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3. Baxi, Upendra, "Access, Development and Distributive Justice : Access Problems of Rural Population" in Wright, Robert (ed.), Alternative Ways to Justice, Sage Publications, New Delhi, 1999, pp. 100-125, at p. 120.

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IRAQ WAR 2003 AND THE APPLICATION OF JUS AD BELLUM & JUS IN BELLO

Nakib Muhammad Nasrullah

Introduction

The US led war in Iraq in 2003 is the supreme concern of the present International Community in terms of its legality and in the consideration of resulting humanitarian consequence. In the event the global trend towards peace and security is advancing, the biggest super power United States of America is resorting to arbitrary action against several states in violation of international law, sometime, under the cover of combating terrorism, sometime under another pretext. Following II September, 2001, the United States of America conducted both air and land attack against Taliban Government in Afghanistan, accusing them of their involvement in that saddest ever incident, later the recent US invasion in Iraq is a glaring example of their arbitrary action. Many attempts have been made to justify their attack and occupation in Iraq.

The invasion of Iraq by the armed forces of United State of America was first undertaken under the cover of "disarming Iraq from weapons of Mass-Destruction (WMD), but in course of the invasion the reason for the invasion was changed to "liberation of Iraq from oppressive government of Saddam Hussain." The Bush administration in order to legitimize the said attack announced it as a preventive war in coalition with other states describing as the 'coalition of willing'. The Bush Doctrine of Preventive war which was published in the National Security Strategy in September 2002 contemplates attacking a state in the absence of a specific evidence of a pending attack. This doctrine marks a departure form the prohibition of the use of force under international law.[1] On the other hand the attack failed to gain the approval of Security Council under Chapter VII of the UN. Therefore, many international lawyers believe that attack was illegal and amounted to a war of aggression. The permitted attack is limited to the exercise of right of self-defence as per Art. 51 of the UN Charter.

Apart from the question as to the legality of the war itself, a number of breaches of international humanitarian laws have already been reported

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1. Duncan, E J, Currie, Preventive war and International Law after Iraq,at http/ www.globelaw/com/Iraq

following the occupation including failure to prevent looting, allowing break down of law and order situation in Bagdad, failure to provide humanitarian assistance and shooting of civilian during protest.

This paper Primarily attempts to address the application of Jus ad bellum in US invasion over Iraq, that is the legal justification of use of force against Iraq by the US, Secondly it addresses the application of Jus in bello in the same, that is, how far the consequences of war are in violation of the laws and customs of war, in particular, the obligations of belligerent occupants of attacked territories.

Methodology : In accomplishing this work relevant international legal instruments, lawyers and experts' opinions, articles of books and research journals, media's reports will be reviewed and duly examined. The whole work will be mainly divided in two parts, part one will be on the legality of Iraq war and second part will be on the determination of the legality of invaders' or belligerent activities during the conflict and their obligations in occupied territories. Every chapter will consist of as many issues as needed.

Part – I

Legality of Use of force against Iraq

The Use of force in International Law

The United Nations Charter provides the framework for the use of force in international law. Almost all states are parties to this Charter including United States, United Kingdom. The Charter emphasizes that peace is the fundamental aim of the United Nations and is to be preserved at all possible situations. The preamble expresses a determination to save succeeding generations from the scourge of war, to practise tolerance and live together in peace with one another as good neighbours, to unite strength to maintain international peace and security and to ensure that armed force shall not be used, save in the common interest. Article I of the Charter sets out the United Nations purposes, the first of which is:

> To maintain international peace and security; to that end; to take effective collective measure for the prevention and removale of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about peaceful means, and in conformity with the principle of justice and international Law, adjustment or settlement of international

> disputes or situations which might lead to a breach of the peace. The other provisions of the Charter must be interpreted in accordance with this aim.[2]

About the proscription of use of force against a state the Charter goes on to set out a fundamental principle. Art 2 (4) says, "all members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations. Article 2(4) has been described as a peremptory norm of international law from which state can not derogate.[3] The effect of Article 2 (4) is that the use of force can only be justified as expressly provided under the Charter and only in situations where it is consistent with the UN purposes.

Under the UN Charter, there are only two circumstances in which the use of force is permissible: collective or individual self-defence against an actual or imminent armed attack; and when the Security Council has directed or authorized use of force to maintain or restore international peace and security.

Laws relating to use of force in self-defence

Article 51 of the UN Charter recognizes the inherent right of self-defence. It states:

> Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measure necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The word 'if an armed attack occurs' is the triggering condition for the exercise of self-defence. The development of the law particularly in the light of more recent state practice, in the 150 years since the Caroline incident suggests that action, even if it involves the use of armed force

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2. See the 1969 Vienna Convention on Law of the Treaties, Article 31, which provides that a treaty must be interpreted in accordance with its object and purposes, including its preamble.
3. Nicaragua v United states, (1986) ICJ Reports 14, at para 190.

and the violation of another states' territory, can be justified under international law where[4]

(a) an armed attack is launched, or is immediately threatened against a state's territory or forces;

(b) there is an urgent necessity for defensive action against that attack;

(c) there is no practicable alternative to action in self-defence and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not control, use them to that effect;

(d) the action taken by way of self-defence is limited to what is necessary to stop or prevent infringement, i.e.. to the needs of defence.

The application of the basic law regarding self-defence to prevent U.S confrontation with Iraq is straightforward. Iraq has not attacked any state, nor is there any showing whatever that an attack by Iraq is imminent. Therefore, the provision of self-defence under Art. 51 of the UN Charter does not justify the use of force against Iraq by the United State or any state.

Is there a right of anticipatory self-defence in International Law?

Beyond the literal meaning of the language of Article 51, some authorities interpret this article to permit anticipatory self-defence in response to an imminent attack. There is no basis in international law for such an expansion of the concept of self-defence as advocated in the Bush administration's September 2002 National Security Strategy to authorize pre-emptive' – really preventive strikes against states based on potential threats arising from possession or development of chemical, biological or nuclear weapons and links to terrorism.[5]

Article 51 of the Charter is silent about whether self-defense includes the pre-emptive use of force, in addition , the use of force in response to an attack. In order to answer the question, other conventional sources of international law must be used, including state practice and the works of learned writers on international law. The conventional sources of law as provided in Article 38 (I) of the statute of International Court of Justice have not left no basis for anticipatory self-defence – Secondly state practice is ambiguous; but tends to suggest that the anticipatory use of

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4. Lawyer's statement on the use ofUN Charter and the use of the force against Iraq – http//www. wslfnfeb. org.

5. Lawyer's Statement on the U.N. Charter and the use of force against Iraq, http//www.wsufweb.org

force is not generally considered lawful, or only in very circumstances. There are numerous examples of states claiming to have used force in anticipatory self-defence, and being condemned by the international community. Examples of state practice are given by Professor Antonio Cassese, former president of the International Criminal Tribunal for the Former Yugoslavia,[6] One particular relevant example is the international reaction to an Israeli bombing attack on Iraqi nuclear reactor :

"When the Israeli attack on the Iraqi nuclear reactor was discussed in the Security Council, the USA was the only State which indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the Security Council (SC) Resolution (Resolution 487/1991), condemning Israel, it pointed out after the vote that its attitude was only motivated by other consideration, namely Israel's failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operation of paragraph I of the Resolution, whereby the SC strongly condemns the military attack by Israel is clear violation of the Charter of the UN and the norms of international conduct. Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence".

International Jurists-views with regard to anticipatory self-defence:

1. Oppenheim States that

   'While anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstance, the matter depending on the fact of the situation including in particular the seriousness of the threat and the degree to which pre-emptive actions really necessary and is the only way of avoiding that serious threat; the requirement of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstance.[7]

2. Detter states that it must be emphasized that anticipatory self-defence falls under the prohibition of force in Article 2 (4) of the Charter entailing a presumption that it is illegal. A mere threat of attack thus does not warrant military action.[8]

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6. International Law, Oxford 2001, at 309-31.
7. R Jennings QC and A Walts QC (eds) Oppenheim's International Law : Ninth Edition 1991 pp. 41-42
8. Detter, TheLaw of War, Second Edition, Cambridge, 2000, p. 86.

3. Casses considers that in the case of anticipatory self-defence, it is more judicious to consider such action as legally prohibited while admitted knowing that there may be cases where breaches of the prohibition may be justified on moral or political grounds.[9]
4. As for anticipatory self-defence Danial Webster's statement regarding the Caroline affair of 1837 is plausible. He said that self-defence is justified only when the necessity for action is'instant', 'overwhelming' and leaving 'no choice of means' and 'no moment for deliberation'.[10]

In the light of the above discussion it is clear that pre-emptive use of force by the US is not justified. Because imminent attack may be pre-empted,[11] but there is no evidence, even international community is not in support of this fact that Iraq would have attacked the US, if such an action was not taken earlier.

Professor Marjoria Cohn of Thomas Jeffersson School of Law viewed that a pre-emptive invasion of Iraq would also violate the UN Charter, which is a treaty and part of the supreme law of the US under Article 6, clause 2 of the constitution. It requires the US to settle all disputes by peaceful means and not to use military force in the absence of an armed attack. The U.N. Charter empowers only the Security Council to authorize the use of force, unless a member state is acting in individual or collective self-defence. Iraq has not attacked the US or any other country in the past eleven years. None of Iraq's neighbors have appealed to the Security Council to protect them from an imminent attack by Iraq, because they don't feel threatened.[12]

In support of pre-emptive action in self-defence it is said that since the terrorist attacks on the twin towers and the pentagon, the case for pre-emptive action against saddam's Iraq is even more compelling. When dealing with rogue states which support, harbor and encourage much terrorism, it has been plausibly suggested, the test of imminence and necessity require reassessment and revision. The oft-cited Caroline formula regarding self-defence enunciated in 1842 by the US Secretary

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9. Cases SC, International Law, Oxford, 2001, p. 311.
10. Letter from Daniel Webster, Secretary of State to Lord Ashbarton, August 6, 1842 reprinted in 2 John Banet Moure, A Digest of International Law (1906) 409, 412.
11. Though the UN Charter is silent about it.
12. Professor Marjorie Cohn ,Invading Iraq would violate US and International Law,JURIST,September 2002.

of State Daniel Webstar in correspondence with Britain may be inapplicable in a context such as Saddam's Iraq. To require that the "necessity" of self-defence be shown to be instant, overwhelming, leaving no choice of means and no moment for deliberation" makes sense when dealing with a state able and willing to suppress terrorist threats to other states. But as Abraham So far has cogently argued:[13]

'Saddam is a major part of the problem. And on the basis of his past aggressive words and deeds the conclusion that he is not likely to be deterred by measures short of war appears more reasonable.

The truth is far from the fact that is desired by the US and other allies terming Saddam as terrorist and a threat to others. There is no claim or publicly disclosed evidence that Iraq is supplying weapons of mass destruction to terrorists. The US government still supplied no such credible evidence that Iraq carried out terrorist attack on II September 2001. It appears that these attacks were carried out by Al-Qaida, an international terrorist organization with supported funds supplied from a number of countries and with particularly close links to the Taliban regime in Afganistan. Further, even it could be shown that Iraq has funded or otherwise assisted Al-Qa'ida, this does not necessarily justify the use of force in self-defence. According to the ICJ in the Nicaragua case:

"In the case of individual Self-defence the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self-defence, of course does not remove the need for this. The Court does not believe that the concept 'armed attack' include not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support."[14]

There is no proof that Iraq has provided `weapons or logistic or other support to Al-Qa'ida. Mere support would not amount to an armed attack unless Iraqi involvement in September II terrorist attacks could meet the higher standard setout in the Nicaragua case. It is not considered that the attacks of September II in themselves justify the use of force against Iraq.

Security Council's authorized use of force

There is only one legal basis for the use of force other than self-defence, that is the Security Council's directed or authorized use of force to

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13. Wall Street Journal, Iraq and International Law, January 30, 2003.
14. ICJ Reprt, 1984, Para-195.

restore or maintain international peace and security pursuant to its responsibilities under chapter VII of the UN Charter. Article 42 of the Charter provides;

> Should the Security Council considers that measures [not involving the use of force] provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, seas or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

It was under chapter VII that in 1990 the Security Council by Resolution 678 authorized all "necessary means" to eject Iraq from Kuwait and to restore international peace and security in the areas. Following the formal cease-fire recorded by Resolution 687 in 1991, there has been no Security Council Resolution that has clearly and specifically authorized the use of force to enforce the terms of the cease-fire including ending Iraq's missile and chemical, biological and nuclear weapons programmes. Such a resolution is required for renewed use of force. It is the Security Council that has assumed the responsibility regarding Iraq, and it must be the Security Council that decides unambiguously and specifically that force is required for enforcement of its requirements. There has been no resolution in this time passed by SC with regard to any armed action against Iraq. Even, Bush administration's announcement of preventive war failed to obtain the approval of SC.

Past Security Council's Resolution authorizing use of force employed language universally understood to do so, regarding Korea in 1950 (Prior to General Assembly action, Security Council Resolution 83 recommended that UN Member Sates provide " such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'') and Kuwait, Somalia, Haiti, Rowanda and Bosnia 1990, ("all necessary means or" all measure necessary"). In all these instances, the Security Council responded to actual invasion, large-scale violence, or humanitarian emergency, not to potential threats.

The International Court of Justice, in the Namibia Advisory Opinion (1971) ICJ Reports 15, 53 stated that 'The language of a resolution of the Security Council should be carefully analyzed - - - having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences. This has been described as one of the very few authoritative guides to the interpretation of Security

Council Resolution'[15] One does not consider that the current resolutions implicitly allow the use of force. The wording of the Gulf War Resolutions shows that, when the Security Council intends to authorize the use of force, it does so in clear terms. Resolution 687 referred to the use of "all necessary means" phrasing does not appear in any subsequent resolution in relation to Iraq.

American Claims that Iraq has been in material breach of its obligation under the Resolution 687 as it is evidenced in 1991 by the Council's deploring Iraq's failure to comply with its commitment with regard to terrorism and this justifies the use of force against Iraq. In the rebuttal of this, it is said, any claim that 'material breach' of cease fire obligation by Iraq justifies use of force by the United State is unavailing. The Gulf War was a Security Council's authorized action, not a state versus state conflict; accordingly it is for the Security Council to determine whether there has been a material breach and whether such breach requires renewed use of force.

Despite the US claims over the years that Resolution subsequent to Resolution 687that is,1154, has provided the basis for the US use of force against Iraq, the Bush administration is now seeking a new resolution authorizing use of force should Iraq continue to fail to comply with Security Council requirements. And thereby it is evident, the Bush Administration accepts that the existing resolutions do not authorize use of fore.

Invasion of Iraq and the US Law

Despite opposition by many prominent Republicans, Dick Chenney and George W. Bush are mounting an intensive public relations campaign to justify their pre-ordained invasion of Iraq. But if we examine, we find, it would violate the US Constitution itself. Article I, Section 8 of the Constitution of the US empowers Congress, not the President, to debate and decide to declare war on another country. The War Powers Resolution provides that the "Constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstance, are exercised only pursuant to (i) a declaration of war, (ii) specific statutory authorization, or (iii) a national emergency created by attack upon the United States, its territories, or possession or its armed force. Congress has not declared war on Iraq, no statute

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15. Michael Byess," Terrorism, The use of force and International Law after II September, (2002) 51 ICLQ401, at 402

authorizes an invasion and Iraq has not attacked the United States, it territories, possessions.[16] President Bush's lawyers have concluded that he needs so new approval from Congress. They cite a 1991 Congressional Resolution authorizing the use of force in the Persian Gulf, and the September 14, 2001 Congressional Resolution authorizing the use of force against those responsible for September 11 attacks. Their contention to justify the war is quite misleading. These two Resolutions do not provide a basis to circumvent Congressional approval for attacking Iraq. The January 12, 1991 Persian Gulf Resolution authorized the use of force pursuant to UN Security Council Resolution 687, which was directed at ensuring the withdrawal of Iraq from Kuwait. That license ended on April 6, 1991 when Iraq formalized a cease-fire and notified the Security Council. The Sept. 14, 2001 Resolution authorized the use of armed force "against responsible for the September attacks on United State." There is no evidence that Iraq was responsible for September attacks.

A pre-emptive invasion of Iraq would also violate the United Nations Charter, which is a treaty and part of the Supreme Law of the United State under Art. 6, Clause 2 of the Constitution. It requires the United States to settle all disputes by peaceful means and not to use military force in the absence of an armed attack.[17]

About two pretexts of Invasion of Iraq by the US

The US and its Associates have tired to justify their armed attack in Iraq under the coverage of 'Disarming Iraq from Weapons of Mass Destruction and liberation of Iraq from the oppressive government of Saddam Hussain. The initial reason for the invasion of disarming Iraq from WMD is not valid, because at present many nation states possess and develop weapons of mass destruction and unless possession and development of WMD is declared a criminal act under International law, which is applicable to all nation states in equal measure, it is not just to use possession and development of WMD by one nation state as a reason for military action against it, which all other nation states are allowed to possess and develop WMD.

More over the claim by Chenney and Bush that Iraq has developed WMD is spurious. Scott Ritter, who spent seven years in Iraq with UNSCOM Weapons inspection teams, has said, "There is absolutely no reason to

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16. Professor Marjorie Cohn, Invading Iraq would violate US and International Law, JURIST Sept. 2002..
17. Professor Marjorie Cohn,Invading Iraq would violate US and International Law, JURIST, Sept.2,2202

believe that Iraq could have meaningfully reconstituted any elements of its WMD capabilities." Ritter, a twelve year Marine Corps veteran who served under General Norman Schwarkopf in the Gulf War maintains that Iraquis never succeeded in developing their chemical and biological agents to enable them to be sprayed over a large area. It is undisputed that Iraq has not developed nuclear capabilities.[18]

According to Hans Blix, the former chief UN Weapons inspector, not a single item of banned weapons has been found in the 11 months that have followed the declared end of hostilities.[19]

It is also a widely circulated matter in the present world that all weapons inspection teams under UN or Private Organizations, Intelligent Agencies have failed till today to trace out any stock or existence of WMD in Iraq.

The Justification of "Liberating Iraq from the oppressive of Saddam Hussain" needs to be legally examined. It is true that government of Saddam was oppressive. It is also true that at present there are no workable legal means of removing oppressive governments. So, given these two facts, is it justifiable for a nation state to remove an oppressive government of another country and if it is, what is the legal status of the parties in such a case? There are no clearly established principles of international law for such cases. The legality of it is important and has practical consequence. So under the said cover, invasion of Iraq by the US is legally unacceptable.

2nd Part

The Iraq War in 2003 and the Application of Jus in bello

Under this part the consequences of Iraq war 2003 will be examined in the light of Jus in bello, that, is, in the context of humanitarian law. The war in Iraq has raised a number of important issues of international humanitarian laws. The US force engaged in number of practices that may have violated international humanitarian law, such as indiscriminate military attack, bombing on civilian properties, failure to prevent looting, maintaining law and order and protecting agricultural property, failure to ensure food and medical supplies, ill-treatment with the prisoners of

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18. Professor Marjore Cohn, Invading Iraq would violate US andInternational Law, September 2, 2002.
19. Common Dreams Newso Center, Published on Friday, March 5, 2004 by the Independent / UK.

war, attacks on broad cast stations, military attacks on government buildings indiscriminately.

Indiscriminate attack

According to the Hague Convention 1907 and Additional Protocol 1, 1977 the attack must be limited to military objects and civilian population can never be the target of attack. The cluster munitions strikes of the US may have violated the provision of the indiscriminate attack beyond the permitted target, for not distinguishing between combatant and civilians. Cluster munitions are weapons, delivered from the air or ground that disperse dozens and often hundreds of sub-munitions over a large area, thereby increasing the radius of destructive effect over a target. The US decapitation attacks is a violation of International Humanitarial Law (IHL) because their targeting method could not distinguish between combatants and civilians. Furthermore, all 50 'decapitation' strikes failed to kill the targeted leaders, but killed dozens of civilians. The continued resort to these strikes despite their complete of success and the significant civilian losses they caused can be seen as failure to take "all feasible precautions" required by IHL.[20]

Looting, Maintenance of order and culture property

In failing to prevent the looting that has occurred of the Baghdad Museum, the US occupying force breached the Hague Convention for the protection of cultural property in the Event of Armed Conflict which requires that the parties undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any act of vandalism directed against cultural property. The Hague Regulations provide that the occupying power shall take all the measures in its power to restore and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in the force in the country. The reality was that the US forces, except the oil ministry and oil fields, didn't protect any thing or prevent any pillage, theft or misappropriation, even some time they encouraged the people in doing so.

Ensuring food and Medical Supplies

Article 55 of the Fourth Geneva Convention provides that to the fullest extent of the means available to it the occupying power has the duty of

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20. Human Rights Watch, Background on international humanitarian Law, War Crimes and the War in Iraq.

ensuring food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." According to the Article 56 of the said Convention the occupying power has the duty of ensuring and maintaining ,with the cooperation of national and local authorities, the medical and hospital establishment and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemic. Medical personnel of all categories shall be allowed to carry out their duties. The above said obligations were not met by the occupying forces, which are indicated in different ways. The president of the International Committee of the Red Cross (ICRC) Jakob Kellenbarges statement that United States as an occupying power has every clear rights and duties under international law, and latter his call for fulfilling its duty to ensure security is clear indication of the violation of humanitarian laws in the occupied territories.[21]

The President of Medicines Sans frontiers, Morten Rostrup said that the coalition has failed to meet its responsibility under international humanitarian law to ensure that the health and well being of the Iraqi people is being provided for.[22] A number of NGOs made a joint statement on 2 May 2003, calling on the United Nations to have a central role, saying the situation is critical, saying that "Already under sever strain and under resourced before the war began, hospitals, water plants and sewage system have been crippled by the conflict and looting. Hospitals are overwhelmed, diarrhea is endemic and the death toll is mounting. Medical and water staff are working for free, but can not continue for long. Rubbish including medical waste is pilling up. Clean water is scarce and disease like typhoid are being reported in Southern Iraq."[23]

Preservation of Property

The occupying powers are bound by the Hague Regulation with respect to dealing with Iraq's oil resources.

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21. AFP 6 May 2003, ICRC Chief urges US to restore law and order in Iraq. at http.//www.relufweb.int/w/rwb
22. MSF Press Release 2 May 2003, "US fails to fulfill obligation to support health system in Iraq" http.//www.reliefweb.int/w/rwb, .
23. Catholic Agency for Overseas Development 2 May 2003, Joint Agency Statement on Iraq, http.//www.reliefweb.int/w/rwb.

Article 55 of the Hague Regulation requires that the occupying state shall be regarded only as administrator and usufructuary of public building, real estate, forests, and agricultural estates belonging to the hostile state and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with rules of usufruct. It must safeguard the oil wells, and may only use the revenue for the purpose of the occupation.[24]

Destruction of oil well might violate the rule that warring states must protect the national environment. Article 55 of the Additional Protocol 1 states, "Care shall be taken in warfare to protect the national environment against widespread, long-term and sever damage. This protection includes a prohibition of the use of methods, or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

In the Iraq war numerous oil stations and refineries have been burnt and destroyed.

Attacks on broadcast station

Military attacks on civilian TV Radio Station by the US force to stop the Saddam Hossain propaganda was a violation of humanitarian law. Civilian TV and Radio station are legitimate targets only if they meet the criteria for a legitimate military objective, the fact that the US prisoners of war were displayed on Iraqi television does not make the station a legitimate target.

Civilian Causalities initiated by the coalition forces

A number of incidents have been reported to have been initiated by the coalition force involving civilian causalities, including bombing of Syria bus[25] use of cluster bombs on bosra[26] destruction of electricity supplies leading to disruption of civilian water supply, attacks on Iraqi Television

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24. See R. Dobie Langenkamp, what happens to the oil, International law and the occupation of Iraq, January 13, 2003 at http, www energy / Uh.edu / documents / behind.
25. 24 March 2003, CNN.
26. Rosbalt, 24 March 2003, "Iraq Claims US and Britnin dropped cluster bambs on Bosra," at http / www,rosbaltnews.com / w003 / 03 / 04.

Station,[27] on Al-Jazzeera[28] and on the Palestine hotel[29] on markets at Al-shaab[30] on civilian at Nassiriya and Hilla, on a van at Najaf,[31] shooting at ambulances[32] and shooting on protestor. In addition there have been reports of a failure to restore water, electricity and other humanitarian needs[33] and encouragement, toleration and failure to stop looting, including of nuclear installations.[34]

In the war of Iraq violation of humanitarian laws not only caused by US and other coalition forces, but also caused by the Saddam's army. This violation mainly involves the deliberate use of civilian shield and the taking of hostage. The use of civilians including a state's own citizens as human shield to protect military objects from attack is a violation of international humanitarian law amounting to a war crime. The forcible use of civilian or other non-combatants as human shields also violates the prohibition on the taking of hostage.[35]

Therefore, it is evident form the above discussion that the US force during conflict against Saddam regime in conducting hostilities, didn't comply with the laws of war and also didn't perform the duties of belligerent in the occupied territory.

Present status of the US and coalition forces in Iraq

It is a common question to every body what is the present status of US and other coalition force in Iraq? Are they having status of occupying power and under what ground they are combating the Islami militants? With the formation of a new interim government in Iraq the occupation of Iraq has ended. As per United Nation's Resolution 1511, the interim government will exercise Iraq sovereignty.[36] The over staying of the US and other forces is pursuant to an expected request by the Iraqi

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27. AP 25 March 2003.
28. Al Jazzier 16 April 2003.
29. International Federation of Journalist, 8 April 2003.
30. CNN 26 March 2003
31. Gurdian 1 April 2003.
32. Al Jazzera 10 April 2003,
33. See ICRC, 9 April, "Humanitarian situation has dramatically warsened", Hltp//electronicitrag/plnet/new/607.
34. BBC, 6 May 2003, "Looking at Iraq nuclear sites" hlttp://news.bloc.co.uk.
35. Geneva IV, art 34.
36. See SC Res. 1511. 4 UN Doc. S/RFS/1511 (2003).

Government. The exchange of letter between Iraq's new prime Minister Iyad Allawi and the US Secretary of state Colin Powel broadly outlines the relationship between Iraqi and US led multi-national force after the occupation of Iraq ends. The letter has been included as annexes to a US British Draft Resolution in the SC that endorses the handover of sovereignty and authorizes the multinational force to remain in Iraq to help provide security. Allawi told the UN Security Council that his government will retain sole control of the country's armed force and work in "full partnership" with the multi-national force to coordinate joint military operations and security policy through a variety of new bodies. Powell said the US led troops will coordinate with Iraqi Security force at all levels. Both Allawi and Powell stressed the importance of the US led force in helping to fight those opposed to Iraq's political transition. So it appears clear to us the continued presence of the US and other forces are at the request of Interim Iraqi government. Given the question surrounding the legitimacy of any Iraqi government, what would be the legal status of such a request?

Internvention by invitation essentially involves the consent by an inviting state to justify action that would, absent such consent, violate the UN Charters' prohibition on the use of force. Only where the inviting government is recognized as embodying the sovereign rights of the state with an invitation there from provide a legal basis in and of itself, for military action according to the terms of the invitation.

On June 30, the sovereignty exercised by the interim Iraqi government will not be complete in the Westphalia Sense[37] Since the government will not, at the time of its creation, effectively control the territory of Iraq. In the era prior to the adoption of the UN Charter, the degree of territorial control would have determined the legality of any invitation issuing from a government. Since the adoption of the Charter, however, in situation involving civil war where government legitimacy is not challenged ,the government representing the state at UN has been deemed to possess sufficient external legitimacy to legally invite foreign military international.[38] This construction may be inferred form the Judgment of the ICJ in its well-known Military and Para-military Activities

37. See Stephen D Krasner, Problematic Sovereignty,in Problematic sovereignty! Contested Ruels and Political Possibilities 1.II.

38. Christopher J. Le Mon, Legality of a Request by the Interim Iraqi Government for the continued Presence of Limited state Military Forces, ASIL Insights, June 2004.

case, where the court distinguished between permissible intervention at the request of the UN-recognized government and impermissible in a situation of struggle for control of the country.[39] Perhaps recognizing this, Security Council Resolution 1511 referred to the exercise of Iraq's sovereignty, determining that the Iraqi Governing Council "embodies the sovereignty of the state of Iraq during transitional period until an internationally recognized, representative government is established and assumes the responsibility of coalition Authority, In view of the above discussion , it may be concluded the US led coalition force are not at the moment occupying forces. But the ongoing war is not termed as an international conflict, rather internal or civil war the US forces are bound to comply with common Art. 3of the Four Geneva Convention. Additionally, they will abide by the customary principles of war. The intervention by invitation will not be permissible in civil war of Iraq on the basis of customary principle of non-intervention in the internal armed conflict.

Conclusion

In the all above discussion the war in Iraq 2003 has been looked at critically in two perspectives, one in the perspective of the legality of this war launched by the United States of America under existing International Law, two, in determination of violation of International Humanitarian Law. For justification of the War, particularly the provision of UN Charter on the prohibition of use of force and its extent and purpose and limitations have been examined critically with an impartial look and the conclusion is that the US invasion over Iraq is unequivocally illegal. The two permissible way of use of force can not be applicable in the justification of war in Iraq. Firstly the prerequisite of force in self-defence was clearly absent as no armed attack occurred against US. Secondly the plea of pre-emptive self-defence has been rejected strongly as there was no evidence supplied by the US upon the imminent attack by Iraq and there were many ways available except armed attack. The Attorney General of the US attempts to legitimize the war to base it on Resolution 1441 was opposed by world public opinion. A Report issued by the New York-based Center for Economic and Social Rights, cites a range of authoritative legal sources to dismiss this argument. According to Professor Thomas Frank, a leading authority on the use of force, the use of old resolutions to support military action today makes a complete mockery of entire

39. See Military and Paramilitary Activities (Nicur.V.US). 1986 ICJ 14.

system of International Law. It is the height of hierocracy for the US and UK to base war on Resolution 1441 when are fully aware, the France, Russia and China approved that resolution on explicit written condition that it could not be used by individual state to justify military action. Said CEC (Centre for Economic and Social Right) Executive Director Roger Normed, who recently returned from a fact-finding mission, "This war violates every legal principle governing the resort to force. It clearly has little to do with disarmament democracy, human rights, or even Saddam Hussain, and everything to do with oil and power".

The report warns that an illegal war in Iraq would threaten the pillars of collective security established after world war II to protect civilians from recurrence of that unprecedented carnage. "This is an attack on the very institution of International Law and the United Nations, " Said Phillip Alston, Professor of Law and Director of Human Rights and Global Justice. "It opens the door for every country to take the law into its own hands and launch pre-emptive military strikes without any universally binding restraints."[40]

From the second perspective, it can be evidently said, that US led force committed huge breaches of humanitarian laws during and even today. As to the means and methods of the warfare, they violated the principles of Hague Regulations and Additional Protocol I by using arms and munitions unable to be limited to the military objects and by causing tremendous civilian causalities, by resorting to reprisal. In the Second phase of their presence after a nominal tutular interim government in combating the terror, they are still resorting to indiscriminate violence, killing wounded. All these violation amount to war crimes.

At the end it is concluded in the application of Jus ad bellum the US invasion of Iraq comes out to be proved illegal and in the light of Jus in bello, they have committed a huge number violations of humanitarian Law.

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40. Report, CESR, 19 March 2003,

The Dhaka University Studies, Part-F Vol. XVI (1) : 19—44, June 2005

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS FROM THE PERSPECTIVE OF TRIPS AGREEMENT

Naima Haider

1. Introduction

Intellectual property confers on individuals, enterprises or other entities the right to exclude others from the use of specific intangible creations. The peculiar feature of such rights is that they relate to pieces of information that can be incorporated in tangible objects. Protection is given to ideas,[1] technical solutions or other information that have been expressed in a legally admissible form and that are, in some cases, subject to registration procedures.

Intellectual Property rights (IPRs) are thus the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.[2] Intellectual property, very broadly, means the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons.[3] One is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations. The second is to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair trading, which would contribute to economic and social development.

The term IPRs covers a bundle of right, such as patents, trade marks or copyrights, each different in scope and duration with a different purpose and effect. However all IPRs generally exclude third parties from exploiting protected subject matter without explicit authorization of the right holder, for a certain duration of time. However, in the case of

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1. The term "ideas" is not used, as copyright protects the specific expression of ideas and not the idea itself.
2. See WTO, TRIPs: What are Intellectual Property Rights (2002) at < http://www.wto.org >.
3. See WIPO, BASIC DOCUMENT ON INTELLECTUAL PROPERTY RIGHTS, http://www.wipo.org , (2001).

trademarks, geographical indications and trade secrets, this may mean unlimited time under certain circumstances.[4]

Though the content of intellectual property is the information as such, intellectual property rights are exercised—generally as exclusive rights—with respect to the products that carry the protected information.[5] For example, the owner of a patent can prevent the manufacture, use or sale of the protected product in the countries where the patent has been registered. This explains why intellectual property rights may have a direct and substantial impact on industry and trade. Those who create a certain intangible may, through the enforcement of such rights, regulate the use of the creation (e.g. a musical work) and the commercialization of the product (e.g. compact disk) that contains it. The control over an intangible asset therefore connotes the control over products and markets. Furthermore, because of the fact that all types of information are intangible property, if the property rights are not granted, this will mean that the creator of the information would be unable to receive the market value of the information in today's economy. Hence, there is a need for protection by means of intellectual property rights.[6]

Traditionally speaking, intellectual property rights may be defined in two ways : (1) in a colloquial sense, IPRs include everything which emerges from the exercise of human brain and (2) in a legal sense, IPRs are understood as "...the legal rights which may be asserted in respect of the product of the human intellect".[7]

In the complex world of today, the Intellectual Property Rights (IPR) have not only gained importance within its own domain but includes a diversity of multilateral agreements, international organizations, regional conventions and instruments, and bilateral arrangements. The international law of intellectual property as it stands today consists of three types of agreement. The most important agreement amongst these that affect the greatest number of countries are the TRIPS Agreement,

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4. Watal, J. 2001. *Intellectual Property Rights in the WTO and Developing Countries.* New York: Oxford University Press. Pg. 1
5. Thurow, Lester, (1997), "Needed: a new system of intellectual property rights", Harvard Business Review, September October.
6. Primo Braga, C.A. 1995, 'Trade-related intellectual property issues: the Uruguay round agreement and its economic implications', Chapter 12 in Martin, W. and Winter L.A. (eds), *The Uruguay Round and the Developing Countries*, World Bank discussion paper 307, The World Bank, Washington D.C. pp. 381–411.
7. Maskus, K.E. 1993, 'Trade-related intellectual property rights', *European Economy*, vol. 52, pp. 11–26.

and the multilateral treaties administered by the World Intellectual Property Organization (WIPO), a specialized United Nations agency located in Geneva. One of WIPO's main objectives is 'to promote the protection of intellectual property through cooperation among States and, where appropriate, in collaboration with any other international organization.'[8]

2. Types of Intellectual Property Rights

Intellectual Property since the Paris Convention, 1883[9] divided into two parts - one, industrial property as organized under the Paris Convention and next, non-industrial property incorporated under Berne Convention, 1886.[10] This distinction of industrial and non-industrial intellectual property rights overwhelmed for a long time till the inception of WIPO[11] in 1967 and especially of the finalisation of Uruguay Round in 1993. The Convention Establishing the World Intellectual Property Organisation (WIPO) has classified intellectual property as such:[12]

1. Literary, artistic and scientific works,
2. Performances of performing artists, phonograms, and broadcasts,
3. Inventions in all fields of human endeavour,
4. Scientific discoveries,
5. Industrial designs,
6. Trademarks, service marks, and commercial names and designations,

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8. Article 3, Convention Establishing the World Intellectual Property Organization. Signed at Stockholm on July 14, 1967.
9. *Paris Convention for the Protection of Industrial Property* of March 20, (1883), as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.
10. *Berne Convention for the Protection of Literary and Artistic Works Paris Act* of July 24, (1971), as amended on September 28, 1979 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.
11. *Convention Establishing the World Intellectual Property Organisation*, (1967), as amended in 1979 and came into force from 1970.
12. *Supra note* 5, art. 2 (viii).

7. Protection against unfair competition, and
8. All other rights resulting from intellectual activity in industrial, scientific, literary or artistic fields.

The Uruguay Round concluded major trade agreements including Trade Related Aspects of Intellectual Property Rights (TRIPs), 1994[13] and established the World Trade Organisation (WTO).[14] The TRIPs has provide all types of intellectual property rights as trade related intellectual property rights,[15] which are as such:

1. Copyright and Related Rights,
2. Trademarks,
3. Geographical Indications,
4. Industrial Designs,
5. Patents,
6. Layout-Designs (Topographies) of Integrated Circuits,
7. Undisclosed Information, and
8. Control of Anti-Competitive Practices in Contractual Licences.

3. The TRIPs Agreement

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which was adopted with the resolution of the Uruguay Round in 1994, comprises the first single instrument to cover all main disciplines of intellectual property. In conjunction with the World Intellectual

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13. This is one of the new Agreements under WTO regime. Developed countries, especially USA, Japan and Canada wanted to include intellectual property rights into the WTO regime, while on the other hand developing countries including India, Pakistan and Argentina wanted to exclude intellectual property rights regime from WTO. At the end of 1993 both developed countries and developing countries traded off between the Agreement on Agriculture and Agreement on Textile and Clothing in one side and TRIPs on the other side. Therefore, TRIPs is blamed for serving the interest of developed countries.
14. WTO came into existence from January 1st 1995 after substituting General Agreement on Tariffs and Trade, (GATT). Currently it consists of 144 Member Countries. The highest body of WTO is Ministerial Conference, which is held in each two years. Since its beginning four Ministerial Conferences have been completed. The fourth and recent one is completed at Doha, Qatar from November 9-14, (2001).
15. Dreyfuss, Rochelle Cooper, and Andreas F. Lowenfeld (1997). Two Achievements of the Uruguay Round: Putting Trips and Dispute Settlement Together. *Virgina Journal of International Law* 37, 2 (Winter): 275–333.

Property Organization (WIPO), the TRIPS provisions have effectively expanded and harmonized a global intellectual property regime.[16]

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) recognizes that widely varying standards in the protection and enforcement of intellectual property rights and the lack of multilateral disciplines dealing with international trade in counterfeit goods have been a growing source of tension in international economic relations. With that in mind, the agreement addresses the applicability of basic General Agreement on Tariffs and Trade[17] (GATT) principles and those of relevant international intellectual property agreements; the provision of adequate intellectual property rights; the provision of effective enforcement measures for those rights; multilateral dispute settlement; and transitional implementation arrangements. TRIPS provides extremely important linkage between intellectual property rights protection and trade portions of the Uruguay Round agreements (establishing the World Trade Organization). In the copyright area, TRIPS sets forth so called "Berne-plus" minimal for substantive protection.[18]

The TRIPs Agreement establishes minimum international standards for the protection (availability, scope, use and enforcement) of IPRs (including patents) and is backed by the proven effective WTO's dispute resolution mechanism. The TRIPs Council within WTO is, in general terms, responsible for evaluating overall implementation and progress of the TRIPs Agreement.

Key to discussion is article 27.1 of TRIPs which provides that

"[...] patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application [...]". Article 27.2 on the other hand envisages that certain inventions can be excluded by Members (of WTO) from patentability in order to protect *"[...] ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment [...]"*. In this regard, article 27.3. b permits

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16. Maskus, K.E. 1993, 'Trade-related intellectual property rights', *European Economy*, vol. 52, pp. 157–84.
17. The General Agreement on Tariffs and Trade came into force on January 1948.
18. "Berne-plus" means that the minimum standard for international copyright protection has risen beyond the Berne standard in the ways enumerated in the substantive section of the TRIPS Agreement on copyright (Section II, Article 9-14).

Members to exclude from patentability " *[...] plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non biological or microbiological processes*". However, this provision also stipulates that Members *"[...] shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof*".

Finally, of relevance in regards to disclosure (inclusion of PIC requirements in patent applications, disclosure of origin, etc.) are articles 8 and 29 which address principles under which Members may adopt necesary legal measures (when developing their IPR legislation) in order to promote the public interest in areas which are vital for their social, economic and technological development (as is the sustainable use of biodiversity for many countries) and determine the need for full disclosure of inventions, respectively.

These substantial TRIPs provisions have been at the core of conflicting political positions and views by developing and developed countries. Since the adoption of GATT and the creation of WTO (1994), they have been subject to intense debate and multiple and diverse interpretations have been suggested regarding their exact scope and meaning. National (and regional)[19] IPR legislation enacted over the past few years in various countries—to adjust to and conform with TRIPs standards—as well as judicial precedents in others,[20] have contributed significantly to the varied interpretation of the TRIPs Agreement.

Developed countries (with certain differences between Europe and the US and Japan) have favoured a broad interpretation of patentable subject matter but a narrow interpretation of the TRIPs exceptions, a position

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19. Decision 486 of the Andean Community (Venezuela, Colombia, Ecuador, Peru and Bolivia) on a Common Regime on Industrial Property (2001) has, for example, determined that parts or the whole of live organisms as they exist in nature, including isolated genes and biological materials, will not be considered inventions for the purpose of patentability (article 15.b). Furthermore, specific disclosure requirements (access to genetic resources and protection of traditional knowledge documentation) are established in order to process patent applications (article 26.h and i) For the text of Decision 486 see: http.// www.comunidadandina.org Similar provisions have been included in biodiversity legislation in Brazil and Costa Rica.

20. In the US for example, the Supreme Court decision in Diamond v Chakrabarty (1980) (hybridized bacterium used in the treatment of oil pollution) laid the foundation for the granting of intellectual property protection for products resulting from modern biotechnology. This 5 to 4, controversial decision of the Supreme Court has blurred the distinction between inventions and discoveries, raising considerable criticism regarding its far reaching consequences.

which would allow for patents to be granted over biological materials, isolated genes, gene sequences, and biotechnological products and processes in general. In regards to the ongoing but protracted process for the examination and review of the TRIPs Agreement within the TRIPs Council initiated in 1999 as part of the mandate in article 71.1 of TRIPs , developed countries are basically of the view that an examination should focus mainly on the degree of implementation of TRIPs in countries and not address modifications to the Agreement.

In contrast, developing countries favour a broad interpretation of exemptions in TRIPs in order to ensure the possibility for national legislation to regulate in detail how these exemptions will apply in areas where—in order to protect human and animal health and the environment in general—the national interest might deem it necessary. Furthermore, in regards to the examination process of TRIPs, developing countries propose not only the review of implementation issues, but a detailed review of substantial provisions in order to propose ammendments and modifications if necessary.[21]

3.1 The TRIPs Agreement and the Doha Declaration

The TRIPs Agreement as the most controversial component of the WTO's "package deal" struck in 1994,[22] has received many different commentaries, either praise or blame. In effect, the TRIPS Agreement has exerted negative influence on implementing domestic public health policies in many developing country Members by adversely affecting their access to medicines. Conforming with the Agreement by providing or strengthening the protection of pharmaceutical products with intellectual property rights has posed a special challenge for many developing country Members, worsening the opportunities for access to medicines, particularly for the poor.

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21. As an example, for the June 2003 meeting of the Council for TRIPs, the Permanent Mission of Morocco, on behalf of the African Group, submitted for discussion the document "*Taking Forward the Review of Article 27.3.b of the TRIPs Agreement* with specific recommendations for the modification of article 27.3.b (WTO. IP/C/W/404 26 June 2003. (03 – 3410 Council for TRIPs)). During this same Council for TRIPs meeting, delegations of Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand and Venezuela submitted a text for discussion entitled "The Relationship Between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Tradictional Knowledge" which proposes specific modifications to patent disclosure requirements of the TRIPs Agreement (WTO. IP/C/W/403 26 June 2003. Council for TRIPs).

22. H. Reichman, *Taking the Medicine, with Angst: An Economist's View of the TRIPS Agreement*, 4 Journal of International Economic Law , 2001, p. 795.

Declaration on The TRIPS Agreement and Public Health made at the Doha Ministerial Conference (the Doha Declaration), enables the people on the globe to see the aurora of reform in the intellectual property regimes regarding public health. Clarifying the flexibility in the TRIPS Agreement, the Declaration entitles developing country Members autonomy to make and implement domestic public health policies with respect to intellectual property protection. Nevertheless, this Declaration does not fully dismantle obstacles created by the TRIPS Agreement, which significantly constrain the autonomy of national legislatures to shape intellectual property laws in the public health perspective.[23]

Doha Declaration requires that in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.[24] The fundamental rule of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[25] had attained the status of a rule of customary or general international law.[26]

In the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the TRIPS Council may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Article 30, is not restricted to the text and Preamble of the TRIPS

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23. Frederick M. Abbott, *The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference*, 5 The Journal of World Intellectual Property 1, 2002, p.15.

24. Declaration on the TRIPS Agreement and Public Health, WTO Ministerial Conference, Forth Session Doha, 20 November 2001, WT/MIN(01)/DEC/2, para. 5(a).

25. Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, entered into force on 27 January 1980.

26. See *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 17. *See* also Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 11; Appellate Body Reports, *India—Patents*, para. 46; *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68AB/R, adopted 22 June 1998, para. 84; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114; and James Cameron and Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 International and Comparative Law Quarterly, 2001, pp. 254-256.

Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties.

3.2 Relationship between CBD and TRIPS

The relationship between the objectives of the Convention on Biological Diversity (CBD) and intellectual property rights (IPRs) is the subject of continuing debate. Equally controversial is the effect of the Agreement on Trade-Related Aspects of Intellectual property (TRIPS Agreement)–one of the agreements binding on Members of the World Trade Organisation (WTO)–on the achievement of the CBD's objectives and on sustainable development generally.

The CBD's objectives are (1) to conserve biological diversity, (2) to promote the sustainable use of its components, and (3) to achieve fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.[27] These objectives find expression in the provisions of the CBD, many of which are affected, directly or indirectly, by IPRs. The relevance of IPRs stems from their role as one of society's principal mechanisms for protecting and enforcing control over information.[28] The information encoded in genetic resources is increasingly of commercial value–as a source of new crop and plant varieties, pharmaceuticals, herbicides and pesticides, as well as new biotechnological products and processes.

Intellectual property rights are private rights. As an incentive for innovation, they grant their holder the ability to exclude others from certain activities, such as using a product or process, for a defined period of time. The control afforded by IP protection thus enables right holders

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27. Convention on Biological Diversity, June 5, (1992) Article 1

28. As noted by the CBD Secretariat "the treatment of IPRs was a contentious issue in the negotiations on the Convention. Many developing countries argued that the application of existing IPR systems hinders the transfer of technology to the developing world, and unfairly disregards the contributions of generations of farmers to the world plant genetic resources, which underpin global food security.... For their part, some developed countries argued that strong universal protection of IPR would stimulate technology transfer and investment in research and development in developing countries, indirectly increasing the incentives to conserve biological diversity." See *Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, United Nations Environment Programme, Conference of the Parties to the Convention on Biological Diversity, Doc UNEP/CBD/COP/3/23 at para. 13.

to limit who can use the resource, and so claim the benefits of commercialisation with little competition. The patent system contemplated by the TRIPS Agreement, for example, allows the holder of a product patent to prevent third parties from making, using, offering for sale, selling or importing the product.[29]

The scope of the exclusive rights created by IPRs defines who can use the information contained in genetic resources, and so influences the distribution of the benefits flowing from this use.[30] In these ways, and others, IPRs will affect who shares in the benefits arising from genetic resources, and the type of technology developed from genetic resources, with implications for the conservation and use of biological diversity. As a result of the value associated with IPRs, there is increasing pressure by commercial interests to gain intellectual property rights over genetic resources. This pressure, and the resulting IPR systems, is raising challenges for policy-makers who seek to give effect to the objectives of the CBD.

3.3 Objectives of WTO/TRIPS

From the Preamble to the WTO/TRIPS[31], we can identify the following key objective in relation to IP (which mirror the general tenor of the entire WTO Agreement): To eliminate trade distortions and trade barriers among countries by providing for 'rules and disciplines' for effective and adequate (read here 'strengthened') protection and enforcement of IP rights, including copyright.[32]

The significance of WTO/TRIPS lies in its integration of copyright as a trade issue. The impact of subsuming copyright to the binding 'rules and disciplines' set out in WTO/TRIPS results in subjecting it to the underlying assumptions upon which the international trade system is based. Thus,

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29. Article 28 of the TRIPS Agreement
30. The scope of intellectual property rights refers to a number of factors such as the subject, duration, category of activities that IPRs extend to, as well as the availability of exceptions to private rights such as compulsory licensing, and other exceptions for research and non-commercial uses.
31. See Preamble (Appendix 1). The first paragraph reads as follows:
    "Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"
32. Article 1(2) WTO/TRIPS define IP as consisting of copyright and related rights, trademarks, geographical indications industrial designs, patents, integrated circuits topographies and undisclosed information (trade secrets).

copyright works are considered exclusively as tradeable commodities to be circulated, without restrictions, across national territorial boundaries. No allowance is made for viewing copyright in any other dimension such as, for example, an integral tool for the dissemination of national culture.[33]

The Preamble itself reinforces this orientation by expressly declaring that intellectual property rights are private rights.[34] In this way, WTO/TRIPS tends to view copyright policy from a 'rights-holder' perspective rather than defining copyright as a 'public good' in which 'user rights' are equally important imperatives to be safeguarded.

Unfortunately but not surprisingly, the major proponents of the final text of the WTO/TRIPS, the US, the EU and Japan did not consider the opinions of copyright user interests or other public interest advocates in formulating their IP agendas, relying solely on the views of IP industries and even then, to a consortium of particular industry interests. As a result, copyright 'user groups' and other public interest advocates had no voice in determining the shape and tenor of the WTO/TRIPS accord.[35]

Outside of the Preamble, Articles 1-8 of WTO/TRIPS set out General Provisions and Basic Principles as they relate to the entire gamut of IP rights and further reinforce the 'rights-holder' orientation of the agreement. For example, Article 1 permits Member States to grant more extensive protection than that stipulated under WTO/TRIPS. Thus, the

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33. The [in]ability of the WTO to accommodate issues of fundamental human concern has been the subject of much commentary especially in relation access to patented medicines for catastrophic diseases. In relation to copyright, concerns have revolved around the hardships faced by aboriginal peoples in seeking to preserve and protect their indigenous culture and folklore. Similar issues have been raised by States themselves in relation to the need to protect national cultural identity and cultural pluralism in the face of the free trade ideology of the WTO. International organizations such as the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) have been studying these issues.

34. See Preamble (Appendix 1).

35. See Mathews, D., *Globalising Intellectual Property Rights – The TRIPS Agreement*, (London: Routledge, 2002). It is worth noting that the discourse surrounding WTO/TRIPS has generally been characterized as North-South i.e. the developed or industrialized world advocating for strong rights against the dissenting opinions of the developing world for whom the benefits of strong IP rights are not at all obvious. What this "North-South" polarization suggests, falsely, is that there is consensus within the industrialized world itself as to the need to strengthen IP rights. In fact, nothing could be farther from the truth, especially in relation to copyright.

standards set out therein are only intended as minimum standards which countries are free to derogate from so long as the net result is to enhance IP rights.

Article 3 provides for national treatment i.e. that Member States must protect foreign nationals in the same manner as they treat their own citizens in relation to IP rights. Article 4 ensures most-favoured nation treatment to all WTO/TRIPS Members except under the conditions specified within that provision.[36]

Finally, Part III of WTO/TRIPS requires Member States to ensure that their national laws provide for effective mechanisms for the enforcement of IP rights domestically through the judicial system.

That said, the WTO/TRIPS is not totally weighted in favour of 'rights-holders'. The agreement gives some general recognition of the need to balance IP rights with other competing public policy objectives. The Preamble expressly recognizes as an objective "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives".[37] This principle manifests itself in Articles 7 and 8 of WTO/TRIPS.

Article 7: Objectives

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8: Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse

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36. This provision obliges Member States not to discriminate against each other. This includes conferring any favours, privileges or other advantages equally.
37. See Appendix 1. The Preamble also recognizes the special needs of the developing world under a separate heading.

of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

These key provisions are of particular significance in providing guidance as to the manner in which the entire WTO/TRIPS agreement is to be interpreted. They ensure that the monopoly interests of the IP rights holder will be weighed against other, equally important public policy considerations such as public health and nutrition, fair technology transfer to the developing world and socio-economic development so long as the measures undertaken by countries to safeguard these interests are consistent with the WTO/TRIPS in its entirety.

It is not clear at this stage just how Articles 7-8 would be interpreted in practice where measures are adopted in respect of copyright that do not, for example, contribute to the dissemination of knowledge and technology or are in restraint of trade or abuse of monopoly. If nothing else, they serve to provide an interpretive tool to challenge domestic policy-makers who invoke their WTO/TRIPS obligations to justify severely narrowing or eliminating 'user rights'.

3.4. The Seven Parts of TRIPS

1. With respect to copyright, the agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how data bases should be protected. An important addition to existing international rules in the area of copyright and related rights is the provision on rental rights. Authors of computer programmes and producers of sound recordings have the right to authorize or prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying which is materially impairing the right of reproduction.[38] Performers are protected from unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the reproduction of recordings for a period of 50 years.

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38. Under international law, domestic legislation is presumed to comply with Canada's international obligations. See *the Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331 (entered into force January 27, 1980). Whether the Educational and Library Exceptions are indeed WTO/TRIPS compliant is always open to challenge.

2. The agreement defines what types of signs must be eligible for protection as trademarks or service marks and what the minimum rights conferred on their owners must be. Marks that have become well-known in a particular country enjoy additional protection. The agreement identifies a number of obligations for the use of trademarks and service marks, their terms of protection, and their licensing or assignment. For example, requirements that foreign marks be used in conjunction with local marks will, as a general rule, be prohibited.
3. In respect of geographical indications,[39] members must provide means to prevent the use of any indication which misleads the consumer as to the origin of goods, and any use which would constitute an act of unfair competition.
4. Industrial designs are protected under the agreement for a period of 10 years. Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.
5. As for patents, the agreement requires that 20-year patent protection be available for all inventions, whether of products or processes, in almost all fields of technology. Inventions may be excluded from patentability if their commercial exploitation is prohibited for reasons of public order or morality; otherwise, the permitted exclusions are for diagnostic, therapeutic and surgical methods, and for plants and (other than microorganisms) animals and essentially biological processes for the production of plants or animals (other than microbiological processes). Detailed conditions exist for compulsory licensing or governmental use of patents without the authorization of the patent owner.[40] Rights conferred in respect of patents for processes must extend to the products directly obtained by the process; under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

   Historically, plant varieties had been exempted from the international patent regime in deference to farmers' traditional practices of saving and exchanging seeds. Industrialised countries, however, have

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39. See Article 24 of the TRIPS agreement.
40. Ashish Kothari & R.V.Anuradha, *Biodiversity, Intellectual Property Rights, and the GATT Agreement: How to Address the Conflicts?* 43 ECON. & POL. WEEKLY 2814, (October 1997).

been debating the merits of PBRs as a form of monopoly that may encourage plant-breeding activity. This culminated in the International Convention for the Protection of New Varieties of Plants (UPOV Convention) in 1978, which as indicated above, was amended in 1991, further strengthening the monopolistic hold of plant breeders. Until recently, the UPOV Convention was primarily comprised of Organisation for Economic Cooperation and Development (OECD) countries. However, the TRIPs Agreement now extends the requirement to protect plant variety property rights to all WTO Member States.

6. With respect to the protection of layout designs of integrated circuits, members are to provide protection on the basis of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits opened for signature in May 1989, but with a number of additions: protection must be available for a minimum period of 10 years; the rights must extend to articles incorporating infringing layout designs;[41] innocent infringers must be allowed to use or sell stock in hand or ordered before learning of the infringement against a suitable royalty; and compulsory licensing and government use is only allowed under a number of strict conditions.

7. Trade secrets and know-how which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices.[42] Test data submitted to governments in order to obtain marketing approval for pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

3.5. Basic Principles of TRIPS

Part I of the agreement sets out general provisions and basic principles, notably a national-treatment commitment under which nationals of other members must be given treatment no less favourable than that accorded to a member's own nationals with regard to the protection of intellectual property. It contains a Most-Favoured-Nation[43] clause under

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41. Newby, T., "What's Fair Here is not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law" (1999) 51 Stanford L.Rev. 1633 at p. 1649.

42. Watal, J. 2001. *Intellectual Property Rights in the WTO and Developing Countries.* New York: Oxford University Press. Pg. 10

43. Part 1 Article 1.1 of the GATT

which any advantage a member gives to the nationals of another member must normally be extended to the nationals of all other members, even if such treatment is more favourable than that which it gives to its own nationals.

Part II addresses different kinds of intellectual property rights. It seeks to ensure that adequate standards of intellectual property protection exist in all members countries, taking as a starting point the substantive obligations of the main pre-existing conventions of the World Intellectual Property Organization (WIPO)—namely, the Paris Convention (1967),[44] the Berne Convention (1971),[45] the Rome Convention[46] and the Treaty on Intellectual Property in Respect of Integrated Circuits.[47] It adds a significant number of new or higher standards where the existing conventions were silent or thought inadequate.

Part III of the agreement concerns enforcement. It sets out the obligations of member governments to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced. Procedures must permit effective action against infringement of intellectual property rights and should be fair and equitable, not unnecessarily complicated or costly, and should not entail unreasonable time-limits or unwarranted delays. They must allow for judicial review of final administrative decisions and, generally, of initial judicial decisions.

The final section in this part of the agreement concerns anti-competitive practices in contractual licences. It recognizes the right of members to take measures in this area and provides for consultations between governments where there is reason to believe that licensing practices or conditions relating to intellectual property rights constitute an abuse of these rights and have an adverse effect on competition. Remedies against such abuses must be consistent with the other provisions of the agreement.

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44. In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property;

45. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971

46. "Rome Convention" refers to the International convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961.

47. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

The civil and administrative procedures and remedies spelled out in the text include provisions on evidence, provisional measures, injunctions, damages and other remedies which would include the right of judicial authorities to order the disposal or destruction of infringing goods. Members must also provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies must include imprisonment and/or fines sufficient to act as a deterrent. In addition, members must provide a mechanism whereby rights holders can obtain the assistance of customs authorities to prevent the importation of counterfeit and pirated goods.

With respect to transition arrangements, the agreement envisages a one-year period for developed countries to bring their legislation and practices into conformity. Developing countries and, in general, transition economies must do so in five years and least-developed countries in 11 years.

Developing countries which do not at present provide product patent protection in an area of technology have up to 10 years to introduce such protection. However, in the case of pharmaceutical and agricultural chemical products, they must accept the filing of patent applications from the beginning of the transitional period, though the patent need not be granted until the end of this period.[48] If authorization for the marketing of the relevant pharmaceutical or agricultural chemical is obtained during the transition period, the developing country concerned must, subject to certain conditions, provide an exclusive marketing right for the product for five years, or until a product patent is granted, whichever is shorter.

4. Enforcement procedures in TRIPS

A weakness of the pre-existing international law in the area of intellectual property has been almost entirely silent on the issue of enforcement. High substantive standards of protection of intellectual property are of little use if rights cannot be effectively enforced. Thus, the TRIPS Agreement requires Members, in addition to granting the right holders the minimum rights contained in the Agreement, to provide domestic procedures and remedies so that they can enforce their rights effectively.

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48. Watal, J. 2001. *Intellectual Property Rights in the WTO and Developing Countries*. New York: Oxford University Press. Pg. 68-76

The TRIPS rules on enforcement constitute the first time in any area of international law that such rules on domestic enforcement procedures and remedies have been negotiated. The Agreement therefore breaks new ground in elaborating rules on the procedures and remedies that must be available under national law. These rules aim to recognize basic differences between national legal systems while being sufficiently precise to provide for effective enforcement action as well as safeguards against abuse in the use of procedures.[49] As provided in Article 1.1 of the Agreement, Member countries are free to determine the appropriate method of implementing these and other provisions of the Agreement within their own legal system and practice.

In some respects the origin of the TRIPS Agreement lies in proposals put forward in 1978 and 1979 in the final stages of the Tokyo Round of Multilateral Trade Negotiations for a GATT agreement on the prevention of the import of counterfeit goods. These proposals were not accepted at that time, but work continued in the GATT, in particular after the 1982 Ministerial Meeting. The ideas put forward at that time correspond broadly to those which were finally contained in the section of the Enforcement Part of the TRIPS Agreement on special requirements related to border measures. However, during the Uruguay Round negotiations it was agreed that the Agreement should cover also obligations on internal enforcement procedures and remedies and on minimum substantive standards.[50]

The provisions on enforcement are contained in Part III of the Agreement, which is divided into five Sections. The first Section lays down general obligations that all enforcement procedures must meet. These are notably aimed at ensuring their effectiveness and that certain basic principles of due process are met. The following Sections deal with civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures.

These provisions have two basic objectives: one is to ensure that effective means of enforcement are available to right holders; the second is to

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49. L.P. Loren, 2002. "Technological protections in copyright law: Is more legal protection needed?" *International Review of Law Computers and Technology,* volume 16, pp. 133-148.

50. Samuelson, P., "Challenges for the World Intellectual Property Organization and the Trade-Related Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age", [1999] 21(11) EIPR 578 at p. 591.

ensure that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

The obligations set out are of two main types. The first type are those which prescribe procedures and remedies that must be provided by each Member - much of this is set out in terms of the authority that must be available to judges and courts or other competent authorities, such as customs. The second type of obligation is what might be described as "performance" requirements in relation to the workings of these procedures and remedies in practices; for example, they must be such as to permit effective action against infringing activity, expeditious and deterrent remedies and applied in a manner that will avoid the creation of barriers to legitimate trade.

The Agreement makes a distinction between infringing activity in general, in respect of which civil judicial procedures and remedies must be available, and counterfeiting and piracy—the more blatant and egregious forms of infringing activity—in respect of which additional procedures and remedies must also be provided, namely border measures and criminal procedures. For this purpose, counterfeit goods are in essence defined as goods involving slavish copying of trademarks, and pirated goods as goods which violate a reproduction right under copyright or a related right.

4.1. General Obligations

The proponents of the *TRIPS Agreement* in the Uruguay Round were concerned not only that minimum substantive IPRs standards be adopted, but also that they be capable of application. As noted earlier, the *TRIPS Agreement* preamble characterizes IPRs as private rights, and this implies that private right holders are responsible for seeking the enforcement of those rights. The *TRIPS Agreement* Part III on Enforcement of IPRs takes the approach of obligating Members to establish administrative and judicial mechanisms through which private IPRs holders can seek effective protection of their interests. It is implicit in all international agreements that their parties will undertake to implement them in good faith.[51] The Paris Convention includes obligations regarding the enforcement, among others, of trademark rights with respect to infringing imports (Articles 9-10). The *TRIPS Agreement* may nonetheless be characterized as the first

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51. *Vienna Convention on the Law of Treaties, Article 26.*

multilateral effort to regulate the internal administrative and judicial mechanisms that countries are obligated to maintain with respect to the application of a set of agreed upon legal rules. Because of the novelty of this endeavour, there are few readily available answers regarding how the requirements of *TRIPS Agreement* Part III will be interpreted or applied.

The general obligation of Members to provide enforcement mechanisms requires that enforcement procedures "are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements".[52]

Members are obligated to ensure that enforcement procedures are "fair and equitable", and "not unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays".[53] There is additional provision on written decisions, opportunities to present evidence, and obligation to provide judicial review for administrative decision in particular contexts.[54] Article 41:5 establishes two important principles. First, Members are not required to establish separate judicial systems for the enforcement of IPRs, as distinct from general law enforcement. Second, there is no "obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law generally". The latter point is relevant to the question under what conditions a Member may be subject to dispute settlement, not for failing to adopt adequate enforcement rules, but rather for failing to "effectively" apply them. If a Member generally does not have adequate resources or capacity in the administration of its civil legal system, it should be under no special obligation to focus its attention on TRIPS enforcement matters.

4.2 . Civil and Administrative Procedures and Remedies

Articles 42 through 49 of the *TRIPS Agreement* establish basic principles for the conduct of civil proceedings to enforce IPRs, such as through

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52. *Article 41:1 of the TRIPS Agreement.*
53. Subramanian, Arvind and Jayashree Watal (2000): 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO', *Journal of International Economic Law*, Vol.3, No.3, pp.403-16.
54. *Articles 41:2 – 41:4 of the TRIPS Agreement.*

actions brought by right holders to enjoin infringement. The rules are largely common among developed legal systems, and include rights in favour of defendants as well as complaining parties. The rules provide that parties should have the opportunity to present and contest evidence, and that adequate remedial measures should be available. There is flexibility inherent in these civil enforcement rules, such as in the area of calculating damages for infringement, as to which there is substantial existing jurisprudence that does not follow a uniform line.

It is of particular interest to note that Article 44:2 of the *TRIPS Agreement* permits Members to exclude the grant of injunctions in circumstances involving compulsory licenses and "other uses". This provision was adopted to take account of the United States government use provision (28 U.S.C. § 1498) that excludes the possibility of obtaining a civil injunction against government use of a patent, and should be taken into account in the drafting and implementation of compulsory licensing and government use measures in other Members.[55]

4.3. Provisional Measures

Article 50:1 of the *TRIPS Agreement* obligates Members to make provision for the ordering of "prompt and effective provisional measures" to prevent entry of infringing goods into channels of commerce and preserve evidence. Article 50:2 requires that judicial authorities have the power to adopt provisional measures "in audit altera parte" (outside the hearing of the other party) where delay may cause irreparable harm. This means that the IPRs holder should be entitled to seek a prompt order whether or not the party alleged to be acting in an infringing manner can be notified and given opportunity to be heard. In this event, the affected party should be notified promptly, and be given an opportunity to be heard and contest the measures that have been taken.

Judicial authorities may require complaining parties to post security in the event that their actions are without merit and damage defendants. Article 50:6 of the *TRIPS Agreement* requires that, if requested by a defendant, a proceeding on the merits of the action be initiated within a reasonable period, with time limits set forth if not decided by a judge

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55. Correa, Carlos M (1997): 'Implementation of the TRIPs Agreement in Latin America and the Caribbean', European Intellectual Property Review, Vol.8, pp. 435-43

under the law of the Member. The question whether this provision is directly applicable in European Community law was the subject of a referral from the Netherlands to the *European Court of Justice* in *Parfums Christian Dior v. Tuk Consultancy.*[56] The ECJ put the question in the hands of the Netherlands courts since the procedural rule was not within the competence of the EC.

4.4. Special Requirements Related to Border Issues

Articles 51 though 60, *TRIPS Agreement*, address measures that a Member must adopt to allow certain right holders to prevent release by customs authorities of infringing goods into circulation. Pursuant to Article 51:1 of the *TRIPS Agreement* these procedures need only be established in respect to suspected "counterfeit trademark or pirated copyright goods", and specifically excludes parallel import goods (that is, according to footnote 13, "imports of goods put on the market in another country by or with the consent of the right holder").

Article 58 provides that equivalent rules should be followed when customs authorities are granted the authority to act against suspected infringing goods on their own initiative. Generally, the specified right holder should be permitted to lodge an application with the relevant authorities that describes with sufficient particularity the allegedly infringing goods, along with information sufficient to establish a prima facie case of infringement. The applicant may be required to post security sufficient to compensate for potential injury to the importer for abuse, and the importer must also have a right to be compensated in cases of abuse of process.

There is provision for notification of the suspension to the importer, and provision for the release of suspended goods by the relevant authorities if a suspension has not been followed by appropriate legal action. The right holder is to be granted a right to inspect allegedly infringing goods, although the authorities may protect confidential information.[57] Competent authorities are to have the power to order destruction or disposal of infringing goods, and a presumption against allowing re-exportation is established.

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56. ECJ Joined Cases C-300/98 and C-392/98, Dec. 14, 2000.
57. Narayanan, P. (1997): Intellectual Property Law, eastern Law House, Calcutta, pp- 97-134

4.5. Criminal Procedures

Article 61 of the *TRIPS Agreement* obligates Members to provide criminal penalties for trademark counterfeiting and copyright piracy on a commercial scale, allowing for the possibility of imprisonment and/or fines "sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of corresponding gravity".[58]

The fifth and final section in the enforcement chapter of the TRIPS Agreement deals with criminal procedures. Provision must be made for these to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. The Agreement leaves it to Members to decide whether to provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale. While in some countries only trademark counterfeiting and copyright piracy are treated as criminal, other countries apply criminal procedures to nearly all forms of intellectual property infringements.[59]

Sanctions must include imprisonment and/or monetary fines sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. Criminal remedies in appropriate cases must also include seizure, forfeiture and destruction of the infringing goods and of materials and instruments used to produce them.

4.6. Acquisition and Maintenance

The *TRIPS Agreement* includes a separate Part IV regarding the "Acquisition and Maintenance of Intellectual Property Rights and Related Inter-Parties procedures". This Part consists solely of Article 62. It provides that Members may apply reasonable procedures and formalities in connection with the grant or maintenance of IPRs, that registrations will be undertaken within a reasonable period of time, and that service mark registrations will be subject to the same basic Paris Convention

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58. Watal, Jayashree: Intellectual Property Rights in the WTO and Developing Countries,Oxford University Press, pp. 360-363

59. Many developed and developing countries have criminal remedies for patent infringement as for instance, Japan, Brazil and Thailand. Many others confine criminal remedies to only trademark and copyright infringement as for instance, UK, Australia, India and Malaysia.

procedures as trademark registrations.[60] It also provides that administrative and *inter partes* (that is, between parties) proceedings relating to the grant or revocation of rights will be subject to similar due process protections as those applicable to enforcement proceedings. Finally, there is provision for judicial or "quasi-judicial" review of grant and revocation proceedings, except in cases of unsuccessful opposition claims.

The procedures by which IPRs are granted or denied are of great interest to applicants, those opposing applications and the public. The *TRIPS Agreement* provides limited guidance in this area, leaving Members with considerable discretion with respect to the manner in which their grant and revocation systems are designed. However, this must be understood within the context of the various WIPO treaties that address these types of procedures and proceedings in more detail than the substantive rules that were the primary focus of the TRIPS negotiations.[61]

4.7. Issues for Dispute Settlement

There are two basic types of claims regarding the enforcement provisions of the *TRIPS Agreement* that are foreseeable. The first are claims that Members have failed to adopt laws and establish administrative mechanisms that satisfy the basic requirements of Part III of the Agreement. The second are claims that while Members may have adopted the relevant laws and mechanisms, they are failing to operate them in a manner that is "effective".

Because the enforcement rules of the *TRIPS Agreement* are unique in the multilateral context, there is little prior international experience to rely on for guidance regarding how these two basic types of claims will be addressed by panels and/or the Appellate Body. The characteristics of legal systems around the world as regards procedure in civil enforcement matters are rather different, stemming from various cultural and legal traditions. In this sense, uniform methods of implementing the

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60. D. Matthews, 2002. *Globalising intellectual property rights: The TRIPs Agreement*. London: Routledge.

61. See Article 64.1 of TRIPS, Articles XXII and XXIII of GATT (1994) and WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) referred to in Article 64.1 of the TRIPS Agreement as the "Dispute Settlement Understanding" (DSU). This Understanding constitutes Annex 2 of the Marrakech Agreement. See WIPO publication No. 223 (E), World Intellectual Property Organization, Geneva 1996 at pp. 129 et seq.

enforcement provisions should not be expected. One of the principal questions that panels and/or the Appellate Body will face is how much discretion will be accorded to each Member to follow its own traditions in matters of enforcement.

Even more difficult to predict is how panels and/or the Appellate Body will evaluate claims that Members are failing to "effectively" implement their civil IPRs enforcement systems. The requirement of providing an effective system of enforcement would not appear to be directed at the process or outcome in a single case or controversy, but rather to be more concerned with repeated or systematic deficiencies. The question is, what quantum of deficiency would constitute TRIPS-inconsistent conduct, and how would this be measured? Also, since Article 41:5 expressly acknowledges that Members need not provide special attention to IPRs enforcement as compared with their general civil legal enforcement regime, there is by definition more leeway in TRIPS enforcement matters allowable to Members with less capacity within their general legal systems. There have as yet been no TRIPS dispute settlement decisions involving Part III of the agreement.

4.8 Approaching Dispute Settlement

As with the substantive subject matter of the *TRIPS Agreement*, a claim involving the enforcement provisions should be approached with the flexible nature of the relevant provisions in view. A Member is clearly permitted to approach civil enforcement within its own legal traditions, and to implement the enforcement provisions in a way compatible with its existing constitutional and regulatory framework. Throughout their histories, the most technologically advanced countries have gone through periods in which legal attitudes towards intellectual property regimes have differed.

As recently as the 1970s, in the United States there was substantial judicial scepticism concerning IPRs and their market restricting characteristics. In the late 1990s, the pendulum had swung towards viewing the market restricting characteristics of IPRs with less concern. As this pendulum swings back and forth, IPRs holders have had less and more success with pursuing civil enforcement claims in the courts.[62]

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62. Maskus, Keith (2000), *Intellectual Property Rights in the Global Economy*, Institute for International Economics, Washington DC, August.

In sum, the legal system and judiciary are entitled to strike an appropriate balance among the various national stakeholders regarding the enforcement of IPRs, provided that basic protections are effectively provided within the provisions of the *TRIPS Agreement*.

- IPRs holders are required to have access to courts or appropriate administrative authorities, and to be afforded basic due process protections. It is not required that right holders be placed in a special category outside the normal civil legal channels. While certain specific requirements must be met, e.g., in respect to the availability of provisional measures, these measures may be those applicable in all civil proceedings. It is mainly in the case of border measures (and customs authorities) that special measures may be required that are distinct from the treatment of other subject matters.
- Developing Members with limited enforcement capacity need not specially allocate resources to IPRs enforcement compared to general law enforcement.

5. Conclusion

In sum, it is in the long-term economic self-interest of developing countries to protect the intellectual property of all nations. To achieve this goal, emphasis must be placed not only on enacting intellectual property laws, but also on making certain that those laws are effectively enforced. Protection of intellectual property is not an end in itself. It is a way to encourage domestic creative activity, make it easier to acquire foreign technology, and provide access to the scientific and technological information contained in millions of patent documents. But the major concern is how to ensure patent as a system that benefits not only the small sections of the rich world but equally serves prevent disease and reduction of poverty by contributing development processes of least-developed countries.

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LEGAL AND CONSTITUTIONAL STATUS OF THE FUNDAMENTAL PRINCIPLES OF STATE POLICY AS EMBODIED IN THE CONSTITUTION OF BANGLADESH

Muhammad Ekramul Haque

Introduction

The Constitution of Bangladesh embodies in its part II certain directions to the State terming them as 'Fundamental Principles of State Policy'. The Constitution itself terms these as 'Principles', not 'laws'.[1] Apart from setting certain ideological objectives, interestingly, this part II contains also the provisions regarding basic necessities which says that 'It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens'[2] the basic necessities and rights, like food, clothing, shelter, education, medical care, right to work, etc. This part in fact contains certain basic duties of the State and certain basic necessities of the type of economic human rights of the people are dependant on the performance of the above duties properly by the State. With the development of the concept of 'welfare state' in fact this trend has been developed on political grounds to impose more duties on the state without assessing the fact whether the State has the actual ability to perform it or not based on its economic strength. The prime characteristic of these principles is that these are not judicially enforceable and act as guidelines to the state; and many Constitutions of the modern world also contain such principles. An attempt has been made in this article to assess the nature, importance and the enforceability of the Fundamental Principles of State Policy as provided in the Constitution of Bangladesh in the light of different juristic interpretations given by the judiciary.

Are these Principles laws?

Article 7 makes it clear that the Constitution is the supreme law of the land and the same has been made more clear by adding the words '... and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'. For example, if the parliament enacts any law violating any of the Fundamental Rights enshrined in the

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1. Article 8 of the Constitution of Bangladesh.
2. Article 15, Ibid.

Constitution that law will be void. But it appears that the Fundamental Principles of State Policy are not laws in the sense that if the parliament enacts any law violating any of these Principles that law will not be void since these Principles are not judicially enforceable as is mentioned in Article 8(2) of the Constitution. Thus this constitutional position of the Fundamental Principles of State Policy gives rise to a paradox, since these are the parts of the supreme law though they are not laws in themselves.

Let us analyze the issue from jurisprudential perspective. In discussing the nature of law[3] Sir Fredrick Pollock has made the following observations:

> "In one sense, we may well enough say that there is no law without a sanction. For a rule of law must at least be a rule conceived as binding, and a rule is not binding when any one to whom it applies is free to observe it or not as he thinks fit. To conceive of any part of human conduct as subject to law is to conceive that the actor's freedom has bounds which he oversteps at his peril."[4] "...On the whole the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of a commonwealth as such."[5]

Hedge J. said in his Rau Lectures:

> "... the view that the principles were not binding if they were not enforceable by law, originated with John Austin, and Kelsen propounded a similar view. However, Prof. Good heart and Roscoe Pound took a different view. According to them, those who are entrusted with certain duties will fulfill them in good faith and according to the expectations of the community."[6]

In this connection Seervai commented rejecting the above contention made by Hedge J.:

> Hedge J. makes no reference to the exposition of the nature of law by Sir Fredrick Pollock in his Jurisprudence and Legal Essays .... However, Sir Fredrick Pollock emphasized the point that the ordinary meaning of law, as given in the Oxford Dictionary, (1903) namely, "The body of rules, whether

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3. Jurisprudence and Legal Essays, selected and introduced by A. L. Goodheart (1961)
4. Ibid. pp. 13-14
5. Ibid. p. 15
6. Hedge, *Directive Principles of state policy in the Constitution of India* ("the Rau Lectures"), pp.49-50

> proceeding from formal enactment or from custom, which a particular state or community, regard as binding on its members or subjects." our founding fathers did not treat framing of our Constitution as a place where a conflict between eminent jurists should be resolved. They used "law" in its plain ordinary sense of " a rule enacted or customary in a community and recognized as enjoining or prohibiting certain actions and enforced by the imposition of penalties". The juristic analysis of law by Prof. Goodheart and Prof. Roscoe Pound can have no relevance to the society and it is simply not true that persons entrusted with the duty of implementing the directives will strive in good faith to implement them according to the expectations of the community.[7]

Thus, it appears that from this jurisprudential perspective also that the Fundamental Principles of State Policy as embodied in the Constitution of Bangladesh are not laws in the sense of enforcement. Justice Mustafa Kamal rightly commented that these are not laws and to term it as laws will be unconstitutional as he says " It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself."[8]

Underlying object of incorporation of Fundamental Principles of State Policy in the Constitution

Certain Directive Principles are embodied in the Constitution of India, which are almost similar in nature to the Fundamental Principles of State Policy as enshrined in the Constitution of Bangladesh. Dr. Ambedkar in his speech delivered before the Indian Constituent Assembly explained the underlying object of the Directive Principles embodied in the Constitution of India.[9] In fact, he described most wonderfully in an elaborate way the underlying philosophy of incorporation of such type of principles in the Constitution as he portrayed that these principles give the direction towards the establishment of economic democracy by setting these principles as the ideals of this Constitution, the hopes and aspirations of the nation to be achieved. Instead of dictatorship the Constitution has established political democracy and there must have an objective set by the Constitution to be achieved by the democratic state. That objective is economic democracy, which is the outcome of the

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7. Seervai, H. M. *Constitutional Law of India*, 4th ed. Universal Book Traders, Delhi, 2002, vol.2, at p. 1929.
8. *Kudrat E-Elahi V. Bangladesh*, 44 DLR (AD) 319, p. 346 para 84.
9. Constituent Assembly Debates of India, Vol. III, pp.494-95.

Directive Principles embodied in the Constitution. To quote him:

> "I see that there is a great deal of misunderstanding as to the real provisions in the Constitution in the minds of those members of the House who are interested in this kind of directive principle. ... ... By parliamentary democracy we mean "one man, one vote". We also mean that every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government. The reason why we have established in this Constitution a political democracy is because we do not want to install by any means whatsoever a perpetual dictatorship of any body of people. While we have established political democracy, it is also the desire that we should lay down an ideal before those who would be forming the Government. ***The ideal is economic democracy***, whereby so far as I am concerned, I understand to mean, "one man, one vote".[10]

Then he posed the question that how can it be achieved? He opined that there are many ways to achieve the goal of economic democracy. To quote him:[11]

> There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic State as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy.
>
> Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act. Sir, that is the reason why the language of the articles in Part IV is left in the manner in which this drafting Committee thought it best to leave it. It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing

10. Ibid.
11. Ibid.

> and must, having regard to the circumstances and the times, keep on changing.

He then summed up describing the value of incorporation of such principles in the Constitution in the following words:

> It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of Government to be constituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really two-fold: (*i*) to lay down the form of political democracy, and (*ii*) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever it is in power, shall strive to bring about economic democracy, most of the misunderstanding under which most members are laboring will disappear."[12]

Utility of the Fundamental Principles of State Policy in the Constitution:

The utility and the significance of these principles have been aptly described by M.C. Setalvad, former Attorney-General of India, who says that although the Directive principles of State Policy—

> "... confer no legal rights and create no legal remedies, they appear to be like an instrument of instructions, or general recommendations addressed to all authorities in the Union reminding them of the basic principles of the new social and economic order which the Constitution aims at building. These fundamental axioms of State policy, though of no legal effect, have served as useful beacon-lights to courts. It has been held in the context of the Directive Principles that legislation making the land resources of the country effectively available to the larger mass of the cultivating community is acquisition of the lands for a public purpose. Restrictions imposed by laws on the freedom of the citizen may well be reasonable if they are imposed in furtherance of the Directive Principles. Thus these principles have helped the courts in exercising their powers of judicial review. They will, therefore, not only form dominating background to all state action, legislative or executive, but also a guide, in some respects, to courts. The directive principles are

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12. Ibid.

> but an amplification of the preamble of the Indian Constitution which bases the authority of the Constitution of India of the solemn resolve of the people of India to secure to all its citizens Justice in the social, economic and political fields; Liberty in all spheres; Equality of status and opportunity, and the promotion among them all of Fraternity assuring the dignity of the individual and the unity of the Nation."[13]

Thus we can sum up the utility of the Directive Principles in the following points:

i) An instrument of instructions to all authorities within the state.

ii) Useful beacon-lights to courts.

iii) Important tool in exercising power of judicial review.

iv) Utility in interpreting the Constitution.

v) Utility in interpreting other laws.

vi) Utility as the ideology.

vii) Utility as setting the goal.

Educative value of the Fundamental Principles of State Policy inserted in the Constitution

The insertion of the Fundamental Principles of State Policy bears great educative value, though these are not judicially enforceable, strictly speaking. It is worth mentioning here that Sir B. N. Rau in fact was in favour of the enforcement of the Directive principles as embodied in the Constitution of India. Mr. Rau talked to the President Valera in Dublin and discussed about the working of the directive principles under the Irish Constitution,[14] perhaps the first of its kind which embodied such principles, and consequently he tried to give primacy to the Directives in case of its conflict with the Fundamental Rights and for that purpose he brought the following amendments to the draft Constitution of India:

> 1. At the beginning of cl. 9(2) [now Art. 13(2)] insert the words "Subject to the provisions of cl. 10" [which emphasized the fundamental nature of directive principles.] 2. To clause 10 *add* the following: "No law which may be made in the discharge of its duty under the first paragraph of this section, and no law which may have been made by the State in pursuance of principles of policy now set forth in chapter III of this Part shall

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13. Mahajan, V. D. *Constitutional Law of India*, Eastern Book Company, Laucknow, 1991, 7th ed., p.368

14. Shiva Rao, *op. cit.* Vol.III, p. 233

> be void merely on the ground that it contravenes the provisions of (cl.) 9, or is inconsistent with the provisions of chapter III of this Part.[15]

Mr. Rau further clarified the object of these amendments in the following words:

> "... to make it clear that in a conflict between the rights conferred by Chapter II (Fundamental rights) which are for the most part rights of the individual and the principles of policy set forth in Chapter III which are intended for the welfare of the State as a whole, the general welfare should prevail. Otherwise, it would be meaningless to say, as clause 10 does say that these principles are fundamental and that it is the duty of the State to give effect to them in making laws."[16]

But these amendments were neither considered nor accepted.[17] Then naturally a question arose : Is there any justification of incorporation of these unenforceable principles in the Constitution? Interestingly Sir B. N. Rau made a wonderful reply to it and the comment made by him regarding the Directive principles incorporated in the Constitution of India is worth mentioning here:

> "... certain lawyers object to the Part in the draft Constitution dealing with 'Directive Principles of State policy', on the ground that since the provisions in the Part are not to be enforceable by any court, they are in the nature of moral precepts; and the Constitution, they say, is no place for sermons. But it is a fact that many modern constitutions do contain moral precepts of this kind, *nor can it be denied that they may have an educative value.*"[18]

Thus it has been emphasized that these principles though unenforceable by the court yet have an educative value generally, which may inspire all authorities in the State to reach the ultimate goal of economic democracy. Sir B. N. Rau whose draft of the Constitution (of India) formed the basis of discussion in the drafting Committee and in the Constituent Assembly admitted that once his amendments had been rejected, directive principles

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15. Ibid. p. 226
16. Ibid.
17. Ibid. p. 326
18. Rau Benegal Sir, *India's Constitution In the Making*, 2nd revised and enlarged edition, at pp. 388-393.

had no legal force but had moral effect by educating members of the Government and of the Legislatures.[19]

Relationship between fundamental rights and fundamental principles of state policy

Obviously the Fundamental Principles of State Policy are not judicially enforceable whereas the fundamental rights are enforceable in the courts as mentioned by articles 8 and 26. It seems to give higher legal status to the fundamental rights in comparison with the Fundamental Principles of State Policy. But on the other hand article 47(1) incorporates an interesting and significant provision regarding the relationship between these two. It provides that no law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the fundamental rights, if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in part II of this Constitution. This provision seems to give higher legal status to the Fundamental Principles of State Policy in comparison with the fundamental rights. So I think it will not be wise to term any of these two as superior to another, because, it seems that the Constitution has maintained a balanced relationship between these two.

Comparison with the provisions of the Indian Constitution

Earlier view: In case of conflict between fundamental rights and the principles of state policy, fundamental rights shall prevail as it has the primacy over the latter.[20]

Recent view: Should avoid any conflicting interpretation between these two and should try to give effect to both as much as possible adopting the principle of harmonious construction.[21] Fundamental rights and the principles of State policy are supplementary and complementary to each other and fundamental rights must be construed in the light of the principles of State policy.[22]

The original Indian Constitution does not contain any provision like our article 47(1), but the theme of this particular provision is in fact found in

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19. Seervai H. M., *Constitutional Law of India*, 4th ed. Silver Jubilee Edition, Universal Book Traders, Delhi, 2002, vol. 2, p. 1927
20. *Madras V. Champakam Dorairajan*, AIR 1951 SC 226
21. *C.B. Boarding & Lodging V. Mysore*, AIR 1970 SC 2042, 2050; *Re Kerala Education Bill*, AIR 1958 SC 995; *Unni Krisnan V. A.P.*, AIR 1993 SC 2178
22. *Unni Krisnan V. A.P.*, AIR 1993 SC 2178, para 141

certain case laws in India and the amended article 31C (inserted in 1972 by the Constitution Twenty-Fifth Amendment Act) contains this theme to a limited extent. Thus this Article 31C gave primacy to articles 39(b) and (c) [two Directive Principles] over the fundamental rights contained in articles 14 and 19, and subsequently in 1976 by the 42nd Constitution Amendment Act the scope of primacy was extended to all principles laid down in Part IV, but this extension was further declared as void for being unconstitutional by the majority decision of the Supreme Court in 1980 in the case of Minerva Mills V. Union of India,[23] so that article 31C now remains at its pre 1976 form which gives shield to articles 39(b) and (c) instead of including all Directive Principles. This part of article 31C was held as valid by the Supreme Court of India[24] and the latter part of this article was declared void as unconstitutional by the same case[25] on the ground of taking away the power of judicial review, but interestingly yet the text has not been changed due to technical legal difficulty and the earlier text[26] still remains in the Constitution though that has been declared void by the highest court.[27] In deciding the validity the court opined that there is no disharmony between these two as they supplement each other in aiming at the same target of bringing about a social revolution to establish a welfare state, which is envisaged in the preamble as the ultimate spirit of the Constitution, and it is also the duty of the court to interpret the Constitution so as to ensure the implementation of the Directive Principles.[28] Justice Mathew goes one step further awarding a higher and significant status to the Directive Principles in the whole constitutional scheme, as he said that—

> "...in building up a just social order it is some times imperative that the Fundamental Rights should be subordinated to Directive Principles...Economic goals have an uncontestable

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23. AIR 1980 SC 1789
24. In *Kesavananda V. State of Kerala*, AIR 1973 SC 1461
25. Ibid.
26. *Article 31C of the Constitution of India: "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing* [all or any of] *the principles* [laid down in Part IV] *shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19...,* [and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: ..."
27. Supra note 13.
28. Ibid.

> claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men exist that there can be Fundamental Rights".[29]

He concluded his observation about article 31C with the following words:

> "... if Parliament, in its capacity as amending body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court can not adjudge the constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant."[30]

Probably being inspired by this spirit in favor of the Directives the law makers subsequently in 1976 by the 42nd Amendment to the Constitution gave primacy to all Directive principles over the fundamental rights which amendment was not uphold by the Supreme Court as constitutional.[31]

However, the present Indian provision is narrower than that of Bangladesh in the sense that Indian article 31C gives shield to two Principles only, whereas article 47(1) of the Constitution of Bangladesh extends this shield to all Fundamental Principles of State Policy generally. Again Indian one is narrower from another aspect that article 31C speaks about only two fundamental rights embodied in article 14 and 19, whereas article 47(1) of the Constitution of Bangladesh talks about all fundamental rights generally.

Distinction between fundamental rights and fundamental principles of state policy

Following points of differences between fundamental rights and fundamental principles of state policy may be mentioned here:

i) ***As regards judicial enforceability:*** Fundamental rights are judicially enforceable,[32] though the fundamental principles of state policy cannot be enforced in the courts.[33]

ii) ***As regards requirement of legislation for the implementation:*** Fundamental rights will be enforced and be implemented directly

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29. Ibid.
30. Ibid.
31. In *Minerva Mills Ltd. V. India*, AIR 1980 SC 1789
32. *See* Articles 26 and 44 of the Constitution of Bangladesh.
33. *See* Article 8 of the Constitution of Bangladesh.

in the form they are mentioned in the Constitution. Whereas, for the implementation of the fundamental principles of state policy new legislation is required in conformity with the policy. Thus, state policy can only be implemented through another new legislation.

iii) ***As regards taking away legislative power:*** The fundamental principles of state policy does not restrict the legislative power, rather that merely formulates certain policies to be followed by the legislature. But the fundamental rights inserted in the Constitution of Bangladesh take away certain legislative power imposing the restriction explicitly in Article 26 that no law in violation of these rights can validly be passed.

iv) ***As regards violation and declaration of a law as void:*** The court can not declare a law as void on the alleged ground of violation of any of the fundamental principles of state policy. Whereas any law passed violating any of the fundamental rights will be declared by the competent court as null and void.

Constitutional Status of the Fundamental Principles of State Policy incorporated in the Constitution of Bangladesh

The first postulate is that these are mentioned in the Constitution of Bangladesh as principles , not as laws, and in fact whole part II wherein these principles are embodied deals only with principles, not laws. However, the status and the functions of these principles are clearly mentioned in article 8(2) of the Constitution of Bangladesh, they are as follows:

i) These Principles shall be fundamental to the governance of Bangladesh,

ii) shall be applied by the State in the making of laws,

iii) shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh,

iv) shall form the basis of the work of the State and of its citizens; but

v) shall not be judicially enforceable.

The points (iii) and (v) above require further explanation and these have become subject to many judicial pronouncements.

Acting as a guide to the interpretation

It speaks about the role of these Principles as a guide to interpret the Constitution and as well as of the other laws of Bangladesh. Thus its role has been widened beyond the Constitution by empowering it to act as a guide to interpret all laws of any type in Bangladesh. What is the

meaning and impact of acting as 'a guide to the interpretation'? It means to interpret the Constitution and other laws in conformity with these Principles. But obviously in the name of interpretation a completely new meaning can not be awarded to any clear provision of the Constitution or of any other law. This task of interpretation must be done with utmost good care so that ultimately let it not amount to enforce these Principles in the name of interpretation. Similarly, if the principles are used by the courts merely to interpret as mandated by the Constitution that can not be restricted in the name of judicial enforcement. Thus every effort made by the judiciary should not be termed as enforcement of that very thing. In this connection 'judicial enforcement' and 'judicial interpretation' must be distinguished with proper care. The earlier one is negatived by article 8(2) and later one has been permitted by the same. This issue can be made clear taking the case of Kudrat-E-Elahi V. Bangladesh[34] as an example. In this case, the Appellate Division in fact did not enforce articles 9 and 11 (two fundamental principles of state policy), rather interpreted articles 59 and 60 in conformity with the above two articles and this is a classic illustration where the highest court used the fundamental principles of state policy as a guide to the interpretation of the Constitution as mandated by article 8(2) of the Constitution. Again the judgment pronounced by the High Court Division in the case of Winifred Rubie V. Bangladesh[35] may be a classic illustration on the point that every effort made by the court does not amount to judicial enforcement. In this case,[36] the term "public purpose" used in the Fundamental Principles of State Policy has been defined in narrow sense and it was held that the requisition of a property for a private school does not serve the "public purpose" and was void. The Appellate Division observed:

> "As for the State policy of education it is unfortunate that the learned Judges have taken upon themselves as enquiry which is neither warranted by law in the Constitution by the arguments of the parties. It is for this reason that the constitutional mandate provides in the chapter on directive Principles of State Policy that these are not enforceable in the Court of Law."[37]

Was the reaction of the Appellate Division towards / about the judgement delivered by the High Court Division, in which the later gave an

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34. 44 DLR (AD) 319
35. 1981 BLD 30
36. Ibid.
37. *Bangladesh Vs. Winifred Rubie*, 1982 BLD (AD) 34, 37

interpretation of the term 'public purpose', justified? The answer to this question is dependent on the result of a query: did the High Court Division enforce the Fundamental Principles in the name of interpretation of the term 'public purpose' violating the prohibition made by article 8(2)? Or that was an interpretation of a term made in conformity with the Fundamental Principles of State Policy as mandated by article 8(2). I think Mr. Mahmudul Islam, the former Attorney General of Bangladesh, rightly criticized in his book[38] the above observation made by the Appellate Division. To quote him—

> "... in order to find the meaning of 'public purpose' in relation to education, the High Court Division was not only entitled, but was also under constitutional obligation, to consider whether the requisition of property for a school of the type involved could be said to serve a public purpose when article 17 mandates the State to adopt effective measures for the purpose of establishing a uniform, mass-oriented and universal system of education."[39]

Thus it may be commented here that the High Court Division did not violate the prohibition of article 8(2), rather it has exercised the power of interpretation as mandated by the same article, and this interpretation seems to be done within the boundary demarcated by article 8(2) which does not amount to judicial enforcement.

The Constitution of India embodies certain Directive Principles which are similar to our FPSP, but Indian Constitution does not contain any such provision which empowers these Principles to act as a guide to the interpretation of the constitution and of other laws, in spite of this fact certain case laws are found in India which give the guidelines regarding how can these principles be used to interpret the Constitution and other laws.[40] But the Indian Constitution provides that 'it shall be the duty of the state to apply these principles in making laws.'[41]

Nature and judicial enforceability of the Fundamental Principles of State Policy

Article 8(2) of the Constitution of Bangladesh makes clear the nature of the Fundamental Principles of State Policy in the way that however

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38. Islam Mahmudul, *Constitutional Law of Bangladesh*, 2nd ed. Mallick Brothers, Dhaka, 2003, p.57.
39. Ibid.
40. see the cases *Mumbhai V. Abdulbhai*, AIR 1976 SC 1455; *Bhim V. India*, AIR 1981 SC 234; *Excel Wear V. India*, AIR 1979 SC 25
41. Article 37 of the Constitution of India.

important these principles are these will not be judicially enforceable which says:

> "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but **shall not be judicially enforceable**."

Thus, article 8(2) fixed four impacts of these Principles and lastly bars clearly the judicial enforcement of these Principles of State Policy. Let us now analyze this issue in the light of different cases decided by the High Court Division and the Appellate Division of the Supreme Court of Bangladesh.

Kudrat E-Elahi V. Bangladesh, 44 DLR (AD) 319

Kudrat E-Elahi V. Bangladesh[42] is an elaborate authority on this issue where the nature and the question of judicial enforceability of these principles have been discussed thoroughly both in the High Court Division and in the Appellate Division. For the convenience of analysis and to get a clear idea about the judicial position regarding this issue the case will be examined here in a detailed manner. In this case,[43] the petitioners before the High Court Division challenged the constitutional validity of the Bangladesh Local Government (Upazila Parishad and Upazila Administration Re-organization) (Repeal) Ordinance, 1991, on the ground, *inter alia*, that this Ordinance is inconsistent with articles 9, 11, 59 and 60 of the Constitution and as such it is void in terms of Article 7(2) of the Constitution. It appears that the petitioners in this case[44] tried to enforce Articles 9 and 11, two fundamental principles of state policy, judicially enforceable along with Articles 59 and 60, but they could not succeed before the Court. Before the High Court Division, Respondents-State defended the *vires* of the impugned Ordinance saying that Fundamental Principles of State Policy are not "judicially enforceable", that these Principles are not laws but are simply guide-lines for the State including Parliament and that even if any law is inconsistent with the Fundamental Principles that cannot be challenged in court.[45] The High Court Division in this case unanimously held that the Upazila Parishad

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42. 44 DLR (AD) 319
43. Ibid.
44. Ibid.
45. Ibid. at p. 324 para 6.

was not Local Government as the Upazila was not an administrative unit, but the judges differed as to the inconsistence of the said ordinance with the Constitution. Here two contrary opinions are found:

1. ***Fundamental Principles of State Policy are not judicially enforceable:*** It was held by one of the judges in the High Court Division that there was not any inconsistency and, even if any, the Repeal Ordinance could not be declared void in view of Article 8(2) of the Constitution, which says that the Fundamental Principles of State Policy are not enforceable by the Court.
2. ***Judicial enforceability of Fundamental Principles of State Policy: A new interpretation:*** The other judge held that though Fundamental Principles of State Policy are not judicially enforceable but a law which is directly contrary to any Fundamental Principle or which negates such a principle then the law may be declared void in spite of the provision in Article 8(2). Thus this opinion is a new interpretation which is in favour of judicial enforceability of the principles, and this view apparently seems to be in conflicting with the provision of Article 8(2).

In the above case[46] Shahabuddin, CJ, before the Appellate Division, made the constitutional position of Fundamental Principles regarding their enforceability in clear terms that these are not enforceable. He says in paragraph 22 of the judgment:

> The Repeal ordinance has been challenged mainly on the ground of its being inconsistent with Articles 9, 11 and 59 of the Constitution. Article 7(2) of the Constitution says that any law inconsistent with the Constitution shall be void. Learned Counsels for the appellants are seeking a declaration of nullity of the Repeal Ordinance on this ground. A law is inconsistent with another law if they cannot stand together at the same time while operating on the same field. Article 9 requires the state to encourage the local Government institutions but the Ordinance has abolished a local Government, namely the Upazilla Parishad. Similarly, Article 11, they have pointed out, provides that the Republic shall be a democracy in which, among other things, "effective participation by the people in administration" at all levels shall be ensured; but the Ordinance has done away with such participation in the administration at the Upazilla level. These two Articles as already quoted are Fundamental Principles of State Policy, but are not judicially enforceable. That is to say, if the State does not or cannot implement these principles the

46. Ibid.

> Court cannot compel the State to do so. The other such Fundamental Principles also stand on the same footing. Article 14 says that it shall be a fundamental responsibility of the State to emancipate the toiling masses—the peasants and workers—and backward sections of the people from all forms of exploitation. Article 15(a) says that it shall be a fundamental responsibility of the State to make provision of basic necessities of life including food, clothing, shelter, education and medical care for the people. Article 17 says that the State shall adopt effective measures for the purpose of establishing a uniform mass-oriented and universal system of education extending free and compulsory education to all children, for removing illiteracy and so on. All these Principles of State Policy are, as Article 8(2) says, fundamental to the governance of the country, shall be applied by the State in making of laws, shall be guide to the interpretation of the Constitution and of other laws and shall form the basis of the work of the state and of its citizen, but shall not be judicially enforceable".[47]

Shahabuddin CJ then explained the reason for not making these Principles as judicially enforceable. In his words:

> The reason for not making these principles judicially enforceable is obvious. They are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes requires resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide.[48]

The lawyers on behalf of the petitioners tried to make the Principles enforceable in the Court at least from a different way though not directly. They contended following an interesting and tricky approach that the state may not enforce the Principles directly, i.e., can not compel the government for the implementation of the policies, but the court can declare a law nullity if it is inconsistent with the Fundamental Principles under Article 7(2). Shahbuddin CJ summarized this contention in his judgment in paragraphs 24, 25 and 26 in the following words:

> 24. Mr. Amirul Islam contends that Article 13 of the Indian Constitution, corresponding to Article 26 of our Constitution, makes any law inconsistent with any fundamental rights void; but in the Indian Constitution there is no provision like Article

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47. Ibid, pp. 330-331.
48. Ibid.

7(2) of our Constitution. Article 7(2) makes void any law inconsistent with any provision of the Constitution besides fundamental rights. It is true that Article 8(2) of our Constitution has been couched in stranger language than Article 37 of the Indian Constitution and that Article 7(2) has no corresponding Article in the Indian Constitution. But the basic position is the same in both the Constitutions—namely Principles of State Policy are not judicially enforceable. In view of this position the learned Attorney-General argues that the Court cannot declare any fundamental principle void on the ground of inconsistency with a fundamental principle for, in that case declaration of nullity of a law will result in implementation of the fundamental principle by the Court. Mr. Amirul Islam has tried to make a distinction between the concept of enforceability of a provision of the Constitution and the concept of inconsistency between a provision of the constitution and another law and has contended that while the Court cannot enforce a fundamental principle, it can declare a law void on the ground of manifest inconsistence with any provision of the Constitution including a fundamental principle.

25. Supporting this view Dr. Kamal Hossain has argued that if a law is directly opposed to and negates any fundamental principle the Court has got power to declare the law void. he has referred to some of the fundamental principles and tried to show that flouting of these principles may be prevented by the Court by issuing appropriate directions learned Counsel has cited Article 18(2) which provides that the State shall adopt effective measures to "prevent prostitution and gambling" and contends that though the Court cannot direct the State to implement this principle, it can certainly declare a law void if the law provides for encouragement of prostitution and gambling. In support of this argument he has referred to certain decisions of the Indian Supreme Court, which despite the bar to judicial enforceability of directive principle, has issued appropriate directions to the Government to take positive action so as to remove the grievances of people caused by non-implementation of some Directive Principles.

26. In Comptroller and Auditor General Vs. Jagannath, AIR 1987 (SC) 537, Article 46 was involved. It requires the State to "promote with special care economic and educational interest of weaker sections of the people"—particularly the Scheduled Caste and Schedule Tribes. Government issued instructions to provide adequate opportunity, special consideration and relaxation of qualification in the cases of candidates from weaker sections of the people for appointment as well as promotion in government services. The Office-Memo containing

> these Instructions was challenged under Article 226 on the ground of violation of Fundamental right as to equal opportunity for public service. The High Court, in spite of Article 37, which makes directive principles unenforceable, upheld the Office-Memo and dismissed the Writ Petition. In Mukesh Vs. State of Madhyapradesh, AIR 1985 (SC) 1363, Bonded Labour System (Abolition) Act, 1976 came up for consideration. It was a public interest litigation on the allegation that this law was not being implemented to stop exploitation of labour in stone quarries. In Sheela Vs. State of Maharashtra, AIR 1983 SC 378, a petition of complaint of custodial violence to women prisoners in police custody came up before the Supreme Court, which then laid down certain guide-lines for ensuring protection against torture and mal-treatment to prisoners in police custody. Direction for legal aid, as provided in the directive principle under Article 39-A of the Constitution, was also issued by the Supreme Court. In Laxmi Kant Vs. Union of India, AIR 1987 SC 232, the Supreme Court issued certain directions as to adoption of destitute and abandoned children keeping in view Articles 15 and 39(f) of the Constitution. In all these cases the State and other authorities concerned were themselves proceeding to make necessary legislation for implementing the directive principles, and in some cases they issued directions to appropriate persons to take necessary action. In some of these cases as cited above the authorities, instead of opposing the writ petitions, sought necessary instructions and directions from the Court. In those cases no law was made in contravention of any directive principles and as such there was no occasion for the Court to declare any such law void.

But Shahabuddin CJ did not settle the issue of enforceability of the Fundamental Principles of State Policy, that may be due to the reason that that was not necessitated to settle the case, as the case was settled on different ground that the Upazilla was not considered as Local Government at all, so no question of violation of the Fundamental Principles of State Policy arose. In fact, though the enforceability of the Fundamental Principles of State Policy has been discussed by the judges, it was not the issue in this case. But Justice Naimuddin Ahmed in the High Court Division decided this issue affirmatively taking it as a hypothesis, which has been criticized in the Appellate Division by ATM Afzal J. in the following words:[49]

> 58. Naimuddin J. in his judgment found that the Upazilla Parishad was not a local Government institution within the

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49. Ibid. pp. 339-340 paras 58 & 59.

> meaning of Articles 59 and 9 of the Constitution and as such Article 9 cannot be invoked for declaring the repealing Ordinance/Act void under Article 7(2) on the ground of inconsistency with Article 9. He has not also found that the impugned Ordinance/Act is in conflict with any other provision of Part II of the constitution containing Fundamental Principles of State policy. That being so, it was wholly unnecessary to decide whether in view of the Provision in sub-article (2) of Article 8 that the principles set out in Part II can be declared void under Article 7(2). Having answered this hypothetical question in the affirmative after taking hypothetical facts into consideration in a lengthy discussion, the learned Judge addressed himself to the real question thus;
>
> "Consequently, if it is found that the impugned repealing Ordinance is violative of Article 9 of the Constitution it is liable to be struck down as void in view of article 7(2) of the Constitution".
>
> 59. Then the finding was made that the repealing Ordinance was not violative of Article 9 with which we have agreed. Therefore the broad decision that a law can be declared void in case of a conflict with any provision of Part II of the Constitution was uncalled for and made on hypothetical facts. This, as a rule, the Courts always abhor. The Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved and the Court should be ever discreet in such matters. Unlike a civil suit, the practice in Constitutional cases has always been that if the matter can be decided by deciding one issue only no other point need be decided.

In concurring with the judgment delivered by the learned Chief justice, Mustafa Kamal J. posed the following question:[50]

> Is the Repealing Ordinance/Act inconsistent with Articles 9 and 11 of the constitution and if so, can it be declared void on that ground under Article 7(2) of the Constitution?

Then he summarized the submission of the lawyers of the petitioners regarding above question in the following words:[51]

> Mr. Amirul Islam submitted that the Repealing Ordinance/ Act is liable to be declared void wholly, first, for being violative of the Preamble of the Constitution and secondly, for being

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50. Ibid, p. 341.
51. Ibid, p. 341 para 63.

> inconsistent with Articles 9 and 11. He submits that the Fundamental Principles of State Policy may not be "judicially enforceable" but inconsistency therewith renders a law liable to be declared void under Article 7(2), there being a distinction between "enforceability" and "inconsistency". Dr. Kamal Hossain submits that a law which negates a clear directive of the Fundamental Principles of State Policy is liable to be declared void as being inconsistent with the constitution. the learned Attorney-general submits that a law is not liable to be declared void on the ground of inconsistency with the Fundamental Principles of State Policy, that Article 8(2) of the Constitution is an exception to Article 7(2) and that to declare a law as void is another way of enforcing a different state of things so that there is no real distinction between "enforceability" and "inconsistency".

Finally, Justice Mustafa Kamal negatived above contention and said that these principles may be enforced through the public opinion. He replied the above question through the following stages of observations.[52] Firstly, he confirmed that these principles are not laws. In his words:

> Article 7(2) provides that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law, to the extent of the inconsistency, be void. (Underlines are mine). Therefore, this constitution taken as a whole is a law, albeit the supreme law and by 'any other law" and "that other law" the Constitution refers to the definition of "law" in Article 152(1), including a constitutional amendment. It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but "principles". To equate "principles" with "laws" is to go against the Law of the Constitution itself. These principles shall be applied by the State in the making of laws, i.e., principles of policy will serve as a beacon of light in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens. Not being laws, these principles shall not be judicially enforceable.[53]

Then he compares the provisions regarding the status of these 'principles' with the provisions describing the status and impact of the 'fundamental rights' and sorted out the finding that unlike fundamental rights there is nothing mentioned in the Constitution, which says that any law enacted

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52. Ibid, pp. 346-347.
53. Ibid. para 84.

violating these 'principles', will be void. To quote him:

> There the Constitution rests. It does not say, as it says in Article 26 in respect of fundamental rights:
>
> "26(1). All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
>
> (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.
>
> (3) ..... ".
>
> there being no specific provisions in the Constitution providing laws inconsistent with fundamental principles of state policy to be void, the learned Counsels for the appellants have fallen back upon Article 7(2) and have urged for acceptance of an interpretation which will bring Fundamental Principles of State Policy at par with fundamental rights in so far as voidability is concerned. The submission is unacceptable, because, first, the makers of the Constitution did not lack in expression if they so meant it. Provisions analogous to Article 26 could have been inserted in Part II as well. The omission is deliberate and calculated. Secondly, Article 8(2) proclaims the fundamental principles of state policy as "principles", not "laws" and that is the mandate of this Constitution. Article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in part II then that other law to the extent of the inconsistency, will be void. The Constitution is the supreme law and if the supreme law prescribes "principle" not "laws", and directs the use of these principles in certain specific manner, then the other law cannot be made void on the ground of inconsistency with these principles. It is argued that Article 9 and 11 are provisions of the Constitution and if any other law is inconsistent with these provisions, then it will be void. Article 7(2) says "this Constitution", not "provisions of the Constitution", which expression the Constitution uses in some other places. The use of the words "this Constitution" and not "provisions of the Constitution" is also deliberate.[54]

He then raised the issue that 'what will happen if the Parliament makes any law violating any of the Fundamental Principles of State Policy embodied in the Constitution?'. He gives answer to this important question in the following words, which is self-explanatory:

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54. Ibid. para 85.

> A hypothetical question has been posed. Parliament passes a law which glaringly violates and flouts a fundamental principle of state policy, and if its *vires* is challenged solely on the ground of inconsistency with that principle and on no other ground whatsoever, will High Court Division declare the law void? It is a madness scenario. The learned Counsels could not show any such legislation in this sub-continent, but suppose, Parliament is struck with madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? What does public opinion, political party and election do if Parliament goes berserk?[55]

Latifur Rahman J. replied the above contention made by Amirul Islam in the following words:[56]

> Mr. Amirul Islam while arguing wanted to make a distinction between these two terms "void" and "enforceable" as contained in our Constitution. But it appears to me that in the context of the present case, the distinction between the terms "void" and "enforceable" are not of much importance as Article 8(2) of the Constitution clearly contemplates that the fundamental principles of State Policy are not enforceable in a court of law and the appellants have no justiciable rights in their favour. The distinction as drawn by the learned Advocate is only superficial and indirectly he is seeking for enforceability which is precluded by this Article. Further, there being no violation of law, such a declaration that the Repealing law is void under Article 7(2) of the Constitution cannot be sought for.
>
> ... Thus I hold that Articles 7(2) and 8(2) co-exist harmoniously and the learned Advocate in an indirect manner is only trying to get a declaration of voidability which is not contemplated under the Constitution.

Lastly, Justice Latifur Rahaman denied the opinion of Justice Naimuddin in favour of enforceability of the FPSP and also criticized him in the following words:[57]

> Before parting with the case, I need to say a word as to the interpretation of Articles 7(2), 8(2) and 9 of the Constitution by Naimuddin Ahmed J. The learned Judge in his judgment observed as follows:
>
> "Consequently, if it is found that the impugned repealing Ordinance is violative of Article 9 of the Constitution it is liable

55. Ibid. para 86.
56. Ibid, p. 351
57. Ibid, p. 354 para 114.

> to be struck down as void in view of article 7(2) of the Constitution".
>
> This observation cannot hold good in interpreting the Constitutional provisions as indicated herein above. I must say that in dealing with Constitutional Provisions the court is not allowed to take hypothetical questions as has been posed by the learned Judge and has answered them like an academician. The learned Judge has made some quotations from Text Books on various Constitutional law of some renowned scholars. Abstract theoretical questions are not to be decided by any court as those are of only academic importance. It is no doubt true that these fundamental principles of State Policy as contained in our Constitution have been declared "to be fundamental to the governance of Bangladesh, shall be applied by the State in making of the laws", but we will normally hold that the State will not make a law contrary to the fundamental principles of State policy, the Government will have to answer and face the people who elect them. So, by taking a hypothetical question and on an interpretation of Article 9, the learned Judge ought not to have ventured to strike down the Repealing Ordinance as void under Article 7(2) of the Constitution in the face of clear constitutional mandate of Article 8(2).

Let me now quote Justice Naimuddin Ahmed's observation,[58] which is the only elaborate judicial authority in favour of the enforceability of the Fundamental Principles of State Policy:

> 55. Let us, therefore, first of all see whether Article 7(2) of the Constitution is in conflict with Article 8(2) of the Constitution. We have already observed that the Fundamental Principles of State Policy embodied in Part II of the Constitution shall not be judicially enforceable. The crux of the question is in interpreting the words, "shall not be judicially enforceable."[59]

He identifies three probable situations that may be envisaged in the context of the Fundamental Principles of State Policy as embodied in Part-II of our Constitution:[60]

First, the Government may not implement the Fundamental Principles by legislative enactment or executive action.

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58. In *Ahsanullah, Pearul Islam, Shamsul Karim, Kudrat-E-Elahi Panir Vs. Bangladesh, through the Secretary, Ministry of Local Government, Rural development and Co-operative (Local Government Division), Government of Bangladesh, Bangladesh Secretarial, Dhaka and others*, 44DLR (1992) pp. 188, 190-192.
59. Ibid., para 55.
60. Ibid., para 64.

Secondly, a legislative act or an executive action may not conform to the Fundamental Principles.

Thirdly, there may be a legislative act or an executive action in clear violation of the Fundamental Principles.

Then he felt no hesitation in negativing the possibility of judicial interference in the above first two situations. In his words:

> In the first contingency the Court has no jurisdiction to direct the legislature to enact laws or the executive to act for implementing the Fundamental Principles and in the second contingency also the court cannot intervene and say that the legislative act or the executive action is invalid not being in conformity with the Fundamental Principles and also cannot issue directions to make them in conformity with those principles.[61]

But what about the above third circumstance, i.e., if any legislation is enacted which clearly violates any of the Fundamental Principles of State Policy enshrined in the Constitution of Bangladesh –will the judiciary be able to declare it as void? Or is the court still unable to interfere on the belief that these are not judicially enforceable? To answer this question he made the following long observation:

> A plain reading of the provisions of clause (2) of Article 8 of the Constitution shows that the Principles set out in Part II of the Constitution shall not be enforced judicially meaning that if the executive or the legislature does not implement any of the provisions of this Part, the Court cannot direct for enforcement of these Principles. Does it mean that the executive or the legislature can act in flagrant contravention and violation of the principles set forth in Part II of the Constitution? To cite only few examples, ... Article 10 provides that steps shall be taken to ensure participation of women in all spheres of national life, Article 17(a) enjoins the State to adopt effective measures for extending free and compulsory education, Article 18(2) enjoins the State to adopt effective measures to prevent prostitution and gambling and Article 24 enjoins the State to adopt measures for protection of all monuments. In the face of the above provisions can any law be enacted prohibiting women from participating in any sphere of national life and keeping themselves shut inside the kitchens, prohibiting introduction of primary education except on payment, introducing prostitution and gambling throughout the country and for

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61. Ibid.

pulling down all monuments all over the country? In my view, the answer is emphatically in the negative, because, the mischief of Article 7(2) of the Constitution will be attracted notwithstanding clause 2 of Article 8 of the Constitution which simply enjoins that the provisions of Part II are not enforceable by any Court but do not provide the *raison detre* for their contravention. What clause 2 of Article 8 says is that the Fundamental Principles cannot be enforced by issuing *mandamus* on the other two organs of Government and it does not give a constitutional right to an individual to seek enforcement of the principles laid down in Part-II of the Constitution if the legislative or the executive organ of the State does not act for implementation of the provisions of Part-II of the Constitution. But it does not mean that since the Court cannot compel their enforcement, the executive and the legislature are at liberty to flout or act in contravention of the provisions laid down in Part-II of the Constitution. In this connection, the observation made by his Lordship Badrul Haider Chowdhury, CJ (as he was then) in the case of Anwar Hossain Vs. Bangladesh, reported in the Special Issue of BLD. 1989 may be referred to:

"Though the directive Principles are not enforceable by any Court, the principles therein laid down are nevertheless fundamental in the Governance of the country and it shall be the duty of the State to apply these principles in making laws. it is a protected Article in our Constitution and the legislature cannot amend this Article without referendum. This alone, shows that the directive principles cannot be flouted by the executive. The endeavour of the Government must be to realize these aims and not to whittle them down."[62]

To these words, it may be added that if the Government fails to implement the Fundamental Principles embodied in the Constitution, the Court cannot compel the Government to act and at the same time it means that the Court has the power to intervene when the Government flouts and whittles down a provision embodied in this Part because Article 7(2) is specific in declaring that any law inconsistent with any provision of the Constitution shall be void to the extent of the inconsistency. Article 8(2), by making the provisions of Part II unenforceable by the Courts, has simply given the legislature the liberty to defer their implementation but that does not mean that the said Article has vested the legislature with power to flout those provisions and enact laws in clear violation of those provisions.

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62. Ibid., para 66.

Article 8(2) cannot be interpreted as superseding Article 7(2) on the yardstick of which all laws enacted by the legislature has to be tested. It also appears to me that there is no conflict between these two Articles, Article 7(2) being the constitutional yardstick to test the validity of all laws passed by Parliament and Article 8(2) being merely a prohibition against enforcement of the provisions of Part II of the Constitution. The constitution-makers were conscious that implementation of the noble principles laid down in part-II may not be possible in the prevailing socio-economic condition of the country and as such, they very wisely enacted Article 8(2) making these principles unenforceable through courts, but, that, by no means, implies that the constitution-makers intended to circumvent the mandate of Article 7(2) and permit the legislature to enact laws in violation of those principles.[63]

In view of the above, I find great force in the following observations made by Dr. MC Jain Kagzi in his The Constitution of India Volume 2, Fourth Edition, Page 938, "The declaration that the directives are 'not enforceable by any court' do not provide the *raison d' eter* for their disregard. Axiomaticality, a clear violation of the Directives might make a law unconstitutional. What is said in Article 37 is that the Directives cannot be enforced by, and through judicial process, if not implemented. Any non-implementation of the Directives violates no individual constitutional right, and affords no basis for litigation and legal remedy. This only means that the State cannot be legally forced to carry them out, if it cannot do. This is not to say that it can throw them to the winds, and can enact laws openly in opposition to them. The first cannot be objected to, but the latter cannot be permitted. A Court can, in a fit case, unambiguously declare a law bad as being manifestly opposed to the fundamental principles of governance of the country and, therefore, unconstitutional. The Directives are legal norms, although they are not enforced by the Court action at individual initiative. Their non-application through legislation might be a non-act which provides no cause of action. But any legislation in opposition to them and in derogation to them is violative of the mandate of Article 37. The legislation can, in a fit case, be impugned on the ground of legislative contravention of the Article 37 directive. If applied, law may be rendered unenforceable even if not *void ab initio*".[64]

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63. Ibid., para 67.
64. Ibid., para 68.

> Fully agreeing with the views expressed above I, therefore, hold that the directives in Part-II of the Constitution are as important and as relevant as any other provision of the Constitution for the purpose of attracting the operation of Article 7(2) of the Constitution. As such, an enactment made by Parliament in opposition to, and in derogation of, the principles laid down in Part II of the Constitution is violative of the mandate provided in Article 7(2) of the Constitution and, therefore, void.[65]

Then he expressed the opinion directly that a law should be struck down as void if that contravenes any of the fundamental principles of state policy. In his words:

> In such circumstance, to my view, a legislative act which is in direct contravention of any provision of Part II of the Constitution calls for intervention by the Court and is liable to be struck down as void in spite of the provisions laid down in Article 8(2) of the Constitution that the provisions of Part-II of Constitution are not judicially enforceable. Clause 2 of Article 8 of the Constitution is not really in conflict with clause (2) of Article 7 of the Constitution.[66]

Finally, he added:

> "... had the Upazila Parishads been found to be Local Government institutions within the meaning of Article 9 of the Constitution the impugned repealing Ordinance would be in contravention of the said Article and would be liable to be struck down to the extent of the inconsistency by operation of clause (2) of Article 7 of the Constitution."[67]

Thus, it appears that in answering the above third question Naimuddin J in the high Court Division in fact ultimately goes in favour of judicial enforceability of the Fundamental Principles of State Policy though in a different way, though this has been overruled subsequently by the Appellate Division.

Sheikh Abdus Sabur V. Returning Officer, District Education Officer-in-Charge, Gopalganj and others, 41 DLR (AD) 1989 (30)

In Sheikh Abdus Sabur V. Returning Officer, District Education Officer-in-Charge, Gopalganj and others,[68] Badrul Haider Chowdhury J. clearly

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65. Ibid., para 69.
66. Ibid.
67. Ibid., para 83.
68. 41 DLR (AD) 1989 (30)

mentioned these principles as judicially unenforceable. In his words:

> "While our Constitution recognizes the supremacy of the Constitution, it lays fundamental principles of State policy in Part II although the principles cannot be judicially enforced."[69]

Shahabuddin J. in the same case focused on the utility of the Fundamental Principles of State Policy in the making of law and negatived the possibility of judicial enforceability in the following words:

> "Parliament is a creation of the Constitution itself; the local elective bodies are created by their respective statutes in pursuance of Article 9 of the Constitution, which appears in Part II relating to Fundamental Principles of State Policy. These Principles, though they must be applied by the State in the making of law, are not justiciable in court."[70]

Saleemullah V. Bangladesh, 47 DLR 218

In Saleemullah V. Bangladesh,[71] it was contended that the decision of then Government to send troops to Haiti to join UN Force in Haiti was in violation of Article 25 of the Constitution. But the High Court Division held this decision of the government not to be contrary to the Fundamental principles of State Policy.[72] In the concluding paragraph of the judgment the Court says:

> "Rather the decision, in our view, has been taken on the principle enunciated in the United Nations Charter which is in no way against the Fundamental Principles of State policy. The decision of the Government of the People's Republic of Bangladesh is in consonance with the spirit of the Fundamental Principles of State policy and in accordance with Chapter-VII of the Charter of the UN. We fail to understand how the policy decision of the Government taken in pursuant to the UN Resolution and the charter of the UN is an infringement of the Constitution as contended by the petitioner. On reference to this Resolution we find that it speaks about participation of the member states to support action taken by the United Nations acting under Chapter-VII of the Charter of the UN to facilitate the departure from Haiti of the military leadership. It may be observed that although the Fundamental Principles of State policy cannot be enforced in writ jurisdiction under Article 102

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69. Ibid, p. 37 para 12
70. Ibid, p. 48 para 40.
71. 47 DLR 218
72. Ibid., page 224.

> of the Constitution but it serves as a guide to the interpretation of the Constitution for the Court. We do not find that the decision of the Government is contrary to the Fundamental Principles of State policy and the Fundamental Rights."[73]

Thus, it appears that though the Court in this case mentioned clearly that the Fundamental Principles of State policy are not judicially enforceable , but at the same time Court says that the decision was not in contrary to the Fundamental Principles of State policy. This addition weakens the earlier clear stand of the Court regarding non-enforceability of the Fundamental Principles of State policy. Because, what would the Court tell if the decision taken by the government would be found as contrary to the Fundamental Principles of State policy?

Aftabuddin V. Bangladesh and others, 48 DLR 1

In Aftabuddin V. Bangladesh and others,[74] the High Court Division has discussed the following two points regarding Fundamental Principles of State policy:

1. *Fundamental Principles of State policy are not judicially enforceable:* Naimuddin Ahmed J. observed that—

> "It is true that the Preamble to the Constitution is not enforceable. Nor is Article 22, which is enshrined in Part II of the Constitution as Principles of State Policy, in view of Article 8 of the Constitution."[75]

Thus, it shows that Naimuddin Ahmed J. deviated from his earlier opinion[76] regarding enforceability of the Fundamental Principles of State Policy.

2. *Interpretive value of the Fundamental Principles of State policy:* Naimuddin Ahmed J. in the High Court Division observed that—

> "But there is no doubt that the Fundamental Principles of State policy act as guide to the interpretation of the Constitution and other laws of Bangladesh in view of clause (2) of Article 8 of the Constitution ... Article 22 of the Constitution enjoins the State to ensure the separation of the judiciary from the executive organs of the State. Article 116 has, therefore, to be interpreted in the light of the above provisions. There is no dispute that the pledge contained in the third paragraph of the preamble

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73. Ibid.
74. 48 DLR 1
75. Ibid., p. 11 para 45.
76. Supra note 58.

> presupposes an independent judiciary and unless independence of the judiciary is ensured the third paragraph of the Preamble cannot be secured. Similarly, although the directive to ensure separation of the judiciary from the executive by the State cannot be implemented and enforced through Court, Article 116 has to be interpreted in the light of this directive. In this connection, Article 116A is relevant. It runs as follows:
>
> "Subject to the provisions of the Constitution all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions."
>
> Article 116A is, therefore, a step to realize the principle enshrined in Article 22."[77]

Dr. Mohiuddin Farooque V. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others, 49 DLR (1996)(AD) 1

It was argued in Dr. Mohiuddin Farooque V. Bangladesh[78] that—

> "The Preamble and Article 8 also proclaim 'the principles of absolute trust and faith in the Almighty Allah' as a fundamental principle of the Constitution and as a Fundamental principle of state Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect his creation and environment. The appellant is aggrieved, because Allah's creations and environment are in mortal danger of extinction and degradation."[79]

Thus, it appears that an act done contradictory to the Fundamental principles of State Policy can make the concerned person aggrieved though those Fundamental Principles of State Policy are not judicially enforceable. In the same case,[80] Dr. Farooque referring Article 21(1) of the Constitution, one of the Fundamental Principles of State Policy, which is as follows:

> "It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property."

argued that he has this constitutional obligation of performing public duties and to protect public property, and he succeeds in proving himself as an aggrieved person.

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77. 48 DLR pp. 11-12 paragraphs 45,46.
78. 49 DLR (AD) 1
79. Ibid., p. 9 para 25.
80. Ibid.

Latifur Rahman J. in this case[81] focused on the interpretive value of the Fundamental Principles of State Policy and also pointed out that the apex court of the country has the obligation to interpret the Constitution in line of the Fundamental Principles of State Policy as enshrined in the same. He observed:

> "Part II of our Constitution relates to fundamental principles of State Policy. Article 8(2) provides that these principles are not enforceable in any court but nevertheless are fundamental to the governance of the country and it shall be the duty of the State to apply the principle in making the laws. The principles, primarily being social and economic rights, oblige the State, amongst other things, to secure a social order for the promotion of welfare of the people, to secure a right to work, to educate, to ensure equitable distribution of resources and to decentralize power to set up local government institutions composed of people from different categories of people as unit of self governance. A Constitution of a country is a document of social evolution and it is dynamic in nature. It should encompass in itself the growing demands, needs of people and change of time. A Constitution cannot be morbid at all. The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the Constitutional Court which is the apex court of the country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and its citizens."[82]

Saiful Islam Dilder V. Government of Bangladesh and others, 50 DLR (1998)318

In Saiful Islam Dilder V. Government of Bangladesh and others[83] the Court observed:

> "True, that fundamental principle of state policy, here Article 25, can not be enforced by Court, nevertheless the fundamental principles of state policy is fundamental to the governance of Bangladesh, and serve as a tool in interpreting the Constitution and other laws of Bangladesh on the strength of Article 8(2) of the Constitution by the superior Court."[84]

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81. Ibid.
82. Ibid., pp. 18-19 para 72.
83. 50 DLR (1998) 318.
84. Ibid., p. 322 para 6.

Here the Court made it clear that the Fundamental Principles of State Policy are not judicially enforceable. But, on the other hand, when the learned Advocate relying upon Article 25 of the Constitution contended that Anup Chetia, if extradited to India the government would violate the mandate of Article 25[85], the Court in response to this argument observed that the said extradition does not go against Article 25, one of the Fundamental Principles of State Policy. Thus, the Court rejected the writ petition relying on, *inter alia*, that the said extradition does not violate Article 25, one of the Fundamental Principles of State Policy.[86] Then, from this approach of the Court a question may easily be posed: what would the Court tell if the Article 25 would be violated? Could the Court decide it differently?

Secretary, Ministry of Finance, Government of Bangladesh V. Mr. Md. Masdar Hossain & others, 20 BLD (AD) (2000) 104

In Masdar Hossain[87] case though the Court does not seem to enforce the *Principle* directly but the Court criticized the State for non-implementation of Article 22 of the Constitution of Bangladesh, one of the Fundamental Principles of State Policy, focusing the failure of the state to separate the judiciary from the executive. The Court observed:

> "Article 22 of the Constitution provides that the State shall ensure the separation of judiciary from the executive organs of the State. Though more than 29 years have elapsed since making of the constitution and its coming into force no effective steps have been taken to separate the judiciary from the executive organs of the State."[88]

In the same case, the Court further adds that 'Article 22 contemplates separation of judiciary from the other organs of the State and it is for the legislature to decide on this issue'.[89]

Though in India also the Directive Principles are not judicially enforceable, interestingly, the Supreme Court issued a number of directions to the Government and administrative authorities to take positive action to remove the grievances which have been caused by non-implementation

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85. Ibid.
86. Ibid.
87. 20 BLD (AD) (2000) p. 142.
88. Ibid., *Per* Latifur Rahman, J agreeing with Mustafa Kamal, C.J., para 75.
89. Ibid. p.147, para 85

of the Directives.[90] The Constitution of Pakistan is rather very particular about the meaning, impact and consequence of certain principles, which are not judicially enforceable. Article 30(2) of the Constitution of Pakistan says—

> "The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State or any organ or authority of the state or any person on such ground."

The 1956 Constitution of Pakistan also embodied certain directives in the nature of our 'principles' which were not judicially enforceable. Mr. Abul Mansur in the then Pakistan Assembly criticized it highly as a member of the opposition in the parliament during the time of Sahrawardi on the 17th January 1956 in the following words:[91]

> "Now, Sir, what is this provision for directive principle which is found nowhere in the world except in India and Ireland? These are the two solitary examples where constitution provides for directive principles. It is preposterous to think that the constitution will give some directives which will not be enforceable in law and which will not be justifiable and will not be effective. If that is so, why should these things be in the constitution at all? It is not a plaything of children. It is a sacred document which shall be preserved in the breasts of the citizens of the state as a sacrosanct provision on which they would rely for protection of their rights—individual, social, collective and political. But they provide at the very beginning that these or such provisions shall not be enforceable in any court of law. If that is so, why do you provide it at all? Leave it to the people."

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90. Comptroller V. Jagannathan, AIR 1987 SC 537. See Basu D.D., *Shorter Constitution of India*, 10th ed., Prentice Hall of India Private Limited, New Delhi, p. 270. Basu cited the following directions issued by the Supreme Court referring different cases:
    - *To issue a notification under the Minimum Wages Act, for the benefit of bonded and other exploited laborers.*
    - *To set up a joint committee of the Union of India and a State Government concerned as a machinery to supervise and ensure that the poor and needy employers are not exploited by unscrupulous contractors in imposing terms violative of the Directives under articles 38, 41, 42, 43 or the various labor laws.*
    - *To take various steps for extending the benefit of article 39A to all under trial prisoners.*
    - *To lay down procedural safeguards in the matter of adoption of Indian children by foreigners, in view of article 39F.*
91. For reference see Bangladesh GonoParishader Bitarka, Sarkari Biboroni, 1972 vol.2 at p. 222.

The Constitution of Lesotho contains in chapter III certain 'Principles of State Policy' which are not enforceable by any court. Article 25 of this Constitution[92] says about the application of these principles of State policy that—

> "The principles contained in this Chapter shall form part of the public policy of Lesotho. These principles **shall not be enforceable by any court** but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles."

The Constitution of the Republic of Liberia contains certain 'General Principles of National Policy' and Article 4[93] says that 'The principles contained in this Chapter shall be fundamental in the governance of the Republic and shall serve as guidelines in the formulation of legislative, executive and administrative directives, policy-making and their execution.'

Suranjit Sen Gupta, a member of the Constituent Assembly in Bangladesh during the debates on the draft constitution termed the Constitution as undemocratic on different grounds, *inter alia*, not making these 'principles' as judicially enforceable.[94] A proposal was raised subsequently in the Assembly to omit the words 'but shall not be judicially enforceable' from Article 8, but the proposal was rejected by the majority.[95]

Is it enforceable otherwise than by the judiciary?

The Fundamental principles of State Policy are not judicially enforceable –but does it mean that these are not enforceable at all even by any other means? Does it necessarily imply that the State will not be answerable to any authority for the non-implementation of these Fundamental Principles? Dr. Ambedkar, the chairman of the Drafting Committee of the Constitution of India, while introduced the draft Constitution, wonderfully settled such a point in the following words:

> "If it is said that the Directive Principles have no legal force ... I am prepared to admit it. But I am not prepared to admit it that they have no sort of binding force at all. Nor am I prepared to conceive that they are useless because they have no binding force in law.... The Draft Constitution as framed only provides a machinery for the government of the country. It is not a

92. The Constitution of Lesotho
93. The Constitution of the Republic of Liberia.
94. Supra note 91, p. 224.
95. Ibid. p.454.

> contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He can not ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized better when the forces of right contrive to capture power."[96]

Thus it has been made absolutely clear that the judicial enforcement is not the only way to enforce a particular rule, rather public opinion is also an effective mechanism for the enforcement of certain principles and certainly this is in conformity with the idea of popular sovereignty as opposed to Austin's concept of sovereignty. Thus, the accountability to enforce these principles was left to the political process and with the passage of time however greater emphasis has come to be laid on the fulfillment of the goals set out in these principles.[97]

The comment made by Hegde J. of India is also worth mentioning here:

> "... a mandate of the Constitution, though not enforceable by courts is none the less binding on all the organs of the State. If the State ignores those mandates, it ignores the Constitution."[98]

Thus it appears that Granville Austin rightly termed fundamental principles of state policy as 'the conscience of the constitution'.[99] In this connection legal status of the constitutional conventions in the UK is worth mentioning here that these are not in reality laws at all since they are not enforced by the courts[100] though may be considered to be binding by and upon those who operate the constitution.[101] To breach a constitutional convention is to act unconstitutionally but not unlawfully,

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96. Indian Constituent Assembly Debate, Vol. VII, p. 41
97. Jain M.P., *Indian Constitutional Law*, 4th edition reprint, Wadhwa and Company Law Publishers, Agra, Nagpur, India, 2002, p. 736
98. Hegde, *Directive Principles of State Policy in the Constitution of India* ("the Rau Lectures) at p.49
99. Mahajan V. D., *Constitutional Law of India*, Eastern Book Company, Lucknow, 7th ed., p. 366
100. Dicey A. V. 1885, for reference see Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.
101. Marshall and Moodie, 1971, pp. 23-24, for reference see Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.

since these are non-legal rules.[102] Such breach attracts no legal sanction but instead risks political repercussions.[103] Thus, Justice Mustafa Kamal rightly observed in the context of the constitutional law of Bangladesh that since the fundamental principles of state policy are not laws to be enforceable by the judiciary, so even if any law is passed by the parliament violating any of these principles, judiciary is not the only light at the end of the tunnel to enforce it, and if it really happens so there are many other ways of enforcement except judicial enforcement, like public opinion, political party and election.[104]

To give the reply to the objection raised by Suranjit Sen Gupta against judicial non-enforceability of the 'Principles', in the Constituent Assembly, Dr. Kamal Hossain, the then law minister and the chairman of the Constitution drafting committee said that 'these are not enforced by the court—rather through the convention'.[105] But it is not really clear how will these principles be enforced through the convention? Did he really mean it? Or he tried to say that like the conventions of the British Constitution these principles would be enforced through different mechanisms of constitutionality and public opinion instead of being judicially enforced.

Though these principles are not enforceable by any court, 'nevertheless fundamental to the governance of Bangladesh'[106] which should form 'the basis of the work of the State and of its citizens'[107] and 'the endeavour of the government must be to realise these aims and not to whittle them down'.[108] However, the question of judicial enforceability arises specially only when there is a violation of these principles or if the State does not perform its Constitutional obligation properly. Why will the State violate these principles or why will it not perform its obligations following the guidelines provided by the Constitution? It must be remembered that the Constitution though says that these 'principles' 'shall not be judicially enforceable' it does not discharge the State from its Constitutional obligation imposed by these 'principles', from the positive approach obligations remain the same whether that is judicially enforceable or not.

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102. Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.
103. Ibid., p.34.
104. *Kudrat-E-Elahi V. Bangladesh*, 44 DLR (AD) 319, at paragraph 86.
105. Bangladesh GonoParishader Bitarka, Sarkari Biboroni, 1972 vol.2 at p. 455.
106. Article 8 of the Constitution of Bangladesh.
107. Ibid.
108. *Per* B. H.Chowdhury, J. in *Anwar Hossain Chowdhury V. Bangladesh*, 1989 BLD (Spl) 1, p.61 para 53.

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SEPARATION OF MAGISTRACY : A BASIC NEED FOR THE INDEPENDENT JUDICIAL SYSTEM IN BANGLADESH

Mohammad Nazmuzzaman Bhuian

1. Introduction

It is almost trite to mention that no other criminal court of the Lower Judiciary in Bangladesh enjoys direct connection with the larger portion of our litigants so extensively like the Magistrate Courts. Nor have Magistrates of other countries the many special jurisdictions and extra-judicial functions conferred on the Magistrates of Bangladesh by statutory enactment.

As regards criminal cases in Bangladesh, Magistrates' Courts are the courts of first instance. It would be evident from the number of criminal cases filed in a year in these courts, which is far greater than the number of cases in civil courts. So, these criminal courts should have played a vital role in shaping the thoroughgoing nature of our legal system. But unfortunately, due to some legal shortcomings, these courts are playing controversial role frustrating the very purpose of the Independent Judicial System. Public perception of the Magistracy is very low and the reasons are plain to see. In order for law enforcement to be fair, the judicial system must be concerned only with the application of Law. There is only one way in order to make this happen: assurance of independence from any sort of influence from the administrative branch of the government. Achieving judicial independence is the crucial phase in regaining public confidence in the Legal System of Bangladesh. The future independence of the Judiciary of Bangladesh depends upon the minimization of the executive interference in the Lower Judiciary, and more importantly, upon the removal of the executive control over the Magistracy.

The aim of this study is to focus on the shortcomings of the Magistracy and subsequently to put forward certain recommendations for the proper functioning of an independent and separate Magistracy in Bangladesh.

2. System of Magistracy

According to the Merriam-Webster's Dictionary of Law, 1996, Magistrate

is a civil or Judicial Official vested with limited judicial powers.[1] Again, according to the American Heritage Dictionary of the English Language, a Magistrate is a local member of the Judiciary having limited jurisdiction, especially in criminal cases.[2] In English legal system, magistrates usually hear prosecutions for and dispose of summary offences. Magistrates' sentencing powers are limited, but extend to shorter periods of custody, fines, probation and community service orders. Magistrates usually pass summary offenders to higher courts for sentencing when, in the opinion of the magistrate, a penalty greater than can be given in Magistrates' Court is warranted.

To have a clear idea of the Magisterial System in Bangladesh, one must know something of the historical setting of Magistracy before and after the emergence of Bangladesh.

2.1 Evolution and Development of Magistracy before Emergence of Bangladesh

Evolution of Magistracy before the emergence of Bangladesh dates back to the period of Warren Hastings, the Governor of the East India Company. In 1772, Warren Hastings took over the collection of revenue and administration of civil justice from the Hands of Nazim and handed it over to the English servants of the Company. He appointed a covenanted servant of the Company as the Collector in each district for collecting revenue. Apart from the District Civil Court, a criminal court was also constituted with the Quazi, Mufti and two Moulovies in each district who had the authority to try all the criminal cases including murder cases. This court could award punishment up to death penalty. But death sentence required approval of the Sadar Nizamat Adalat, which, in its turn, had to take approval from the Nazim.[3] Sadar Nizamat Adalat consisted of Naib Nazim, Quazi-ul-Quzzat, Head Mufti and three well reputed Moulovis to hear appeals against the District Quazis in criminal matters.[4]

In the Year of 1781, Warren Hastings appointed Collectors as Magistrates and empowered them to arrest persons suspected of committing crimes

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1. Merriam-Webster's Dictionary of Law, 1996 available at www.lectlaw.com/def2/m064.htm.
2. The American Heritage ® Dictionary of the English Language, Fourth Edition, Copyright © 2004, available at www.lectlaw.com/def2/m064.htm.
3. Jain, M.P., *Outlines of Indian Legal History* (Bombay, 1972) pp. 75-77.
4. Mittal, J.K., *Indian Legal History* (Allahabad, 1981), pp. 48-50.

and to send them to the District Criminal Court for trial. In 1785, the Magistrates were authorized to try petty offences.[5]

During the Period of Lord Cornwallis, the revenue and judicial administration were separated. He removed the Collector's judicial powers – leaving the position purely administrative. This step was undoubtedly praiseworthy. Four Provincial Courts were introduced in the four divisions. Two of the Judges of each Provincial Court formed the Circuit Court of Sessions of the division to try criminal cases sent to them by the Magistrates. That court could also hear appeals and revisions from the decision of the Magistrates' courts. But as usual, a sentence of death used to require confirmation by the Sadar Nizamat Adalat.[6] Sadar Adalats were again reconstituted with the Governor General and some of his Councillors to hear appeals from the Provincial Courts of Appeal and Circuit Courts of Sessions.

During the period of Lord Hastings, Regulation IV of 1821 empowered the Governor General in Council again to authorize the collector or any other revenue officer to exercise powers of the Magistrate.[7] Afterwards, Lord William Bentick vested almost all the Collectors with magisterial powers to administer criminal justice.[8] A Commissioner of Revenue and Circuit in each division was appointed to control the Magistrates and he was empowered to try cases of grave offences and the Circuit Court of Sessions was abolished.[9] Afterwards, Regulation VII of 1831 authorized the Governor General to empower the District and City Judges who were not Magistrates to hold sessions to try cases of grave offences instead of the Commissioners of Revenue and Circuit. Thus, gradually, the District Judges were made Sessions Judges of the District and the Divisional Commissioners were relieved of their duty of holding sessions. Afterwards, Criminal Justice Act 1843 passed by Lord Ellenborough's government provided for appointment of Deputy Magistrates from amongst educated and competent natives for trying petty criminal cases.[10]

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5. Jain, M.P., *Outlines of Indian Legal History* (Bombay, 1972), pp. 153, 158.
6. Morley, William H., *The Administration of Justice in British India* (New Delhi, 1858, reprinted 1976), pp. 59-60.
7. Jain. M.P., *Outlines of Indian Legal History* (Bombay, 1972), p 251.
8. Ibid., p. 259.
9. Ibid., pp. 259-260
10. Ibid., p. 271.

During the last days of the East India Company's Rule, there were four tiers of the Magistrate Courts where Deputy Magistrate was the court of first instance. Above this court, there were three more courts – court of Assistant Magistrate, court of Joint Magistrate and court of District Magistrate. District Magistrate used to control the other Magistrates. Magistrates used to try petty offences and investigate the grave offences. Where the investigation disclosed a prima facie case, then they used to refer the case to the Court of Sessions. Magistrates had the maximum power of imprisonment up to two years and additional one year imprisonment instead of corporeal punishment. Appeal lay from their sentences to Sessions Judges.

During the British Rule, when the Company's rule came to an end in the year of 1858 by a proclamation of Queen Victoria, some changes were brought about by the different Law Commissions. Each district got divided into several sub-divisions and there were courts of Magistrates in the sub-divisional headquarters, which were presided over by the Sub-divisional Magistrates. Three classes of magisterial power were introduced – first class Magistrates, second class Magistrates and third class Magistrates. Magistrate of the first class had the authority to award punishment upto 2 years imprisonment and 2000 rupees fine, second class Magistrate could award punishment upto six months imprisonment and fine upto 500 rupees, and the third class Magistrate had the authority to award imprisonment upto one month and fine upto 100 rupees.[11] District Magistrate, Joint Magistrate and Additional Magistrates located in the district headquarters if empowered, could try cases punishable with imprisonment upto seven years. Otherwise, they had the authority of a Magistrate of the first class. They could also hear appeals from the Magistrate of the third class.[12] Appeal from the Magistrate of the first and second class lay to the Sessions Judges. However, appeal from a sentence of the Magistrate specially empowered sentencing any of the accused for a term exceeding four years lay before the High Court.[13]

During Pakistan period, the entire Magistracy continued to function as it was.[14]

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11. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 19.
12. Ibid.
13. Ibid., p. 20.
14. Ibid., p. 21.

2.2 Magistracy on the Emergence of Bangladesh

Magistracy continued to function in Bangladesh under the Laws Continuance Enforcement Order 1971 and Magistrates continued to function as well after taking oath of allegiance to Bangladesh.[15] Thus it appears that all subordinate courts and Magistracy functioning during the Pakistan period continued to function after emergence of Bangladesh under the High Court of Bangladesh.[16]

In 1972, the Constitution of the People's Republic of Bangladesh was passed which came into force on the 16th December, 1972. Chapter II of Part VI deals with the subordinate courts and Magistracy.

Apart from the Court of Sessions, there are four types of criminal courts.[17] They are –

a) Court of Metropolitan Magistrates

b) Court of Magistrate of the First Class

c) Court of Magistrate of the second class

d) Court of Magistrate of the third class

The Government may confer upon any person the powers of Magistrate under the Code of Criminal Procedure.[18] Normally, the Government appoints a junior civil servant of the administrative cadre as a Magistrate of the third class. When such an officer gains some experience as a Magistrate of the third class, he is conferred with second class power and after further experience, he is conferred with first class power.[19] Under the Code of Criminal Procedure, the Government may confer upon any person all or any of the powers conferred or conferrable by or under the Code on a Magistrate of the first, second and third class in respect to particular classes of cases, or in regard to cases generally in any local area outside a Metropolitan area. Such Magistrates shall be called Special Magistrates and shall be appointed for such term as the Government may by general or special order direct.[20]

In the Districts outside the Metropolitan areas, Magistrates of the first class are appointed District Magistrates and Additional District

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15. 24 DLR, Bangladesh Statute (Dhaka, 1972) p. 3.
16. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 28.
17. See Section 6 of the Code of Criminal Procedure, 1898.
18. Section 12, ibid.
19. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 40.
20. Section 14 of the Code of Criminal Procedure, 1898.

Magistrates.[21] Normally, Deputy Commissioner of the district acts as District Magistrate and the Additional Deputy Commissioner acts as Additional District Magistrates.[22] All other Magistrates including the Additional District Magistrates are subordinate to the District Magistrates.[23] In the Metropolitan areas, Government appoints Chief Metropolitan Magistrate, Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates to perform magisterial functions.[24] All of them exercise first class magisterial power. Normally, they are also civil servants from administrative cadre.

3. Importance of the Magistracy in the trial of criminal cases

Magistrate Courts are the courts of first instance for criminal cases. So Magistracy serves as the gateway for seeking redress in criminal cases. Discussion regarding the functions, powers and workloads of the Magistrate Courts will reveal the importance of the Magistracy in the trial of criminal cases.

3.1 Functions and Powers of the Magistrate Courts

A criminal case regarding a cognizable offence is initiated by lodging first information report (FIR) with the local police station[25] and in case of non-cognizable offence, the same is done by filing a complaint petition with the Magistrate of the local area.[26] In case of cognizable offence, the police submits either charge sheet (where the allegation is proved after investigation) or final report (where the allegation is not proved after investigation) to the Magistrate of the area. In case of charge sheet, the Magistrate takes cognizance of the offence and in case of final report, discharges the accused.[27] But the Magistrate is not bound by the final report. The court may act suo moto or on the application of the informant (usually known as Naraji Petition) and if satisfied that there are sufficient materials in support of the allegation, may take cognizance of the offences rejecting the final report.[28] In case of non-cognizable offences, when information is given to an officer in charge of the Police station, he

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21. Section 10, ibid.
22. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 39.
23. Section 10 and 17 of the Code of Criminal Procedure, 1898.
24. Section 18, ibid.
25. Section 154, ibid.
26. Section 155 and 190, ibid.
27. Section 190 (1) (b) and 202(2b), ibid.
28. Abdus Salam Vs State, 36 DLR (AD) p. 58.

shall enter in a book and refer the informant to the Magistrate.[29] In case of such offences, police can not arrest the accused without warrant of arrest from the Magistrate, nor can investigate into such an offence without the permission of the Magistrate.

In case of non-cognizable offence, when the case is initiated by filing a complaint petition, the Magistrate taking cognizance of such offence on complaint shall examine upon oath the complainant and such of the witnesses present, if any, as he may consider necessary. The substance of the examination shall be reduced into writing and shall be signed by the complainant or witness so examined, and also by the Magistrate.[30] The Magistrate may, for the ends of justice, himself (not being a Magistrate of the third class) hold inquiry for ascertaining the truth or falsehood of the allegation. He may direct any other Magistrate subordinate to him or any other police officer to hold the inquiry.[31] The Magistrate may dismiss the complaint if, after considering the statement of the complainant and other witnesses (if any) or the result of the inquiry, he is of the opinion that the complaint bears no substance.[32] On the other hand, if the Magistrate takes cognizance of the complaint case, he issues summons or warrant of arrest against the accused to compel his appearance before the Magistrate.[33] It is to be mentioned here that in case of cognizable offence, police arrests the accused during investigation and produces him before the court.

As soon as the accused is produced or appears before the court, the court sets really in motion. The Magistrate may enlarge the accused person on bail or send to the jail custody. After taking cognizance and appearance of the accused, if the Magistrate finds that the offence is exclusively triable by the Court of Sessions or any other Special Tribunals, he then sends the case to Sessions Judge of the District.[34] If it appears to the Magistrate that the offence is triable exclusively by the Chief Metropolitan Magistrate, District Magistrate or the Additional District Magistrate, then he shall send the cases to those courts.[35]

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29. Section 155 of the Code of Criminal Procedure, 1898.
30. Section 200, ibid.
31. Section 202, ibid.
32. Section 203, ibid.
33. Section 204, ibid.
34. Section 205C, ibid.
35. Section 205CC, ibid.

Generally, less grave offences are to be tried by the Magistrates. However, powers of Magistrates depend upon the sentences which Magistrates may pass. The court of Magistrates may pass the following sentences:[36]

(a) Court of Metropolitan Magistrates and Magistrates of the first class may award imprisonment for a term not exceeding five years including such solitary confinement as is authorized by law and fine not exceeding ten thousand taka;

(b) Court of Magistrates of the second class may award imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law and fine not exceeding five thousand taka;

(c) Court of Magistrates of the third class may award imprisonment for a term not exceeding two years imprisonment and fine not exceeding two thousand taka.

However, the court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.[37] Besides, the court of a Magistrate, specially empowered under Section 29C of the Code of Criminal Procedure, may pass any sentence, authorized by law, except a sentence of death or of transportation or imprisonment for a term not exceeding seven years.[38]

So, the above discussion very clearly reveals the importance of the Magistracy in the judicial system of Bangladesh. It also shows that although the Magistrates are to try minor offences, they have been given a wide range of authority to inflict punishment upon the accused person which should be given only to a Judicial officer having legal background.

3.2 Workload in Magistrates' Courts

According to the information obtained from the Cabinet Division of the Government of the People's Republic of Bangladesh, up to June 1994, there were 875 Magistrates including 24 Magistrates deputed in autonomous bodies, working in the country and disposing of criminal cases. In 1993, in the court of the Magistrates, 2,59,053 cases were filed making a total of 4,01,027 cases including the cases pending from the previous year and out of these, 2,26,042 cases were disposed of leaving

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36. Section 32, ibid.
37. Id.
38. Section 33A, ibid. Be it noted that by Govt. Notification No. ED/FA-52/82-466 dt. 8.9.82 and No. ED/EA-28/83-120 dt. 6.3.83, all the District Magistrates and Additional District Magistrates were empowered under section 29C.

1,74,985 cases pending at the end of the year.[39] From 1994 to 2005, number of Magistrates as well as number of cases increased but the rate of disposal of cases decreased, resulting in an increase in the number of pending cases before the court of the Magistrates.[40] In 1994, the percentage of the disposal of cases was 52.12% where it has decreased in the year of 1999 to 43.58% although the number of Magistrates has increased.[41] Although there was a notable rise in the year 2002 but then again there was a downfall and the number is presently decreasing.[42] From Year 1994 to year 2005, the number of cases has increased from 2,82,401 to 3,42,268.[43] The Statement of criminal cases in the Courts of Magistrates from 2000 to 2005 may be shown as follows:[44]

Year	Number of cases pending at the end of the previous year brought forward	Number of cases filed during the year	Total number of cases in the current year	Number of cases disposed of during the year	Number of cases pending undispo-sed at the end of the year	Perce-ntage of dis-posal of cases	Number of Magis-trates (at pre-sent)
2000	3,95,908	3,31,595	7,27,503	3,20,287	4,07,216	44.02	
2001	4,07,216	3,79,050	7,86,266	3,52,447	4,33,819	44.83	
2002	4,33,819	3,77,430	8,11,249	4,06,987	4,04,262	50.17	923
2003	4,04,262	3,74,817	7,79,079	3,73,832	4,05,247	47.98	March/
2004	4,05,247	3,42,268	7,47,515	3,39,613	4,07,902	45.43	2005
2005 up to March	4,07,802	74,606	4,82,508	79,035	4,03,473	16.38	

39. See for details, Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), pp. 84-85.
40. As per the statement supplied by the Cabinet division in May 2005.
41. See for details, Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003)., Appendix – V, p. 294.
42. As per the statement supplied by the Cabinet division in May 2005.
43. Ibid.
44. Ibid.

This picture clearly reveals the huge workload upon the Magistrate Courts proving the importance of Magistracy as the court of first instance in the disposal of criminal cases.

4. Problems of the Present system of Magistracy

It is now beyond any doubt that the Magistracy in Bangladesh serves as the gateway to protect the rights of the citizen in criminal matters. All the criminal cases are started in the Magistrates' courts and those triable by the Court of Sessions or sessions level courts or tribunals are sent by the Magistrates to those courts or tribunals after the preliminary stages. And the power enjoyed by those Magistrates in awarding punishment upon the accused person is not negligible. Even specially empowered Magistrates may pass sentence of imprisonment up to seven years. In such circumstances, how far the Magistrates in Bangladesh can uphold the dignity of the judicial system by exercising their magisterial power is a burning question. A little discussion about the appointment, promotion, discipline etc. of the Magistrates will reveal how does the present system of Magistracy is directly in conflict with the concept of independent judicial system.

4.1 Appointment, promotion, discipline etc. of the Magistrates

As it is found in the history, at first, the collectors[45] were appointed as the Magistrates during the period of Warren Hastings[46], who were then empowered to try petty cases. The present system of Magistracy has not deviated too much from that very first concept of British rule in this sub-continent. The dual function of Magistrates is a legacy of British rule. According to the Code of Criminal Procedure, the Government may confer upon any person the powers of Magistrate.[47] But practically, it is neither vested upon 'any person', nor there is any separate cadre of Magistrates. Officers appointed in the administrative cadre of the Civil Service are initially vested with the third class magisterial power. After gaining some experiences as the Magistrates of the third class, they are vested with second class and first class magisterial power. As the Magistracy has not been separated from the Executive organ of the State,

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45. 'Collector' was a crucially important colonial officer placed at the district level and entrusted with the responsibility of revenue collection and other civil duties. The district collector functioned as the most decisive officer of the administration throughout the British period. It was through this officer that the colonial state used to execute its command, and sustained local control.
46. See for details, "Legal system under Company rule" as available at –http://banglapedia.search.com.bd
47. Section 12 of the Code of Criminal Procedure, 1898.

as directed under Article 22 of the Constitution, the officers of the administrative cadre performs both the administrative and judicial functions and their control including posting, promotion and leave is exclusively exercised by the Executive organ of the Government, accordingly, depends on the sweet will of the Executive. However, according to the Constitution, the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.[48] But in practice, Supreme Court is not consulted in the matters of posting, promotion etc. of Magistrates. Besides the term 'magistrates exercising judicial functions' as used in the Constitution of Bangladesh is a misnomer. A little discussion about that will make it clear.

4.1.1 'Magistrates' Vs 'Magistrates exercising Judicial Functions'

In the Constitution of the People's Republic of Bangladesh, the term 'magistrates exercising judicial function' has been used to describe the Magistrates. This term is a misnomer. The definitions of Magistrates as universally used in different languages very clearly reveal that Magistrate is usually a person who exercises limited judicial power in summary matters.[49] No officer who does not have any type of judicial power is normally called Magistrate. Besides, in Bangladesh, there is no appointment of any officer as Magistrates. So, there is no one who can be called Magistrate in practice except an officer of the administrative cadre who exercises magisterial power. Under such circumstance, the term 'Magistrate' itself implies that he is a person who has some judicial power. So, there is no reason for using the term 'magistrates exercising judicial function'. This term can be used only when there is a separate cadre of Magistrates where the persons are appointed as Magistrates with magisterial power and they are specially given limited judicial power to exercise. And then, obviously, a distinction must be categorically maintained between the term 'magisterial' and 'judicial'. But there is no separate appointment as Magistrates. The persons who played key role in drafting the Constitution clarified that they tried to mean Judicial Magistrate by that term.[50] Then the question arises, why again 'Judicial

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48. Article 116 of the Constitution of the People's Republic of Bangladesh.
49. See for details, the various definitions of Magistrates as available at www.lectlaw.com/def2/m064.htm
50. See for details, Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective*, (Dhaka, 2003) p. 350.

Magistrate' instead of 'Magistrate' only. The term 'Judicial Magistrate' can be used only if there is another type of Magistrates called 'Lay Magistrate' as found in the old system of England and Wales.[51] If the term 'Judicial Magistrate' was used and separate cadre of Judicial Magistrates was created where the appointment would be made from among the persons having legal background who would exercise judicial functions, there would not be any problem regarding magistracy at present. But, as now, the officers from the administrative cadre are vested with judicial power, there are a lot of shortcomings of the Courts of Magistrates that deserve a little discussion.

4.2 Shortcomings of the present system of Magistracy

It can be said that in criminal matters, Magistrates' Courts are the lowest courts of the judicial system in Bangladesh, which are presided over by the members of the executive. Magistrates are the executive officers and they are directly controlled by the Executive branch of the Government. So, they are most easily influenced by the Government objectives. Thus, it is the lack of independence of the Magistracy, which stands as the largest impediment to justice in the Lower Judiciary.

However, the shortcomings of the present system of Magistracy may be described as follows:

- Officers of the administrative cadre of the Bangladesh Civil Service are vested with the magisterial power in practice. So, all the magistrates exercise dual functions – judicial and administrative. For their administrative activities, they are directly answerable to Executive branch of the Government but for exercising judicial power, they are not under the direct control of the Judiciary. It is principally due to this practice, the Executive branch has been able to intrude upon and influence the Magistracy, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence.
- Posting, promotion and the prospects of the career of a Magistrate is totally dependent upon the pleasure of the Executive branch of the Government. Under such a circumstance, it is impossible for a Magistrate to take an independent view of the case he is trying where the interest of the Executive branch is involved.

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51. There were two types of Magistrates in England and Wales: Lay Magistrates who are known as Justices of the Peace and sit voluntarily on local benches, and another type was Professional or Stipendiary Magistrates (who are now known as District Judges).

- As mentioned earlier, the officers of the administrative cadre are vested with the magisterial power in practice. So, they are actually appointed as Assistant Commissioners through the Public Service Commission after a competitive test and legal background is not a prerequisite for such an appointment. As a result, a person graduating from any discipline (e.g. Bengali Language or History) of any University may be appointed as Assistant Commissioners. Afterwards, those officers are vested with the judicial power under the Code of Criminal Procedure, as according to the provisions of the Code of Criminal Procedure, such power may be invested upon 'any person'[52] and theoretically, it is better to confer such power upon the officers of the administrative cadre. But practically, such a Magistrate is exercising judicial power without having any legal background. It is somehow impossible to expect criminal justice from a person who has no legal education. Consequently, they are doing injustice in the name of justice. As discussed above in this Article, Magistracy serves as the gateway to the criminal justice in Bangladesh as all the criminal cases are initiated in the Magistrates' Courts. So, Magistracy plays a very crucial role in doing criminal justice to the people at large. If such a role is played by the officers who do not have any legal background, it is almost impossible to expect justice from these courts. Thus the continuous deterioration of the quality and independence of the Lower Judiciary is spear headed by the insensitivity of the Magistrates to the practice of law resulting in unsystematic granting of police remand and the denial of bail for those who should be granted bail.
- Magistrates' courts are not under the direct control of the Judiciary. So, in case of any discrepancy, the Higher Judiciary can not take any administrative action regarding the Magistrates. As a result, the officers of the administrative cadre sometimes do not care about doing injustice.

Thus the Magistrates' Courts, who are the court of first instance in case of criminal matters, are suffering from a lot of shortcomings regarding which, immediate remedial measures should be taken to put the Magistracy above controversy. This can only be done through the separation of Magistracy.

5. Separation of Magistracy and the Direction of the Supreme Court

As discussed above, it was first the Lord Cornwallis, who separated the revenue and judicial administration. But this failed to take an ultimate

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52. Sections 12 and 14 of the Code of Criminal Procedure, 1898.

shape of the separation of Magistracy due to the later interventions by his successors. Thus, although the separation of Magistracy has been debated almost since arrival of the British, it is since the emergence of Bangladesh and the formation of its own Constitution that the need for the separation and independence of the Judiciary as well as Magistracy has become crucial. Specially after the 4th Amendment of the Constitution on 25th January of 1975, which introduced the one party political system, the country went through the most significant and radical changes in the Constitution.[53] It is told that the Amendment completely curtailed the independence of Judiciary.[54] As to the appointment in the Subordinate courts, it was provided in the original Constitution that the District Judges shall be appointed by the President on the recommendation of the Supreme Court and other judicial officers including Magistrates would be appointed by the President after consulting the Public Service Commission and the Supreme Court.[55] As to the security of tenure, it was provided that the control and discipline of the Judges and Magistrates would vest in the Supreme Court.[56] So, these were healthy provisions regarding the Lower Judiciary as well as Magistracy. But the 4th Amendment amended the appointment provision to the effect that appointments of persons to offices in the judicial service or as Magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf. And the provisions regarding control and discipline were amended to the effect that the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President. Thus the whole Judiciary became completely subservient to the executive. And after making such provisions, it was inserted in the Constitution that subject to the other provisions, all persons employed in the judicial service and all Magistrates shall be independent in the exercise of their judicial functions.[57] This provision was really illusory. However, the undemocratic

53. See for details, Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, (Dhaka, 1984), p. 233.
54. See for details, Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective*, (Dhaka, 2003) p. 118.
55. Article 115 of the Constitution of the People's Republic of Bangladesh.
56. Article 116, ibid.
57. Article 116A, ibid.

provisions regarding the control and discipline introduced by the 4th Amendment were repealed and the healthy provision 'in consultation with the Supreme Court' as was provided by the original Constitution was revived in 1978 by the Second Proclamation. But, unfortunately, the arbitrary provision relating to the appointment of Judges and Magistrates of the Lower Judiciary still exist.

In the years following the 1975 Amendment, a few attempts were taken to improve the independence of Judiciary, which revolved around mainly the Higher Judiciary only (e.g. the creation of Supreme Judicial Council regarding the removal of Supreme Court Judges in 1977 and the increase in the tenure of the office of the Supreme Court Judges several times) but the issue of the separation of Lower Judiciary was unheeded until 1997 when the High Court Division demanded the Judiciary be separated from the Executive. And since December 2, 1999, the issue of judicial independence centered on a twelve-point direction issued by the Supreme Court as operative part of its judgement delivered in the case of Secretary, Ministry of Finance Vs Masdar Hossian.[58] In fact, these twelve points in the operative part of the judgement are not all directions in true sense of the term. Of these 12 points, five are (i.e. 4,5,6,8,9) in the nature of directions. The directions asked the Government to take necessary steps to create a unified Judicial Service of Bangladesh or Bangladesh Judicial Service. The Government in power at that time did not take any step except establishing Judicial Pay Commission while the current Government is now in the final steps to give effect to the 12 point directions of the Supreme Court. The Judicial Service Commission has already been established and Judicial Service Commission Rules 2004 has already been promulgated.[59] The process of appointing Judges of the lower courts through the Judicial Service Commission is going on in full swing. But this Commission is going to appoint only the Assistant Judges, which has been considered as the 'Entry Post' of the Lower Judiciary by the Judicial Service Commission Rules. But the problem remains the future of the Magistrates. Government may create a separate cadre of Magistrates or the members of the judicial service may perform Magistracy. However, some recommendations may be put forward regarding the separation of Magistracy.

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58. 52 DLR (AD), p. 82.
59. The Judicial Service Commission Rules 2004 has been notified in the Official Gazette on 28 June, 2004.

6. Some Recommendations for the Separation of Magistracy

The foregoing discussion reveals that, the shortcomings of the Magistracy are so considerable, the need for an effective and independent Magistracy is so great, and the directions of the Supreme Court of Bangladesh regarding the creation of a unified Judicial Service are so specific, that it is now time to 're-evaluate' its future. Supreme Court has already declared in point 2 that 'appointments' in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf. So, the President can make rules for the **reformation** of the Magistracy regarding the recruitment and appointment to make it an independent one.

Be it noted that the Magistracy is considered as a separate stream outside the judicial service as in its present form, Magistracy can not be included in the 'Judicial Service' and the Supreme Court has also mentioned it separately and used the Constitutional term 'Magistrates exercising Judicial Functions'. But, as they are performing judicial functions, it would be better if they could be included in the Judicial Service. In that case, present system of Magistracy has to be abolished, because, Supreme Court has already declared in point 1 that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative service. And in point 11, the Appellate Division disagreed with the view of the High Court Division and declared that, if the Parliament so wishes, it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete. If this point is taken into consideration widely, the present system of Magistracy may be **abolished** by amending the Constitution and a new post for this purpose may be created within the judicial service.

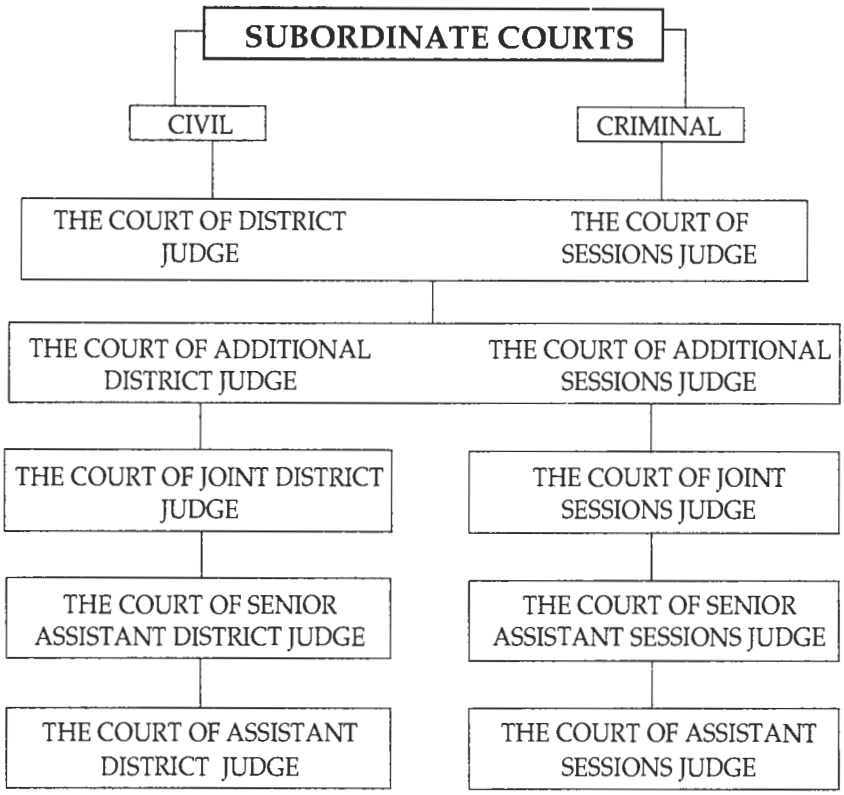
To make the Magistracy an effective and independent one, the following reforms may be suggested:

- There will be a separate stream of Magistrates who will exercise judicial functions to be known as Judicial Magistrates. They will serve as the courts of first instance regarding criminal offences. All these Magistrates shall be appointed from among the persons having legal background in the rank of the 'Judicial Magistrate' by the Judicial Service Commission.

- Equivalent to Assistant Judge and Senior Assistant Judge, there will be two ranks of Judicial Magistrates –Judicial Magistrate and Senior Judicial Magistrate. Usually, the Assistant Judges try the cases in which the suit value is less than 2 lakh taka while Senior Assistant Judges try the cases with suit value up to 4 lakh taka. Likewise, the Judicial Magistrates shall try the petty offences and the Senior Judicial Magistrates shall try the less grave offences.
- The Senior Judicial Magistrates may be promoted to the rank of Assistant Sessions Judge after gaining experience. Thus he may enter into the hierarchy of the Sessions Court. If the Judicial Service Commission thinks fit, the Assistant Sessions Judges (exercising criminal jurisdictions) and the Joint District Judges (exercising civil jurisdictions) may be transferred from one stream to another after a short training period.
- These Magistrates will be under the direct control of the Judiciary and control of these Magistrates including posting, promotion and granting of their leave and their discipline should be exclusively vested in the Supreme Court by amending the provisions of Article 116 of the Constitution.
- The officers of the Administrative cadre will have no judicial power, they will serve the Government as Assistant Commissioners and will exercise administrative powers only. But for maintaining law and order situation, they will have limited magisterial power and may have the jurisdiction of summary trial regarding petty matters, but no criminal case of grave or less grave offences may be initiated before them. In that case, they will be known as lay Magistrates.

Another option is abolition of the 'Magistracy exercising judicial functions' from the Legal System of Bangladesh where the judicial functions of the Magistrates will be performed by the members of the judicial service. For that, the present Assistant Sessions Judge's post will have to be re-named as 'Joint Sessions Judge' and the post of 'Assistant Sessions judge' shall become equivalent to the post of 'Assistant Judge' (presently exercising civil jurisdiction), who will perform the judicial functions of Magistracy as court of first instance regarding criminal matters. In such case, the post of 'Assistant Judge' may be re-named as 'Assistant District Judge". Both the Assistant District Judge and Assistant Sessions Judge shall be appointed by the Judicial Service Commission. For that, the Judicial Service Commission Rules shall have to be amended to the effect that 'Entry Post' shall mean both Assistant District Judge and Assistant Sessions Judge.

In that case, civil and criminal court structure will be as follows:



The Court of District Judge and the Court of Sessions Judge may be presided over by the same person. In the same way, Additional District Judge and the Additional Sessions Judge may also be the same person. But, from the post of Joint District Judge and the Joint Sessions Judge downwards, there will be division of Jurisdiction regarding civil and criminal matters, but Joint Sessions Judges (exercising criminal jurisdictions) and the Joint District Judges (exercising civil jurisdictions) may be transferred from one stream to another after a short training period. This interchange will help them to gain expertise in both the civil and criminal matters.

If the Government thinks fit, the officers of the Administrative cadre may be appointed as lay Magistrates with limited magisterial power, provided no criminal case of grave offences shall be initiated before them. They will have limited magisterial power for maintaining law and order situation only and may have the jurisdiction of summary trial regarding petty matters.

7. Conclusion

There is no denying that complete separation of power is neither possible, nor desirable. Complete separation is relatively unheard of outside of theory that would imply that no Judiciary is completely severed from the administrative and legislative bodies (because this reduces the potency of checks and balances and creates inefficient communication between organs of the State). But that does not mean that one organ of the Government may have the exclusive control over the other organ. So far as the Magistracy is concerned, the Executive has unfettered control over the Magistracy while they are exercising judicial functions. This is also not desirable. A high degree of separation, however, can be a strong guardian of judicial independence.

The present system of Magistracy completely ignores a principle fundamental to the Legal System of a country based on Common Law that legal appointment as of right belongs to the legal profession and the appointment of laymen to any legal office whatever is a violation of the established rights of the profession. These Magistrates, who usually hold judicial posts for three to ten years early in their careers before returning to their administrative job, don't usually have any legal background. Responsible for 80 percent of criminal cases, the Magistrates usually decide if the accused is to be granted bail or prosecuted – and typically have the power to jail an individual for up to five years.

History of the World shows that the perfection of Judicial System in short time is quite an improbable task. It would develop over time. The example of England displays how the development was slow but steady.[60] It is plausible that no other court of summary jurisdiction in the British Commonwealth has anything like the extensive civil and criminal jurisdiction of the Magistrates' Court in New Zealand. But in New Zealand too, there was lay Magistracy in the beginning. It is the Magistrates' Courts Act of 1908, which finally put the seal on the matter. From henceforth, all stipendiary Magistrates were required to be qualified barristers or solicitors.[61] In the same way, Bangladesh may also take a step to observe the 'major reform' as suggested in this Article and then slowly, abolish 'Magistracy exercising judicial functions' with a view to including that in the Judiciary in a new form by amending the Constitution. Supreme Court has directed the Government to amend the Constitution to make the separation more meaningful, pronounced, effective and complete. It is up to the Government to immediately take measures for applying the concepts embodied in the 12 point directions meaningfully and make the separation of Magistracy a real priority. Only through this, a new and sustainable criminal justice system would be guaranteed.

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60. See for details, "The Criminal Courts and Their Management" available at – www.criminal-courts-review.org.uk/chpt3.pdf.

61. Visit for details – www.teara.govt.nz/1966/M/Magistracy.

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THE CONCEPT OF FLOATING CHARGE AND ITS PERFECTION IN BANGLADESH

Dalia Pervin

It is only a natural question for a creditor to ensure that he recovers his credit with agreed upon margin from the debtor. It is therefore no surprise that a creditor would attempt to obtain genuine rights over the debtor's properties for securing payment of the debt. As a result, any failure to repay would lead to the sale of the secured property for realizing the creditor's debt. Our law recognizes mortgage, pledge, lien/ hypothecation, charges as modes of security. This article will mainly deal with the floating charge. Our case law on questions of fixed charges as security is settled, but does not deal with developments of floating charge very much. Keeping of title to goods until payment of the price i.e. hire purchase in general practice is intended as a security device, yet it does not constitute security as a matter of law. The seller/owner does not take security in the buyer's asset, he merely require that ownership to the buyer shall not devolve upon until the full price has been paid.

Kinds of security devices

(i) The mortgage

A mortgage is a transfer of an interest[1] in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or, an existing or future debt.[2] Our law allows six kinds of Mortgages.[3] *Simple* mortgages arise when without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money.[4] Where a mortgagor apparently or

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1. Transfer of interest in a property is to be distinguished from transfer of ownership in a property. Transfer of ownership attracts a sale where all rights of the owner passes to the new purchaser. In a mortgage some rights are transferred to the mortgagee and certain important right always vest in the mortgagor.
2. Section 58 of the Transfer of Property Act 1882.
3. Ibid
4. Ibid

ostensibly sells the mortgage property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that such payment being made the buyer shall transfer the property to the seller, such transaction is called *mortgage by conditional sale*,[5] provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. *Usufructuary mortgage* occurs where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorized him to retain such possession until payment of the mortgage-money and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage –money.[6] Where a mortgagor binds himself to re-pay the mortgage money on a certain date and transfer the mortgage property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an *English mortgage*.[7] Where a person delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a *mortgage by deposit of title deeds*.[8] A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of section 58 of the Transfer of Property Act is called an *anomalous mortgage*.

Advantage with mortgages is its suppleness. In commercial transactions with regard to security it is the most favorite vehicle of the financial institutions. Properties are and can be mortgaged without transferring possession by deposition of title deeds only. The mortgage thus is an instrument of utmost use in an environment where the financial institutions do depend at great length on securities like land having fixed value.

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5. Ibid
6. Ibid
7. Ibid
8. Ibid – In Bangladesh, this was originally applicable only in the towns of Dhaka, Narayanganj and Chittagong and gave the power to the Government to include any other town by notification in the official Gazette.

(ii) The pledge

The Bailment[9] of goods as security for payment of a debt or performance of promise is called a pledge.[10] The bailor is called the "pawnor" The bailee is called the "Pawnee". Common law always emphasized on possession of a security. The policy evolved to restrict fraud upon the debtors. After delivery of possession the debtors were not able to provide security to other creditors on the basis of the same assets since the debtors would not have possession due to earlier pledge a sine qua non of a valid security interest. Even the mortgage of land was originally in the nature of a pledge, the mortgagee taking possession until payment, and it was not until the sixteenth century that the practice developed of leaving the mortgagor of land in possession.

Scope of the pledge further widened with the evolution of documentary ownership of goods or chattels. Only then it became unnecessary for the creditor to take or retain physical possession. Rather the constructive possession through a third party or even through the debtor himself became a recognized way to secure financing. This became particularly useful rule for banks financing the import of goods against a pledge of the shipping documents or pledge of share certificates[11] or railway receipts.[12]

Pledge's strength lies in the fact that though the pledgee's interest is a limited one, his possession gives him a legal title to that interest, with an implied power of sale in the event of default. The fact of possession indicates evidence of the transaction and also put third parties on notice of the pledgee's rights without any need for registration. However, it is inconvenient for the creditor like the banks to hold the assets of the debtor with other risks including risks of loss. Also if the assets are needed by the debtor in his business, for the purpose of generating income from which to pay the debt, a pledge to the creditor does not serve any purpose. Therefore, question of non-possessory security interest became a necessity.

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9. Section 148 of the Contract act provides that "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "baillor" and the person to whom they are delivered is called the "bailee".
10. Section 172 of the Contract Act 1872.
11. 1943 (Mad) 74
12. 1934 PC 246

(iii) The contractual lien

When a creditor is given right by contract to detain goods of the debtor to secure payment or performance of some other obligation, the goods having been delivered to the creditor for some purpose other than security, such as storage or repair a contractual lien is created. It is this element that separates the contractual lien from the pledge. The legal effect of a contractual lien differs from that of a pledge in that the pledge carries with it an implied power of sale upon the debtor's default, whereas a lien is in principle a right of detention only, so that a power of sale would have to be agreed between the parties.

(iv) Charges

Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the later person is said to have a charge on the property.[13] What constitutes a property may be an interesting question to answer at times. In *Abdur Razzak Howlader v Sh. Muhammad Shafi*[14] Kaikaus J had to reply whether the rents and profits which are to accrue in future are properties or not? His Lordship stated that according to section 3(25) of the General Clauses Act and section 2(6) of the Registration Act benefits to arise out of immovable properties are immovable properties. This conclusion, his Lordship continues, receives support from the Privy Council decision of *M E Moolla Son Ltd. (In Liquidation) v Official Assignee of the High Court of Judicature at Rangoon and others*[15] wherein the proposition appeared in that case to the effect that future rents in respect of land are benefits to arise out of the land was fully endorsed and a distinction was made between rent already accrued and rent to accrue in future. Rent already accrued it was held would not be immovable property for it was not a benefit to "arise out of land", but rent still to accrue was immovable property. It is necessary to explain here, however, that future rent payable by a lessee to whom the property has already been leased has two aspects and it is only one of its aspects that is to be regarded as immovable property. In one aspect it is the benefit which arises out of the use of land. In the other aspect however, it is merely a consideration of the transfer of rights in land. In a lease the lessor transfer an interest in the immovable property to the lessee and the rent is consideration for this transfer. A right to receive the consideration

13. Section 100 of the Transfer of Property Act 1882.
14. 14 DLR (SC) 119
15. 63 IA 340

for a lease is not immovable property any more than a right to receive consideration in the case of a mortgage or sale of immovable property. When property is given in mortgage against a sum of money there is a transfer of an interest in immovable property for a consideration as there is in the case of a lease but the amount received has never been regarded as a benefit arising out of land. Similarly observations would apply to a case where the property is sold outright. Although rent too is consideration for the transfer of an interest in land is regarded as a benefit to arise out of the land because it has another aspect. It is something which the owner on account of the use of the land. A charge does not involve the transfer either of possession or of ownership or any interest in property. It only creates the right of the creditor arising mostly out of a contract,[16] to have an asset identified in the contract to be appropriated or sold to discharge the indebtedness in failure. In other words, an agreement or contract which gives immovable property as security for the satisfaction of a debt or for any other purpose without transferring any interest in the property constitutes a charge in the property. The right is satisfied from the sale proceeds of the asset. Such sale may result from the debtor's voluntary act or may occur under a court order for sale or the appointment of a receiver made on application of the chargee.[17] Charges can be created in respect of movable or immovable properties. No specific form or writing is necessary to create a charge. It is sufficient to express the intention to make a particular property a security for payment of a debt. Section 100 of the Transfer of Properties Act deals with consensual charges[18] and charges created by operation of law.[19]

The Floating Charge

For understanding commercial realities charges may be divided into fixed or floating. A fixed charge is one which fastens as soon as the

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16. Sometimes by way of Trust
17. The broad distinction between a mortgage and a charge is this that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property (mortgage of movable property not considered for the purpose of this article). A mortgage is a jus in rem, a charge jus ad rem and the practical distinction is that a mortgage is good against subsequent transferees and a charge is only good against subsequent transferees with notice. Per Das J. in Raja Sri Shiva Prasad v Beni Madhab AIR 1922 Pat 529.
18. Charges created by act of parties.
19. Application of sections 39, 55(4)(b), 55(6)(b), 72, 73, 95 of the Transfer of Property Act 1882 creates charges by operation of law.

charge has been created or the debtor has acquired rights in the asset to be charged, whichever is the later. The result is that the debtor cannot dispose of the asset free from the charge without the chargee's consent except, by satisfying the indebtedness secured by the charge. The floating charge is one which flies over a designated class of assets in which the debtor has or will acquire any interest in future. The debtor in such case is free to deal with the properties so charged with floating charges so long no default event occurs which crystallizes[20] the floating charge.[21] Therefore, the creditor in a floating charge will have interest in the continuing or revolving assets of the debtor instead of any particular assets. It is a present charge in a company's asset although it does not attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of business. A creditor can take a fixed and floating charge over the same asset to secure different liabilities but not the same liability.

The lenders in whatever jurisdiction is not usually comfortable in advancing money without any security. In case of a commercial enterprise or a company it's most important and valuable assets are its equipment and receivables. However, in order to transfer any security interest in the equipment, it had to be an existing one. Unless a property existed it could not be used for security. In common law if one wanted to finance any new equipment in substitution of old ones, a new instrument of transfer had to be written to specify the security pursuant to the original security document which would specify such future event of substitution the equipment. In Holroyd v. Marshall[22] it was held that equity would

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20. Explained below.
21. In other words the floating charge is an interest in corporate property granted to a lender, generally a debenture-holder, which attaches or "crystallizes" on the happening of certain defined events such as (i) the company going into liquidation (this is an event that itself crystallizes a floating charge), (ii) the appointment of an administrative receiver (iii) the levy of execution or distress on the assets of the company (iv) the company becoming unable to pay its debts (v) cessation of business by the company (vi) the giving of notice by the chargee converting the charge into a fixed charge, if agreed upon in the document creating the charge for such notice. Prior to crystallization, the company is free to deal with the property subject to the charge in the ordinary course of business. Once the charge crystallizes, it becomes a fixed charge. Subject to the provisions of the debenture, the charge generally crystallizes on the liquidation of the company, or on the debenture-holders taking possession of the property charged or appointing a receiver. – (LAW REFORM COMMISSION OF BRITISH COLUMBIA)
22. (1862) 10 HL cas 191.

recognize a charge over after-acquired property. Such charge over future property would be effective to create a security interest attaching automatically on acquisition without the need for a new act.

Holroyd v. Marshall dealt with an equitable mortgage of machinery in a mill. The mortgagor in this case was required to hold the machineries for the mortgagee with independence to substitute new machineries which would then become subject to the charge. It was held that the mortgage was effective even over the after-acquired or newly substituted machineries purchased in replacement for the original equipment. This provided effectively for security over machinery and other equipment. However with a device as such the debtor could not dispose of its secured properties without authorization by the mortgage or without the creditor's consequent approval. Therefore, the difficulty of security over changing or variable classes of assets like stock and receivables remained. It was impractical to ask a trading company to ask permission of its mortgagee every time it wanted to sell an item or ask permission of its mortgagee every time it wanted to sell an item of stock. In case of receivables it is only natural that the debtor would want to pay the proceeds of sale into its own bank account. Although the obligation to pay the mortgagee remains the debtor would normally want to treat all its receivable as its own money and pay the mortgagee at its own will without segregating its sale proceeds to identify any specific amount for the benefit of the mortgagee. To get to an answer for such problems the floating charge was the only reply.

This concept of floating charge originated in England in a series of cases in the Chancery Division in the 1870's.[23] Two things led to this development. First, the possibility of assigning future property in equity was confirmed in *Holroyd v Marshall* as stated earlier. The principle was of general application and made it possible for future book debts to be assigned by way of security.[24] Secondly, the Companies Clauses Consolidation Act 1845 sanctioned a form of mortgage for use by statutory companies by which the company assigned "its undertaking". This formula was afterwards adopted by companies incorporated under the Companies Act 1862.

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23. *In re Panama, New Zealand,and Australian Royal Mail Co* (1870) 5 Ch App 31824 ; *In re Florence Land and Public Works Co, Ex p. Moor* (1878) 10 Ch D 530; *In re Hamilton's Windsor Ironworks Co., Ex p. Pitman & Edwards* (1879) 12 Ch D 707; and *In re Colonial Trusts Corporation, Ex p. Bradshaw* (1879) 15 Ch D 465

24. *Tailby v Official Receiver* (1888) 13 App Case 523

In re Panama, New Zealand, and Australian Royal Mail Co[25] the debenture issued was in this form. The debenture was issued charging "*the undertaking*" of the company "*and all sums of money arising therefrom*". This was taken to mean all the assets of the company both present and future including its circulating assets, that is to say, assets which are regularly transacted in the course of trade. From the word "*undertaking*" Giffard LJ derived the inference that unless and until the charge holder intervened the parties contemplated that the company was to be at liberty to carry on business as freely as if the charge did not exist, which it would not be able to do if the circulating assets were subject to a fixed charge. The thinking behind the development of the floating charge it seems was that compliance with the terms of a fixed charge on the company's circulating capital would paralyze its business. This theme was repeated in many of the cases.[26] A fixed charge gives the holder of the charge an immediate proprietary interest in the assets subject to the charge which binds all those into whose hands the assets may come with notice of the charge. Unless it obtained the consent of the holder of the charge, therefore, the company would be unable to deal with its assets without committing a breach of the terms of the charge. It could not give its customers a good title to the goods it sold to them, or make any use of the money they paid for the goods. It could not use such money or the money in its bank account to buy more goods or meet its other commitments. It could not use borrowed money either, not even, as Sir George Jessel MR observed, the money advanced to it by the charge holder. In short, a fixed charge would deprive the company of access to its cash flow, which is the life saving oxygen of a business. Where, therefore, the parties contemplated that the company would continue to carry on business despite the existence of the charge; they must be taken to have agreed on a form of charge which did not possess the ordinary incidents of a fixed charge. The floating charge is capable of affording the creditor, by a single instrument, an effective and all-embracing security upon the entire undertaking of the debtor company and its assets from time to time, while at the same time leaving the company free to deal with its assets and pay its trade creditors in the ordinary course of business without reference to the holder of the charge. Such a form of security is

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25. Supra 21.

26. *In re Florence Land and Public Works Co.* at p. 541 *per* Sir George Jessel MR; *Biggerstaff v Rowatt's Wharf Ltd.* [1896] 2 Ch 93, at p. 101 *per* Lindley LJ and p. 103 *per* Lopes LJ

particularly attractive to banks, and it rapidly acquired an importance in commercial life[27] of enterprises.

The nature of the floating charge

Lord Macnaghten provided the first judicial definition of a floating charge in *Governments Stock and Other Securities Investment Co Ltd v Manila Railway Co.*:[28]

"A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes."

However, the most celebrated, and certainly the most often cited, description of a floating charge is that given by Romer LJ in *In re Yorkshire Woolcombers Association Ltd.*:[29]

"I certainly do not intend to attempt to give an exact definition of the term "floating charge," nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the Charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

This was offered as a description and not a definition. The first two characteristics are typical of a floating charge but they are not wholly distinctive of it, since they are not necessarily inconsistent with a fixed charge. It is the third characteristic which is the hallmark of a floating charge and serves to distinguish it from a fixed charge. Since the existence of a fixed charge would make it impossible for the company to carry on business in the ordinary way without the consent of the charge holder, it follows that its ability to do so without such consent is

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27. [2001] UKPC 28 – The Court of Appeal of New Zealand
28. [1897] AC 81, at p. 86
29. [1903] 2 Ch D 284 at p.295

inconsistent with the fixed nature of the charge. In the same case Vaughan Williams LJ explained at p. 294: "... but what you do require to make a specific security is that the security whenever it has once come into existence, and been identified or appropriated as a security, *shall never thereafter at the will of the mortgagor cease to be a security. If at the will of the mortgagor he can dispose of it and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a "specific security"* (emphasis added).

This was the first case to deal specifically with book debts. The question was whether a charge on uncollected book debts was a fixed charge or a floating charge so as to require registration. At every level of decision it was held to be a floating charge, the critical factor being the company's freedom to receive the book debts for its own account and deal with the proceeds without reference to the charge holder.

At first instance[30] Farwell J said at p. 288: "If the assignment is to be treated as a specific mortgage or charge or disposition, then the company had no business to receive one single book debt after the date of it; but if, on the other hand, although not so called, *the company was intended to go on receiving the book debts and to use them for the purpose of carrying on its business*, then it contains the true elements of a floating security" (emphasis added).

And at p. 289: "A charge on all book debts which may now be, or at any time hereafter become charged or assigned, leaving the mortgagor or assignor free to deal with them as he pleases until the mortgagee or assignee intervenes, is not a specific charge, and cannot be. The very essence of a specific charge is that the assignee takes possession, and is the person entitled to receive the book debts at once. So long as he licenses the mortgagor to *go on receiving the book debts* and carry on the business, it is within the exact definition of a floating security" (emphasis added).

Cozens-Hardy LJ in appeals also at p. 297 spoke in similar terms along with Romer LJ expressly treating the company's right to go on *receiving* the book debts as inconsistent with the nature of a fixed charge.

When the case reached the House of Lords[31] Lord Halsbury LC also took this to be the critical factor at p. 357: "It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of *those book debts being extinguished by*

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30. *Ibid*

31. *Sub. nom. Illingworth v Houldsworth* [1904] AC 355

payment to the company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me to be an essential characteristic of what is properly called a floating security. The recitals ...shew an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way - that the book debts shall be at the command of, and for the purpose of being used by, the company. Of course, if there was an absolute assignment of them which fixed the property in them, the company would have no right to touch them at all. The minute after the execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purport of this instrument is to enable the company to carry on its business in the ordinary way, *to receive the book debts that were due to them,* to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security." (emphasis added).

The language of Romer LJ was endorsed by Lord Macnaghten on appeal:[32] "I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is mended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

Therefore, the fundamental concept is that of a class of circling or revolving assets which the company is to be free to manage and deal with in the ordinary course of business until an event occurs which entitles the creditor to intrude and assert his security and assert his security rights over the assets then held or subsequently acquired by the company. The occasion of such an event is said to cause the charge to 'crystallize'. Until crystallization, the security interest does not attach and the charges has merely an interest in a liquid fund of assets. As to the existence of a floating charge Buckley LJ in F*vans v. Eival Granite Quarries Ltd.*[33] stated that; "A floating charge is not future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his

32. *Ibid* at page 358
33. [1910] 2 KB 979

business, but is a floating mortgage applying to every item comprised in the security but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

As a result, a floating charge forms an instantaneous security interest but until crystallization no specific asset is appropriated to the security. The debtor company is free to deal with the asset in the ordinary course of its business. In comparison to a fixed charge, the debtor company's present ownership or subsequent acquisition of property covered by the floating charge is not sufficient to cause the security interest to attach; a further act is needed to cause the charge to crystallize.

When crystallization takes place, the fund of assets comprised in the charge freezes, terminating the debtor company's powers to manage to the assets and converting the creditor's security interest into a fixed interest as regards the property covered by the charge in which the company then has or subsequently acquires an interest. Although the floating charge is naturally taken over property not prone to a fixed charge, it is not limited to moving or rolling assets but can be made to cover any description of property, including land. On the other hand, it is possible to have a fixed charge over revolving assets. In application however, because of the advantages of a fixed charge in the event of the debtor's liquidation, creditors tend to take a fixed charge over fixed assets and a floating charge merely over circulating assets. The main test for distinguishing between a fixed and a floating charge is not whether the assets comprising the security are fixed or circulating but whether the creditor has or has or has not excluded the debtor's right to continue of business free from charge.[34] Having said so, a charge over circulating assets is intended as a floating charge, so that restrictions on the debtor company's ordinary dealing authority with its assets remain intact, whereas in case a charge over fixed assets is wished to dispose of the asset free from the charge, it would need to obtain the charge's assent.

Creation of the charge

To create a floating charge no particular form of words is necessary. It is sufficient that the agreement expresses an intention to charge the company's present and future assets, or a designated class of assets, with freedom to deal with them in the ordinary course of business and the creditor does not exercise any right to interfere. However, for it is normally created by an instrument expressed to cover the debtor company's 'undertaking' or its present and future property'. The

34. *Sieve Gorman & Co. Ltd v. Barclays Bank Ltd,*

important issue is to examine the nature of the charge or the nature of the overall transactions despite characteristics dedicated to such charges by expressions in instruments. It is almost immaterial or of no consequence how the document describes a security i.e. fixed or floating charge. The courts are to look at the essence of the transaction.

What causes crystallization of a floating charge?

Even with the existence of floating charges the company will continue to have authority and manage its business with its directors performing. Crystallization occurs through the withdrawal of the authority of the company to continue management of the assets comprised in the security. It may be mentioned here that the withdrawal of the company's authority may be actual or apparent. These two types of withdrawal of authority need to be distinguished. In case if the directors' powers of management relinquishes with regard to part of the assets comprised in the floating charge, as regards the remainder of such assets, the charge prolong to float.

(i) Apparent withdrawal : The floating charge will crystallize if the company stops to do or continue its business either voluntarily or in response to a winding-up petition or other external cause. Although for practical purposes a receiver is appointed formally the directors preserve power to manage the affairs of the company, such theoretical control does not prevent crystallization.

(ii) Actual withdrawal : When the company is in fact transacting, termination of the power of the directors to run the company as a running business will cause the charge to crystallize i.e. crystallization will commence or occur from the appointment of a receiver (voluntarily, by other secured creditors or by the court), passing of a resolution for voluntary winding up, the making of a winding-up order.

(iii) Chargee's exercise of intervention : When the chargee has become entitled to intervene in the management of the company's power thereby striping the directors of their own powers to manage in relation to the charged assets, the charge will crystallize. Normal manner of intervention includes (but is in no way limited to) the appointment of a receiver, sending of notice to crystallize under any instrument (i.e. debenture) to take possession of the assets, sale of assets. What entitles a chargee to intervene and terminate a company's management powers may be stipulated by an agreement between the parties i.e. as between the chargee and the company. Subject to a clear clause in this regard, a demand for arrears payment to the company or its bankers does not of itself cause crystallization.

(iv) Automatic and partial crystallization : The freedom to incorporate

commercial covenant in a commercial contract is inherent and is quite common in borrowing agreement. It is often the case that auto crystallization is incorporated in such contracts with an event of default[35] clause of various characters. Few examples will make the case easier; if the debtor company allows its corporate borrowing to surpass a certain amount, fails to pay a sum due under the charge within a specified period of time, allows a judgment against it by any third creditor etc. may result in crystallization.[36] All such events may occur without any notice to third parties or without the instance of the creditor.

A floating charge may provide for crystallization over part of the assets keeping aside the charge floating as to the remainder. However a condition precedent for such a partial floating charge is that the subject of the partial crystallization has to be distinctly identifiable from the security agreement.

Effect of crystallization

Crystallization results in the charge becoming a specific charge over any property in which the company has or later gain an interest. The chargee acquires all the rights of the holder of a specific equitable charge on the assets of the company and the company's actual authority to deal with the charged assets comes to an end. The remedies given at law are extended or written in the instrument forming the charge. As stated earlier normally, the chargee will be able to appoint a receiver, to take possession, to sell the assets or take other steps. Questions of priority of the creditors will also arise when crystallization arises by reason of the appointment of a receiver or because the company goes into liquidation. The question of validity of the charge may also become an issue at this stage e.g. failing to apply statutory requirement,[37] creating the charge at a time when it was illegal to do so.[38]

Priorities

(i) Interests occurring prior to crystallization: The creation of a mortgage or fixed charge after a floating charge has been created will still take

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35. Although it does not necessarily have to be an event of default. What is important is to identify the crystallization event.
36. In Re Breghtlife Ltd. (1987) Ch 200, Hoffman J. referred to the distinction between crystallization by action of the chargee (as in the case before him) and 'automatic' crystallization without the chargee's knowledge. His lordship expressed the view that the courts should not limit the freedom to contract by refusing to give effect to automatic crystallization clauses.
37. Section 159 of the Companies Act 1994.
38. E.g. when the company is insolvent.

priority over the floating charge since in case of a floating charge the company is free to deal with its assets in the ordinary course of business. This is because of the nature of the floating charge. However, if a subsequent floating charge is created on the assets which are already subject to earlier floating charge, express ranking in priority to the junior or later floating charge is prima facie against the intention of the earlier charge. Even if the later floating charge crystallizes first, it is useless against the holder of the earlier charge except in so far as thereby authorized. It may be noted that any creation of later fixed charges ranking in priority to the floating charge normally is restricted by the terms of the instrument of charge. Such restrictions will not bind a subsequent purchaser or encumbrancer unless he has notice of them but are successful as between the chargee and the company but.

(ii) Interests arising after crystallization : The parties in a floating charge are free to agree on any event they choose as constituting a crystallizing event as stated earlier. Such events may not be known to any third party and before such event arises the company is free to deal with the assets. But although crystallization terminates the company's authority to dispose of the asset, its power to do so still remains. This depends on the extent to which its apparent authority continues. In principle, a person who dealt with the company prior to crystallization should be entitled to assume the continuance of its authority to deal until he has had notice of the termination of that authority. Similarly, one who dealt with the company for the first time after crystallization and was aware of the existence of the floating charge but not of its crystallization can reasonably contend that the company was held out to him as continuing to have authority to deal. It is one of the mysteries of the development of this branch of law that priority conflicts between the holder of a crystallized charge and a third party claiming rights over the charged property have always been viewed in purely property law terms, without reference to agency principles, and the issue has thus been to consider if the holder of the charge's interest or that of the rival claimant's interest was created first. However, the priority of the first in time is not definite rule. He may lose it if he allows the debtor to hold himself out to be at liberty to deal with the asset free from the security. Where the crystallizing event is itself a public act, the termination of apparent authority will coincide with the time of crystallization. Therefore, the holder of the crystallized charge will have priority over a subsequently created interest. This is the case when the crystallizing even is the winding up of the company or the cessation of its trading activity. But not all crystallizing events are of this character. The appointment of a receiver or taking possession of property by the

charger has to be notified otherwise would not be able to defeat the claims of the bonafide purchaser for value.

Perfecting floating charges in Bangladesh

Only certain forms of non-real estate security are required to be registered. It is to be understood that floating security or charge is recognized regarding limited companies in as much the same terms as in England.[39] Therefore what has been stated above on the nature and character of the floating charges in Common law is applicable in Bangladesh as well. Charges on company assets including floating charges must be recorded in the Registry of Joint Stock Companies (JSC). Pledges and hypothecations as such do not need to be recorded. Encumbrances against assets of sole proprietorships are apparently not registered at all. Laws on companies and registration make registered instruments effective as of the date of their execution, not of registration itself. The possibility of conveyances in the interim introduces uncertainty. Priorities among creditors can therefore be uncertain, and are not moreover widely known. In practice priorities are determined by either usage or agreement.

The relevant provisions and comments

Section 159 of the Company Act 1994 provides for the registration of the floating charges.[40] The validity of a charge under the section does not

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39. AIR 1935 Cal. 218-62 Cal. 1 (DB)

40. ***Certain mortgages and charges to be void if not registered***. Every mortgage or charge created after the commencement of this Act by a company and being either-
    (a) mortgage or charge for purpose of securing any issue of debenture; or
    (b) a mortgage or charge on uncalled share capital of the company; or
    (c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or
    (d) a mortgage or charge on any book debts of the company; or
    (e) a mortgage or a charge, not being a pledge on any . movable property of the company except stock-in-trade; or
    (f) **a floating charge on the undertaking or property of the company**;
    shall, so far as any security on company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract 01' obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section. this money secured thereby shall immediately become payable:
    Provided that-

stand only on the actual registration of it by the Registrar. No precise form is required by the company for creating a charge or a mortgage whether on immovable property or movable property and if the intention of the parties to create a charge is clear from the transaction, it is sufficient for the purpose of this section.[41] A floating charge regarding immovable properties of a company is to be registered both under the Registration Act and also under this section of the Companies Act.[42] As understood from the nature of a floating charge that such charge may become specific on the happening of one of the events mentioned in the conditions of the debenture, the issue of debentures is a mutation of the right of the company to its immovable property contingent on one of the events specified in the condition. Further issuance of a debenture does denote to create a charge as described in section 100[43] of the Transfer of Property

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(i) in the case of a mortgage or charge created out of Bangladesh comprising solely property situate outside Bangladesh twenty-one days after the date on which the instrument or copy could, in due course of post, and if dispatched with due diligence, have been received in Bangladesh shall be substituted for twenty-one days after the date of the creation of the mortgage or charge as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(ii) where the mortgage or charge is created in Bangladesh but comprises property outside Bangladesh, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

41. AIR 1955 Bom. 419

42. AIR 1957 Mad 169 (DB)

43. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property...

Act on the property of the company. As the provisions of section 17 (I) (b) of the Registration Act[44] purport or operate to create, declare, assign, limit or extinguish a right, title or interest are mandatory; debentures which are not registered under that section fail to create a charge on the immovable property of the company.[45] A debenture which contained no stipulation to qualify the elasticity of the floating charge and which left the company at liberty to execute specific mortgages or charges in priority to it, was held to require registration under section 17 of the Registration Act and that in the absence of such registration it could not take effect with regard to the immovable property of all sorts possessed by the company at the time of its execution. The fact that the right of the company to use the properly during the course of its business was a condition of the charge was no reason to exempt the instrument from compulsory registration under the Registration Act.[46] However, as apparent from the fourth proviso to section 159 (I)[47] would exempt only the debentures from being registered and not the immovable properties given as security to the debenture holders. A floating charge creates an immediate equitable charge on the assets, subject to the right of the company in the ordinary course and for the purposes of its business, but not otherwise, to dispose of the assets as if the charge did not exist.[48] A floating charge does not prevent the making of a specific charges or specific alienations of property by the company because that would destroy the very object for which the money is borrowed, namely the carrying on of the business of the company. Thus where under the power conferred on it by the articles to borrow money by mortgage or by "bonds, debentures or mortgage debentures" under which the holders would be entitled to be paid out of the moneys, property and effects of the company and similarly the company issued *pari passu* instruments binding themselves and their estates to repay at a future date and with a power to redeem a certain part of the liability at intermediate dates; it was held that it constituted a charge on the property subject however, to the right of the company to dispose of any part in the ordinary course of its business.[49] Because of the nature of a floating charge where a deed of debenture after charging all the assets of the company by way of a

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44. Covering the registration of non-testamentary instruments
45. AIR 1959 All 247
46. AIR 1913 Cal. 223=Cal. 136 (DB)
47. Supra 37.
48. AIR J957 Mad. 169 (DB)
49. (1878) 10 Ch. D 530

floating charge provides that notwithstanding such charge the company should have power to carry on the business and deal with the assets until the happening of a certain event, the right to carry on the business is not infringed automatically by the happening of the event but continues until the debenture-holder intervenes to show his desire that it should cease.[50] However, any debt incurred by the company in the ordinary course of carrying on its business after the creation of a floating charge are capable of being realized by the creditor through the process of law, before the floating charge is crystallized. The person in whose favor a floating charge has been created may intervene at any time only after default. A debenture bolder may obtain the appointment of a receiver or receiver and manager and crystallize the floating charge. When the floating charge upon all the property or assets of the company is so crystallized or fixed, it constitutes a charge upon all the property or assets then belonging to the company. A floating security which has been crystallized has priority over subsequent equitable charges and over unsecured creditors and over moneys advanced to the liquidator to carry on the business of the company although the advances were made with the sanction of the court in winding up and over the costs of the liquidators other than costs of realization. The right of the creditor holding a floating charge to intervene on default may be suspended by agreement and if the company creates mortgages and charges subsequent to the suspension of the power the question of their priority is a question of construction. Such an agreement can also contain a power to create a second floating charge ranking in priority.

Section 160 of the Companies Act 1994 provides for registration of charges on properties acquired subject to charge. It is a self explanatory provision and reads as follows:

(1) Where a company registered in Bangladesh acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy certified in the prescribed manner to be a correct copy of the instrument, if any, by which the charge was created or [is] evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed.

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50. AIR 1917 Mad. 646

Provided that, if the property is situate and the charge was created outside Bangladesh the said twenty-one days shall be counted by excluding the period which would be necessary to receive the instrument in Bangladesh in due course of post had it been dispatched with due diligence.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine not exceeding one thousand taka.

Procedure for registration

Charges, are somewhat easier to register. Fees are modest: about 600 tk for a loan up to one crore (ten million equals one crore), then 400 tk for each subsequent crore. The registration process is as follows:

(i) the creditor financial institution sends a "sanction" letter through the borrowing firm, stating the items to be charged, with the registration fee;

(ii) before registering the charge, the registry checks for any title problems, encumbrances, unpaid rent, or other problems with the property to be charged;

(iii) the registry checks whether the agreement to charge the property was approved by a duly constituted meeting of the company board of directors, and if necessary checks the company's articles of association;

(iv) if necessary, the registry checks whether any outstanding taxes are due on the property; and

(v) the registry issues a registration certificate to the company.

Registration normally can be done within a week or even three to four days. Companies are required to register charges within 21 days, although delays can be obtained with permission from the High Court. Companies whose charges are subject to registration include corporations and partnerships, but not sole proprietorships or cooperatives. Most commercial loans are extended by banks without registration of a charge. A bank can check prior charges upon payment of a 20 tk fee. The Companies Act, 1994 requires the JSC Registry to keep indexes both by company and chronologically,[51] although the Registry appears to operate without written administrative rules.

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51. Articles 163 and 164

However, with respect to both mortgages and company charges, registration may fail to play its optional role as a system of "perfection" or creation of legally effective interests entitles to protection against third parties. The problem here is that even when registration is required for legal effectiveness, this legal protection does not begin on the date of registration but relates back to the date on which the subject agreement was created. Time lags of 21 or even 30 days permitted between creation and perfection mean that, for such period of time, third parties have no notice of prior security interests. This introduces significant uncertainty into the scheme of security interest priorities. Furthermore, the registries are called upon to perform the kind of due diligence that is best left to interested parties. This explains much of the system's ineffectiveness. At least with respect to non-real estate security, this system would be much clearer and efficient if the registries were limited to the mechanical task of posting notices of asset encumbrances, and running searches of these notices, without having to ensure the legal validity of the encumbrances.

In conclusion it must be said that the purpose of this article was only to provide a glimpse on the floating charges. Although this device is in practice by the commercial banks and other financial set-ups, case law on this subject is scarce. One reason may be the fact that in practice the banks in Bangladesh would always take security with real assets and personal and corporate guarantees in addition to floating charges on the revolving assets. And in almost all cases they are able to realize their debt through the sale of the real assets. Furthermore, junior credits are also very unpopular and thus junior security is also quite uncommon. Normally a later creditor would always ask for a pari passu clause and bring the earlier creditor in the scene and enter into a new agreement of credit. Hence the development of floating charge is slow in our jurisdiction. However, with more commercial activities it is expected that because of the flexible nature of the floating charge, and its frequent use by the companies, development of this device is only a question of time.

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NON-MUSLIMS' RIGHTS IN ISLAM AND ITS COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS

Md. Towhidul Islam

1. Introduction

The western concept of religion is based on something, which makes relationship between the believer and God.[1] Islam is not only such a religion making relationship between the believer and God, but also a complete code of life based on the commandments of Allah (*Subhanahu wa Ta'ala*) contained in the Holy Qur'an and the *Sunnah* of the Prophet Muhammad (*Sallallaho Alaihi Wasallam*). Muslims believe that Islam is a religion not confined to matters of personal faith and worship; it is an all-encompassing value system regulating every aspect of human existence, including the political. It is a religion organizing all aspects of life on both individual and national or international levels. It has made mankind aware of the obligations due to each other and to God. With this end in view, mankind is given the guidelines for how to interact with people, as well as how to communicate with God. It has clearly told mankind about spiritual life, intellectual life, personal life, family life, social life, economic life, political life, international life and so on. It has taught a Muslim, as a member of the society that he has no superiority on account of faith, colour, class, origin or wealth. It has taught people to respect others' rights to life, honour or property.[2]

2. Meaning of the word 'Islam'

The word 'Islam' ordained from Arabic root *Silm* and *Salam*,[3] means peace, purity, submission and obedience.[4] In the religious sense, Islam means complete or unconditional submission to the will of God and obedience to His Law.[5] The Qur'an defines Islam as 'the readiness of a person to take orders from God and to follow them'.[6]

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1. http://www.islam4all.com/islam_and_rationality_6.htm 26/05/2003.
2. http://www.barghouti.com/islam/lifecode.html 26/05/2003.
3. http://islamicity.com/mosque/Intro_Islam.htm 26/05/2003.
4. http://www.barghouti.com/islam/meaning.html 26/05/2003.
5. Mawdudi, S. A. A., *Towards Understanding Islam*, Islamic Publications Ltd., Lahore, available in http://www.wponline.org/vil/books/ M_tui/ chapter1.html 26/05/2003.
6. Ibid

3. Meaning of the word 'Muslim'

The word 'Muslim' derived from the word Islam, means the person who is ready to take orders from God and to follow them.[7] Thus the message revealed to the Prophets and to profess the belief in the message is also Islam and the Muslim is meant to be a person who follows the message of Muhammad and all his teachings (*Sunnah*) which contained the teachings of all the previous Prophets and all the Divine commandments and believes in the truthfulness of Muhammad.[8] In other words, a Muslim is a person who has belief in One God (i.e. there is no deity save Allah and Muhammad is His Messenger[9]), in His Angels, in His Revealed Books (commandments), in His Messengers and Prophets, in the Last Day and Resurrection and in the determination of good and evil by God.[10]When a person professes the belief in the truthfulness of Muhammad and pledges to follow his message, he is virtually stating his readiness to obey the orders of God unconditionally. Though literally the word Muslim means 'one who has submitted, technically it refers to a believer who has submitted to the will of God'[11] i.e. submission by way of attestation of the unity of God, services of Worship of God, fasting, alms-giving and pilgrimage.[12] The Qur'an describes Muslims as believers.[13] It is obligatory for every Muslim to fashion his entire life in accordance with the dictates of the Qur'an and *Sunnah*.[14]

4. Meaning of the expression 'Non-Muslim'

Conversely Non-Muslims are those who do not believe in Islam or basic Islamic ideologies i.e. who do not submit to One God and have no belief in His Messenger Muhammad.[15] Submission to One God is so important

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7. 'Abraham was not a Jew nor a Christian, but he was an upright (man), a Muslim; and he was not one of the Polytheists.' Qur'an 3:67.
8. http://www.al-islam.org/inquiries/2.html 26/05/2003.
9. http://www.islamicity.org/dialogue/Q397.HTM 26/05/2003.
10. Hamidullah, M., *The Muslim Conduct of State*, Lahore, 1st ed. 1953, 2nd ed. 1977, available in http://www.muslim-canada.org/conduct_1.html 26/05/2003.
11. http://www.atheism.about.com/library/glossary/indexes/blglossary_islam.htm 26/05/2003.
12. Ali, S. M., 'The Gist of Islam', available in http://www.muslim-canada.org/conduct_1.html 26/05/2003.
13. Qur'an 64:2.
14. I. Doi, A. R., *Shariah: The Islamic Law*, Ta-ha Publishers Ltd., London 1984, Preface.
15. http://answering-islam.org/NonMuslims/rights.htm 26/05/2003.

test that differentiates between a Muslim and non-Muslim can be found in the saying of the Prophet that a person who has been a non-believer of One God, declares just before his death that he has submitted to One God, he will be given paradise after the hereafter.[16] Sometimes people may submit themselves in the literal sense of the word submission, but they may lack the true nature of faith in their heart, actions, practices and habits. Though God is the best judge hereafter,[17] in such situation, some jurists opine that an Islamic State is under an obligation to term someone to be non-Muslim.[18] The Qur'an refers to the non-Muslims as unbelievers.[19] Islamic jurists categorised non-Muslims into four divisions such as *Ahl al Dhimmah, Musta'min* (non-Muslim coming to an Islamic State for short stay as merchants, visitors etc), *Musta'man* and *Mu'ahid*.[20]

5. Division of the World in Islam

Although Islamic jurists differ, in practice the world can be divided into two broad categories: i) *Dar al Islam* i.e. Islamic State and ii) *Dar al Harb* i.e. Enemy State.[21]

5. 1. *Dar al Islam*

Dar al Islam means a territory where Islamic law is enforced and practised under the Muslim authority throughout all spheres of life.[22] Its inhabitants are mostly Muslims and non-Muslims are minority there. In early Islam its territory was acquired by force of arms or without fighting or by treaty with the condition that owners of covenanted land will pay *jizyah* unless they embrace Islam and Muslims and non-Muslims will enjoy full protection as to their lives, property and religious freedom with some restrictions on non-Muslims.[23]

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16. The Prophet is reported to be saying by Abu Dharr, Bukhari and Muslim.
17. Qur'an 45:30-31; 47:1-3.
18. http://www.soas.ac.uk/Centres/IslamicLaw/YB1Zaheer-ud-din.htm1 26/05/2003.
19. Qur'an 64:2.
20. Awang, A. R., *The Status of the Dhimmi in Islamic Law*, International Law Book Services, India, 1994, p.16.
21. Ibid, p.1.
22. Ibid.
23. Ibid, pp.1-4.

5. 2. *Dar al Harb*

Dar al Harb is a territory inhabited and dominated mostly by the non-Muslims. It is a land where Islamic law is not enforced. Here the laws of human origin were applicable as per the wish of the majority.[24] Mawdudi, a prominent scholar and traditionalist, says: 'An Islamic State is essentially an ideological State, and thus radically different from a national State.'[25] According to his view, responsibilities for policy making and administration of such a State should rest primarily with those who believe in the Islamic ideology. In spite of the fact that non-Muslims in such State are entrusted with certain specific rights, beyond these rights they are not permitted to meddle in the affairs of the State, as they do not stick to its ideology.[26]

6. Treatment of non-Muslims in an Islamic State

The non-Muslims who live in a Dar al Islam or an Islamic State and enjoy the equal protection of the rights to life, property and religion like the Muslims as enshrined in the Qur'an and *Sunnah*[27] are called *Ahl al Dhimmah* or *Dhimmis*.[28] The word *Dhimmi* literally means *al Aman* (peace/safety), *al Ahad* (covenant/pledged), al-Daman (guarantee). *Dhimmi* was the name applied by the Arab Muslim conquerors to indigenous non-Muslim population who surrendered by a treaty to a Muslim dominion.[29] The non-Muslims are called *Dhimmis* as they are under the covenant or protection of God, the Prophet and the Muslim *Ummah* on the condition that they can enjoy the rights to life, property and religion under the protection of Islam or Muslims and in return they will pay *jizyah*.[30] In the legal sense, the *Dhimmis* are the non-Muslims normally Jews, Christians (developed) and others such as idolaters, pagans, polytheists etc. (primitive),[31] who have permanent covenant with the Muslim authority.[32]

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24. Ibid, pp.4-5.
25. Mawdudi, S. A. A., *The Rights of Non-Muslim in Islamic State*, Islamic Publications, Lahore, 1982, available in http://answering-islam.org/NonMuslims/rights.htm 26/05/2003.
26. Ibid
27. Op. cit., I. Doi, (1984) p.427.
28. Ibid, p.426.
29. Bat Ye'or, 'The Status of Non-Muslim under Islamic Rule', available in http://www.dhimmitude.org/ 26/05/2003.
30. Op. cit., Awang, Supra, p.16
31. Hamidullah, M., *Introduction to Islam*, published by Sh. Muhammad Ashraf, Lahore, 1974, p.439.
32. Op. cit., Awang, p.16.

They are not outside the jurisdiction as is the case compared by some scholars with *Jus Civile*.[33] To protect life, property and honour of a non-Muslim becomes an integral part of the faith of the Muslims. Unlike the so-called human rights, those rights of *Dhimmis* cannot be curtailed or suspended in any situation as their status is fixed and governed by the Divine Law.[34] The status of *Dhimmis* pledged is similar to citizenship by naturalization in the modern times because alike the naturalized citizens, they acquire all rights of the nationals and become liable to some responsibilities.[35]

7. Obligations of the Non-Muslims (*Dhimmis*)

1. Paying *Jizyah* and other Tax

The *Dhimmis* as residents of an Islamic State are under obligations to perform certain duties such as payment of *jizyah, kharaj, ushar* and observance of some aspects of Islamic law.[36] Though *jizyah* and *Kharaj* appeared to be interchangeable and loosely used by some Muslim historians and jurists, *jizyah* as a tax on *Dhimmi* got recognition through the most celebrated sources of Islamic law i.e. Qur'an and *Sunnah*, whereas *Kharaj* as a tax on land got its acceptance through secondary sources of Islamic law, first *Ijtihad* (consensus) and second, *Qiyas* (analogy).[37] Amongst the four duties, the most pertinent is *jizyah* as it concerns the *Dhimmi* specifically. It is a tax prescribed by the Qur'anic injunction.[38] This tax is imposed on them for their protection and they are exempted from defending *Dar al Islam*.[39] In early Islam, there were constant wars on extensive frontiers of the Islamic territory, military service was very was not an easy means of earning a livelihood, the life and the economic situation of the combatants were at real risk.[40] The exemption of the non-Muslim subjects from this service was thought to be justifiable for the suspicions in regard to their faithfulness.[41] All non-

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33. Op. cit., I. Doi, (1984) p.426.
34. Ibid, p.427.
35. Ibid, p. 426.
36. Ibid, p.19.
37. Ibid, p.19.
38. Qur'an 9:29.
39. Op. cit., Awang, p.207.
40. Op. cit., Hamidullah, M. (1974); see also http://muslim-canada.org/ch12hamid.html 26/05/2003.
41. Ibid.

Muslims who had accepted Muslim domination and did not seek its overthrow in collusion with foreigners welcomed this exemption from military service.[42] They could thus pursue in tranquillity their avocations and prosper, while the Muslims would be performing military duties with all the attendant risks.[43] Even if the State could not protect the *Dhimmi*, the tax will not be collected.[44] So, the non-Muslims who have reached the age of puberty paid little supplementary tax, the *jizyah* - of which the women, children, old, insane and the poor from among them were exempt - which was neither heavy nor unjust.[45] In the time of the Prophet, the *jizyah* amounted to ten *dirhams* annually, which represented the expenses of an average family for ten days.[46] Moreover, if a non-Muslim subject participated in military service during some expedition in a year, he was exempted from the *jizyah* for the year in question.[47]

7. 1. 1. Significance of the Provision of Paying *Jizyah* under the Covenant

7. 1.1.1. *Jizyah* under the Qur'anic Verdict and *Opinio Juris*

The covenant or contract with the provision of paying *jizyah* got support in the Qur'anic verse as follows: 'Fight those who believe not in God nor the Last Day, nor hold that forbidden which hath been forbidden by God and His Apostle, nor acknowledge the religion of truth, (even if they are) of the people of the book, until they pay the *jizyah* with willing submission, and feel themselves subdued.'[48]

The making of this covenant binds the Islamic State not only to tolerate non-Muslims' faith, religious practices and laws but also to offer them protection of their lives and properties although some criticism went on when Abu Hanifa, founder of the Hanafi School,[49] comments that *Dar al Islam* may lose its *de jure* status as *Dar al Islam* when the laws and regulations of non-Muslims be enforced therein and when a non-Muslim

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42. Ibid.
43. Ibid.
44. Op. cit., Awang, p. 207.
45. Ibid.
46. Op. cit., Hamidullah, M. (1953).
47. Op. cit., Awang, p.17.
48. Qur'an 9:29.
49. It is one of the four Islamic Schools of Jurisprudence. The other schools are Malikites, hanbilites, and Shafiites. All four schools agree dogmatically on the basic creeds of Islam but differ in their interpretations of Islamic law.

be permitted to live there, in the same security and harmony as the under the earlier Muslim government.[50] Muhammad al-Shaybani, the father of Muslim Public International Law and one of Abu Hanifa's followers, maintains that on the enforcement of the non-Muslim laws, the country is no longer considered as *Dar al Islam.*[51]

There is some controversy as to why such sort of contract was done. Some jurists opine that by this way non-Muslims were given some opportunity to intermingle with Muslims, hear and witness the justice and of beauty of Islam and thus it will enable them to appreciate the teachings of Islam.[52] Some jurists thought that this type of contract paved the way of a good means of internal revenue, though this interpretation could not stand.[53]

7. 1.1. 2. *Jizyah* in History

From history it can be maintained that the Muslims did not introduce *jizyah* rather it was imposed by the different sovereigns on their subjects before the arrival of Islam.[54] Byzantines imposed such tax on the people of coastal regions of Asia Minor in 500 B.C. The Roman Emperor imposed similar tax on the conquered people and that was greater amount than that of Muslims.[55] Shibli Numani said that the term *jizyah* was Arabicized from the word *Kizyat* meant levy that was imposed by the Persian Emperors.[56] But the concept of imposing tax on non-believers developed from the Roman-Byzantine Empire practice of taxing colonists and non-Christians.[57] Later it developed through Sasanid Empire.[58] In early Islam, this tax did exist neither in Medina nor elsewhere. It was in the year 9 AH i.e. after the conquest of Mecca, the Qur'an ordained it.[59]

Agin, Jizyah was a question of expediency, and not a fundamental law in Islam. It is reported (by Ibn Sa'd on the authority of Zuhri) that at the

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50. Ibid, pp. 2-3.
51. Ibid, p.3.
52. Op. cit., Awang, p.17.
53. Ibid.
54. Ibid, p.22.
55. Ibid.
56. Ahmad, Z., *The Concept of Jizyah in Early Islam,* Islamic Studies. XIV, 1975, p.294, available in http://www.wponline.org/vil/articles 26/05/2003.
57. Op. cit., Awang, p.23.
58. Ibid, p.22.
59. Qur'an 9:29.

moment of the death of his son, Ibrahim, the Prophet Mohammed declared: 'Had he survived, I would have exempted all the Copts from the *jizyah*, as a mark of esteem for Ibrahim's mother (Who was a Coptic girl)'.[60] The case of Taghlib where they preferred to pay *sadaqah* like Muslims instead of paying *jizyah* and the covenant with Nubians serve as modus operandi for the concept. The same treatment would be accorded to any group of non-Muslims having the same traits like Banu Taghlib.[61]

7. 1. 2. Whether *Jizyah* is a Poll Tax

Jizyah is neither a poll tax nor a punishment for infidelity as alleged by some scholars. Some Hanafi jurist like Jassas says that *jizyah* is imposed with the intent of punishing the *Dhimmis* for their continuous nature of infidelity.[62] Some modern writers say that paying of *jizyah* is a symbol of humiliation and submission because when he pays *jizyah* with the knowledge that they have got defeat and have been compelled to sign a treaty, he does not feel home in his own land, among his own people and with his own government.[63] Sheik Najih Ibrahim Ibn Abdulla says, quoting Ibn Qayyim al-Jawziyya, that the *jizyah* is enacted 'to spare the blood (of the *Dhimmis*), to be a symbol of humiliation of the infidels and as an insult and punishment to them, and as the Shafiites indicate, the *jizyah* is offered in exchange for residing in an Islamic country.'[64] This view can be shown incompatible with the practice of the Prophet and his Companions.

First, paying of *jizyah* is securing and protecting them from external attacks.

Second, they contradict with the concept of tolerance in Islam where the Qur'an Specifically says that there is no compulsion in religion.[65]

Third, if *jizyah* is retributive it must be imposed on all non-Muslims and there would be no exemption for certain people or group of people like Banu Taghlib.

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60. Op. cit., Hamidullah, M. (1953).
61. Op. cit., Awang, p.41.
62. Jassas, *Ahkam al Qur'an*, 3 vols., Beirut, pp. 100,103.
63. Shahid, S., 'Rights of non-Muslim in an Islamic State', available in http://answering-islam.org/NonMuslims/rights.htm 26/05/2003.
64. Ibid.
65. Qur'an 2:56.

Fourth, if it is punitive, obligation of paying *jizyah* is not to be lifted if any non-Muslim joins the Muslim army voluntarily.[66]

Some modern writers like Dennett, Becker, Cahen and others have frequently used the term poll tax to describe *jizyah*. They are wrong in making the term *jizyah* equivalent to poll tax for the following reasons:

First, unlike poll tax, *jizyah* is not levied twice a year.

Second, unlike poll tax, *jizyah* is not imposed unilaterally; it is imposed through mutual consent.

Third, Poll tax was imposed on every head, man and woman alike, whereas *jizyah* is imposed on only able-bodied men in lieu of military service and payment of *Zakat*.[67] Fourth, the poll tax collector has been an object of fear, hatred and execration as there is no justice as said Walker[68] but collection of *jizyah* was peaceful as it was mutually agreed, sometimes people were exempted or given other alternative as *sadaqah*.

So *jizyah* is not a poll tax rather it was a protection tax or security tax. Its nature, however, according to Majid Khadduri, was more of a collective tribute rather than a poll tax paid by each individual to the Muslim authorities.[69]

7. 2. Observing some Aspects of Islamic Law

In an Islamic State the *Dhimmis* are under obligations to observe some aspects of Islamic law except matters relating to beliefs and personal laws as the maxim says: 'Leave them whatever they believe'.[70] The *Dhimmis* are free to practice their own social and religious rites at home and in church without interference from the state, even in matters entirely opposed to those of Islam such as drinking wine, rearing pigs, and eating pork, as long as they do not sell them to Muslims or in Muslim areas or in the month of fasting.[71] They are not allowed to commit adultery or any abominable work in any area of an Islamic State.[72] Though the *Dhimmis* enjoy a social and religious autonomy, their cases of

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66. Op. cit., Awang, pp. 28-29.
67. I. Doi, *Non-Muslim under Shariah*, Lahore, 1977, p. 112
68. Walker, D. V., *The Oxford Companion of Law*, Oxford, 1980, p.966.
69. Khadduri, M., *War and Peace in the Law of Islam*, Johns Hopkins Press, Baltimore, 1955, p.189.
70. Op. cit., Awang, p. 67.
71. Hamidullah, M., *Introduction to Islam*, published by Sh. Muhammad Ashraf, Lahore, 1974, p. 438.
72. Op. cit., Awang, p. 121.

religious or social matters, if brought to the Muslim courts, are judged in accordance with Islamic law as the Qur'an says: 'So judge between them by that which God hath revealed, and follow not their desires, but beware of them lest they seduce thee from some part of that which God hath revealed unto thee....'[73]

7. 3. Enjoyment of Judicial Autonomy

The *Dhimmis* enjoy judicial autonomy in establishing their own tribunals presided by its own judges. Each group should seek to apply its laws to all branches of human affairs. Thus judicial autonomy is intended to encompass not only individual or private matters but also for all the affairs of life: civil, criminal, religious and others.[74] On personal matters of marriages, divorces, and the *Dhimmis* are allowed to appeal to their own religious courts.[75] The *Dhimmis* are generally denied the right to appeal to an Islamic court in family matters, marriage, divorce, and inheritance.[76] However, in the event a Muslim judge agrees to take such a case, the court must apply Islamic law.[77] The jurists say: 'For them is whatever for us and against them is whatever against us'.[78] But when it comes to privileges, the *Dhimmis* do not enjoy the same treatment, so for example, the *Dhimmis* are not issued licenses to carry weapons.[79]

7. 4. Some Restrictions in Personal Laws

The *Dhimmi* male is not allowed to marry a Muslim girl[80] on the ground that the *Dhimmi* male, who does not believe in her Apostle, by nature of his male chauvinism and domination, disregards her and forbids her to adhere to her faith or perform its rites,[81] though a Muslim male can marry a *Dhimmi* girl (developed).[82] Islam secures for this girl all the marital rights except the right to inherit. In this case neither does she inherit her

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73. Qur'an 5:49, 5:47.
74. Op. cit., Hamidullah, (1953), pp. 321, 430.
75. Op. cit., Awang, pp. 67-68.
76. Ibid.
77. Ibid.
78. Ibid, p. 68.
79. Op. cit., Shahid.
80. Malik b. Anas, *al Muwatta*, translated by Aishah and Johnson, Norwich, 1982, p.298.
81. Tabbarah, A.A., 'Tolerance in the Religion of Islam', available in http://www.wponline.org/vil/articles/ibadah/tolerance_in_the_religion_of_islam.html 26/05/2003.
82. Op. cit., Awang, pp. 78-79.

husband nor does her husband inherit her- putting them on equal footing.[83] If a *Dhimmi* woman embraces Islam and wants to get married, her *Dhimmi* parent loses authority to give her away to the bridegroom, rather be done by an appointed Muslim guardian.[84] If one parent is a Muslim, children must be raised as Muslims.[85] If the father is a *Dhimmi* and the mother converts to Islam, the marriage breaks down and the mother gets the custody of the child.[86] Moreover, the Qur'an says: '...and give not your daughters in marriage to non-Muslims till they believe in Allah alone verily a believing slave is better than a free non-Muslim.'[87]

7. 5. Respecting the Islamic State and its Ideology

They have to respect the Islamic State and its ideology.[88] They are not allowed to abuse, God, Islam, the Prophet and the Qur'an while practising their own faiths, as the liberty of the adherents of different faiths residing in an Islamic Sate, following their own beliefs, personal statutes and practices, are not absolute for the reason that if it is not used properly, it would conflict with the rights of others.[89] For to commit such act constitutes a breach of the covenant they have had and the undermining of the religion.[90] So the rights of the *Dhimmis* will be called in question if they fail to respect or undermine the law of the country, vilify its principles, or if they tend to disturb the peace and general security of the State.[91]

7. 6. Enjoyment of Religious Freedom with Certain Limitations

Islamic law requires Muslims not to force the *Dhimmis* to embrace Islam. The Qur'an says: 'Call unto the way of thy Lord with wisdom and fair exhortation, and reason with them in the better way. Lo! Thy Lord is best aware of him who strayeth from His path, and He is best aware of those who receive guidance'.[92] Once a *Dhimmi* person becomes a Muslim, he

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83. Op. cit., Tabbarah, A.A., 'Tolerance in the Religion of Islam'.
84. Op. cit., Shahid.
85. Op. cit., Shahid.
86. Op. cit., Awang, p. 140.
87. Qur'an 2:221, also available in http://www.jannah.org/sisters/intermarriage.html 26/05/2003.
88. Op. cit., Awang, p. 69.
89. Ibid, p.70.
90. Ibid.
91. Shafuddin, A.M.M., 'Tolerance in Islam', *The voice of Islam*, XX, 1972, pp. 582-583, available in http://www.wponline.org/vil/articles/ibadah/tolerance_in_the_religion_of_islam.html 26/05/2003.
92. Qur'an 16:25, 10:99-100.

cannot recant. If he does or gets involved with the act of apostasy i.e. rejection of the religion of Islam either by action or by the word of the mouth,[93] he will be warned first, then he will be given three days to reconsider and repent. 'The act of apostasy, thus, put an end to one's adherence to Islam.'[94] When one rejects the fundamental creeds of Islam, he rejects the faith, and this is an act of apostasy such an act is a grave sin in Islam.[95] If his apostasy continues, his wife gets divorced from him, his property is confiscated, and his children are taken away from him. He is not allowed to remarry. Instead, he should be taken to court and sentenced to death. If he repents, he may return to his wife and children or remarry. According to the Hanifites, an apostate female cannot get married.[96] She must spend time in meditation in order to return to Islam. If she does not repent or recant, she will not be sentenced to death; rather she is to be persecuted, beaten and jailed until she dies. Other schools of *Shariah* demand her death. The above punishment is prescribed in a *Hadith* that the messenger of Allah ... said, whosoever changes his religion (from Islam to any other faith), kill him.'[97] Doi remarks that all the four schools of Islamic jurisprudence has unanimously agreed upon the punishment by death in the case of Apostasy.[98] A non-Muslim wishing to become a Muslim is encouraged to do so and anyone, even a father or a mother, who attempts to stop him, may be punished. However, anyone who makes an effort to proselytise a Muslim to any other faith may face punishment.[99] The punishment of the apostate is because of his treasonable and deceptive conduct.[100]

7. 7. Capacity to Testify

The *Dhimmis* are not allowed to testify against Muslims except in certain cases i.e. in cases of necessity e.g. testimony of a non-Muslim doctor, while travelling testimony of a non-Muslim in matters of will.[101] But the Malikites opine that in no circumstances will the testimony of non-Muslim be accepted, whether it is for or against a Muslim, in travelling

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93. Op. cit., I. Doi, (1984) pp. 265-266.
94. Ibid, p.265.
95. Ibid.
96. Op. cit., I. Doi, (1984) p.265-265.
97. Bukhari, reported by Abbas.
98. Op. cit., I. Doi, (1984) pp. 265-266.
99. Op. cit., Shahid.
100. El-Berry, Z., 'Man's Rights In Islam', available in http://www.wponline.org/vil/books/zb_mri/islam_and_human_rights.htm 15/05/2003.
101. Op. cit., Awang, pp. 162-163.

or otherwise. The Qur'an says: 'and call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses.'[102] The Qur'an goes further: '...and call to witness two just men among you, and keep your testimony upright for God.'[103] Therefore the majority holds that these verses have excluded the *Dhimmis* from being a witness. Muraghi states bluntly that the testimony of a *Dhimmi* is not accepted as Allah, may He be exalted, has said: 'God will not let the infidels (*kafir*) have an upper hand over the believers.'[104] A *Dhimmi*, regarded as an infidel, cannot testify against any Muslim regardless of his moral credibility. If a *Dhimmi* has falsely accused another *Dhimmi* and was once punished, he has his credibility and integrity and hence his testimony is no longer acceptable. One serious implication of this is that if one Muslim has committed a serious offence against another, witnessed by a *Dhimmi* only, the court will have difficulty deciding the case since the testimonies of the *Dhimmis* are not acceptable.[105] Yet, this same *Dhimmi* whose integrity is blemished, if he converts to Islam, will have his testimony accepted against the *Dhimmis* and Muslims alike, because according to the *Shariah*, 'By embracing Islam he has gained a new credibility which would enable him to witness...'[106] All he has to do is to utter the Islamic confession of faith before witnesses, and that will elevate him from being an outcast to being a respected Muslim enjoying all the privileges of a devout Muslim.[107] All schools excepting Hanafites have agreed that they cannot testify even for each other except for *Musta'min*.[108]

7. 8. Equal Treatment in Crimes

According to Hanafites, both *Dhimmis* and Muslims must suffer the same Penalty for similar crimes. If a Muslim kills a *Dhimmi* intentionally, he must be killed in return following the principle of retaliation i.e. *Qisas*. The same applies to a Christian who kills a Muslim. The Shafiites and other schools opine that a Muslim who assassinates a *Dhimmi* must not be killed, because it is not reasonable to equate a Muslim with a

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102. Qur'an 2:282.
103. Qur'an 65:2.
104. Muraghi, A.M., *Islamic Law Pertaining to Non-Muslims*, Library of Letters, Egypt, 2001-2002.
105. Op. cit., Shahid.
106. Ibid.
107. Ibid.
108. Op. cit., Awang, pp. 165-167.

polytheist i.e. non-Muslim.[109] This majority view is supported by the Qur'anic verses[110] and by the Tradition, which says that the Muslim should not be killed for the killing of the non-Muslim.[111] In such a case, blood price must be paid.[112] The majority contention goes further when it is said that the Muslim should not be prosecuted for the murder of a *Musta'min*. Therefore the same condition applies to *Dhimmis* as the bloods of Muslims are equal. Hence, it is implied that there is no equality between the blood of a Muslim and a non-Muslim for qualifying one of *Qisas* requirements- equality between the two parties. Since there is no equality in this case, the *Qisas* should not be followed.[113]

7. 9. Capacity to Head a State

A *Dhimmi*, who does not believe in Islamic ideology, cannot be the head of an ideological Islamic State or a member of the Advisory Council, which assists the head of the State in implementing the Islamic principles and adhering to them, because as a head of the State he has to be bound by the *Shariah* to conduct and administer the State in accordance with the Qur'an and the *Sunnah*.[114] Since the Islamic State is based on Islamic ideology, it is expected that State will restrict some other positions for Muslims like Commander of Jihad, Judges, *Zakat* Collectors and some policy-making posts, as they are purely religious in nature. For instances, the leadership of the army in Islam is not civil or secular, rather it is a worship; it is unreasonable for a non-Muslim to deliver judgment following Qur'an and *Sunnah*, in which he does not believe and the same applies to the post of *Zakat* Collectors.[115] Again, this sort of requirement is not alien in some States. Say for an example in the USA or the UK to become a head of the State, one needs to believe in Christianity (sometimes Catholic or Protestant).

7. 10. Capacity to Participate in Election

There is no evidence suggesting that the *Dhimmi* had ever participated in the election of the Four Guided Caliphs nor do we encounter the demand any report that the *Dhimmi* had claimed such right.[116] So it can

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109. Op. cit., Awang, pp. 114-120.
110. See for instance Qur'an 59:20.
111. Op. cit., Awang.
112. Ibid.
113. Ibid.
114. Op. cit., Awang, pp.189-190.
115. Ibid.
116. Ibid, pp.194-195.

be said that the *Dhimmi* does not have any voting right.[117] Election though a modern concept, which should be reviewed in Islamic law so far the *Dhimmi* is concerned. Mawdudi, aware of the requirements of modern society, seems to be more tolerant toward *Dhimmis*. He says, 'In regard to a parliament or a legislature of the modern type which is considerably different from the advisory council in its traditional sense, this rule could be relaxed to allow non-Muslims to be members provided that it has been fully ensured in the constitution that no law which is repugnant to the Qur'an and the *Sunnah* should be enacted, that the Qur'an and the *Sunnah* should be the chief source of public law, and that the head of the state should necessarily be a Muslim.'[118]

Mawdudi though traditionalist, expresses his views in a more liberal way. But his views have failed to receive the approval of most other schools of the *Shariah*, which hold that non-Muslims are not allowed to assume any position, which might bestow on them any authority over any Muslim. According to their view, a position of sovereignty demands the implementation of Islamic ideology. It is believed that a non-Muslim (regardless of his ability, sincerity, and loyalty to his country) cannot and would not work faithfully to achieve the ideological and political goals of Islam.[119]

7. 11. Capacity to work under/above Muslim Authority

It is not permissible for a Muslim owner (of a company) to confer authority on a Christian over other Muslims'[120] because God Almighty said: 'Allah will not give access to the infidels (i.e. Christians) to have authority over believers (Muslims)'.[121] For Allah has elevated Muslims to the highest rank (over all men) and foreordained to them the might, by virtue of the Qur'anic text in which God the Almighty said: 'Might and strength be to Allah, the Prophet (Muhammad) and the believers (Muslims)'.[122] The Qur'an says again: 'Thou wilt not find any people who believe in Allah and the Last Day, loving those who resist Allah and His Apostle, even though they were their fathers or their sons, or their brothers, or their kindred.'[123]

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117. Ibid.
118. Op. cit., Shahid.
119. Op. cit., Awang..
120. *Al-Muslim Weekly*, Vol. 8, Issue No. 418, Friday 2, 5, London, 1993.
121. Qur'an 4:141.
122. Qur'an 63:8.
123. Qur'an 63:8 and 22:58.

Thus, these two verses have strictly prohibited the authority of non-Muslim over a Muslim, since the Muslim has to submit to and obey whoever is in charge over him. The Muslim, therefore becomes inferior to him, and this should not be the case with the Muslim.[124]

7. 12. Freedom of Expression

As freedom of expression or opinion is recognised by Islam, hence it is lawful for a *Dhimmi* in an Islamic State to criticise the government, its policies including the Head of the State as long as it does not amount to an attack Islam as a religion and the Prophet under the pretext of freedom of expression.[125] Mawdudi, who is more lenient than most Muslim scholars, presents a revolutionary opinion when he emphasizes that in an Islamic state 'all non-Muslims will have the freedom of conscience, opinion, expression, and association as the one enjoyed by Muslims themselves, subject to the same limitations as are imposed by law on Muslims.'[126]

Most of the schools of Islamic law do not support Mawdudi's view, especially in regard to freedom of expression like criticism of Islam and the Government. Even in countries like Pakistan, the homeland of Mawdudi, Iran, Saudi Arabia or some other Muslim countries, it is illegal to criticize the government or the head of the State. Through the course of history except in rare cases, not even Muslims have been given freedom to criticize Islam without being persecuted or sentenced to death. It is far less likely the *Dhimmi* to get away with criticizing Islam.[127] Mawdudi's statement has defined the term 'limitations' in a very obscure way. If it were explicitly defined, it would seem, in the final analysis, that it curbs any type of criticism against the Islamic faith and government.

8. Compatibility of the Treatment

From the earliest period of Islam to the present day the non-Muslims have been enjoying the same rights and carry same responsibilities as the Muslims. When the Prophet says: 'He who hurts a *Dhimmi* hurts me, and he who hurts me annoys Allah'[128]; or 'Whoever hurts a *Dhimmi*, I am his adversary, and I shall be an adversary to Him on the Day of Resurrection'[129]; or 'On the Day of Resurrection I shall dispute with

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124. Op. cit., *Al-Muslim Weekly*.
125. Op. cit., Awang, p. 196.
126. Ibid.
127. Op. cit., Shahid.
128. Reported by Al-Tabarani.
129. Reported by Al-Khatib.

anyone who oppresses a person from among the people of the covenant, infringes on his right, or puts a responsibility on him which is beyond his strength, or takes something from him against his will'[130], it is clearly indicated that non-Muslims are given the same honour and dignity as the Muslims enjoy. The successors of the Prophet, the Caliphs safeguarded the rights and sanctions of non-Muslim citizens and the Islamic jurists, in spite of their divergences of opinions regarding many other matters, are unanimous in emphasizing these rights and sanctions. According to some *Ahadith*, severe warning is reported for violating the property or lives of the *Dhimmis*. 'Whoever unjustly kills a person of the covenant of *Dhimmah*, Allah has prohibited Heaven for him.'[131] The Qur'an says: 'O ye believe! Stand out firmly for justice, as witness to God, even against yourself, or your parents, or your kin, and whether it be (against) rich or poor.'[132] Under Islamic law, one cannot transgress law, justice and good conscience on the pretext that the other party is non-Muslim; one cannot violate pledge given them on any account; if any non-Muslim seeks asylum, it can on no account be refused and afterwards he is to be conveyed to his place of safety.[133] In fact, the entire fabric of Islamic international Law is intended for the non-Muslims.[134] Thus in an Islamic State, the non-Muslims are given right to life, property and religion, right to equality, right to honour and dignity, freedom of expression or opinion, right to practise own culture, right to pre-emption, right to fair trial etc which are termed as human rights by the traditional Muslim scholars as these rights quite resemble with those inserted in the Universal Declaration of Human Rights Adopted by the United Nations in 1948, the Convention for the Protection of Human Rights and Fundamental

130. Reported by Abu Daud.
131. Reported by Bukhari, Ibn Majah, Ahmad, Tirmidhi and Darimi.
132. Qur'an 4:135.
133. Qur'an 9:6.
134. Op. cit., Hamidullah, (1953) p. 75.

Freedoms 1950,[135] the Optional Protocol 12[136] (not yet in force), the International Covenant on Civil and Political Rights 1966,[137] International Convention on the Elimination of All Forms of Racial Discrimination,

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135. Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

136. Article 1

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

137. Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

1969,[138] the American Convention on Human Rights 1969,[139] the Universal Islamic Declaration of Human Rights adopted by the Muslim Council of

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138. Article 1
    1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
    2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
    3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
    4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

    Article 5

    In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
    a. The right to equal treatment before the tribunals and all other organs administering justice;
    b. The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
    c. Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
    d. Other civil rights, in particular: [movement, leave and return, nationality, marriage, property, inheritance, thought, conscience, religion, opinion, expression, association and assembly]
    e. Economic, social and cultural rights, in particular: [work, trade union membership, housing, public health & social services, education & training, equal cultural participation]
    f. The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

139. Article 1: Obligation to Respect Rights

    The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their

Europe in 1981,[140] the African [Banjul] Charter on Human and Peoples' Rights 1981,[141] the Cairo Declaration on Human Rights in Islam

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jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 20: Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

140. http://www.iifhr.com/uidhr1.html 26/05/2003.

141. Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

1990,[142] the Arab Charter on Human Rights 1997,[143] the Framework

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

142. Article 11

a. Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty.

b. Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States peoples to support the struggle of colonized peoples for the liquidation of all forms of and occupation, and all States and peoples have the right to preserve their independent identity and control over their wealth and natural resources.

Article 19

a. All individuals are equal before the law, without distinction between the ruler and the ruled.

b. The right to resort to justice is guaranteed to everyone.

c. Liability is in essence personal.

d. There shall be no crime or punishment except as provided for in the *Shariah.*

e. A defendant is innocent until his guilt is proven in a fast trial in which he shall be given all the guarantees of defence.

143. Article 1

a. All peoples have the right of self-determination and control over their natural wealth and resources and, accordingly, have the right to freely determine the form of their political structure and to freely pursue their economic, social and cultural development.

Convention for the Protection of National Minorities 1998,[144] the European

b. Racism, zionism, occupation and foreign domination pose a challenge to human dignity and constitute a fundamental obstacle to the realization of the basic rights of peoples. There is a need to condemn and endeavour to eliminate all such practices.

Article 2

Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women.

Article 37

Minorities shall not be deprived of their right to enjoy their culture or to follow the teachings of their religions.

(The 22 member States of the League of Arab States are: Jordan, U.A.E., Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Comoros, Kuwait, Lebanon, Libya, Egypt, Morocco, Mauritania, Yemen.)

144. Article 1

The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

Article 3

1. Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights, which are connected to that choice.
2. Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.

Charter for Regional /Minority Languages 1998, the Charter of Fundamental Rights of the European Union 2000.[145]

Many western scholars, who have carried numerous investigations on the Muslim formulation of human rights and said that Muslim world has hired the concept from the West, have concluded that these schemes run far short of the protections provided by the international human rights, enshrined in the Universal Declaration of Human Rights.[146] Mawdudi has refused to accept their view and said until the seventeenth century the western world never knew that the Magna Carta contained the human rights and civic rights but the human rights in Islam existed before that point of time and unlike the traditional human rights, the rights in Islam cannot be suspended or withdrawn because of its divine nature and sanctions are followed in the violations.[147]

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145. Article 21
    1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
    2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

    Article 22

    The Union shall respect cultural, religious and linguistic diversity.

146. Safi, Louay M., 'Human Rights and Islamic Legal Reform', available in http://www.wponline.org/vil/books/shariah/human3.pdf 26/05/2003.

147. Mawdudi, *Human Rights in Islam*, available in http://www.wponline.org.vil/books/M_hri/index.htm 15/03/2003.

Ann Elizabeth Mayer, who conducts certain research on Islamic jurisprudence and believes in universalistic approach, contends that contemporary endorsement of international human rights by Muslims is more apparent than real, because all human rights pronouncements by Muslim individuals and groups have been curtailed by qualifications rooted in *Shariah*. The application of *Shariah* law would lead, she concludes, to serious breaches of international human rights. More specifically, the application of *Shariah* law would lead to the attrition of religious freedom and to discrimination against ... non-Muslims.[148]

Rhoda Howard, who is very critical about Islamic treatment towards non-Muslims, points out that traditional *Shariah* fails to afford equal protections of the law for ...non-Muslims. She wrote: 'According to traditional interpretations, Islam excludes entire categories of people, most notably women, slaves [sic], and non-Muslims, from equality under the law, although it does set out careful rules for their unequal protection.'[149] Howard, though critical about *Shariah*, takes reasonable care, however, in saying that against any conclusion that would suggest that the classical legal system was unjust, and continues to argue that compared with Europe until barely a century and a half ago, Islamic societies might well be characterized as far more just in the modern sense of protecting human rights. Still, Howard is quick to deny the possibility of developing a modern human rights tradition, rooted in Islamic worldview, insisting that 'Islamic conception of justice is not one of human rights.'[150]

Heiner Brelefeldt who argues for reformation in Islamic law for its partisan attitude about the treatment of non-Muslims in an Islamic State, supports the contention made by Mayer regarding historical *Shariah*'s capacity to provide for human rights protections, particularly for women and non-Muslims. Examining areas of conflict between *Shariah* and human rights, he notes: 'Due to the timing of its development, it is hardly

148. Mayer, Ann Elizabeth, Islam and Human Rights: Tradition and Practice, 2nd Edition, Westview Press, 1995, pp.64-65.

149. Rhoda Howard, Human Rights and the Search for Community (Boulder, Co.: Westview Press, 1995), p. 93.

150. Ibid, p. 94.

surprising that the classical *Shariah* differs from the modern idea of universal human rights. Although the *Shariah* puts a great deal of emphasis on the equality of all the faithful before God, it traditionally assumes unequal rights between men and women and between Muslims and members of other religious communities'.[151]

Abdullahi An-Na'im, who was born and brought up in an Islamic environment and speaks in his mother tongue Arabic, is thought to be the leading reformist for his opinion on the point that the world is advancing very fast and the people are getting aware of what is good or bad treatment keeping pace with time, whereas the *Shariah* still keeps it in tact with the primitive attitude. Though he realizes that the possibility and importance of sprouting human rights tradition from within the Islamic normative system, and warns against any external burden, he discusses detailed examples of violation of religious freedom by *Shariah* rules, and cites instances of discrimination against women and non-Muslims in the historical legal system.[152] To make the *Shariah* attuned with the modern concept of human rights, he calls for an Islamic reformation aimed at overcoming contradictions between international human rights and *Shariah* rules, and proposes a methodological approach based on what he calls 'the evolutionary principle' introduced in the seventies by his late Sudanese mentor, Mahmoud Muhammad Taha who was later executed by the Sudanese Government on the charge of blasphemy. According to this principle, An-Na'im urges for the application of reverse *naskh*, i.e. the abrogation of the Madinan Qur'an, which places the solidarity of Muslims above all others having different religious faith and exerts Muslims to coerce the unbelievers to accept Islam, and introduces actions that discriminate against women and against non-Muslims,[153] whenever contradicts the Makkan Qur'an, which embodies the eternal principles of the Islamic revelation which emphasize

151. Heiner Biefeldt, 'Muslim Voices in the Human Rights Debate', *Human Rights Quarterly*, 17.4 (1995), p. 596.

152. An Na'im, A.A., *Toward an Islamic Reformation*, Syracuse university Press, Cairo, 1990, pp. 52-56.

153. Ibid, p. 176.

human solidarity and establish the principle of justice for all, regardless of religion, gender, or race.[154] An-Na'im concludes by making a obsessive plea that succinctly summarizes his approach: 'Unless the basis of modern Islamic law is shifted away from those texts of the Qur'an and *Sunnah* of the Medina stage, which constituted the foundations of the construction of *Shariah*, there is no way of avoiding drastic and serious violation of universal standards of human rights. There is no way to abolish slavery as a legal institution and no way to eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of *Shariah'*.[155]

In spite of An-Na'im's proposal seeming apparently to provide a quick fix to the contradictions between historical *Shariah* and international human rights, the 'evolutionary principle', is not satisfactory, as it can be easily faulted on both theoretical and practical grounds.[156]

First, as long as Muslims consider the Qur'an, which An-Na'im himself agrees, as a divine revelation, they must accept the totality of the Qur'anic statements as a single discourse.

Secondly, opposing the Madinan Qur'an would not be tolerable by the Muslims, including those who agree with An-Na'im that there should be a fresh reading of the Islamic sources so as to produce a sweeping legal reform.[157] Those who peruse the Qur'an profoundly cannot deny the fact that the Madinan Qur'an not only comments on family matters and relationships with non-Muslims, but also on issues relating to fundamental Islamic practices, such as the performance of prayer, *zakat*, fasting, and *hajj*.

Thirdly, ignoring one-third of a book which the majority of Muslims believe to be unquestionable is counterproductive, particularly when it can be shown, that the contradictions between the Makkan and Madinan statements on women and non-Muslims are more perceptible than real, resulting from faulty interpretations by classical scholars, as well as the application of an atomistic methodologies of derivation.[158]

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154. Ibid, p. 49.
155. Ibid, p.180.
156. Op. cit., Safi.
157. Ibid.
158. Ibid.

9. Conclusion

While the traditionalists treat Islamic States' conduct towards non-Muslims as compatible with international human rights and the modernists view that apparent formulation of human rights by the Islamic States towards non-Muslims are not real human rights as it gets circumscribed by qualifications rooted in *Shariah*, it can be concluded with the view that Islam, which means peace is bound to establish peace and dignify the humanity through all the guidance revealed in the Qur'an and *Sunnah* and whose objectives are such, practicing discrimination between Muslims and non-Muslims, men and women whatever is never possible on its part. Given the objectives, what it proposes, has got its justification though seeming sometimes imbalanced apparently. Moreover, certain distorted and isolated incidences are being laminated with Islam, which Islam neither endorses nor presupposes.[159] Since the arrival of Islam, it leaves no stone unturned for the well being of the humanity. Muslims and Islamic civilization must be recognized for their extensive contributions to human progress. So it can be said that Islamic law i.e. *Shariah* has been quite resembling with the human rights doctrine of equality, which has evolved in modern times. But the problem lies with the modernists who have failed to locate human rights tradition in Islam because of their static and ahistoric outlook that isolate the *Shariah* rules developed by classical scholars from the socio political structure of early Muslim society. For a modern human rights tradition to take hold in modern Muslim society, it should be rooted in the moral or religious commitments of the Muslims. The dignity of mankind can be achieved not by making an import of human rights tradition evolved in an alien culture, but by appealing to the conception of human dignity embedded in the Qur'anic texts, and by employing the concept of reciprocity which lies at the core of the Qur'anic notion of justice. Louay M. Safi has rightly commented that human rights tradition capable of ensuring equal protections of the moral autonomy of both individuals and groups is bound to evolve by the application of the Islamic sources through a paradigm that incorporates the principles of human dignity and moral reciprocity into a modern society, characterized by cultural plurality and globalizing technology.[160]

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159. Eliz Sanasarian, *Religious Minorities in Iran*, Cambridge University Press, Cambridge, 2000, pp.220-228.

160. *The American Journal of Islamic Social Sciences*, Herndon, USA, available in http://www.wponline.org/vil/books/shariah/human3.pdf 26/05/2003.

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EXAMINING LIABILITIES ARISING FROM DOCTOR'S NEGLIGENCE

Md. Ershadul Karim

1. Introduction

Negligent behaviour can be perceived at different levels in our daily lives. Instances of negligence in the medical profession is not a new phenomenon. Most people do not know the Hippocratic oath[1] by heart, but what they do expect from their doctors is dedication and compassion. In our fast-paced and increasingly materialistic world today, these and a host of other qualities expected in doctors often come at a high price, if at all. Like everything else in our world today, medical treatment and healing have become expensive, sometimes even exploitative, treated as commodities. It is difficult to find doctors who will take the time to listen to a patient's problems and suggest remedies that will actually work. All of us have heard some stories about doctor's negligence e.g., while performing operation doctors keeping his wristwatch or gauge or scissors inside the patient's body. Doctors and drugs are the two main factors playing important role in health sector. The doctors are very distinguished

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1. HIPPOCRATES, the celebrated Greek physician, was a contemporary of the historian Herodotus. He was born in the Island of Cos between 470 and 460 B.C., and belonged to the family that claimed descent from the mythical AEsculapius, son of Apollo. There was already along medical tradition in Greece before his day, and this he is supposed to have inherited chiefly through his predecessor Herodicus; and he enlarged his education by extensive travel. He is said, though the evidence is unsatisfactory, to have taken part in the efforts to check the great plague which devastated Athens at the beginning of the Peloponnesian war. He died at Larissa between 380 and 360 B.C. The works attributed to Hippocrates are the earliest extant Greek medical writings, but very many of them are certainly not his. Some five or six, however, are generally granted to be genuine, and among these is the famous "Oath." This interesting document shows that in his time physicians were already organized into a corporation or guild, with regulations for the training of disciples, and with an esprit de corps and a professional ideal which, with slight exceptions, can hardly yet be regarded as out of date. One saying occurring in the words of Hippocrates has achieved universal currency, though few who quote it to-day are aware that it originally referred to the art of the physician. It is the first of his "Aphorisms": "Life is short, and the Art long; the occasion fleeting; experience fallacious, and judgment difficult. The physician must not only be prepared to do what is right to himself, but also to make the patient, the attendants, and externals cooperate. < http://members.tripod.com/nktiuro/hippocra.htm > accessed on June 15, 2005.

class of professionals and it is always expected that they shall exercise care and caution while they are performing professional duties. Despite taking all precautions doctors tend to commit professional blunders which tantamount to negligence. The national dailies in Bangladesh contain lots of news about death or injury of patients due to negligence of doctors almost everyday. Awareness must be created about the issue 'doctor's negligence or medical negligence' so that both the doctors and ordinary people alike can get the protection of law. The issue 'negligence in health care' is so important that the World Health Organisation (WHO) in the year of 1993 selected the theme *Handle life with care; prevent violence and Negligence* as its slogan.

2. Background discussion

Health is the greatest of all possessions reflecting the age old proverb 'if health is lost everything is lost'. The Constitution of the People's Republic of Bangladesh, 1972, in its *Art.32* states that everybody shall have the right to life and this right is constitutionally guaranteed[2] i.e., if anybody is deprived of the enjoyment of his life then he can go to the Court of Law for the enforcement of his right. Sound health is the pre-condition to enjoy this right to life peacefully. It is but an unwritten rule of nature that one's health does not always remain fully fit, sometimes owing to reasons beyond our control that is when we have to visit doctors and seek professional advice. Hence doctors play a role of paramount importance. Due to doctor's negligence sometimes we have to suffer immeasurably to the extent that a good number of people have died prematurely due to such callous disregard of peoples' faith.

Broadly speaking, the Constitution has classified various rights of the citizens in two broad categories i.e. Civil and Political Rights and Economic, Social and Cultural Rights. The first category rights are located in Part III titled "Fundamental Rights" (Articles 27- 44) and the second category rights are placed in Part II under the heading "Fundamental Principles of State Policy" (Articles 8-25). Article 15 of the Bangladesh Constitution, while dealing with the provision of basic necessities, states in Article 15(1) that it shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing, shelter, education and medical care. It is the constitutional obligation of the Govt. of Bangladesh to attain the

2. Article 32, the Constitution of the People's Republic of Bangladesh, 1972.

fundamental principles of state policies. As a result the Government of Bangladesh adopted and enacted a good number of legislations.[3]

3. Defining negligence

Negligence is the mental attitude of undue indifference with respect to one's conduct and its consequence. The concept 'negligence' has been defined by different scholars in different ways. L.B. Curzon, in *Dictionary of Law* defined the term 'negligence' as the breach of a legal duty to take care, resulting in damage to the claimant which was not desired by the

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3. The Vaccination Act, 1880 (Bengal Act V of 1880); The Epidemic Diseases Act, 1897 (Act No. III of 1897); The Lepers Act, 1898 (Act No. III of 1898); The Glanders and Farcy Act, 1899 (Act No. XIII of 1899); The Mining Settlements Act, 1912 (Bengal Act II of 1912); The White Phosphorus Matches Prohibition Act, 1913 (Act No. V of 1913); The Medical Degrees Act, 1916 (Act No. VII of 1916); The Juvenile Smoking Act, 1919 (Bengal Act II of 1919); The Public Health (Emergency Provisions) Ordinance, 1944 (Ordinance No. XXI of 1944); The Undesirable Advertisements Control Act, 1952 (East Bengal Act No. XV of 1952); The Pure Food Ordinance, 1959 (East Pakistan Ordinance No. LXVIII of 1959); The Eye Surgery (Restriction) Ordinance, 1960 (Ordinance No. LI of 1960); The Medical Colleges (Governing Bodies) Ordinance, 1961 (Ordinance No. XIII of 1961); The Allopathic System (Prevention of Misuse) Ordinance, 1962 (Ordinance No. LXV of 1962); The Cantonment Pure Foods Act, 1966 (Act No. XVI of 1966); The Bangladesh College of Physicians and Surgeons Order, 1972 (President's Order No. 63 of 1972); The *Bidi*- Manufacturer (Prohibition) Ordinance, 1975 (Ordinance No. LVII of 1975); The Pharmacy Ordinance, 1976 (Ordinance No. XIII of 1976); The Prevention of Malaria (Special Provisions) Ordinance, 1978 (Ordinance No. IV of 1978); The International Center for Diarrhoeal Disease Research, Bangladesh Ordinance, 1978 (Ordinance No. LI of 1978); The Medical And Dental Council Act, 1980 (Act No. XVI of 1980); The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982 (Ordinance No. IV of 1982); The Drugs (Control) Ordinance, 1982 (Ordinance No. VIII of 1982); The Bangladesh Unani And Ayurvedic Practitioners Ordinance, 1983 (Ordinance No. XXXII of 1983); The Fish and Fish Products (Inspection and Quality Control) Ordinance, 1983 (Ordinance No. XX of 1983); The Bangladesh Homeopathic Practitioners Ordinance, 1983 (Ordinance No. XLI of 1983); The Bangladesh Nursing Council Ordinance, 1983 (Ordinance No. LXI of 1983); The Breast-Milk Substitute (Regulation of Marketing) Ordinance, 1984 (Ordinance No. XXXIII of 1984); The Drugs (Supplementary Provisions) Ordinance, 1986 (Ordinance No. XII of 1986); The *Iodine Obhab Jonit Rog Protirod Ain*, 1989 (Act No. X of 1989); The *Tamakjat Samogry Biponon (Niontron) Ain*, 1988 (Act No. 45 of 1988); The *Madok Drobbo Niontron Ain*, 1990 (Act No. 20 of 1990); The *Paromanobik Nirapotta O Bikiron Niontron Ain*, 1993 (Act No. 21 of 1993); The *Bangabandhu Shiekh Mujibur Rahman Medical Bishwabidhalaya Ain*, 1998 (Act No. 1 of 1998); The Transplantation of Organ in Human Body Act, 1999 (Act No. V of 1999); The Bangladesh Protibondhi Kollan Ain, 2001, The Safe Blood Transfusion Act, 2002 (Act No. XII of 2002).

defendant. In the case of *Blyth vs. Birmingham Waterworks Co. (1856) 11 EX. 78,* the concept 'negligence' was defined as the 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. *Actus non facit reun, nisi mens sit rea,* is a very well known maxim of Law of Tort which says that the act itself creates no guilt in the absence of a guilty mind. But this provision of Tort is not applicable in case of negligence i.e., sometimes absence of guilty mind can also create liability. So we need to examine the essential elements of negligence.

3.1 Essential Elements of Negligence

Negligence consists of unreasonable conduct, which causes harm in breach of a legal duty to take care to avoid harm of that kind.[4] So, there are three elements of negligence and they are: a duty to take care, breach of that duty and loss of the plaintiff as a result of the breach of duty. The elements are discussed as follows.

3.1.1 Duty of Care

The concept of negligence presupposes a duty of care. It is obvious that without having a duty to take care a person shall not be held liable. So, there must have been a 'duty' and that duty must be done 'carefully'. In the case of *Le Lievre vs. Gould [1893] 1 Q.B. 491, 497, 504,* A.L. Smith, LJ held that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. Again the mere fact that a man is injured by another's act gives in itself no cause of action unless there is *mens rea.* If the act involves lack of care, no case of actionable negligence will arise unless the duty to be careful exists.[5]

It is not easy to define the phrase 'duty of care'. It is far from easy to say when the courts will accept or deny that the defendant was under a common law duty to take care of the plaintiff's interests. Lord Atkin made a famous generalization in 1932, in the case of *Donoghue vs. Stevenson (1932), A.C. 562 at 580,* to the effect that a person owed a duty to another ("his neighbour") who, as he should have realized, was likely to be affected by what he was doing if he did it badly. Thirty-year later Lord Wilberforce extended it somewhat (the "two-stage" test). Neither formulation emphasized either the nature of the damage in issue (personal injury, property damage, mere economic loss?) nor the nature of the

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4. Weir, Tony, *A Casebook on Tort,* Sweet & Maxwell, London, 1997, p. 1.
5. *Grant vs. Australian Knitting Mills [1936] A.C. 86.*

conduct, apart from its being unreasonable (act or omission, action or speech?). These factors are nevertheless of great importance in the decision as to the existence of duty. The current view is that a duty arises where there is sufficient "proximity" between the parties (an amalgam resulting from the relationship between the parties and the nature of the plaintiff's interest), provided it would be "fair, just and reasonable" to impose a duty (which means "to impose liability in the event of damaging carelessness").

In modern times, to define the "duty of care", the House of Lords laid down three-stage test in the *Caparo Industries Plc vs. Dickman [1990] 1 All E.R. 568.* In this case, it was decided that the Court must now consider the following three stages-

3.1.1.1 The first stage

The first stage is whether the consequences of the defendant's act were reasonably foreseeable. It is purely a question of fact. As for example, in the case of *Jolley vs. Sutton London Borough Council [2000] 3All E.R. 409*, the defendant council left lying (for at least two years) a boat on their land outside some flats. The 14 years old claimant and his friend decided to repair it. They jacked it up but, while they were at work, the boat fell on the claimant and caused him serious injuries. The defendants accepted that they had been negligent in falling to remove the boat but contended that the accident was not one that they could have reasonably foreseen. In allowing the defendant's appeal the Court of Appeal accepted this connection, but the House of Lords saw things differently and held that the accident had been reasonably foreseeable. But in the case of *Bourhill vs. Young [1943] A.C. 92*, the plaintiff was "not in any way physically involved in the collision". The defendant's motor cycle was already some 45 feet past the plaintiff when he collided with a motor car, and was killed. The plaintiff was on the far side of a tramcar, and so shield from the physical consequences of the accident. If, therefore, liability was to be established, it could only be on the basis that the defendant should have foreseen injury by nervous shock. The plaintiff did, in fact, suffer injury to her health as a result of the shock which she sustained. But as the defendant could not reasonably foresee that she would suffer injury by shock, it was held that she could not recover compensation. Again, in the case of *Topp vs. London Country Bus Ltd [1993] 3All. E.R. 448*, the defendants left their mini-bus unattended with the irrigation key visibly in place for nine hours at a bus-stop outside a *pub.* At 11.15 p.m. a person unknown drove it away, and five minutes later knocked down and killed Mrs. Topp who was cycling home. The trial judge held that there was proximity between Mrs. Topp and the defendants but that it would not

be fair, just and reasonable to impose a duty of care on the defendant. The Court of Appeal upheld this decision.

3.1.1.2 The second stage

The second stage is whether there is a relationship of proximity between the parties, i.e., a legal relationship or physical closeness. The existence of relationship of proximity between the parties varies from case to case. Say for example, in the case of *Home Office vs. Dorset Yacht Co. [1970] A.C. 1004*, seven Brostal boys, five of whom had escaped before, were on a training exercise on Brownsea Island in Poole Harbour, and ran away one night when the three officers-in-charge of them were, contrary to instructions, all in bed. They boarded one of the many vessels in the harbour, started it and collided with the plaintiff's yatch, which they then boarded and damaged further. The court held that there was a relationship of proximity. But in the case of *Caparo Industries Plc vs. Dickman [1990] 1 All E.R. 568*, the directors of Fidelity Plc announced unexpectedly poor results in May 1984 shares in Fidelity with a take-over in view. Four days later the counts, Touche Ross, were issued to shareholders as provided by statute, and Caparo bought a further 50,000 shares. Finally Caparo bought all the rest at a price of £125. This proved to be a very bad bargain, since far from making a profit of £1.3 million as indicated by the accounts, Fidelity had made a loss of £ 4,00,000. In addition to claiming (and obtaining) damages in deceit from Fidelity's directors, Caparo sued the auditors for negligence, alleging that it had bought the shares in reliance on the accounts and that they would not have bought them at that price or at all if the accounts had presented, as they said they did, a true and fair view of Fidelity's position. Hence, the court held that there was no proximity between the parties.

3.1.1.3 The third stage

The third stage is whether in all the circumstances it would be fair, just and reasonable that the law should impose a duty. As for example, in the case of *Hill vs. Chief Constable of West Yorkshire (1988) 2All E.R. 238*, the court held that it was not to be fair, just and reasonable to impose a duty on the police. However, a duty was imposed on the fire brigade in the case of *Capital vs. Hampshire County Council (1997)*.

3.2 The Breach of Duty

The second element of negligence is that to make a man liable there must be a breach of that duty. While performing the duty a person should take reasonable care. Otherwise he will be liable for the breach of that duty.

In *Bolton vs. Stone (1951) 2 All ER 1078 (HL)*, during a game of cricket the ball was hit out of the park hitting the plaintiff who was standing on a

nearby highway at a distance of about 100 yards from the batter. Over the whole history of the cricket park a ball had been hit that far only about six times in 30 years.

The House of Lords found that there was no negligence. They calculated whether the defendant had a duty to the plaintiff by taking into account the foressability of the risk was and the cost of measures to prevent the risk.

Lord Porter has observed that the following conditions must be satisfied to make a man reasonable in an action of negligence-

(a) A reasonable possibility of the happening of the injurious event;

(b) There must be sufficient probability to lead a reasonable man to accept it.

3.2.1 The Standard Expected

It is clear that to make a man negligent it has to be proved that that person has not followed the standard of care. It should be kept in mind that standard of care will be different for different categories of people i.e. specific rules shall be applied if the defendant is a child[6], a learner,[7] experts or a professional. In the case of *Bolam vs. Friern Barnet Hospital (1957)*[8] the plaintiff broke his pelvis during electro-convulsive therapy treatment at the defendant's hospital. He alleged that the doctor was negligent in not warning him of the risks of the treatment, in not giving relaxant drugs before the treatment, and in not holding him down during the treatment. It was held that the defendant was not negligent. The decision of this case was exhaustively discussed. In the case of *Whitehouse vs. Jordan [1981] 1 All E.R. 267,* it was held that error of judgement made a doctor liable in the case of negligence; whereas in the case of *Nettleship vs. Weston [1971] 2 Q.B. 691,* the defendant asked the plaintiff, who was a friend and not a professional driving instructor, to teach her to drive her husband's car. On being assured that there was fully comprehensive insurance cover, he agreed to do so. During the third lesson the defendant stopped at a junction prior to turning left. The plaintiff engaged first gear for her, and she started to turn slowly to the left. Her grip on the steering wheel tightened implacably, and despite the plaintiff's advice and efforts, the car followed a perfect curve, mounted the nearside pavement and struck a lamp post with sufficient impact to

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6. *Mullin vs. Richards [1998] 1 All E.R. 920.*
7. *Wilsher vs. Essex Health Authority [1986] 3 All E.R. 810,* H.L.
8. Q.B. 1957, 1 W.L.R 582; 101 S.J. 357; 1957, 2 All E.R. 118.

fracture the plaintiff's knee. It was held by Lord Denning that the driver owes a duty of care to every passenger in the car, just as he does to every pedestrian on the road; and he must attain the same standard of care in respect of each. But in all other cases, the court will consider the following four factors in deciding if there has been a breach of duty:

3.2.1.1 The degree of risk involved

Here the court will consider the likelihood of harm occurring. There may have either no known risk or a low risk[9] or there may have a known risk.[10]

3.2.1.2 The practicability of taking precautions

The courts expect people to take only reasonable precautions and not excessive precautions in guarding against harm to others.[11]

3.2.1.3 The seriousness of harm

Sometimes, the risk of harm may be low but this will be counter-balanced by the gravity of harm to a particularly vulnerable claimant.[12]

3.2.1.4 The social importance of the risky activity

If the defendant's actions served a socially useful purpose then he may have been justified in taking greater risks.[13]

3.2.2 Proof of Breach

The claimant must produce evidence which infers a lack of reasonable care on the part of the defendant. However, if no such evidence can be found, the necessary inference may be raised by using the maxim *res ipsa loquitur*, i.e., the thing speaks for itself.[14]

3.3. Damage caused by breach of duty

The third element of negligence is that the plaintiff must suffer damage due to the breach of that duty. To prove this element the claimant must prove that harm would not have occurred 'but for' the negligence of the defendant,[15] where there are a number of possible causes of injury, the claimant must prove that the defendant's breach of duty caused the harm

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9. *Roe vs. Minister of Health [1954] 2 Q.B. 66, Bolton v Stone [1951] 2 All E.R. 1078 (HL).*
10. *Haley vs. London Electricity Board [1964] A.C. 778.*
11. *Latimer vs. AEC Ltd. [1952] 1 All ER 1302.*
12. *Paris vs. Stepney Borough Council [1951] A.C. 367.*
13. *Watt vs. Hertfordshire County Council [1954] 1 W.L.R. 835; 2 All E.R. 368.*
14. *Scott vs. London & St Katherine Dock Co [1865] 3 H. & C. 596.*
15. *Barnett vs. Chelsea & Kensington Hospital [1968] 1 All ER 1068.*

or was a material contribution.[16] Again, the opinion of the Privy Council was that a person is responsible only for consequences that could reasonably have been anticipated and not for any other consequences.[17] The defendant will be responsible for the harm caused to a claimant with a weakness or predisposition to a particular injury or illness.[18] If harm is foreseeable but occurs in an unforeseeable way the defendant may still be liable.[19] However, there are two cases where the judges reversed this decision.[20]

4. Defining doctor's negligence

Doctor's negligence or medical professional negligence can be defined as a dereliction from medical professional duty or failure to exercise an accepted degree of medical professional skill or learning rendering medical services which result in injury, loss, or damage. It may again be defined as absence of reasonable care and skill or willful negligence of a medical man in course of treatment of patient resulting in bodily injury or death. Actually it is nothing but the failure in the exercise of a reasonable degree of skill and care on the part of a medical practitioner in the treatment of a patient.

4.1 Essential elements of Doctor's negligence

There are four elements that must be present in a given situation to prove a health care professional guilty of negligence. Sometimes called the "Four D's of Negligence" these elements include: duty i.e., the person charged with negligence owed a duty of care to the accuser, derelict i.e., the health care provider breached the duty of care to the patient, direct cause i.e., the breach of the duty of care to the patient was a direct cause of the patient's injury and damages i.e., there is a legally recognizable injury to the patient. When a physician (the defendant) is sued by a patient (the plaintiff) for negligence, the burden of proof is on the plaintiff. That is, it is up to the patient's lawyer to present evidence of these four Ds.

4.1.1 Duties of a doctor

A doctor has to perform some duties which are voluntary in nature like he must use average degree of skill, care, judgment and attention during

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16. *Wilsher vs. Essex AHA [1988] 3 All E.R. 810, H.L*
17. *The Wagon Mound [1961] 1 A.C. 617.*
18. *Smith vs. Leech Brain & Co [1961] 2 Q.B. 405.*
19. *Hughes vs. Lord Advocate [1963] A.C. 837.*
20. *Doughty vs. Turner Manufacturing [1964] 1 All ER 98, Crossley vs. Rawlinson [1981] 3 All ER 674.*

treatment, continue the treatment unless he has given due notice for discontinuing his treatment, use clear and proper instruments and appliance, furnish his patient with proper and suitable medicine, if the doctor has his own dispensary, otherwise he should give legible prescription maintaining full and detailed instructions, give full direction in simple language, advice for higher consultant (specialist) under certain circumstances, must maintain professional secrecy, issue medical certificates when needed. All these duties are voluntary duties and it will be presumed that a doctor is quite aware of all these duties.

A doctor has some duties towards the community like notification of infectious diseases like Plague, Cholera, Small pox etc., information of birth and death, notification of any new dangerous disease, e.g., viral infection (Typhoid fever) AIDS, etc., notification of fitness of servant and employees for their employment if known to the medical practitioner, reporting to law enforcing agencies in cases of homicidal poisoning, reporting of certain cases falling under category of privileged communication especially as regards moral and social duties and responsibility in criminal cases, reporting of unnatural deaths.

Besides one of the main obligations of medical profession is that a doctor must follow the ethical principles mentioned in the International Code of Medical Ethics, 1949 (popularly known as Geneva Declaration accepted by the General Assembly of the World Medical Association in London on October 12, 1949).[21] A doctor has to take an oath in the form of promises solemnly, freely and upon by honour where among many other words the doctor has to promise that he solemnly pledge himself to consecrate his life to the service of humanity, he will practise his profession with conscience and dignity, the health of his patient will be his first consideration, he will respect the secrets which are confided in him.

In the case of *Dr. Lakshman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128 at pp. 131-132*, it was held that a medical practitioner, when consulted by a patient, owes him the following duties:

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21. After the serious violations of medical ethics by Fascist doctors in Germany and Japan during the 1939-45 war, when horrific experiments were carried out in concentration camps, the international medical community in 1948 re-stated the Hippocratic Oath in a modern form in the Declaration of Geneva. In 1948, an international medical conference was held in Geneva, which adopted a Declaration for oath to be taken by all the registered practitioners. It was accepted at the assembly of World Medical Association held in London in October 12, 1949. Now a day this is the basis of all internationally accepted code of Medical Ethics.

(a) a duty of care in deciding whether to undertake the case;

(b) a duty of care in deciding what treatment to give; and

(c) a duty of care in the administration of the treatment.

A breach of any of the above mentioned duties give a right of action for negligence to the patient.

4.1.2 Breach of duty

A doctor should always maintain professional secrecy. A doctor should not discuss the illness of his patient with others without the consent of the patient. He should not answer any enquiry by third parties even when enquired by near relatives of the patient, either with regard to the nature of illness or with regard to any subsequent effect of such illness on the patient without the consent of the patient. He should not disclose any information about the illness of his patient without the consent of the patient, even when requested by a public or statutory body, except in case of notifiable diseases. If the patient is a minor or insane consent of the guardian should be taken. If the patient is a major, the doctor should not disclose any facts about the illness without his consent to parents or relatives even though they may be paying the doctor's fees. In the case of a minor or an insane person, guardians or parents should be informed of the nature of the illness. Even in the case of husband and wife, the facts relating to the nature of illness of the one must not be disclosed to the other without the consent of the concerned person. When a domestic servant is examined at the request of the master, the doctor should not disclose any facts about the illness to the master without the consent of the servant, even though the master is paying the fees.

When a doctor examines a Government servant on behalf of the Government, he cannot disclose the nature of the illness to the Government without the patients consent. A person in police custody as an under trial prisoner has the right not to permit the doctor who has examined him, to disclose the nature of his illness to any person. If a person is convicted, he has no such right and the doctor can disclose the result to the authorities. The medical officer of a firm or factory should not disclose the result of his examination of an employee to the employers without the consent of the employee. The medical examination for taking out life insurance policy is a voluntary act by the examinee and therefore, consent to the disclosure of the finding may be taken as implied. A doctor should not give any information to an insurance company about a person who has consulted him before, without the patient's consent. Any information regarding a deceased person may be given only after obtaining the consent from the nearest relative. In divorce and nullity

cases, no information should be given without getting the consent of the person concerned. Medical Officers in Government service are also bound by the code of professional secrecy, even when the patient is treated free. In reporting a case in any medical journal care should be taken that the patient's identity is not revealed from the case notes or photographs. In the examination of a dead body certain facts may be found, the disclosure of which may affect the reputation of the deceased or cause distress to his relatives and as such, the doctor should maintain secrecy.

4.1.2.1 *Res Ipsa Loquitur*

The English equivalent of the Latin maxim *"Res Ipsa Loquitur"* is "the thing speaks for itself". It means that to make a person liable, it is not always necessary to prove that a person was negligent. Sometimes the nature of his job will clearly spells out that the person was negligent. As for example if it is found that a doctor finishes operation while keeping scissor inside of the patient's stomach it is a clear case of *"Res Ipsa Loquitur"*.

To apply the Rule three things must be satisfied i.e., (a) in the absence of negligence the injury would not have occurred ordinarily, (b) the defendant had exclusive control over the injury producing instrument or treatment, and (c) the plaintiff was not guilty of contributory negligence. This enables the plaintiff's lawyer to prove his case without medical evidence. Prescribing overdose of a medicine producing ill effects, giving poisonous medicines carelessly, failure to removes swab, instrument during operation, failure to give T.T. in case of injury causing tetanus, burns from application of hot water bottle or from excessive X-ray therapy, misadventure with blood transfusion.

4.1.2.2 *Novus Actus Interveniens*

The principle of *Novus Actus Interveniens* states that a person is responsible not only for his actions but also for the logical consequences of those actions. That is, if a doctor conducts an operation and that is a bad one and as a result the patient has to suffer infection then the doctor will be liable for both the wrong operation and for the infection. This principle is applied to cases of assault and accidental injury.

4.1.2.3 Doctor's duty and Privileged Communication

The word "privileged" in law is used to mean an exceptional right, immunity or exemption belonging to a person by virtue of his status or office. The phrase "privileged communication" means communication made to a person by virtue of his status or office. Though sections 126-132 of the Evidence Act, 1872 does not consider the relationship between

doctors and patient as privileged one but if we take into account the theme it will be clear to us that there is a privileged relation between doctor and patient. Under the above-mentioned sections, the persons who are enjoying the communication of privilege must not disclose the fact he obtained due to his status or office. "Breach of privileged communication" in relation to doctors may be defined as a statement made by a doctor to the authorities concerned, *bona fide* and without malice, in the interests of the community or the public towards whom he has a legal, social or moral duty, although such communication under normal conditions contravenes the general rule of professional secrecy. Breach of privileged communication is justifiable in the following cases.

In case of an infectious diseases, if a patient is suffering from an infectious disease and is employed as cook or waiter in a hotel, as children's nurse etc., the doctor may pursue him to leave the job until he becomes non–infections. If the patient refuses to accept this advice the doctor can disclose it to the employer of his patient.

Again, in case of servants and employees, if an engine or bus driver, ships officer or aeroplane pilot may be suffering from epilepsy, Parkinson's disease, malignant hypertension, alcoholism, drug addiction or colour blindness, then the doctor's first duty in such a case is to try to get the patient to change his employment pointing out to him the dangers of his present occupation, both to himself and to the public. If this fails, the doctor should inform the employer that the patient is unfit for that kind of employment.

In case of venereal diseases, if a person is suffering from syphilis or gonorrhea and is going to marry, it is the duty of the doctor to advise the patient not to marry till he is cured, if the person refuses, he can disclose the matter to the woman to whom he is getting married, or to her parents. It is also similarly applicable to females. Swimming pools should be prohibited to those having syphilis and or gonorrhea, but if the person refuses, the authorities can be informed. The doctor can also inform the hostel superintendent, if any boarder is suffering from such venereal diseases.

In case of laying information of a suspected crime, e.g., murder, the doctor is bound to give information to the police. Again, when the patient brings either civil or criminal actions against the doctor, evidence about the patient's condition may be given without any hesitation. Besides, a doctor can warn the parents about the suicidal tendency of the patient.

5. Kinds of Doctor's Negligence

Doctor's negligence is manifest in a number of ways. However, in the

broad sense, Doctor's negligence can be divided into two categories namely civil and criminal.

5.1 Civil negligence

It is a form of negligence in which a patient brings an action against his physician in the civil court for injury or damage caused to him as a result of breach of his legal duty to exercise skill and care, i.e., his professional duty necessary in the circumstances of the case. Failure to prescribe tetanus toxoid to a patient of multiple road injuries, breaking of needle during injection, medical examination of a person against his or her consent, prescribing overdose of medicine and causing harm, giving poisonous drug carelessly, loss or damage of limbs due to prolonged or careless plastering, burns due to careless deep X-ray or burns due to application of extreme hot water bottles, prescribing overdoses of medicine and causing harm can be examples of civil negligence.

The question of civil negligence arises in two circumstances i.e., where in case of death of a patient, his relative brings a civil suit for realisation of compensation from the doctor and when a doctor brings a civil suit for recovery of his fees from his patient or patient's relative who refused to pay on the ground of professional negligence.

5.2 Criminal negligence

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable or proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[22] It is a form of negligence in which the physician exhibits gross lack of competency, gross inattention, criminal indifference to the patient's safety or gross negligence in the selection and application of remedies resulting in death or serious injury to the patient. Examples of criminal negligence may be performing criminal abortion,[23] issuing false medical certificates,[24] leaving instrument or swabs in the site of operation after performing operation, gross mismanagement of delivery of a woman especially by a doctor addicted to the inhalation of anesthesia, grossly incompetent administration of a general anesthetic by a doctor addicted to the inhalation of anesthetic, use of wrong drug in the eye causing loss

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22. Per Straight J., in *Idu Beg, (1881) ILR 3 All 776, 780; Attra, (1891) PR no. 9 of 1891; Bhalchandra, (1968) 71 Bom LR 634, (SC)*
23. Sections 313 and 314 of the Penal Code, 1860.
24. Sections 191 and 192 of the Penal Code, 1860.

of vision or damage of the eye, amputation of wrong finger or leg or operation on wrong limb or wrong patient, gangrene due to very tight plaster, causing paralysis after splints, dressing with corrosive instead of bland liquid, removal of wrong organ or errors in ligation of ducts, damages caused by mismatched blood transfusion.

The question of criminal negligence arises in three circumstances i.e., when a doctor shows gross absence of skill or care in the course of treatment resulting in serious injury to or death of the patient by acts of omission or commission, when a doctor performs an illegal act, so as to abuse his rights and duties, when an assaulted person dies the defence may attribute the death to the negligence or undue interference in the treatment of the deceased by the doctor.

Where death is caused involuntarily by professional negligence, there it is necessary for criminal conviction that there is a duty, there is breach of that duty amounting to gross negligence and the causing of death. In a case two junior doctors erroneously injected a substance into the spine of a youth who died;[25] an electrician fitted into a house an electric programmer which electrocuted a person.[26] They were convicted for manslaughter. They appealed. The doctors and the electrician succeeded in their appeal. The court said that gross-negligence may be shown by indifference to an obvious risk or by foresight of the risk and a determination to run the risk or attempting to avoid the risk with such a degree of negligence that a conviction is justified or by failure to avert a serious risk going beyond mere inadvertence in respect of an obvious and important matter which demanded the accused person's dutiful attention.

From the above discussion it is clear that there are some differences between civil and criminal negligence.

5.3 Difference between Civil and Criminal negligence

As regards the offence, in civil negligence, no specific or clear violation of law need to be proved but in criminal negligence violation of law must be specifically proved. Again, if there is simple absence of care and skill it is civil negligence whereas if it is willful, wanton, gross or culpable, it is criminal negligence. The single test to make a doctor civil negligent is it is compared to a generally accepted simple standard of professional conduct, in criminal negligence, no such single test can be suggested. Consent by the patient for doing an act is a good defence in civil

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25. *R vs. Prentice, [1993] 3 WLR 927 (CA).*
26. *R vs. Adomako, [1993] 3 WLR 927 (CA).*

negligence, which cannot be presented in criminal negligence. Preponderance of evidence is sufficient as evidence in civil negligence but the guilt should be proved beyond reasonable doubt in case of criminal negligence. The accused is liable to pay damages or compensation in civil negligence, whereas the accused will be punished with fine or imprisonment or with both in criminal negligence. Civil negligence can be tried twice, which is not possible in criminal negligence.

6. Examining Liabilities arising from Doctor's Negligence

Courtesy, compassion and common sense are often cited as the "three C's", most vital to the professional success of health care practitioners. In absence of these "three or any one of the C's", the doctors have to face some legal consequences.

6.1 Negligence in Bangladeshi Law

In the recent past, a growing tendency has been witnessed to label every incident of medical mishap as gross negligence amongst law enforcing agencies, mass media and public. The criminal cases against the doctors were registered under Section 304 of the Penal Code, 1860 (Culpable homicide amounting to murder) and 304A of the Penal Code, 1860 (Rash and negligent act) against the doctors. This has led to a situation, where doctors were always apprehensive of a sword hanging on their head while treating a patient. A large majority of doctors have started using defense medicine whereby increasing the cost of treatment. Many of the doctors avoided using useful procedures just to save them from criminal liability. Referring of patient to specialist for the sake of avoidance became routine. Since, majority of the patients in our country belong to poor socioeconomic strata, it is beyond their reach to cough out the cost of treatment from specialists and super-specialists.

Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under section 304A of the Penal Code, 1860.

The accused, a Homoeopathic practitioner, administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf of *dhatura* without studying its effect; the patient died of poisoning. The accused was held guilty under section 304A of the Penal Code, 1860.[27]

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27. *Juggankhan, AIR 1965 SC 831.*

Again, compounder in order to make up a fever mixture took a bottle from a cupboard where non-poisonous medicines were kept and without reading the label of the bottle which was in its wrapper added its full contents to a mixture which was administered to eight persons out of whom seven died. The bottle was marked poison and contained strychnine hydrochloride and not quinine hydrochloride as was supposed. It was held that the compounder was guilty under section 304A of the Penal Code, 1860.[28]

To be criminal in nature, the negligence must be willful, wanton, gross or culpable. For criminal malpraxis the doctor may be prosecuted by the police and charged in criminal court under sections 304A and 337 of the Penal Code, 1860 which deals with causing death by negligence. The provisions of section 304A apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death.[29]

A hakim (native physician) performed an operation of the eye with an ordinary pair of scissors and sutured the wound with an ordinary thread and needle. The instruments used were not disinfected and the complainant's eye-sight was permanently damaged. It was held that the *hakim* had acted rashly and negligently, and was guilty under section 336 of the Penal Code, 1860 as there was no permanent privation of the sight of the eye.[30]

Again, the single Act, which deals with the negligence or malpractice of the doctor to some extent, is the Bangladesh Medical and Dental Council Act, 1980 (Act No. XVI of 1980). This Act was passed to repeal and, with certain modifications, re-enact the Medical Council Act, 1973, to provide for the constitution of a Medical and Dental Council, for regulating registration of medical practitioners and dentists and also for the purpose of establishing a uniform standard of basic and higher qualifications in medicine and dentistry.

The second proviso to section 5(2) of the Act says that a doctor shall be deemed to have vacated his seat if he is declared by a competent court of law to be of unsound mind, or insolvent, or is convicted for a criminal offence involving moral turpitude, including unprofessional and

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28. *De Souza, [1920] 42All 272.*
29. *Sukaroo Kobiraj, (1887) 14 Cal 566, 569 Chhallu, (1941) All 441.*
30. *Gulam Hyder Punjabi, (1951), 17 Bom LR 384, 39 Bom 523.*

infamous conduct. The Act only contains provision relating to covering[31] and the prescribed punishment is fine up to 2000/= or imprisonment for up to 2 years.[32] Section 28 says that the Bangladesh Medical and Dental Council can remove the name of the Doctor for the abovementioned reasons.

6.2 Different tests to determine Doctor's negligence

Since we do not have specific provision of law relating to the negligence of doctor's we have to taken into consideration different opinions given by learned judges in different cases. On the basis of those decisions we have cited here different tests to determine the doctor's negligence.

6.2.1 Reasonable skill and care

The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor, no doubt, has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. The question for the judge had been whether the surgeons in reaching their decision displayed such a lack of clinical judgment that no surgeon exercising proper care and skill could have reached that same decision.[33]

What will be the consequence if an act which is done by an ordinary doctor is done by a specialist? A surgeon or anesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong.[34] But in the case of specialist, a higher degree of skill is needed.[35]

In the case of *Dr. Lakshman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole, AIR 1969, SC 128,* the son of the respondent, aged about 20 years, met with an accident on a sea beach, which resulted in the fracture of the femur of his left leg. He was taken to the appellant's hospital for treatment. The appellant did not give an anaesthetic to the patient but

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31. The term 'covering' means association with unqualified or unregistered person practicing medicine in such a way that members of public are misled as to their true status.
32. Section 25, the Bangladesh Medical and Dental Council Act, 1980 (Act No. XVI of 1980).
33. *Hughes vs. Waltham Forest Hospital Authority, 1990, Times L.R. 714.*
34. *Dr. P. Narshima Rao vs. G. Jayaprakasu, AIR 1989 A.P. at p. 215.*
35. *Dr. P. Narshima Rao vs. G. Jayaprakasu, AIR 1989 A.P. at p. 215.*

contented himself with a single dose of morphine injunction. He used excessive force in going through this treatment, using three of his attendants for pulling the injured leg of the patient. He then put this leg in plaster of paris splints. The treatment resulted in shock, causing the death of the patient. The doctor was held guilty of negligence by the Supreme Court.

If the doctor does not take proper or reasonable care he will be liable. In C. *Sivakumar vs. Dr. John Mathur & Another, 1998*,[36] the complainant had the problem of blockage of urine. The opposite party, a doctor, with an attempt to perform the operation for curing the problem, totally cut off the complainant's penis. There was enormous bleeding, and the complainant now could not pass urine and became permanently impotent. It was held that there was deficiency in service and the opposite party was directed to pay compensation to the complainant.

In *Lakshmi Rajan vs. Malar Hospital Ltd., 1998*,[37] the complainant, a married woman, aged 40 years noticed development of a painful lump in breast. The opposite party hospital while treating the lump, removed her uterus without justification. It was held to be a case of deficiency in service for which the opposite party was required to pay as compensation to the complainant.

It is the duty of the doctors to render services to community. The Doctors may say that it is their constitutional right not to work as the Constitution of the People's Republic of Bangladesh, 1972 prohibited forced labour, but as when they take oath according to the Geneva Declaration, 1949, they cannot stop from offering their services. There may be some other ways to establish their claim. In *Dr. Mohiuddin Farooque vs. Bangladesh and Others, 1994 (Writ Petition No. 1783/1994)*, one Dr. Mohiuddin Farooque filed a writ petition on 3.10.1994 requesting the intervention of the High Court Division of the Supreme Court in restoring the public medical services and care all over the country, which had been disrupted by the continuous strike of. In that Writ Petition the petitioner challenged the continuance of strike by the doctors of all the Govt. Medical Hospitals, Health Complexes and Centres. It was submitted that due to a long strike by the government medical hospitals, health complexes and centers, the whole system for providing treatment for the people become paralysed, and the sufferings of the people knew no bounds. The High Court Division of the Supreme Court issued a Rule and granted a mandatory injunction to call off the strike of the BCS (Health) Cadre doctors of all the

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36. 111 (1998) CPJ 436 (Tamil Nadu S.S.D.R.C.).
37. 111 (1998) CPJ 586 (Tamil Nadu S.C.D.R.C.).

government medical hospitals, health complexes and centers immediately with effect within 24 hours from the date of service of notice and to join their respective offices.

6.2.2 Difference of Opinion

Sometimes it may happen that one doctor differ from the opinion of the other doctors. As such if a patient suffers for that the doctor may not be held liable. In a Scottish Case, Lord President Clyde said: "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of the others. The true test for establishing negligence in diagnosis or treatment on the part of a doctor of ordinary skill would be guilty of, acting it with ordinary care."[38]

6.2.3 Error of Judgement

Again if a doctor makes an error of judgement he cannot be found guilty of negligence. In the case of *Whitehouse vs. Jordan, 1981, 1 All E.R. 267*, a charge of negligence was brought against a senior registrar in charge of a childbirth in which the child suffered brain damage. The defendant realized that normal birth by contraction was impossible and attempted a trial by forceps in order to see whether delivery by forceps, a better method than Caesarean section, might be possible. The question was whether he pulled too long and too hard. The House of Lords unanimously held that the defendant did not pull too long and too hard.

In the case of *Dr. Suresh Gupta vs. Govt. of N.C.T. of Delhi & Another, 2003*[39] *(Criminal Appeal No. 778 of 2004)*, a patient was operated for removal of nasal deformity. He died on the same date. The Post Mortem report mentioned the probable cause of death is "blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum". Medical records and opinion of experts committee did not give direct cause of cardiac arrest. It was held that where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. They further added, "It is not merely lack of necessary care, attention and skill. When a patient agrees to go for medical treatment or surgery, every careless act of the medical man cannot be termed as 'criminal'. It could be termed 'criminal' only

38. *Hunter vs. Hanley, 1955, S.L.T. 213, 21.*

39. http://www.imakarnal.com/archives/supreme.htm (accessed on May 5, 2005).

when the medical man exhibited gross lack of competence or inaction and wanton indifference to his patient's safety and which is bound to have arisen from gross ignorance or gross negligence".[40] So, the doctors are not liable under Section 304A.

Advancement in technique is another problem for the doctors. Sometimes it may happen that a doctor used a technology which was best at the time of use but subsequently better technology was invented by which his previous treatment was proved to be erroneous. The law is silent in such places but in Europe, the Brussels Directive[41] left it to the various member states to decide whether to impose liability or not.

6.2.4 Decisions taken for the benefit of the Patient

In ordinary cases where the consequence of an act is foreseeable and if the doctor does not apply due diligence he will be liable. In the case of *Dr. P. Narsimha Rao vs. G. Jayaprakasu, 1990,* [42] the plaintiff, a brilliant student, aged 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and the anaesthetist. In this case, proper diagnosis was not done, and if the surgeon had not performed the operation, there was every possibility of the plaintiff being saved from the brain damage. The anaesthetist was also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a mask or bag, which is an act of *per se* negligence in the circumstances. The plaintiff was, therefore, held entitled to claim compensation for the same.

It should be kept in mind that only in extremely necessary cases the doctor can take serious decisions otherwise he will be held liable. The question of professional negligence arose before the Madhya Pradesh High Court in *Ram Bihari Lal vs. Dr. J.N.Srivastava, 1985.*[43] In that case, the wife of the plaintiff complained of abdominal pain. The defendant was a Civil Assistant Surgeon and started her treatment, and when the treatment did not respond, the defendant advised plaintiff No.1 that this was to be *operated for appendicitis,* to which the plaintiff and his wife reluctantly agreed. The patient was put under chloroform anaesthesia. On incision, the appendix was found to be normal and not at al inflamed. The defendant then made another incision and removed the gall bladder

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40. *Lets doctors off the Hook,* The Times of India. Aug 6,2004.
41. The Council of the European Communities Directive of July 25, 1985.
42. A.I.R. 1990 A.P. 207.
43. A.I.R. 1985 M.P. 150 (D.B.), reversing the Single Bench decision, A.I.R. 1982 M.P. 132.

of the patient without taking her husband's consent for the same, although he had been waiting outside the operation theatre. The liver and the kidney of the patient, which were already damaged, has been further damaged due to the toxic effects of the chloroform and as a consequence of the same, the patient died on the third day after this operation. It was found that the operation had been performed in that ill-equipped hospital having no anaesthetical and other basic facilities like oxygen and blood transfusion, and without carrying on necessary investigations like urine test, which are necessary for carrying out any major operation, and without preparing the patient for the operation. Moreover, the second operation for removing the gall bladder was performed without the consent of the patient's husband, who was available, though the gall bladder was neither gangrenous nor was there any pus formation and therefore, it was not a case of emergency operation, and it took hours before the completion of operation when the patient was under the effect of chloroform. Reversing the Single Bench decision, it was held by the Division Bench that the patient died due to rash and negligent act of the Surgeon and therefore he is liable for damages.

Again, on the other hand, failure to perform an emergency operation to save the life of a patient amounts to a doctor's negligence. In case of *Dr. T.T. Thomas vs. Elissar, 1987*,[44] the plaintiff's husband was admitted as an in-patient in a hospital on 11.3.1974 for complaints of severe abdominal pains. It was diagnosed as a case of acute appendicitis, requiring immediate operation to save the life of the patient. The doctor failed to perform the operation and the patient died on 13.3.1974. It was held that the doctor was negligent in not performing the emergency operation, and he was liable to the death of the patient. The doctor plead that the patient had not consented to the operation. The plea of the doctor was rejected. It was held by the Kerala High Court that the burden of proof was on the doctor to show that the patient had refused to undergo the operation and in this case, the doctor had failed to convincingly prove the same.

6.2.5 Causal relation between the alleged illness and the medical treatment

For an action for medical negligence causal relation between the alleged illness and the medical treatment has got to be proved. If no causal relationship can be proved between the illness and the alleged negligent treatment, the doctor cannot be held liable for negligence.

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44. A.I.R. 1987 Kerala 42 : 1987 ACJ 192.

In *Venkatesh Iyer vs. Bombay Hospital Trust, 1998* [45] the plaintiff, a young college student complained of fever and loss of appetite. There was also growth of a boil near the lower side of his abdomen. After some initial treatment for malaria etc., the patient got admitted to a Hospital. The doctors diagnosed cancer of Lymph Glands, in initial curable state. He was given treatment ABVD Chemotherapy and radiation. The plaintiff was thereafter discharged but was advised to visit the Hospital every fortnight for Chemotherapy. After a few months, the plaintiff complained of swelling in left leg, which continued without relief. He was admitted to the Hospital again and there was diagnosis of recurrence of cancer. He was given further radiation. The plaintiff was thereafter asked to visit another Hospital for checkup. The expert medical opinion there was that the patient had fully recovered from cancer. Within a few months after the second radiation, the plaintiff began to suffer from one illness and another. He was then hospitalized in the said Hospital. An abscess formed on his left thigh where 1000 cc. of pus was drained. Soon afterwards, he developed Hepatitis B, along with severe stomachache. Thereafter, his irradiated area burst open by itself. This was diagnosed as Fecol Fistula. The complications continued and after a few years a major operation was performed.

The plaintiff alleged permanent major problems like swollen left leg giving him a imp, a large hole at the radiated side resulting in continuous leakage of mucus, and colostomy, which cased leakage of faccal matter to collect which he had to always wear a plastic bag, which needed continuous replacement. The plaintiff claimed compensation of Rs. 47 lakhs from the Bombay Hospital alleging that all these complications had occurred due to the negligence of the medical staff of the Bombay Hospital. It was found that the treatment given by the defendant hospital as necessary to save the plaintiff's life. The plaintiff had taken treatment from other doctors also. There was held to be no causal connection between the treatment given by the defendant and illness of the plaintiff. The defendant was held not liable.

6.2.6 Consequence of Disobeying Govt. Prescribed Guidelines

If the government prescribes a guideline for the treatment of the patient and if it is not followed then the authority will not be able to escape its liability. In *Pushpaleela vs. State of Karnatak, 1999,*[46] a Free Eye Camp was organized by Lions Club, where 151 persons were operated upon for cataract problem. Most of these persons developed infection and severe

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45. A.I.R. 1998 Bom. 373.
46. A.I.R. 1999 Kant. 119.

pain after surgery. 72 out of them lost sight of one eye and 4 victims lost the sight of both the eyes. According to an enquiry report the guidelines laid down by the Govt. of India for such eye camps were not followed, and the procedure adopted for sterilization was not up to the mark. There was found to be careless and negligence in performing eye operations. The court directed payment of Rs. 5000 as interim compensation to 4 persons who had become totally blind, in addition to Rs. 1000 already paid and directed the payment of Rs. 250 per month to each of the 66 victims. Subsequently, on the basis of a Public Interest Litigation on behalf of the victims, the Rajasthan High Court awarded costs to the petitioners and lump sum payment of compensation ranging from Rs. 40,000 to Rs. 1,50,000 to the victims, on the basis of the injury suffered by them.

6.2.7 Doctor's duty to maintain secrecy

As per the Hippocratic Oath[47] and the Geneva Declaration, 1949, a doctor is under a moral duty not to disclose the diseases of the patients in front of the society. In *Dr. Tokugha vs. Apollo Hospital Enterprises Ltd., 1999,*[48] the appellant, a doctor by profession, whose marriage was proposed to be held on December 12, 1995 with one Ms. Akli, was called off, because of disclosure by the Apollo Hospital Madras to Ms. Akli that the appellant was HIV(+). The appellant claimed damages from the respondent alleging that his marriage had been called off after the letter disclosed the information about his health to his fiancé, which it was required under medical ethics to be kept secret. It was held that the rule of confidentiality is subject to the exception when the circumstances demand disclosure of the patient's health in public interest, particularly to save others from immediate and future health risks.

Further, the right of privacy of a person was also held to be not an absolute right, particularly when the fact of a person's health condition would violate the right to life of another person. If the fact of the appellant being HIV(+) had not been disclosed to Ms. Akli with whom the appellant was likely to be married, she would have been infected with the dreadful disease if the marriage had taken place and consummated. The appeal was, therefore, dismissed.

6.2.8 Action brought without seeking an explanation

It is necessary that before filing a case against a medical personal, the injured should seek an explanation of the injury otherwise his claim may

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47. *Supra,* footnote 1.
48. A.I.R. 1999 S.C. 495; 111 (1998) C.P.J. 12 (S.C.).

be failed. In the case of *Roe vs. Minister of Health, 1954, 2 Q.B., 66, 2 W.L.R. 915, 98 S.J. 319, 2 All E.R. 131*, the two plaintiffs were insured contributors to the hospitals, paying a small sum each week, in return for which they were entitled to be admitted for treatment when they were ill. The plaintiffs entered hospital for minor surgery and was rendered permanently paralysed from the waist down. The reason was that the ampules of the anaesthetic, nupercaine, which was injected spinally by Dr. Graham, a visiting anaesthetist, had tiny cracks in them, and some phenol, the disinfectant in which they were kept, had percolated through those cracks and had contaminated the anaesthetic. The action was brought against the Ministers of Health, as successor in title to the trustees of the Chesterfield and North Derbyshire Royal Hospital, and the obligation to provide a regular service at the hospital. The trial judge dismissed the plaintiff's action and the Court of Appeal dismissed their appeal.

6.2.9 Burden of Proof

The burden to prove that the doctor was negligent lies on the plaintiff i.e., the patient. The plaintiff must prove that the death was caused due to the doctor's negligence. In *Philips India Ltd vs. Kunju Punnu, 1974,*[49] the plaintiff's son, who was treated for illness by the defendant company's doctor, died. The plaintiff in her action contended that the doctor was negligent and had given wrong treatment. It was held that the plaintiff could not prove that the death of her son was due to the negligence of the doctor and therefore the defendants could not be made liable.[50]

In *M. Sobha vs. Dr. Mrs. Rajkumari Unithan, 1999,*[51] the plaintiff, M., Sobha, aged 35 years, who had an 8 years old son, approached the defendant gynecologist. The gynecologist advised the plaintiff to have test tubing to clear the obstructions, if any, in the fallopian tube blocking the delivery of ovum into the uterus. The needful was done by a simple procedure of blowing of air through an apparatus into the vagina under the controlled pressure. Subsequently, infection had occurred in the reproductive system of the plaintiff, and the same had to be removed. It could not be proved that the infection had occurred due to the negligence of the defendant. The cause of infection could not be known. It was held that in the absence of proof of negligence, the defendant could not be held liable for the sufferings of the plaintiff.

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49. 77 Bom. L.R. 337: AIR 1975 Bom. 306: Also see: *Dr. Sharad Vaidya vs. Pailo Joel Vales, A.I.R. 1992 Bom. 478.*
50. A.I.R. 1975 Bom. 306, at 312.
51. A.I.R. 1999 Ker. 149.

7. Vicarious Liability or Responsibility

There is a Latin maxim i.e., *Qui facit per alium facit per se* "He who employs another to do something does it himself. By vicarious responsibility is meant the liability that exists in spite of the absence of blameworthy conduct on the part of the master. It is the "responsibility of a medical practitioner for negligence acts of nurses or medical students". Under the doctrine of *'respondeat superior'*, which is a Latin for 'Let the master answer', physicians are legally responsible for their own acts of negligence and for negligent acts of employees working within the scope of their employment.

Medical practitioners work with physicians as part of the health care team. Non-physicians members of the health care team share responsibility for the delivery of health services.[52] In developed countries, there are few people who work with physicians, dentists and/or other professionals in providing services to patients in medical offices, dental offices, hospitals, clinics, community programs and other health care settings like Audiology, Dental Hygienist, Dietician and Nutritionist, ECG Technicians, ECG Technicians and Technologist, EMT/Paramedic, Health Information Technologist or Technologist, LPN/LVN, Medical Assistant, Medical Laboratory Technician and Medical Technologist, Medical Transcriptionist, Nurse Practitioner, Nursing Assistant, Occupational Therapist, Optician, Optometrist, Phlebotomist, Physical Therapist, Physicians Assistant, Radiologic, or Medical Imaging, Technologist, Registered Nurse, Respiratory Technicians and Therapist etc.

A medical practitioner will be held responsible civilly, but not criminally, if the nurse, compounder, student or assistant is negligent in carrying out his instructions provided the negligent act was done in his presence and with his acquiescence.

In modern law many people are treated as 'servants' for the purposes of vicarious liability who are not directly subject to their employer's control.[53] In *Collins vs. Hertfordshire County Council, 1947 KB 598, 1 All ER 633*, the defendants were a hospital authority. A house surgeon in their employment, instead of 'procaine', negligently ordered 'cocaine' to be supplied as a local anaesthetic during an operation. Cocaine in the quality supplied, and in the event injected, was known to be, and in fact

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52. Judson, Karen and Hicks, Sharon, CMA, *"Law and Ethics for Medical Careers"*, 2nd ed., McGraw-Hill Companies, Inc. NY, 1999, p.19.

53. *Md. Akber Ali Vs. Mrs. Rezia Sultana Begum, 1983, 35 DLR 391.*

proved to be, lethal. It was held that the house surgeon was in the position of a servant to the authority; and they were therefore liable for the death of the patient so injected.

The hospital authority will be liable for the activities performed by its staff, nurses and doctors, anaesthetists or surgeons whether permanent or temporary, resident or visiting, whole time or part time. But there is an exception to this rule and that is if the patient himself employs and selects the consultants or anaesthetists,[54] then the hospital authority can escape its liability. In *A.H. Khodwa vs. State of Maharashtra,1996,*[55] a sterilization operation was performed after the child birth of a patient. The surgeon concerned left a mop inside the abdomen of the patient. As a consequence of that, she developed peritonitis, and the same resulted in her death. The doctor performing the operation was presumed to be negligent and for that the State, who was running the hospital, was held vicariously liable.

The hospital authorities may be liable for the consequences of initial carelessness of the nurse, even though the consequences could not reasonably have been foreseen. The decision of *Re Polemis 1921, 3 K.B. 560,* is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct.[56]

8. Defences for the doctors

The doctors can follow the following issues to save them from the liabilities of negligence. In Bangladesh, the doctors can be protected under section 82 of the Penal Code, 1860, but in such cases the burden of proof lies on the defendant i.e., the doctor. Section 103 of the Evidence Act, 1872, imposes an obligation on the part of a person who wants to proof a particular fact and section 105 of the same Act as provides that if anybody wants to get the benefit of the General Exceptions in the Penal Code, 1860, he has to proof that fact.[57]

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54. *Roe vs. Minister of Health, 1954, 2 Q.B., 66, 2 W.L.R. 915, 98 S.J. 319, 2 All E.R. 131.*
55. 1996 ACJ 505 (S.C.).
56. *Bourhill vs. Young, 1943, A.C. 92. , Woods vs. Duncan, 1946, A.C. 401, 137.*
57. *Jalal Din vs. Crown, 5 DLR (WP) 58.*

The Doctors can discontinue the treatment in some cases like when the patient wants to change the doctor, medicines other than those prescribed by him are being used by the patient, when the patient does not follow his instructions about diet/medicine, when another practitioner is also attending the patient.

This is not always possible that a medical practitioner will understand everything. Sometimes the situation may require him to make consultation with specialists. One can consult with specialists when the case is obscure and difficult and has taken a serious turn, when an operation or special treatment endangering the life is to be undertaken, when an operation affecting vitally the intellectual or generative functions is to be performed, when an operation is to be performed on a patient who has received serious injuries in criminal assault, when an operation of mutilating or destructive nature is to be performed on an unborn child, when a therapeutic abortion is to be performed, when a woman on whom criminal abortion has already been performed, sought his advice for treatment, in case of suspected poisoning especially homicidal, when the equipment or facilities of a physician are inadequate, in an emergency.

8.1 Contributory negligence

Contributory negligence is defined as concurrent negligence by the patient and the doctor which has caused delayed recovery or harm to the patient. In other words, it is any unreasonable conduct or negligence on the part of the patient which is the cause of the harm complained of, although the doctor was also negligent. Failure to give the doctor an accurate medical history, failure to cooperate with his doctor in carrying out all reasonable and proper instructions, refusal of taking the suggested treatment, leaving the hospital against the advice of the physician, failure to seek further medical assistance if symptoms persist can be the some examples of contributory negligence.

The question of contributory negligence arises, when the patient does not follow the instructions of the doctor and thereby causes further harm or injury to himself or delayed recovery. In such cases the patient loses his right in whole or in part to claim damages from the doctor. Contributory negligence is a good defence for the doctor in civil cases but not in criminal cases. The burden of providing such negligence rests entirely on the doctor.

The doctrine of contributory negligence does not apply to criminal liability, that is, where the death of person is caused partly by the negligence of the accused and partly by his own negligence. If the accused is charged with contributing to the death of the deceased by his

negligence, it does not matter whether the deceased was deaf, or drunk or negligent, or in part contributed to his death.[58]

There is a Latin maxim *"Nemo contra factum suum venire potest"* means 'no one can come against his own deed'. The plaintiff cannot shout compensation from the doctor if the doctor acts on the statement of the patient, and has no reason to disbelieve the same, he is not deemed to be negligent. In *Satish Chandra Shukla vs. Union of India, 1987,*[59] the appellant-plaintiff got himself operated upon for sterilization for getting money by falsely stating that he was married and had two female children. The father of the appellant pleaded that the appellant was of unsound mind and was not capable of consenting to the operation, and that the respondents should be liable for performing the vasectomy operation of a unmarried person. The court found that when the plaintiff went for the operation, there was nothing to indicate from his conduct or behaviour that he was mentally ill, rather he showed proper understanding of the things. Under the circumstances, it was held that there was no negligence on the part of the medical authorities in performing the said operation, and they were, therefore, not liable for the same.

8.2 Volenti non fit injuria

The doctrine *"Volenti non fit Injuria"* is another defence a doctor can utilize to escape his liability. The doctrine says that if anyone does anything with free consent[60] where he has knowledge of the risk that may arise out of that act and suffers an injury then that person cannot claim any compensation for that injury. This is what the doctors do before an operation. The doctors take the signature of the patient or his guardian before performing an operation and escape liability.

8.3 Illegality

Another defence available for the doctor is based on the Latin maxim *ex turpi causa non oritur actio.* The defence tends to be raised where the parties are fellow criminals and the activity is dangerous as well as illegal, i.e., in cases where elements of both consent and contributory negligence are also present. In such cases, the doctor is not bound to maintain professional secrecy.

8.4 Doctrine of Calculated Risk

Doctrine of calculated risk states that the doctrine *res ipsa loquitur* should

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58. *Swindall, (1846) 2 C & K 230.*
59. 1987 A.C.J. 628.
60. Section 14 of the Contract Act, 1872, says that consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation, mistake.

not be applied when the injury complained is of a nature that may occur even though reasonable care has been employed. It is an important defence to any malpractice defendant, who can produce expert evidence or statistics demonstrating that the accepted method of treatment he employed posed unavoidable risks.

As for example, in UK, Termination of Pregnancies in the UK are performed under the legal umbrella of Abortion Act, 1967, as amended by the Human Fertilisation and Embryology Act, 1990. In an operation of termination of pregnancies two doctors need to decide in good faith that one or more of the following five conditions apply and complete Form HSAI: the five conditions are-

(a) The continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.

(b) The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.

(c) The pregnancy has not exceed its 24th week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated or injury to the physical or mental health of the pregnant woman.

(d) The pregnancy has not exceed its 24th week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated of injury to the physical or mental health of the existing child(ren) of the family of the pregnant woman.

(e) There is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

If a doctor abides by the above mentioned conditions he can escape his liability. In Bangladesh also, the doctors can follow these conditions to save them from the liability even though we do not have such provision of law.

9. Suggested Precautions against Negligence

There are some dos and don'ts which doctor can follow to keep him safe from the liability of negligence. A doctor should get consent before medical examination, get written informed consent before operation or giving anesthesia, employ ordinary skill and care at all times, confirm the diagnosis by laboratory investigations, X-ray etc., keep full accurate medical records, take Skiagrams in bone or joint injuries or when

diagnosis is doubtful, do sensitivity test before injecting preparations which are likely to produce anaphylactic shock, identify the drug before being injected or used otherwise, do immunization when necessary particularly for tetanus, give anesthesia by a qualified person, report to the police for holding a police enquiry in case of death from an anesthesia or during an operation, give proper instruction and take proper post-operative care after a surgical operation, consult a specialist when diagnosis is obscure, in suspected cases of cancer, do all laboratory investigations without delay to establish early diagnosis, specially biopsy, etc.

When it comes to the use of drugs, one solution, as implemented by Médecins Sans Frontières (MSF), is to use the World Health Organization (WHO) Model List of Essential Drugs,[61] and not to encourage physicians to use the most advanced, costly, non-replicable drugs.

Again, a doctor should not do the following things like he should never guarantee a cure, he should not examine a female patient unless third person (female) is present, should not perform criminal wounding unless it is absolutely necessary, should not leave a patient unattended during labour, should not fail to written consent of both the husband and wife if an operation on either is likely to result in sterility.

10. Role of Bangladesh Medical and Dental Council

As the doctors are professional they may like to avoid visiting the court of law for the trial of negligence case and they may say that it is better to be tried by the Bangladesh Medical and Dental Council. Recently, in *Indian Medical Association vs. V.P. Shantha, 1996*,[62] the Supreme Court recognized the liability of medical practitioners for their negligence and held that the liability to pay damages for such negligence was not affected by the fact that the medical practitioners are professionals, and are subject to disciplinary control of the Medical Council.

11. Suggestions for legislative enactment

It is true that judges are more sympathetic to doctors. Trial judges are too strict to apply a true test against a doctor. In Bangladesh, as far as we learn civil or criminal cases arise out of doctor's negligence is not common. In India, the conduct of the doctors are regulated by the Consumers Protection Act, 1986. Now, the doctors have to remain very

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61. World Health Organization. WHO Model List of Essential Drugs (EDL) by Drug Name, 11th Edition.1999.[http://www.who.int/medicines/organization/par/edl/infedl11alpha.html] (Accessed on February 12, 2002).
62. A.I.R. 1996 S.C. 550.

serious about the treatment of a patient. In UK enacted the Consumer Protection Act, 1987 according to the Council of the European Communities Directives of July 25, 1985. Article 1382 of the French Code says that every act whatever of man which causes damage to anther binds the person which default it was to repair it. Section 823 of the German Civil Code says that a person who deliberately or carelessly injures another contrary to law in his life, body, health, freedom, property or other right is liable to compensate that other for the resulting damage. The Government of Bangladesh can enact a law containing specific provisions relating to doctor's negligence i.e., the following provisions must be incorporated in our national laws-

(1) the duties of a medical profession should be specified as far as possible;
(2) the conducts amounting to breach of duty must be specified;
(3) provisions relating to privileged communication of doctors and patient must be inserted in the Evidence Act, 1872;
(4) provisions relating to liabilities arise out even after taking reasonable care;
(5) provisions relating to liabilities arise out when there is a difference of opinion between doctors;
(6) provisions relating to liabilities arise out in case of gross negligence;
(7) specific provisions of punishment;
(8) provisions of defence to be followed by the doctor to save them from the liability of negligence.

12. Conclusion

The doctors are engaged in one of the noblest professions of the society. It is our strong belief that doctors, generally, is pledge bound by the solemn oath of the health professionals and we entrust them with our lives which they take utmost care to protect and preserve. But it may sometimes so happen that due to some difficulties, workload, inventions of scientific instrument, amendment of national legislation, the doctors do something which amount to negligence. The doctors should be aware of the legal consequences of such situations so that they act dutifully and meticulously and avoid landing themselves in controversies and litigations. People at large, too, should appreciate the constraints imposed on the doctors in our country by the sheer imbalance in the ratio of doctor and patient. The ever increasing vital role of doctors in our lives cannot be over stated and the doctors too, in turn, should be able to value the faith put in them. Only then can we boast of a society based on mutual faith and harmony where interest of all can and shall truly be protected.