people, i.e., 1, patients who have experienced conventional medication failure, and 2. patients who belong to low-income groups because the cost of homeopathic therapy is relatively cheaper than the cost of the therapy at conventional clinics and hospitals. The authors’ experience tells us that patients belonging to low-income groups in Bangladesh are also not highly educated and, therefore, cannot often verify the accuracy of the homeopathic drugs and treatment protocol and can not effectively address the issue of adverse side effects.

The Eye Surgery Restriction Ordinance, 1960: The preamble of this Act provides that it is promulgated to prevent eye surgery on patients by persons other than registered medical practitioners¹⁷.

The performance of eye surgery with or without the consent of the patient by a person not being a registered medical practitioner is criminally punishable¹⁷. Any person who holds himself/herself out as a registered medical practitioner while not being one, as practicing, or prepared to practice eye surgery shall be criminally liable¹⁷. This Act prevents the performance of eye surgery by persons not being registered, as medical professionals. However, there may be reported few cases of incidents in rural areas of Bangladesh, where surgeries including eye surgery are performed by traditional practitioners commonly known as “*hature dactar*” claiming to be or not having proper medical degrees at all or without having proper know how that resulting in post-operative complications and. that caused them severe harm¹⁸. This law provides an overarching framework to delimit who can and who cannot perform eye surgery to prevent surgery by non-medical professionals. This Act

is pragmatic in the sense that it is aware of the practice of surgery by fraudulent individuals in Bangladesh and provides a framework to prevent it.

The Medical Practitioners and Private Clinics and Laboratories (Regulation) Ordinance, 1982: Under these sections¹⁹, charges for medical procedures in private clinics and private medical practices have to follow the schedule specified in the Act. Furthermore, the fees payable for these procedures should be displayed in a visible location at the facility¹⁹. However, visibility of fees is not seen in the case of some of the private clinics¹⁹ (personal experience). Therefore, private medical service providers increase their fees and charges unless the Government intervenes. For example, during the regular examination, a patient might pay a certain amount of fees. But as a COVID-positive patient, S/he might get a discount (personal communication) which was likely to be negotiated by the Government as an extraordinary measure. Usually, the price control mechanisms are not there in private healthcare facilities. In Bangladesh, there is a Competition Commission to look after and control the anti-competitive behavior of the dominant producer of goods and services under the Competition Law of 2012²⁰. Moreover, fees vary among private healthcare facilities. Some of their sample collection rooms might not be as hygienic as the health facility is expected to be. The absence of uniform medical fees may contradict the spirit of the Constitution of Bangladesh because such variation is a clear embodiment of the healthcare disparity²¹.

Moreover, the following conditions¹⁹ have to be fulfilled to get a license to establish a private clinic:

1. proper hygienic accommodation;
2. at least eighty square feet of floor space for each patient;
3. air-conditioned operation theatre;
4. an adequate supply of life-saving and essential medicines;
5. specialists for the operation, treatment, and supervision of patients;

6. number of full-time registered medical practitioners, nurses, and other staff as specified in Schedule C;

While the criteria mentioned here are laudable, they are less seen in action. Even the A-listed hospitals, public or private, may not be able to offer all the facilities of the book. This Act provides an aspirational regulatory framework but often fails to survive the practical tests as evidenced by the litany of violations of the provisions referred to above. Thus, from a pragmatic and preventive perspective, this Act is inadequate; its only utility lies in reactive measures after the violation has already taken place.

The Allopathic System (Prevention of Misuse) Ordinance, 1962: Persons who are not registered medical practitioners shall not perform any surgical operation. However, circumcision, incision of boils, and injection administration can be done under section 5 of this Act.

The law also says no person²² other than a registered medical practitioner or person authorized by the Government shall prescribe any antibiotic or drugs with possible adverse reactions. For example, the High Court Division of Bangladesh on October 12 issued an order¹⁶ addressing the prevention of unnecessary c-sections and giving instructions to hospitals to maintain documentation so that violations of the procedure can be addressed upon receiving complaints from the patients.

Law also said that no sale of medicine of *unani*, *ayurvedic*, and *homeopathic* origin is permitted under section 7 unless the container specifies the ingredients in the outer layer of it.

Contravention of the provisions leads to the constitution of criminal liability. However, how far are these provisions followed? What expertise do the numerous pharmacies around the country have, to prescribe drugs, as is done so often?²³ This phenomenon can be experienced in remote locations where there is a dearth of qualified medical practitioners. In most of the drug stores, practically one can buy any medicine without a prescription. One may witness traditional practitioners removing

the teeth or cleaning ear wax of people in heavily crowded urban areas of Bangladesh. If it is not a branded pharmacy located in an important place, we recommend the patients to check the expiry date of the medicine. In Bangladesh, one may find a persistent culture of ignorance and indiscipline in health-related matters. It is also hard to implement perfect health standards for the “resource constraint societies” overwhelmed by scarcity.

The Human Body Organ Transplantation Act, 1999: The Act defines a Cadaveric state²⁴, as when a human body with a functional heartbeat is declared by a registered medical practitioner as brain dead and the organ functionality of such human body is preserved for organ transplantation. Organ donation by a living human being a person who is healthy and of sound mind can donate his/her organs for transplantation to her close relatives conditional upon such transplantation not impeding his/her normal life-functions. However, under section 3, for donation or detachment of skin, tissue, bone marrow, or eyes, the donation is not limited to a close relative²⁴. Hospitals are required to perform organ transplantation with due informed consent of patients and donors as prescribed by the Government²⁴.

The organs of voluntary donor may be detached for transplantation who has been declared brain dead and permission for transplantation has been obtained from his/her legal heir and the District Commissioner²⁴. Section 2(2) of the Human Body Organ Transplantation Act 1999, establishes a hierarchy in terms of legal representative of the donor. The section establishes the hierarchy in the following order, the husband, wife, children of age of majority, parents, and then other relatives of the age of majority as legal representatives of the donor. However, the Human Body Transplantation Act has been updated in 2018²⁴. It allows organ donation can be obtained from distant relatives. Verification by the concerned authority must be done to make sure that the person authorizing has had an “emotional and sentimental bond” with the brain-dead person whose organs will be extracted for donation. A

clinical psychologist may be engaged in the process. Despite providing an elaborate framework, one may consider that this Act has failed to achieve the desired impacts with organ donation; the abuse and malpractice surrounding the organ transplantation being rampant in Bangladesh confirmed by accounts from several sources²⁵ and studies²⁶. Economic realities and convenient availability may have an association with abuse and malpractice surrounding organ transplantation issues²⁷.

The Safe Blood Transfusion Act, 2002: The purpose of the cold chain⁷ is to preserve the blood and blood components at an ideal temperature. Section 2 prescribes the ideal temperature as +20 to +80 degrees Celsius. However, per international practice, the ideal conservation temperature for the blood cold chain is from +1 to +6 degrees Celsius and between +1 and +10 °C during transportation²⁸.

The National Safe Blood Transfusion Council is tasked with protecting the human body from blood-related diseases, prescribing safe blood transfusion procedures, etc., amongst other functions.

However, this Act is devoid of fees for transfusion services. The fees chargeable for blood transfusion⁷ services are to be specified by the rules promulgated under this Act and the fees shall be placed at a location visible to the persons resorting to such service. The fees for blood transfusion services shall be specified by the Rules under this Act and will be displayed in a place that is visible to the persons undertaking such services.

However, the wrong blood transfusion process results in criminal liability⁷ and has been ensured in this Act to prevent serious health hazards and exposure to irreversible damage. Any blood donor using a fake ID⁷ will be criminally liable under this Act²⁹. The Act fails to adhere to established standards for maintaining a blood cold chain and has yet to promulgate the Rules to be formulated under it. From a pragmatic point of view, this Act needs amendment.

The Mental Health Act, 2018: Mental illness³⁰ has been defined as a mental health condition not connected with intellectual incapacity and substance abuse. Mental disorder³⁰ is defined under section 2(16) as any clinically recognized condition including substance abuse, intellectual incapacity, or behavior connected to various physical or mental factors or both that impede normal life.

The Bangladesh Medical and Dental Council Code of Professional Conduct, Etiquette, and Ethics³¹ emphasizes the consent of the patient for any examination, treatment, or investigation in Bangladesh. However, mental health law is the only law in Bangladesh that conceptually reflects informed consent wherein the consent of the patient is obtained by informing the patient of the risks and benefits of the treatment procedure³⁰. Moreover, section 6 guarantees the patients' right³⁰ to health, property, dignity, education, and other rights.

However, adults suffering from any mental illness may voluntarily be admitted to the hospital while the consent of legal guardians is required for the admittance of minors³⁰. The patients who have been admitted voluntarily can seek release unless upon examination their admission status is changed and they are subjected to involuntary treatments for grounds unspecified under section 12(3) of the Act.

Nevertheless, A non-protesting patient is a person who is suffering from any mental illness and is incapable of giving any opinion concerning their admission³⁰. The application for admission can be done by a parent or guardian and be facilitated based on the examination conducted by the concerned medical practitioner³². In addition, an unwilling patient whose admission is involuntary may be admitted by a guardian, relative, or police officer or without any application subject to a psychological evaluation by a psychiatrist of the person's illness, its nature, and severity and based on the assessment of whether or not such person poses a threat to himself/herself and his or her surroundings³².

Section 17 asserts the right to receive treatment of a patient suffering from a mental illness. A patient without a support system for rehabilitation is transferred to the closest rehabilitation centre upon discharge³². However, the Court under section 20 can intervene subject to the application of the patient's guardians for the right to treatment of mental patients.

This Act does not focus on more contentious issues in mental health treatment such as patient confidentiality, or redress mechanisms for violation of the rights of persons suffering from any mental health conditions³³. The Law fails to focus on training for mental healthcare providers³², an effective community-based rehabilitation system³⁴, and accountability for lapses in the standard of care delivered³⁴. The Mental Health Act 2018 frames informed consent and adds mental health conditions in the legal framework of Bangladesh, which is certainly noteworthy. However, its failure to focus on the rights of patients, lack of Rules, and semi-standard provisions on patient admission, evaluation, and treatment including no procedure for recourse in case of violation of patient rights, makes it a piece of legislation that is more aspirational and less pragmatic. Furthermore, in the post-COVID world, mental health is important for people suffering from long-COVID too. The increased emphasis surrounding mental health can be addressed to make the law more pragmatic by amendment of it, in the near future.

Conclusion: The authors discussed pragmatism as a moral philosophy in the first part of the writing. In the second part, the article discussed the biomedical laws in application in Bangladesh and the authors attempted to examine their practical relevance. Are these laws sufficiently pragmatic to address the needs of the time? Are they able to provide the flexibility needed to make the interpretation under a particular circumstance? Are they capable of resolving the prevalent problems with their current linguistic formulation? We have found them partially adequate to claim that they are rooted in the philosophical school of pragmatism. Some might be "utilitarian" or market-oriented. We

believe that some of the Acts *need to be revised to fit technological progress and acquired scientific knowledge* and some areas need specific laws to address those circumstances. Furthermore, pragmatism is not the only school of moral philosophy relevant to biomedical legislations and the article refrains from calling it the best one. However, it is indeed emerging as a very useful philosophical justification for the regulation of biomedical affairs.

Certain laws that we have discussed, such as The Bangladesh Homeopathic Practitioners Ordinance, 1983 are deemed to be moderately pragmatic and certain others need improvisation, in other words, “amendments” to keep their content relevant for contemporary needs. Some areas would require new legislation altogether keeping pragmatic considerations in mind. Furthermore, *all laws cannot be pragmatic*, due to prevalent religious and cultural influences, and hence, other philosophical considerations for those areas of laws might be important.

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Contribution of the Authors: Dr. Arif Jamil heavily edited the article, once the framework was developed jointly by all the authors. Ahmed Ragib Chowdhury and Sal Sabil Chowdhury's unpublished tutorial assignment for the Biolaw course at Dhaka University's LLM program was utilized to develop the last part of the writing. All authors constantly communicated on Dropbox and edited, inserted, and redesigned the content over a period of several months to accomplish the article. All three authors contributed equally. The article took nearly a year to complete the first draft and more than a year to be finally published from the first conception of the idea of the research.

Conflict of Interest: None.

Funding: Self.